sidered another claim containing the same item which is substantially the same thing."

Also bearing on this question is the following paragraph which is in 29 Cyc., 1433:

> "If the power has by law been given to an officer to determine a question of fact, his determination is final, in the absence of any controlling provision of statute, provided he has not been guilty of an abuse of discretion. Such a determination is * * * binding upon the successors in office of the officer who made it."

In answer to your questions, as numbered, it is my opinion that:

1. The board of county commissioners may reject entirely a sheep claim allowed by township trustees under procedure set forth in Sections 5840-5847, inclusive, of the General Code, as such power is within the discretion given them by law under that statute.

2. When the county commissioners elect to hear additional evidence on claims, notice should be given to the claimant.

3. When the board of county commissioners in proper compliance with Section 5846, of the General Code, act upon a claim, their decision is final, unless the claimant appeals to the Probate Court as provided by law.

4. The board of county commissioners may not rescind or reverse the action on a claim taken by the prior board of county commissioners at another session.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

747.

DELINQUENT MUNICIPAL IMPROVEMENT ASSESSMENT—FORECLOSURE OF STATUTORY LIEN ON TWO LOTS OWNED BY ONE MAN—PROCEEDS OF SALE OF ONE LOT MAY BE ASSIGNED TO OTHER LOT FOR DEFICIENCY, WHEN—ASSESSMENT IS PERSONAL OBLIGATION.

NEUTRALIZED BY SECTION 3898, GENERAL CODE—ASSESSMENT AGAINST LAND.

SYLLABUS:

1. *Where two lots belonging to the same owner are assessed by a municipal corporation for local improvement and both become delinquent and are subject to sale in a proceeding to foreclose the statutory lien, and one lot sells for more than enough to satisfy the lien against it and the other sells for less than enough to satisfy the lien against it, the excess in the one case can not be applied as a credit on the deficiency in the other case. If an unqualified personal judgment could be taken against the owner for the entire amount of the delinquent assessments, an execution against the lot producing the excess would take care of such deficit. Sec.* 3897, *G. C., does provide that the duty to pay an assessment against lands is a personal obligation of the owner, but Section* 3898, *G. C., neutralizes the effect of the personal judgment by providing that the owner, (in such case) shall not be liable beyond his interest in the property assessed so that in its final analysis, the personal judgment amounts to no more than the foreclosure of the lien.*

2. *Such assessment is against the land and not against the estates therein, and in the case of any estate tail, the treasurer should proceed against the donee in tail in possession, who is in other words, a life tenant, making the remainder man or tenant in fee a party, if he is in being, sell the land, satisfy the lien and let the life-tenant and remainder-man determine their rights in the excess in a court of equity.*

COLUMBUS, OHIO, June 17, 1937.

HON. PAUL D. MICHEL, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR: I am in receipt of your communication of recent date, which reads as follows:

> "Will you please render this office an opinion on the following?
>
> 1. This case involves quite a considerable sum of money but can be best explained as follows: A real estate company owns lots A and B. There are $100.00 special assessments on lot A, remaining unpaid, and $1000.00 special assessments remaining unpaid on lot B. Upon foreclosure of the lien for taxes and assessments both lots will probably sell for $500.00 each. Obviously there will be an excess of $400.00 over and above the taxes and assessments in the case of A and a deficiency in the amount of $500.00 in the case of lot B. The question is,

whether the excess of $400.00 in the case of lot A, which would ordinarily go to the mortagee, can be applied to satisfy the deficiency of $500.00 in the case of lot B. It is very plain that there is no personal liability for taxes, but there is a distinction between taxes and special assessments. Since the deficiency consists of unpaid special assessments, will you please advise us as to whether we can collect as set out above?

2. We have a tract of land upon which there is $1500.00 due in unpaid taxes. This tract was given by deed of entailment in 1910. The donee in tail is in possession. In an action to foreclose the lien for delinquent taxes, can we foreclose the entire interest in the land, that is, the interest of the donee in tail and the issue of the donee in tail, or are we confined to foreclosing our lien on the interest of the donee in tail? A further question presents itself as to whether the County Treasurer is such a party as would be entitled to maintain an action under G. C. Section 11925 which provides a statutory proceedings for the sale of an entailed estate?

If the law permitted a personal judgment for unpaid delinquent assessments, your first question could be easily disposed of.

In all these instances the assessments were made by the municipal corporation. One hundred sections of the General Code of Ohio, namely, Sections 3812 to 3911, inclusive, are devoted to the one subject—assessments by municipal corporations.

Section 3897, General Code, provides that special assessments shall be paid by the owner of the property assessed, *personally,* and shall be a lien from the date of the assessment. Had the General Assembly stopped right there, there would have been no question as to personal liability, inasmuch as a personal obligation had been created and one can not be made to respond to a personal obligation other than by personal action, but the General Assembly proceeded to enact Section 3898, General Code, which provides in substance that if payment is not made by the time stipulated, the amount assessed together with interest and a penalty of five per cent thereon may be recovered by suit before a justice of the peace or other court of competent jurisdiction in the name of the corporation against the owner or owners, but the owner shall not be liable under any circumstances, beyond his interest in the property assessed at the time of the passage of the ordinance or resolution to improve.

It is readily seen that Section 3898 neutralizes the personal liability provided for in Section 3897. Let us see how such procedure works out. Suppose the land owner is sued for the amount of the assessment, interest and penalty. Judgment is obtained against the owner. A justice of the

peace issues an execution against the personal property of the owner. The owner says "I am only liable to the extent of my interest in the real estate assessed. The justice of the peace has no means of knowing what the value of the interest of the owner in the property would be, as the value of real estate is what it will bring in the open market. Remember, there is no question of reasonable value or fair market value. It is the value of an interest. There is just one way to ascertain *the value* and that is to expose it for sale on the open market. A transcript of the docket of the justice of the peace is taken, filed in the office of the clerk of courts of the county, an execution is issued and levied, and it thereby becomes a judgment lien against all the real estate of the owner in the county, but you can not sell all his real estate because of his limited liability, consequently, the municipality is forced to sell the property assessed. Take the proceeds and it can obtain no more. You would arrive at the same result had the action been brought in the court of common pleas.

The owner of property is not personally liable for an assessment levied thereon in the absence of statutory provision or contractual agreement. 36 O. Jur., Sec. 82, pp. 1045 and 1046. I have detailed the statutory provisions in Ohio and fail to see wherein the statutory provision for personal liability for assessments amounts to any more than the foreclosure of the assessment lien. The Supreme Court of Ohio so views it. *Davis* vs. *Cincinnati,* 36 O. S. 24. After certification to the county auditor and entering the assessment on the tax duplicate, the same result would be reached by the treasurer in foreclosing the lien. A prsonal deficiency judgment can not be taken against the owner of the real estate and we come back to the proposition that regardless of how you proceed in the way of the collection of unpaid assessments, all you can get is the value of the interest of the owner in the real estate assessed.

You say that the assessments against lot "A" amount to $100.00 and it will sell for $500.00, consequently, there would be an excess of $400.00 due the lot owner on lot "A." The assessments against lot "B" amount to $1000.00 and it will sell for $500.00, leaving a deficit of $500.00 in the case of lot "B." Your query is whether the $400.00 excess on lot "A" can be applied to the $500 deficit on lot "B"? It could only be done through the instrumentality of a personal judgment. As the only personal judgment that can be taken is limited by the owner's interest in the lot assessed, it can not be done. 36 O. Jur. 79, pp. 1042 and 1043, and cases cited.

Your second question involves an entailed estate. The donee in tail is in possession in the enjoyment of a life-estate and at his death the remainder man named in the deed will take the fee. An assssment is made against lands and not against estates. The treasurer could not

maintain an action to sell the entailed estate under virtue of Section 11925 as will readily be ascertained by a careful reading of such section. It is provided as follows by Section 3894, General Code:

> "When a special assessment is made on real estate subject to a life estate, the assessment shall be paid by the tenant for life, but upon application by the life tenant to the court of competent jurisdiction, by action against the owner of the estate in fee, such court may apportion the cost of the assessment between the life tenant and the owner in fee, in proportion to the realtive value of the improvement to their estates, respectively, to be ascertained and determined on principles of equity."

I made the unsupported assertion that assessments were made against lands and not against estates. This statement was primarily made because of the apparent incongruities that would necessarily arise in the event a municipality attempted to assess an estate, which is nothing more than the extent of interest in lands. In such case the municipality would have to ascertain the extent of the estates and probably determine equities, which it could not do. I find ample support for this statement of the law. I quote from 36 O. Jur. Sec. 99, page 1073:

> "It is said that the lien of an assessment is an encumbrance on the property itself and that the estate owned by the person in possession is of no consideration."
> The text cites 25 Ruling Case Law, Section 100, page 187.

Likewise, it was held in *Chicago* vs. *Chicago Uinversity,* 302 Ill. 455; 134 NE 723:

> "An assessment proceeding is in rem against the property itself and not against the several estates existing therein, or against the owner."

It was made plain herein, supra, that the owner of assessed lands could not be proceeded against personally in an action to recover delinquent assessments unless authorized by statute or by his voluntary contract. This repetition is indulged in order to avoid any confusion that might arise from a consideration of the last clause of the above citation, namely, "or against the owner."

In my opinion, assuming that these assessments have been duly certified, the treasurer should proceed against the life-tenant to foreclose his lien, making the remainder-man or tenant in fee a party, if

in being, sell the land, apply so much of the proceeds as is necessary to the payment of the assessment, interest, penalty and costs, and if there is an excess, let the life-tenant and remainder-man go into a court of equity for the determination of their respective shares to the fund.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

748.

BOARD OF EDUCATION, AFTER ENTERING INTO CONTRACT WITH TEACHERS MAY NOT INCREASE SALARY TO BE RETROACTIVE.

SYLLABUS:

A board of education cannot enter into a contract with a teacher on September 1, 1935, *at a fixed salary, and increase the salary of the teacher at a later date, and make such increased salary retroactive as of September* 1, 1935, *and thereby such teacher receive for the period between September* 1, 1935, *and the date of increase the difference in amount, computed on the basis of such increased salary, in addition to the salary paid by the board for the period from September* 1, 1935, *to the date of increase, in accordance with the terms of the contract.*

COLUMBUS, OHIO, June 18, 1937.

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

GENTLEMEN: This will acknowledge receipt of your communication, which reads as follows:

> "You are respectfully requested to furnish this department your opinion upon the following:
>
> May a board of education increase the salary of one of its teachers, whose contract commenced on September 1, 1935, and make such increase retroactive to the beginning of the contract; or to any other prior date?"

From additional information secured by personal conference with your department, I am informed that the specific question upon which you desire my opinion is: whether or not a board of education that entered into a contract with a teacher on September 1, 1935, at a fixed