
State Board of Dental Examiners; Power to Revoke Certificate.

ing with the patient for the purpose of determining the county and district, the term "resident or inhabitant of the district," should be taken in its ordinary sense or definition. Section 700 not clearly defining the question of residence, but section 702 in prescribing the form of affidavit uses the term "legal settlement in ——— township, ——— county."

It is my opinion that the patient, having no mind of her own, and being a minor, the removal of the parents to Hamilton County would be the removal of the child, and that such child, in law, has its legal settlement in Hamilton County, and the probate judge of Hamilton County would have jurisdiction over its person for the purpose of inquest and determining its eligibility for the proper asylum of that district.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

STATE BOARD OF DENTAL EXAMINERS; POWER
TO REVOKE CERTIFICATE.

Office of the Attorney General,
Columbus, Ohio, January 25, 1898.

Dr. F. H. Lyder, Secretary State Board of Dental Examiners, Akron, Ohio:

DEAR SIR:—I have the honor to receive a communication from your board, asking for a written opinion upon the proposition, or rather, defining the powers of your board under the statute, where an applicant for a certificate to practice dentistry had obtained the same from your board by perjury and fraud. You further state that had the holder of such certificate made known all the facts at the time of his application, that you have since learned, he would not

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have received the certificate. Then you put the strong proposition: "Has not the board in such case, where fraud was perpetrated and perjury committed, the power to revoke such certificate?"

The act of March 20, 1884, defining the powers of dental boards, provides that each applicant shall present himself before said board, and submit to an examination of an elementary and practical character, unless such person has regularly, since July 4, 1889, been engaged in the practice of dentistry in this State, or who may hold or hereafter obtain from any reputable dental college such diploma, etc. And all persons who successfully pass such examinations, or who may legally hold diplomas, or who have been regularly since July 4, 1889, engaged in the practice of dentistry in this State, of good moral character, shall be registered and licensed by said board of dental examiners and shall receive a certificate of such registration and license, duly authenticated by the seal and signature of the president and secretary of such board.

The applicant, as I understand, received his certificate on the ground that he had regularly practiced since July 4, 1889, and you claim it was received on false affidavit, which you call perjury, and upon fraud.

It is said that fraud vitiates all contracts and even records, which is doubtless true in a general sense. But fraud and perjury must be reached or defined in some regular and authoritative mode.

The court in discussing the case of Knapp vs. Thomas, took this view: That while Knapp obtained a pardon by fraud, in the common acceptance of the term, the governor had not the power to revoke the pardon, nor to *judicially* ascertain the existence of fraud in obtaining it.

Applying the principal laid down in the discussion of this case, and the many cases therein cited, it is my opinion that the question of perjury and fraud would vitiate this certificate, but that it must be judiciously determined, and

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that your board has not judicial powers, and the holder of the certificate would be entitled to a hearing and a day in court. On such hearing the board's ideas of perjury and fraud might be very different from those of the court. The holder of the certificate is entitled to the benefit of having this matter judicially determined.

Your second proposition asking whether your board has the power to delegate to an individual member of the board, examining powers, and permit such member to pass upon the efficiency of an applicant, is answered in the negative.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

STATE PROPERTY; TITLE; NATURE.

Office of the Attorney General,
Columbus, Ohio, January 31, 1898.

*Hon. J. W. Jones, Superintendent, Deaf and Dumb Asylum,
Columbus, Ohio:*

DEAR SIR:—This department has the honor to receive a communication from you under date of January 31, 1898, enclosing a deed from the files of your institution, being a certified copy of the original deed, for the real estate upon which the institution is now located. You further state that the other two deeds you have exhibited to me by copy, both in the granting and the warranting clause, have the same expression. You ask for a written opinion as to the nature of the title the trustees may hold in the property, and whether such title is such that the trustees, either by their own power or legislative enactment, may have title, and power to sell such title to purchasers bidding on the same.

Examining the original statutes under which the insti-

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tution was created, I find the act establishing the institution for the deaf and dumb was passed January 30, 1827. Section 2 of this act provides:

“That the said trustees and their successors in office, be and they are hereby authorized to receive by gift, grant, devise, legacy or otherwise, moneys, lands and other property, and the same to hold, use and apply, in such manner as they may deem most beneficial for that purpose; provided, that the clear annual income of such moneys, lands and other property, does not exceed \$30,000; and provided also, that no part thereof shall be applied to any other purpose than that of furnishing the necessary buildings, accommodations and teachers for such deaf and dumb persons, and for maintaining and educating them.”

While this law was in force Rev. James Hoge, Messrs. McDowell and Sells, being the owners in fee simple of the original lots where the asylum now stands, together with their wives, joined in a deed of conveyance, or separate deeds of conveyance for their separate interests, for the consideration of one hundred dollars (\$100.00) for each lot, using this expression in the granting clause:

“Have given, granted, bargained, sold, released and conveyed, and do by these presents, give, grant, bargain, sell, deed, convey, and confirm unto the trustees of the Ohio Asylum for Educating the Deaf and Dumb and unto their successors forever, outlot, etc.”

And in the habendum clause, this expression is used:

“Unto the said trustees of the Ohio Asylum for Educating the Deaf and Dumb, and unto their successors in office forever.”

The same expression is used in the covenant and warranty clauses. It will be observed in each case that the term “trustees” is used for a specific purpose, and a qualified term

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of perpetuity, namely, "successors." These deeds lacking the words "assigns" or any other expression in the deeds clearly indicating that a fee simple was intended, but restricting it to "trustees" and "successors" to trustees, and for specific purposes, it is my opinion, that as against the grantors and the grantors' heirs, the board cannot transfer this title in fee simple to purchasers, but there is a trust impressed upon it by virtue of the terms of the instrument, and being a trust, the statute of limitation could not run against the heirs. I would not advise the State, nor could it safely attempt a sale to the prejudice of these grantors or their heirs. So far as the interest is now vested in the trustees, I am clearly of the opinion that the Legislature could fully authorize such trustees to grant or sell any such title if they had any. But the Legislature could not pass any act that would divest the original grantors or their heirs of any title that they may have had, or which had been reserved to them, or which did not pass by this original trustee. Such an act would be taking property without due process of law, and would be unconstitutional and void.

Second. This infirmity, or lack of title in fee could be cured by the heirs of the original grantors giving quit-claim deeds unto the State; or if the original grantors had performed any act that would have produced an estoppel in pais, the State might have a title by estoppel. I have examined the reports of your institution from 1827 down to date, and the correspondence. I find very little that shows light upon the question in the nature of an estoppel, but rather the reverse.

Under date of April 29, 1829, a report by Allen Trimble, president, signed by James Hoge, secretary, the said Hoge being one of the grantors referred to in these deeds, makes this a part of his report:

"In pursuance of an act passed by the General Assembly, 1829, appropriating \$500 for the purpose of purchasing a suitable site on which to erect buildings for the accommodation of the asylum,

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three outlots, containing altogether about 10 acres, have been procured, and have been duly conveyed for this *purpose*. As these lots were sold to us for the *use designed*, for a price considerable below the proposed value, the whole cost has been only \$300, leaving a balance of the appropriation which has not been drawn from the treasury of the State, amounting to \$200, etc."

This being a part of the report of the grantor, Hoge, he discreetly and discriminately used the term "for this purpose," and "for the use designed," and also assigned that for the reason of the nominal consideration paid for the property.

Again, I find in the report of 1854, certain correspondence between the Legislature and the grantor, Rev. James Hoge as follows:

"House of Representatives, April 22, 1854.

"DEAR SIR:—I wish to place the House in possession of the circumstances attending the founding of the Institution for Educating the Deaf and Dumb in Ohio. As you were one of its early and for a long time an efficient friend of this institution, and must be familiar with its history, will you be so good as to state in reply to this, whether when you, Mr. McDowell and Sells conveyed the present site, you received a consideration that was then regarded as a full price. If not, the reasons why you sold for less, and whether you would regard it as an act of good faith toward the grantors of that deed, to divert the property to any other use.

"What is the amount that you think it would bring you, if restored to you so that you could dispose of the land to the best advantage?"

"I am with great respect, etc.,

"M. BIRCHARD.

"To Rev. Dr. Hodge, Columbus."

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Columbus. April 25, 1854.

DEAR SIR:—Not having been at the postoffice, I did not receive your letter early. The three outlots on which the Asylum for the Deaf and Dumb is located were sold to the State by us (Messrs. McDowell, Sells and myself) for \$100 each, less than their value then, but how much less I cannot now say, for the express purpose of being so used, and would by no means have been sold at that price for individual use. In our view, it would be at variance with the faith of the State to remove and locate elsewhere this institution, unless a reasonable remuneration were given to us. But I would not be understood that we have a *legal* claim. What remuneration we should in equity recover, and in what way, if any it should be made, I cannot undertake to say.

You inquire, what is the value of the land at the present time? I can only answer that it is a prevalent opinion that if sold as city lots, according to the plat of Columbus, the proceeds would not be less than fifty or sixty thousand dollars; consequently, each of the lots may be worth between fifteen or twenty thousand dollars. There are nearly 10 acres in the whole.

Yours respectfully,
JAMES HODGE.

Hon. M. Birchard.

In the light of the report above cited, and in connection with the language actually used in the deed, I cannot hold that this is an estoppel; but fairly construed, it should be taken as a warning that the grantors at all times claimed the deed given for trust purposes. Lord Coke has defined an estoppel to be:

“Where a man’s own act or acceptance stoppeth or closeth up his mouth to allege or speak the truth.”

Estoppel in pais arises when one by his acts or representations, or by his silence when he ought to speak out, intentionally, or through culpable negligence, induces

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another to believe certain facts to exist, and such other one rightfully acts on the belief so induced in such manner that if the former be permitted to deny the existence of such facts, it will prejudice the latter. That is, if these grantors or their duly authorized representatives, had asserted in writing notwithstanding the language of this deed, that they had intended a fee simple, or that they had no claim whatsoever, in law or in equity, in said premises, and the trustees acting upon such representations, should have transferred the property by a deed of warranty, or had expended money upon it in buildings or other improvements that they would not have done without such an express statement, then the original grantors might be estopped from making any claim to a reversion of the title. Or a claim to any title whatsoever in themselves.

Hence I conclude:

First. That the State holds it in trust for a specific purpose.

Second. That such trustees cannot alienate or deed it away.

Third. That it must be held by them and their successors for the purposes expressed in the deed.

Fourth. I find no acts that would constitute an estoppel in deed or in pais, or of record, as against any of said grantors or their heirs.

Fifth. Before such transfer or sale of the premises can be made by the State or its representatives, quitclaim deeds would have to be obtained from all the grantors or their heirs; or an action to quiet title in which all the heirs would have to be made defendants for proper service, being a trust estate, there can be no adverse possession for a period of 21 years or more to enable the State to gain title by prescription.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

Is the Department of Agriculture a State Department.

IS THE DEPARTMENT OF AGRICULTURE A
STATE DEPARTMENT.

Office of the Attorney General,
Columbus, Ohio, February 1, 1898.

*Hon. W. W. Miller, Secretary State Board of Agriculture,
Columbus, Ohio:*

DEAR SIR:—I have the honor to receive a communication from you containing the following information and proposition:

“A bill is now pending in the General Assembly to amend section 1523, of the Revised Statutes of Ohio, providing that agricultural statistics collected by the township assessors and reported to the county auditors, shall be returned by the county auditors to the secretary of agriculture, and by him published in monthly crop and stock bulletins and the annual report of the Ohio Department of Agriculture, instead of having returns made to the state auditor, as now provided by said section 1523, Revised Statutes. In discussing the merits of the proposed legislation in the House of Representatives, the question of the legal status of the Department of Agriculture as related to the State government, has been raised, and the suggestion made that this department is not a legal department of the State government under the laws of the State.

“I beg to submit the proposition to you, as the attorney general of the State and the legal advisor of the board, whether the Department of Agriculture is or is not a recognized department of the State government, and to respectfully ask you for a written opinion as to the same.”

Section 22a, passed April 7, 1882, requires the president of your board to furnish an itemized statement, as well as a detailed statement, for all requisitions from his department upon the auditor of state for warrants upon the auditor of state, the same as the heads of all other departments of State. Annual appropriations are made from

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the public treasury to support your department. Section 177 requires the auditor of state to prepare and furnish the secretary of the state board of agriculture certain official data to be published in your annual report. Section 4446i requires that all suits for the recovery of fines shall be brought by the secretary of the board of agriculture in the name of the state of Ohio. Section 4446h empowers you to select certain packages and samples of commercial fertilizer; in fact, it gives you full power to act for the State controlling the whole subject of fertilizers. Sections 3692 and 3693-7 recognize your board, of which you are a creature, as one of the boards of the State. Section 341 requires you to make official reports to be published by the State.

The act passed April 26, 1890, and amended April 22, 1896, places the subject of farmers' institutes, and their holdings, under your direction and control. Another section expressly provides that the attorney general shall be the legal advisor of the board.

Hence, it is my opinion that the department of agriculture as now organized, governed and controlled by the various statutes above cited, and expenses defrayed by the annual appropriations of the Legislature, and the many powers vested in your board and in the secretary, is a clearly recognized department of the State government; as much so as the dairy and food department, or board of public works, medical board or any other board of special functions now performing important duties at the State's expense.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

Election to Fill Unexpired Term.

ELECTION TO FILL UNEXPIRED TERM.

Office of the Attorney General,
Columbus, Ohio, February 16, 1898.

Hon. Charles Kinney, State Supervisor of Elections:

DEAR SIR:—You have submitted to this department the question whether a person elected to the office of county commissioner to fill an unexpired term, shall qualify immediately following his election, or whether such qualification shall be on the third Monday of September following the election?

It is my understanding, and I believe the rule to be, that:

First. Where the statute does not provide that a person elected to fill a vacancy in any office, shall be elected for the unexpired term, the person so elected holds his office for the full term provided by statute; and he does not qualify, nor enter upon the discharge of the duties of such office, until the regular time fixed by law for the commencement of the term of that office.

Second. Where the statute provides that a person elected to fill a vacancy in any office, shall hold such office for the unexpired portion of the term of his predecessor whom he was elected to succeed, the person elected should qualify and assume the discharge of the duties of the office, immediately following his election.

Section 841, R. S., provides that a person elected to fill a vacancy in the office of county commissioner, shall hold his office for the unexpired term for which his predecessor was elected; and a person elected to fill such a vacancy should qualify immediately, and assume the discharge of the duties of that office, immediately following his election.

Very respectfully,
JOHN L. LOTT,
Assistant Attorney General.

*Commissioner of Railroads and Telegraphs; Authority to
Issue Grade Crossing Orders.*

COMMISSIONER OF RAILROADS AND TELE-
GRAPHS; AUTHORITY TO ISSUE GRADE
CROSSING ORDERS.

Office of the Attorney General,
Columbus, Ohio, March 16, 1898.

*Hon. R. S. Kayler, Commissioner of Railroads and Tele-
graphs, Columbus, Ohio:*

DEAR SIR:—This department has the honor to receive a communication from you under date of March 9, 1898, stating that under date of July 31, 1897, the city of Toledo had applied to your department for protection at certain street crossings in that city; that thereafter you had officially examined the grounds, and issued the following order to the officials of the Lake Shore and Michigan Southern, and Michigan Central railways:

“September 17, 1897.

“I have, therefore, in consideration of the facts and the high speed at which your trains pass over this crossing, decided that they shall be further protected as follows:

“There shall be a watchman stationed at Phillips avenue; there shall be safety gates put up and operated at Central avenue, all in accordance with sections 247a and 247b, Revised Statutes. This work shall be completed within 60 days from the date of this order, and at the joint expense of the Lake Shore and Michigan Southern and Michigan Central railways.”

“September 18, 1897.

“In regard to my orders of the 17th inst., kindly correct the order to read as follows:

“There shall be a watchman stationed at Central avenue from six o'clock A. M. until six o'clock P. M. There shall be safety gates put up and operated at Phillips avenue from six o'clock A. M. until six o'clock P. M. each day in the week, in accordance with sections 247a and 247b of the Revised Statutes.

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"This work shall be completed within 60 days from date of this order, at the joint expense of the Lake Shore and Michigan Southern, and Michigan Central railways."

You further state that the railroads above named take exceptions to this order because you did not apportion a part of the costs to the electric street railway crossing the tracks on these streets, claiming that your predecessor, Mr. Kirkby, had made an order of this kind which was never obeyed, two years previously; that you subsequently gave a hearing to such companies, and ask for instructions as to your duties in the premises under such orders given, also how to proceed to compel them to act and what punishment can be inflicted for disobedience, etc.

Being present at the hearing referred to, as well as having examined the brief of the learned counsel, Messrs. Potter & Emery, who appeared before you, representing the said defendant companies, I still adhere to my former opinion rendered to you more elaborately in the matter of construction of the act of April 27, 1896, referring to grade crossings.

It is my opinion that your order is properly given under section 247a and section 247b. The punishment provided in 247a is, a forfeit of \$100 and the further sum of \$10 per day while such neglect or refusal continues after the 60 days expire, referred to in your order.

The penalty provided for in 247b is \$25 for every neglect of such duty. This perhaps would be at the rate of \$25 per day for all the time omitted, or during which your order was disobeyed.

The prosecuting attorney of Lucas County perhaps would be the proper officer, as he is allowed 10 per cent. commission for collecting claims and accounts of this kind, to bring civil action against the defendant companies. If he refuses to act in the matter, this department can bring an action in the name of the State, and have the matter ad-

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vanced on the docket in Lucas County. But section 265 seems to expressly provide a compensation to prosecuting attorneys for doing this work. Under section 210, if brought by the attorney general.

Or the more drastic punishment would be under section 676I, sub-division 4, which provides a remedy in quo warrantu against a corporation that exercises a franchise, privilege or right in contravention of law.

Foreign corporations are amenable to this section. This latter action would of course be brought in behalf of the State directly in Supreme Court, and would only be accumulative, and would not prevent the civil action in the courts of Lucas County.

The provisions of 247a are mandatory, and companies disobeying your orders and relying upon the defenses suggested, do so at their own peril.

I would therefore advise you to make out a bill of forfeitures and penalties, according to the facts, and mail to the prosecuting attorney of the proper county ordering him to bring suit at once and have the cases advanced on the docket, and if you desire it, the more drastic means can be taken of filing suits by this department at once in Supreme Court.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

Incompatible Offices.

INCOMPATIBLE OFFICES.

Office of the Attorney General,
Columbus, Ohio, April 25, 1898.

Hon. Henry J. May, Member of the Senate:

DEAR SIR:—This department has the honor to receive a communication from you asking for a written opinion upon the question of your right to accept a commission as an officer in the military service of the United States, while holding office under the authority of this State, under the following conditions:

You state that while holding the office of State Senator, you are a captain of a military company in the Ohio National Guard, you are desirous of enlisting in the military service of the United States and receiving a like com-

mission as captain in the volunteer army of the United States, and you wish to know whether an acceptance of the latter office would work a forfeiture of your office as State Senator.

In reply I would state that it is a question as to whether the two offices are incompatible, either in their nature or made so by the United States constitution, or the United States statutes, or the State constitution or the State statutes. Referring to the fundamental law of the United States government, article 2, section 2, of the United States constitution, provides that "the President shall be commander in chief of the army and navy of the United States and of the militia of the several states, when called into service in the United States."

Article 1, section 6, provides so far as members of the National Guard are concerned, that "no person holding any office under the United States shall be a member of either house during his continuance in office," indicating that it was the express intention of the founders of the government to absolutely divorce the legislative from the military

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and thereby making the holding of office under each incompatible.

The Federal statutes further provide (section 1222 R. S.) as follows:

“No officer of the army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the army, and his commission shall be thereby vacated.”

Section 1223 further provides that certain appointive offices shall be considered wholly incompatible with active military offices.

Section 1224 provides: “Officers of the army on the active list shall not be separated from their regiments or corps for employment on civil works of internal improvement, nor be allowed to engage in the service of incorporated companies, or be employed as acting paymaster * * if such extra employment require that he be separated from his regiment or company, or otherwise interfere with the performance of the military duties proper.”

The attorney general of the United States (18th Volume of Opinions) in an opinion to the secretary of war, has ruled as follows:

“Referring to section 1222, any office created by State statutes is within the spirit of the law quoted above, and the officer of the army on the active list cannot lawfully accept or hold such an office whether in State military organizations or otherwise. Exceptions from the operation of section 1222, R. S., U. S., can of course be authorized only by Congress. I can only find such exception which refers to the engineers of the army being one of the legal officers of the District of Columbia.”

The attorney general of the United States further discusses the proposition (19 opin. 283) as to whether a re-

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tired officer of the army is ineligible to hold an appointment to a civil office, and assures in the discussion of the subject that if he is an active officer he could not do so. The act of July 31, 1894 by Congress, permitted retired officers of the army and navy to hold certain public and civil offices. The inference is still strong, that without such exception even for retired officers, the two are incompatible.

Section 1860 R. S., provides that no person, belonging to the army or navy, shall be elected to, or hold any civil office or appointment in any territory. The attorney general of the United States held (19 opin., 600) that a leave of absence, granted for the express purpose of enabling an officer to engage in the service of an incorporated company would be clear evasion of the statutes and unwarranted.

Referring to our State constitution, article 2, section 4, expressly provides that "no person holding office under the authority of the United States or any lucrative office under the authority of this State shall be eligible to, or have a seat in the General Assembly."

Throop, on Public Offices, commenting on this subject, says:

"Where the constitution of a state provides that no person holding office under the United States shall hold or exercise any office under the State, inasmuch as the State has no power to declare a Federal office vacant, the State courts will declare the State office vacant, and the person would be liable for trespass for attempting to exercise the State office. If the office under the United States is accepted after the office under the State, the acceptance vacates the latter within the rule laid down in the former section of the same work, but one holding office under the United States cannot be declared by State Court to have forfeited his office by the acceptance of the State office, 129 Pa. St., 151." See Winthrop Military Law and Precedents (Pg. 1399 and notes.) Hechem, Public Officers (Sec. 76), *People vs. Leonard*, 73 California 230.

14 Pacific Reporter, 853. *Crawford vs. Dunbar*, 52 Cal. 36. *State vs. Clark*, 3d Nevada, 566.

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“The office of postmaster is an office of trust and profit under the authority of Congress, and a justice of peace holds a judiciary office, and both cannot therefore be held by the same person.” 14 Vermont, 429, 39th Am. Dec. 231.

Stimson Am. Statute Law, Sec. 220. “Where it is the holding of the two offices at the same time, which is forbidden by the constitution or a statute, a statutory incompatibility is created, similar in its effect to that of the common law, and, as in the case of the latter, it is well settled that the acceptance of the second office of the kind prohibited operates *ipso facto* to absolutely vacate the first.” Mechem, Sec. 429, 77 N. Y., 503.

33 Am. Reporter 659. In Indiana it was held where one, who at the time of his election to one lucrative office, that of township trustee, holds another lucrative office, that of United States postmaster, may be compelled to vacate the office which he held under the State. 105 Ind., 221. Where the constitution provides that no person holding a position of honor or profit under the United States, shall hold any office of honor or profit under the State, a person who is a director of the State deaf and dumb asylum vacates his office when he accepts that of United States marshal.” Hechem Sec. 431. Dickson vs. People, 17 Illinois, 191.

So it is held that an alderman in the city who is elected to Congress and accepts the latter office, by that act vacates his office of alderman. People vs. Brooklyn, 77 N. Y., 503.

It is, therefore, my opinion that your being commissioned in the United States service as captain, being under the president of the United States as commander in chief, such a commission vests you with an office within the meaning of the State and Federal statutes, taking into consideration the nature of the two positions, the duties required of you in each, that even in the absence of constitutional or statutory prohibition, they would seem to be incompatible.

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I would further hold from the Federal constitution above cited, and the Federal statutes above cited, together with the opinion of the highest courts of the states having similar constitutions and statutes with our own, that your enlistment and accepting a commission of captain in the service of the United States would work a forfeiture of your office as State Senator, perhaps even without a judicial decree to that effect in the State courts. If you desire to enter the United States service as such officer, who should resign as State Senator, or should you desire to remain as State Senator, you should decline to accept a commission as an officer in the United States service.

Respectfully submitted,

F. S. MONNETT,
Attorney General.

STATE BOARD OF AGRICULTURE; AUTHORITY
TO ISSUE BONDS.

Office of the Attorney General,
Columbus, Ohio, May 11, 1898.

W. W. Miller, Secretary Board of Agriculture, Etc.:

SIR:—This department has the honor to receive a communication from you, in reference to the authority of your board to issue bonds under act of April 12, 1898, (93 O. L., 110), and the act of April 25, 1898, in reference to the paying of interest thereon, desiring to know whether such bonds are valid, and what security they will be to purchaser?

In reply would state that a reference being made to the various acts heretofore cited you will observe, under section 3694, that there is a provision that all property "shall revert to the State," that the "Attorney General shall act as legal adviser of the board the same as for other State

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departments." "No portion of such real estate be disposed of except by act of the Legislature."

These are all expressions used in connection with the other State departments, penal, or educational institutions.

Further, I would call your attention to the construction the Legislature has put upon it by the various appropriations and bond issues heretofore made. In each instance I believe the State has taken up its indebtedness, and, as you will observe, the same Legislature which passed this act provides for the payment, out of the sinking fund, some \$20,000 principal and \$1,200 interest of the old issue of bonds, clearing up the liens on the very property which you are authorized to re-pledge for this \$80,000 issue.

So, when the State ordered or permitted a foreclosure of such mortgage to pay the debt, it but seems to treat such security as an additional indemnity to the ordinary credit of the State, viz.: by providing at each biennial session payment from appropriations.

The State, the owner of the land, has authorized this debt and pledged its specific property for it, that a future Legislature could not repudiate even should it fail to make appropriations; while any ordinary bond is dependent, every two years, upon the will of the Legislature to meet its just debts by appropriations.

It is my opinion, judging from the acts of the Legislature in the past and from the recognition which your board receives in the general statutes of the State, that the credit of the State is pledged to pay this issue of bonds, and in addition thereto, lends specific credit upon this valuable real estate and the improvements, amounting to at least \$400,000. Having already provided for first accruing interest, in the act of April 25, 1898.

Very respectfully,
F. S. MONNETT,
Attorney General.

Mutual Protective Association.

MUTUAL PROTECTIVE ASSOCIATION.

Office of the Attorney General,
Columbus, Ohio, May 16, 1898.

Hon. W. S. Matthews, Superintendent of Insurance, Columbus, Ohio:

SIR:—This department is in receipt of your communication containing inquiries made by Hon. Chas. P. Griffin, acting as receiver for the Northwestern Mutual Fire Association of Toledo, Ohio, a mutual protective association organized under and pursuant to sections 3686 to 3689 inclusive, of the Revised Statutes of Ohio.

The inquiries so made arrange themselves as follows:

First. Whether, under sections 3686-3689, R. S., partnership property may be insured by such associations, and assessments levied against them, and otherwise treat such partnerships as members of such associations?

Answering this question independently of the question of estoppel, which might arise under the particular facts concerning such membership, I would refer you to my opinion, addressed to you on February 19, 1897, upon nearly a similar question, and which you will find on pages 38, 39 and 40 of the report of the attorney general for the year 1897.

The question there involved a construction of the words "persons" and "members of such association" as contained in said sections of the Revised Statutes; and whether such words could be held to include within their meaning associations of individuals, corporations or other organizations.

The opinion then given, I still adhere to; and merely extending the principle therein set forth, I am of the opinion that the term "persons" or "members of such association" should not be so construed as to include partnerships.

As additional reasons to those set forth in my former opinion above referred to, it may be urged, that while in some other states the courts of last resort have held that

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a partnership is a distinct and palpable entity in the eye of the law, as distinct from the individuals composing it, yet, our Supreme Court in *Dyers & Schlupe et al.*, 51 O. S., on page 314, held—

“A partnership is not, in our judgment, a legal entity, having as such a domicile or residence separate and distinct from that of the individuals who compose it.”

Domicile and residence are essential to be determined in ascertaining who may be members of “such association.”

Section 3686, Revised Statutes, provides:

“Any number of persons of lawful age, *residents of this State*, not less than ten in number, may associate themselves together for the purpose of insuring each other.”

Considering the composition of partnerships, some of the members may be residents of the State, and some not. All may be non-residents of the State, and still do business in the State. This is by virtue of the statute giving them such powers. (See 51 O. S., page 313.)

But the court held in the case last cited that the members of a partnership do not form a collective whole, distinct from the individuals composing it, nor are they collectively endowed with any capacity of acquiring rights or incurring obligations. The rights and liabilities of a partnership are the rights and liabilities of the partners.

This being true, the partnership as a partnership, composed of non-residents, only obtain rights in this State by force of the statute governing such relations. But section 3686, R. S., provides, members must be “residents of the State.” If the partnership can be a member, composed of non-residents, it forces us to the conclusion that the individuals can “be collectively endowed with a capacity of acquiring rights or incurring obligations,” which the individuals composing such partnership could not.

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I merely use the instance of the non-resident members composing such partnership to force the conclusion, that *no* partnership, no matter whether composed of resident or non-resident individuals, can become a member of such association.

See also *State ex rel. vs. Mfrs. Mu. Fire Assn.*, 50 O. S., 145-151.

Second. Could a partnership be considered as a member of such association by the operation of the principles of estoppel? Or, in other words, could they, having had protection to their property during a given period, be assessed for that protection?

Such associations derive their authority, and right to transact business by virtue of sections 3686-3689 R. S. Independent of those sections they have no right whatever to do the matters and things specified. They are limited to the powers enumerated in the statutes, and to purposes incidental thereto.

State ex rel. vs. Monitor Fire Association, 42 O. S., 564.

If they (the partnerships) had had protection, or had received under their contract of insurance, anything of value to them, they might on the principle of estoppel, be held to pay for that which they had received.

The assumption must be made before they can be held by the equitable principle of estoppel, that they had actually received something of value to them, or had been protected.

If a partnership is not such "person" as is contemplated by section 3686, R. S., then it could not become a member of such association, and it follows that it could not obtain any protection or benefits unless it could become a member. The assured must be a member of such association before he can be insured. If the principle of estoppel could be invoked to create members, all the company would need to do to enlarge its powers, and set the statutes at defiance, would be to take in whomsoever they pleased as members.

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One of the necessary ingredients of estoppel is that they must be mutual. In the case supposed that is entirely lacking. The association cannot be estopped to deny their lack of authority in accepting a partnership as a member. The insured is a part of the association. (Sec. 3686.) He is bound to know the statutes creating the association. The doctrine of estoppel was not intended for such cases. The contract is "*Ultra Vires*," and those who dealt with them are bound to take notice of the extent of their powers.

See *City of Cleveland vs. Bank of Ohio*, 16 O. S. 269.

The city is not estopped to deny the existence of the power assumed.

In this case the city is not estopped.

See *Mfrs. Fire Assn. vs. the Lynchburg Drug Hills*, 8 Circuit Court R^p. 117.

Hence it follows that partnerships cannot be members of such association. Cannot be insured by them. And the association is not estopped by any principle, to assert their lack of authority to make such a contract.

As to the third inquiry of Mr. Griffin. He is acting as receiver; he is a creature of the court which appointed him. In case of any contemplated action, wherein he is in doubt as to his authority to act, he should apply to the court for direction in the premises.

Very respectfully,

F. S. MONNETT,
Attorney General.

Joint Resolution of General Assembly; Effect on Statute Law.

JOINT RESOLUTION OF GENERAL ASSEMBLY;
EFFECT ON STATUTE LAW.

Office of the Attorney General,
Columbus, Ohio, May 24, 1898.

To Hon. Asa S. Bushnell, Governor:

DEAR SIR:—This department has the honor to receive a communication from you, submitting House Joint Resolution No. 51, adopted April 21, 1898, entitled: "A Joint Resolution authorizing the acceptance of a regiment of reserve militia," and inquiring as to the legal effect such joint resolution may have upon you as governor, should you be called upon to act under sections 3086, 3087 and 3088, R. S. of Ohio; and further inquiring in what way, or to what extent your duties may be enlarged or curtailed by those sections under this resolution.

In reply I would state that on examination of the subject matter of the resolution, it purports to amend such sections of the statute, and to make them especially applicable to one class of volunteers named in the resolution, giving them the title of "Reserve Militia of Ohio," giving such regiment, as named in the resolution, special and preferential recognition. What is attempted by this resolution is the subject matter for a statute and not for a resolution; and even as a law, it would have constitutional objections which I do not need here to discuss, but as a joint resolution it can in no way amend, modify, or enlarge sections 3086, 3087 and 3088, neither can it carry with it the implied expenditure of money.

Sections 15 and 16, article 2 of the constitution provide how laws shall be passed, and this resolution does not purport to have been passed as a law. The court, in the case of *State vs. Kinney*, brought by this department last June, and decided June 1897, by the Supreme Court, reported 56 O. S., 721, says: "The statute law of this State can neither be

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repealed nor amended by a joint resolution of the assembly, and these provisions being so intimately connected with the subject matter proper for a resolution, follow that the court cannot say that the resolution would have been passed without these void provisions. The whole resolution must be and is held void."

It is my opinion, therefore, that this resolution does not in any way modify, enlarge, or curtail your powers, or change your duties set forth and laid down in sections 3086, 3087 and 3088, and it is my opinion further that the court would hold the same absolutely void.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

TAXATION; LISTING PERSONAL PROPERTY.

Office of the Attorney General,
Columbus, Ohio, June 15, 1898.

Hon. Benjamin Meck, Prosecuting Attorney, Upper Sandusky, Ohio:

DEAR SIR:—Answering yours of recent date, relating to who should list chattel property, under the circumstances narrated in your letter, would say:

Section 2734, Revised Statutes, provides *who* shall list personal property, and among others it mentions.

"Every person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned or otherwise controlled by him, as *agent* or attorney, or on account of any other person or persons, company or corporation whatsoever."

Section 2735 Revised Statutes provides when personal property shall be listed; and says: "every person required

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to list property on *behalf* of *others* shall list the same in the same township, city, or village in which he would be required to list it if such property were his own."

There should be no disagreement whatever among lawyers as to the meaning of the above sections of the statutes. Applying them to the facts as recited by you, I would say, that valid agencies do exist, undoubtedly, under which agencies, the principal's property, should be listed by the agent. The statute is broad enough to include moneys found in the hands of one acting as the attorney of another, on the second Monday of April, that the attorney should list it at the same place he would list his own property. Every agent, governed by the same rules, should list the property of his principal.

But it should be borne in mind that agencies cannot be created for the express purpose of listing property in a locality more favorable to the individual than the one in which he lives. The law will not favor any ruse or scheme to thus change the situs of chattel property, for such an illegal purpose. That which one cannot do directly, he cannot do indirectly. And when the purpose of the agency is plainly to defeat the action and operation of the tax laws, he cannot create an agency for that purpose.

In this class of cases the fundamental question is, is one actually the agent of another, bona fide? Is that agency made necessary by the circumstances surrounding the party, such as by the absence of the one party from the taxing district, or other sufficient cause? So that it cannot be answered by any uniform rule as to how or when such agency could be created, but that must be determined by the circumstances of each particular case; but if a valid agency be shown to exist, the party to list the property, namely, the agent, should list it at the same place as his own, but separately from his own, as required by section 2735, Revised Statutes of Ohio.

Respectfully submitted,

F. S. MONNETT,
Attorney General.

Foreign Corporation Doing Business in Ohio.

FOREIGN CORPORATION DOING BUSINESS IN
OHIO.

Office of the Attorney General,
Columbus, Ohio, June 27, 1898.

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

SIR:—I have your communication of June 23, asking an opinion and instructions with relation to the following facts:

That the C. F. Adams Co., a corporation organized under the laws of New Jersey, with its principal and manufactory at Erie, Pa., is engaged in selling its goods in Ohio, under the following circumstances: Said company is said to have an agency in the city of Cleveland, where samples of its goods are kept, they sell their goods under a contract of sale (a copy of which you enclose) which is in the form of a contract of rental, reserving the title in the name of the vendor company; when the contracts are made out they are forwarded to Erie, and the goods are shipped to Ohio from Erie, the agent makes his collections on these contracts, and at the end of every month remits to the home office.

After examination of the contracts, and the Revised Statutes of Ohio, and the decisions bearing upon the question, I am of the opinion:

First: That under section 2734 of the Revised Statutes, these leases or contracts are intangible in their nature, and if they are the property of a non-resident of the State, as is claimed, the situs of such property should be the place where it is owned, and not the place where it is owed, nor as the Supreme Court say, in the case of *Myers vs. Seadeger*, 45 O. S., 235.

“Intangible property has no actual situs. If for purposes of taxation we assign it a legal situs, surely that situs should be the place where it is owned and not where it is owed. It is incapable of a separate situs, and must follow the situs either of the creditor or the debtor. To make it follow the residence of the latter is to tax the debtor and not the creditor.”

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Second. I am of the opinion that such contracts or leases are not taxable because under the rule adopted, they follow the situs of the creditor and not the situs of the debtor, and hence are taxable in the state of Pennsylvania, and not in the State of Ohio.

Third. With regard to the property itself mentioned in such contracts or leases, or owned by said company, the ordinary rule prevails as set forth in sections 2730, 2731, 2734 and 2744 of the Revised Statutes of Ohio, and so much of it as is actually located within the State of Ohio on the day for the listing of personal property, should be so listed and reported to the county auditor, together with a statement of the amount of said property, giving the township, village, city or ward where situate.

Fourth. I do not think, that, under the circumstances above cited, such company could be held to be a "merchant" under section 2740 R. S. of Ohio, for under the above rule all the property belonging to such company within the State of Ohio can be listed, and to attempt to bring it under the section just cited would be to embrace property which would never come into the State, and which could not be properly taxed under the statutes of this State.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

AN ACT FOR THE PROTECTION OF RAILROAD
EMPLOYEES.

Office of the Attorney General,
Columbus, Ohio, June 27, 1898.

*Hon. R. S. Kayler, Commissioner of Railroads and Tele-
graphs, Columbus, Ohio:*

DEAR SIR:—This office has the honor to receive a communication under date of the 27th inst. from your department asking for the construction of an act passed April 24,

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1898, amending the act 85 O. L., p. 105. You especially wish to know what would be a fair construction of the language in said act that provides that "all railroads shall adjust, fill, or block all angles in frogs, switches and crossings on their road and in all yard terminals and points where trains are made up, with the best known sheet steel spring guard or wrought iron appliances, to be approved by the commissioner of railroads and telegraphs." You further state that there are guards made that fill the opening, made of sheet steel, that have no spring appliances contained in them; there are wrought iron appliances made that do not completely fill the opening, and there are cast iron appliances that do completely and solidly fill the entire opening. You ask whether you would be justified in approving the devices that do not have springs contained in them or would not completely fill the space, or those made of other than sheet steel or wrought iron, for instance, solid cast iron block.

The act of March 23, 1888, of which this is an amendment, used like language, to-wit:

"To adjust, fill or block the frogs * * *
so as to prevent the feet of its employes from being caught therein."

The act of April 24, 1898, in itself, does not use the term "to prevent the feet of its employes from being caught therein." But the title of the act which, under the same circumstances, is permitted to be used for the purpose of statutory interpretation says that this is an act for the protection of railroad employes. The new act modifies the kind of frogs and switches by the word "angle" and omits the exceptions that were incorporated in the act of 1888. It is a rule of interpreting an ambiguous statute to ascertain from the terms used in the act, if possible, what was the evil that existed and the purpose of the Legislature in passing the act to prevent the evil. As I understand from the trade of railroading, the evil aimed at was to prevent employes from

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getting their feet, boots or shoes in any way wedged in the spaces formerly left vacant or open, known as "angles, switches, frogs and crossings." Under the interpretation of the old law, cinders, ashes, wood and various substances were used to protect the foot of the employe. The present act undertakes to limit it, subject to your approval, to sheet steel spring guards or wrought iron appliances, and this by implication, for the purpose of preventing feet being fastened in such angle. You are required to block, fill or adjust such angle with such filling. The first controlling feature governing you in the inspection of these appliances to ascertain whether it accomplishes the purpose, to-wit: to protect the employes from accident or injuries at such points. To do this you may use appliances made of wrought iron, if such wrought iron can be so adjusted to prevent the injury, whether the same fills or completely blocks the angle or not, as the term adjust has equal force in controlling you as that of the word fill or of block. The term wrought iron is iron that is, or may be, wrought into form by forging or rolling and that is capable of being welded. This is a very broad definition of iron which you will observe by consulting any of the standard dictionaries, and would include a large variety of appliances for such purpose. If you do use sheet steel to comply with the act, I am of the opinion that you would have to use the spring attachment, so you would not be justified in approving sheet steel devices that do not have springs contained therein. But you could approve sheet steel spring devices whether they completely filled the space or not, if they were so adjusted as to fully protect the employes; or further, you can use such form of wrought iron taking in its broad sense whether it completely fills the space or not if it can be so adjusted as to prevent the employe from suffering injuries at such angles or points designated in the statutes. It seems the statute forbids the cast iron appliances unless they have been made malleable.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

Taxation; Listing of Personal Property.

TAXATION; LISTING OF PERSONAL PROPERTY.

Office of the Attorney General,
Columbus, Ohio, June 27, 1898.

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

SIR:—I would respectfully call your attention to a certain class of property, which under the statutes of this State, plainly should be listed and taxed, and that is to the mercantile reporters, or volumes issued by the reporting agencies, known as "Dun's" and "Bradstreet's." I have been reliably informed that such companies, being non-residents of Ohio, charge their customers about \$50 per year for the use of these volumes, the title to which is retained in name of the company. That there is in use in the State of Ohio about \$100,000 worth of these volumes, and none of the same have ever been taxed in this State.

I would suggest, that, acting under the powers conferred on you by section 166, Revised Statutes of Ohio, you issue such instructions to the various county auditors as may, in the future, require them to see that such property be hereafter listed. If upon examination you may find that the individuals having custody of the same have not listed them for taxation in such individual's return.

Very truly yours,

F. S. MONNETT,
Attorney General.

Power of Auditor to Correct Tax Valuation.

POWER OF AUDITOR TO CORRECT TAX VALUATION.

Office of the Attorney General,
Columbus, Ohio, June 28, 1898.

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

SIR:—This office is in receipt of a communication from you, containing application of one Elizabeth Barnitz, addressed to the auditor of the state of Ohio, and to the auditor of Butler County, for decrease of tax valuation on 15 acres of land, located in said county, on account of damage to the same by overflowing of the Big Miami river, and the depositing of sand and gravel thereon.

Upon examination of said application, and proofs accompanying same, would say:

This application is based by the applicant upon sections 2800 and 2801, of the Revised Statutes of Ohio, which, upon examination, will be found to authorize each county auditor to correct any error with regard to taxation of real estate in the following class of cases:

First. In the name of the owner.

Second. In the valuation.

Third. In the description.

Fourth. In the quantity of any tract or lot contained in the list of real property in his county.

No deduction can be made from the valuation of any real property until ordered by the State board or county board of equalization, or upon the written order of the auditor of state.

Section 2801 provides, the county auditor shall correct the valuation of any parcel of real property on which any new structure of over \$100 in value may have been erected, or on which *any structure of like value* shall have been *destroyed*.

The relief claimed being predicted upon these sections, do they entitle the party to the relief asked?

Power of Auditor to Correct Tax Valuation.

In the case of *Draude vs. Staley*, treasurer, 6 Bulletin, 773, the Supreme Court of Cincinnati, held:

"The powers of the auditor with respect to taxation are only such as are conferred upon him by statute, and it has been the policy of the courts to give those powers a strict construction."

That court commenting on sections 1038, 2800 and 2803, Revised Statutes say:

"They simply provide that the auditor may *correct any errors* he may from time to time discover in the duplicate."

This statute referred to section 2800 seems to have been passed by the Legislature for the express purpose of "correcting errors." They, in no sense, in my opinion provide for equalizing values, not for reduction on account of any damage to real estate, or its fixtures.

Sections 2801 and 1038a, Revised Statutes, assist us in that construction, and confirm the view, by their making provision for the county auditor correcting the valuation of real property, on which *any structure* shall have been destroyed or injured by fire, flood, tornado or otherwise.

It is not here claimed that *any error* was made with regard to the real estate in question, in the name of the owner, in the valuation, in the description, or quantity of any tract or lot; but rather it is claimed that damage has been sustained to said tract by flood. No deduction can be made under section 2800, Revised Statutes, for any such cause, and the power does not lie with the county auditor under such section to make such reduction.

It is not "damage to any structure" that is claimed, therefore no relief could be given under sections 2801 or 1038a, Revised Statutes.

The Legislature here undoubtedly recognized a distinction between "correcting an error," and "equalizing values" under changed conditions.

Power of Auditor to Correct Tax Valuation.

In the case of *State ex rel. Poe vs. Baine*, 47 O. S., page 456, the Supreme Court says:

“We do not doubt that the power of the county auditor to correct errors is limited to such as are clerical.”

And in the case of *Ohio ex rel. vs. Commissioners of Montgomery County*, 31 O. S., 271-3, the Supreme Court says:

“The county auditor could not correct fundamental errors, but only such as were clerical.”

Here the application and proof do not show “any error” at all, but as before stated, what is here claimed is a correction, because of destruction or damage caused to real property.

If the county auditor has no power, as I claim, to make any change in real valuations under such circumstances, then the auditor of state has no power to direct and require him to do it. This question was determined by the Supreme Court, 47 O. S., 454.

“That the auditor of state had no power to direct and require a county auditor to correct a duplicate, unless the error sought to be corrected in one that, under the law, the latter officer has power to correct must be conceded, for, of course, if the county auditor has not been clothed by law with power to do and act, its performance by him cannot be required either by his superior, or by courts of justice.”

Second. The county auditor of Butler County, not having authority to grant the relief to the party, which it had asked, the question is presented, have you, as auditor of state, the power to grant the relief?

My answer is in the negative.

Under section 167, Revised Statutes, you may remit

Schools; Construction of the Word District.

taxes and penalties illegally assessed, and such penalties accruing in consequence of the negligence or error of any officer required to do any duty relating to the assessment of property for taxation, or the levy or collection of taxes, and may correct any error in any assessment of property for taxation or in the duplicate of taxes in any county, provided it does not exceed \$100.

Not one of these enumerated powers comprehend the above question.

I therefore conclude that, neither you, as the auditor of state, nor the auditor of Butler County, have any authority to grant the relief asked in the application of Elizabeth Barnitz and the same should be refused.

I might say in connection with the above, that if there were any structures upon said lands destroyed, the remedy is full and ample, under the sections above cited to obtain relief for such, but for decrease in the value of the real estate itself, under such circumstances, it should be before the county board of equalization, or through the Legislature.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

SCHOOLS; CONSTRUCTION OF THE WORD DISTRICT.

Office of the Attorney General,
Columbus, Ohio, August 2, 1898.

Hon. Lewis D. Bonebrake, Commissioner of Common Schools, Columbus, Ohio:

DEAR SIR:—This department has the honor to receive a communication from your office, under date of July 27, 1898, making the following inquiries:

“Under section 4021, to what political sub-division does the word ‘district,’ as used in said section, refer, township

Schools; Construction of the Word District.

district or sub-district? Does it also include city districts? If so, does it include elementary schools in all grades and high schools? Can the petitioners under said section designate the school or schools in which they desire to have the German language taught? How many petitioners would it require to compel the teaching of said language in a high school in a city district?"

Section 4021 reads as follows:

"The board of any district shall cause the German language to be taught in any school under its control, during any school year, when a demand therefor is made, in writing, by 75 freeholders-residents of the district, representing not less than 40 pupils who are entitled to attend such school, and who, in good faith, desire and intend to study the German and English languages together. but such a demand shall be made at a regular meeting of the board, and prior to the beginning of such school year; and any board may cause the German and other language to be taught in any school under its control without such demand."

The word district refers to a political subdivision governed by a school board. Before a school board can be compelled to cause the German language to be taught in any school under its control, the following steps must be taken:

First, the petition must be in writing; second, must be signed by 75 freeholders, residents of the district, representing not less than 40 pupils who are qualified to attend such school; third, that such pupils shall in good faith desire and intend to study the German and English together; fourth, that such written demand shall be made at a regular meeting of the board and prior to the beginning of the school year.

To answer your questions more specifically, a township high school district would entitle 75 freeholders of the entire district to make such demand, provided they represented not less than 40 pupils who are entitled to attend such high school, and who in good faith, desire and intend to study the German and English languages together.

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In applying the test to a subdistrict the demand should be made to the board having control of such subdistrict, notwithstanding the same board has charge and control of other subdistricts, but the petitioners must represent such pupils, not less than 40 in number, that attend such subdistrict, and desire and intend to study the German and English languages, etc.

The same test should be made as to the ward schools in the city districts and the high schools in the city districts, making the test in such case, whether the petitioners represent a sufficient number of pupils that are eligible to attend the particular school petitioned for, whether it be a ward school or a city high school.

As to your last inquiry, whether the petitioners can, in addition to demanding that such language be taught, not only in a given ward, school or given subdistrict, but whether they can be taught in any particular grade of such graded school, I would hold that the school should be taken as an entirety, rather than by grade, and the board must use its discretion as to what grades, or whether all the grades should have such a combined course established. In the practice it has been construed to mean that a separate room presided over by German instructors, teaching different grades in one room, complies with the statute so long as the English pupils have access to take such German course therein prescribed, and that the German students have an opportunity to carry on their studies in the English classes in the other grades.

In addition to powers thus vested in the board by petition, such school board may cause the German or other language to be taught in any school under its control without such demand.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

Fees; Transporting Insane Patient.

FEES; TRANSPORTING INSANE PATIENT.

Office of the Attorney General,
Columbus, Ohio, August 10, 1898.

Hon. W. D. Guilbert, Columbus, Ohio:

DEAR SIR:—I am in receipt of your favor of recent date enclosing a communication from the Hon. John M. Wellston, sheriff of Van Wert County, asking for the construction of that portion of section 719, which refers to the conveyance of insane persons to the State hospital.

Construing said statute that the sheriff is to receive five cents per mile going and returning, and 75 cents per day for the support of each patient to or from the hospital, and one assistant five cents per mile each way, and nothing more for said services, that that is to include the expenses paid out for railroad fare for the patient one way, would deprive the sheriff of any compensation; indeed it would be an actual loss to him for such service. The statute is not free of ambiguities, but until the courts have passed thereon I would hereby instruct you that a fair construction of that portion of section 719, as amended April 21, 1898, would be that the five cents per mile, as mileage, is for the expenses and services of the sheriff personally, and so the five cents per mile mileage for the assistant, is for the expenses and reward to such assistant, and nothing more; that it does not include or require of the sheriff or such assistant to pay out of their compensation, any portion of their mileage so paid for such services, nothing for the support of such patient or anything for the actual railroad fare paid for such patient, or anything for the carriage hire made necessary in conveying such person. If the other construction was intended the term "for said services" would not be so limited, but would have said "services and expenses." It would not be proper for the sheriff or assistant to charge up for more than the actual expenses paid for the transportation of such patient, nor to exceed 75 cents per day for the support of such pa-

*Chief Inspector of Mines; Duty to Exhume Body Before
Taking Evidence.*

tient to or from the hospital. The other construction would certainly have expressed that the sheriff would be allowed at least the legal rate of fare for himself and patient, which is three cents per mile, or six cents for the two for the trip going, when both the sheriff and patient are enjoying such transportation. Otherwise the sheriff would be obliged to pay six cents per mile going, and if there was a patient to be brought back, it would be the duty while there to bring such patient back and to pay six cents per mile back, which would make him pay two cents per mile more than he would draw from the county. In other words, instead of receiving five cents per mile for his services as the statutes states, he is to pay out two cents per mile for the privilege of performing such services. The statute should not be construed in such a way as to produce an absurdity. It is, therefore, my conclusion, as above stated, that the sheriff is not to pay out any portion of his mileage to pay for the transportation of such patient, but that the same should be audited as an item of expenses, the same as carriage hire or support.

Respectfully submitted,

F. S. MONNETT,
Attorney General.

CHIEF INSPECTOR OF MINES; DUTY TO EX-
HUME BODY BEFORE TAKING EVIDENCE.

Office of the Attorney General,
Columbus, Ohio, August 13, 1898.

*Hon. R. M. Hazeltine, Chief Inspector of Mines, Columbus,
Ohio:*

DEAR SIR:—This department has the honor to receive a communication from you under date of August 13, stating that Alexander Powell was fatally injured at the Bessie

Chief Inspector of Mines; Duty to Exhume Body Before Taking Evidence.

mine in Athens County, on the 4th inst., that on the 11th inst., he died and was buried on the 12th, and that there had been no inquest held. You desire official opinion as to whether it is an imperative duty to exhume and view the body before taking evidence.

Section 301, R. S., and section 6871, R. S., seems to be special statutes governing this subject matter, relating particularly to fatalities in mines. These statutes should be construed as an exception to the general statutes governing coroners in the event they in anywise conflict therewith. So much of section 301 as is pertinent to your inquiry, provides that "every person having charge of any mine, whenever loss of life occurs by accident connected with the working of such mine * * * shall give notice thereof forthwith * * * to the coroner of the county in which said mine is situate, and the coroner shall hold an inquest upon the body of the person or persons whose death has been caused and inquire carefully into the cause thereof, and shall return a copy of the finding and of the testimony of the chief inspector."

Section 6871, so far as relates to this subject matter requires notice to the coroner of the county in which such mine is situate, wherein such accident has occurred, and any such coroner who neglects or refuses to hold an inquest upon the body of the person whose death has been thus caused, and to return a copy of the finding and of the testimony, shall be fined not less than \$50, etc.

The purpose of these two statutes seems to be something more than is required, or at least is sought to be obtained by the coroner's inquest under the general statutes. Under the latter, the law seems to contemplate taking such necessary data in connection with the fatality, accident or sudden death as will enable the authorities to ferret out any crime that may be connected therewith. Under the mining statute it seems to contemplate perhaps all of this and more, viz.: To furnish protection to the administrator and heirs of

*Chief Inspector of Mines; Duty to Exhume Body Before
Taking Evidence.*

the decedent if the accident be caused by negligence on the part of the company to afford then a civil remedy in damages, and on the other hand to likewise protect the company against imposition by suit for damages where there has been contributory negligence on the part of the decedent. Looking at these propositions I would hold that you would not be compelled to exhume the body. In order to hold a coroner's inquest in the case suggested that "an inquest upon the body of the person" within the meaning of the statute, would be for you to examine the witnesses that had actual information of the cause of the death, and having thus taken all the testimony, if there is no dispute as to the nature of the injury or cause of the death, or in other words, if you can fully investigate the matter without actual view of the body, the statute has been complied with. However, in cases where there is a dispute as to either the cause or the nature of the fatal wound that could not be ascertained by oral testimony of actual eye witnesses, and it could be cleared up by an actual view of the body, and that is the only way in which it could be satisfactorily demonstrated to the coroner, then of course the body should be exhumed. In other words, it is only where it is necessary to settle a disputed point that a law would require such proceedings as suggested. Where the same evidence can be secured without exhuming the body, the statute would not require it, because it does not require a vain thing to be done.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

Fire Insurance Companies; What is a Common Agent.

FIRE INSURANCE COMPANIES; WHAT IS A COMMON AGENT.

Office of the Attorney General,
Columbus, Ohio, September 5, 1898.

Mr. J. W. Cochran, Columbus, Ohio:

DEAR SIR:—I have the honor to receive an inquiry from you, bearing upon the construction to be given to section 3659, R. S. of Ohio. As you no doubt are aware, the statute defining the power of the attorney general does not permit me to give an official opinion to inquiries from private parties, but the pleasant relations always existing between this office and your bureau prompts me to answer this in an unofficial way.

Section 3659, or so much thereof as is a basis of your inquiries, provides in substance that no fire insurance company shall enter into any compact or combination with other insurance companies or shall require their agents to enter into any compact or combination with other agents or companies for the purpose of governing or controlling the rate charged for fire insurance on any property within this State, provided that nothing herein shall prohibit one or more of such companies from employing a common agent or agents to supervise or advise of defective structures, suggest improvements to lessen the fire hazard, and to advise as to the relative value of risks.

Your inquiry is as to what is the meaning of "common agent or agents," as referred to in this section, and whether it means the duly licensed and commissioned local agents can advise as to the relative value of risks, or the companies have the right to jointly, and for the sake of economy, have this information furnished by some person or persons who hold no contractual relations with them.

Section 283, R. S., defines the duties of licensed fire insurance agents, namely: "It shall be unlawful for any person, company, * * * * either to procure, receive or

Fire Insurance Companies; What is a Common Agent.

forward applications for insurance in any company * * * or in any manner to aid in the transaction of the business of insurance with any stock company, unless duly authorized by such company, and licensed by the commissioner of insurance in conformity with the provisions of this chapter."

Sections 287, 288, 289 and 2843, define further the duties and penalties imposed upon agents. Hence, if the agent referred to in section 3659 as a common agent performs such duties as in any manner aid in the transaction of the business of insurance of any non-resident company, then he must be licensed or commissioned.

The term "to advise," as used in said section, being an exception to the general prohibition of the section against entering into any compact or combination, must be so construed as not to result in any such combination or compact for the purpose of governing or controlling the rates charged for fire insurance; hence the licensed agent must act wholly independent of any and all other agents in fixing the rates charged for fire insurance. And hence, I would conclude that inasmuch as the agent is prohibited from entering into a compact to govern rates, that he has no business obtaining advice for that purpose, but the term should be defined to apply to the desirability of a risk from a physical standpoint and as a moral hazard, and features other than the question of rates to be charged, which is prohibited by the general statute.

Answering your questions then in order: If your services do not come within the prohibition of section 283, which makes it unlawful for any person to, in any manner, aid in the transactions of the business of insurance of any such non-resident company, then you would have a right to sell your advice to all parties desiring to buy the same, but if your services bring you within section 283 and section 3659, then you should be employed as a common agent of the companies which choose to employ you within the limitation of the proviso of section 3659, and as such common agent you could supervise and advise of defective structures, sug-

Fire Insurance Companies; What is a Common Agent.

gest improvements to lessen the fire hazard, and advise as to the relative value of risks, with the limitations as above set forth, namely: Limiting your advice to the desirability of the risk from a physical or moral standpoint, but not having your advice so framed, or your system so arranged that it will furnish a scheme for a compact or combination between such companies or their agents for the purposes of governing or controlling a rate charged for fire insurance on any property within the State.

Nowhere does the section use "advisory rates." After the common agent has described the structure, and advised that a given kind of structure, such as brick or stone, with a given kind of roof, with a certain moral hazard, is worth more or less than another brick structure in a different locality more thickly populated, or other incident to increase or decrease the risk, that is as far as the advice can extend, for the judgment must be left free and unimpaired of each insurance company or its agent when it comes to the settling on the rates to be charged for such risk. You would clearly violate section 3659 to take the combine judgment of all the agencies on each and every risk in a given locality, for that in itself would be combination or compact, for it could have but one purpose, namely: Of governing, if not controlling, the rates to be charged.

The word "combine," means to agree, to unite, to form a union, confederate, or it is a union of persons to effect some purpose, *or that tends to bring about some result.* These are Webster's definitions.

The "Century" gives the definition as "union or association of two or more persons, or parties, for the attainment of some common end;" also, an "alliance to obtain some common end, to co-operate." Hence, I would conclude that if you conferred with two or more local representatives, or all the representatives of a given district, and agreed upon the rate for each risk in that district, it is a union to effect some purpose, or that tends to bring about a union rate, and goes beyond the powers given the common agent within the provision of section 3659.

Superintendent of Insurance; Authority to Revoke License.

'As to your inquiry whether your acting as a publisher of advisory rates comes within the provisions of the term "common agent," I would call your attention to the provisions of sections 283 and 288, that you are, in a certain manner, aiding in the business of insurance, and you must be duly authorized by such company or companies and licensed by the superintendent of insurance, in compliance with said section, that your contract with such companies may be that of a limited agency, vesting in you the powers indicated in the proviso of section 3659. That your system will be held strictly within the limits indicated above, and not furnishing "advisory rates," but to supervise and advise of defective structures, suggest improvements to lessen the fire hazard, and to suggest and to advise as to the relative value of risks. Anything beyond that, which will furnish means to form a combination or compact within the above definition, will render you and the companies represented by you liable to the penalty set forth in sections 289 and 3659, which will more fully appear on perusing the same.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

SUPERINTENDENT OF INSURANCE; AUTHORITY TO REVOKE LICENSE.

Office of the Attorney General,
Columbus, Ohio, September 5, 1898.

Hon. W. S. Matthews, Superintendent of Insurance, Columbus, Ohio:

DEAR SIR:—This department has the honor to receive a communication from you as to your rights and duties to revoke licenses to fire insurance agents, when such fire insurance agents enter into a local board, or form a combina-

Superintendent of Insurance; Authority to Revoke License.

tion for the purpose of governing or controlling the rates charged for fire insurance in this State. I herewith enclose you an official answer bearing upon the same subject matter, analyzing the section bearing upon this question, which I hereby adopt and make part of this reply for your guidance. Sections 283, 288 and 289 provide for licensing of agents for the purpose of procuring, receiving and forwarding applications for insurance, only in a lawful way. Section 3659 makes unlawful certain acts for company and agent to-wit: making it unlawful for such companies (and companies act by their agents and officers), to enter into any compact or combination with other insurance companies, or shall require their agents to enter any compact or combination with other insurance agents or companies for the purpose of governing or controlling the rates charged for fire insurance on property within this State.

The "Century" Dictionary defines "compact" or the verb "to compact," as a joining together, to consolidate, to unite or attach firmly, as in a system; the secondary definition being an agreement, a compact between parties, in general, any covenant between individuals, or members of a community; a somewhat stronger term than the word combination, which primarily meant a union of two, but the derivative and common definition, as the act of uniting in a whole; the union or association, of two or more parties for the attainment of some common end.

Webster defines a "combination" as the union of persons or things to effect some purpose, or that tends to bring about some result.

I assume that the term "local board" is such as exists in Cincinnati, Dayton, Toledo, Cleveland, Columbus, Akron, where official testimony was taken in the cases now pending in the Supreme Court, as appears in the printed testimony of such cases, in which report various by-laws and constitutions of such associations are set out more fully. In each and every one of those cities such association of agents violates said section 3659, and such agents are violating the com-

Construction of Pure Milk Statute.

missioner's license granted them by you, under section 282 and the other provisions as to the licensing of agents, and their licenses should be revoked by you, as the superintendent of insurance.

A further penalty is provided in Sec. 3659, requiring you also to revoke the license of such insurance company. Such companies can no longer claim, in the light of the published testimony, that they are not advised of the condition of affairs, but notwithstanding these disclosures, the complaints which you refer to, as filed in your office, as well as the complaints filed in this office, warrant you in finding that such companies are openly defying the laws of Ohio, and are openly violating the licenses granted by you, and a special power is vested in you in addition to the power vested in the courts, to speedily right this wrong which, in compliance with your request for instruction thereon, I advise you to so do.

The sworn testimony before the court, with which I have heretofore furnished your department, clearly indicate the great amount the citizens of the State would save could we have the same free competition among the solvent companies in which the same companies are obliged to engage in New York City, Boston, Philadelphia, and in some states in the eastern part of the United States.

Respectfully submitted,
F. S. MONNETT,
Attorney General.

CONSTRUCTION OF PURE MILK STATUTE.

Office of the Attorney General,
Columbus, Ohio, September 13, 1898.

Hon. J. E. Blackburn, Commissioner Dairy and Food Department, Columbus, Ohio:

DEAR SIR:—I have the honor to receive a communication from your department requesting a construction by me

Construction of Pure Milk Statute.

of section 4200-12 (Bates' Codification of Revised Statutes of Ohio), your question involving a construction of that portion of said section that pertains to what constitutes a standard quality of milk in contemplation of the act against adulteration of the same. The statute in question reads as follows:

"In all prosecutions under this chapter, if the milk is shown upon analysis, to contain more than eighty-eight per cent. (88%) of watery fluid, or to contain less than twelve per cent. (12%) solids, not less than one-fourth of which must be fat, it shall be deemed, for the purpose of this chapter to be adulterated, and not of good standard quality, except during the months of May and June, when milk containing less than eleven and one-half of milk solids shall be deemed to be not of good quality."

In the act above quoted, a "standard" is fixed, and if the milk does not come up to the standard there fixed it shall be deemed to be not of good quality. What is that standard? Eighty-eight per cent. of watery fluid, 12 per cent. solids, not less than one-fourth of which must be fat. The fractional part, one-fourth, relates to amount of solids and has no connection with that part of the statute fixing the amount of "watery fluid." In the phrase "one-fourth of which must be fat" it must not be understood as placing a limit upon that constituent element at three per cent., or one-fourth of the 12 per cent. mentioned in the statute, for the 12 per cent. solids is the minimum of solids, and the same should not receive the construction that one-fourth of the 12 per cent. solids should be the uniform test of the quality of the milk. On the contrary, if by analysis it be shown that the milk solids should exceed 12 per cent. the fats must bear the same proportion to the solids, namely, one-fourth, whether it be 14, 15 or 16 per cent. Any other construction of the statute would permit one having a high grade of milk, in which the solids are considerably in excess of the statutory requirement, to remove a considerable portion of that which is de-

Inconsistent Acts; Relative to Employment of School Youth.

nominated "fat" and still have a milk which will contain three per cent. of fats, but by such a construction instead of the fats bearing the statutory fractional relation to the solids of one to four, the three per cent. would become a uniform per cent. without regard to whether the solids are 12 or 16 per cent. of the entire.

Such a construction would be obviously wrong, the purpose of the entire act being to establish standards below which a dealer cannot descend, but places no limit upon the quality of the milk excelling the statutory standard.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

INCONSISTENT ACTS; RELATIVE TO EMPLOYMENT OF SCHOOL YOUTH.

Office of the Attorney General,
Columbus, Ohio, September 16, 1898.

*Hon. L. D. Bonebrake, Commissioner of Common Schools,
Columbus, Ohio:*

DEAR SIR:—Complying with your personal request for a legal construction of section 4022-2 of the Revised Statutes of Ohio, and section 1 of what is commonly known as the Davis Law, passed April 19, 1898, 93 O. L., p. 123, this office begs leave to submit the following opinion:

As you will observe, there is a specific repeal of part of section 4022-2, in that the Davis Law repeals section 6986aa, which is incorporated in and made a part of section 4022-2. If this were all, the other part of the section would stand. But the age at which children can be employed has, as you will notice, been changed from 14 to 15 years, and this is such a repugnancy between the two acts as to preclude their

Pure Food Laws; Labels.

being reconciled so as to permit giving effect to both acts. Therefore, under the rule of construction that where it is necessary to hold an earlier statute impliedly repealed by a later one, on account of the conflict between them, we hold that section 1 of the Davis act repeals section 4022-2. The extent of the repeal being measured by the extent of the conflict or inconsistency between the acts, and the above sections being the only ones that conflict, the balance of the compulsory education law remains in force. The intention of the Legislature that the remaining sections of the education law should stand, is, we believe, manifest, for the Davis act charges the inspector of workshops and factories with the duty of prosecuting all violations of the law and confers upon the chief and district inspectors the same authority and power to enforce the law as is invested in the truant officer, to compel school attendance. We would, therefore advise you to follow the Davis Law in so far as it repeals the education act.

Respectfully submitted,

GEO. C. BLANKNER,
Assistant Attorney General.

PURE FOOD LAWS; LABELS.

Office of the Attorney General,
Columbus, Ohio, September 26, 1898.

Hon. J. E. Blackburn, Dairy and Food Commissioner, Columbus, Ohio:

DEAR SIR:—This department has the honor to receive a communication from you, under date of September 24, and enclosing a label styled as follows: "Van's (2 lbs.) Instant Rising Buck-Wheat Flour, Compound Wheat, Phosphate, Soda, Salt, Not Injurious to Health." You inquire whether this label complies with the law governing such compounds.

The statute controlling such labels and the sale of such

Pure Food Laws; Labels.

mixtures or compounds is contained in the 87 O. L., 248, being the last expression of the Legislature upon this subject; which provides that "no person shall within this State manufacture for sale, offer for sale, or sell * * * * any article of food which is adulterated within the meaning of this act." Section 3, of said act, defines what is such compound as follows:

"* * * (b) In the case of food: (1) if any substance or substances have been mixed with it, so as to lower or depreciate, or injuriously affect its quality, strength, or purity; (2) if any inferior or cheaper substance or substances have been substituted wholly or in part for it; (3) if any valuable or necessary ingredient or constituent has been wholly or in part abstracted from it; (4) if it is an imitation of, or sold under the name of another article; (5) if it consists wholly or in part of a diseased, decomposed, putrid, infected, tainted or rotten vegetable or mineral substance or article, whether manufactured or not—or, in the case of milk, if it is the produce of a diseased animal; (6) if it is colored, coated, polished or powdered, whereby damage or inferiority is concealed, or if by means it is made to appear better or of greater value than it really is; (7) if it contains any added substance or ingredient which is poisonous or injurious to health; provided, that the provisions of this act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food, if each and every package sold or offered for sale be distinctly labeled as mixtures or compounds, with the name and per cent. of each ingredient therein and are not injurious to health."

As I understand, the compound referred to comes clearly within this definition, and each and every package sold or offered for sale should not only be distinctly labeled as a mixture or compound, but should have thereon the name and per cent. of each ingredient therein, for when such ingredients as are named on this package are properly admixed or compounded, no doubt they would be edible and not injuri-

Authority of Justice of the Peace to Commit Child to Industrial Home.

ous to health. The court has repeatedly held that it comes within the police powers of the State to require labeling of compounds or mixtures that are sold for food. In the case of *Palmer vs. State*, 39 O. S., p. 239, which passed upon a similar statute, made this suggestive closing to that opinion in construing section 7090, passed April 26, 1881, which is a statute in *pari materia* with this statute, but now repealed :

“The language of the act supplementary to section 7090, passed April 26, 1881, shows very plainly that the design of the Legislature in passing section 7090, as well the supplementary section, was to prevent the sale of impure and unwholesome food, and that both sections, therefore, come within the most narrow definition of police regulations. If it were conceded, however, that none of the substances described in section 7090 are positively injurious to health, we hold that the law is within the general powers possessed by the State. Those who buy food have a right to know what they buy, and to have the means of judging for themselves as to its quality and value.”

Respectfully submitted,

F. S. MONNETT,

Attorney General.

AUTHORITY OF JUSTICE OF THE PEACE TO
COMMIT CHILD TO INDUSTRIAL HOME.

Office of the Attorney General,
Columbus, Ohio, October 1, 1898.

Hon. W. D. Guilbert, Columbus, Ohio:

DEAR SIR:—Replying to your reference of the letters of D. B. Edwards, deputy auditor of Union County, relative to the authority of a justice of the peace to commit children to either the industrial or the girl's home, I desire to render the following opinion :

Board of Public Works; Authority to Lease.

Upon an examination of the numerous laws touching this subject, we find that such an officer did, at one time, have the power to commit children to houses of refuge. It seems, however, that the authority of a justice of the peace has been eliminated from the statute, at least so far as the reform school is concerned, as well as the girl's home. Section 753 of the Revised Statutes says: That "any judge of a police court, judge of Common Pleas or Probate Court," on conviction, may commit children to the farm or to the girls' home. This seems as though the Legislature intended to preclude the commitment of children to either of the institutions by a justice of the peace, and it is also the more plain for the reason that in two or three previous laws, the justice was given some power in this regard, while section 753 leaves him out entirely. We would, therefore, hold that they have no right to commit a child to the institutions referred to, and this being so, the decision on the remaining questions are easily answered.

Yours respectfully,

F. S. MONNETT,

Attorney General.

BOARD OF PUBLIC WORKS—AUTHORITY TO
LEASE.

Office of the Attorney General,
Columbus, Ohio, December 1, 1898.

To the Canal Commission, Columbus, Ohio:

GENTLEMEN:—Your esteemed favor of the 1st inst., making inquiry as to whether the board of public works and canal commission and chief engineer have the right under section 218-230 to lease or to let to any person or persons the canal lands lately in suit in the Court of Common Pleas of Franklin County, Ohio, known as the "abandoned Hocking canal property," for gas purposes?

If you have complied with said section, and officially

Board of Public Works; Authority to Lease.

determined as therein provided by your commission, board of public works and chief engineer the use of the land so leased would not materially injure or interfere with the navigation of any canals of this State, you may thereafter enter into such leases for tracts not exceeding 40 acres, upon such terms and conditions for the payment of rent, as you deem best for the interest of the State.

Referring to your further inquiry as to what effect the action of said joint board may have had by advertising for bids on the fifteenth day of August, A. D. 1898, on the subsequent action of this board, and whether such board is legally bound to accept such bids or to consider them, to the exclusion of any subsequent bids, I beg leave to reply as it appears from your record you had not prior to that date determined by official action, that the use of the land so leased would not materially injure or interfere with the navigation of any of the canals of this State, and inasmuch as the Ohio canal commission had not on, or prior to that date, in compliance with the statute, recommended to the joint board such property for leasing, and as these two statutory requirements are necessary conditions precedent to give any power or legal authority to make contracts or enter into such leases for such purpose, it necessarily follows that on August 15, 1898, said board had not the power to make such contract, and such bids so filed must necessarily be informal and not binding as a contract with this board.

Respectfully submitted,

F. S. MONNETT,
Attorney General.

Sheriff; Serving Four Years; Filling Vacancy.

SHERIFF; SERVING FOUR YEARS; FILLING VACANCY.

Office of the Attorney General,
Columbus, Ohio, December 15, 1898.

Hon. Asa S. Bushnell, Governor of Ohio:

MY DEAR SIR:—Your esteemed favor of the 14th instant, enclosing a communication from Hon. G. H. Heffner, sheriff of Mercer County, with inquiry for official opinion thereon, is duly received. Two questions present themselves in this inquiry:

First. Whether the commissioners have the statutory authority to fill an interim created by the amendment of section 1202, Revised Statutes.

Second. Whether said sheriff, having been elected and served two full terms, or four successive years, shall be eligible to the office of sheriff for said interim of eight months.

It is my opinion that the commissioners have the power to fill the vacancy, although it is not free from serious questioning, inasmuch as their power should be strictly construed, and it may be well argued that the interim, so created, was not contemplated by the Legislature when the power was vested in the commissioners, to fill such vacancy. As an executive officer, I feel justified in holding that they have such power, until the courts may have an opportunity, on a full hearing, to adjudicate the matter.

As to the second proposition, I am of the opinion that the sheriff in this case, by virtue of article 10, section 3, of the constitution, is not eligible to the office for such interim, having served four years immediately prior to such vacancy.

I might further suggest that both of these propositions being so important it would be a very agreeable proceeding to our department to have Sheriff Heffner, or some other appointee, obtain an adjudication of this matter as speedily as possible. This can be done in two ways:

First. Have the commissioners of Mercer County ap-

Ohio Wholesale Grocers' Association; Violation of Anti-Trust Laws.

point Sheriff Heffner, and you refuse the commission; have the appointee mandamus, in the name of the State, the governor, beginning such action directly in the Supreme Court, and we can make the formal defense and have the matter tested within thirty days after such application; or

Second. Some appointee can be commissioned by your excellency, and thereupon the attorney general can file a proceeding in quo warranto against such appointee, and all these questions can be raised in such action.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

OHIO WHOLESALE GROCERS' ASSOCIATION;
VIOLATORS OF ANTI-TRUST LAWS.

Office of the Attorney General,
Columbus, Ohio, December 15, 1898.

Hon. Orrin Thacker, Secretary O. W. G. A. Co., City:

DEAR SIR:—This department has the honor to receive a communication from your company, under date of December 2, asking for a construction of your constitution and by-laws stating that you would be glad to have me examine this code of regulations, and to give to your association an opinion as to whether or not any of the articles contained therein are contrary to the provisions of any law of this State, or of the United States, and that it is the desire of your association to observe the laws strictly to the letter.

You have kindly called my attention to the fact of having omitted, by amendment, article 15, which formerly provided for a forfeiture as punishment for an offense against violations of your regulations. You further state that you have submitted the same to eminent legal talent of the State,

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before the same was adopted, and that the same has been pronounced perfectly legal, etc.

Allow me to preface the communication with the statement that this department cannot officially give an opinion to a private party or private corporation, but in as much as the trust law is a new one, and has been enacted during my administration, and as your association is so nearly and closely connected with the commercial interests of the State, I take pleasure in giving you an unofficial review of some of the articles of your code of regulations.

I might further preface this communication with the statement, that prior to the Valentine-Stewart law, that took effect July 1, 1898, known as the anti-trust law of the State, the courts of our State have repeatedly passed upon corporate acts, and corporate contracts, partnership contracts, and contracts of private persons, and held a large number to be illegal and void, and against public policy in the absence of any express statute. This you may know is one of the provinces of a court of equity when such an issue is fairly presented to them, and comes under the general equity powers of the court to determine whether a given policy or any element in a contract executed by the natural or artificial persons of a State may be in harmony with the public policy of the State; and in as much as the decrees of the court that adjudicated what public policy, as to contracts and trusts, may be in this State, are as binding as the statutes themselves upon the citizens of the State. The answer would not be complete or safe to confine it to the statutes alone, but I will call your attention to a few of the decisions heretofore rendered by the highest tribunal of our State upon some of the questions that necessarily are raised in your code of regulations; so that if your association in the practical workings thereof violates any of the denounced policies as set forth in our Supreme Court decisions, of course you would be liable to ouster, or other punishment, should any complainant attack you on these grounds.

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The following are some of the authorities you can examine fully at your leisure, so establishing what the public policy of this State is:

Crawford & Murray vs. Hugh W. Wick, 18 O. S., 190.

See also the case of Salt Company vs. Guthrie, 35 O. S., 660 and especially on page 672.

In that case, the court said:

“Public policy, unquestionably favors competition in trade, to the end that its commodities may be offered to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance market prices, to the injury of the general public. The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on grounds of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public.”

I will call your attention also to the case of Scofield vs. R. R. Co. 43 O. S., 571, where the public policy of this State is further discussed in this behalf.

I call attention also to the case of Emery vs. The Ohio Candle Co. 41 O. S., 320.

Also the case of the Cordage Co. vs. Cordage Co., 6 O. C. C.; 615. In that case, the judge among other observations said that it was “entirely clear that the purposes of the contract was to destroy natural competition to the great injury of the consumers of the product, and create a monopoly to whose power other producers would be compelled to submit. That such agreement was contrary to public policy, and therefore void, and was settled by numerous authorities in well considered cases, and then he cites a large number of authorities from other states.”

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Also the White Lead case in 9 Bulletin, page 310, the decision by the Superior Court of Cincinnati.

See also 11 Bulletin, 258. "Where an agreement for pooling part of the receipts by giving monthly certificates to pool trustees was made by the tobacco warehousemen in a large city, it provided expressly against competition by forbidding certain methods of doing business, and fixed a complete schedule of prices. It further provided for the creation of a large guarantee fund for money so collected, each party being made liable to forfeit his interest therein, as well as to a heavy fine for breaking any of its stipulations. It was unlimited in duration, and withdrawal could take place only by unanimous consent." The court held that the same was void as against public policy, and would not enforce such contract.

I also call your attention to Judge Minshall's decision of February 1, 1898, in case of Lufkin Rule Co. vs. Fringeli et al., where Judge Minshall reaffirmed the doctrine independent of any statute. That all agreements in general restraint of trade, against public policy are not divisible for the reason that if restrained to the limits of the State, still such limitation would be general in its nature and obnoxious to all objections that exist against the general restraint of trade.

United States courts have been equally jealous of the rights and competition, and perhaps more drastic than Ohio decisions. I will call your attention to the case of United States vs. Hopkins, 82 Federal Reporter, 529, decided September 20, 1897. It was a case where 300 members of a voluntary association entered into a combination relating to the landing of live stock at Kansas City stock yards. One of the conditions was that if live stock is consigned to a person or partnership not a member of the exchange, he is not permitted to dispose of the same at the Kansas City market, for the reason that defendants and all other commission merchants doing business at the stock yards are required by the rules of said Exchange not to deal in any manner with a person not a member of the Exchange, such person being systematically blacklisted and boycotted.

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The court said that such combination was an illegal combination to restrict, monopolize and control that class of trade.

The court passing upon these facts, which are simply outlined here, held that a combination that in any way restricted, monopolized or controlled trade, was illegal, and that such combination is to be determined, not alone from what appears upon the face of the preamble, rules and by-laws of the association, but from the entire situation and practical workings, and results of the defendant's methods of doing business.

I call your attention also to the case of *United States vs. Addison Pipe and Supply Company*, 78 Federal Reporter, 712. These several companies simply agreed not to compete with each other, and to make the arrangement effectual, agreed to charge a bonus upon the work done and pipe furnished, which bonus would be added to the market price on the pipe sold. It was alleged and proven that the combination had not been able to raise prices above a reasonable price, but Judge Taft, in delivering the opinion, held that such a combination was illegal and against public policy, as well as against the Federal trust act. In his opinion he held further that the contract of this association, even if the prices fixed under it, were reasonable, and its only purpose was to prevent ruinous competition, as claimed by the defendant was nevertheless void at common law, because in restraint of trade and attempted monopoly.

I call your attention to the 70th N. W. Reporter, 166 (Supreme Court of Wisconsin) where there were 60 or 70 masonic contractors of Milwaukee, and in their by-laws they provided a uniform price. The full details of the decision I will not narrate here, but the court held the same to be void and contrary to public policy.

These decisions outside of the trust act of our own State have always been recognized as binding precedents, on what is known as the common law policy of the State. The trust

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act of Ohio, as you know, defines trusts to be a combination of capital, skill or acts by two or more persons, firms, partnerships or corporations to agree to carry out restrictions in trade or commerce, and to limit or restrict the production or increase or reduce the price of merchandise on any commodity, to fix at any standard or figure whereby the price of any commodity to the public or consumer, shall be in any manner controlled or established, and name their limitations, as appears in section 1.

I have examined the secretary of state's office, and find your corporation provides in its powers as follows:

"Said corporation is formed for the purpose of buying, selling or exchanging merchandise on commission and for profit for the advancement of the interests of the grocery, jobbing trade and for the ownership of such real estate as may be necessary or convenient for such business."

Article 3 reproduces substantially what your charter names, with an additional phrase, using the expression "inequalities in the grocery jobbing trade, for the maintenance of equality prices on merchandise so classed in the code of regulations." As I stated to you verbally, these terms so used in article 3 could very readily be construed in your code of regulation, as well as in your practical operation, as power to fix a standard or figure whereby prices to the public or consumer should be controlled and established by your association. The term "maintenance of equality prices" could be so construed by your association as to have uniformity as to prevent competition in the sale or purchase of any given commodity you might agree upon. It could also violate sub-section 5 of section 1 of said act, where you could agree not to sell below a common standard, figure or fixed value, and by which you could agree to keep the price of such article or commodity at a fixed or graduated figure, and you could all raise or lower the price in exactly the same way,

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system or plan, all of which would be in violation of the trust act, if not of the common law decisions as above cited.

In your inquiry you ask me further, if any other articles contain anything contrary to the provisions of this law. Without carefully examining all of the provisions submitted, I call your attention to article 13, sections 2 and 3, which sections provide that constituent corporations in the State can become members of this company, shall subscribe to the preamble, code of regulation, etc., but shall own one share of the capital stock of the company, and shall pay such assessments as may be made to meet the expenses of the company.

I need not call the attention of the learned counsel of your association perhaps to all of the authorities upon the subject, I am about to refer to, for if these rules have been submitted to able attorneys of the State they no doubt have investigated this matter, but some recent decisions renders your corporation amenable to action on the part of the State, and especially action by the State against the constituent corporations that have bought stock in your company as doing it in violation of the charter and especially of the public policy of our State repeatedly annunciated, viz.: that a private corporation has no power to become a stockholder of your corporation. It cannot be a subscriber nor owner of your stock neither can it pay assessments on the stock.

I call your attention to the 42d American State Reports, page 17, where the court held "a corporation of any nature cannot either directly or indirectly through its agents, in the absence of express authority, become an incorporator by subscribing for shares in a new corporation. A corporation has no authority to invest its capital stock in the stock of another corporation under statutory power, and invest its money in real or personal property, stocks or choses in action. An attempt by the board of directors of a corporation to invest its capital stock in any corporation is *ultra vires and void*."

In the 48th American State Report, page 317, the court

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held that a formation of a partnership between corporations is illegal, whether they are domestic or foreign. This decision also discusses the general effect of trust contracts.

See also 121 N. Y. 582. 18 American State Report, 843, 71 American Dec. 687.

In 36 American State Report, page 130, Denny Hotel Co. vs. Schram, the court held one corporation cannot subscribe to the capital stock of another corporation.

See also Morawetz on Private Corporations, section 433, where it provides that a corporation cannot become an incorporator by subscribing for shares in a new corporation, nor can it do this indirectly through persons acting as its agents or tools.

Also the 31 N. J. Equity, 475. The right of forming a corporation is conferred by the corporation laws only upon persons acting individually and not upon associations.

The notes on pages 134, 135 and 136 of this decision are very full, all sustaining the above criticism that I have made on your article 13.

There are other sections that would vest in the constituent corporations powers that are inconsistent to the charters of said constituent companies under the Ohio and other State decisions.

I therefore again conclude:

First. That the language of the code of regulations under article 3, is broad enough for you to violate the public policy of the State as laid down by the State and Federal decisions.

Second. The terms "maintenance of equality prices on merchandise" could be so construed by the practical operation as to clearly violate section 1 of the trust law.

Third. Sections 2 and 3 of article 13 is wholly in violation of the powers vested in your company as well as in the constituent companies in attempting to sell stock to corporations and to associate corporations with partnerships and individuals for any purpose.

Taxation; Listing of Personal Property.

You might so construe article 3 in the practical workings of your association by omitting the maintenance of the equality of prices on merchandise, and amend that section so as not to conflict with the anti-trust law, unless I misunderstand the use of the terms therein, but I am at a loss to know how you will remedy the infirmities manifest in article 13.

I appreciate fully the field of usefulness that such an association might occupy, and yet it would seem that the very life of the association depends upon the ability to make money for its individual members through the maintenance of prices, or, in other words, to eliminate to a greater or less degree competition, not only among yourselves, but it would be a great benefit to larger trusts or syndicates in carrying out their factor arrangements of other trust schemes that have been so popular in the last few years.

Again thanking you for the uniform courtesy manifested, and your fairness in advising the State authorities of your willingness to be law-abiding, I am,

Yours very truly,

F. S. MONNETT,
Attorney General.

TAXATION; LISTING OF PERSONAL PROPERTY.

Office of the Attorney General,
Columbus, Ohio, December 17, 1898.

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

DEAR SIR:—Your esteemed favor of the 17th inst., making inquiry as to the effect of the sale of sugar in the State of Ohio by the American Sugar Refining Company, and other sugar refining companies, through factors or agents retaining the title of such property within themselves would not be subject to taxation under our general tax laws as such company, notwithstanding their non-residence. In reply I beg leave to state, that so far as physical or tangible personal

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property is concerned, such as merchants' manufacturers' stock, in fact all property of non-residents, outside of moneys and credits should be reported for taxation, and is liable and subject to assessment for taxation in the township, city or village in which the same may be situated, regardless of the residence of the real owner. That if the American Sugar Refining Company and other sugar refining companies, for any purpose or through any system or scheme retained the title or ownership of such property, it would be subject to taxation in these respective taxing districts. The nature of the contract will determine in each instance whether the property will come under section 2740 as well as under section 2735, the substance of the latter I have above stated; the former section relates to the statements by merchants, consignees and commission merchants. If I understand the nature of the contract submitted, unless the same has already been returned by the merchants it would be the duty of the assessing officer in each district after ascertaining the true nature of the contract to either classify them as owners of such personal property under section 2735, or as merchants under section 2740, and find under the latter section the true average in compliance with the merchant's statute, and place the same on the tax duplicate for the five years next prior to the current year. Under section 166 it becomes your duty to so advise the county auditors, and they in turn to make the necessary corrections under section 2781, which provides if any person shall evade making a return or statement, the county auditor shall for each year ascertain as near as practicable, the true amount of personal property that such person ought to have returned or listed for not exceeding five years next prior to the year for which the inquiry and corrections provided for in the next sections are made, and to the amount so ascertained as admitted for each year shall add 50 per cent. and multiply the omitted sum or sums and increased by their penalty by the rate of taxation belonging to the year or years, and accordingly enter the same on the

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tax list in his office, giving a certificate therefor to the county assessor, who shall collect the same as other taxes.

Respectfully submitted,

F. S. MONNETT,

Attorney General.

REFILING OF PAPERS IN PROBATE COURT.

Office of the Attorney General,
New Lexington, Ohio, December 19, 1898.

Senate Bill No. 220, Ohio Laws of 1898, page 287, provides for the refiling of the papers in the Probate Courts of this State. We are arranging now to do this work, but are confronted by the following difficulties:

First. The Probate Court was established in this county in 1851, and the first probate judge took his office in 1852. Prior to 1852 the probate work was done in the Court of Common Pleas. Are we authorized under this statute to file all the papers pertaining to the probate work prior to 1852? If not, what shall be done with the probate papers prior to that time? What shall we do with cases begun in the Common Pleas Court and closed in the Probate Court? prior to that time? What shall we do with cases begun in the Probate Court? Does the probating of a will, appointment, inventory and appraisal, sale bill, account (and sale of real estate) each constitute a case or proceeding, or do they collectively constitute a case? We are required to make out separate fee bills for each of these proceedings, and so far as these matters have been numbered in this court each have been given a separate number.

Third. The statute above referred to expressly says that the papers shall be filed up to January 1, 1888, and on and after that date the probate judge shall file all papers as required by this section of the statute free of cost. [Now the

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original act was passed for some western county in 1887, I think, and the above statute seems to apply to that act; but the act making it applicable to all the counties was not passed till April 26, 1898. The judges in all other counties could not have complied with this act after January 1, 1888, for it was not yet passed, and was not passed for more than 10 years after.] Now how are the papers to be filed from January 1, 1888, to the present time, as the statute above does not provide for it? Can the commissioners order the filing of the papers and allow compensation when the statute says that no compensation shall be allowed? See 7 O. S., 237; 25 O. S., 13; 47 O. S., 480; 57 O. S., 209.

Fourth. The Senate bill above requires that when the papers are refiled proper memoranda shall be made upon the docket or index. Now, from 1852 to 1879 the only docket was a mere memoranda of the proceedings and a few of the transactions in the settlements of estates—administrators, executors, guardians, etc., were kept in this book without orders or references to journal, page, as required by statute. (From 1879 to 1894 there was no docket of any kind kept). From 1894 to 1897 the docket is about like the first we mentioned. *Now, if we file these papers, we must have a docket.* Can we under section 530 of the Revised Statutes of Ohio, make these dockets and place the proper entries in them as required by law? *And can we receive compensation for our service under sections 531 and 532?* Can the commissioners issue an order to transcribe these old and worthless dockets and allow us statutory fees for the same, or can we transcribe, rearrange and complete them on our own motion? §528, §528a.

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OPINION ON CONSTRUCTION OF SENATE BILL
NO. 220 (O. L., 1898, p. 287).

(Requested by Hon. M. W. Wolfe, Probate Judge of Perry County, O.)

Question No. 1. Our Probate Court was established in said county in 1851, and the first probate judge took his office in 1852. Prior to 1852 the probate work was done in the Common Pleas Court. Are we authorized under this statute to file all the papers pertaining to the probate work prior to 1852? If not, what shall be done with the probate papers prior to that time? What shall we do with cases begun in the Common Pleas Court and closed in the Probate Court?

Answer. In order to intelligently answer the above question, comparison should be made between section 1 of article 3 of the Constitution of 1802, with section 1 of article 4 of the Constitution of 1851.

By the first named section the judicial power of this State was vested in a Supreme Court, courts of Common Pleas for each county, in justices of the peace, and in such other courts as the Legislature might establish.

By section 5 of article 3, Constitution of 1802, the court of Common Pleas in each county was vested with jurisdiction of all probate and testamentary matter, granting administrations, the appointment of guardians, and such other cases as shall be prescribed by law.

By section 1 of article 4 of the Constitution of 1851, the judicial power of the State was vested in the Supreme Court, and by the amendment of October 9, 1883, in Circuit Courts, Courts of Common Pleas, Courts of Probate, Justices of the Peace and such other courts inferior to the Supreme Court, as the General Assembly may from time to time establish.

Section 7, article 4, Constitution of 1851, provided that there shall be established in each county a Probate Court, which shall be a court of record, open at all times and holden by one judge, elected by the voters of the county, who shall

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hold his office for the term of three years, and shall receive such compensation, payable out of the county treasury, or by fees, or both, as shall be provided by law.

Section 8 of article 4 of the Constitution of 1851, provides that the Probate Court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, and such jurisdiction in habeas corpus, issuing of marriage licenses, and for the sale of land by executors, administrators and guardians, and such other jurisdiction in any county or counties as may be provided by law.

By these sections of the different constitutions, it will be found that no Probate Court, as now constituted, was provided for by the Constitution of 1802, but by section 5 of article 3 of that Constitution, all probate and testamentary matters were attended to in the courts of common pleas as then constituted.

By section 4 of the schedule attached to the Constitution of 1851, provision was made for the election of judges of Probate Courts, as well as other courts, and a portion of that section reads as follows :

“No suit or proceeding pending in any of the courts of this State shall be affected by the adoption of this constitution.”

As no suit or proceeding pending at the time of the adoption of the Constitution of 1851 was to be affected by the adoption of such Constitution, it followed that all suits and proceedings then pending in courts of Common Pleas concerning subjects, which by the Constitution of 1851, was vested in Probate Courts, the same should have been completed to final judgment without changing the jurisdiction of any pending cause from the Common Pleas to the Probate Courts.

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I would conclude from the foregoing sections of the Constitution, and construing the act of April 26, 1898, in harmony therewith, that when section 1 of that act provides for the assorting, arranging and preserving "all the pleadings, accounts, vouchers and other papers on file in the Probate Court of such county," the same should be construed so as to include such papers as are on file in the Probate Court as organized under the Constitution of 1851, and does not include any causes, papers, pleadings, accounts or files of any kind now on file in the Common Pleas Court, and which was filed in some cause or proceeding pending in that court prior to the adoption of the Constitution of 1851.

If there are any cases begun in the Common Pleas Court and not closed in that court, the statute should be so constructed as to include only such as are on file in the Probate Court, as I do not think that it can be construed so as to include any of the files in the Common Pleas Court placed there prior to the adoption of the new Constitution. I am supported in this construction by reading section 523, R. S., which provides that the Probate Court shall be held at the county seat, in an office in which shall be deposited and safely kept by the judge of the court, all books, records and *papers pertaining to the court.*

It is such papers as have been deposited and kept there "pertaining to the court," that should be arranged and preserved under the act in question, and not those deposited and kept in any other court.

Question No. 2. "What is a case, cause or proceeding in the Probate Court? Does the probate of a will, appointment, inventory and appraisement, sale bill, account and sale of real estate, each constitute a case or proceeding, or do they collectively constitute a case?"

Answer. For some purposes under the statutes of Ohio distinctions have been made between the word "cause" and "proceeding." In the act referred to, section 2 thereof provides for the compensation to be paid, which, says, "it

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shall not exceed the sum of 20 cents for each case or cause so assorted, arranged, marked and docketed, and not exceeding the sum of one cent for each of said marriage certificates, birth and death reports, and such similar papers so assorted and arranged." The word "proceeding" is not mentioned in that section of the act. The words "case," "cause," or "proceeding" are used in section 3 of the act, which provides for the preservation of papers filed since January 1, 1888.

I am of the opinion that the terms "case" and "cause" are used synonymously; no distinction, for the purpose of this act, should be made between these two terms.

A "cause" is defined by Wood, in his civil law, as follows:

"A suit or action. Any question civil or criminal, contested before a court of justice."

"Suit" and "action" are synonymous terms in Ohio.

6th Ohio Report, 213.

7th Hammond, pt. 2, p. 449.

3d Ohio Circuit Court, 448.

The terms "case" or "cause" are therefore by judicial interpretation construed to be "suits" or "actions."

While the terms "suits" and "actions" are not used in the act under consideration, their synonyms "case" or "cause" are there used.

"Proceeding" has a meaning when used in the statute distinct from either "cause" or "case."

This has been announced in the following cases:

Linton vs. Laycock, 33 O. S., 128.

Bank vs. Slemmons, 34 O. S., 142.

Olin vs. Hungerford, 10 Ohio, 271.

Westerman vs. Westerman, 25 O. S., 507.

In the last case cited, the court said:

"By the word proceeding is meant, not the steps taken or form of proceeding in an action, but a *certain description of suit* which is not properly denominated an action."

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Black vs. Hill, 29 O. S., 87.

Arnul vs. Knox, 3 Bull, 787. (S. C.) 1 Clev. Rep., 285.

Metzger vs. Meekers, 8 Rec., 98.

Chinn vs. Trustees, 32 O. S., 236.

C., S. & C. R. R. vs. Sloan, 31 O. S., 1.

In subdivision 7 of section 528, Revised Statutes, which provides for the keeping of a final record in Probate Court, the term "cause" is there used as follows:

"A final record which shall contain a complete record in each *cause* or matter of all petitions, answers, demurrers, motions, returns, reports, verdicts, awards, orders, or judgments."

Petitions, answers, demurrers, etc., etc., are papers or pleadings filed in "cases" or "causes." Final records shall be made up in such. They are more than "proceedings." The probating of a will is not a "case" or "cause." The granting of letters of administration is not a case or cause. The sale of real estate in Probate Court is an action, suit, case or cause. These instances will serve to illustrate the distinctions to be observed. This distinction is observed in section 2 of the act in question where it provides for the payment of a "sum not exceeding 20 cents for each case or cause so assorted, arranged, marked and docketed."

All the filings in such cause from petition to judgment constitute but one "case or cause." For that the judge gets not exceeding 20 cents.

The absence of the word "proceeding" from that section (2) of the act is a reason to my mind why "proceedings" should not be paid for as "cases or causes." "Proceedings" must then be paid for under the last clause of said section 2, at not exceeding the rate of *one cent for each * * * paper* so assorted and arranged."

The foregoing answers the first part of your second question as to what is a case, etc. And answering the latter part of said question, I conclude, that the probating of a

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will, appointment, inventory and appraisement, sale bill, and account do not constitute a "case" or "cause," and therefore shall not be paid at 20 cents each cause, but the same should be paid for under the other part of said section at not exceeding one cent each.

The papers filed in an action for sale of real estate, constitute a cause or case, and such actions should be paid for at a rate not exceeding 20 cents each case.

Question No. 3. The statutes above referred to expressly says that the papers shall be filed up to January 1, 1888, and on and after that date the probate judge shall file all papers as required by this section of the statute free of cost.

Now the original act was passed for some western county in 1887, I think, and the above statutes seems to apply to that act, but the act making it applicable to all of the counties was not passed until April 26, 1898. The judges in all of the other counties could not have complied with this act after January 1, 1888, for it was not yet passed, and was not passed for more than 10 years after; now how are the papers to be filed from January 1, 1888 to the present time as the statute above does not provide for it. Can the commissioners order the filing of the papers and allow compensation, when the statute says that no compensation shall be allowed?

Answer. As to whether the original act was passed for any particular county or not does not cut any figure in the answer to the question suggested above, and I do not consider that the fact that judges in all the counties could not have complied with said act after January 1, 1888, for the reason that you assign, could not have any effect upon a proper interpretation of the act as applied to the particular case in question.

In answer to your inquiry how the papers are to be filed from January 1, 1888 to the present time, I think that section 3, of said act provides the method of filing before

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that date, the same as section 1, provides the method of filing before that date. You will notice that section 3 provides that "All pleadings, accounts, vouchers or other papers filed in such court in causes and proceedings begun or commenced after the first day of January, 1888, and all pleadings, accounts, vouchers and other papers which shall be hereafter filed in said Probate Court in each estate, trust, assignment, guardianship or other proceeding exparte or adversary begun or commenced after said first day of January, 1888, shall be kept together as provided in section 1 of this act."

I think that citation from said section fully answers the interrogatory there proposed.

Now as to whether the commissioners can allow compensation for the work done after January, 1888, when the statute expressly provides (see the latter part of section 3 of the act), "without further compensation to such probate judge therefor."

Following the well settled rule announced in the case of *Debolt vs. The Trustees of Cincinnati Township*, found in the 7 Ohio State Report, page 237, I conclude that no extra compensation shall be allowed for the services therein provided for.

The Supreme Court of Ohio in that case said: "An officer whose fees are regulated by statute cannot charge fees for those services only to which compensation is by law fixed."

Is there any compensation provided for by this act for the services required to be done by the probate judge in the matters therein specified after the first day of January, 1888?

Section 2 of said act provides "that the probate judge shall be entitled to receive compensation for assorting, arranging, preserving and marking such pleadings, accounts,

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vouchers and other papers as required in the preceding section (section No. 1), in such amount as may be allowed by the commissioners," etc.

Turning to section No. 1, we find that it is only such pleadings, accounts, vouchers and other papers on file in the probate court begun or commenced prior to the first day of January, 1888.

By no construction that said section is capable of, could that be extended to assorting, arranging and preserving all such papers in matters begun or commenced after the first day of January, 1888.

The compensation provided by section 2 applies only to the work required under section 1, and that is the preservation in the manner stated of the papers filed in said court prior to the first day of January, 1888, and by section 3 all pleadings, accounts, vouchers and other papers filed in said court in causes or proceedings begun after the first day of January, 1888, and all pleadings, accounts, vouchers, and other papers which were hereafter filed in said court (naming each) shall be kept together as provided in section 1, and shall be so preserved. (That is preserved in the manner set forth in section 1), *without further compensation* to such probate judge therefor.

It seems very clear that the duties thus imposed upon the probate judge are duties for which he shall not be allowed extra compensation, as the statute makes no provision for compensation for such services. "Where service for the benefit of the public is required by law, and no provision for its payment is made, it must be regarded as gratuitous, and no claim for compensation can be enforced."

Citing *Anderson vs. Commissioners*, 25 O. S., p. 13: "The fact that a duty is imposed upon a public officer will not be enough to charge the public with an obligation to pay for its performance, for the Legislature may deem the duties imposed to be a full compensation by the privileges

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and other emoluments belonging to the office, or by fees permitted to be charged and collected for services connected with said duty or services, and hence provides no direct compensation therefor to be paid out of the public treasury."

Strawn vs. Commissioners, 47 O. S., 408. To the same effect is the case of Jones, Auditor vs. Commissioners, 57 O. S., 189, and especially on page 209.

Question No. 4. The Senate bill above requires that when the papers are refiled proper memoranda shall be made upon the docket or index. Now, from 1852 to 1879 the only docket was a mere memorandum of the proceedings and a few of the transactions in the settlement of estates. The administrators, executors and guardians, etc., were kept in this book without orders or references to journal and page, as required by statute. From 1879 to 1884 there was no docket of any kind kept. From 1894 to 1897 the docket is about like the first we mentioned. Now, if we file these papers we must have a docket, can we under section 530 of the Revised Statutes of Ohio make these dockets and place the proper entries in them as required by law, and can we receive compensation for our services under sections 531 and 532? Can the commissioners issue an order to transcribe these old and worthless dockets and allow us statutory fees for the same, or can we transcribe, rearrange and complete them on our own motion?

...*Answer.* To the questions as above proposed I will attempt an answer in their proper order.

The act referred to of April 26, 1898, does not contemplate preparation or keeping of any other docket, record, index, journals or other book than was already provided for by section 528 of the Revised Statutes of Ohio. That act must be so construed with reference to the object of it which is set forth in the title thereof, viz.: To "provide for the proper arrangement and preservation of certain pleading and papers on file in certain probate courts."

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The records in which reference to memoranda required should be kept was provided upon the organization of the Probate Court and is contained in section 528 cited, and includes a criminal record, an administration docket, a guardian's docket, a civil docket, a journal, a record of wills, a final record, a record of accounts, an execution docket, a marriage record, a record of bonds, a naturalization record, and by sections 3821-91, of Bate's Revised Statutes, a record of unclaimed deposits in banks shall be kept. So that the act in question does not add to the number of volumes to be kept by the probate judge, but merely provides that there shall be entered "proper memoranda upon the docket record or index entries of such cases, causes or proceedings respectively," for the purpose of readily finding the original papers, which are to be assorted and arranged as provided in said act. In other words "the papers, assorted and arranged shall be properly jacketed and otherwise tied, fastened or held together and be numbered, lettered or otherwise marked," and proper memoranda placed upon the docket, record or index entries referring to the same, so that they can be readily found. Such services performed by direction of section 1 of said act is part of the arrangement, marking and docketing for which compensation may be awarded under section 2.

No extra compensation is to be charged or paid for *such labor* in addition to that provided for in section 2.

In the last query you say, "If I file these papers I must have a docket, can we, under section 530 of the Revised Statutes of Ohio, make these dockets, and place the proper entries in them as required by law?"

The probate judge who undertakes this work cannot receive extra compensation for the work required in *placing proper memoranda upon the docket, record or index entries*. If in fact no docket was ever had and such a docket, record or index as is contemplated in section 528 has never

Opinion on Construction of Senate Bill No. 220 (O. L., 1898, p. 287).

been obtained, and never been kept, full authority is given under section 528 to the county commissioners to purchase the same at the expense of the county.

I am of the opinion that the purpose of said act was not to require as part of the services to be performed thereunder, *the opening of new dockets, records, journals, indexes, or other books, but merely to place the memorandum required by said act* upon those which are pre-supposed by said act, to have been in existence and kept in such office. Therefore, if such records had not been opened, provided for by section 528, and the records of the business or any portion thereof transacted in the court during the continuance in office of any former probate judge thereof, had not been made as required by law by the probate judge whose duty it was to make such entries or records, the probate judge may make the proper records, entries, records and indexes so omitted by his predecessor or predecessors in office, *and for such services in making such records, entries and indexes*, the probate judge shall receive the same fees as are allowed by law for like services in the manner suggested by sections 530, 531 and 532 of the R. S. And the labor thus required would not be compensated by the amounts provided for in section 2 of the act in question, but the compensation for such services performed under sections 530, 531 and 532, shall be paid in addition thereto by the authority, and in the manner as therein stated.

Respectfully submitted,

F. S. MONNETT,

Attorney General.