Note from the Attorney General's Office:

1915 Op. Att'y Gen. No. 15-0934 was overruled by 1983 Op. Att'y Gen. No. 83-036.

OPINIONS OF THE ATTORNEY GENERAL FROM JANUARY 1, 1915, TO JANUARY 1, 1916.

1.

IN ELECTION CONTESTS DEPUTY STATE SUPERVISORS OF ELECTIONS MAY BE REQUIRED TO PRODUCE IN COURT BALLOTS CAST AT ELECTIONS.

In the course of the trial of election contests, as provided by section 5152, General Code, deputy state supervisors of elections may be required to produce in court the ballots cast at such elections.

COLUMBUS, OHIO, January 14, 1915.

The State Supervisor and Inspector of Elections, Columbus, Ohio.

DEAR SIR:—From your statement of the matter, we understand that there is now pending in Lucas county of this state, a contest of elections of county officers; that there is in progress a trial of such contests in the common pleas court of that county such as is contemplated and provided for in section 5152 of the General Code of Ohio; and that there has been issued a subpoena or an order of that court, requiring deputy state supervisors of elections of Lucas county to produce in court the ballots in their possession which were cast at the general election on November 3rd, last.

Section 5090-1 of the General Code, as enacted May 2, 1913 (103 O. L., 265), after setting forth the manner in which such ballots should be preserved for a period of thirty days after the election and then destroyed, further provides:

> "* * * that if any contest of election shall be pending at the expiration of said time the said ballots shall not be destroyed until such contest is finally determined. In all cases of contested elections, the parties contesting the same shall have the right to have said ballots opened and to have all errors in counting corrected by the court or body trying such contest, but such ballots shall be opened only in open court or in open session of such body and in the presence of the officers having the custody thereof."

The right of the contesting parties to have these ballots opened in court and the errors in counting the same corrected, carries with it, in our opinion, full authority of the court in trying the contests of elections, as provided in section 5152, to require a deputy state supervisor of elections, having custody of such ballots, to produce the same. In our opinion, this case is clearly distinguishable from the case of Seidel v. Duncan, decided by Kinkead, Judge, in the common pleas court of Franklin county, this state.

Very respectfully,
EDWARD C. TURNER,
Attorney General.

2.

CITY SOLICITOR—PAYMENTS FROM INCIDENTAL FUNDS—PHYSICIAN'S BILLS.

If a city solicitor has an incidental fund appropriated to him, he may pay therefrom for service of a physician employed by him to make examination of injuries of plaintiff in a suit against a city.

COLUMBUS, OHIO, January 15, 1915.

HON. MARSHALL G. FENTON, *City Solicitor, Chillicothe, Ohio.*

DEAR SIR:—I have your letter of recent date, as follows:

"A damage suit was pending against the city of Chillicothe by one Altha Search, who was injured by reason of a pile of dirt remaining unguarded in the street. As city solicitor, I requested a physician of this city to make an examination of the plaintiff's injuries so that he might qualify himself to testify as an expert on behalf of the city. A bill for ten dollars was presented and approved by me as solicitor, but the city auditor now refuses to pay the physician his fees from the only fund available, that of the incidental fund of the solicitor's department, although council of this city has made the necessary appropriation to said fund.

"QUERY—Can a physician be paid his fees for qualifying himself as an expert for the city in a damage suit from the incidental fund of the solicitor's department?

"If not, how can this bill be paid where there is no other fund appropriated by council and available?"

I beg to advise that it is my opinion that the bill of this physician for his examination of plaintiff's injuries, is one properly payable from the incidental fund of the solicitor's department.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

3.

CIVIL SERVICE—EMPLOYES IN OFFICE OF GOVERNOR, BECAUSE OF LOCATION AND NATURE OF CONFIDENTIAL DUTIES, IN UNCLASSIFIED SERVICE.

Whether it is practicable to determine the merit and fitness of officers and employes by competitive examination is a question in the first instance for the civil service commission, but subject to review by the courts. In determining this practicability, the commission should look to the nature of the duties and the relation of the employes to the head of the offices as well and particularly to the nature of the duties of the office of the appointing power.

The secretary to the governor, the stenographer to the governor, and all other employes in the governor's office, who from the nature of the service rendered, or by reason of their location in the governor's office, are in position to observe the transactions or obtain information relative to matters that may legally come before the governor, are not within the classified service for reason that, as a matter of law, it is impracticable to determine their merit and fitness by competitive examination.

COLUMBUS, OHIO, January 16, 1915.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for opinion as to whether or not the employes in the office of the governor of this state are in or out of the classified service.

You state that there is no question but that the secretary to the governor and his executive clerk are clearly outside of the classified service under the provisions of section 8 of the Civil Service act.

I assume that the ground upon which you have heretofore placed this exemption is subsection 7 of section 8 of the Civil Service act.

Section 10 of Article XV of the Constitution provides:

> "Appointments and promotions in the civil service * * * shall be made according to merit and fitness to be ascertained *as far as practicable* by competitive examination."

Subsection 1 of division B of section 8 of the Civil Service law, provides:

> "The competitive class shall include all positions and employments now existing or hereafter created * * * *for which it is practicable to determine the merit and fitness of applicants by competitive examinations.*"

The answer to your question rests solely upon the correct decision as to whether it is practicable to determine the merit and fitness of officers and employes in the governor's office by competitive examination. This is a question in the first instance for your commission, but subject to review by the court.

In determining this practicability you will look to the nature of the duties and the relation of the employes in his office to the governor, as well as, and particularly, to the nature and duties of the office of governor.

It is universally recognized that the premature disclosure of some of the matters that may come before the governor of a state, and particularly the obtaining by interested parties of even a hint of matters pending or the probable action thereon, would be prejudicial to the public welfare. While the limitations of the

doctrine are disputed, it is settled in this country that even the courts themselves will not compel a governor to testify relative to some of the matters that may legally come before him.

The nature of the office of the governor and the relation to him of the employes of his office, suggest that the particular merit and fitness to be possessed by the employes of the governor's office are *judgment and discretion,* and your question as applied to the governor's office resolves itself into this: "Is it practicable to determine by competitive examination whether an employe possesses the requisite judgment and discretion?"

Answering the question as stated, I quote the language of Judge Haight, in discussing the practicability of civil service examinations for persons who occupy confidential positions:

> "A candidate may be ever so competent and still lack many of the necessary elements of a trustworthy officer; he may be ever so learned and still lacking in judgment and discretion; he may be discreet and still without character; *he may be honest and yet meddlesome, and a person in whom you could not confide.* To our mind the framers of the constitution or of the statutes never contemplated or intended that a competitive examination was practicable for such a position."
>
> Chittendon v. Wurster, 152 N. Y., 345.

Your commission has heretofore held that it was not practicable to test by competitive examination the merit and fitness of jury commissioners, the employes in the office of the reporter of the supreme court and the stenographers to members of the supreme court. The reason for exempting officers and employes in the governor's office is equally as strong, if not stronger.

I have no hesitation in saying that as a matter of law, the secretary to the governor, the executive clerk, the stenographer to the governor, and all other employes, who from the nature of the service rendered, or by reason of their location in the governor's office are in position to observe the transactions or to obtain information relative to matters that may legally come before the governor, are not within the classified service, for the reason that it is impracticable to determine their merit and fitness by competitive examination.

This opinion applies solely to the governor's office, for where the reason does not exist the rule should not.

The letter and spirit of the Civil Service provision in the Constitution and statutes require that wherever practicable all employments shall be under Civil Service, and while in cases of doubt you should place the employes in the classified division, you should not lose sight of the principle laid down by my predecessor, Mr. Hogan, found on page 45 of your publication of the opinions of the attorney general, to wit:

> "The Civil Service act is one designed for practical purposes, and to embrace all these offices of such character as that in fact it ought not matter what may be the political or general notions of the appointee or employe. The act is not designed to bring impracticable and unworkable relations into the administration of public affairs."

Respectfully submitted,

EDWARD C. TURNER,
Attorney General.

4.

ASSISTANT SECRETARY OF STATE IS IN THE UNCLASSIFIED SERVICE.

The asisstant secretary of state comes within the exception of subsection 8 of the Civil Service act, being a deputy of an elective executive officer, authorized, by law, to act generally for and in the place of his principal and holding a fiduciary relation to such principal.

COLUMBUS, OHIO, January 16, 1915.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for opinion reading as follows:

> "The state civil service commission desires your opinion as to the number of positions in the office of the secretary of state that may be held as exempt under the provisions of section 8 of the Civil Service law.
>
> "This inquiry involves the question as to whether or not the assistant secretary of state is to be deemed one of the two assistants named in section 8, or is to be considered a deputy under the provisions of the same section."

In a number of opinions heretofore rendered by my predecessor, Honorable Timothy S. Hogan, he has clearly defined the persons coming under subsection 8 of the Civil Service law, who are to be classified as deputies acting generally for and in the place of their principals and holding a fiduciary relation to such principal.

Section 157, General Code, provides:

> "The secretary of state shall have power to appoint an assistant secretary of state, whose appointment shall be made in writing under the seal of the secretary of state and entered on record in his office."

Section 158 provides:

> "In case of the absence or disability of the secretary of state, the assistant secretary of state shall have power to perform the duties of the secretary of state, and the general duties of the assistant shall be such as the secretary of state shall assign him."

Section 159, General Code (103 O. L., 528), provides:

> "Before entering upon the discharge of the duties of his office the assistant secretary of state shall give bond to the secretary of state in such sum and with such sureties as the secretary of state may require, conditioned for the faithful discharge of the duties of his office. Such bond shall be deposited with the secretary of state and kept in his office."

The assistant secretary of state clearly comes within the definition of a deputy of an elective executive officer who may act, generally, for and in the place of his principal and holding a fiduciary relation to such principal. The assistant secretary of state, therefore, is in the unclassified service and is not to be deemed or counted as one of the two assistants, clerks or secretaries that may be selected by the elective officer.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

5.

CIVIL SERVICE—STATE REGISTRAR OF VITAL STATISTICS IN THE CLASSIFIED SERVICE.

The position of state registrar of vital statistics is in the classified service of the state, assuming the practicability of determining the merit and fitness of applicants therefor by competitive examination.

COLUMBUS, OHIO, January 16, 1915.

The State Civil Service Commission of Ohio, Columbus, Ohio.

DEAR SIR:—I acknowledge receipt of your letter of January 13, 1915, requesting my opinion as follows:

> "The state civil service commission desires your direction as to whether or not the position known as the 'state registrar of vital statistics' may be held as exempted under the provisions of section 8 of the Civil Service law; that is, does this position sustain such a relationship to the office of secretary of state as to permit this commission, should it so desire, to hold that it is one of the two positions that may be exempted under the provisions of subsection 7 of section 8 of the Civil Service law."

I have considered not only the exact question which you submit, but also the broader question as to whether the position mentioned by you is (waiving the question of the practicability of determining the merit and fitness of applicants therefor by competitive examination) in the classified service of the state.

The position of which you speak is provided for by statute, and the powers and duties pertaining thereto are specifically provided by law, as follows:

> "Section 197: A state system of registration of births and deaths is hereby established, which shall consist of a central bureau of vital statistics and primary registration districts. * * * *
>
> "The secretary of state shall have charge of such system, and general supervision of the central bureau.
>
> "Section 198: The secretary of state shall prescribe methods, forms and blanks for obtaining registration of births and deaths in each district, and of preserving the records thereof and those of the central bureau. He shall enforce the provisions of this chapter thoroughly and uniformly throughout the state, and, from time to time, shall recommend necessary legislation for that purpose. He shall provide for necessary clerical and other assistance to carry out the provisions of this chapter. * * *.
>
> "Section 199: The secretary of state shall appoint a state registrar of vital statistics who shall be a registered physician and a competent vital statistician, and who shall serve for a term of four years commencing on the first day of January after his appointment. He shall give a bond in the sum of ten thousand dollars satisfactory to the secretary of state. A vacancy in such office shall be filled by appointment by the secretary of state. Such state registrar shall have the immediate direction of the central bureau of vital statistics.
>
> "Section 200: The state registrar of vital statistics shall prepare and print blanks and forms to be used by registrars in registering, recording and preserving the returns, or in otherwise carrying out the provisions

of this chapter. He shall prepare and issue detailed instructions necessary to secure the uniform observance thereof and the maintenance of a perfect system of registration. No blanks shall be used other than those supplied by the state registrar. He shall inform registrars of diseases communicable and dangerous to the public health, in order that, when deaths occur therefrom, proper precautions may be taken against such diseases. He may combine two or more primary registration districts into one primary registration district."

Without burdening this opinion with extensive quotations, I refer the commission to sections 201, 230, 231, 231-1, 232, 233 and 234, General Code, all of which, like section 200 above quoted, vest in the state registrar of vital statistics, as such, specific powers and impose upon him specific duties.

By virtue of section 1 of the Civil Service act, 103 Ohio Laws, 698, the position in question is in the civil service of the state. By virtue of paragraph "b" of section 8 of said act, the position is in the classified service designated as the competitive class, if it is practicable to determine the merit and fitness of applicants therefor by competitive examination; and unless the position is specifically included in the unclassified service. The fact that the position may be deemed to be an office and the fact that appointments thereto are for a definite term, are both alike immaterial as affecting the proposition just laid down.

It is obvious, therefore, that the question of practicability of ascertaining merit and fitness by competitive examination being waived, paragraph "a" of section 8 of the Civil Service act, which enumerates the class of positions in the unclassified service, must be examined for an answer to your specific question as well as to the more general one which I have suggested.

The position in question is not that of the head of a principal department, appointed by the governor or by and with his consent; it is not that of a deputy of an elective officer authorized by law to act generally for and in place of his principal and holding a fiduciary relationship to his principal, for the statutes above quoted and cited make it very clear that the state registrar acts wholly in an independent capacity, although under the direction and supervision of the secretary of state; and there are no other provisions in paragraph "a" of section 8 of the Civil Service law which could be regarded as in any way applicable to the question, save the one referred to by you. So that the general question which I have considered resolves itself, at last, into the specific one which you submit.

Subsection 7 of paragraph "a" of section 8 of the Civil Service law enumerates the following as in the unclassified service:

"Two secretaries or assistants or clerks for each of the elective and principal executive officers, boards or commissions * * * authorized by law to appoint such a secretary, assistant or chief clerk."

I do not think that it is worth while to quote lexicographers' definitions of the terms "secretary," "assistant" and "clerk," as the ordinary and usual meaning of each of these words, for present purposes, is well understood. The state registrar is, in no sense, a secretary of the secretary of state, because he sustains to the secretary of state no direct or personal relation whatever in the discharge of the official duties of either save that the secretary of state, as I have pointed out, is to exercise supervision over the discharge, by the registrar of vital statistics, of the independent functions pertaining to the bureau of vital statistics.

The registrar of vital statistics is not an assistant of the secretary of state, as he performs no services whatever for the secretary of state, as such.

The state registrar is not a clerk of the secretary of state; in fact, he is not a clerk at all.

Indeed, as the words "secretary," "assistant" and "clerk" are used in this statute, I do not think that they could be held to apply to one having the attributes of an independent officer, especially to one appointed for a definite term independent of that of the appointing officer.

I am, therefore, of the opinion that your question is to be answered in the negative, and that the general question which I have suggested is to be answered by the statement that, waiving the question of the practicability of ascertaining the merit and fitness of applicants for the position of state registrar of vital statistics, by competitive examination, that position is in the classified service of the state.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

6.

INHERITANCE TAX LAW—APPRAISEMENT BINDING IN PROBATE COURT—METHOD OF COMPUTING TAX—APPOINTMENT OF APPRAISERS BY PROBATE COURT.

First. Under the inheritance tax law, the appraisement returned in the probate court is, in the first instance, binding upon all parties.

Second. If land devised to collateral relatives is sold in partition at less than the appraised value thereof, the probate judge may not take cognizance of this fact for the purpose of computing the tax.

Third. The probate court may not appoint appraisers to determine the actual market value of the property except on formal application under the statute. Such application must be made within a reasonable time after the death of the testator and the filing of the inventory.

COLUMBUS, OHIO, January 16, 1915.

HON. PHILIP L. WILKINS, *Probate Judge, Mt. Vernon, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of January 7, 1915, addressed to my predecessor and by him handed to me. In it you ask for the opinion of the department upon the following question:

> "The price for which real estate, part of which is devised to collateral relatives within the scope of the inheritance tax law, sells at partition sale is much less than the appraisement of the estate returned in the probate court. The administrator, accordingly, contends that the tax should be computed upon the amount actually realized from the public sale rather than upon the inventory and appraisement.
>
> "May the probate judge, in the first instance, approve for collateral inheritance tax purposes, the appraisement included in the general inventory?
>
> "May he take judicial notice of the selling price of the land in another court and compute the tax accordingly?
>
> "In a case of this sort, should he appoint appraisers, under section 5343, General Code?"

The sections of the statutes involved are as follows:

> "Section 5340. Within ten days after the filing of the inventory of every such estate, any part of which may be subject to a tax under the

provisions of this subdivision of this chapter, the judge of the probate court, in which such inventory is filed, shall make and deliver to the county auditor of such county a copy of the inventory; or, if it can be conveniently separated, a copy of such part of the estate, with the appraisal thereof. The auditor shall certify the value of the estate, subject to taxation hereunder and the amount of taxes due therefrom, to the county treasurer, * * *.

"Section 5343. The value of such property, subject to said tax, shall be its actual market value as found by the probate court. If the state, through the prosecuting attorney of the proper county, or any person interested in the succession to the property, applies to the court, it shall appoint three disinterested persons, who, being first sworn, shall view and appraise such property at its actual market value for the purposes of this tax and make return thereof to the court. The return may be accepted by the court in a like manner as the original inventory of the estate is accepted, and if so accepted, it shall be binding upon the person by whom this tax is to be paid, and upon the state. * * *.

"Section 5344. The probate court, having either principal or auxiliary jurisdiction of the settlement of the estate of the decedent, shall have jurisdiction to hear and determine all questions in relation to such tax that arise, affecting any devise, legacy or inheritance under this subdivision of this chapter, subject to appeal as in other cases, and the prosecuting attorney shall represent the interests of the state in such proceedings."

While much seemingly essential machinery is omitted from the collateral inheritance tax statutes, I am of the opinion that the following statements, responsive to your questions, constitute the correct application of the foregoing provisions:

First. The appraisement included in the general inventory is primarily binding upon all parties. This is because, in the first instance, the probate court has no duty or function whatever to perform with respect to the valuation of the estate, if so much thereof as is subject to the collateral inheritance tax can be conveniently separated from the remainder; for in such event, the value of the estate and the amount of taxes due therefrom is to be ascertained by the county auditor, upon the basis of the appraisement of the taxable portion of the estate.

Second. The probate judge may not take cognizance in any way of the price for which land subject to the tax may have sold at public sale in partition proceedings. The primary appraisement of the estate, for reasons already stated, stands until the same is set aside by the court in the exercise of the special jurisdiction vested in it by section 5343 and 5344, General Code. Facts of the kind which you mention would be competent evidence in such proceedings, but would have to be introduced as other evidence.

Third. The probate court may not exercise jurisdiction under sections 5343 and 5344, General Code, and appoint appraisers to determine the actual market value of the property for the purpose of the tax, except upon formal application to the court as therein provided.

With the exception of the appraisal of the value of a life estate, not subject to the tax, which must be made within sixty days after the death of the testator (Section 5333, G. C., amended 103 O. L., 463), the statutes provide no time limit within which the proceedings for appraisal, referred to in section 5343, General Code, shall be commenced. This question seems to be involved in your inquiry and I am of the opinion that such proceedings must be instituted within a reasonable time after the death of the testator and the filing of the inventory, having regard to all the facts and circumstances of the case (in re Kingman, 220 Ill.,563, a dictum under a statute silent, in this respect, like that of Ohio). As to what

constitutes a reasonable time, I am of the opinion that the probate court may determine this question in the exercise of judicial discretion, subject to appeal as provided by statute. In other words, while section 5343 provides that if the application is made, the probate court *"shall appoint,"* etc., nevertheless it is my opinion that the implication of the statute is that application must be made within a reasonable time so that the statute is to be given its manadtory effort only when a timely application is made.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

7.

BOND ISSUE—ELECTION MAY BE HELD FOR APPROVAL OF BOND ISSUE UNDER LONGWORTH ACT—TWO-THIRDS VOTE NECESSARY—DEPUTY STATE SUPERVISORS OF ELECTION DETERMINE THE FORM OF QUESTION—RESOLUTION OF COUNCIL NECESSARY.

1. *An election may be held for the purpose of securing the elector's approval of the issuance of bonds under the Longworth act, so-called, as amended, notwithstanding the fact that bonds could have been issued by council without a vote.*
2. *At such election, two-thirds of the voters voting on the question must vote in favor of the proposition in order to authorize the issuance of the bonds.*
3. *The form of the question to be submitted to the electors is to be determined by the deputy state supervisors of elections, on the basis of a resolution of necessity passed by council and certified to such supervisors.*

COLUMBUS, OHIO, January 16, 1915.

HON. JONATHAN TAYLOR, *City Solicitor, Akron, Ohio.*

DEAR SIR:—You state in your letter of January 12, 1915, receipt of which has been acknowledged, that it seems desirable to submit to a popular vote a proposition to issue bonds for extending and enlarging a waterworks plant now in process of construction, and that the issuance of such an amount of bonds by the council, without a vote of the electors, would not cause either the one per cent. limitation or the two and one-half per cent. limitation of the Longworth act, so called, to be exceeded. You submit for my opinion the following questions:

"1. Under the circumstances named, have we authority to expend the funds of the municipality to hold an election for the issue of the bonds referred to?

"2. Must the issue be carried by a majority or two-thirds vote?

"3. Is there any authority for holding an election on the bond issue except when it exceeds the one per cent. or two and one-half per cent. limitations?

"4. What shall we indicate the purpose of the issue to be on the ballot?

"5. Is there any authority for submitting this matter to a popular vote except on an initiative petition?"

All of these questions involve consideration of what is known as the Longworth law, in its present amended form. Section 3939, General Code, a part of this measure, provides that:

"When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, * * * may issue and sell bonds, * * * for any one of the following specific purposes; * * *.
(Here follows an enumeration of twenty-seven specific purposes which it will not be necessary to quote, it being sufficient to state that the extension and enlargement of waterworks is one of them.)

Section 3940, General Code, provides that:

"* * * The total indebtedness created in any one fiscal year * * * under authority conferred in the preceding section, shall not exceed one per cent. of the total value of all property in such municipal corporation, as listed and assessed for taxation."

Sections 3941 and 3952 of the General Code, read together, have the effect of providing that the net indebtedness, created or incurred by the council under section 3939 of the act, and under the original Longworth law with its amendments, shall not exceed two and one-half per cent. of the assessed value of the property in the municipality.

Section 3942, which must be very carefully considered in connection with your question, is as follows:

"In addition to the authority granted in section one (1) (G. C. sec. 3939) of this act and supplementary thereto, the council of a municipal corporation, whenever it deems it necessary, may issue and sell bonds in such amounts, or denomination, and for such period of time and rate of interest not exceeding six per cent. per annum, as it may determine upon for any of the purposes set forth in said section one (G. C. sec. 3939), upon obtaining the approval of the electors of the corporation at a general or special election in the following manner."

I am of the opinion that council may act under section 3942 whenever it chooses, although there may be no necessity for such action by reason of the lack of power to act under section 3939, General Code. That is to say, if council wishes to do so it may submit any bond issue to a vote of the electors, though it could have issued the bonds itself, without violating any of the limitations imposed by law upon the issuance of bonds without a vote of the people.

In this respect the amended Longworth act differs radically from the original Longworth law, but the difference is so obvious that the intent to make the change seems very clear to me.

Consideration of section 3942 and related sections, in this light, furnishes answers to all but one of your questions. Referring to them in their order, I may say that I am of the opinion,

First: That under the circumstances which you name the city of Akron may hold an election for the issuance of the bonds referred to.

Second: In order to authorize the issuance of bonds, two-thirds of the voters voting at the election, on the question, must vote in favor thereof. (Section 3947, General Code.)

Third: The authority to hold an election on the issuance of bonds, under such circumstances, does not depend upon the lack of the authority of council to issue them otherwise, by reason of the operation of the one per cent. or two and one-half per cent. limitations.

Fourth: (Responsive to your fifth question) Council may submit the matter

to a popular vote in the manner prescribed by the statutes cited, and an initiative petition is not necessary.

Separately considering your fourth question, which requires that special attention be given to a statute not yet cited, I beg to state that in my opinion, by virtue of sections 3943 and 3944, General Code, council should, in its resolution of necessity, state the purpose for which the bonds are to be issued and cause a copy of the resolution to be certified to the deputy state supervisors of the county. It then becomes incumbent upon the deputy state supervisors to prepare the ballots, and in so doing they will select the proper form of the statement of the proposition to be voted upon.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

8.

PERMISSION PRIOR TO 1913 IS SUFFICIENT TO MAINTAIN SCHOOL FOR DEAF—SAID SCHOOL MAY RECEIVE FROM STATE TREASURER ONE HUNDRED AND FIFTY DOLLARS FOR EACH DEAF PUPIL TAUGHT DURING THE YEAR ENDING AUGUST, 1914.

A school district receiving permission, prior to 1913, *to maintain a school for the deaf, is entitled, without further permission, to maintain such school and to receive from the state treasury the sum of one hundred and fifty dollars* ($150.00) *for each deaf pupil taught in such school during the year ending August,* 1914.

COLUMBUS, OHIO, January 16, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of January 11, 1915, submitting for my opinion the following question:

> "There had been a law (section 7755-7761, General Code), authorizing the state commisioner of common schools to grant permission to a board of education of any school district in Ohio to maintain one or more day schools for the instruction of the deaf.
>
> "In May, 1911, the state commissioner of common schools granted to the board of education of Toledo, the permission to maintain such school for the deaf, whereby the board of education of Toledo was entitled to receive from the state common school fund received by Lucas county, one hundred and fifty dollars for each deaf pupil attending such school.
>
> "In 1913, this law was amended so that the state now pays the money direct instead of being paid by the county. The board of education of Toledo did not apply for permission under the new law, and, consequently, no permission was granted. Toledo now wishes to receive the compensation of one hundred and fifty dollars per deaf pupil taught in such school last year. Is Toledo legally entitled to this money?"

I find, upon examining the statutes referred to in your letter, that the original act provided for the establishment of schools for the education of the deaf only, whereas the corresponding sections, as amended in 1913, authorized the establishment of schools for the deaf, blind and crippled.

I find that section 7755, General Code, as amended, which is the provision

requiring application to the superintendent of public instruction differs from original section 7755 in two respects only, viz.: the designation of that official by his present title instead of as state commissioner of common schools, and the reference to the schools for the blind and crippled. I find that the only other changes in the related statutes, which in any way affect the question which you present, are such only as are necessary to extend the scope of the scheme of legislation which they constitute so as to comprehend the common school education of the blind and crippled as well as that of the deaf, with the exception of the change spoken of by you with reference to the source of the funds necessary to defray the expense of such special instruction. The nature of this change is made clear by the quotation of the following provisions of original and amended section 7757, respectively:

> "Sec. 7757 (original) The county auditor in each county shall apportion and the county treasurer pay out of the state common school fund received by such county, to the treasurer or other financial officer of a board of education, maintaining a school or schools for the instruction of the deaf, one hundred and fifty dollars for each deaf pupil, resident of such county, instructed in any such school * * *.
>
> "Sec. 7757 (as amended 103 O. L., 271) At the close of each school year each board of education of the school district in which such schools for the education of the deaf, crippled or blind shall be established and maintained, shall certify to the auditor of state the number of pupils given instructions in said schools during the preceding school year, and thereup the auditor of state shall draw his warrant upon the treasurer of state in favor of such board of education, payable out of the general state fund in an amount equal to one hundred and fifty dollars ($150.00) for each deaf or crippled pupil given instruction in such school within said district. * * *."

It is evident to me that the formal repeal and re-enactment of the sections in question was prompted only by the necessity of complying with article II, section 16 of the constitution, and that the intention of the legislature was, as expressed in the title of the act of 1913, merely to *"amend* section 7755, etc.," so as to enlarge the scope of the special instruction that it might include other classes of defective pupils and so as that too, the burden of paying such special instruction might be shifted from the state common school fund distributed to the county, to the general revenue fund of the state. The general rule is that where a statute is repealed or re-enacted for the mere purpose of amending it, the unchanged portions of the same are to be regarded as having been the law all the time, as to cases within the purview of the original law. If the amendment of 1913 had been limited to that of section 7757 and section 7758, with reference to the source of payment, it would not be contended that a new application to the state commissioner or superintendent would have been thereby rendered necessary.

The mere fact that the new law refers to the superintendent of public instruction, whereas the old one referred to the commissioner of common schools is immaterial in view of the provisions of section 4, article VI of the amended constitution.

So far as schools for the deaf are concerned, the provision for application to the state department is the same in both the old and the new law. Curiously enough, both sections provide that on application the state officer "shall grant permission," so that his function seems to have been purely ministerial at all times. Whether or not this is so, I am of the opinion and so advise that an application to the state commission of common schools, under the old law, and the granting of permission based thereon, is sufficient authority for the payment out

of the state treasury of one hundred and fifty dollars ($150.00) for each deaf pupil given instruction in a day school of a given district, out of the general revenue fund of the state, providing, of course, the necessary appropriation has been made by the general assembly.

Inasmuch as the amendment in question did not take effect until August 2, 1913, the last school year, that ended in August, 1914, would be the first year for which payments out of the state treasury could be made.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

9.

RIGHT OF SUPERINTENDENT OF PUBLIC WORKS TO FIX RATES FOR LEASING WATER FOR POWER AND OTHER PURPOSES—AUTHORITY TO LEASE SURPLUS WATER FROM CANALS FOR PURPOSES OTHER THAN POWER—LEASING WATER FROM CANALS—RESERVOIRS.

1. *The superintendent of public works has the right to fix rates for leasing water for power and other purposes.*

2. *The legislature has left the fixing of rates of all tolls and rentals to the sound judgment and discretion of the superintendent of public works.*

3. *The superintendent of public works has authority for leasing surplus water from the canals for purposes other than power.*

4. *Where there is no navigation in a canal, water therein may be leased provided it is not needed for some other purpose such as the protection of the canal.*

5. *No lease of water privileges can be made from the reservoirs set apart as public parks, which lease would interfere with the right of the people to use these reservoirs for recreation and pleasure.*

COLUMBUS, OHIO, January 18, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your letter of January 12, 1915, inquiring as to the rights and duties of the superintendent of public works with reference to certain features of the law governing the leasing of water on the public works of the state.

First. You inquire as to whether or not the superintendent of public works has the right to fix the rates for the leasing of water for power and industrial purposes, or for any other purposes. I am of the opinion that he has such right.

Section 431 of the General Code, which provides among other things that the superintendent of public works shall "adjust and fix the amount of rent due and unpaid as may be deemed just," is not as clear upon this proposition as might be desired, in that it seems to apply only to rent due and unpaid, but section 416, General Code, clears up all ambiguity by providing broadly that "the superintendent of public works of Ohio shall regulate the rate of tolls to be collected on the public works of the state, and shall fix all rentals."

Second. Your second question is directed to the proposition of whether or not the legislature in its laws establishing the canals and reservoirs, had in mind the idea of making a profit from them. This question would seem to raise a question of policy rather than one of law. The legislature has apparently chosen to allow

the matter of the rates of all tolls and rentals to rest in the sound judgment and discretion of the superintendent of public works, giving him in sections 416 and 431 of the General Code of Ohio, full authority to regulate the rate of tolls, fixing all rentals, and adjusting and fixing the amount of rent due and unpaid "as may be deemed just." Legislative intent can be gathered only from the language of the statutes, and that language clearly and unequivocally places the control of rates of tolls and rentals in the hands of the superintendent of public works. Without reviewing the declarations of the legislature bearing upon this proposition, it is sufficient to observe that a very recent enactment contemplates that there may properly be a scale of toll rates and charges, sufficiently high to leave a surplus after payment of the cost of operation, maintenance and improvement. I refer to section 2503-1 of the General Code, as amended in 103 O. L., p. 473, said amended section being passed April 18, 1913, and providing, among other things, for the disposition of a surplus such as is referred to above.

Third. Your third question, as to what authority, if any, exists at the present time, or has existed at any time hitherto, for the leasing or selling of surplus water from the canal for other than power purposes, must be answered by a reference to several sections of the General Code. While section 431 refers in terms to the leasing of surplus water power, there is no expression of limitation by which the superintendent of public works is inhibited from leasing water for purposes other than power. On the other hand, section 429, General Code, refers to contracts for "water privileges" and section 433, General Code, authorizes the superintendent of public works to collect not only "water rents as they become due under the lease of water power," but also "rentals for pipe permits." If the legislature had not intended to authorize the leasing of water for purposes other than power, it would not have authorized the collection of rentals for pipe permits. I am, therefore, of the opinion, that the superintendent of public works has authority for leasing surplus water from the canals, for purposes other than power.

Fourth. Your inquiry as to the meaning of the term "surplus water not needed for navigation" is best answered by a reference to section 431 of the General Code, which omits the words "not needed for navigation" and broadly authorizes the leasing of surplus water power. I am, therefore, of the opinion, that you have the authority, where water in a canal is not needed for navigation for the reason that there is no navigation in the canal, to lease said water, if not needed for some other purpose such as the protection of the canal.

Fifth. As to your fifth question, I am of the opinion that the fact that the state has made public parks of various reservoirs, does place a limitation upon the leasing of water drawn therefrom. These reservoirs are, by the statutes, dedicated and set apart forever, for the use of the public as public parks or pleasure resorts, and are to be open to the public for recreation and pleasure, including hunting, fishing and boating, and it is clearly the intention of the legislature that no lease of water privileges is to be made which would interfere with the right of the people to use these reservoirs for the above named purposes.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

10.

UNDER SECTION 3004, GENERAL CODE, THERE IS NO LIMITATION OF TIME OR AMOUNT ALLOWED PROSECUTING ATTORNEYS FOR EXPENSES.

Neither the court of common pleas nor probate court have any jurisdiction under section 3004, General Code, to limit the amount or time of withdrawing the amount allowed prosecuting attorneys for expenses to be paid under said section. The matter lies wholly within the discretion of the prosecuting attorneys.

COLUMBUS, OHIO, January 18, 1915.

HON. CHAS. T. STAHL, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—I acknowledge receipt of yours of January 11, 1915, in which you ask for an opinion of this department, upon the following question:

> "The construction of section 3004, G. C., as to whether the prosecuting attorney may draw out the entire fund therein stipulated, viz., one-half of his salary, at his own discretion, or whether it is within the jurisdiction of the judge, and that he may apportion the same."

This section reads as follows:

> "There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. Upon the order of the prosecuting attorney, the county auditor shall draw his warrant on the county treasurer payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county.
>
> "Provided that nothing shall be paid under this section until the prosecuting attorney shall have given bond to the state in a sum not less than his official salary to be fixed by the court of common pleas or probate court with sureties to be approved by either of said courts, conditioned that he will faithfully discharge all the duties enjoined upon him, by law, and pay over according to law, all moneys by him received in his official capacity. Such bond with the approval of such court of the amount thereof and sureties thereon and his oath of office inclosed therein shall be deposited with the county treasurer.
>
> "The prosecuting attorney shall annually before the first Monday of January, file with the county auditor an itemized statement, duly verified by him, as to the manner in which fund has been expended during the current year, and shall if any part of such fund remains in his hands unexpended, forthwith pay the same into the county treasury. Provided, that as to the year, 1911, such fund shall be proportioned to the part of year remaining after this act shall have become a law."

The evident purpose of the enactment of this statute was to place at the disposal of the prosecuting attorney a sum of money which he might expend in

such a manner as to render partial secrecy at the time when the expenses were incurred, and also adding a requirement that on or before the first Monday of the year following, he should render a statement under oath, of the manner of his expenditures.

The statute contemplates two methods by which this special fund may be drawn from the treasury and by the prosecuting attorney expended. First, he may secure from the county auditor a warrant for all or a portion of the amount to which he is entitled, after having given bond and securing its approval by the court; or, he may leave the entire amount in the county treasury and issue his order to the county auditor for each separate expenditure of money. In no event does the statute contemplate that the court shall exercise any jurisdiction or have any control over this fund other than to approve the bond when submitted.

I am in hearty accord with the construction you have placed upon this section, wherein you say:

> "The matter lies wholly within the discretion of the prosecuting attorney, and that after the bond is executed and approved by the court, it is not within the province of the court to designate either the amount or the time in which the prosecuting attorney may draw the fund."

It is my opinion, therefore, that after you have given bond and the bond has been approved by the court, you may withdraw either all or a portion of the amount to which you are entitled, and expend it in such a manner as is contemplated by this section, and that the court has no jurisdiction over the amount to be drawn by you.

Yours very truly,
EDWARD C. TURNER,
Attorney General.

11.

STATE CIVIL SERVICE COMMISSION REQUIRED TO CERTIFY ONLY THE THREE CANDIDATES STANDING HIGHEST ON ELIGIBLE LIST.

When the state civil service commission has certified to a board the names of the three candidates standing highest, said commission has no authority to certify the three next highest to said board, merely because said board is unable to agree upon any one for the position.

COLUMBUS, OHIO, January 18 , 1915.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I have your letter of January 13, 1915, which submits the following proposition:

> "In one of the counties of Ohio, we recently held an examination for the position of superintendent and matron of the county infirmary. This examination resulted in an eligible list of some eight (8) people for each position. On requisition of the board of county commissioners, we certified the three highest people for each position. The

clerk of the board of county commissioners now notifies us that the board has been unable to agree upon any one for either of the positions of superintendent and matron, and asks us to certify to them the next people on the eligible list. We doubt the power of this commission to go any further than we have already gone when we made the regular certification, unless legal reasons are given to us for the removal of those from the eligible list who stand highest thereon."

Your view is correct; this department approves your action. The fact alone that the board of county commissioners are unable to agree upon any one for either position, will not justify you in certifying the names of the next three persons on the eligible list.

Respectfully yours,
EDWARD C. TURNER,
Attorney General.

12.

EMERGENCY ACT OF THE LEGISLATURE BECOMES A LAW ON THE DAY IT IS SIGNED.

An emergency act of the legislature becomes a law on the day it is signed by the governor.

COLUMBUS, OHIO, January 18, 1915.

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

DEAR SIRS:—Under date of January 12, 1915, you inquire:

"When does an emergency act of the legislature become a law; the day it is signed by the governor or the day it is filed with the secretary of state?"

The sections of the constitution, that it is necessary to consider in this matter, are as follows:

"Article II, Sec. 1c. No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided.

"Article II, Sec. 1d. Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety, *shall go into immediate effect.*

"Article II, Sec. 16. Every bill passed by the general assembly shall, *before it becomes a law,* be presented to the governor for his approval. If he approves, he shall sign it and thereupon it shall become a law and be filed with the secretary of state. If he does not approve it, he shall return it with his objections in writing, to the house in which it originated, which shall enter the objections at large upon its journal, and may then reconsider the vote on its passage. If three-fifths of the members elected to that house vote to repass the bill, it shall be sent, with the objections of the governor, to the other house, which may also reconsider the vote on its passage. If three-fifths of the members elected to that house vote to repass it, it shall become a law notwithstanding the objections of the

governor, except that in no case shall a bill be repassed by a smaller vote than is required by the constitution on its original passage. * * * If a bill shall not be returned by the governor within ten days, Sundays excepted, after being presented to him, it shall become a law in like manner as if he had signed it, unless the general assembly by adjournment prevents its return; in which case, it shall become a law unless, within ten days after such adjournment, it shall be filed by him, with his objections in writing, in the office of the secretary of state."

I assume that you do not refer, in your question, to a bill which has been presented to the governor and has not been signed by him, or one which has been vetoed by him, since you ask, solely, when an emergency act becomes a law—the day it is signed by the governor or the day filed with the secretary of state.

The actions of the general assembly are known as "bills" until they have received the signature of the governor, when they are known as "laws." Section 16 of article II, above quoted, states that every bill passed shall, before it becomes a law, be presented to the governor for his approval, and when signed shall thereupon becomes a law. Therefore, it is necessary that the signature of the governor be attached to a bill before it becomes a law, but it does so become a law upon such signature being attached. The mere fact that it is required to be filed with the secretary of state does not affect the fact that it is already a law.

Section 1d of article II states that emergency laws shall go into immediate effect.

Since a bill becomes a law upon the signature of the governor and does not necessarily have to wait upon the filing of the same with the secretary of state, I am of the opinion that an emergency act of the legislature becomes a law, immediately, upon its being signed by the governor.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

13.

ARTICLES OF INCORPORATION—MUTUAL FIRE INSURANCE COMPANY MUST STATE IT IS FORMED FOR PURPOSE OF TRANSACTING "BUSINESS OF INSURANCE ON THE MUTUAL PLAN."

A mutual fire insurance company must, in its articles, state that it is formed for the purpose of transacting "business of insurance on the mutual plan."

COLUMBUS, OHIO, January 18, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return herewith, without my approval endorsed thereon, the proposed articles of incorporation of The Auto Insurance Company, for the reason that the statement of the purpose of incorporation is so indefinite that it cannot be determined therefrom what the kind and character of business, which the company proposes to undertake, is.

The declared purpose of the corporation is as follows:

"insuring automobiles and accessories against fire or theft, or both."

This fact, together with the fact that the corporation is not for profit, suggests the possibility of an attempt to incorporate either under sections 9510 and 9556, or under section 9593, General Code.

I find that my predecessor advised the then secretary of state, that the articles were not in conformity with section 9593, General Code. The correspondence attached to the articles, and also enclosed herewith, shows that the incorporators actually did intend, in the first instance, to organize a mutual protective association, under section 9593, General Code, but now tender the same articles of incorporation as sufficient for a mutual company, under section 9510, General Code.

It is true that mutual companies may be organized under sections 9510, General Code, and the succeeding sections, particularly sections 9525-9528, inclusive. But in order that the articles of incorporation may be so definite as to enable one to apprehend the exact nature of the corporation, I am of the opinion that it is necessary specifically to state in the articles that the company is formed for the purpose of transacting the business desired "on the mutual plan." For lack of these necessary words I am unable, as already stated, to certify my approval of the articles.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

14.

WHO MAY BE EMPLOYED BY THE STATE BOARD OF CHARITIES AS VISITORS—DUTIES THEY MUST PERFORM

The board of state charities may enter into an arrangement with a private charitable organization whereby its representatives may be employed by the board to act as visitors for the inspection of institutions receiving, caring for and disposing of children, provided such visitors perform all of the duties of the position; such an arrangment would not be lawful if the visitors merely investigated the disposition of certain classes of children.

COLUMBUS, OHIO, January 18, 1915.

The Board of State Charities, Columbus, Ohio.

DEAR SIRS:—I acknowledge receipt of your letter of January 12, 1915, requesting my opinion upon the following question:

> "A certain private organization, in which this board has confidence as to its ability and discretion, in one of the larger cities is planning to make a special study of the disposition of illegitimate children. * * *
>
> "Would it be possible for this board to designate certain members of the private organization as visitors without salary and thereby have the rights and powers of other visitors employed under the express terms of section 1352?"

Section 1352 of the General Code, as amended 103 Ohio Laws, 865, provides as follows:

> "The board of state charities shall investigate by correspondence and inspection the system, condition and management of the public and

private benevolent and correctional institutions of the state and county, and municipal jails, workhouses, infirmaries and children's homes, and all maternity hospitals or homes, lying-in hospitals, or places where women are received and cared for during parturition, as well as all institutions whether incorporated, private or otherwise which receive and care for children. * * *. For the purpose of such investigation and to carry out the provisions of this chapter it shall employ such visitors as may be necessary, who shall, in addition to other duties, investigate the care and disposition of children made by institutions for receiving children, and by all institutions including within their objects the placing of children in private homes, and, when they deem it desirable they shall visit such children in such homes, and report the result of such inspection to the board. * * *.

"Section 1352-1. Such board shall annually pass upon the fitness of every benevolent or correctional institution, corporation and association, public, semi-public or private as receives, or desires to receive and care for children, or places children in private homes. * * * When the board is satisfied as to the care given such children, and that the requirements of the statutes covering the management of such institutions are being complied with, it shall issue to the association a certificate to that effect, which shall continue in force for one year, unless sooner revoked by the board. No child shall be committed by the juvenile court to an association or institution which has not such certificate unrevoked and received within fifteen months next preceding the commitment. A list of such certified institutions shall be sent by the board of state charities, at least annually, to all courts acting as juvenile courts and to all associations and institutions so approved. Any person who receives children or receives or solicits money on behalf of such an institution, corporation or association, not so certified, or whose certificate has been revoked, shall be guilty of a misdemeanor, and fined not less than $5.00 nor more than $500.00."

Without quoting the remaining provisions of the chapter in which these sections are found I may say that on an examination of them I have reached the conclusion that "the provisions of this chapter," referred to in section 1352, do not comprehend any of the other sections of the General Code which happen to be in the chapter in question, but the phrase is obviously limited in its application to the contents of section 1352-1, above quoted. That is to say, the purpose for which visitors may be employed by the board of state charities is to enable the board to acquire information upon which to base its determination relative to the issuance of the certificate provided for in section 1352-1. For this purpose the investigation described in section 1352, as amended, must be made, and such investigation must include, within its scope, the system, condition and management of all institutions which receive and care for children, with a view to determining the fitness of such institutions to do this kind of work.

I am of the opinion, therefore, that the board of state charities is without authority to employ, in any sense, a visitor, the scope of whose investigation would be limited to examining into the condition of any class of children cared for in institutions, with the sole object of studying the disposition of such children as a class. The visitors must examine the institutions, as such, and must report to the board the care and disposition of children in the institution so that the board can pass upon the fitness of the institution.

The arrangement about which you inquire could not lawfully be entered into if the visitors without salary, of which you speak, would not be expected to report to the board or would limit the scope of their investigations to the care and

disposition of children of a certain class; but if the persons whom you have in mind are willing to act as visitors for the board of state charities and to perform all the duties of such visitors, without compensation, for the purpose of incidentally acquiring for other uses approved by the board, information with respect to the care and disposition of certain classes of children in the institutions examined by them, I believe that the arrangement would be lawful and would constitute an "employment" within the meaning of section 1352 as I have quoted it. In such event, the employment might be limited, if desired, to a certain class of institutions such as public institutions, semi-public institutions or private institutions receiving and caring for children and placing them in private homes, as such a division of the labor of visitation is permissible under the statute. To permit the arrangement upon the first basis disclosed above, would be to subject the institutions subject to inspection to two visitations for the same single purpose; and indeed would compel them to open their doors to investigators not really interested in the ascertainment of the facts which the law requires the board of state charities to find out. I do not believe that such an arrangement could be justified.

While I have not been able to answer your question positively, I trust that my advise to you will enable you to determine the actual question which you have before you.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

16.

MECHANIC'S LIEN NOT TO BE ENFORCED AGAINST STATE.

A mechanic's lien is not to be enforced against the state.

COLUMBUS, OHIO, January 19, 1915.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of January 15, 1915, which is as follows:

> "By direction of the board of administration, I am handing you herewith the sworn and itemized statement of a claim which was filed with the board of administration January 7, 1915, by Talfourd P. Linn, attorney for the Atlantic Terra Cotta Company, subcontractors, who have been awarded the general contract for the construction and completion of a dormitory building at the institution for feeble-minded, Columbus, Ohio.
>
> "I am also enclosing letters under dates of January 7 and 8 from Mr. Linn; copy of letter from the Ohio board of administration to the Dawson Construction Company; two letters from the Dawson Construction Company to the board of administration under dates of January 9 and 14; all of which are self-explanatory.
>
> "Your advice and opinion is respectfully requested as to what further action should be taken by the board relative to said claim."

Replying to the inquiry contained in your letter, permit me to advise that the courts, in the construction of section 8324 of the General Code, have held that while the language is broad enough to include public improvements, public buildings, etc., that statute does not apply to improvements in charge of the state.

The state cannot be sued; consequently mechanic's lien cannot be perfected in a case of this kind. Inasmuch as a suit may not be brought against the state for the enforcement of a mechanic's lien there is no method by which a court can decree its enforcement, and in the absence of a law to enforce the same, the auditor of state cannot recognize this lien.

This matter was fully considered by Judge Kyle in the case of The State of Ohio ex rel. Merritt & Company v. D. Q. Morrow et al., 10 Ohio Nisi Prius Reports, N. S. page 279, in which he decided:

> "There are no proceedings in law whereby a mechanic's lien may be enforced against the state of Ohio."

This case was affirmed by the circuit court in the following memorandum opinion to be found at the bottom of page 279 of the volume referred to above, and is as follows:

> "We think that the judgment of the lower court should be affirmed for the reasons given by Judge Kyle in his opinion, and in addition this reason:
> " 'There is a doctrine laid down in 38th Law Bulletin, 212, which is the law that where a contractor absconds that that ends his rights, and that the owner may proceed with the completion of the work and without paying to the contractor or his subcontractor anything, even though he should complete the work at a less price than originally contracted for.' "

In view of the circumstances and from the facts presented, it would appear that there is nothing further that your board can do towards affording relief to the subcontractor, The Atlantic Terra Cotta Company.

Very respectfully yours,
EDWARD C. TURNER,
Attorney General.

17.

STATE LIQUOR LICENSING BOARD—PRESENT GOVERNOR'S AUTHORIZATION FOR FIXED CURRENT EXPENSES, PREVIOUSLY AUTHORIZED, NEED NOT BE SECURED—GOVERNOR'S APPROVAL NOT NECESSARY FOR CURRENT FIXED EXPENDITURES OF COUNTY BOARDS—PRESENT GOVERNOR SHOULD APPROVE ALL ITEMS OF EXPENSES OF STATE BOARD, HEREAFTER INCURRED.

1. *The state liquor licensing board need not secure present governor's authorization and approval of fixed current expenses previously authorized and approved by preceding governor.*

2. *The state liquor licensing board need not procure the approval of the governor for the current fixed expenditures of county boards other than salaries of members hereafter appointed.*

3. *The state liquor licesing board should have the approval of the present governor to all items of expense of said state board hereafter to be incurred.*

COLUMBUS, OHIO, January 21, 1915.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I am in receipt of yours of the 13th requesting an answer to three questions propounded.

The answers to these questions involve a construction of sections 5, 8, 13 and 46 of the act of April 18, 1913, 103 O. L., 216.

The first question you ask is:

> "Should it procure and have on its files the newly installed governor's authorization and approval of its current fixed expenditures hereafter to be paid? *At the installation of the department or from time to time thereafter as they arose, such expenditures were authorized in writing by the governor retired.*"

My answer is, No.

Supplementing the answer just given:

(a) Referring now to the things mentioned in section 5 of the act; rental of office for the state board does not require the approval of the governor either in the incurring or paying of same. Section 5 is by no means clear, and the only safe course to pursue is to secure the approval of the governor to the *incurring* of all indebtedness other than rental above referred to, and for your protection and to avoid all questions, I hold this to be necessary to any future indebtedness incurred.

For the continued payment of the approved compensation of those persons whose employments were approved by the preceding governor, there need be no further approval by the present governor. No other persons may be employed, nor may compensation heretofore approved be increased without the approval of the present governor.

(b) Referring now to section 8: The approval of the present governor is unnecessary for the continued payment to county licensing commissioners of the salaries heretofore fixed with the approval of the preceding governor. Such salaries may not be changed, nor may the salary of a new incumbent be fixed without the approval of the present governor.

Your second question is:

> "Should it procure and have on its files the newly installed governor's approval of the current fixed expenditures of the county boards hereafter to be paid?"

My answer is, No. (Salaries of county licensing commissioners is referred to above.)

Section 13, which authorized the incurring of expenses by county boards, requires the approval only of the state board. This section (13) further provides that the *payment* (not the *incurring* of the expenses) be made in the same manner as the state board's expenses are *paid.* The manner in which the expenses of both the state and county boards, which have been properly incurred, are to be *paid* is provided for in section 46 of the act. The language of this section is clear and needs no explanation.

Your third question is:

> "Should it have on file the newly installed governor's written authorization for the incurring of its incidental and contingent expenses that may and will arise, the exact nature and amount of which cannot always be determined in advance? Would an oral authorization for the incurring of such expenses to be subsequently approved in detail in writing by the governor be sufficient?"

My answer is that it will be necessary for your board to have the present governor's approval for the *incurring* of such incidental and contingent expenses

of the state board. The method of such approval is not prescribed by the act, but it should be of such character as to leave no doubt. I suggest that you outline to the governor the general nature and probable amount of such expense and have him approve it. This together with the subsequent approval in detail (for payment) will be sufficient.

Respectfully,
EDWARD C. TURNER,
Attorney General.

18.

CONSTRUCTION OF SECTION 742, GENERAL CODE—SUPERINTENDENT OF BANKS NEED NOT EMPLOY AN ATTORNEY TO PRESENT HIS ACCOUNT TO COURT.

Under section 742, General Code, the notice required to be given "such corporation, company, society or association," should be served at such time prior to presenting the statement of expenses of supervision and liquidation to the common pleas court for approval as will give all parties concerned a reasonable opportunity for filing objections or exceptions to such expense account. Under said section the superintendent of banks need not employ an attorney to present his account to the court for its approval.

COLUMBUS, OHIO, January 22, 1915.

MR. GEORGE WALTERS, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Under date of January 20, 1915, you submitted for my opinion the following question:

> "Section 742-4 relative to the expenses incurred in the liquidation of banks, among other things, provides that:
> 'all expenses of supervision and liquidation shall be fixed by the superintendent of banks, subject to the approval of the common pleas court of the county in which the office of such corporation, company, society or association was located on notice to such corporation, company, society or association.'
> "Please render to me an opinion as to when such notice shall be given the corporation, company, society or association, and as to whether or not it is necessary to employ an attorney to represent the superintendent of banks in presenting the expense accounts to the court for its approval."

Since you delivered this letter to me personally and we had a conversation relative to the object of your request, I am answering it in view of my understanding of that conversation.

The notice to "such corporation, company, society or association" required under section 742-4 of the General Code should be served at such time prior to presenting the statement of expenses of supervision and liquidation to the common pleas court for approval as will give all parties concerned a reasonable opportunity for filing objections or exceptions to any part of such expense account.

If you so desire, you may personally present the accounts mentioned to the court for its approval, and need not employ an attorney, as any litigant has the right to appear in his own behalf in any court of common pleas in Ohio.

Respectfully submitted,
EDWARD C. TURNER,
Attorney General.

19.

REGISTRATION OF LAND TITLES.

In registration of land titles, the titles are to be numbered consecutively. Documents relating to title should carry the title number for filing purposes. All papers relating to registered title should be filed together under the title number in the county recorder's office.

COLUMBUS, OHIO, January 22, 1915.

MR. C. B. GORDON, *Recorder of Perry County, New Lexington, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your favor of January 14, which is as follows:

> "Please let me know where to record a mortgage given under the Torrens land registration law. Each instrument is to be given a document number. Where do we get this number?"

Replying to your inquiry, I beg to direct your attention to section 8572-47, G. C., at page 938 of vol. 103 O. L. (being section 47 of the act to provide for the settlement, registration, transfer and assurance of land titles and to simplify and facilitate transactions in real estate, known as the "Torrens land registration act") wherein it is provided that:

> "The recorder, upon the written request of the lessee, mortgagee, or encumbrancee, and payment of the proper fee, shall, in addition to registering the same, also record the instrument filed in his office in volumes to be known respectively as 'records of liens on registered land' and 'record of leases on registered land' * * *"

Answering your second question as to where you get the number to be given to the documents filed or recorded, permit me to call your attention first to the provision contained in section 8572-23 of the General Code (section 23 of the act) on page 927, vol. 103 O. L., as follows:

> "All certificates of title shall be numbered consecutively, beginning with number one. * * *"

In addition to the provisions quoted from section 8572-23, section 8572-35 of the General Code (103 O. L., 932) provides, amongst other things, that:

> "Each recorder shall keep an entry book in which he shall enter and number *in the order of their reception,* all deeds and other voluntary instruments and all involuntary instruments and copies of writs or other papers filed with him which relate to registered land. He shall note in such book the year, month, day, hour and minute of the reception of all instruments or papers in the order in which they are received, and shall also at the same time *enter the number* of the instrument or paper in appropriate blank space on the registered certificate of title for the land to which it relates."

In view of the fact that one of the purposes of the law is to "simplify and facilitate transactions in real estate" it is at once apparent that one of the essentials to carry out the intention of the act would be to have all of the papers

relating to a given case of a registered title where they might be readily accessible and in convenient form, and in view of this it is important that a system be adopted which will obviate the necessity of searching through extensive files for the purpose of locating such papers.

I believe that the purpose of the act will best be carried out if every paper relating to a registered title bears the number of the registered title as the master number, and in addition thereto the number given the document at the time of its reception as contemplated in section 8572-35 of the General Code. At the present time there are, of course, comparatively few papers to be searched for in connection with the operation of this law, but as time goes on and business under this law increases numerous papers will be filed and unless all of the papers, documents, etc., in connection with a certain registered title are filed in one place it will be necessary to go through numerous files for the purpose of securing such papers which at the outset could and should be segregated and it is my opinion that the provision in section 8577-36 of the General Code for the filing of other instruments and memoranda in any way affecting the title to registered land under the proper file numbers contemplates the use of the registered title number as the proper file number.

Trusting that this answers your inquiry, I beg to remain,

Very truly yours,
EDWARD C. TURNER,
Attorney General.

20.

CIVIL SERVICE—SECRETARY OF STATE MAY SELECT STATE REGISTRAR OF AUTOMOBILES AS ONE OF TWO EXCEPTIONS TO CIVIL SERVICE LAW.

Under section 7 of subdivision 8 of the civil service act, 486-8, General Code, the secretary of state may select as one of two secretaries, clerks or assistants, the person discharging the duties of automobile registrar.

COLUMBUS, OHIO, January 23, 1915.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of yours of the 21st inst., asking for an opinion as follows:

> "The head of what is known as the automobile department is designated as the registrar of automobiles, and is an appointee of the secretary of state. The state civil service commission has made an examination to determine the duties of this position, and we find them as follows:
>
> "'Supervising the registering of automobiles, motorcycles, chauffeurs and dealers, the receipt of fees and issuing of tags and badges, conducting correspondence and directing of all employes of his department; annually receives and accounts for about $700,000.00. He has heretofore been required to give bond in the sum of $50,000.00.'
>
> "The state civil service commission desires to know whether or not as a matter of law the duties of this position are such as may be performed by an assistant to the secretary of state, provided for in subsection 7 of main

section 8, of the civil service act. This section provides that such an elective officer as the secretary of state may have two secretaries, assistants or clerks exempt from the classified service. We are clear that this position is not that of a secretary or clerk, and desire to know whether or not as a matter of law it can be designated as an assistant to the secretary of state."

Also your supplementary letter of same date, reading:

"Referring to our letter of even date with reference to the head of the automobile department, will say that the matter contained in quotation marks is the description of the duties of that position as prepared by this department for use in standardizing that position. We are preparing what we call the standardization of positions as shown by the duties, and the matter quoted is taken from our description of these duties as determined after an examination for that purpose."

Careful investigation of both the statutes and appropriation bills will fail to disclose any department in this state known as the "automobile department," or any position known as the "registrar of automobiles." Neither are there any such duties as you refer to in your quotation above, resting upon any one except the secretary of state himself. Nowhere is there any authorization or requirement that the person now occupying the position referred to, shall give bond. Whether he gives bond or not is a matter for the secretary of state to determine.

The duties of "supervising the registering of automobiles, motorcycles, chauffeurs and dealers, the receipt of fees and the issuing of tags and badges, conducting correspondence and directing all employes of his department" rests exclusively upon the secretary of state.

The secretary of state may, however, employ the necessary assistants and clerks to enable him to discharge the duties of the office so long as he remains within the appropriation given him for that purpose by the legislature.

As to his duties respecting the registration of automobiles, etc., the matter now under consideration, he may require any of the employes in his office to assist. In other words, the secretary of state alone has the power to prescribe the duties of employes in his department, except so far as the statute confers a limited power upon the assistant secretary, under certain conditions. The bureau of vital statistics, in regard to the registrar of which I gave you an opinion recently, is a separate department in respect to which the secretary of state has certain duties to perform.

While under section 9 of the civil service act (G. C. 486-9) the civil service commission may make and put into effect rules for the classification of offices, positions and employments, your commission is without authority to prescribe what the duties of the employment shall be. In other words, you are to take the duties as prescribed by statute, or in the absence of statute as prescribed by the head of the department, for each employe.

Taking the duties of the position referred to to be the assisting of the secretary of state in respect to his duties imposed upon him by law, relative to automobiles, motorcycles, chauffeurs and dealers, and his supervising for the secretary of state the registering of automobiles, motorcycles, chauffeurs and dealers, the receipt of fees and issuing of tags and badges, conducting correspondence and directing all employes of this particular phase of the secretary of state's duties, and receiving on behalf of the secretary of state large sums of money, the person occupying such a position must be classed either as a chief clerk or an assistant.

As has been said to you in former opinions from this department, it is the duties which the employe discharges rather than the title he bears, that are controlling.

As the secretary of state is clearly such an officer as may make the appointment under subsection 7 of section 8 of the civil service act (G. C. 486-8), he clearly has the right to exempt the employe from acting under the designation of registrar of automobiles from the classified service under said subsection 7, providing the present secretary of state has not heretofore exempted two secretaries, clerks or assistants, not counting the assistant secretary of state.

Yours very truly,
EDWARD C. TURNER,
Attorney General.

21.

BOARD OF STATE CHARITIES MAY NOT ACT AS VISITING AGENT OF COUNTY CHILDREN'S HOME—TRUSTEES OF CHILDREN'S HOME MUST CO-OPERATE WITH STATE BOARD IN ORDER TO TRANSFER GUARDIANSHIP OF CHILDREN NOT PROPERLY CARED FOR—EXPENSE OF EXAMINATION OF CHILD BY STATE BOARD IS NOT CHARGEABLE AGAINST THE COUNTY.

1. *The board of state charities may not act as visiting agent of county children's home. An agreement to do so will not have the effect of transferring the guardianship of all wards of the home to the board of state charities. There must be a separate transfer of this kind in the case of each child under section* 1352-3, *General Code.*

2. *In case a visitor of the board of state charities discovers that a child placed by a children's home is not being properly cared for, and the trustees are willing to co-operate with the state board, the proper procedure is for the trustees of the home to transfer the guardianship to the state board of charities under section* 1352-3, *General Code.*

3. *Expenses incurred by the board of state charities in having made a physical and mental examination of a child to be placed in a foster home are not chargeable against the county of the child's legal residence, under section* 1352-4, *General Code.*

COLUMBUS, OHIO, January 23, 1915.

The Board of State Charities, Columbus, Ohio.

GENTLEMEN:—Under date of January 12th, you request my opinion upon the following questions:

"1. Two county children's homes have by resolution of their boards of trustees requested the board of state charities to act as visiting agent. The board has accepted the responsibility. The question has been raised whether the board of state charities by such general contract becomes ipso facto the sole and exclusive guardian of children received from such homes and placed in foster families, or, whether it will be necessary to have a formal transfer of each case in the manner set forth in section 1352-3.

"2. If the general contract and agreement grants such guardianship, can it be held to apply to a child previously placed in a foster home by

the board of trustees who upon subsequent investigation and visitation by a representative of this board is found to be placed in an improper home and should be placed in another; or, must readjustment be made by the board of trustees personally or by formal transfer of the case to the board of state charities.

"3. It is the practice of this board before placing a child in a foster home for the first time, to have a thorough physical and mental examination; the charges for such service have been very nominal. We wish to know whether such items of expense can be included in the terms of section 1352-4 for reimbursement by the proper county.

"4. Furthermore, when the board of state charities acts as agent for a county home under section 3099 shall the home be responsible for expenses of visiting children previously placed by the board of trustees, as is the case when former wards of that board have been placed in foster homes by the board of state charities?"

Your first question invites consideration of sections 1352-3 and 3099 of the General Code, as amended in the so-called Juvenile Code, 103 O. L., 864. It will be necessary to consider practically all the provisions of both of these sections, and I accordingly quote them in full:

"Section 1352-3. The board of state charities shall, when able to do so, receive as its wards such dependent or neglected minors as may be committed to it by the juvenile court. County, district, or semi-public children's homes or any institution entitled to receive children from the juvenile court may, with the consent of the board, transfer to it the guardianship of minor wards of such institutions. If such children have been committed to such institutions by the juvenile court that court must first consent to such transfer.

"The board shall thereupon ipso facto become vested with the sole and exclusive guardianship of such child or children. The board shall, by its visitors, seek out suitable, permanent homes in private families for such wards; in each case making in advance a careful investigation of the character and fitness of such home for the purpose. Such children may then be placed in such investigated homes upon trial, or upon such contract as the board may deem to be for the best interests of the child, or proceedings may be had, as provided by law, for the adoption of the child by suitable persons. The board shall retain the guardianship of a child so placed upon trial or contract during its minority, and may at any time, if it deems it for the best interest of the child, cancel such contract and remove the child from such home. The board, by its visitors, shall visit at least twice a year all the homes in which children have been placed by it. Children from whom on account of some physical or mental defect it is impracticable to find good, free homes, may be so placed by the board upon agreement to pay reasonable board therefor not to exceed $3.50 per week, which shall be paid out of funds appropriated to the use of the board by the general assembly. When necessary any children so committed or transferred to the board may be maintained by it in a suitable place until a proper home is found.

"So far as practicable children shall be placed in homes of the same religious belief as that held by their parents.

"Section 3099. Unless a children's home places its wards through the agency of the board of state charities, the trustees shall appoint a competent person as visiting agent, who shall seek homes for the children in

private families, where they will be properly cared for, trained and educated. When practicable, the agent shall visit each child so placed not less than once in each year, and report from time to time to the trustees its condition, any brutal or ill treatment of it, or failure to provide suitable food, clothing or school facilities therefor in such family. The agent shall perform his or her duties under the direction of the trustees and superintendent of the children's home for which he or she is appointed, and may be assigned other duties not inconsistent with his or her regular employment as the trustees prescribe. His or her appointment shall be for one year, or until his or her successor is appointed, and he shall receive such reasonable compensation for his or her services as the trustees provide."

The fundamental question is as to what is meant by the phrase "unless a children's home places its wards through the agency of the board of state charities," as provided in section 3099. I may say in connection with this section, I have examined the other provisions of the children's code and the unamended laws relative to the board of state charities and county children's homes. I do not find therein any direct authority in the trustees of children's homes to make the board of state charities a mere agent for the purpose of placing children in private homes, nor any authority on the part of the board of state charities to accept such an agency for this purpose. In my opinion, the phrase in question means and refers to the proceeding authorized in section 1352-3, General Code, and that only; so that the act of "placing wards of a children's home through the agency of the board of state charities" means the transfer to the board of the guardianship of the wards of the home, as contemplated by section 1352-3, as a consequence of which it becomes the duty of the board under that section to seek out and provide permanent homes in private families for such wards. I do not find any authority of law for the board of state charities acting as visiting agent for children's homes. The board has authority to appoint visitors to investigate institutions under section 1352, General Code, and such visitors are especially directed, in addition to other duties, to "investigate the care and disposition of children made by institutions for receiving children, and by all institutions including within their objects the placing of children in private homes, and when they deem it advisable they shall visit such children in such homes and report the result of such inspection to the board." It may be a matter of convenience for the visitors of the board to act also as visiting agents for children's homes, but the duties of the two positions are not, in my judgment, compatible, for the reason that the purpose of the visitation under the supervision of the board of state charities is to enable that board to form judgment as to the efficiency of the management of the institution placing the child in the home. Therefore, the board of state charities is in a position in law, adverse, so to speak, to that of the children's homes, and for one person to act as the agent of both in the same transaction would offend against fundamental principles.

Irrespective of the question whether a general contract such as you speak of can be made for the purposes of which you mention, I am of the opinion that such an agreement does not have the effect in and of itself of transferring the guardianship of children who are wards of the children's homes in question to the board of state charities. That must be, in my opinion, a separate, distinct and formal transfer. It is necessary in the case of each child, under section 1352-3, and a general transfer, either prospective or retrospective in its character is insufficient. The very fact that the juvenile court must consent to the transfer of children committed to the children's home by it indicates the correctness of this view.

Your second question being dependent upon an answer to your first question opposite to that which I have given, perhaps does not require a separate answer. I may say, however, that in my opinion if the representatives of the board of state charities discover that a child previously placed in a foster home by the board of trustees of a children's home, is improperly placed and should be placed in another home, and the trustees of the children's home are willing to co-operate with the board of state charities to that end, the proper procedure would be for the trustees to transfer its guardianship to the board of state charities as provided in section 1352-3, in which event the board acting under the section just cited might cancel the contract of indenture, remove the child from the home in which it was found, and place it in another home more suitable to its interests.

Your third question requires consideration of section 1352-4 of the General Code, as enacted 103 O. L. 867, which provides in part as follows:

> "The actual traveling expenses of such child and that of the agents or visitors of said board in connection with placing such dependent or neglected child in a home and of subsequent visitation of such child, together with half the amount of board, if any, paid by said board on account of the child to the owners of such home shall be charged by the board of state charities to the county in which the child had a legal residence when received by such board. The treasurer of each county shall pay the quarterly draft of the board of state charities for the amount so chargeable against such county for the preceding quarter. * * *"

It is apparent from the foregoing language that the expenses which are chargeable to the county are traveling expenses in connection with placing a child in a home, expenses of subsequent visitation of such child and the board of the child. I do not believe that the expense of making a physical and mental examination of the child can be regarded as a traveling expense; and certainly it could not be classed with the other expenses which I have named. Therefore, in my opinion, an expense of this character is not one for which reimbursement from the county of the legal residence of the child can be claimed.

Your fourth question is answered by the general statement that the board of state charities upon the principles already laid down has no authority to act as an agent for a county home under section 3099 of the General Code. I might add to what I have already said along this line that if the board of state charities is to act as an agent of the home it "must perform its duties under the direction of the superintendent and trustees of the children's home * * * and may be assigned other duties not inconsistent with * * * regular employment as the trustees prescribe, as these duties are exacted of the agents by section 3099." It will readily appear that the board of state charities is without authority to place itself in a position such as this. For these reasons I cannot give an answer to your fourth question as you state it.

Respectfully,
EDWARD C. TURNER,
Attorney General.

ADDENDUM

After dictating the above opinion I discovered that my predecessor, the Honorable T. S. Hogan, advised you on January 6, 1915, that the board of state charities was without authority to act as a visiting agent of a children's home and that the only legal arrangement of this character is the transfer of guardianship. As I have already stated, I am in accord with his opinion.

22.

JUVENILE COURT SHOULD BE CONSULTED AS TO DISPOSITION OF CHILD COMMITTED BY COURT TO A CHILDREN'S HOME.

Juvenile court should, as a matter of policy, be consulted as to disposition of a child by the children's home to which the court has committed it, when it is suspected that the court will not approve such disposition.

COLUMBUS, OHIO, January 23, 1915.

The State Board of Charities, Columbus, Ohio.

GENTLEMEN:—I have your letter of January 12, 1915, which, in full, reads as follows:

> "In May, 1912, the superintendent of a certain children's home, incorporated for the purpose of placing dependent children in foster homes, received from the board of trustees of a certain infirmary a child. The superintendent claims that in his contract with the infirmary officials there is a clause that the child may be returned at any time it may prove to be unplaceable. Between May, 1912 and October, 1913, the child was placed in five different foster homes. At the last one the child was removed by an officer of the juvenile court of the county in which the foster parents resided on the ground of cruelty and abuse, for which the foster father was fined. For some reason the child was transferred without any record so far as is known to an officer connected with the juvenile court of another county presumably for the reason that the place of business of the organization referred to above was in the latter county. There is no record in the latter court concerning the manner in which the custody of the child was secured.
>
> "Subsequently the child was placed in a foster home by the same officer of the latter court where it remained for about a year. The first record of the latter court concerning this child appears in November, 1914, where an affidavit was filed with another officer of such court, the former officer who had handled this case without record having left the state. On the first day of December, 1914, said child was committed to the county children's home.
>
> "Previous to the disposal of the case by commitment to the county children's home, a representative of this board advised the officer of the juvenile court that the child was a legal ward of the aforesaid organization and that the superintendent should be notified concerning the situation. It appears that no such notice was sent and the child was committed to the children's home without even informing the organization which was supposed to be legally responsible for the child, perhaps on the ground that the court had some prejudice against the methods of such organization.
>
> "The board of trustees of the children's home have requested the organization which first dealt with this case to receive the child. The superintendent of the organization is in doubt because of court procedure as to his rights in the case.
>
> "Query: Should he accept this child from the county children's home without further procedure by the juvenile court?"

While you have stated the facts upon which my opinion is requested somewhat fully, I am unable to form from your recital very definite conclusions of law upon

some of the points suggested. In the first place you do not state what kind of an infirmary it was the trustees of which made the original contract with the private children's home referred to by you. This could scarcely have been a county infirmary because, in the first place, where there is a children's home in the county children may not be kept at the county infirmary (section 3092, G. C.); and where there is no children's home in the county the superintendent of the infirmary (whether it be a county infirmary or a municipal infirmary) may transfer a child to a private charitable institution instead of providing for it in another county children's home or otherwise, except that the authorities doing this are limited to private homes in the county (section 4527, G. C.). Inasmuch as your letter at least suggests that the private institution of which you speak may have been located in a county other than that in which the infirmary which you mention was located, this statute, it would seem was not complied with.

Therefore, one of the legal propositions involved in a complete answer to your query, viz.: that the private children's home was the legal guardian of the child in question by virtue of the original arrangement between it and the board of trustees of the infirmary, cannot be determined with any certainty from the facts stated by you.

Again I do not feel that the facts submitted by you call for the consideration of the question of jurisdiction. At least the filing of the affidavit in November, 1914, would prima facie fix jurisdiction in the juvenile court in which the same was filed and the proceedings thereunder would not be open to collateral attack; and insofar as the failure of the juvenile court to issue a citation under section 1648 to the private children's home is the supposed guardian of the minor and its bearing upon the question of jurisdiction is concerned, this cannot be considered because of the lack of sufficient facts upon which to base an opinion as to guardianship in the first instance.

It seems, however, from what you say that the judge exercising the juvenile jurisdiction may have intended to keep the child in question away from the private children's home. That being the case, prudence suggests that the juvenile court be consulted by all parties concerned before the private home accepts the child from the county children's home. The jurisdiction of the juvenile court over a child committed by it to a children's home continues until the child attains the age of twenty-one years, so that the child may be recalled by the juvenile court from the county children's home or from any institution or foster home in which a child committed by the juvenile court has been placed by the authorities of the county children's home.

In this respect I agree with the conclusions of my predecessor expressed in his opinion to you under date of December 30, 1914. So that if the court had jurisdiction in the premises, a question which I am unable to decide from the facts stated by you, it would hardly be advisable for the private organization which you mention to accept the child from the county children's home under all the circumstances without the consent of the juvenile judge.

The facts submitted not only are insufficient upon which to base an unofficial opinion, but they suggest to me that the whole matter presents a question of policy rather than of law.

Respectfully,
EDWARD C. TURNER,
Attorney General.

23.

DEPOSITS BY STUDENTS—TAXES, ASSESSMENTS, LICENSES, FEES—SUPPLIES, BROKEN APPARATUS, RECEIPTS FROM DINING ROOM SERVICE, ROOM RENT, ATHLETIC FEES, RECEIPTS FROM CLASS PLAYS, ETC., NEED NOT BE PAID INTO STATE TREASURY.

Deposits by students of colleges, universities and normal schools, against which supplies and broken apparatus are charged, are not to be paid into the state treasury weekly, under section 24, General Code.

If students are charged for supplies for services, as the same are furnished, the sums so received should be paid into the state treasury weekly, under section 24, General Code.

Receipts from dining service and room rent in dormitories are not for the use of any university, college or normal school as such, or for the use of the state, but for the use and maintenance of the dormitory, and are, therefore, not to be paid weekly into the state treasury.

Athletic fees and receipts from class plays and from entertainments, assumed to be student activities, are not for the use of the institution or the state and should not be paid into the state treasury.

COLUMBUS, OHIO, January 23, 1915.

HON. W. O. HEFFERNAN, *Budget Commissioner, Columbus, Ohio.*

DEAR SIR:—Mr. Donaldson of your department requests, on your behalf, my opinion as to the interpretation of section 24 of the General Code, as amended 104 Ohio Laws, 178, in the following particulars, as stated by him:

> "Will you please give me your opinion as to whether this section makes it obligatory upon the colleges, universities and normal schools to turn in such extra funds as deposited by students for supplies used and breakage of apparatus, receipts from dining room service in dormitories, room rent in dormitories, key deposits, towel rentals and food supplies used by individual students in domestic science, athletic fees, receipts from class plays or other entertainments, etc."

Said section 24 of the General Code, as amended, provides as follows:

> "On or before Monday of each week, every state officer, state institution, department, board, commission, college, normal school or university receiving state aid shall pay to the treasurer of state all moneys, checks and drafts received for the state, or for the use of any such state officer, state institution, department, board, commission, college, normal school or university receiving state aid, during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals, or otherwise, and file with the auditor of state a detailed, verified statement of such receipts. Where tuitions and fees are paid to the officer or officers of any college, normal school or university receiving state aid, said officer or officers shall retain a sufficient amount of said tuition fund and fees to enable said officer or officers to make refunds of tuition and fees incident to conducting of said tuition fund and fees. At the end of each term of any college, normal school or university receiving state aid, the officer or officers

having in charge said tuition fund and fees shall make and file with the auditor of state an itemized statement of all tuitions and fees received and disposition of the same."

In dealing with funds of colleges, normal schools and universities, two questions of a general nature must be considered in applying these provisions to specific cases, namely:

(1) Are the moneys in question, tuitions and fees, to the conducting of which refunds are incident?

(2) Are the moneys received for the state or for the use of the college, school or university?

So far as the description of sources of revenue, which is found in section 24, is concerned, viz.: "Taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals or otherwise," it is clear to me that the same is comprehensive enough to include everything, and the limits of the application of the statute are to be found in the uses to which the revenues are to be put rather than in the source from which they arise.

I fear that I cannot give you any satisfactory rule for universal application; but by answering the specific questions which you ask, I may perhaps suggest to your department the lines of demarcation which may be observed in practice.

I am of the opinion that deposits by students for supplies used and breakage of apparatus, from which the student is entitled to a refund, if he does not consume the requisite amount of supplies or destroy a sufficient quantity of apparatus, are to be regarded as "tuitions and fees," to the conducting of which "refunds" are "incident," within the meaning of the second half of the section.

As to moneys of this character, there should be deducted from the weekly payments a sufficient amount to enable the officers to care for the anticipated refunds, and at the end of the term an itemized statement of the disposition of all such funds is to be filed with the auditor of state.

The same principle applies to key deposits, towel rentals and food supplies used by individual students in domestic science, if the method of administration is for a certain sum to be exacted in advance, subject to refund at the end of the term. But if this is not the case, and students are merely charged for supplies and services as they are received by them, I would be of the opinion that the contrary result would follow, and that moneys received from such sources should be paid into the state treasury, weekly; for in that event, such moneys could not be regarded as incidental "fees" and would clearly constitute moneys received, for the use of the institution, from sales and rentals.

A more difficult question is suggested by your mention of receipts from dining room service and room rent in dormitories. I am, however, of the opinion, that while dormitories are a part of the educational plant and service, yet a distinct separation of such activities from the regular educational activities of the institution may be noted. I think that it is the intention of the legislature, in authorizing the the maintenance of dormitories, that the same shall be conducted upon a self-sustaining basis. That is, I do not believe that, in the contemplation of the legislature, the general revenues or educational funds of the state are to be used to pay for the maintenance of dormitories or the food supplies consumed in such dining rooms; I think, on the contrary, that it is the intention that the revenues of the dormitories and the dining rooms, themselves, shall maintain them. In this view of the case, receipts from these sources being devoted to the maintenance of the dormitory and the dining room, respectively, as such, rather than to the general use of the institution or of the state, should not be regarded as moneys received for the use of the state or of the college normal school or university, within the

meaning of section 24. Of course, in this case, the question becomes even clearer if, in administration, students are charged in advance for board and room, subject to refund in the event of withdrawal before the end of the term. In either event, I am of the opinion that receipts from dining room service and room rent in dormitories should not be paid into the state treasury, weekly.

Athletic fees and receipts from class plays may be considered together. I am assuming that such receipts are for the use of some particular student activity, fostered and encouraged by the authorities of the educational institutions but not directly administered by them. In such event, even if such receipts were handled through the college or university treasuries, I would be of the opinion that they are not received for the use of the state or of the college, normal school, or university, within the meaning of section 24 of the General Code.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

24.

PANAMA-PACIFIC INTERNATIONAL EXPOSITION—APPROPRIATION FOR LIVE STOCK AND AGRICULTURAL PRODUCTS MUST BE EXPENDED FOR SAME.

The Panama-Pacific International Exposition appropriation of $25,000.00, *February* 16, 1914, *is to be expended in exhibiting at this exposition, the live stock and agricultural products of the state of Ohio, and the resources and opportunities afforded for the raising and development of the same within this state.*

COLUMBUS, OHIO, January 23, 1915.

HON. D. B. TORPY, *Directing Commissioner of the Ohio Commission, The Panama-Pacific International Exposition, Columbus, Ohio.*

DEAR SIR:—I have your letter of January 20th, in which you submit for my opinion thereon the following:

> "At a meeting of the Ohio commission of the Panama-Pacific international exposition, held at the office of Governor Frank B. Willis, on the 19th inst., the writer was requested to ask for your written opinion as to the proper interpretation of the following statute passed by the last general assembly of the state of Ohio at its extraordinary session—being part of the bill to make sundry appropriations.
>
> "'Panama-Pacific International Exposition.
>
> "'Exposition commissioner for the purpose of installing, maintaining and exhibiting the live stock, agricultural products, resources and opportunities of this state at the Panama-Pacific International Exposition in San Francisco in the year 1915.....$25,000.00.'"

On May 31, 1911, the legislature passed an act "creating a commission to have charge of installing and maintaining an exhibit of the products and resources of the state of Ohio at the Panama-Pacific International Exposition, and appropriating money to pay the expenses thereof." And section 1 of this act provides that:

> "The governor of the state of Ohio is hereby appointed a commissioner, to be known as the Panama-Pacific International Exposition Com-

missioner, for the purpose of installing, maintaining and exhibiting the products and resources of this state at an international exposition to be held in the city of San Francisco, in the year nineteen hundred and fifteen, known as the Panama-Pacific International Exposition; and as such commissioner he shall have full and exclusive charge and control of said exhibits, and the maintenance and installation thereof, with power to appoint and employ deputy commissioners, and all other persons necessary for the purpose of carrying out the provisions of this act, upon such terms and salaries as he shall deem to be fair and reasonable."

On January 28, 1914, the legislature passed another act to make further provision for the purposes outlined in the said act of May 31, 1911, section 1 of this act provides that:

"The governor is hereby authorized and empowered to appoint a special commissioner as directing commissioner for Ohio at such exposition, which directing commissioner shall have such exclusive powers and duties with regard to such exposition as the governor may confer upon him and shall receive such compensation for his services as the governor may prescribe. The governor may fill all vacancies in the position of deputy commissioner or directing commissioner and may remove from office any person appointed under this act or the act of May 31, 1912."

In section 2 of this act of January 28, 1914, the legislature made the following appropriation:

"* * * the sum of one hundred thousand dollars, for the purpose of erecting a state building in which to house and exhibit the state products, of securing complete and creditable display of the interests of the state at such international exposition and of paying the expenses and compensation, etc., (is hereby appropriated)."

On February 16, 1914, the legislature passed an act to make sundry appropriations, in which act an appropriation was made for the Panama-Pacific International Exposition as set forth in your letter.

On December 3, 1914, my predecessor, Mr. Hogan, gave you an opinion relative to this legislation, advising you that the governor as such exposition commissioner shall have full and exclusive charge and control of the installation and maintenance of all the interests in Ohio officially exhibited at the said exposition, including the power to appoint comimssioners and a directing commissioner and to fill all vacances in the position of deputy commissioner or directing commissioner and to remove from office any person appointed under the act of May 31, 1911, or the act January 28, 1914.

With this advisement I am in accord.

I further advise that there now remains for determination the question as to whether this twenty-five thousand dollar appropriation is to be used exclusively for exhibiting live stock and agricultural products at the said exposition or whether a part thereof may be used for the purpose of exhibiting interests of Ohio other than live stock and agricultural products.

In addition to the language used, the legislative intent is proper and helpful in the consideration of this question. It will be observed in the act of January 28, 1914, the legislature appropriated the sum of one hundred thousand dollars

> "for the purpose of erecting a state building in which to house and exhibit state products, of securing complete and creditable display of the interests of the state at such international exposition, etc. * * *"

In this appropriation it will be seen that the legislature has not attempted to specify what particular exhibits shall be displayed as representing the interests of Ohio. In the appropriation directly under consideration the legislature did specify that

> "live stock, agricultural products, resources and opportunities of this state shall be exhibited"

under the direction of the governor or his delegated authority as hereinbefore defined. For this specific purpose, twenty-five thousand dollars have been appropriated.

It is a fundamental rule of statutory construction that where particular or specific words are followed by general ones, the general are restricted in meaning to objects of a like kind with those specified, or where an enumeration of specific things is followed by some more general word or phase, such general word or phase is to be held to refer to things of the same kind. This principle of construction is known as *ejusdem generis,* and in my opinion applies to the language under consideration.

From a consideration of the different legislative expressions appropriate to be considered in connection with this language, I am of the opinion that this twenty-five thousand dollar appropriation is to be expended in exhibiting at this exposition the live stock and agricultural products of the state of Ohio and the resources and opportunities afforded for the raising and development of the same within this state.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

25.

MEMBER OF THE BOARD OF SINKING FUND TRUSTEES CANNOT BE SECRETARY OF SAID BOARD.

A member of the board of sinking fund trustees of a city cannot be selected as secretary of said board and draw salary fixed by ordinance of council for services as such secretary.

COLUMBUS, OHIO, January 26, 1915.

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

DEAR SIRS:—Under date of January 14th, you inquire as follows:

> "May a member of the board of sinking fund trustees of a city be selected as secretary of said board and draw the salary fixed by ordinance of council for services as such secretary?"

The statutes relative to the trustees of the sinking fund are found in section 4506, et seq. The board of sinking fund trustees of a city under section 4507, consists of four persons, electors of such city. Under section 4508, it is stipulated that said trustees shall serve without compensation.

Section 4509 provides:

> "The trustees of the sinking fund, immediately after their appointment and qualification, shall elect one of their number as president and another as vice-president, who, in the absence or disability of the president, shall perform his duties and exercise his powers, and such secretary, clerks or employes as council may provide by an ordinance which shall fix their duties, bonds and compensation. Where no clerks or secretary is authorized, the auditor of the city or clerk of the village shall act as secretary of the board."

Section 4518 provides the method by which money shall be drawn by said board of sinking fund trustees, as follows:

> "Money shall be drawn by check only, signed by the president and at least two members of the board, and attested by the secretary or clerk."

Section 4522 provides the manner in which bonds issued by the sinking fund trustees shall be signed, to wit, by the mayor and president of the board, and further, that such bonds shall be attested by the auditor or clerk of the corporation and the secretary of the board of trustees of the sinking fund.

Section 4523 provides that the trustees of the sinking fund shall be a board of tax commissioners, but since under section 4525, the city auditor is made the clerk of the board, sitting as a board of tax commissioners, said sections have no bearing upon the question.

Under section 4509, supra, it is specifically provided that the president and vice-president of the board of trustees of the sinking fund shall come from among the members of the board. There is no provision, in said section, as to whether or not the secretary may or may not be taken from among the members of the board. Consequently, there is no statutory inhibition against a member being chosen as the secretary of the board.

The provision of section 4518, that checks shall be signed by the president and at last two members of the board and attested by the secretary, requires that three members of the board, to wit, the president and two other members shall act in the drawing of money by the sinking fund trustees, and further their act shall be attested by the secretary. The attestation by the secretary is, of course, in order to check the action of the members of the board and the president in so drawing money, and it is very easy to conceive of a state of facts wherein, were the secretary a member of the board, he would be permitted to sign the checks in a dual capacity, and therefore, as it seems to me, would render the positions of secretary and member of the board incompatible, for the reason that the one is required to be a check upon the other.

A further and additional reason why the two offices are incompatible, is not only that the one may be a check upon the other, but that it would be against public policy for a member of an administrative board to hold a salaried position under the authority of such board, unless expressly authorized so to do. This matter was considered in a somewhat similar case by Hon. U. G. Denman, the then attorney general, under date of April 25, 1910. See attorney general's report for 1910, page 120. Although in the case considered by Mr. Denman, the board fixed the salary of its secretary, whereas in the case in question, said salary is fixed by ordinance of council, yet after a careful consideration of the opinion foregoing mentioned, I agree with Mr. Denman relative to the question of public policy.

I hold, therefore, that a member of the board of sinking fund trustees of a city may not be selected as secretary of the board.

Yours very truly,
EDWARD C. TURNER,
Attorney General.

26.

TO WHOM ANTI-LOBBY LAW APPLIES.

Under the anti-lobby law, section 6256-1, General Code, any person, whether employed exclusively, or merely in connection with other duties, who promotes, defeats or opposes legislative matters in any manner, and whether he receives compensation directly or indirectly, must register with the secretary of state.

COLUMBUS, OHIO, January 26, 1915.

HON. CHAS. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

MY DEAR MR. SECRETARY:—I am in receipt of yours of the 22nd, requesting an opinion on the anti-lobby law, as to whether or not that law applies only to individuals who are employed exclusively to look after legislation, and whether officers of a corporation who look after legislative matters in connection with other duties are exempt.

General Code 6256-1 provides (103 O. L., p. 3):

> "Any person, firm, corporation or association, or any officer or employe of a corporation or association acting for or on behalf of such corporation or association, who or which directly or indirectly employ any person or persons, firm, corporation or association to promote, advocate, amend or oppose in any manner, any matter pending or that might legally come before the general assembly or either house thereof, or a committee of the general assembly or of either house thereof, shall within one week from the date of such employment furnish in a signed statement to the secretary of state the following information, to wit: * * *."

This law applies to individuals, whether they are employed exclusively or only in connection with other duties, to promote, advocate, amend or oppose in any manner any matter pending or that might legally come before the general assembly or either house thereof, or a committee of the general assembly or of either house thereof, and whether such individual receives pay directly or indirectly.

Respectfully,
EDWARD C. TURNER,
Attorney General.

27.

MUNICIPALITIES—CITY FIREMEN—PREMIUMS FOR INSURANCE.

Municipalities may not expend public funds in payment of premiums for accident insurance for city firemen.

COLUMBUS, OHIO, January 26, 1915.

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

GENTLEMEN:—I have your letter of the 20th, in which you submit for my opinion thereon the following inquiry:

> "May the public funds of a city be legally expended in payment of the premium upon accident insurance policies carried in favor of members of the fire department, if said city does not maintain a pension fund for such purpose? Said firemen are now protected by the workmen's compensation law, and the question is whether or not additional insurance may be carried at the expense of public funds."

The answer to this question depends upon whether or not the payment of premiums upon such accident insurance policies is for a municipal purpose, and whether or not there has been specific provision made for the insurance of firemen. Subsection 1 of section 14 of the employers' liability act provides:

> "Every person in the service of the state, or of any county, city township, incorporated village or school district therein, including regular members of lawfully constituted police and fire departments of cities and villages, under any appointment or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city township, incorporated village or school district therein. Provided that nothing in this act shall apply to policemen or firemen in cities where policemen's and firemen's pension funds are now or hereafter may be established and maintained by municipal authority under existing laws."

Where municipalities do not maintain policemen's and firemen's pension funds, said policemen and firemen are now protected by the said workmen's compensation law, and this protection is made compulsory upon the city or village employing such firemen or policemen. I do not believe that the payment of a premium upon an accident insurance policy taken out for the benefit of a fireman or a policeman for his protection against injury which he may receive while acting within the scope of his employment and for his sole benefit is an expenditure of public funds authorized by law. If such might be construed to be a municipal purpose in the interest of firemen, it would be in equally close analogy, to include the policemen and many other municipal employes.

Your question might well be answered in the negative for the reasons given in the absence of a workmen's compensation law applicable to firemen. In the absence of regularly established policemen's and firemen's pension fund, the municipality must, under the act of the legislature, maintain liability insurance, which is a municipal purpose within the letter of the law.

I am therefore of the opinion that a municipality in Ohio has no authority to carry additional insurance in favor of members of its fire department, paying the premium therefor out of the public funds.

Very truly yours,

EDWARD C. TURNER,

Attorney General

28.

BALLOTS OPENED IN ELECTION CONTEST—IRREGULARITIES MUST BE PRIMA FACIE IN PARTICULAR PRECINCT.

Under section 5090-1, *General Code, ballots may be opened only where an inspection of the same would tend to prove or disprove the grounds of the contest.*

Before the ballots of any precinct may be opened, irregularities must be shown prima facie to have taken place in the particular precinct. The showing of irregularities in one precinct will not authorize the opening of ballots of other precincts where no irregularity is shown.

COLUMBUS, OHIO, January 26, 1915.

HON. F. E. WHITTEMORE, *Chairman House Committee on Contested Elections, House of Representatives, City.*

DEAR SIR:—In response to your request of even date for an opinion interpreting that part of section 5090-1, General Code, (103 O. L. 265), reading:

> "* * * Provided that if any contest of election shall be pending, at the expiration of said time the said ballots shall not be destroyed until such contest is finally determined. In all cases of contested elections, the parties contesting the same shall have the right to have said ballots opened and to have all errors in counting corrected by the court or body trying such contest, but such ballots shall be opened only in open court or in open session of such body and in the presence of the officers having the custody thereof."

And your specific questions:

> "(a) When, under that section, may the ballots be opened?
> "(b) Must there be first a *prima facie* showing a fraud?"

The clear purpose of the above quoted portion of section 5090-1 is to *correct errors. Ballots may be opened only when an inspection of the same would tend to prove or disprove the grounds of the contest.*

I am of the opinion that the showing of fraud in an election will not authorize the opening of the ballots unless the fraud charged is such as that an examination of the ballots themselves might tend to confirm or disprove the charge. To illustrate, if the evidence showed conclusively that votes had been bought, or that unqualified persons had voted at the election, or that any other instances of fraud had been committed outside of the election booths, the opening of the ballots would throw no light upon such matters, and such evidence, by itself, would not authorize the opening of the ballots.

On the other hand, if the evidence showed *prima facie* that there were irregularities in the receipt of ballots by the election officers, or in the counting of the ballots by said election officers, and these irregularities were such as an inspection of the ballots themselves might tend to prove or disprove, then for the purpose of *correcting errors in the count,* the ballots might be opened.

To illustrate, section 5083, General Code, provides:

> "One of the ballots shall then be taken out of the ballot box by one of the judges and shall forthwith be inspected by all the judges and inspectors. If the judges all agree as to how the ballot shall be counted, one of them shall place it where it can readily be seen by the other judges and by the

inspectors, and shall read aloud distinctly the name of the candidates voted for and the answers to any questions that may have been submitted, and the clerks shall forthwith tally the same. In the event that the judges do not agree as to how any part of the ballot shall be counted, such ballot shall not be counted but shall be placed in an envelope provided for the purpose. The same method shall be observed in respect to all the ballots until all the ballots shall have been taken from the ballot boxes."

If the evidence were to show that instead of following the statutory method of tallying the judges had allowed all of the ballots to be taken out of the boxes and separated into straight and scratched tickets, and only two judges had inspected and counted the straight ballots while the other two judges had only inspected and counted the scratched ballots; or where there were several ballot boxes and instead of complying with the statutory method the judges had taken the ballots out of the respective boxes and one judge had inspected and counted the partisan ballots, another judge had inspected and counted the constitutional amendment ballots, another judge had inspected and counted the non-partisan judicial ballots; or that the clerks had not forthwith tallied the votes as provided in section 5083; in fact, any substantial departure from the method of opening the ballot boxes and tallying the ballots, as provided in said section 5083, then there would be sufficient authority for opening the ballots of any precinct where such irregularities had obtained.

But the showing of such irregularities in one precinct would not authorize the opening of the ballots of any other precinct in which no such irregularities had been shown, at least *prima facie.*

Respectfully,
EDWARD C. TURNER,
Attorney General.

29.

NOTICE OF ELECTION MUST BE PUBLISHED BY DEPUTY STATE SUPERVISORS OF ELECTION.

Section 5639-1, *General Code, requires notice of election to be published by the deputy state supervisors of elections of the county in which the election is to be held.*

COLUMBUS, OHIO, January 26, 1915.

HON. JOE T. DOAN, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—In your letter under date of January 25, 1915, you submit for opinion the following:

"Under the provisions of section 5639-1 of the General Code of Ohio, I desire to know whether the fifteen days' notice provided therein should be given by the deputy state supervisor of elections or whether it should be given by the county commissioners or some other official."

Under section 5638, General Code, the county commissioners are authorized to levy a tax and appropriate money, or issue bonds for certain purposes therein specified, but must first submit to the voters of the county the question as to the policy of making such expenditure.

Section 5639-1 of the General Code, provides as follows:

"When the board of county commissioners desires to submit such question to the voters of the county, it shall pass and enter upon its minutes a resolution declaring the necessity of such expenditure, fixing the amount of bonds to be issued, if any, in connection therewith, and fixing the date upon which the question of making any such expenditure shall be so submitted, and shall cause a copy of such resolution to be certified to the deputy state supervisors of elections of the county; and thereupon the deputy state supervisor shall prepare the ballot and make other necessary arrangements for the submission of the question to the voters of the county at the time fixed in such resolution.

"The election shall be held at the regular places for voting in such county and shall be conducted, canvassed, and certified in the manner, except as otherwise provided by law, as for the election of county officers. Fifteen days' notice of the submission of any such question shall be given the deputy state supervisors by publication in at least two newspapers of opposite politics having a general circulation in said county, which notice shall be published once a week for two consecutive weeks, and shall state the amount of such proposed expenditure, the amount of the bonds, if any, to be issued in connection therewith, the purpose for which such expenditure is to be made, and the time of holding such election."

That part of this section particularly applicable to your question submitted being as follows:

"Fifteen days' notice of the submission of any such question shall be given the deputy state supervisors by publication in at least two newspapers of opposite politics having a general circulation in said county."

Bearing in mind that the primary purpose of elections is the determination of the sense of the electorate upon such propositions as may be properly submitted thereto, and in addition, the general policy of the statutes of this state requiring notice of elections to be given to the electorate, will aid materially in a proper construction of the above quoted provision of the statute.

It is clearly evident that the word "by" was inadvertently omitted after the word "given" in the 5th line of the second paragraph of said section as printed in the General Code of Ohio. This conclusion we derive from a consideration of the previous provisions of said section, which require that the county commissioners shall cause a copy of the resolution to be certified to the deputy state supervisors of the county, thus specifically providing ample notice to the deputy state supervisors of elections, and in further consideration, that without such interpretation of this particular provision, no notice to the electorate is elsewhere provided in case of such election, and the manifest purpose of this notice is, to my mind, to apprise the electorate of the holding of such election. This position is generally sustained by the authorities of this state, and elsewhere.

The supreme court of Minnesota, in the case of State v. County Commissioners, lays down the following rule:

"In cases of imperfectly drawn statutes, the court, rather than pronounce them unconstitutional and void, will draw inferences from the evident intent of the legislature, as gathered from the whole statute, supplying by implication technical inaccuracies in expression and obviously unintentional omission from the necessity of making them operative and

effectual as to specific things which are included in the broad and comprehensive terms and purposes thereof; and such inferences and implications are as much a part of the statute as what is distinctly expressed therein."

This rule is fully sustained by the supreme court of this state in cases of

Slingluff v. Weaver, 66 O. S., 621;
Sawyer v. State, 45 O. S., 343;
and also by the supreme court of the state of New Jersy, in the case of Inhabitants of the County of Bergen v. Mayor, 64 N. J. Law, 286;
See also Cyc. 1113 (A. & E. Enc. 26, p. 653).

I am therefore of the opinion that the notice should be published by the deputy state supervisors of elections in the manner and for the time prescribed in said section 5639-1.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

30.

A PERSON WHO PREVENTS VETERINARIANS FROM INSPECTING ANIMALS MAY BE LIABLE TO PROVISIONS OF SECTION 1119, GENERAL CODE, IF AGRICULTURAL COMMISSION HAS AN ESTABLISHED RULE—WHEN SECTION 1121, GENERAL CODE IS NOT APPLICABLE.

A person who prevents, by threats or otherwise, an inspection of animals by veterinarians or other persons duly appointed for such purpose by the agricultural commission of this state, under the provisions of the act of April 15, 1915, 103 *O. L.*, 304, *may be liable to payment of the forfeit as provided in section* 41 *of said act, section* 1119, *General Code, only when in violation of a duly established rule of such commission, with which he had been notified to comply, or had notice to respect.*

Section 43 *of the act of April* 15, 1913, 103 *O. L.*, 304, *General Code,* 1121, *provides a penalty only for a violation of the statutory provisions of said act, relating to the agricultural commission, and is therefore not applicable to violation of the rules and regulations of such commission.*

COLUMBUS, OHIO, January 27, 1915.

The Agricultural Commission, Division of Agriculture, J. W. FLEMING, *Chief Assistant, Columbus, Ohio.*

GENTLEMEN:—I have a communication from Mr. Paul Fisher, state veterinarian, in which it is stated:

"In the conduct of foot and mouth eradication work during the past few weeks, inspectors of the agricultural commission and those of the federal government regularly commissioned by this department, have been prevented by threats and otherwise from entering upon premises for the purpose of making necessary inspections as provided by law. This has been particularly frequent in Seneca county."

and therein submitting for an opinion the following question.

> "Will you advise me or Mr. Russell M. Knepper, prosecuting attorney, of Seneca county who makes the request through me, under what section of the laws of Ohio the agricultural commission is empowered to bring action against persons resisting inspectors?"

Without quoting or extended discussion of the same, suffice it to say that by sections 31, 20, 33 and 30 of amended senate bill 178 (103 O. L., 304), the agricultural commission is fully authorized to appoint in case of outbreak of disease among animals, if deemed advisable, additional veterinarians or other persons for special work in connection with its duties, to adopt rules and regulations, to enter a building, railway car, boat or other conveyance, and premises public or private, and may use all proper means in the prevention of the spread of dangerously infectious and contagious disease among domestic animals and provide for the extermination of such disease. While it is not by you so stated, I assume that the inspectors of the agricultural commission, as referred to by you, are all persons who have been duly appointed in accordance with the provisions of section 31 of said act.

Section 41 of this act is as follows:

> "A person, firm or corporation who fails to comply with the rules of the agricultural commission or to respect its lawful regulations, when notified so to do, shall forfeit and pay not less than fifty dollars nor more than five hundred dollars."

Providing for the collection of a forfeiture by civil action, is in its nature, quasi criminal, and therefore subject to the rule of strict construction.

> White v. Woodward, 44 O. S., 347.
> Shewry v. Shewry, 6. N. P. (n. s.), 238.

Chief Justice Marshall, in the case of United States v. Willberger, 5 Wheaton, 76, says:

> "To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

In the case of State v. Meyers, 56 O. S., 350, the court says:

> "A statute defining a crime cannot be extended by construction to persons or things not within its descriptive terms, though they may appear to be within the reason and spirit of the statute. Persons cannot be made subject to such statute by implication. Only those transactions are included in them which are within both their spirit and letter; and all doubts in the interpretation of such statutes are to be resolved in favor of the accused."

It will therefore be essential to a recovery under this section, that the defendant be brought clearly within the terms and spirit of this section. That is to say, a prevention of an inspection, as referred to in your question, must be shown to

be either a noncompliance with or in disrespect of some lawful rule or regulation duly established by the agricultural commission, with which the person who has prevented such inspection has been properly notified to comply or to respect.

That part of section 43 of the act herein referred to, insofar as applicable to the question, is as follows:

> "Whoever violates any provision herein relating to the agricultural commission, for the violation of which no penalty has been provided, shall be fined not less than fifty dollars nor more than two hundred dollars."

This provision is general in its terms and broad in its scope, and it may be that the legislature was attempting to provide a penalty for just such cases as the one under consideration. But this being a criminal statute, it is to be construed strictly and we are bound by the express terms of the statute confining its operation to "provisions herein (of this act) relating to the agricultural commission."

I am, therefore, of the opinion that the prevention of an inspection of animals under the circumstances and conditions stated by you, may not be punishable under the provisions of this latter section.

Aside from the remedy provided by section 41 of this act above referred to, I am unable to advise you of any section of law under which you can maintain an action against such persons resisting an inspection, unless such resistance constitutes the offense of assault or assault and battery as defined by section 12433 of the General Code.

Where such interference is substantial and continued, injunction would lie in a court of equity (22 cyc., 775).

Yours very truly,
EDWARD C. TURNER,
Attorney General.

31.

THE SOUTHERN SETTLEMENT AND DEVELOPMENT ORGANIZATION, NOT SUBJECT TO THE "BLUE SKY" LAW.

The Southern settlement and development organization, chartered by special act of the legislature of the state of Maryland, which does not in Ohio sell, offer for sale, or otherwise deal in real estate, is not subject to the provisions and regulations of the "Blue Sky" law of Ohio.

COLUMBUS, OHIO, January 27, 1915.

MR. GEORGE WALTERS, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of January 22nd asking my opinion as to whether the Southern settlement and development organization, chartered by special act of Maryland legislature, is subject to the regulations of the blue sky law; together with enclosed copy of letter from Clement S. Ucker, assistant general manager of the Southern settlement and development organization to the attorney general of the state of Ohio; also pamphlets referred to in said enclosed letter as exhibits A and B.

As my opinion is based very largely upon the information contained in the letter of Mr. C. L. Ucker, directed to the attorney general, I am quoting it in full:

SOUTHERN SETTLEMENT AND DEVELOPMENT ORGANIZATION GENERAL OFFICES—CONTINENTAL BUILDING.

BALTIMORE, MD., January 18, 1915.

The Honorable Attorney General, State of Ohio, Columbus, Ohio.

"SIR:—The Southern settlement and development organization having its principal office at Baltimore, Md., submits for consideration the provisions of its charter and requests your opinion as to whether its operations in the state of Ohio, without complying with the provisions of an act of the Ohio legislature, known and referred to as the "blue sky law," would be in violation of the Ohio statutes.

"The Southern settlement and development organization is chartered by a special act of the Maryland legislature. The charter is set forth on page 47 et seq., of the pamphlet entitled 'Southern settlement and development organization,' copy of which is hereto attached and marked 'exhibit A.' Attention is also invited to a copy of the appropriation made by the legislature of Maryland in support of the organization set forth on page 53 of the same pamphlet. No change has ever been made in this charter by subsequent re-enactment of the Maryland legislature.

"A second pamphlet entitled 'Southern settlement and development organization, meeting of executive committee, Baltimore, March 6, 1913,' marked 'exhibit B,' is also attached. These pamphlets contain the minutes and proceedings leading up to the application of the state of Maryland for the charter granted and referred to above. Particular attention is invited to that provision of the charter appearing in section 4, reading: 'And be it further enacted, that it shall not be one of the objects of said organization to make money for the said organization or the members thereof; but the said organization may collect and receive money in any lawful manner and hold property of any kind, real, personal, or mixed, for the purposes for which said organization is chartered.'

"The financial support of the organization from the date of its inception to the time of presenting this application has been derived solely and exclusively from the appropriations made by the legislature of the state of Maryland and fixed contributions each year from those railroad corporations operating in the territory south of the south line of Pennsylvania and the Ohio river and east of the Mississippi river. The organization has in practical effect been regarded as a clearing house for the industrial and land operations of the several railroad corporations operating within the territory referred to. Its activities are divided into four departments, namely: colonization, agriculture, publicity, commerce and industry. In practice it has rigidly adhered to the policy that it will accept no direct compensation for its services, that it will own no land, issue no stock, make absolutely no profit, rely entirely upon contributions, as outlined above, for its support, and so comport itself as to be truly a quasi-public institution.

"Attention is invited to a pamphlet apparently issued by the bureau of banks and banking of the Ohio state government, entitled 'blue sky law' and reference is had to page 9 thereof to that section reading:

"'This section shall apply where the title to such property is held in the name of a trustee for any corporation or for any such described person or company, but it shall not be deemed to prohibit the disposal of an owner of his own property, in good faith and not for the purpose of avoiding the provisions of this act, where the transaction is not one of repeated transactions of a similar nature, performed as a part of the business of dealing in real estate; nor shall it be deemed to prohibit a railroad company having an immigration bureau or department for advertising either directly or through its accredited representatives, the fact that there are along its route lands for colonization or sale; provided that such advertising be not of specific tracts of real estate, and not for the purpose of avoiding the provisions of this act.'

"Sometime since certain representatives of an organization existing amongst the street car employes of one of the leading cities of the state of Ohio got into communication with this organization and requested its services to the end that they might be referred to a suitable location somewhere in the South where they might obtain title to an individual area of forty acres each on the colony plan. This matter was taken up, several conferences had and arrangements made to the end that a representative of this organization should present to them in the form of a streoptican lecture the advantages of certain selected areas of southern land, and about this time attention was invited to the existing statutes in the state of Ohio, and all further efforts along these lines were held in abeyance until the matter could be presented to you through the state bureau of banks and banking for your decision as to whether the activities of this organization came within the purview of the Ohio laws and whether it would be necessary that this organization comply with the provisions of the Ohio laws.

"In the opinion of the officials of this organization its activities should come within the purview of the exceptions laid down in the section referred to on page 9 of the pamphlet entitled 'blue sky law,' it being essentially and so regarded as a clearing house for the activities of the land and industrial departments of the southern railroads. Let it be borne in mind that this organization has no land to sell, that it consummates no sale, that it operates without profit, that its services are entirely gratuitous that its principal object is to advance the agricultural and industrial betterment of the territory in which it operates."

Very respectfully yours,

(Signed) CLEMENT S. UCKER,
Acting General Manager.

Sections 2 and 4 of the proposed charter of the Southern settlement and development organization as set forth in the pamphlet marked "exhibit A," commencing on page 47, are as follows:

"Section 2. And be it further enacted, That the purposes for which this corporation is formed are:

"1. To make a thorough and scientific study of the resources and possibilities of the states of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, N. Carolina, Oklahoma, S. Carolina, Tennessee, Texas, Virginia and West Virginia, and the best practical methods of developing the same.

"2. To direct public attention, both in this and in other countries to the resources and possibilities of said states, and more especially to the immense area of unimproved land therein.

"3. To attract into said states capitalists, investors and desirable immigrants, and more especially experienced farmers and agricultural laborers.

"4. To encourage by every practical means the establishing in the several states named in the south, by said states or otherwise, bureaus of agriculture and immigration bureaus for the purpose of disseminating reliable information regarding the resources and possibilities of said states.

"5. To establish and maintain, so far as practical, a co-operation between the United States government, the government of the several states named, the railroad and transportation companies, commercial bodies, real estate men, and members of the said Southern settlement and development organization, in placing the southern country properly before the people of the world.

"6. To secure from the United States government proper port facilities at Baltimore and the South Atlantic and gulf ports for the handling of foreign immigration.

"7. To establish the principal office of the organization, headquarters or bureau in the city of Baltimore, Maryland, with as many branches thereof, and in such cities as the executive committee may determine.

"Section 4. And be it further enacted, That it shall not be one of the objects of the incorporation of said organization to make money for the said organization or the members thereof; but the said organization may collect and receive money in any lawful manner and hold property of any kind, real, personal or mixed, for the purposes for which said organization is chartered."

Section 6373-15 of the General Code of Ohio, being a part of what is known as the "blue sky law" is as follows:

"No person or company, other than a dealer licensed as hereinbefore provided, shall within this state, in repeated or successive transactions, deal in real estate not located in Ohio; and unless so licensed and the 'commissioner' shall issue his certificate as provided in the following section, and, prior to such issuance, there shall, together with a filing fee of ten dollars, be filed with the 'commissioner' an application for such certificate and a written statement of the dealer containing a pertinent description of the real estate the disposal of all or a part of which is sought to be made, the nature and source of title of the owner thereto, and the amount or value and the nature of the consideration paid or allowed by him therefor, it shall, within this state, be unlawful:

"(a) For any corporation or any person, association or copartnership doing business under any name other than the name or names of such person or of all the members of such association or copartnership to dispose or offer to dispose of any real estate not located in Ohio.

"(b) For any person or company to sell or offer for sale any such real estate, the owner of which is, or is represented to the purchaser to be, a corporation, or any person or company of the character described in the foregoing paragraph, where such corporation, person or company is engaged in the business of dealing in real estate.

"This section shall apply where the title to such property is held in the name of a trustee for any corporation or for any such described person or company; but it shall not be deemed to prohibit the disposal by an

owner of his own property, in good faith and not for the purpose of avoiding the provisions of this act, where the transaction is not one of repeated transactions of a similar nature, performed as a part of the business of dealing in real estate; nor shall it be deemed to prohibit a railroad company having an immigration bureau or department from advertising either directly or through accredited representatives the fact that there are along its route lands for colonization or sale; provided that such advertising is not of specific tracts of real estate, and not for the purpose of avoiding the provisions of this act."

The above section was enacted for the purpose of preventing fraud in the sale of real estate located out of the state, and with that end in view it requires, with certain exceptions therein contained, all persons and companies to secure a license from the state of Ohio before dealing in, selling or offering for sale in Ohio, real estate not located within the state. As a preliminary to securing such a license, an applicant therefor must submit to certain inspection provided in the statutes and pay the filing and license fees mentioned in the statutes.

The provisions of the statute apply only to persons, companies, etc., dealing in, selling or offering for sale, real estate not located in Ohio. Neither in the charter of the Southern settlement and development company nor in the letter of explanation above quoted does it appear that said organization has any power to sell, offer for sale, or otherwise deal in real estate, or that it has any intention of dealing in or selling real estate. On the contrary, in the last paragraph of the letter to the attorney general, above quoted, I find this language:

"Let it be borne in mind that this organization has no land to sell, that it consummates no sale, that it operates without profit, that its services are entirely gratuitous, that its principal object is to advance agricultural and industrial betterment of the territory in which it operates."

I am therefore of the opinion that the provisions of the blue sky law, relative to dealers in real estate not located in Ohio, do not apply to a situation like that set forth in the letter of inquiry, and that it is not necessary for the Southern settlement and development organization to secure a license from the superintendent of banks of the state of Ohio.

It should be understood that my opinion on this matter is based very largely upon the representations of the letter herein quoted, and that it applies only to the situation as therein set forth.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

32.

ANNUAL REPORT OF HIGHWAY DEPARTMENT MUST BE PRINTED BY DEPARTMENT OF PUBLIC PRINTING—SECTION 1183, G. C., APPLIES TO OTHER PUBLICATIONS.

The annual report of the state highway department should pass through the department of public printing, and the expense of the same should be paid for out of the appropriation for printing for the department of public printing.

Section 1183, G. C., was not intended by the legislature to apply to the printing of the annual report of the state highway commissioner and is merely permissive as to the preparation, publication and distribution of such other bulletins and reports as the said highway commissioner may deem proper.

COLUMBUS, OHIO, January 27, 1915.

HON. FRANK HARPER, *Supervisor of Public Printing, Columbus, Ohio.*

DEAR SIR:—I have your request of January 22, 1915, inquiring as to whether the annual report of the state highway department is to pass through the department of public printing and the expense of the same to be paid for out of the appropriation for printing for the department of public printing, or, whether under section 1183 of the General Code of Ohio, the annual report of the state highway department is to be published by said department and paid for out of the funds of the state highway department.

Upon an examination of the statutes, I am of the opinion that the annual report of the state highway department should pass through the department of public printing and that the expense of the same should be paid for out of the appropriation for printing for the department of public printing.

The annual report of the state highway commissioner to the governor is required by section 1231 of the General Code. By section 2265 of the General Code, it is required that the governor shall cause this report, among others, to be printed and made a part of the executive documents, the report not being one of those required by section 2274 of the General Code, to be bound in muslin. By section 748 of the General Code, it is provided that the printing for the executive documents shall be ordered through the supervisor of public printing.

I am therefore of the opinion that section 1183 of the General Code, providing among other things, that the state highway commissioner "may prepare and publish, and distribute bulletins and reports," was not intended to repeal the provisions of law above referred to as to the publication of the annual report of the state highway commissioner, and is merely permissive as to the preparation, publication and distribution of such other bulletins and reports as the state highway commission may deem proper.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

33.

CINCINNATI MUNICIPAL COURT—FORFEITED RECOGNIZANCES SHALL BE COLLECTED AND PAID INTO THE COUNTY TREASURY.

Under the Cincinnati municipal court law, forfeited recognizances thereunder shall be collected by the prosecuting attorney and paid into the county treasury.

COLUMBUS, OHIO, January 27, 1915.

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

GENTLEMEN:—On January 20th you submitted to me for my written opinion thereon the following inquiry:

> "Under the Cincinnati municipal court law what should be the disposition of forfeited recognizances? If same are required to be certified to the county auditor, and from thence to the prosecuting attorney for collection, and is made by said prosecuting attorney, should the moneys collected be returned to the municipal court or be paid into the county treasury?"

Section 13 of the act creating the Cincinnati municipal court (103 O. L., 283), provides that:

> "In all criminal cases and proceedings the practice and procedure and mode of bringing and conducting prosecutions for offenses, and the powers of the court in relation thereto, shall be the same as those which are now or may hereafter be, possessed by police courts in municipalities unless otherwise provided herein."

No other provision has been made in this act whereby the practice prevailing in municipal police courts has been changed. Forms of recognizances are found under sections 13552 and 13553 of the General Code, and are made payable to the state of Ohio.

Section 13546 of the General Code provides that clerks of police courts shall return forthwith to the county auditor of their respective counties all forfeited recognizances in criminal cases: and under section 13547 of the General Code, the county auditor shall make a record thereof and deliver the same to the prosecuting attorney for collection; and the prosecuting attorney under section 13548 of the General Code shall prosecute the forfeited recognizances by him received, for the penalty thereof. Such penalty, when recovered by the prosecuting attorney, shall be paid into the county treasury by the prosecuting attorney under authority of sections 289 and 2926 of the General Code.

It, therefore, appears that the moneys collected on forfeited recognizances under the Cincinnati municipal court law should be paid into the county treasury.

Respectfully,

EDWARD C. TURNER,

Attorney General.

34.

STATE NOT LEGALLY LIABLE TO PAY NEW YORK LIFE INSURANCE COMPANY FOR TAXES PAID IN EXCESS OF AMOUNT REQUIRED BY LAW, BUT IS MORALLY BOUND.

There is no legal liability on the part of the state of Ohio to pay to the New York Life Insurance Company, $13,958.81, which said company was required by the superintendent of insurance to pay into the treasury of the state during the years 1901 to 1907, both inclusive, as taxes in excess of the amount required by law, but payment may be made by the state as a moral obligation, the claim of said company, subject to verification as to amount.

COLUMBUS, OHIO, January 27, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Capitol.*

MY DEAR SIR:—Under date of January 20, 1915, you requested my opinion as to the validity of the claim of the New York Life Insurance Company against the state of Ohio for $13,958.81, which amount the company asserts it was unlawfully compelled to pay to the state by the superintendent of insurance in the years 1901 to 1907, both inclusive. Attached to your letter is a communication to you from Mr. H. B. Arnold, an attorney of Columbus; also a history of the case as presented by the insurance company.

I have investigated the facts presented in the claim and I find that the history of the case as presented is correct, except that I have been unable to verify the amount of the claim submitted, as the records of the superintendent of insurance for that period were not so kept as to reveal the amount which the company paid in excess of the amount which it was under legal obligation to pay.

The facts revealed by my investigation are as follows: section 2745, Revised Statutes, as amended February 29, 1902, provided that foreign insurance companies should pay a tax of 2½ per cent. on "the gross amount of premiums received by it in the state during the preceding calendar year." Under this section superintendent of insurance ruled that foreign insurance companies should pay this 2½ per cent. tax upon the gross amount of premiums received by the company from business done in the state of Ohio, whereas the company contended that the law required them to pay 2½ per cent. tax only upon the gross amount of premiums actually paid to the company at its agencies in the state.

As it was necessary for foreign insurance companies to secure from the superintendent of insurance a license to do business in this state, and the superintendent of insurance served notice upon all the companies that unless payment was made in accordance with his interpretation of the law such license would be withheld, the insurance companies were practically forced to accept his interpretation of the law, and paid into the state treasury according to that interpretation during the years above mentioned.

In the meantime, a test case was brought by the attorney general upon the request of the superintendent of insurance to determine the correct interpretation of this law, which was finally reached and decided by the supreme court on January 26, 1909, 79 Ohio State Reports, 275. By this decision of the supreme court the ruling of the superintendent of insurance was held to be without authority, and that the law as in effect during the said years required foreign insurance companies to pay such tax of 2½ per cent. only upon such premiums as were paid at their agencies in the state.

As a result of this decision of the supreme court, the state insurance department was in a position of having forced foreign insurance companies to pay taxes

in excess of the amount authorized by law. The matter was brought to the attention of the legislature, and an apparent attempt was made to rectify the mistake in a law contained in volume 100, Laws of Ohio, page 166. The provisions of this law, however, were so vague and indefinite that the attorney general held it was in conflict with the Constitution of Ohio, and nothing was ever done under its terms.

In 1911 (volume 102, Laws of Ohio, 369), the general assembly refunded to four insurance companies—The Equitable Life Insurance Society, The Northwestern Mutual Life Insurance Company, The Mutual Life Insurance Company, and the Pittsburgh Life and Trust Company, the respective amounts which they had been unlawfully required to pay to the insurance department.

The only difference between the claims of these companies which have been paid and the claim of the New York Life Insurance Company, is that the four companies that have been reimbursed, paid under protest to the superintendent of insurance and the New York Life Insurance Company paid without formal protest, at least so far as the record shows.

From a legal standpoint, I am of the opinion that there is no liability upon the state of Ohio to pay this claim of the New York Life Insurance Company for the reason that the state of Ohio cannot be sued. From a moral standpoint, however, the claim should be paid, as the superintendent of insurance had no legal right to collect the money, and the company was virtually forced to make payment under the penalty of losing its license, and the mere fact that the four insurance companies which have been reimbursed, paid under formal protest, ought not in all good conscience have any bearing on the matter, as all of the companies were in exactly the same situation and all paid on the same basis. Subject to a verification of the amount thereof, the claim presented by the New York Life Insurance Company should be paid.

Respectfully yours,
EDWARD C. TURNER,
Attorney General.

35.

GOVERNOR MAY USE MILITIA TO PREVENT A PRIZE FIGHT—ATTORNEY GENERAL MAY BE DIRECTED TO INSTITUTE NECESSARY PROCEEDINGS.

The governor, as commander-in-chief of the militia, may, under section 5316, *G. C., use the militia to prevent a prize fight.*

The governor may, under section 333, *G. C., direct the attorney general to take necessary proceedings in the name of the state to prevent a prize fight.*

COLUMBUS, OHIO, January 29, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus Ohio.*

MY DEAR GOVERNOR:—I beg to acknowledge receipt of your letter of January 28, 1915, which is as follows:

"Subject. Contemplated boxing exhibition or prize fight in Cincinnati.

"Your immediate attention and written opinion is desired on the following situation:

"A telegram has just been received which is hereto attached.

The same matter from a military standpoint has come to the attention of the adjutant general; that situation is made known to you by the attached files from this office.

"It is contended unofficially by other persons that the matter set out as facts in these exhibits are not the true facts, it being claimed that the exhibition proposed is not a prize fight, but a boxing exhibition contemplated by section 12803, General Code.

"The information desired is just what authority the governor of Ohio or the governor of Ohio as commander-in-chief of the Ohio national guard has in the premises for interference or action toward stopping the contemplated exhibition."

Answering first as to the authority of the governor as commander-in-chief of the national guard:

Article 2, section 10, of the Constitution provides:

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

Section 5316 of the General Code provides.

"When there is a tumult, riot, mob or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence to break or resist the laws of the state, or there is reasonable apprehension thereof, the commander-in-chief, the sheriff of the county, the mayor of a municipal corporation therein, or a judge of any court of the state or United States, may issue a call to the commanding officer of any regiment, battalion, company, troop or battery, to order his command of part thereof, describing it, to be and appear, at a time and place therein specified, to act in aid of the civil authority."

Under the foregoing provision of constitution and section of the General Code quoted, I am of the opinion that, if you are satisfied that a prize fight is about to take place, you have the authority to use the power above referred to.

As to your authority as governor of Ohio:

Section 333 of the General Code provides:

"* * * When required by the governor * * * he (the attorney general) shall appear for the state in any court or tribunal in a cause in which the state is a party or in which the state is directly interested."

Under this section of the Code, you have the right to direct the attorney general to take such legal action as may be necessary to prevent this proposed prize fight, if you are satisfied that it is to be a prize fight.

I call your attention to the case of The State of Ohio ex rel J. M. Sheets, attorney general, v. William N. Hobart, et al., 8th Ohio nisi prius, page 246, in which the law upon the subject of your request for an opinion is thoroughly discussed. (The opinion is too long for quotation here.)

Respectfully,

EDWARD C. TURNER,

Attorney General.

36.

TWO VILLAGE SCHOOL DISTRICTS MAY NOT UNITE UNDER AUTHORITY OF SECTION 4736, G. C.

The county board of education may not, under section 4736, *G. C.,* 104 *O. L.,* 133, *unite two village school districts into one single village district. Section* 4682-1 *and* 4683, *G. C., control in such cases.*

COLUMBUS, OHIO, January 29, 1915.

HON. FRANK W. MILLER, *Superintendent Department of Public Instruction, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of January 19, in which you request my opinion upon the following state of facts:

> "Baltimore, Fairfield county, and Basil, Fairfield county, are contiguous village school districts. Would section 4736 or any other section of law permit the boards of education of these two villages to join as one school district?"

In order to answer your question, a consideration of sections 4679, 4682-1 and 4683 of the General Code, as amended in 104 O. L., page 133, are necessary, in addition to section 4736 to which you refer in your letter. These sections are as follows:

> "*Section* 4679. The school districts of the state shall be styled, respectively, city school districts, village school districts, rural school districts and county school districts.
>
> "*Section* 4682-1. A village school district containing a population of less than fifteen hundred may vote at any general or special election to dissolve and join any contiguous rural district. After approval by the county board such proposition shall be submitted to the electors by the village boards of education on the petition of one-fourth of the electors of such village school district or the village board may submit the proposition on its own motion and the result shall be determined by a majority vote of such electors.
>
> "*Section* 4683. When a village school district is dissolved, the territory formerly constituting such village district shall become a part of the contiguous rural district which it votes to join in accordance with section 4682-1, and all school property shall pass to and become vested in the board of education of such rural school district.
>
> "*Section* 4736. The county board of education shall as soon as possible after organizing make a survey of its district. The board shall arrange the school according to topography and population in order that they may be most easily accessible to pupils. To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and transfer territory from one rural or village school district to another. A map designating such changes shall be entered on the records of the board and a copy of the resolution and map shall be filed with the county auditor. In changing boundary lines the board may proceed without regard to township lines and shall provide that adjoining rural districts are as nearly equal as possible in property valuation. In no case shall any rural district be created containing less than fifteen square miles. In changing boundary lines and other work of a like nature, the county board shall

ask the assistance of the county surveyor and the latter is hereby required to give the services of his office at the formal request of the county board."

In the absence of any information upon the subject, I assume that both Basil and Baltimore are villages having a population of less than 1,500. If such be the case, then either or both of said village districts may, as provided in section 4682-1, at a special or general election, vote to dissolve such village district. If the vote upon the question of dissolution is in the affirmative, then the village district will be joined to a contiguous rural district and not to a contiguous village district. Before such votes shall be taken, however, the proposition for this dissolution of the village district and union with a rural district, must be submitted to the county board of education for its approval. You will notice that the statutes above referred to very clearly state that when a village district is dissolved, it shall be joined to a contiguous rural district and not to a contiguous village district.

Consideration of section 4736 does not, in my opinion, permit a consolidation of two village districts into a single village district. I quote that portion of this section applicable, which is as follows:

> "The county board of education shall, as soon as possible after organizing, make a survey of its district. The board shall arrange the schools according to topography and population in order that they may be most easily accessible to pupils. *To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and transfer territory from one rural or village school district to another.* * * *"

In my opinion the effect of the above quoted portion of section 4736 merely authorizes the county board of education to transfer a part of one village or rural district to another village or rural district, and does not permit of the consolidation of two village districts. Such transfer is only authorized in order that the schools may be arranged "according to topography and population in order that they may be most easily accessible to pupils."

I am, therefore, of the opinion, and so advise you, that the Baltimore and Basil school districts may not, under section 4736, nor under any other sections of the General Code, unite as one village school district.

Yours very truly,
EDWARD C. TURNER,
Attorney General.

37.

CIVIL SERVICE COMMISSION—MUST DETERMINE MERIT AND FITNESS OF SUPERINTENDENT AND MATRON OF COUNTY CHILDREN'S HOME.

Whether it is practicable to determine merit and fitness of a superintendent and matron of a county children's home, is a question for the civil service commission. When provisional appointment may be made.

COLUMBUS, OHIO, January 29, 1915.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I am addressing to you the following opinion which was requested by Hon. George W. Porter, prosecuting attorney of Darke county, Ohio, as follows:

"I would like to have your opinion as to whether or not the superintendent of the county children's home is employed under the civil service law?

"The superintendent of our county children's home has tendered his resignation to take effect March 1. The board is of the opinion that it would be impossible to hold an examination under the civil service law for application to this position, in time to make an appointment under this law before his resignation took effect. This being the case, would it be permissible for the board to appoint a person temporarily to fill the position until a civil service examination could be held? I understand that there is some doubt as to whether this is a civil service position, that Attorney General Hogan ruled that this position did not come under civil service. I am not sure about this."

In the letter when he states "the board is of the opinion that it will be impossible to hold an examination, etc.," I assume that he is referring to the board of trustees of the children's home, rather than to the civil service commission.

If it be a fact that the civil service commission has no one upon its eligible list to certify and it finds that it cannot hold an examination in time to make the proper certification before the resignation of the present superintendent takes effect, then and in that event the board of trustees might make a provisional appointment under subsection 1 of section 14 (G. C. 486-14), which provides as follows:

"Whenever there are urgent reasons for filling a vacancy in any position in the competitive class and the commission is unable to certify to the appointing officer upon requisition by the latter a list of persons eligible for appointment after a competitive examination, the appointing officer may nominate a person to the commission for noncompetitive examination, and if such nominee shall be certified by the said commission as qualified after such noncompetitive examination, he may be appointed provisionally to fill such vacancy until a selection and appointment can be made after competitive examination; but such provisional appointment shall continue in force only until regular appointment can be made from eligible lists prepared by the commission, and such eligible lists shall be prepared within ninety days thereafter. In case of an emergency an appointment may be made without regard to the rules of this act, but in no case to continue longer than ten days, and in no case shall successive emergency appointments be made."

Answering your second question as to whether such a position is under civil service and whether Attorney General Hogan had made a ruling upon this position, I beg to advise you, first, that Attorney General Hogan has made no ruling upon the questions herein involved so far as I can find from an examination of the files.

Further answering I quote an opinion of Hon. Robert P. Duncan, prosecuting attorney of Franklin county, to the board of trustees of the Franklin county children's home, which opinion I adopt and approve, to wit:

"I have your favor of January 6, 1915, in which you ask my opinion as follows:

" 'First. In selecting a superintendent is the board of trustees of the children's home governed by civil service rules?

" 'If so, please kindly advise the trustees as to the method in which they should proceed, and the duties devolving upon them, in regard to such selection.

"'Second. Is the selection of the matron for the children's home governed by civil service rules?

"'If so, please advise as to the duties and proper course to pursue, by the trustees, and oblige.'

"Pertinent to the inquiries made in your communication, I note that statutory provisions which have been carried into the General Code as sections 3077 to 3081, inclusive, provide for the establishment of a county children's home and its management by a board of trustees to be appointed by the county commissioners.

"Sections 3084, 3085 and 3086, General Code, provide as follows:

"'Sec. 3084. The board of trustees shall designate a suitable person to act as superintendent of the home, who shall also be clerk of such board, and who shall receive for his services such compensation as the board of trustees designates at the time of his appointment. He shall perform such duties, and give security for their faithful performance, as the trustees require.

"'Sec. 3085. Subject to such rules and regulations as the trustees prescribe, the superintendent shall have entire charge and control of such home and the inmates therein. Upon the recommendation of the superintendent, the trustees may appoint a matron, assistant matron, and teacher, whose duties shall be the care of the inmates of the home and to direct their employment, giving suitable physical, mental and moral training to them. Under the direction of the superintendent, the matron shall have the control, general management and supervision of the household duties of the home, and the matron, assistant matron and teacher shall perform such other duties, and receive for their services such compensation as the trustees may by by-laws from time to time direct. They may be removed at the pleasure of the trustees, or a majority of them.

"'Sec. 3086. The superintendent may suspend temporarily a matron, assistant matron, or teacher, notice of which must be immediately given to the board of trustees for their approval or disapproval, but, if in their judgment it is for the best interest of the home and of the county, the trustees may dispense with a superintendent and authorize the matron to assume entire charge of the home and its management.'

"It follows from a consideration of the statutory provisions above noted that a children's home established and managed as therein provided is in every respect a county institution and that the superintendent and matron of such institution are county employes. *State ex rel. v. McGonagle,* 5 O. C. C. (n. s.), 292.

"Section 1 of an act entitled 'An act to regulate the civil service of the state of Ohio, the several counties, cities and city school districts thereof' (103 O. L., 698), provides:

"'The term "civil service" includes all officers and positions of trust or employment, including mechanics, artisans and laborers in the service of the state and the counties, cities and city school districts thereof.'

"'The "state service" shall include all such offices in the service of the state or the counties thereof, except the cities and city school districts?

"Section 2 of said act provides as follows:

"'On and after January 1, 1914, appointments to and promotion in the civil service of this state and the counties, cities and city school districts

thereof shall be made only according to merit and fitness to be ascertained as far as practicable by examinations which, as far as practicable, shall be competitive; and on and after January 1, 1914, no person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted or reduced as an officer or employe in the civil service under the government of this state, the counties, cities and city school districts thereof, in any manner or by any means other than those prescribed in this act.'

"Section 8 of said civil service act provides in part as follows:

" 'The civil service of the state of Ohio and the counties, cities and city school districts thereof shall be divided into the unclassified service, and the classified service.

" 'The unclassified service shall comprise the following positions which shall not be included in the classified service, except as otherwise provided in section 19 hereof:

" '1. All officers elected by popular vote.

" '2. All heads of principal departments, board and commissions appointed by the governor or by and with his consent or by the mayor, or if there be no mayor such other similar chief appointing authority of any city or city school district.

" '3. All officers elected by either or both branches of the general assembly.

" '4. All election officers.

" '5. All commissioned, noncommissioned officers and enlisted men in the military service of the state.

" '6. All presidents, superintendents, directors, teachers and instructors in the public schools, colleges and universities; the library staff of any library in the state supported wholly or in part at public expense.

" '7. Two secretaries or assistants or clerks for each of the elective and principal executive officers, boards or commissions, except civil service commissioners, authorized by law to appoint such a secretary, assistant or chief clerk.

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

" '9. Bailiffs of courts of record.

" '10. Employes and clerks of boards of deputy state supervisors and inspectors of elections.'

"This section further provides that the *classified service* shall comprise all persons in the employ of the state, the counties, cities and city school districts thereof not specifically included in the unclassified service, to be designated as the competitive class. And further provides as follows:

" 'The competitive class shall include all positions and employments now existing or hereafter created in the state, the counties, cities and city school districts thereof, for which it is practicable to determine the merit and fitness of applicants by competitive examinations. Appointments shall be made to, or employment shall be given in, all positions in the competitive class that are not filled by promotion, reinstatement, transfer or reduction, as provided in sections 15, 16 and 17 of this act and the rules of the commission by appointment from those certified to the appointing officer in accordance with the provisions of section 13 of this act.'

"Section 2 of section 14 of the civil service act provides as follows:

> "In case of vacancy in a position in the competitive class where peculiar and exceptional qualifications of a scientific, managerial, professional, or educational character are required, and upon satisfactory evidence that for specified reasons competition in such special case is impracticable and that the position can best be filled by a selection of some designated person of high and recognized attainments in such qualities, the commission may suspend the provisions of the statute requiring competition in such case, but no suspension shall be general in its application to such place, and all cases of suspension shall be reported in the annual report of the commission with the reasons for the same.'

"It is apparent from the foregoing provisions of the civil service act that the positions of superintendent and matron of a county children's home are not in the unclassified service, and not being so included in the unclassified service they are, by the express provisions of section 8 of said act, included in the classified or competitive class, and being in the competitive class as defined by the statute, incumbents must be appointed after competitive examination unless it be determined that it is not practicable to determine the merit and fitness of applicants for these positions by competitive examinations, or unless, as provided for in section 14 of the act, these positions call for peculiar and exceptional qualifications of a scientific, managerial, professional, or educational character such as would make competition for those positions or either of them impracticable.

"Whether or not, within the purview of the provisions of sections 8 and 14 of the civil service act, it is practicable to determine the merit and fitness of applicants for either the position of superintendent of the children's home or the position of matron thereof, is, in my opinion, a question to be determined by the state civil service commission. At any rate, I am unable to say, as a matter of law, on a consideration of the provisions of this act, that the merit and fitness of applicants for these positions cannot be determined by competitive examination.

"Having arrived at the foregoing conclusion, it follows that in the event of a vacancy in either the office of superintendent or matron of your institution, it is your duty, under the provisions of section 13 of the civil service act, to notify the state civil service commission of the fact of such vacancy or vacancies, which commission, unless it determines that said positions or either of them can be filled by promotion as provided for in section 15 of the act, will certify to your board the names and addresses of three candidates for each of said positions standing highest on the eligible list; or if there be no eligible list for said positions or either of them, the state civil service commission will certify to you names from eligible lists most nearly appropriate for the groups in which the position to be filled is classified. In this connection I note that section 14 of the act provides that if there are urgent reasons for filling a vacancy in any position in the competitive class and the commission is unable to certify to the appointing officer—in this case the board of trustees—upon requisition by the latter a list of persons eligible for appointment after competitive examination, the appointing officer—in this case your board—may nominate a person to the commission for non-competitive examination, and that if such nominees shall be certified by the civil service commission as qualified, after such noncompetitive examination, such person may be appointed provisionally to fill such vacancy until a selection and appointment can be made after competitive examination."

Respectfully,
EDWARD C. TURNER,
Attorney General.

38.

THE DATE FOR SPECIAL ELECTIONS UNDER AUTHORITY OF SECTION 4227-5, GENERAL CODE, IS ON THE FIFTH TUESDAY AFTER THE PETITION IS FILED.

Special elections under the provisions of section 4227-5, G. C., are thereby required to be held on the fifth Tuesday after the petition is filed with the city auditor, if in a city, or with the village clerk, if in a village.

COLUMBUS, OHIO, January 30, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—In yours of January 28, 1915, you refer for opinion, communication from the chief deputy supervisor of elections of Hamilton county, Ohio, in which it is stated that the city council of Cincinnati passed an ordinance, which is now to be referring to the electors of said city for approval or rejection, under the provisions of section 4227-5, General Code, as amended in 104 O. L., page 239, and submitting for an opinion the following:

> "Shall said election be held on the fifth Tuesday after the petition is filed with the city auditor or on the fifth Tuesday after certification to the board of deputy state supervisors of elections?"

That section of the statute determining this matter and to which you refer, is as follows:

> "*Section* 4227-5. Whenever twenty per cent. of the electors of any municipality file a petition with the city auditor if it be a city, or village clerk, if it be a village, proposing or against an ordinance or other measure requesting in the petition that the ordinance or measure be submitted to the electors of the municipality at a special election. the auditor or village clerk, after ten days, shall certify the same to the board of deputy state supervisors of elections who shall submit the same at a special election to be held on the fifth Tuesday after the petition is filed. The petition shall not be submitted at a special election if a regular or general election will occur not later than ninety days after the petition is filed but shall be submitted at the regular or general election."

This language, it seems, is clear and unequivocal. There is but one provision therein requiring or in any way referring to the filing of such petition, and that is the requirement that the petition be filed with the city auditor. While it is further provided that such petition shall afterwards be certified to the deputy state supervisor of elections, no reference is any where made to a filing with the deputy state supervisors of elections, nor requiring the same.

I am, therefore, of the opinion that the day provided for the election is the fifth Tuesday after the petition is filed with the city auditor or village clerk.

Very respectfully,
EDWARD C. TURNER,
Attorney General.

39.

JOINT OR SEVERAL BOND WITH TWO BONDING OR SURETY COMPANIES IS REQUIRED FOR A COUNTY TREASURER.

Under the provisions of section 2633, G. C., as amended 103 O. L., 540, a joint and several bond is required and at least two or more bonding or surety companies must appear on a bond for county treasurer.

COLUMBUS, OHIO, January 30, 1915.

HON. S. W. ENNIS, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—I am in receipt of your favor of January 22, which is as follows:

> "In accordance with the provisions of section 2633 of the General Code, as amended in volume 103, pages 540 and 541 of the session laws of Ohio, can a county treasurer furnish two bonds with one surety company on each, or is he required to furnish one bond with two surety companies on same?
>
> "Our county treasurer has procured two $25,000.00 bonds each signed by one surety company, and before approving the bonds, I would like to have your opinion upon the same and whether or not they are in strict accordance with the above statute as amended."

Replying to your letter, I have to advise that in view of the provisions contained in section 2633 of the General Code, as amended in 103 Ohio Laws, page 540, as follows:

> "Before entering upon the duties of his office, the county treasurer shall give bond to the state in such sum as the commissioners direct with two or more bonding or surety companies as surety, or at his option, with four or more free-hold sureties. * * *"

It is my opinion that the legislature intended that the bond of the treasurer referred to in the act was to be one joint and several bond with two or more bonding or surety companies as surety, and that each of the surety companies signing the bond would be held liable for the full amount of the bond.

This opinion is in harmony with one rendered by my predecessor, Honorable Timothy S. Hogan, on the same question.

I have to advise you, therefore, that unless the bond of the treasurer submitted for your approval contains the names of at least two bonding or surety companies as surety, it should be rejected as not coming within the provisions of section 2633 of the General Code, as amended in 103 Ohio Laws, page 540.

Respectfully yours,
EDWARD C. TURNER,
Attorney General.

40.

PRIVATE BANKS MAY BID FOR STATE FUNDS UNDER AUTHORITY OF SECTION 744-12, G. C.

Private banks may not bid for state funds under an act to provide for a depository for state funds, but they may bid for state funds under section 744-12, G. C.

COLUMBUS, OHIO, January 30, 1915.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of the 25th inst, requesting my written opinion upon the following inquiry:

> "Do private banks have the same right to bid for state funds as the national banks and trust companies and banks organized under the laws of the state of Ohio under the depository law described as 'An act to provide a depository for state funds?'"

Section 3 of this act, (section 323 of the General Code) provides that the board of deposits shall meet "and designate such national banks within the state, and banks and trust companies doing business within this state and incorporated under the laws thereof, as the board deems eligible to be made such depositories."

Your question presents for determination whether or not the word "bank," as used in this section, includes "private banks." The word "bank," as used in this act, clearly means an organization incorporated under the laws of Ohio and having special privileges or authority from the state, and subject to such regulation as may be imposed upon it by law. A "private bank" does not imply incorporation nor the having of special privilege or authority from the state. Therefore, a private bank would not seem to come within the purview of this act. However, the legislature has seemingly made clear the line of demarcation between a bank and a private bank. In the county depository act, section 2715 of the General Code, the legislature provided that the county funds shall be deposited in a bank or banks or trust companies situated in the county and duly incorporated under the laws of this state. Then follows the provision:

> "In a county where such bank or trust company does not exist, or fails to bid * * * the commissioners shall designate a private bank or banks located in the county."

It therefore follows from this legislation that private banks have not the right to bid for state funds as national banks and trust companies and banks organized under the laws of the state of Ohio may have, unless said inhibition is rendered null and inapplicable as to private banks by reason of the later act of the general assembly found in volume 103, Laws of Ohio, at page 379, the title of which is "To provide for the examination, regulation, supervision and dissolution of certain banking concerns." Section 13 of this act (section 744-12 of the General Code) contains the following provision:

> "That whenever any of the funds of the state, or of any of the political subdivisions of the state, shall be deposited under any of the depository laws of the state, every corporation, person, partnership and association coming within the purview of this act shall be permitted to bid upon and

be designated as depositories of such funds, upon furnishing such surety or securities therefor as is prescribed by the laws of the state of Ohio; * * *"

From the title and text of this later act of April 17, 1913, its obvious purpose seems to be that of regulating private banks, requiring them to discard the use of the name "bank" or else submit to examination, regulation, supervision and dissolution by the state. This enactment is in accordance with authority found in article XIII, section 3 of the constitution of Ohio existing at the time of its enactment.

The provision contained in said section 13, is contrary to the provisions relating to depositories of state and county moneys subject to deposit and found in the state and county depositories acts. Notwithstanding this fact, however, I am of the opinion that because of the constitutional authority aforesaid and the provisions contained in said section 13 subsequently enacted, a private bank conducted by a person, partnership or association by complying with the requirements set forth in this act of April 17, 1913, will be permitted to bid upon and be designated as a depository of the funds of the state or on any political subdivision of the state.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

41.

THE PROPOSITIONS OF CENTRALIZATION OF SCHOOLS AND ISSUING OF BONDS MAY BE SUBMITTED AT ONE ELECTION.

A proposition for the centralization of schools under the provisions of section 4726, G. C., and a proposition to issue bonds authorized by section 7625, G. C., may both be submitted to the electors of a rural school district at one election.

COLUMBUS, OHIO, January 30, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Under date of January 21st, Mr. W. I. Everson, county superintendent, Brilliant, Ohio, submitted for an opinion the following question:

"Is it necessary to hold two elections in order to decide on centralization and the issuing of bonds, or can this be decided at one election?"

I assume that the bonds referred to are deemed necessary to the furtherance of the scheme of centralization, and I shall confine my answer to such state of facts.

I am of the opinion that the question of centralization of schools as provided in section 4726, G. C., as amended in 104 O. L., 139, and the question of the issuance of bonds as authorized by section 7625, G. C., may both be submitted to the electors of a rural school district at one election. It might be suggested, however, that before the issue of such bonds would thereby be authorized, there must be a concurrence of a majority of the votes cast at such election in favor of both centralization and the issuing of bonds, and the answer implies that the election shall be in all further respects in compliance with the statutes relative thereto.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

42.

THE COUNTY BOARD OF EDUCATION HAS AUTHORITY TO DETACH AND THEN ADD A PART OF A RURAL SCHOOL DISTRICT TO ANOTHER DISTRICT.

Under section 4736, G. C., the county board of education has the authority to rearrange boundary lines so as to detach one part of a rural school district and add it to another rural or village district.

COLUMBUS, OHIO, January 30, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of January 19, 1915, in which you ask for my opinion upon the following statement of facts:

> "Sections 4692, 4696 and 4736 of the General Code, deal with the transfer of territory from one school district to another.
>
> "Waterford rural school district, Washington county, contemplates the issuance of bonds. Waterford formed a separate supervision district according to section 4740 of the General Code. Beverly, a village district entirely surrounded by Waterford rural district, desired to be a part of a supervision district. But the law requires that a supervision district be contiguous. To that end the county board of education of Washington county transferred a part of the Waterford district to the Beverly school district for all school purposes. This part transferred gave the Beverly district connection with the remaining part of the Washington county school district, other than that of the Waterford school district. The Waterford board of education contends that since they are a separate supervision district, the county board of education acted without authority."

You then ask to be advised whether or not the county board of education acted within its authority in the transfer of this territory.

I call your attention especially to section 4736 of the General Code, as found in 104, O. L., at page 138, as follows:

> "*Section* 4736. The county board of education shall as soon as possible after organizing make a survey of its district. The board shall arrange the schools according to topography and population in order that they may be most easily accessible to pupils. To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and transfer territory from one rural or village school district to another. A map designating such changes shall be entered on the records of the board and a copy of the resolution and map shall be filed with the county auditor. In changing boundary lines, the board may proceed without regard to township lines and shall provide that adjoining rural districts are as nearly equal as possible in property valuation. In no case shall any rural district be created containing less than fifteen square miles. In changing boundary lines and other work of a like nature, the county board shall ask the assistance of the county surveyor and the latter is hereby required to give the services of his office at the formal request of the county board."

I assume that the action taken by the county board of education of Washington county was in accordance with the authority given them by the above quoted section. If such be the case, the county board of education was clearly within its rights in taking a portion of the Waterford school district and joining it to the Beverly school district in order to provide a supervision district for the Beverly school district, provided, however, that there remains in Waterford rural school district a territory of not less than fifteen square miles.

Sections 4692 and 4696 do not, in my opinion, apply to the question involved by your statement of facts. These sections have reference to a transfer of territory from one school district to another by action of the local boards of education of such districts and by annexation of territory to a city or village.

I am, therefore, of the opinion, and so advise you, that from the statement of facts as outlined above, the county board of education of Washington county acted within its authority in transferring the territory involved.

Yours very truly,
EDWARD C. TURNER,
Attorney General.

43.

A FIRE INSURANCE COMPANY ORGANIZED UNDER THE LAWS OF OHIO IS NOT AUTHORIZED TO CONSOLIDATE WITH A LIKE COMPANY OF ANOTHER STATE.

Section 9544, G. C., does not authorize the consolidation of a fire insurance company organized under the laws of Ohio with like companies incorporated under the laws of another state.

COLUMBUS, OHIO, January 30, 1915.

HON. PRICE RUSSELL, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Under date of January 25, 1915, you submit for my opinion the following questions:

> "1st. Does section 9544, General Code, laws of Ohio, permit the consolidation of a fire insurance company organized under the laws of Ohio with a fire insurance company organized under the laws of Illinois and admitted to do business in Ohio?
>
> "2nd. Does said section 9544, General Code, laws of Ohio, permit the consolidation of a fire insurance company organized under the laws of Ohio with a fire insurance company organized under the laws of Illinois and *not* admitted to Ohio?"

Sections 8544 and 9545 of the General Code, providing for the consolidation of certain fire and marine insurance companies, are as follows:

> "Section 9544. When a joint stock fire and marine insurance company of this state determines by a vote of the holders of two-thirds of its stock to consolidate and make joint stock with another like company or companies engaged in or incorporated for like business, and each agrees by such vote to the consolidation, the companies by a vote of the holders

of a majority of the stock so consolidated, may determine under which corporate organization or articles of association of the consolidating companies, and under what name, their future business shall be conducted.

"Section 9545. Upon filing with the superintendent of insurance, a certificate of such consolidation, the companies thenceforth shall be consolidated under the corporate organization or articles of association and corporate name chosen. (Thereupon also all franchises, rights, equities, property, and estate of whatever name or nature, belonging to or vested in either of the consolidating companies, immediately, upon and by the act of such consolidation shall become the property and estate of and be vested in the consolidated company, and the corporate existence of the consolidating companies thenceforth cease, and be merged in the consolidation.) Such consolidated company shall have the exclusive right and power to demand, sue for, collect, convey, and dispose of the rights, equities, property, and estate aforesaid, or any part thereof, under its own name, and all debts, liabilities and obligations of the consolidating companies shall be assumed and paid by it."

The language of section 9544 is somewhat ambiguous, and your question involves a determination of the meaning and comprehensiveness of the expression therein "and other like companies or companies engaged in or incorporated for like business." Does the word "like" as first used in the quoted language mean only that such other company or companies must be joint stock fire and marine companies; or does it mean that they must be joint stock fire and marine companies *of this state?*

I believe that the legislative intent is clearly shown in the language of section 9545, above quoted, which prescribes the rights and duties of the consolidated companies. In the second sentence of this section, it is provided that:

"Thereupon also all franchises, rights, equities, property, and estate of whatever name or nature, belonging to or vested in either of the consolidating companies, immediately upon and by the act of such consolidation shall become the property and estate of and be vested in the consolidated company, and the corporate existence of the consolidating companies thenceforth cease, and be merged in the consolidation."

If the above section authorizes the consolidation of an Ohio company with a company of another state, then the state of Ohio is in the position of having enacted a law which arbitrarily disposes of all "franchises, rights, etc.," of a corporation created by another state without consulting or taking into consideration the laws of such other state. This state may undoubtedly pass laws relative to corporations created by it and even deprive such corporations of their legal existence, but I know of no method by which it can attain that result in regard to corporations created by another state. That law should be interpreted so as to give it meaning and effect and not so as to place the law-making body in the position of attempting the impossible.

I am of the opinion, therefore, that section 9544 of the General Code, was intended to apply only to Ohio corporations, and I answer both questions one and two of your inquiry in the negative.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

44.

ARTICLES OF INCORPORATION—THE NORTON MUTUAL FIRE ASSOCIATION.

Certificate of amendment of the articles of incorporation of The Norton Mutual Fire Association disapproved.

COLUMBUS, OHIO, January 30, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return, herewith, the certificate of amendment of the articles of incorporation of The Norton Mutual Fire Association which has been sent to me for my examination and action upon the supposition that the same is required by law.

I do not believe that the law requires that the attorney general certify to amendments to articles of incorporations of mutual protective associations (which I suppose the company is). Be that as it may, however, I am unable on purely technical grounds, to approve the certificate of amendment. Such grounds are as follows:

(1) The certificate does not state that notice of the business to come before the meeting was given, as provided by section 8720, General Code.

(2) The certificate being silent in respect to notice, it does not appear that all the members of the corporation were present at the meeting which was held, and in writing consented to the waiver of the notice, as authorized by section 8723, General Code.

(3) The certificate of amendment was not sealed with the seal of the corporation, nor is it stated that the corporation has no seal, whereas section 8721, General Code, requires that if there be a seal the certificate shall be sealed with it.

I have no doubt that these details can be supplied by the president and secretary of the corporation, but without them I could certainly not certify that the amendment has been made in conformity to the laws of the state.

Yours very truly,
EDWARD C. TURNER,
Attorney General.

45.

CLERK OF THE BOARD OF EDUCATION OF A CITY SCHOOL DISTRICT PERFORMS THE DUTIES OF TREASURER WHEN A DEPOSITORY HAS BEEN PROVIDED.

When a depository has been provided by a city board of education for its school funds, as authorized by law, the board of education of the district must dispense with the treasurer, and the clerk of the board of the city school district performs all the services and duties of such treasurer.

COLUMBUS, OHIO, January 30, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Under date of January 20, 1915, you submit to this department the following question:

> "When a depository has been provided by a city board of education for its school funds, shall the clerk of the board of education act as

treasurer, or shall the treasurer or director of finance of the city funds act as the treasurer of the school funds?"

The first two lines of section 4763, General Code, as amended in 104 O. L., 159, provide that:

> "In each city school district, the treasurer of the city funds shall be the treasurer of the school funds. * * *."

It is also provided in section 4782, General Code, as amended in 104 O. L., p. 159, that:

> "When a depository has been provided for the school moneys of a district, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members, shall dispense with a treasurer of the school moneys, belonging to such school district. In such case, the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school districts."

The provisions of section 4783, General Code, have an important bearing on this question, which section provides as follows:

> "When the treasurer is so dispensed with, all the duties and obligations required by law of the county auditor, county treasurer or other officer or person relating to the school moneys of the district, shall be complied with by dealing with the clerk of the board of education thereof. Before entering upon such duties, the clerk shall give additional bond equal in amount and in the same manner prescribed by law for the treasurer of the school district."

When the provisions of these three sections are considered together, I am of the opinion that when a depository has been provided as authorized by law, the board of education of the district must dispense with the treasurer, and that the clerk of the board of education of the city school district performs all the services and duties of such treasurer.

Yours very truly,
EDWARD C. TURNER,
Attorney General.

46.

BOARD OF EDUCATION SHOULD CANVASS THE VOTES OF A SPECIAL ELECTION FOR THE ISSUANCE OF BONDS FOR ERECTION OF A SCHOOL HOUSE.

The vote at a special election at which is submitted a proposition for the issuance of bonds for the erection of a school house, is governed by section 5120, *G. C., and should be canvassed by the board of education of the district as therein provided.*

COLUMBUS, OHIO, February 1, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have yours of January 28, 1915, referring for an opinion a communication addressed to you by the clerk of the deputy state supervisors of elections of Seneca county, which is in part as follows:

"Section 5115 of the General Code says: In registration cities, the returns of the election of municipal officers, members of boards of education or justices of the peace shall be made to the board of deputy state supervisors of the county in which such city is located, and canvassed by a board of canvassers consisting of such board of deputy state supervisors and the city auditor.

"Does this section apply to special elections such as a bond election for erection of a school house or is the canvass to be made by the school board?"

It will be observed that the section above quoted is specific in its terms, obviously confining its application to the officers therein enumerated, viz., municipal officers, members of boards of education or justices of the peace, and that there is nothing therein contained that would warrant an inference of legislative intent to include under the provisions of this section other officers or matters not therein specifically mentioned. It therefore follows that the provisions of this section apply only to the election of municipal officers, members of boards of education and justices of the peace, and that a special election for bond issue as mentioned to you, does not under any fair or reasonable construction of the language in this section contained, come within its terms. The solution of the problem submitted by you, however, involves the consideration of a further section of the statute, relative to the canvassing of election returns, as follows:

"*Section* 5120. In school elections, the returns shall be made by the judges and clerks of each precinct to the clerk of the board of education of the district, not less than five days after the election. Such board shall canvass such returns at a meeting to be held on the second Monday after the election, and the result thereof shall be entered upon the records of the board."

This section, it will be observed, is general in its terms, purporting to contemplate all "school elections." I assume that it would not be seriously questioned that a special election submitting a proposition for a bond issue, for the erection of a school house, is a school election within the meaning of that phrase as used in section 5120, G. C., just quoted. The rule of construction of statutes of the character of those now under consideration, is clearly stated by the court in the case of Doll v. Barr, 58 O. S., at page 120, as follows:

"Where there are in one act, specific provisions relating to a particular subject, they must govern in respect to that subject, as against general provisions in other parts of the statute, although the latter, standing alone would be broad enough to include the subject to which the more particular relate."

and,

"If there are two acts, or two provisions of the same act, of which one is special and particular, and clearly includes the matter of controversy, whilst the other is general and would, if standing alone, include it also, and if reading the general provisions side by side with the particular one, the inclusion of that matter in the former would produce a conflict between it and the special provision, it must be taken that the latter was designed as an exception to the general provision."

While an election of the members of the board of education, in my opinion, would come within the meaning of the term "school election," and but for the provisions of section 5115, General Code, would be governed by the provisions of section 5120, General Code, applying the above rule of construction to the provisions of these above quoted sections, section 5115, General Code, constitutes only an exception insofar as the election of members of boards of education is concerned, to the provisions of section 5120, General Code.

I am, therefore, of the opinion that the canvass of the vote at a special election at which is submitted a proposition for the issuance of bonds for the erection of a school house, is governed by section 5120 of the General Code and should, therefore, be canvassed by the board of education of the district as therein provided.

Yours very truly,
EDWARD C. TURNER,
Attorney General.

47.

THE CITY COUNCIL HAS THE RIGHT TO INCREASE THE SALARY OF POLICEMEN AND FIREMEN AFTER APPOINTMENT.

The city council has the right to increase the salary of policemen and firemen, after appointment. State ex rel. Ferris v. Bish, 12 O. N. P. n. s. 369; State v. Coughlin, Auditor, 12 O. N. P. n. s., 419; distinguishing the case of State ex rel Spaller v. Moody, Auditor, et al., 85 O. S., 483, affirming State ex rel Spaller v. Painesville, 13 O. C. C. n. s., 577, followed.

COLUMBUS, OHIO, February 1, 1915.

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

DEAR SIRS:—Under date of January 15, 1915, we received a communication from Honorable H. W. Koons, City Solicitor, Mt. Vernon, Ohio, in which he requested our opinion in the following matter:

> "May I ask you to give me an opinion on the right of the city council to raise the salary of persons at the present time holding positions of firemen, under the safety department, and patrolmen under the same department, assuming that both are within the classified service."

Section 4213, General Code, provides as follows:

> "The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

As the matter is one which is of general importance throughout the state, we feel that the opinion should be addressed to your department.

The question immediately arises as to whether or not a policeman or a fireman is an officer, clerk or employe of the city, and secondly, whether or not they can be considered as holding a "term." There can be but little doubt that the position of a policeman and a fireman is within the comprehension of the terms "officer,"

"clerk" or "employe." However, a policeman or fireman, when appointed is appointed during good behavior, and there is no definite term for which he serves. I do not believe that the word "term," as used in section 4213, contemplates a position, which would be a life position, provided the incumbent was not sooner discharged for cause.

I am mindful of the fact that the circuit court, in the case of State ex rel. Spaller v. City of Painesville et al., 13 O. C. C. n. s. 577, held:

> "A duly appointed patrolman of the police department of a city is an officer within the meaning of the laws of Ohio.
>
> "A city council has no power to increase or diminish the salary of a police officer, appointed under the civil service provisions of the municipal code, during the term for which he was appointed which is during good behavior."

and that such case was affirmed by the supreme court without report on January 16, 1912. (85 O. S., 483.)

Subsequent to the decision of the supreme court, in affirming the circuit court in such case, it was held by Judge Sprigg, of the common pleas court of Montgomery county, in the case of State ex rel. Ferris, et al., v. Bish, Auditor, decided March 9, 1912, and reported in 12 O. N. P. n. s., page 369:

> "Policemen and firemen do not hold their positions for a fixed and definite term, and hence are not subject to the provisions of section 4213, P. & A. Anno. General Code, which forbids the increase or diminishing of salaries of officers, clerks or employes of a municipality during the term for which they were appointed or elected.
>
> "A municipal council has authority to pass an ordinance providing for the number, salaries, and bonds of members of the police department, repealing at the same time the former ordinance, under which the department was operated; and where such action is taken by council all members of the police force lose their positions as of the date of the repeal of the former ordinance under which the department was theretofore operated, this method of removal being excluded under section 4484, P. & A. Anno. General Code, which refers only to individual removals for cause; and it thereafter becomes the duty of the board of public safety to appoint members of the force under the contemplated reorganization and upon such terms as council has provided."

Judge Lawrence of the court of common pleas, Cuyahoga county, in the case of Stage v. Coughlin, Auditor, et al., decided March 15, 1912, and reported in the 12th N. P. n. s., 419, held:

> "Members of the police and fire departments of a municipality are not appointed for a 'term' within the meaning of section 4213, P. & A. Anno. General Code, and having no fixed or definite term the restriction as to changes in salaries does not apply to them, and council has power to increase or diminish their salaries after appointment."

Both of these cases, as before stated, were decided after the decision of affirmance of the supreme court in the case of State ex rel. Spaller v. Painesville, and both of said cases the courts of common pleas distinguished the said Painesville case, and I think, properly so. The right to a writ of mandamus must be

clearly established, and the supreme court, in simply affirming the judgment of the circuit court of Lake county, did not necessarily affirm the reasoning as found in said case in said court.

I would call your attention to the discussion of the Painesville case as found in the decision of Judge Sprigg, beginning at page 375 of the report in which it appears, and also the reasoning of Judge Lawrence found in the same report at page 421. Both of said judges clearly recognize that whether or not a police officer has a term of office, as understood by the use of such word in section 4213, the Painsville case would have had to have been decided as it was.

I will not undertake to discuss the facts in the Painsville case, for the reason that they are clearly set forth in the two discussions mentioned. However, I am of the opinion that the reasoning of both Judge Sprigg and Judge Lawrence is correct, and that therefore the inhibition of the increase of salary, found in section 4213, does not apply to policemen and firemen, and fully concur in the opinion rendered to the Honorable Ben L. Bennett, city solicitor, East Liverpool, Ohio, under date of May 18, 1912, by my predecessor, Honorable Timothy S. Hogan.

Respectfully,
EDWARD C. TURNER,
Attorney General.

48.

DISTRIBUTION OF ESCHEATED PERSONAL PROPERTY—MONEY RECEIVED FROM SUCH PROPERTY SHOULD BE CREDITED TO CONTINGENT FUND.

Distribution of escheated personal property to schools of a county, collected under section 8579, G. C., is to be made as provided for the state common school fund under section 7600, G. C., as said section stands, when the money is paid into the county treasury.

Money received from escheated personal property should be credited to the contingent fund of the school district, when received under section 7603, G. C.

COLUMBUS, OHIO, February 1, 1915.

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

DEAR SIRS:—Under date of January 15, 1915, you inquire as follows:

> "Section 8579, General Code, provides for the distribution of escheated personal property to schools of the county. Shall the distribution be based on the tax valuation of the different districts, on the school enumeration, or on the average daily attendance? To what statutory school fund, or funds, should the money be credited?"

Section 8579, General Code, provides as follows:

> "If there be no person living to inherit it by the provisions of this chapter, such personal property shall pass to and be vested in the state. The prosecuting attorney of the county, in which letters of administration are granted upon such estate, shall collect and pay it over to the

treasurer of such county; to be applied exclusively to the support of the common schools of the county in which collected, in such manner as is prescribed by law."

It will be noted, therefore, that the title to the personal property which escheats is vested in the state of Ohio, but that the duty is placed upon the prosecuting attorney of a county to collect it and pay it into the county treasury, and that the same shall be applied exclusively to the support of the common schools of such county. In other words, although the title vests in the state of Ohio, yet, such money goes into the county treasury for the support of the common schools, and there is no provision of law making any specific appropriation of said sums after the same reaches the county treasury.

So much of section 7600 as is pertinent to the question involved, is found in the last sentence of said section, which reads as follows:

"All other money in the county treasury for the support of common schools, and not otherwise appropriated by law, shall be apportioned annually in the same manner as the state common school fund."

The language, above quoted, was not changed by the amendment found in 104, O. L., 159.

We find, therefore, that by reason of section 8579 and section 7600, the property received under section 8579 is to be apportioned in the same manner as the state common school fund.

Further, in section 7600 it is provided:

"After each annual settlement with the county treasurer, each county auditor shall immediately apportion the school funds for his county. The state common school fund must be apportioned in proportion to the enumeration of youth in each of the several school districts within the county, except if an enumeration of the youth of any district has not been taken and returned for any year, such district shall not be entitled to receive any portion of such fund."

That part of section 7600, just quoted, was amended in 104 O. L., 159, to read as follows:

"After each annual settlement with the county treasurer, each county auditor shall immediately apportion school funds for his county. The state common school funds shall be apportioned as follows:

"Each school district within the county shall receive thirty dollars for each teacher employed in such district, and the balance of such funds shall be apportioned among the various school districts according to the average daily attendance of pupils in the schools of such districts. If an enumeration of the youth of any district has not been taken and returned for any year and the average daily attendance of such district has not been certified to the county auditor such district shall not be entitled to receive any portion of that fund."

The question submitted by you is:

"Shall the distribution be based on the tax valuation of the different districts, on the school enumeration, or on the average daily attendance?"

In view of the statutes, foregoing quoted, I am of the opinion:

First. That the distribution is not based upon the tax valuation of the different districts within the county.

Second. That prior to the going into effect of the amendment of section 7600 (104 O. L., 159), if the money had been collected and paid over to the treasurer of the county before such time, it would, by reason of section 7600, prior to the amendment, have been distributed in accordance with the enumeration of youth.

Third. If the money did not reach the county treasurer until after the going into effect of section 7600, as amended 104 O. L., 159, the distribution would be made on the basis of the average daily attendance.

You also inquire:

> "To what statutory school fund, or funds, should the money be credited?"

This, I think, is clearly answered by the last sentence found in section 7603, General Code, wherein it is stated. "Moneys coming from sources not enumerated herein shall be placed on the contingent fund."

In said section 7603 there is no specific provision for moneys coming from escheated personal property, and, therefor, the same should be placed in the contingent fund.

Yours very truly,
EDWARD C. TURNER,
Attorney General.

49.

EXAMINERS OF THE BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES ARE IN THE UNCLASSIFIED SERVICE.

It cannot be held, as a matter of law, that the state examiners of the bureau of inspection and supervision of public offices are within the unclassified service.

COLUMBUS, OHIO, February 1, 1915.

The State Civil Service Commission of Ohio, Columbus, Ohio.

DEAR SIRS:—Under date of January 25, 1915, the bureau of inspection and supervision of public offices submitted the following inquiry:

> "Are the duties devolving by law upon state examiners of the bureau of inspection and supervision of public offices, as such duties are set forth in sections 284, et seq., of such a nature as to place said officers in the unclassified list of the state civil service?
>
> "The application of the laws of the state to the work of the various public offices requires of said examiners such a general knowledge of law as to render it doubtful whether a qualification of said officials can be determined by written examination."

Under date of May 28, 1914, my predecessor, Hon. Timothy S. Hogan, rendered an opinion to your commission on the same question, and stated at the conclusion thereof, the following:

"It is therefore my conclusion that it cannot be determined as a matter of law that it is impracticable to hold competitive examinations of applicants for the positions of state examiners in the bureau of inspection and supervision of public offices. The question of the practicability of examinations should be determined by the state civil service commission."

I assume that the question has again been submitted to this department because of an opinion rendered by me, under date of January 16, 1915, to your commission, relative to the employes in the office of the governor of this state, wherein I held that, as a matter of law, the secretary to the governor, the executive clerk, the stenographer and all other employes who, from the nature of the service rendered, or by reason of their location in the governor's office are in position to observe the transactions or to obtain information relative to matters that may come legally before the governor, are not within the classified service, for the reason that it is impracticable to determine their merit and fitness by competitive examination. In said opinion I distinctly stated that such opinion applied solely to the governor's office, and based the same on the fact of the peculiar situation in said office and the fact that "it is universally recognized that the premature disclosure of some of the matters that may come before the governor of a state, and particularly the obtaining by interested parties of even a hint of matters pending or the probable action thereon, would be prejudicial to the public welfare."

The governor of the state is in such a position and the matters before him are of such a character as to require each and every employe in his office to be possessed of judgment and discretion.

I cannot say, as a matter of law, that the state examiners of the bureau of inspection and supervision of public offices cannot have their merit and fitness determined by competitive examination, and, therefore, your commission is the proper body to decide whether or not it can determine the merit and fitness of said examiners by a competitive examination.

The question, therefore, is answered in the negative, so far as it can be determined, as a matter of law, that said positions are in the unclassified service.

Respectfully,
EDWARD C. TURNER,
Attorney General.

50.

EXPRESS CHARGES ARE NOT "COSTS" IN A CASE PERMITTED TO BE FILED IN THE SUPREME COURT.

The cost of expressing files and papers in cases permitted to be filed in the supreme court, under order thereof to certify record, are not a part of the costs of the cases and must be advanced by the party seeking a revision in the supreme court.

COLUMBUS, OHIO, February 2, 1915.

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

DEAR SIRS:—I am in receipt of your letter of January 22, 1915, wherein you inquire:

"Who is to pay costs of expressing the files and briefs in cases appealed to the supreme court under the order of the supreme court to certify record?

"First. Is the express charge to be paid by the attorneys taking the case to the supreme court directly; or,

"Second. Is this charge to be taxed as a part of the costs in the court from which the case is appealed; or,

"Third. Are the files to be sent C. O. D., the supreme court paying the expressage, which costs shall then be made a part of the supreme court costs?"

There has been no statutory provision made relative to the paying of the costs of expressing the files and briefs to the supreme court under its order to certify the case, and, consequently, there being no statutory provision to that effect, the same cannot, in any sense, be considered as a part of the costs in the case. The case is brought to the supreme court on *certiori* on application of the party claiming to have been aggrieved by the action of the court of appeals, and it would seem, therefore, to me that such being the case and there being no statutory authority for the charging of the costs of the expressage mentioned, as costs in the case, that the party causing the action of the supreme court, in ordering the case certified to it, should pay the costs of the expressage of the papers, and I would suggest that before expressing the same, the clerk should require the party, causing the same to be brought before the supreme court, to advance the costs of the expressage in such case.

Answering, therefore, your questions submitted, I would say that the express charge is to be paid by the attorneys taking the case to the supreme court and should be paid to the clerk of the courts before he expresses the same to the supreme court.

(2) That the same cannot be taxed as a part of the costs of the case in the court from which the case is appealed.

(3) That the same cannot be charged as a part of the costs of the case in the supreme court.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

51.

THE TOWNSHIP CLERK IS CLERK OF THE BOARD OF EDUCATION UNTIL BOARD OF EDUCATION IS ELECTED AND ORGANIZED, UNDER SECTION 4747, G. C.—COUNTY BOARD OF EDUCATION MAY NOT CREATE A RURAL DISTRICT.

The township clerk remains, ex-officio, the clerk of the township board of education until a board of education has been elected and organized, under the provisions of section 4747, as amended, 104 O. L., 139.

A county board of education may not create a new rural district containing fifteen square miles, from an existing rural district, which leaves the original district containing less than fifteen square miles.

COLUMBUS, OHIO, February 2, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Under date of January 20, 1915, Hon. Harold Houston, prosecuting attorney, Champaign county, submitted to this department request for opinion on the propositions herinafter set out.

For the purpose of uniformity, it is the policy of this office to direct opinions on all matters to the various state departments, as far as possible. I am, therefore, directing to you an opinion covering said inquiry.

> "1st. Where a clerk of the township is serving as clerk of the board of education in a township school district, under the provision of section 4747, General Code, at the time the amendment to said section, as contained in the act of 1914, 104 O. L., page 133, et seq., became effective, does the said act of 1914 operate to vacate the office of the clerk of said board of education, or will said clerk's incumbency continue until the expiration of his term, for which he was elected and be consistent with the provisions of the original section 4747?
>
> "2nd. Can a new rural school district be created under the provisions of the act of 1914, 104 O. L., page 133, et seq., by a county board of education, by a division of a then-existing rural school district, if the result would be to leave the original district, under the original name, with an area of less than fifteen square miles, although the newly created district contains the requisite area?"

Section 4747 as contained in 104 O. L., page 139—act of 1914—provides as follows:

> "The board of education of each city, village or rural school district shall organize on the first Monday in January, after the election of members of such board. One member shall be elected president, one member vice-president and a person who may or may not be a member of the board shall be elected clerk. The president and vice-president shall serve for a term of one year and the clerk for a term not to exceed two years."

The organization of the board of education authorized by the foregoing, amended section 4747, by the express terms thereof, shall take place on the first Monday in January after the election of members of such board pursuant to the provisions of said amended act of 1914. Until there has been an election of members of the board of education under this act, and not before the first Monday in January, after such election of members of such board, the section above quoted does not authorize the organization of boards of education, nor the election of any officers of such boards.

There is nothing in said section purporting to terminate the incumbency of officers of the board of education already occupying such offices.

Section 4747, General Code, in effect previous to the act of 1914, provides:

> "The board of education of each school district shall organize on the first Monday in January after the election of members of such board. One member of the board shall be elected president, one as vice-president and, in township school districts, the clerk of the township shall be clerk of the board. The president and vice-president shall serve for a term of one year and the clerk for a term not to exceed two years. * * *."

It is evident, from the provisions of this section, that the township clerk is effectively constituted the "clerk of the board of education" of such township

school district to serve for the full period of his incumbency of such office of township clerk, provided that he shall not serve for a term to exceed two years.

Section 3299, General Code, provides:

> "A township clerk shall be elected, biennially, in each township, who shall hold his office for a term of two years * * *."

The term of office as clerk of the township and the maximum term for which such clerk may serve as "clerk of the board of education," therefore, seem to be coextensive.

The inquiry contains the information that the clerk in question, at the time the act of 1914 went into effect, was, and still is, serving an unexpired term, and inquiries whether he may continue to serve as "clerk of the board of education" until the expiration of his term as clerk of the township.

Section 4735 of the act of 1914 provides:

> "* * * All officers and members of boards of education of such existing districts shall continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and qualified."

Having reference to the language of the foregoing section and to the fact that the term of office of the clerk of the township, in question, has not expired, it would seem that the said clerk of the township, by authority of the law, continues to be "clerk of the board of education" until the expiration of his term. There seems to be no provision of the law which would have the effect to terminate the incumbency of such clerk in the office of "clerk of the board of education."

It is, therefore, my conclusion that the township clerk continues to be ex-officio "clerk of the board of education" until the organization of the newly elected board of education takes place on the "first Monday in January after the election of the members of such board," pursuant to the amendment of 1914, at which time the board is authorized to organize and elect president, vice-president and clerk.

As to the second inquiry, section 4735 of the act of 1914, 104 O. L., page 138, provides:

> "The present existing township and special school districts shall constitute 'rural' school districts, until changed by the board of education. * * *."

Section 4736 of the same act provides:

> "The county board of education shall as soon as possible after organizing make a survey of its district. The board shall arrange the schools according to topography and population in order that they may be most easily accessible to pupils. To this end the county board shall have power by resolution at a regular or special meeting to change school district lines and transfer territory from one rural or village school district to another. A map designating such changes shall be entered on the records of the board and a copy of the resolution and map shall be filed with the county auditor. In changing boundary lines the board may proceed without regard to township lines and shall provide that adjoining

rural districts are as nearly equal as possible in property valuation. In no case shall any rural district be recreated containing less than fifteen square miles. * * *."

The only substantial object sought to be accomplished by section 4735, above quoted, would seem to be to constitute all school districts previously known as township and village and special school districts as "rural" school districts. Said section in itself does not undertake to make any change of boundaries, but merely incidentally refers to the power of the county board to make such changes of boundaries, which power is effectively conferred by the subsequent section 4736. Such county board is authorized to make an investigation into the conditions of its district, arrange schools according to topography and population, so that they shall be easily accessible to pupils; change district school lines and transfer territory from one rural or village school district to another; they may proceed in so doing without regard to township lines and they shall provide that adjoining rural districts are as nearly equal as possible in property valuation.

All this authority vested in such board, the effecting of the purposes generally of arranging the schools under their jurisdiction to the end that they shall be most easily accessible to pupils, is subject to the provision of section 4736, following:

"In no case shall a rural district be created containing less than fifteen square miles."

It would not be competent for such county board in the furtherance of the purposes contemplated in the statute to make any changes of boundary lines or transfer of territory, affecting school districts under its jurisdiction, which would have the effect to constitute any resulting district or districts of less area than the minimum prescribed in said section. The purpose of this restraining provision lies in the manifest intention that each district shall be of sufficient size to justify the maintenance of school facilities therein and shall comprise sufficient territory to support such school facilities as nearly as possible. The legislature has undertaken to specify what territory shall be sufficient, as a minimum, for the aforementioned purpose and has arbitrarily fixed such minimum at fifteen square miles. This provision is devised to guard against the undesirable consequences of small school districts, to wit: less than the minimum prescribed—these consequences being in no way increased or diminished, whether such district of less than the prescribed minimum be the one from which, or to which, the territory is to be transferred. That cannot be accomplished indirectly which the law prohibits being done directly.

It is my opinion that the county board is not authorized to transfer territory from an existing district which will render such district of less area than that prescribed by the statute, unless such board at the same time annex to such district sufficient amount of territory from another source to leave it of an area equal to the prescribed minimum.

Respectfully,
EDWARD C. TURNER,
Attorney General.

52.

WHEN A TREASURER OF THE SCHOOL BOARD AND HIS SURETIES ARE RESPONSIBLE FOR LOSSES SUSTAINED BY A BANK FAILURE —KNOWLEDGE BY BOARD OF EDUCATION AS TO WHERE MONEY IS DEPOSITED DOES NOT RELIEVE TREASURER AND HIS SURETIES.

The treasurer of a school district who deposits money in a bank other than in conformity to the provisions of the depository law, together with the sureties upon his bond, is responsible for losses sustained by failure of the bank. Mere knowledge by the board of education of such deposit does not relieve the treasurer and his sureties of liability.

COLUMBUS, OHIO, February 2, 1915.

HON. T. B. JARVIS, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—In yours of January 18, 1915, you state:

"Along about 1910, the treasurer of the school district of Worthington township, Richland county, Ohio, deposited in the Butler bank certain funds belonging to the township school district. Heretofore this bank had not been a depository for such funds and was not made a depository by the school board. The treasurer of said school board merely depositing the funds there as a matter of convenience, upon which funds checks were drawn in payment of the school district bills.

"During this time, the board of directors knew that the money was so deposited, but had never given any authority for its being deposited there, merely done upon the initiative of the treasurer as a matter of convenience.

"The next year, this bank failed; the receiver later paying 40 per cent. of a dividend, leaving a balance unpaid of $656.26.

"I believe that is all that there will be paid as the funds are now exhausted. I would like to know, first, whether the treasurer and his bondsmen are responsible for the loss sustained by the bank's failure, and second, if the school board is bound by the conduct of the treasurer in making this bank the depository without instructions from it."

Section 4764 of the General Code of Ohio, provides:

"Before entering upon the duties of his office, each school district treasurer shall execute a bond, with sufficient sureties, in a sum not less than the amount of school funds that may come into his hands, payable to the state, approved by the board of education, and conditioned for the faithful disbursement according to law of all funds which come into his hands, provided that when school moneys have been deposited under the provisions of section 7604-7608 inclusive, the bond shall be in such amount as the board of education may require."

The above section was passed May 10, 1910, and while it is not so expressly stated in your letter, I shall assume that the treasurer of the Worthington township, Richland county, Ohio, school district had executed the bond in full compliance therewith.

Section 4768 prescribes the manner of the disbursement of funds by treasurers of school districts, as follows:

> "No treasurer of a school district shall pay out any school money except on an order signed by the president or vice-president, and countersigned by the clerk of the board of education, and when such school moneys have been deposited as provided by sections 7604-7608, inclusive, no money shall be withdrawn from any such depository, except upon an order signed by the treasurer and by the president or vice-president and countersigned by the clerk of the board of education; and no money shall be paid to the treasurer of the district other than that received from the county treasurer, except upon the order of the clerk of the board, who shall report the amount of such miscellaneous receipts to the county auditor each year immediately preceding such treasurer's settlement with the auditor."

Section 4773, General Code, provides that the treasurer shall at the expiration of his term of service, deliver to his successor all books, papers, money and other property in his hands belonging to the district. To bear in mind the limitation of the authority of public officers to the powers expressly granted by law and those necessarily incidental to the performance of their duties imposed by law, will lend material aid in the solution of the problem now under consideration. The present form of the statutes of this state providing for the establishment of a depository for the school funds of any district, was enacted May 10, 1910, 101 O. L., 290, sections 7604 to 7609, General Code of Ohio, inclusive.

An examination of the provisions of these several sections will disclose that every duty relative to and all authority for providing such depositories, rests solely with the board of education of the school district, and that no authority is granted to or duty imposed upon the treasurer relative to the designation of such depository, nor elsewhere in the statutes of the state is such authority granted to treasurers of school districts.

It follows, then, by no act of the treasurer could "a depository be lawfully provided" as within the terms of the section of the statutes just referred to.

Certain duties in addition to those before referred to are imposed upon the treasurer, after such "depository is lawfully provided," a full compliance with which shall relieve the treasurer from liability occasioned by the failure of such depository, as follows:

> *"Section* 7605. The treasurer of the school district must see that a greater sum than that contained in the bond is not deposited in such bank or banks and he and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bond.
>
> *"Section* 7607. The treasurer of the school district must see that a greater sum than that contained in the bond is not deposited in such bank or banks, and he and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bond."

The bond referred to in the foregoing quotations is the bond of the bank given to the board of education as provided for in said sections.

Section 7609 provides:

> *"Section* 7609. When a depository is lawfully provided, and the funds are deposited therein, the treasurer of the school district and his bonds-

men shall be relieved from any liability occasioned by the failure of the bank or banks of deposit or by the failure of the sureties therefor, or by the failure of either of them, except as above provided in cases of excessive deposits."

You do not say in your statement, and it is immaterial for our present purpose, whether or not the board of education had provided a depository for the funds of the district as provided by law. It is sufficient that the board of education had not provided for the deposit of the funds of the district in the Butler bank, under the provisions of sections 7604 to 7608, inclusive. That the treasurer may be relieved from liability occasioned by the failure of the depository provided, or the sureties therefor, there must be shown a strict compliance with every requirement of the statutes providing relief from such liability.

Answering your question, I am, therefore, of the opinion that the treasurer and his bondsmen are liable for the loss sustained by the failure of the bank, under the circumstances stated by you, and from this it necessarily follows that the board of education is not bound by the conduct of the treasurer in depositing funds of a district in a bank not provided as a depository for such funds by the board of education, according to law.

Yours very truly,
EDWARD C. TURNER,
Attorney General.

53.

A PRIOR EXISTING BONDED INDEBTEDNESS OF A SCHOOL DISTRICT IS A CHARGE UPON THE PROPERTY ONLY OF THE DISTRICT CREATING IT.

Prior existing bonded indebtedness of a school district is a charge upon the property only of the district creating it, and may not become a charge upon the property of a district formed by the union of two districts under the provisions of sections 4735-1 *and* 4735-2, *G. C.*

COLUMBUS, OHIO, February 2, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a letter from Hon. Charles F. Adams, prosecuting attorney, Elyria, Ohio, under date of January 18, 1915, requesting an opinion upon the following subject:

"The union school district in La Grange township desires to unite with the rural district of said township; the union school district has now outstanding bonds, and is about to issue additional bonds in the sum of $5,000 to be used in providing additional school buildings for the union school district.

"In the event that the union is effected after a vote of the people, would the redemption of the bonds of the union district issued prior to the consolidation of the two school districts, be a burden upon the whole territory then constituting the district, or upon that portion of the territory formerly embraced in the union school district?"

This inquiry involves a consideration of sections 4735-1 and 4735-2, G. C., as found in 104 O. L., at page 138. They are as follows:

"*Section* 4735-1. When a petition signed by not less than one-fourth of the electors residing within the territory constituting a rural school district, praying that the rural district be dissolved and joined to a contiguous rural or village district is presented to the board of education of such district; or when such a board, by a majority vote of the full membership thereof, shall decide to submit the question to dissolve and join a contiguous rural or village district, the board shall fix the time of holding such election at a special or general election. The clerk of the board of such district shall notify the deputy state supervisors of elections, of the date of such election and the purposes thereof, and such deputy state supervisors shall provide therefor. The clerk of the board of education shall post notices thereof in five public places within the district. The result shall be determined by a majority vote of such electors.

"*Section* 4735-2. The legal title of the property of the rural school district, in case such rural district is dissolved and joined to a rural or village district as provided in section 4735-1, shall become vested in the board of education of the rural or village school district to which such district is joined. The school fund of such dissolved rural district shall become a part of the fund of the rural or village school district which it voted to join. The dissolution of such district shall not be complete until the board of education of the district has provided for the payment of any indebtedness that may exist."

I assume that the term "union school district in La Grange township" refers to a rural school district that has been formed by the union in some time past, of two or more separate districts. If this be true, then the proposed union of the "union school district of La Grange township" and La Grange township rural school district, merely means the union of two rural school districts as now constituted under favor of the provisions of the new school code, found in 104 O. L., page 133, et seq. I call your attention to that portion of section 4375-2 (104 O. L. 136), which provides:

"The dissolution of such district shall not be complete until the board of education of the district has provided for the payment of any indebtedness that may exist."

I take this to refer to the board of education of the district which is to dissolve (in this case the union district of La Grange township) and that the payment of the existing indebtedness must be provided for before the union can be complete. Inasmuch as the question of the union of the two school districts is only submitted to the electors of the district which is to be dissolved and joined to the other district, I do not believe that the property of the district to which the dissolved district is to be united could be held liable for the payment of any indebtedness, when the same was incurred without any action on the part of the electors of the district to which the dissolved district is to be joined.

I am, therefore, of the opinion that in the event of a union between the "union school district of La Grange township" and La Grange township rural school district, that the entire property of the united district could not be held subject to the payment of the indebtedness incurred by the union school district of La Grange township, prior to the amalgamation, but on the contrary the property of "the union school district of La Grange township" alone would be subject to the payment of the prior created indebtedness.

Yours very truly,

EDWARD C. TURNER,

Attorney General.

54.

PETITION CONTAINING A REQUEST TO IMPROVE A ROAD WITH CERTAIN SPECIFIED MATERIALS SHOULD BE REFUSED BY THE COUNTY COMMISSIONERS, UNLESS THE COMMISSIONERS ARE WILLING TO MAKE THE IMPROVEMENT ACCORDING TO THE MATERIAL SPECIFIED IN PETITION.

When a petition to the county commissioners for a road improvement, under sections 6956-1 to 6956-21, inclusive, G. C., contains a request that said road be improved with a certain specified material named therein, the commissioners are warranted in refusing to consider said petition and such refusal is the only safe course for them to pursue, unless the commissioners are willing to make the improvement with the exact material named in the petition. Should action be taken by the commissioners upon such a petition, they would be bound by the stipulation in the petition as to the character of material to be used in the improvement.

COLUMBUS, OHIO, February 2, 1915.

HON. F. J. BISHOP, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—I have your communication of January 27, 1915, in which you inquire as to whether, when a petition, for the improvement of a road by paving the same, is filed with the county commissioners under sections 6956-1 to 6956-21 inclusive, of the General Code, and contains a request that said road be improved with a certain specified material named therein, then can the commissioners depart from the material specified in the petition and order the improvement made with other and entirely different material.

In reply to your inquiry, I desire to call your attention to the case of the Board of County Commissioners of Franklin County v. The State ex rel. Thrailkill, 88 O. S., 607. Unfortunately, there is no report available of the decision of the supreme court in this case. In this case a petition was filed with the board of county commissioners of Franklin county under sections 6956-1 to 6956-21 inclusive, of the General Code, containing with other pertinent matters, a request to the commissioners "to repair and improve such road by grading and graveling the same with gravel procured near the line of said road." The county commissioners refused to take any action upon this petition for the reason that they regarded the effort of the petitioners to stipulate the material to be used, as an unwarranted attempt to interfere with and control the discretion vested in the commissioners. Mr. M. E. Thrailkill sought by mandamus to compel the commissioners to act upon this petition, and the case being carried to the supreme court, the contention of the county commissioners was fully sustained.

The petition to the county commissioners in the case referred to by you, contained the following provision: "Description of kind of road desired: This road shall be a seven-inch concrete with a tar top," and you state that the commissioners propose to ignore this request and pave the road with brick.

In view of the decision in the case above cited, it is my opinion that the petition presented to your board of county commissioners cannot be regarded as correct in form and substance under sections 6956-1 to 6956-21, inclusive, of the General Code. Being incorrect in form and substance, the petition must be regarded as invalid, and the only safe course for the board of county commissioners is to refuse to act thereon, for the reason that the petition attempts to control the discretion of the county commissioners in selecting the material with which the improvement is to be made.

It is not quite clear, however, from your statement of facts, whether or not the commissioners have already taken action upon the petition referred to in your letter. Should action be taken by the commissioners upon the petition in question, it is my opinion that the commissioners would be bound by the stipulation in the petition, as to the character of material to be used in the improvement. It is true that section 6956-2 of the General Code, provides that: "The commissioners shall determine * * * the kind and extent of the improvement or repairs," but in accepting a petition requesting that the improvement be made with a certain material designated therein, the only logical conclusion would seem to be that the commissioners must be held to have exercised their discretion as to selecting the material, at the time and by the act of receiving, considering and acting upon the petition. Any other conclusion might produce results which appeal to me as unconscionable, for a different conclusion would produce a state of law where persons might be willing to have constructed and might petition for an improvement built from gravel or other inexpensive material, and in petitioning for the same and stipulating the material, confer upon the commissioners authority to build an improvement using brick or other expensive material.

I desire to reiterate the statement, however, that the only safe course for the commissioners to pursue under the state of facts presented by you, is to refuse to take any action whatever on the petition.

Yours very truly,
EDWARD C. TURNER,
Attorney General.

55.

WHEN A BANK STOCKHOLDER MAY VOTE.

A bank stockholder who has paid the first fifty per cent. of his stock subscription may vote the whole number of shares subscribed by him, provided he is not in default in payment of any monthly installment due upon his stock.

COLUMBUS, OHIO, February 2, 1915.

HON. GEORGE WALTERS, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of January 27, 1915, in which you submit the following request for opinion:

> "Section 9710 of the General Code, provides among other things that after the first fifty per cent. of the capital stock has been paid in, and the bank has been authorized to commence business, the remaining fifty per cent. shall be payable in monthly installments of at least ten per cent. on each share, as provided in section 9716.
>
> "It often happens that after a bank has been authorized to begin business, and before all the monthly installments have been paid in, stockholders' meetings are held.
>
> "Please render to this office an opinion as to whether or not a stockholder can vote the whole number of shares subscribed and being paid by him, providing he has not defaulted in the payment of any monthly installment."

Sections 9710, 9711, 9712 and 9713, General Code, providing for subscription to stock of banks and the method of organization of such banks, are as follows:

"Section 9710: The persons named in the articles of incorporation of any such company, or a majority of them, shall order books to be opened for subscription to the capital stock of the company in the manner provided for other corporations. An installment of ten per cent. on each share of stock shall be payable at the time of making the subscription, and an installment of forty per cent. on each share of stock shall be payable as soon thereafter as may be required by the board of directors, the remaining fifty per cent. being payable in the manner hereinafter required.

"Section 9711. As soon as the capital stock of such corporation is fully subscribed and ten per cent. thereof paid in, the subscribers of the articles of incorporation, or a majority of them, shall so certify in writing to the secretary of state, and thereupon give notice to the stockholders, in the manner provided for other corporations, to meet for the purpose of choosing not less than five nor more than thirty directors, who shall continue in office until the time fixed for the annual election, and until their successors are elected and qualified. But if all subscribers are present in persons or by proxy, such notice may be waived in writing.

"Section 9712. At the time and place appointed, directors shall be chosen in the manner provided for other corporations.

"Section 9713. Unless the regulations of the corporation otherwise provide an annual election for directors shall be held on the second Wednesday of January of each year. If for any cause, directors are not elected at the annual meeting or other meeting called for that purpose, they may be chosen in the manner provided for other corporations."

From these sections it follows that the stockholder who has paid ten per cent. of his stock subscription, may vote at least on matters incidental and necessarily preliminary to the organization of such corporation.

Sections 9715 and 9716 are as follows:

"Section 9715. No such corporation shall transact business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the superintendent of banks.

"Section 9716. The entire capital stock of such corporation shall be subscribed and at least fifty per cent. of each share paid in before it may be authorized to commence business. The remainder of its capital stock shall be paid in in monthly installments of at least ten per cent. each on the whole amount of the capital, payable, at the end of each succeeding month from the time it is authorized by the superintendent of banks to commence business. The payment of each installment shall be certified under oath to the superintendent of banks by the president, secretary, treasurer, or cashier of such corporation."

Under the provisions of the two preceding sections all the capital stock of such corporation must be subscribed and fifty per cent. thereof paid in before the company is authorized to commence business. The natural inference, therefore, is that a stockholder may vote after paying in fifty per cent. of his stock unless otherwise limited or restricted by law. If this were not true a bank could not in reality commence business until at least a part of the stockholders had paid in the full amount of their stock, as there would be no one to authorize action by vote.

Section 9714 provides:

"In all other respects, such corporation shall be created, organized, governed and conducted in the manner provided by law for other corporations insofar as not inconsistent with the provisions of this chapter."

Section 8636, relating to corporations generally, is as follows:

"At the time and place appointed, directors shall be chosen by ballot, by the stockholders who attend, either in person or by lawful proxies. At such and all other elections of directors, each stockholder shall have the right to vote in person or by proxy the number of shares owned by him for as many persons as there are directors to be elected, or to cumulate his shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock equals, or to distribute them on the same principal among as many candidates as he thinks fit. Such directors shall not be elected in any other manner. A majority of the number of shares shall be necessary for a choice, but no person shall vote on a share on which an installment is due and unpaid."

It follows, therefore, that a stockholder of a banking corporation cannot vote when he is in default for payment of any installment due on his stock. There seems, however, to be no other provision of law denying the right of such a stockholder to vote because the stock is not fully paid up.

I am, therefore, of the opinion that the stockholder of a bank who has paid fifty per cent. on each share of his stock and is not in default for payment of any monthly installment on the remaining fifty per cent. may vote the whole number of shares subscribed and standing in his name on the books of the company.

Respectfully,
EDWARD C. TURNER,
Attorney General.

56.

INSURANCE COMPANIES MAY WRITE INSURANCE AGAINST LOSS OR DAMAGE TO PLATE GLASS RESULTING FROM INUNDATION.

Insurance companies, operating under the provisions of paragraph 2, section 9510, G. C., and licensed by the superintendent of insurance may write insurance against loss or damage to plate glass resulting from inundation.

COLUMBUS, OHIO, February 2, 1915.

HON. PRICE RUSSELL, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I have your letter of January 25, 1915, together with enclosures therein mentioned which letter is as follows:

"Enclosed you will find correspondence from the Metropolitan Casualty Company, of New York, relative to its authority to write insurance in the state of Ohio against loss or damage to plate glass resulting from inundation, also you will find enclosed their policy forms Nos. 1 and 2. The license issued to the Metropolitan Casualty Company of New York, dated March 1, 1914, and expiring March 1, 1915, authorizes it to.

"transact in this state, its appropriate business of making insurance on the health of individuals and against personal injury, disablement or death, resulting from traveling or general accidents by land and water; making insurance against loss or damage resulting from accident to property from cause other than fire or lightning, as prescribed by section 9510, paragraph second, General Code of Ohio, in accordance with law.

"The import of the enclosed letter is that the Metropolitan Casualty Company claims to have authority, under paragraph 2 of section 9510, General Code, Laws of Ohio, to write insurance in the state of Ohio against loss or damage to plate glass resulting from inundation. It is my opinion, that this authority, if granted at all, is granted by that part of said paragraph 2, as follows:

" 'Make insurance against loss or damage resulting from accident to property from cause other than fire or lightning.'

"I am also enclosing a letter and form policy from Lloyd's Plate Glass Insurance Company of New York, covering the same proposition. The license issued to Lloyd's Plate Glass Insurance Company as of March 1, 1914, and expiring March 1, 1915, authorizes it to

" 'transact in this state its appropriate business of making insurance against loss or damage resulting from accident to property from cause other than fire or lightning; i. e., plate glass, as provided in section 9510, paragraph second, General Code of Ohio, in accordance with laws.'

"The contention of the one company is of the same character as that of the other.

"We ask that you kindly give the above subject-matter your consideration, and apprise this department accordingly."

Section 9510, General Code, so far as it is pertinent to your inquiry, is as follows:

"A company may be organized or admitted under this chapter to:

"1. * * *.

"2. Make insurance on the health of individuals and against personal injury, disablement or death, resulting from traveling or general accidents by land and water; make insurance against loss or damage resulting from accident to property from cause other than fire or lightning; * * *."

The answer to your question is purely a matter of statutory construction and involves the meaning of the word "accident" as used in the section of the General Code above quoted. "Accident" as defined in the Standard dictionary is:

"Anything that happens, an occurrence, anything occurring unexpectedly, a contingency, calamity, casualty or disaster."

According to Webster it is:

"A happening by chance, or unexpectedly, taking place not according to the usual occurrence of things."

In view of the above definition, an "inundation" is clearly an accident.

I am, therefore, of the opinion that both the Metropolitan Casualty Company of New York and the Lloyd's Plate Glass Insurance Company of New York,

under authority of section 9510, General Code, as well as by the terms of their respective licenses to operate in Ohio, may write insurance in Ohio against loss or damage to plate glass resulting from inundation.

Respectfully,
EDWARD C. TURNER,
Attorney General.

57.

PURCHASE OF REAL ESTATE BY ARMORY BOARD.

Ohio state armory board cannot purchase real estate except from moneys specially appropriated for that purpose. Buildings worth at least $17,500 *held to be real estate. Appropriations to "state armory fund" are to be made from "state military fund" provided for in section* 5265, *G. C.*

COLUMBUS, OHIO February 2, 1915.

COL. BYRON L. BARGAR, *Secretary of Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your favor of January 22, 1915, which is as follows:

> "Pursuant to the proceedings indicated by the attached file, which relates to the contemplated purchase of the buildings known as the Cincinnati Riding Academy on condition that the lands pertaining thereto be donated to the state, the auditor of state's office and the armory board have encountered the following difficulty:
>
> "The money wherewith this purchase of buildings is to be made is now in the fund known as 'maintenance F.' Under the laws known as 'the 1914 general appropriation bill' restrictions as to the use of the funds of 'maintenance F' seem to inhibit the purchase of real estate therefrom.
>
> "Now, the option of the Seton Realty Company herewith submitted proposes to donate the lands of the Riding Academy, if the buildings are purchased for $17,500.00. These buildings are now located on the lands to be donated. The auditor of state suggests that these buildings are real estate and cannot therefore be purchased from funds in 'maintenance F' without a resolution of the legislature or other legislative action properly transferring the necessary amount to subdivision 'H' of the classification provided for in said laws.
>
> "An opinion is therefore requested as to whether or not the proposed purchase can be made without such legislative action. If such legislative action is necessary we request that you draw a proper resolution or act which will make available the sum of $17,500.00 now in 'maintenance F' for the purchase mentioned in said option.
>
> "We would further request instructions as to the right of the armory board to take the action contemplated and tentatively approved, as per memorandum hereto attached and made December 26, 1914."

In your letter you request an opinion as to whether or not the proposed purchase of the Cincinnati Riding Academy can be made without legislative action, and in reply I beg to advise that, in view of the provisions of the act "to make general appropriations and to repeal house bill No. 670, approved May 9, 1913

(103 O. L., 627) entitled "an act to make general appropriations" in which it is provided in section 3, under the head of "state board of accountancy" at page 72, Laws of Ohio, vol. 104, among other things, that:

> "The moneys appropriated in section 1 of this act under the general headings of 'personal service,' 'maintenance,' or under like designation, to each department, institution, board or commission, shall be and constitute the summary controlling account, and shall be expended only in accordance with such detailed classifications as are provided in said budget, and as provided in section 5 of this act, except as hereinafter in this section provided."

and the further provisions contained in section 5 of the same act, on page 73, vol. 104, Laws of Ohio, which are as follows:

> "No money appropriated in section 1 of this act shall be drawn except in accordance with the detailed classifications of the budget of authorized expenditures, and upon a requisition or voucher presented to the auditor, approved by the head of a department or by the trustees of an institution or by the members of a board or commission, or by an officer or employe of such department, institution, board or commission, specially designated by resolution or order to approve and present such requisition or voucher, a copy of which resolution or order shall be filed with the auditor of state. Such requisitions or vouchers shall set forth, in itemized form and specify the budgetary classification of, the service rendered, or material furnished, or expenses incurred, and the date of purchase, and time of service, and showing that competitive bids were secured or that it was an emergency requiring purchase; and all institutions, boards, commissions and departments to which appropriations are herein made shall render to the auditor of state an itemized account of such receipts and expenditures, as may be required by the auditor of state; and such institutions, boards, commissions or departments shall be subject to inspection by the auditor of state; and it shall be the duty of the auditor of state to see that these provisions are complied with."

The money in the fund known as "maintenance F" cannot be used for the purpose desired. In your letter you call attention to the fact that the auditor of state has suggested that the buildings are "real estate" and cannot therefore be purchased from the fund in "maintenance F" without a resolution of the legislature or other legislative action. properly transferring the necessary amount to subdivision H of the classification provided for in said laws. While there is nothing in your letter which attempts to describe or classify the buildings known as the "Cincinnati Riding Academy" the fact that the buildings are represented as being of the value of at least $17,500.00 prevents an escape from the conclusion that they are of a permanent nature such as, of course, would bring them within the classification of "real estate," and in view of the provisions of the act which places all appropriations for real estate under the classification or subdivision H, there is no provision contained in that part of the appropriation for the Ohio national guard which could be used for the purchase of real estate.

It is therefore my opinion that the position taken by the auditor of state is correct and that the only course left which will enable you to exercise the option of the Setin Realty Company which provides for the donation of the land upon which the buildings of the Cincinnati Riding Academy are located upon

the payment of $17,500.00 for the buildings, is through the enactment of legislation making special provision therefor.

You further ask to be advised as to whether or not the armory board has the right to take the action contemplated and tentatively approved, and in reply to this matter your attention is invited to the provisions of section 5255 of the General Code, which is as follows:

> "The board shall provide armories for the purpose of drill and for the safekeeping of arms, clothing, equipments, and other military property issued to the several organizations of organized militia, and may purchase or build suitable buildings for armory purposes when, in its judgment, it is for the best interests of the state so to do. The board shall provide for the management, care and maintenance of armories and may adopt and prescribe such rules and regulations for the management, government and guidance of the organizations occupying them as may be necessary and desirable."

From a reading of the section just quoted, it is my opinion that you have the right to purchase all the property under consideration when the appropriation for the payment of the same shall be made available by an act of the legislature.

Unless there be some special reason requiring it, I prefer not to draft bills or resolutions to be presented to the general assembly, and therefore suggest that in the absence of such condition you proceed with the preparation of the bill yourself, if you desire to take that course. For your further information, and to guide you in the preparation of an appropriate bill to be presented to the general assembly, your attention is called to the provisions of section 5268 of the General Code, as follows:

> "From the 'state armory fund' the board shall provide armories by leasing, purchasing or constructing as provided in this chapter."

The appropriations to the "state armory fund" shall be made under the provisions of section 5266 of the General Code, which is as follows:

> "The general assembly shall appropriate annually, and divide into two funds, the amount authorized by the preceding section. Such funds shall be respectively known as the 'state armory fund' and 'maintenance Ohio national guard fund.'"

In this connection, your attention is called to the provisions of section 5265 of the General Code for the segregation of a special fund to be known as the "state military fund" from which fund the appropriations contemplated under section 5266 shall be made. Section 5265 is as follows:

> "The auditor of state shall credit to the 'state military fund' from the general revenues of the state, a sum equal to ten cents for each person who was a resident of the state, as shown by the last preceding federal census. Such fund shall be a continuous fund and available only for the support of the organized militia. It shall not be diverted to any other fund or used for any other purpose."

Respectfully yours,

EDWARD C. TURNER,

Attorney General.

58.

APPOINTMENT OF MEMBER TO TAX COMMISSION OF OHIO MUST BE CONFIRMED BY THE SENATE.

Appointment of a member of the tax commission of Ohio must be confirmed by the senate at its session after the appointment.

COLUMBUS, OHIO, February 2, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR SIR:—You request my opinion as to whether the appointment of Christian Pabst to membership on the tax commission of Ohio, in February, 1914, under authority of the emergency act of February 6, 1914, requires confirmation by the senate.

On May 10, 1910, the general assembly of the state of Ohio passed an act to create a tax commission of Ohio, 101 O. L., p. 339. The first section of this act (section 5445 of the General Code) provides that the governor shall appoint the three commissioners provided for in the said act, and provides for the appointment of their successors in the following language:

> "A tax commission is hereby created, to be known as the tax commission of Ohio, to be composed of three commissioners, electors of the state, not more than two of whom at any time shall be of the same political party. On or before July 1, 1910, the governor shall appoint such commissioners as follows: The term of one such appointee, who shall belong to the same political party as one of the other members appointed on such commission, if there be two appointees from the same political party, shall terminate on the second Monday of February, 1911; the term of the second such appointee shall terminate on the second Monday of February, 1912, the term of the third such appointee shall terminate on the second Monday of February, 1913. In February, 1911, and annually thereafter, in the month of February, there shall be appointed in the same manner, one commissioner for the term of three years, from the second Monday of February of such year. Each commissioner so appointed shall hold his office until a successor is appointed and qualified. Any vacancy on the commission shall be filled by appointment of the governor for the unexpired term. No appointee shall be qualified to act until after his appointment has been confirmed by the senate, unless appointed during a recess or adjournment of the senate."

These three commissioners were to be appointed by the governor on or before July 1, 1910, and the term of one such appointee terminated on the second Monday of February, 1911, and his successor appointed for a term of three years, ending on the second Monday of February, 1914. This is the position in question.

On May 31, 1911, the general assembly passed an act, being section 1465-1 of the General Code, section 1 of which provides that:

> "Between the first day and the second Monday of February, 1913, and biennially thereafter, the governor shall appoint one member of the tax commission of Ohio for the term of six years from the second Monday of February of such year."

This section repeals that portion of section 1 of the act of May 10, 1910, to the extent that it changes the length of the term from three to six years, making biennial instead of annual appointments, and changes the dates of the beginning

of the terms expiring on the second Monday of February, 1914, as hereafter appears. A portion of the said original section 1, remaining unrepealed and applicable to the question, reads as follows:

> "The commissioner so appointed shall hold his office until a successor is appointed and qualified. Any vacancy on the commission shall be filled by the governor for the unexpired term. *No appointee shall be qualified to act until after his appointment has been confirmed by the senate, unless appointed during a recess or adjournment of the senate.*"

Section 1 of the act of May 31, 1911, repealed the authority of the governor to make an appointment of a successor to the member whose term expired on the second Monday of February, 1914, as provided in section 1 of the act of May 10, 1910, but did confer upon the governor the power to make such appointment between the first day and the second Monday of February, 1915; hence the hiatus from the second Monday in February, 1914, to the second Monday in February, 1915, which the legislature evidently overlooked in the change of the terms of office of the commissioners.

Later on the legislature noted this omission and sought to remedy the same by an emergency act of February 6, 1914, section 1 of which, at page 199 of vol. 104, Ohio Laws (being section 1465-1a, G. C.) reads as follows:

> "That within fifteen days after the passage of this act the governor is hereby authorized to appoint one member of the tax commission of Ohio, to serve for the term of three years, commencing at the expiration of the term now held by the incumbent whose term will expire the second Monday in February, 1914. And that thereafter appointments to said commission shall be made in compliance with section 1465-1 of the General Code."

Under this emergency act, the governor appointed one member of the tax commission of Ohio to serve for three years commencing at the expiration of the term held by the incumbent whose term would expire on the second Monday of February, 1914, but he did not send the name of such appointee to the senate for confirmation, nor has the name of such appointee been at any time sent to the senate for confirmation.

As we have seen from section 1 of the original act of May 10, 1910: *"no appointee shall be qualified to act until after his appointment is confirmed by the senate, unless appointed during a recess or adjournment of the senate.*

In connection with this specific legislation on the subject, it is helpful to consider section 12 of the General Code, which is as follows:

> "When a vacancy in an office filled by appointment of the governor, with the advice and consent of the senate, occurs by expiration of term or otherwise during a session of the senate, the governor shall appoint a person to fill such vacancy, and forthwith report such appointment to the senate. If such vacancy occurs when the senate is not in session, and no appointment has been made and confirmed in anticipation of such vacancy, the governor shall fill the vacancy and report the appointment to the next session of the senate, and, if the senate advise and consent thereto, such appointee shall hold the office for the full term, otherwise a new appointment shall be made."

The emergency act of February 6, 1914, does not repeal or modify either directly or by implication those provisions of the law under which this appointment is required to be confirmed by the senate, unless appointed during a recess or adjournment of the senate. Had this emergency act not been passed, this com-

missioner whose term was to expire on the second Monday in February, 1914, would have continued to serve until his successor was duly appointed and qualified; but under this emergency act, the governor was required to make the appointment in question within fifteen days after the passage of the act. The act was passed February 6, 1914, and approved on February 17, 1914. Subsequent to this, and within fifteen days, the governor made the appointment of Christian Pabst, being the position in question. We find that the legislature adjourned sine die on February 16, 1914, being one day prior to the act's becoming a law and authorizing the governor to make the said appointment thereunder. The appointment was, therefore, a recess appointment.

Section 12 of the General Code, above quoted, provides that when a vacancy occurs during a recess or adjournment of the senate,

> "the governor shall fill the vacancy and report the appointment to the next session of the senate, and if the senate advise and consent thereto, such appointee shall hold the office for the full term, otherwise a new appointment shall be made."

It therefore becomes the duty of the appointing governor to report the appointment to the next session of the senate after the same was made. The next session of the senate was the result of the governor of the state of Ohio having called the general assembly in extraordinary session during the summer of 1914, by virtue of constitutional authority therefor in him vested, found in section 8 of article III of the constittution, as follows:

> "The governor on extraordinary occasions may convene the general assembly by proclamation and shall state in the proclamation the purpose for which such special session is called, and no other business shall be transacted at such special session except that named in the proclamation, or in a subsequent public proclamation or message to the general assembly issued by the governor during said special session, but the general assembly may provide for the expenses of the session and other matters incidental thereto."

Was the reporting of this appointment to the senate by the governor such a duty as that he could have or should have done so to the senate during the extraordinary session of the general assembly convened under this constitutional provision? It is the senate that is to advise and consent to such recess appointment and not the general assembly.

Without expressing at length the reasoning by which I arrive at the conclusion, I deem it sufficient here to express my conclusion that the governor should have reported this appointment to the senate during this extraordinary session of the general assembly, but if it were a question as to whether this report was to be made to the next session of the general assembly when the next session is an extraordinary session, limited in its work to the boundaries fixed by the governor in his call therefor, that question would be removed in this case for the reason that the general assembly was in regular constitutional session during the incumbency of the appointing governer and the name of this appointee was not sent to the senate for confirmation by him.

It therefore follows that, the appointment made under the emergency act of February 6, 1914, being one that should have been reported to and confirmed by the senate, and such report and confirmation not having been made, a new appointment shall be made by you as governor.

Respectfully,
EDWARD C. TURNER,
Attorney General.

59.

COUNTY TUBERCULOSIS HOSPITAL ERECTED MAY BE MAINTAINED, ALTHOUGH THE COUNTY JOINS IN THE ERECTION OF A DISTRICT HOSPITAL.

A county tuberculosis hospital erected prior to the enactment of section 3141, *G. C., may be maintained by county commissioners notwithstanding their action in joining with other counties in the erection of a district hospital under the provisions of section* 3148, *G. C., as amended,* 103 *O. L.,* 494. *Limitation to such maintenance is to be measured by funds available for that purpose.*

COLUMBUS, OHIO, February 3, 1915.

E. F. MCCAMPBELL, M. D., *Secretary and Executive Officer of The State Board of Health, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your favor of January 22, which is as follows:

> "Under the authority of section 3148, G. C., (O. L., 103, p. 494) the commissioners of five counties have united in the construction of a 'district tuberculosis hospital' which recently has been opened to patients. The capacity of the hospital is eighty beds. The trustees have allotted to each county interested the number of beds to which the county is entitled, based upon the proportion of the amount assessed against the county for the initial cost. In one of the counties interested, the quota is seventeen beds and it is estimated that there are fifty or more cases of tuberculosis in the county seat alone. At the present time, there are in the county hospital for tuberculosis maintained thirty patients.
>
> "A local charity organization society has petitioned the county commissioners to continue the county tuberculosis hospital and to also send to the district hospital as many patients as the county may be entitled to, but the county commissioners have held that the county hospital will have to be abandoned, giving as a reason that the commissioners may not legally maintain the county hospital and at the same time assist in the maintenance of the district hospital.
>
> "Query. Can the county commissioners legally maintain the county hospital in addition to paying the pro rata share of the county in the support of the district hospital?
>
> "Informally, I may add, that I have advised that the county must first exhaust its resources at the district hospital and in addition take advantage of any vacancies that may exist due to the failure of other counties interested to avail themselves of the opportunity of using the hospital, before the commissioners would be warranted in continuing the county hospital."

Replying to your inquiry as to whether the county commissioners can legally maintain the county hospital in addition to paying the pro rata share of the county in support of the district hospital, I beg to call your attention to the provisions of section 3140, as amended in 103 O. L., 492, which are as follows:

> "Whenever complaint is made to the state board of health that a person is being kept or maintained in any county infirmary in violation of section 3139 of this act, such state board of health may make arrange-

ments for the maintenance of such person in some hospital or other institution in this state devoted to the care and treatment of cases of tuberculosis, and the cost of removal to, and the cost of maintenance of, such person in such hospital or institution shall become a legal charge against, and be paid by the county in which such person has a legal residence. If such person is not a legal resident of this state, then such expense shall be paid by the county maintaining the infirmary from which removal is made."

To carry out the provisions of section 3139 of the General Code, as amended on page 492 of 103 Ohio Laws, as follows:

"On and after January first, nineteen hundred and fourteen, no person suffering from pulmonary tuberculosis, commonly known as consumption, shall be kept in any county infirmary,"

it is provided in section 3141 of the General Code as amended on page 492 of 103 Ohio Laws that:

"In any county where a county hospital for tuberculosis has been erected such county hospital for tuberculosis may be maintained by the county commissioners, and for the purpose of maintaining such hospital the county commissioners shall annually levy a tax and set aside the sum necessary for such maintenance. Such sum shall not be used for any other purpose."

The purpose of the act referred to is primarily to segregate persons suffering from pulmonary tuberculosis and to remove them from the county infirmaries. The provisions heretofore quoted empower the county commissioners to maintain a county hospital where erected for that purpose, but in order to afford a broader scope for carrying out the purposes of the act provision is made for the establishment of a district hospital for the care and treatment of persons suffering from pulmanory tuberculosis in section 3148 of the General Code, as amended on page 494 of 103 Ohio Laws, as follows:

"The commissioners of any two or more counties not to exceed ten, may form themselves into a joint board for the purpose of establishing and maintaining a district hospital, provided there is no municipal tuberculosis hospital therein for the care and treatment of persons suffering from pulmonary tuberculosis (commonly called consumption) or laryngeal tuberculosis, and may provide the necessary funds for the purchase of a site, which site shall be separate and apart from the infirmary boundaries in any county and also may provide for the erection of the necessary buildings thereon; and provided further that where any number of counties have already constructed and are operating a district tuberculosis hospital, other counties may join such counties for enlargement and use of such hospital. Any new district or addition to a district shall be approved by the state board of health."

The authority for the erection of a county tuberculosis hospital originally is to be found in the provisions of section 1, of an act "to provide for county hospitals" to be found on page 486 of volume 89 of the Ohio Laws. The provisions contained in section 1 of the act aforesaid were repealed in an act, found on page 86, vol. 100 of the Ohio Laws, entitled:

"To amend sections 1 and 2 of an act 'to provide for county hospitals for the care and treatment of inmates of county infirmaries and other residents of the county suffering from tuberculosis,' passed April 2, 1908, and to supplement said act by adding thereto sections 6, 7, 8, 9 and 10, to provide for district hospitals."

and in section 2 of the act it is provided, on page 86, Ohio Laws, vol. 100, that:

"The board of county commissioners are hereby authorized and may construct in each county a suitable building or buildings, which shall be separate and apart from the infirmary buildings, to be known as the county hospital for tuberculosis; and they shall also provide for the proper furnishing and equipment of said hospital; provided that there is not already established a hospital in the county for treatment and maintenance of tuberculosis patients; and wherever in any county funds are not available to carry out the provisions of this act, the county commissioners shall levy for that purpose and set aside the sum necessary, which shall not be used for any other purpose, and the commissioners of the county may issue and sell the bonds of said county in anticipation of said levy, and the provisions of section 2825 of the Revised Statutes, relating to the construction of public buildings and bridges, as amended May 9, 1908, shall not apply to county hospitals for tuberculosis provided for herein. The infirmary directors shall provide for the treatment, care and maintenance of patients received at said county hospital, and for necessary nurses and attendants, and all expenses so incurred shall be audited and paid as are other expenditures, for county infirmary purposes. An accurate account shall be kept of all moneys received from patients or other sources, which shall be applied toward the payment of maintaining said county hospital; and the infirmary directors shall have authority to receive for the use of such hospital gifts, legacies, demises or conveyances of property, real or personal, that may be made, given or granted for the use of said county hospital, or in its name, or in the name of said directors."

The provisions of section 2 of the act quoted above are carried into sections 3140 and 3141 of the General Code. Section 3141 of the General Code hereinbefore referred to is repealed in an act entitled,

"To amend sections * * * of the General Code of Ohio, relating to county and district tuberculosis hospitals,"

found on page 492 of vol. 103 Ohio Laws, and in its stead is re-enacted section 3141, on page 492, vol. 103 Ohio Laws, in the following language:

"In any county where a county hospital for tuberculosis has been erected such county hospital for tuberculosis may be maintained by the county commissioners, and for the purpose of maintaining such hospital the county commissioners shall annually levy a tax and set aside the sum necessary for such maintenance. Such sum shall not be used for any other purpose."

From a perusal of the statutes governing the county tuberculosis hospitals, it will be noted that whereas in the past the county commissioners have had authority to erect and maintain such hospitals under the provisions of section 3141, quoted

above, the authority to maintain such county hospital for tuberculosis is continued in any county where a county hospital for tuberculosis has been erected, provision being made in the section therefor.

In your letter you refer to the fact that under the authority of section 3148 of the General Code, as amended in Ohio Laws, vol. 103, page 94, the commissioners of five counties have united in the erection of a district tuberculosis hospital, and in answer to your inquiry as to whether the county commissioners can legally maintain the county hospital in addition to paying the pro rata share of the county to maintain a district hospital, it is my opinion that in view of the provisions of section 3141 referred to above, the legislature clearly expressed the intention to authorize the commissioners to maintain county hospitals which had been erected prior to the passage of the act *"to amend sections* 3139 to 3149, both inclusive, and sections 3151, 3152 and 3153 of the General Code of Ohio, *relating to* county and district tuberculosis hospitals," found on pages 492 et seq., of vol. 103 Laws of Ohio. It would seem that the only limitations in the conduct of such county hospitals would be measured by the funds available for that purpose.

Very respectfully,
EDWARD C. TURNER,
Attorney General.

ADDENDA.

February 2, 1915.

Under the foregoing opinion it is not to be assumed that county commissioners are obliged to continue or maintain county hospitals for tuberculosis after joining in the erection of a district hospital. In the light of information received from an officer relative to the particular hospital under consideration, there may be ample grounds for its abandonment on the ground that its continuance would not be conducive to the health of the inmates. It is to be borne in mind that section 3141 of the General Code (O. L., 103, page 492) is a permissive statute under which county commissioners may care for patients for whom there may be no provision in the district hospital.

60.

BRASS KNUCKLES ARE "DANGEROUS WEAPONS"—INDICTMENT SHOULD STATE APPROXIMATELY THE TIME THAT THE OFFENSE IS ALLEGED TO HAVE BEEN COMMITTED.

Brass knuckles come within the term "dangerous weapons" as used in section 12819, *G. C.*

Where time is not of the essence of the offense, an indictment should state at least approximately the time that the offense is alleged to have been committed so that the defendant may be prepared to meet the evidence of the state.

COLUMBUS, OHIO, February 3, 1915.

HON. A. B. UNDERWOOD, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—I am in receipt of your request for opinion as follows:

> "1st. Are brass knuckles included within the term "dangerous weapons," as used in 12819, G. C., and do they fall within the prohibition of this section, against the carrying of concealed weapons?

"2nd. An indictment returned by the grand jury in this county, at the January term charges one Allex Kovois, with cutting and stabbing, with the intent to wound, under section 12420, G. C., and states the crime to have been committed on or about the 22nd day of November, A. D., 1915, whereas the date should have been changed as on or about the 22nd day of November, A. D., 1914. Will this laying of the crime at a future date be a fatal defect in this indictment? Will not section 13581, G. C., and 12 O. D. (N. P.) 724, be a sufficient protection, and render it safe to go to trial on this indictment?"

Answering your first question: Brass knuckles are universally conceded to be included within the term "dangerous weapons." Numerous convictions have been had in the Franklin county courts upon an indictment under section 12819, General Code (R. S. 6893), for carrying brass knuckles concealed on or about the person of the defendant.

A "dangerous weapon" is defined in United States v. Williams, 2 Fed. 61, 64, as one liable to produce death or great bodily injury. This definition is adopted in United States v. Reeves, 38 Fed. 404-406.

It is a matter of common knowledge that great bodily injury and even death may be produced by the use of the weapon commonly known as "brass knuckles" and that this article is designed and used only for the purpose of producing death or bodily injury, and has no lawful use.

Answering your second inquiry: I am of the opinion that in alleging a crime it is necessary to show in the indictment that the crime occurred after the enactment of the statute making the act a crime, and prior to the rising of the grand jury.

I am not unmindful of the case of State v. Mulford, 12 Ohio Decisions, 720, in which it was held that alleging the date of the offense as "the 31st day of December, 1998," was not material, but the court finds that this particular count in the indictment contains sufficient to show the charging of a crime in the past tense. It should not be overlooked that this decision refers only to one count in an indictment, and that count in the indictment may have had some reference to other counts therein.

Neither am I unmindful of the provisions of section 13581, General Code, which provide:

"An indictment shall not be invalid * * * for omitting to state the time at which the offense was committed, in a case in which time is not of the essence of the offense."

While time is not of the essence of the offense to which your inquiry refers, yet the constitution provides in article 1, section 10, that:

"In any trial in any court the party accused shall be allowed * * * to demand the nature and cause of the accusation against him, and to have a copy thereof."

An indictment which *attempts* to lay the time and fix it at a period in the future, does not, in my opinion, sufficiently inform the accused of what he is expected to meet. Where time is not of the essence of an offense, it need not be stated exactly, but I am of the opinion, from my own experience as prosecuting attorney, that the accused has a right to know, at least approximately, the time that the offense is alleged to have been committed, so that he may be prepared to meet the evidence of the state.

I know it will be argued that "every defendant knows when he committed the offense," but the rules of criminal procedure are made for the protection of the innocent and it is of the first importance to my mind that the defendant should know, at least aproximately, the time that he is accused of committing the wrongful act.

My opinion, therefore, is that you ought either to reindict this defendant and then nolle the present indictment, or if there be a motion to quash pending and the court sustains that motion, you should have the court, under section 13624, General Code, commit the defendant, or hold him to bail for his appearance at the first day of the next term of court.

Respectfully,
EDWARD C. TURNER,
Attorney General.

61.

COUNTY ROADS—CONSTRUCTION OF SECTION 6945, G. C.—NEW MAXIMUM LEVY.

Section 6945, G. C., does not fix a total maximum levy for improved roads, but merely creates a new maximum levy for improved roads where the improvement is constructed in accordance with the provisions of the act of which said section 6945 is a part, said act being sections 6926 to 6956-a, inclusive, of the General Code, as amended, 103 O. L., 198 to 204.

COLUMBUS, OHIO, February 3, 1915.

HON. D. M. CUPP, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR:—I have your communications of January 20, 1915, and January 27, 1915, in which you request my opinion as to the construction to be placed on section 6945 of the General Code of Ohio, as amended in 103 O. L., page 198, 202.

As I understand your inquiry, the exact question raised by you is as follows:

> "Does section 6945 of the General Code fix the total maximum levy for improved roads at three mills, without regard to the law under which the roads are improved; or, does this section create a new maximum levy of three mills for roads improved under section 6926 to 6956-a, inclusive, of the General Code, as amended in 103 O. L., page 198 to 204, which levy shall be in addition to levies previously made under other laws for the improvement of roads?"

I am of the opinion that this question can best be answered by a reference to the exact language of the section in question.

Section 6945, General Code, reads as follows:

> "For the purpose of providing by general taxation a fund out of which not less than one-half nor more than two-thirds of the costs and expenses of all improvements made under the provisions of this subdivision of this chapter can be paid, the commissioners are authorized to levy upon the taxable property of any township or townships within the county in which such improved road is to be or has been constructed,

not exceeding three mills in any one year upon each dollar of the valuation of the taxable property in such township or townships. Such levies shall be in addition to all other levies authorized by law for township purposes, but subject to the maximum limitation upon the aggregate amount of all levies now in force."

You will note that under the terms of this section the three mill tax levy therein authorized is expressly limited to "the purpose of providing by general taxation a fund out of which not less than one-half nor more than two-thirds of the costs and expenses of all improvements made under the provisions of this subdivision of this chapter can be paid." The subdivision of the chapter referred to consists of sections 6926 to 6956-a, as amended in 103 O. L., pages 198 to 204.

Section 6956-a provides as follows:

"It is hereby declared the intention to provide an additional method for the laying out, construction, repair or improvement of any public road or any part thereof and for the straightening, widening, altering and draining of the same by the county commissioners, and the method provided herein shall be in addition to all other methods provided for by law, and it is not intended to and does not repeal any section or sections applying to a method for the improvement, construction or repair of any public highway, not here specifically repealed."

Expenditures from the levy provided for in section 6945 being limited to the making of improvements authorized by the act of which said section is a part, and said act containing a declaration that it was the intention of the legislature to provide an additional method of road construction and that the method therein provided should be in addition to all other methods provided by law, and that it was not intended to repeal any section or sections relating to road construction not specifically repealed, it follows, as a necessary conclusion, that the legislature did not intend to prevent the making of other levies for road purposes under other laws and that the section in question, to wit: Section 6945, does not, therefore, fix a total maximum levy for improved roads, but merely creates a new maximum levy for improved roads where the improvement is constructed in accordance with the provisions of the act of which said section 6945 is a part.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

62.

A NEW COUNTY INFIRMARY BUILDING CANNOT BE CONSTRUCTED UNDER AUTHORITY OF SECTION 2436, G. C., UNLESS THE OLD BUILDING IS DESTROYED BY FIRE OR OTHER CASUALTY.

A new county infirmary building to replace an old one cannot be constructed under the provisions of section 2436, G. C., unless old one is destroyed by fire or other casualty.

COLUMBUS, OHIO, February 3, 1915.

HON. C. ELLIS MOORE, *Prosecuting Attorney, Cambridge, Ohio*

DEAR SIR:—Permit me to acknowledge receipt of your favor of February 1st, which is as follows:

"On May 2, 1912, Chief Building Inspector Kearns, directed a letter to Alex Arbuckle who was then the president of the board of infirmary directors of this county, reporting the result of his investigation of the Guernsey county infirmary.

"The county infirmary is in need of a new building because the present building is not fit for occupancy. I have been asked for an opinion as to whether a new building can be erected under section 2436 of the General Code without first submitting the matter for a vote of the people. I have given my opinion that it cannot be done since the building has become unfit for occupancy because of natural wear and tear rather than of any fire or other casualty. You understand that there has been no particular occurrence or accident but just the gradual decay of the building. By request, I am writing for your opinion upon this matter, and you can kindly write me at the earliest possible date as to what you think about the matter."

In your letter you ask whether or not a county infirmary can erect a new building to take the place of an old one, under the provisions of section 2436 of the General Code, which is as follows:

"For the purpose of rebuilding an infirmary, or court house, destroyed by fire, or other casualty, the commissioners of a county may appropriate money, levy tax, issue and sell bonds of such county in anticipation thereof, in an amount not to exceed fifty thousand dollars, without first submitting to the voters of said county, the question of rebuilding such infirmary or court house, appropriating such money, levying such tax and issuing and selling such bonds. And hereafter the county commissioners in the construction of all court houses and offices for county officials shall provide fireproof vaults therein in which shall be kept all the valuable records and documents belonging to the county. The provisions of section twenty-four hundred and forty-four, and fifty-six hundred and sixty of the General Code shall not apply to the making of any of the improvements mentioned in this section."

A reading of the section above quoted leaves but one conclusion and it is therefore my opinion that as your county infirmary building is not unfit for occupancy by reasons of fire or other casualty, the provisions of section 2436 of the General Code cannot be invoked for the purpose of erecting a new building.

Respectfully,
EDWARD C. TURNER,
Attorney General.

63.

COUNTY COMMISSIONERS MAY NOT CONTRACT TO ADMIT A PERSON TO THE INFIRMARY AT FUTURE DATE.

The county commissioners may not contract to admit a person to the county infirmary at a future date.

COLUMBUS, OHIO, February 4, 1915.

HON. JAMES F. FLYNN. JR., *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—I have yours of January 25, 1915, submitting therewith a copy of a proposed contract, as follows:

"Memorandum of agreement by and between Mr. Andrew F. P. Mahon, of Sandusky, Ohio, hereinafter known as the party of the first part, and the commissioners of Erie county, Ohio, located at _____, as parties of the second part.

"Witnesseth: That the party of the first part has this day given to the party of the second part, and to their successors in office forever, one hundred dollars ($100.00), for the general county tax fund; six hundred dollars ($600.00) for the Erie county infirmary, said money to be used for infirmary purposes only; and five hundred dollars ($500.00 for the Erie county children's home; total, twelve hundred dollars ($1,200.00), the receipt of which is hereby acknowledged by the said party of the second part.

"Now, in consideration of the said gift of twelve hundred dollars ($1,200.00) by said party of the first part, the undersigned parties of the second part, as the duly elected, qualified and acting commissioners of Erie county, Ohio, do on behalf of themselves and their successors, in the name of the said Erie county, Ohio, hereby covenant and agree with the said party of the first part, Andrew F. P. Mahon, to furnish him with room, board, care and medical attendance in sickness and infirmity, in the infirmary of said Erie county, Ohio, and we and our successors, moreover, agree to accept the lump sum of twelve hundred dollars ($1,200.00) as full payment for life, and, moreover agree to set up no post mortum claim against Andrew F. P. Mahon, his executor or his heirs."

You state in your letter:

"I have advised the commissioners that they cannot enter into a contract to furnish one with room, board, care and medical attendance as set forth in this contract, by virtue of the fact that under the circumstances they are bound by law to furnish the same. Mr. Mahon does not desire to enter the infirmary at this time, but wants to enter at any time he should be disabled or in such a position that he cannot care for himself. His intention is to turn this money over to the county for the purpose named in his agreement, so that he will not be classed as a pauper.

"Query: Can the commissioners contract with a second party to admit this second party to the infirmary in the future?

"If you agree with me that they cannot so contract, have you any suggestions to offer whereby Erie county may do such act as to secure the money Mr. Mahon desires to give it in this case?"

County commissioners have such authority only as is conferred upon them by law, and there is no law under which the commissioners of a county could enter into a contract such as you submit.

The commissioners of a county cannot contract with any one to admit them to the county infirmary at any time, admission to a county infirmary being governed strictly by law.

The county commissioners are capable, under the statutes, of receiving gift, in behalf of the county, but I have no suggestions to offer as to how Erie county might do anything towards securing Mr. Mahon's money.

Respectfully,

EDWARD C. TURNER,

Attorney General.

64.

WHEN CONTRACT MAY BE CANCELLED BY THE OHIO STATE COMMISSION TO THE PANAMA-PACIFIC INTERNATIONAL EXPOSITION—FAMOUS FACTORIES OF THE WORLD COMPANY.

The Ohio state commission to the Panama-Pacific international exposition may, at the request or with the consent of the other parties to a contract which said commission may be authorized to enter into, when satisfactory evidence is furnished to said commission that all agreements made or obligations created in pursuance of such contract have been cancelled and that all expenses of every description growing out of such contract have been paid, cancel such contract and release a bond executed in pursuance thereof, and may require a bond indemnifying the commission or the state of Ohio against all claims made or actions instituted on account of any obligation assumed or liability created by or in pursuance of such contract.

COLUMBUS, OHIO, February 4, 1915.

The Ohio State Commission to the Panama-Pacific International Exposition.

GENTLEMEN:—I am in receipt of Mr. Pretzinger's letter under date of February 1, 1915, reading as follows:

"Regarding the contract for motion picture display, entered into between the Ohio state commission, to the P. P. I. E. and the Famous factories of the World Co., Dayton, Ohio.

"Herewith find copy of contract and resolution which the Ohio state commission passed at its last meeting held in Columbus on Wednesday, January 27, 1915.

"Mr. Torpy and the writer have been appointed as a committee to confer with you relative to this contract and bond, and we most respectfully request that you give it your consideration and let us have your opinion at the earliest convenience.

"Verifying the statements made when we were in Columbus, the Ohio state commission has been put to no expense whatever in connection with this contract, nor are the contractors in any manner asking for reimbursement for work that has been done and material furnished. The contractors up to the time they notified the commission, claim to have gone to an expense of somewhat over $3,000.00, but are not asking the commission to reimburse them in any manner.

"I might further emphasize that the commission has unanimously expressed itself that unless the motion picture display could be made representative of the interesting industries of the state, there had better be no motion picture display.

"As there is no fund for a motion picture display, it was decided originally that if a motion picture display could be arranged at absolutely no cost to the state, it would be desirable to do so.

"The general depression throughout the country has caused all large advertisers to retrench, with the result that it has been impossible to secure such contracts as the Famous factories of the World Co., indicated could be secured.

"The commission has thoroughly investigated this condition and has decided that the project is not feasible at this time and for this reason passed the resolution, copy of which is enclosed.

"When you render your opinion, kindly address the same to the writer, 1155 Reibold Annex, Dayton, Ohio, as Mr. Torpy will be in California. The writer will then place it before the commission at its next regular meeting, even though Mr. Torpy is not here."

Enclosed with the letter was a copy of the contract between the Famous factories of the World Company and your commission. It is unnecessary to set this contract out at length. Suffice it to say that your commission attempted to enter into an agreement with the Famous factories of the World Company, to make a moving picture display at the exposition.

Also enclosed with the letter was a copy of the resolution of your commission, which reads as follows:

"Whereas there is a contract existing between the Famous factories of the World Co., of Dayton, Ohio, and the Ohio state commission to the Panama-Pacific international exposition, for a motion picture display in the assembly room of the Ohio state pavilion at the P. P. I. E.

"And whereas the Famous factories of the World Co., through its authorized officers has notified the Ohio state commission to the P. P. I. E. that owing to general business depression throughout the state, it has been found impossible to interest the various cities and the large advertisers of the state, with the result that it cannot carry out the terms of its contract and make a representative display of the various interests and industries of the state.

"And whereas the members of the Ohio state commission unanimously agree after a thorough discussion, that unless the display is representative of the various interests and industries of the state, there had better be no motion picture display.

"And whereas the members of the Ohio state commission after a thorough investigation of the conditions are of the opinion that the Famous factories of the World Co. has made every honest effort to fulfill the terms of its contract and has failed only on account of the unusual business conditions prevailing throughout the country.

"Now be it Resolved:

"First. That the directing commissioner accompanied by the architect, acting as a committee for the Ohio state commission to the P. P. I. E. confer with the attorney general of the state relative to the contract existing.

"Second. That with the approval of the attorney general of the state, when the Famous factories of the World Co. presents to the Ohio state commission, satisfactory evidence that all contracts for industrial and state films have been cancelled and that all expense of every description for both industrial and state films has been paid and that there will be absolutely no expense to the state of Ohio on account of the contract existing, that the contract and the bond for ten thousand dollars ($10,000.00) which is a part of the contract, be and is hereby released and their obligations made void."

As I take your request for opinion to be, it is this: Has the commission the authority to cancel, with the consent of the Famous factories of the World Company, said contract?

It is unnecessary in answering this question to go into the question of whether or not your commission had the power to enter into the contract in the first instance.

I am of the opinion that when the Famous factories of the World Company presents to your commission satisfactory evidence that all contracts for industrial

and state films have been cancelled, and that all expense of every description for both industrial and state films has been paid by said company, and that there will be absolutely no expense to your commission or the state of Ohio on account of said contract, that your commission and the Famous factories of the World Company may cancel said contract.

It would be competent for your commission, in consideration of the cancellation of the contract, to take a new bond guaranteeing the payment of any outstanding obligations.

I might say further, by way of mere suggestion that the resolution submitted should be redrafted and readopted by the commission, and should contain instead of the last paragraph thereof, a provision that the agreement should be cancelled and the bond released when the Famous factories of the World company shall have entered into an agreement to assume and pay all obligations resting upon your commission by reason of any contracts which may have been entered into in pursuance of the agreement between the Famous factories of the World Company and the Ohio state commission to the Panama-Pacific international exposition, and to defend all claims made or actions instituted on account of the same, and shall furnish a bond of sufficient amount and with satisfactory security to indemnify and hold harmless your commission from all loss on account of any claims, liabilities or damages growing out of any such contracts and against any expense for the defense of any such claim made or action instituted, provided of course that it should be deemed advisable by your commission to require such a bond.

Respectfully,
EDWARD C. TURNER,
Attorney General.

65.

DISTRICT ASSESSORS—SALARY—PAID ONLY FROM THE TIME OR ENTRANCE UPON THE PERFORMANCE OF DUTY.

As the salary of a district assessor is paid monthly, an assessor who did not qualify and enter upon his duties within a reasonable time after his appointment should only be paid from the time he entered upon the performance of his duties.

COLUMBUS, OHIO, February 6, 1915.

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

GENTLEMEN:—Under date of January 29th, the Honorable C. E. Bloomer, auditor of Huron county, Norwalk, addressed a letter to me in which he says:

> "Under an opinion rendered by the attorney general as per instructions from the bureau of inspection and supervision, of date of January 11, 1915, relating to the salary or compensation of district assessors as to date of commencement of same, it states that 'a district assessor is entitled to one-half of his salary for the month of December, 1913, without regard to the time of qualifying or filing his bond.' This ruling of opinion may be proper for those who were on the job during the month of December, but would that be a proper ruling where the district assessor was outside of the state, did not return or qualify until the first of January, 1914?"

The opinion to which he referred is No. 1306 rendered to your bureau under date of December 21, 1914, and in such opinion it was held that each district

assessor after qualifying became entitled to his annual salary provided he served the full year and regardless of the particular date of qualifying, that is, he became entitled to the annual salary after December 5, 1913, which appears as the date on the books of the governor's office on which the appointments were made.

It is provided in section 5614, General Code, that:

> "The salaries of the district assessors * * * shall be paid *monthly* out of the county treasury on the warrant of the county auditor."

In view of the fact that the annual salary of a district assessor is split up into monthly payments, I am of the opinion that if a district assessor did not qualify within a reasonable time after the appointment was made by the governor, a proportionate reduction should be made in his compensation as based on monthly periodical payments up to the time that he did qualify after his appointment.

Respectfully,
EDWARD C. TURNER,
Attorney General.

66.

DEFICIT IN MAINTENANCE ACCOUNT OF DEPARTMENT OF BANKS

Funds to meet a deficit in the maintenance of the department of banks in certain items appropriated under "summary controlling account" and "maintenance," where there are no funds in other items of same account which may be transferred, can only be secured by legislative act.

COLUMBUS, OHIO, February 6, 1915.

MR. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 3, 1915, requesting my opinion as follows:

> "Upon assuming the office of superintendent of banks and banking I discover that there are deficiencies in certain appropriations. These deficiencies represent unpaid bills which have not been formally approved. The accounts which show deficiencies are as follows:
>
> "C-4. Office supplies.
>
> "F-6. Transportation.
>
> "F-7. Communication.
>
> "To pay accrued bills and to operate the department up to and including February 15, 1915, I have estimated that it will require the sum of $4,615.00.
>
> "I shall be very grateful indeed if you will advise me at the earliest possible moment just what I should do."

By the general appropriation bill passed February 15, 1914 (104 O. L., 64), the sum of $68,182.00 was appropriated to meet the expenses of the department of banks and banking. This appropriation was made under two heads constituting the "summary controlling account" (104 O. L., 72) viz.: "personal service $51,200.00 and "maintenance" $16,982.00. In the detailed and itemized budgets, as designated in and appended to the above appropriation bill (104 O. L., 86), this appropriation was further itemized as follows:

"Personal service.			
"A-1.	(Salaries, regular and temporary)	$51,200 00	$51,200 00
"Maintenance.			
"C-4.	(Office supplies)	$620 00	$620 00
"F-6.	(Transportation)	14,085 00	
"F-7.	(Communication)	477 00	
"F-8.	(General Plant Service)	1,700 00	
"F-9.	(Contingencies)	100 00	16,362 00
			$16,382 00"

Your letter recites deficits in items C-4, F-6 and F-7 under the maintenance account, but fails to reveal the condition of funds in other items under "summary controlling account" for maintenance. You have since, however, orally informed me that the balance in these items is practically exhausted and wholly insufficient to meet any material part of the deficit stated; therefore, it will avail nothing to procure a transfer of funds from other subdivisions of "maintenance" to the subdivisions in which the deficits exists, as is contemplated and authorized in section 3 of the appropriation bill (104 O. L., 72).

I am, therefore, of the opinion that there is no legal way of meeting the deficit in the exhausted items mentioned, except by act of the general assembly, and I therefore advise you to apply to the general assembly for an appropriation of the amount required to meet the necessary expenses of your department for the remainder of the year, either by the introduction of a bill for that purpose or by request to the house finance committee to include it as an item of the "sundry appropriation bill" which will probably be passed at an early date. I may add that the payment of any expenses of your department, for which no funds are available, must of necessity await the pleasure and action of the general assembly.

Respectfully,
EDWARD C. TURNER,
Attorney General.

67.

TORRENS LAND ACT—REGISTRATION OF TITLES.

The words "A True Copy," etc., appearing on certificates in Land Title Registration, forms 29-a and 29-b, are sufficient for the purpose of certifying the court's decree under the provisions of section 8572-23, G. C.

COLUMBUS, OHIO, February 6, 1915.

HON. LANGDON W. KUMLER, *Recorder of Lucas County, Toledo, Ohio.*

DEAR SIR:—Your request for an opinion concerning the use of various forms in connection with the Land registration act, covered by sections 8572-1 to 8572-118 of the General Code, has been received, and is contained in your several letters as follows:

> "I am desirous of getting some information regarding the land title registration act, Ohio Laws, volume 103, page 914, section 23.

"This section provides that a certified copy of the court's decree shall be filed with the recorder, and the recorder shall transcribe or bind the decree in a book to be called 'Register of Titles.'

"On the above mentioned certified copy of decree, is it, or is it not, necessary for the probate judge to affix his certificate thereto? The probate judge in this county will not file a copy of his decree in this office without his certificate being attached, but the form prescribed by your department does not provide for any such certificate.

"I have complied with the instructions of the attorney general's office regarding the various forms, and if the probate judge's certificate must be attached to his decree, and this office must transcribe this certificate with the decree, it will conflict with the numerous forms which were prescribed by your department.

"Should not the probate court make their decrees according to the forms prescribed by your department? Should this office transcribe these decrees identically? As early a reply as possible will be greatly appreciated.

"Your letter of January 26th received. I will endeavor to make what information I desire as clear as possible to you regarding the land title registration act, Ohio Laws, volume 103, p. 914, section 23.

"This section provides that a certified copy of the court's decree shall be filed with the recorder, and the recorder shall transcribe or bind the decree in a book to be called 'Register of Titles.'

"Previous to July 1, 1914, which was the time this law went into effect, I very carefully went over all of the forms and instructions prepared by your department, and after familiarizing myself with the act and the forms, I went ahead with them and equipped this office with all records and blanks necessary for the operation of this act.

"The instructions I received from your department specifically say that the probate judge shall use form 29-a or 29-b. This decree we either bind or transcribe. The probate court has sent to this office decrees which do not comply with these forms. Consequently, it throws out all of the forms I have prepared for this work.

"The probate judge's reason for not complying with this form is principally on account that this form has no certificate thereon, certifying that it is a certified copy. The judge will not send any copy of his decree to this office without his certificate. You will notice that on this form 29-a the words below say 'A true copy,' which I suppose is sufficient.

"The forms prepared by your department have no court certificate thereon, and if they now start to affix their certificate, it will make considerable confusion, as the forms are not printed so that this certificate could be added in the proper place.

"I would appreciate as prompt an answer as would be convenient."

Since the receipt of your second letter I have communicated with Honorable O'Brien O'Donnell, probate judge of your county, for the purpose of learning just what his objection was to the use of form 29-a for the purpose of certifying the copy of a decree entered in his court to your office for filing or transcribing, and I am just in receipt of a letter from him concerning the matter. I gather from his letter and from your several communications that there is but one question raised in this matter, and that is as to whether or not the form contains a sufficient certificate of decree. There is no provision in law setting out any special form of certificate under which decrees from the probate court or the common pleas court shall be sent to the recorders, and it is my opinion that the certificate printed on form 29-a, which is as follows:

"A true copy. Witness my official signature and the seal of said court this_____day of_____19____.

"(Seal) _____clerk. By_____deputy.

"Received for entry in the register of Land Titles of_____ county, Ohio, on the_____day of_____19__, at _____ o'clock __m. and entered in Registration Book_____page_____as of date of said decree.

"_____recorder. By_____deputy."

heretofore prescribed by my predecessor, Attorney General Hogan, under the provisions of section 8572-94 of the act referred to, is in all respects legal for the purpose of carrying out the provisions of section 8572-23 of the General Code above referred to.

I might add that the practice of some of the recorders that has come under my observation is to bind the forms in a book entitled "Register of Titles" in the form in which it comes from the court, thereby obviating the necessity of transcribing it.

I am sending a copy of this opinion to Honorable O'Brien O'Donnell, and feel that you will have no further difficulty along the lines indicated in your letter.

Respectfully yours,
EDWARD C. TURNER,
Attorney General.

68.

A CERTIFICATE OF FEES EARNED BY A SHERIFF IN PROBATE OR JUSTICE OF THE PEACE COURTS SHALL BE MADE BY SAID COURT OFFICERS.

The certificate comprehended by section 2846, G. C., as to such fees as are earned by the sheriff in the probate court and the court of justice of the peace, shall be made by such probate judge and justice of the peace, respectively.

COLUMBUS, OHIO, February 6, 1915.

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

GENTLEMEN:—Under date of January 26th, 1915, you submit to this office a request for written opinion upon the following question:

> "Section 2846, G. C., which provides for an allowance to the sheriff for his lost fees in criminal cases, not to exceed the sum of $300.00 per year, provides that these shall be 'paid upon the certificate of the clerk and the allowance of the county commissioners.' Can the use of the word 'clerk' be held to apply to the probate judge as acting by law as the clerk of his own court, and to a justice of the peace?"

Section 2846 of the General Code provides:

> "Upon the certificate of the clerk and the allowance of the county commissioners, the sheriff shall receive from the county treasury in addition to his salary his legal fees for services in criminal cases wherein the state fails to convict, and in misdemeanors upon conviction where the defendant proves insolvent, but not more than three hundred dollars shall be allowed for the services rendered in any one year of his term. * * * * *"

Under the provision of the foregoing section the query is as to the administration of such provision in cases in the probate court and justice court.

Section 1596, General Code, provides:

> "When required by the probate judge, sheriffs, coroners and constables shall attend his court, serve and return process directed and delivered to them by such judge, * * * * *."

The probate court is given concurrent jurisdiction with the common pleas court in all misdemeanor cases, by statute. Section 13494, General Code, provides:

> "Justices of the peace, police judges and mayors of cities and villages may issue process for the apprehension of a person charged with an offense and execute the powers conferred and duties enjoined in this title."

Section 13500, General Code, provides:

> "The warrant shall be directed to the *sheriff* or to any constable of the county, or, when it is issued by an officer of a municipal corporation, to the marshal or other police officer thereof, * * * * *."

By the foregoing and other kindred sections, it will be observed that the three courts, common pleas, probate and justice of the peace, have similar authority to direct warrants and process to the sheriff, and that he has a corresponding duty to obey such mandate from each of said courts, and make return to each court, respectively, of his execution of such process, including a taxing of his fee for such service. Such return thereupon becomes a part of the files and records of such courts, respectively.

The clerk or the corresponding officer discharging the clerical functions of the court becomes the custodian of such files and records of the court.

The fees to be received by the sheriff upon such certificates, shall be only the fees actually earned and not to exceed three hundred dollars in any one year.

I hold that the term "clerk" as used in the statute, shall be construed as referring to the officer of each of the various courts, wherein the sheriff is required to render such service, having custody of the records and memoranda of such court and being charged with the clerical or ministerial functions thereof, rather than that such word "clerk" should be construed as referring exclusively to the particular officer of the county technically named "clerk of the court."

The probate judge is by statute made clerk ex-officio of his court. Section 1584, General Code, provides:

> "Each probate judge shall have the care and custody of the files, papers, books and records belonging to the probate office. He is authorized to perform the duties of clerk of his own court. * * * * *."

By the provisions of the statute a justice of the peace performs all the ministerial and clerical functions incidental to his court, as well as the judicial functions thereof, except that in the larger cities of the state the law specifically provides justice courts with a clerk.

Section 1724, General Code, provides:

"Each justice of the peace must keep a docket, which shall be furnished by the trustees of the township in which must be entered by him; (The section then enumerates fifteen different matters which shall be recorded by such justice in the course of the conduct of his court)."

Section 1726, General Code, provides the justice shall keep alphabetical indexes, etc., and in all respects it is made the duty of the justice to perform the functions arising in his court corresponding to those ordinarily performed by clerk of the court in reference to the higher courts.

As to the fees of the sheriff "for services in criminal cases wherein the state fails to convict, and in misdemeanors upon conviction where the defendant proves insolvent," in the probate court, I hold that the certificate to the statement or bill of such fees shall be made by the probate judge, as ex-officio clerk of such court, and for such services rendered in a justice court by the sheriff, such certificate shall be made by the justice of the peace, as the officer of such court charged with the execution of the duties arising therein corresponding to the duties ordinarily exercised by clerks of the higher courts.

Respectfully,
EDWARD C. TURNER,
Attorney General.

69.

OFFICES INCOMPATIBLE — COUNTY COMMISSIONER — VISITING AGENT OF CHILDREN'S HOME.

The position of county commissioner and visiting agent of a county children's home are incompatible.

COLUMBUS, OHIO, February 6, 1915.

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

GENTLEMEN:—In your letter of February 2nd, you request my opinion upon the following question:

"May the trustees of a children's home legally appoint a member of the board of county commissioners as visiting agent under the provisions of section 3099, G. C., as amended 103 O. L., page 892?"

Amended section 3099, G. C., referred to in your question, provides in effect that the trustees of the children's home shall, under certain circumstances, appoint a visiting agent. The duties of the agent are specified. The section then uses the following language:

"* * * The agent shall perform his or her duties under the direction of the trustees and superintendent of the children's home for which she is appointed, and may be assigned other duties not inconsistent with his or her regular employment as the trustees prescribe. His or her appointment shall be for one year, or until his or her successor is appointed, and he or she shall receive such reasonable compensation for his or her services as the trustees provide."

The trustees of children's home are appointed by the county commissioners (3081, G. C.), and the county commissioners have the power to remove any trustees for certain specified causes (3082, G. C.).

In my opinion, the relation between the two positions referred to in your question, that is, visiting agent of the children's home and county commissioner, is such as to make them incompatible. The trustees of a children's home are subject to the control and direction of the commissioners, and the visiting agent is subject to the control and direction of the trustees. The extreme possible consequences of the selection of a county commissioner as visiting agent need not be stated. No plainer case of incompatibility than this could be imagined.

A letter attached to your query (and as per your request enclosed herewith) states that the commissioner in question has been in the past serving as visiting agent and desires to continue in this position without salary or compensation of any kind, save reimbursement for his expenses, after entering upon his office as commissioner. The willingness of the person in question to serve without compensation evidences his good faith, but does not change the legal situation.

Respectfully,
EDWARD C. TURNER,
Attorney General.

70.

APPROVAL OF BOND ISSUE FOR THE VILLAGE OF MARBLE CLIFF, OHIO.

The transcript of the proceedings of council of the village of Marble Cliff for the issuance of bonds constitutes a valid and legal obligation against said village.

COLUMBUS, OHIO, February 8, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I hereby certify that I have examined the transcript of the proceedings of the council of the village of Marble Cliff, Ohio, in the issuance of bonds in the amount of seventeen thousand dollars ($17,000.00) in anticipation of the collection of special assessments to pay the estimated cost and expense of improving Cambridge place between First avenue and Fifth avenue, in said village, and First avenue between Cambridge place and the east corporation line of said village; and that said proceedings are in conformity with the law of this state; and that said bonds, if sold to the industrial commission of Ohio, would constitute a valid and binding legal obligation against the said village of Marble Cliff, Ohio, to be paid in accordance with the terms specified therein.

The bonds themselves have not been submitted to me. They should refer, on their face, to the amendatory ordinance of January 15, 1915, as well as to the original ordinance of July 30, 1914, providing for their issuance.

Respectfully,
EDWARD C. TURNER,
Attorney General.

71.

TAX LIENS FOR REAL PROPERTY ATTACH ON THE SECOND MONDAY IN APRIL, 1915—CONSTRUCTION OF HOUSE BILL NO. 50, 104 O. L., 253.

House bill 50, 104 *O. L., 253, is to be read as to all matters subsequent to its taking effect, as if a part of the original Warnes law,* 103 *O. L.,* 786, *et seq.*

Under existing laws, liens of the state for taxes will attach to real property on the day preceding the second Monday in April, 1915.

COLUMBUS, OHIO, February 8, 1915.

To the Senate of the 81*st General Assembly, In re Senate Resolution No.* 26.

MR. PRESIDENT AND GENTLEMEN:—I beg to acknowledg the receipt of senate resolution No. 26, reading as follows:

> "WHEREAS, There appears to be considerable doubt on the part of many county auditors throughout the state as well as citizens of the state of Ohio, as to the true and proper date when the tax lien begins to run for the year 1915; and,
>
> "WHEREAS, There is considerable doubt as to the proper construction of house bill No. 50 passed February 16, 1914, which was designated to amend sections 5584, 5590 and 5624-4 of the General Code, relating to the assessment of property for taxation, therefore,
>
> *Be It Resolved,* That the attorney general be requested to advise the senate in writing regarding the proper construction of said house bill No. 50 aforesaid, as found in 104 Ohio Laws, page 253, and further advise the senate as to the date when the tax lien will accrue for the year 1915."

The act to which said resolution refers, is found in the 104th Ohio Laws, 253, and the matter to be principally discussed is that part designated as 5584 of the General Code, which as amended, reads as follows:

> "Whenever any property is by any existing provision of law required to be listed or returned for taxation at any time between the second Monday of April and the third Monday of May, in any year, such property shall be listed or returned between the first Monday of April and the first Monday of June, annually; whenever any property is by any existing provision of law required to be valued as of the day preceding the second Monday of April, in any year, such property shall be valued as of the day preceding the first Monday of April, annually; and whenever the liability of any person or of any property to taxation is by any existing provision of law to be determined by reference to the day preceding the second Monday of April, said liability shall be determined by reference to the day preceding the first Monday of April; provided, that the provisions of this section shall not apply in any case where property is by any existing provision of law required to be returned for taxation to, or to be valued by, the tax commission of Ohio; nor in any case where the liability of any person or of any property to taxation is by any existing provision of law required to be originally determined by the tax commission."

Section 5548 of the General Code was originally section 6 of the Warnes law (103 O. L., p. 788), which provided as follows:

"Whenever any property is by any existing provision of law required to be listed or returned for taxation at any time between the second Monday of April and the third Monday of May in any year, such property shall be listed or returned between the first Monday of February and the first Monday of June, annually; whenever any property is by any existing provision of law required to be valued as of the day preceding the second Monday of April, in any year, such property shall be valued as of the day preceding the first Monday of February, annually; and whenever the liability of any person or of any property to taxation is by any existing provision of law to be determined by reference to the day preceding the second Monday of April, said liability shall be determined by reference to the day preceding the first Monday of February; provided, that the provisions of this section shall not apply in any case where property is by any existing provision of law required to be returned for taxation, or to be valued by, the tax commission of Ohio; nor in any case, where the liability of any person or of any property to taxation is by any existing provision of law required to be originally determined by the tax commission."

The doubt to which your resolution refers, exists and arises out of the fact that from and after the time of the enactment and taking effect of section 6 of the Warnes law, above quoted, there was no "existing provision of law requiring property to be listed or returned for taxation at any time between the *second Monday of April* and the *third Monday of May,*" etc., i. e., section 6 of the Warnes law which was then in effect, had changed the listing time, etc., to the period between the date preceding the *first Monday in February* and the *first Monday in June.* Therefore, when house bill No. 50 was enacted (104 O. L., 253), it is claimed by some that said section could have no application, because section 6 of the Warnes law had repealed all heretofore existing laws in conflict with said section 6, and apparently the only then existing law provided for listing the returning, etc., *between February and June.*

While this question is not without its difficulties, and the situation is one which should not exist, I believe that by applying the well-recognized principles of statutory construction the statute may be given effect. The primary rule of construction is to give effect to the legislative intent. In gathering this intent, we may look to the whole bill, as well as to the whole legislation to be amended. In the original Warnes law, there was a definite purpose to amend all laws so as to change the first day of the listing and assessing period from the day preceding the second Monday in April to the day preceding the first Monday in February, so as to make all related laws conform thereto, e. g.: the amendment in the original Warnes law of 5590 (103 O. L., 790) and 5624-4 (103 O. L., 799) which are the same sections dealt with in house bill 50 referred to in your resolution. For reasons that are well known, the same legislature at a subsequent session, sought to change back to a date in April from the date in February fixed upon in the original enactment of the Warnes law. This was the sole change that the legislature sought to make in the law. Hence, it took section 6 (G. C. 5584), section 12 (G. C. 5590) and section 51 (G. C. 5624-4) of the Warnes law, and wherever the word February occurred, changed it to April. This is the only change in all of these sections, except that in section 5624-4 some of the language was re-arranged.

The section that is causing the general public most confusion, is section 5584, and in this section the change consisted in substituting in three instances, the word "February" for the word "April."

While the method pursued in both the original Warnes law and in house bill

50 was careless, the intent of the legislature in both instances as gained from the legislation itself, is obvious.

In the case of McKibbon v. Lester, 9 O. S., 628, the supreme court of Ohio laid down the following doctrine:

> "Where one or more sections of a statute are amended by a new act, and the amendatory act contains the entire section or sections amended, and repeals the section or sections so amended, the section or sections as amended must be construed as though introduced into the place of the repealed section or sections in the original act, and, therefore, in view of the provisions of the original act, as it stands after the amendatory sections are so introduced."

This doctrine was followed and approved by the supreme court in the cases of State ex rel. v. Cincinnati, 52 O. S., 410, and State ex rel. v. Spiegel, decided September 17, 1914.

Under this doctrine said house bill 50 is to be read now (and as to operations subsequent to the amendment) as if it was the original language contained in the original act.

Therefore, the words "any existing provisions of law" occurring in section 5584 as amended in said house bill 50 (G. C., 5584) have reference to any provision of law existing at the time of the enactment of section 6 of the Warnes law (103 O. L., 788).

This same doctrine applies to all of said house bill 50.

Answering your second question as to the date when the tax lien will begin to accrue, section 5671, G. C., provides:

> "A lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid. All personal property subject to taxation shall be liable to be seized and sold for taxes. The personal property of a deceased person shall be liable, in the hands of an executor or administrator, for any tax due on it from the testator or intestate."

This is the only statute that I have been able to find which fixes the time for the attaching of a lien for taxes.

Confusion was introduced here by the third clause of section 6 of the Warnes law (G. C. 5584), the language of which remains the same in 104 O. L., 253 amendment. Said third clause of section 5584 provides:

> "Whenever the liability of any person or of any property to taxation is by any existing provision of law to be determined by reference to the day preceding the second Monday of April, said liability shall be determined by reference to the day preceding the first Monday of April."

It will be observed that in the language just quoted the word "lien" is not used, but the word "liability" is used. "Lien" and "liability" are not synonomous terms.

Generally speaking, all property real and personal is liable for taxation, but a lien attaches only to real property that is subject (liable) to taxes.

While the term "lien" may include the term "liability," the term "liability" by no means necessarily includes the term "lien."

Two canons of statutory construction should be kept in mind. (a) That a general statute—that is, a statute dealing with matters generally—is modified by one that deals with a particular matter. (b) In order for a later statute to repeal or modify an earlier, the two must be irreconcilable, otherwise both shall stand.

Applying the first canon, the third clause of 5584 above referred to, provides the general rule for "liability" "of any person or of any property," and does not distinguish between property or between property or persons. On the other hand, section 5671 clearly distinguishes between a lien upon real property and the liability of personal property, subject to taxation, to be seized and sold.

Applying the second canon, section 6584 as amended in house bill 50, and section 5671 of the General Code, are reconcilable.

While it is desirable that the date of the attaching of the lien to real property and the liability of all property for taxation should be the same, there is no absolute necessity for it.

I hold, therefore, that the date when the tax lien on real property will accrue for the year 1915, will be on the day preceding the second Monday in April, under the provisions of section 5671, G. C.

I would suggest that a bill be introduced clarifying this situation so that the ordinary citizen will not have to employ a lawyer to find out the time when he must make his return for taxation or the date of the state's lien for taxation attaching to his real estate.

Respectfully,
EDWARD C. TURNER,
Attorney General.

72.

LEGAL RESIDENCE—PERSONAL PROPERTY TAXATION—DETERMINED BY PLACE LAST ACQUIRED AS LEGAL DOMICILE.

One who owns a farm which is rented on shares, and at which the owner has never resided cannot claim residence there for purposes of personal property taxation; and if at the time he has no other actual place of abode his legal residence is determined by the place at which he had last acquired a legal domicile.

COLUMBUS, OHIO, February 8, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letters of February 1st, and February 2nd, respectively, stating facts and requesting my opinion thereon as follows:

> "One 'B' prior to the year 1895, owned a residence in the village of London, Madison county, where he resided with his wife. In the year mentioned the couple was divorced. 'B' at this time bought a farm in Monroe township, Madison county, which he owned until the year 1899. Between the years 1896 and 1899 'B' listed his intangible personal property in Monroe township and voted therein.
>
> "After selling the farm in Monroe township, 'B' bought another farm in Summerford township, which he held until 1902, and he listed his intangible property and voted in that township during that period of time.
>
> "In 1902, upon selling the farm in Summerford township, 'B' purchased

a farm in Faifield township, Madison county, which he still owns. In each year beginning with 1902 and ending with 1913, 'B' has listed his intangible personal property and voted in Fairfield township.

"Since his separation from his wife, 'B' has had no fixed place of abode. He has spent most of his time in the village of London, where he has been in the habit of renting a room in a hotel for different periods of time. There is a statement to the effect that he has been given at one time or another, a special rate at this hotel as a regular boarder. Much of 'B's' time has also been spent in other places, as at Cincinnati and in the village of Lilly Chapel, Fairfield township, in which places 'B' stops at a hotel. He never, however, has stayed over night at any of the farms which he has owned, and there are no accomodations for him at the farm which he now owns and has always rented on shares.

"'B' submits an affidavit stating some of the facts above referred to and containing a number of legal conclusions, which I quote literally as follows:

"He is a single man, having no wife or children; that all the real estate he owns is a farm of about 226 acres in Fairfield township, Madison county, Ohio, on which there is a farm house and improvements, *which is the home of the affiant,* which land he has farmed on the shares * * * the man farming the land lives with his family in the said farm house, which is also the residence and home of the man so farming his land. * * * * * * *.

"His right to vote and exercise his right of franchise in said Fairfield township has never been questioned or disputed by any election officers; that for about twelve years last past, he has listed with the assessor of Fairfield township all of his property consisting of over $20,000.00 in personal property besides his real estate * * *.

"The affiant does not reside in the corporation of London, but often takes his meals and puts up at a hotel in London corporation, but has no regular room or rooms there and pays only by the day for such time as at said hotel, never expecting or intending to make his home or residence there. He also often puts up at a hotel in Cincinnati the same way * * * and at various other places, and on the first day of February, 1914, was boarding and rooming in Hamilton county, Ohio, * * * always intending to have his residence and his home on his said farm * * *.

"Should 'B's' personal property be listed in the village of London or in Fairfield township, Madison county?"

Before stating my conclusions of law, I wish to say that I shall not attempt to determine what the actual facts of the case presented by you are. There is really no confiict between the facts set forth in the affidavit and those submitted by you and acquired from other sources, save in the legal conclusions and statements of intention which are found in the affidavit. The legal conclusions must, of course, be ignored, and the statements of intention will on the other facts submitted, if true, prove, I think, to be immaterial.

These facts and the question submitted thereon invite consideration of section 5371, G. C., which provides in part as follow:

"* * * Merchants' and manufacturers' stock, and personal property upon farms shall be listed in the township, city or village in which it is situated. All other personal property, moneys, credits and investments,

except as otherwise specially provided, shall be listed in the township, city, or village in which the person to be charged with taxes thereon *resides at the time of the listing thereof,* if such person resides within the county where the property is listed, and if not, then in the township, city or village where the property is when listed."

I find that a question somewhat similar to that presented by you was considered in the administration of former Attorney General Denman, in an opinion, to which I refer generally is found at page 808 of the annual report of the attorney general for the year beginning January 1, 1910, and ending January 1, 1911. In the course of that opinion, the writer states a proposition with which I agree, and which may be stated here without repeating in full the reasoning and authorities upon which it is based, as follows:

"The word 'resides' as found in 5371, G. C., denotes legal domicile and not actual place of abode."

This principle raises the question as to what is necessary in order to establish a legal domicile. A few elementary principles will suffice to answer this question. Except as to married women, there are two kinds of domiciles, viz.: domicile of origin and domicile of choice. A domicile of origin is that which every infant has upon attaining majority, being the domicile of the parents at that time. A domicile of choice is that which an individual has elected and chosen for himself to displace the domicile (whether of origin or choice) previously obtaining.

It is obvious that in answering this question the principles surrounding the acquisition of a domicile of choice must be applied.

On this point, the authorities (of which unfortunately there are none in Ohio) are unanimous to the effect that residence and intent must concur in order that a domicile of choice may be established, or in legal phraseology the *factum* and *animus* are both elements of the choice which is effective to change a domicile. Therefore, residence at the place in question must be shown to have existed in order that a party's domicile may be deemed to have been established there. The character of such residence is wholly immaterial. It is not necessary that a dwelling house be owned or leased at the place of choice in order to accomplish the required result; nor is any specified length of time required, but any residence at the place for an appreciable interval of time coupled with the intent to make that place a home, i. e., to remain there for an indefinite time, even though not permanently, is sufficient to establish a domicile of choice.

There are other collateral principles which might be stated, but the foregoing are sufficient on the facts stated by you to enable me to return an answer to your question.

If it is true that the party inquired about by you never stays at his farm, and never has remained there for any period of time, then he has failed to acquire a legal domicile at that place, notwithstanding his expressed intention to make that place his home.

It is clear that during his married life, his domicile was in London. Since his divorce, it is not clear that he has any fixed place of abode; but if the facts reported to you are substantiated as you state them, he has never committed any act which would suffice to change the domicile which became fixed during his married life.

I am clearly of the opinion that the mere fact that "B" has purchased farms in different townships, but has not owned more than one farm at any one time is not sufficient to make such farm his domicile of choice, even though such

purpose is coupled with an intention on his part to constitute such farm his home. In order to make that intention effective as a change of domicile he must have resided on one or another of these farms for some appreciable length of time with the intention of staying there indefinitely—that is without entertaining the intention of returning to the place of his original domicile.

The fact that "B" has paid taxes for years in different taxing districts under an erroneous interpretation of the law, does not alter the case for the purpose of the future; nor does the fact that the election officers of the several townships may have permitted him to vote therein become material, whether he simply voted unchallenged or not.

For all the foregoing reasons, I am of the opinion that if the facts, as I have stated them, are substantiated, "B" should list his personal property in the village of London.

I think I have said enough, however, to indicate that if it should appear that "B" had actually resided for an appreciable length of time upon the farm in Fairfield township with the intention of making that place his home, the contrary result would follow, and his personal property should be listed in the township; but if "B" should show that he at some time resided on the farm, and should profess to have done so with the intention of making it his home, then his profession of intention would, I think, have to be weighed in the balance, so to speak, with his habits of life as described by you, in order to determine whether or not a domicile of choice had been established in the township; and even if it should appear that a domicile of choice had been established in a township it might still be made to appear that there had been a more recent establishment of domicile in the village.

In short, I cannot express any opinion in the premises except upon the facts as you submit them; and upon those facts and those only I advise that "B" should list his personal property in the village of London.

Respectfully,
EDWARD C. TURNER,
Attorney General.

73.

STATE FUNDS—BOARD OF DEPOSIT MAY LOAN MONEY TO BANKS BIDDING ONLY AT REGULAR BIDDING PERIODS.

Under the state depository law, the state board of deposit may not lend money to banks organized and bidding therefor between regular bidding periods.

COLUMBUS, OHIO, February 9, 1915.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 5, 1915, containing the following inquiry, and asking for my opinion thereon:

> "Has the board of deposit the right to loan money to banks under provision of section 8 of the state depository act, section 328 of the General Code, which banks have been organized since the last regular bidding period?"

Section 328 of the General Code provides as follows:

"All awards for the deposit of state funds shall be made upon competitive bidding; bids shall be received by the treasurer of state every two years, beginning between one o'clock p. m. on the first Monday in March and closing at one o'clock p. m. on the third Monday in March, 1911, and every two years thereafter."

Section 323 of the General Code provides that:

"It shall be the duty of the said board to meet on the first Monday in April, 1911, and every two years thereafter, or as often as is necessary at the call of the chairman, after this bill becomes operative, and designate such national banks within this state and banks and trust companies doing business within this state, and incorporated under the laws thereof as the board deems eligible to be made state depositories."

The state board of deposit consists of the treasurer of state, who is chairman, the superintendent of banks, and the attorney general.

Section 330 of the General Code provides that:

"After bids have been opened the treasurer of state shall on or before the first Monday in April of each bidding period award the state funds to the highest bidder. The treasurer of state shall deposit the state funds in such banks and trust companies after such applications have been approved by the board of deposit. Should additional state funds become available at any time during the two years or until the next bidding period, it shall be awarded to the highest bidders, first to the banks and trust companies from which deposits have been withdrawn to meet obligations of the state, second to those who failed to receive the full amount of their original award, and then the next highest bidders."

From these sections it appears that the bids shall be received by the treasurer of state between one o'clock p. m. on the first Monday in March and one o'clock p. m. on the third Monday in March, 1911, and every two years thereafter; and that said board shall meet on the first Monday in April, 1911, and every two years thereafter, or as often as necessary at the call of the chairman and designate such banks (bidding banks) as it deems eligible to be made depositories, and from these bidding and approved banks the treasurer of state shall on or before the first Monday in April of each bidding period award the state funds to the highest bidders.

In said section 330 of the General Code the provision is found that:

"Should additional state funds become available at any time during the two years, or until the next bidding period, it shall be awarded to the highest bidders, first to the banks and trust companies from which deposits have been withdrawn to meet obligations of the state, second to those who failed to receive the full amount of their original award, and then the next highest bidders."

This can only mean that the deposit should be limited to the list of bidding banks which has been approved by the board of deposits, and by the provisions of section 328 the receiving of bids by the treasurer of state is restricted to the periods therein prescribed—in every two years.

It therefore follows that banks which have organized subsequent to the bidding period prescribed in said section 328 must wait until the next bidding period therein designated in which to file with the treasurer of state its bids for state money.

Respectfully,
EDWARD C. TURNER,
Attorney General.

74.

FARM PRODUCTS MUST BE SOLD FOR CASH BY THE OHIO STATE UNIVERSITY AND AGRICULTURAL EXPERIMENT STATION.

Farm products sold by the Ohio State University and the agricultural experiment station must be sold for cash.

COLUMBUS, OHIO, February 9, 1915.

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

DEAR SIR:—Under date of January 9th, which letter was received by this department on January 19th, you request my opinion in the following matter:

> "Please let me have your opinion on the following proposition at your earliest convenience:
>
> "Do sections 20, 259 and 268, G. C., contemplate the certification of claims against individuals for farm products sold by the Ohio State University, the agricultural experiment station and kindred institutions, or should the officers charged with the disposition of such products be required by the governing boards to sell for cash or be personally responsible for the same?
>
> "If the auditor of state and attorney general should be required to handle these claims, their records will be encumbered with thousands of accounts ranging from ten cents up for butter, eggs, milk, potatoes, corn and similar products."

Section 20, G. C., to which you refer, roads as follows:

> "When an office or agent of the state comes into possession of a claim due and payable to the state, he shall demand payment thereof, and on payment have the amount duly certified into the state treasury. If he fails to collect such claim within sixty days after it comes into his possession, he shall certify it to the auditor of state, specifying the transaction out of which it arose, the amount due, the date of maturity, and the time when payment was demanded."

There is no doubt that the agricultural experiment station being under the control of a director appointed by the agricultural commission of Ohio makes the said director "an agent of the state." The Ohio State University is not a corporation and its officers in charge would, therefore, be agents of the state under section 20, G. C.

Neil vs. Board of Trustees, 31 O. S., 15.

However, there is no direct statutory authority for permitting the Ohio State University or the agricultural experiment station to sell farm products. Since not to do so would be an economical waste, the authority may be implied.

Unless direct authority of statute authorizes selling of state property on time, such property should be sold for cash. Therefore, said farm products should be sold for cash.

Respectfully,
EDWARD C. TURNER,
Attorney General.

75.

BANK STOCKHOLDERS—DOUBLE LIABILITY.

Stockholders of banks organized and doing business prior to January 1, 1913, *are subject to double liability for debts of the bank incurred prior to November* 3, 1903, and subsequent to January 1, 1913.

COLUMBUS, OHIO, February 9, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 6, 1915, requesting my opinion, as follows:

> "Will you kindly advise this department as to whether or not the stock of banks organized and doing business prior to January 1, 1913, is subject to double liability?"

To properly answer your question it is necessary to follow the history of article XIII, section 3 of the constitution of Ohio, adopted in 1851.

Original section 3 of article XIII was as follows:

> "(Dues From Corporations, How Secured) Dues from corporations shall be secured, by such individual liability of the stockholders, and other means, as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock."

This same section, as amended November 3, 1903, was as follows:

> "(Dues From Corporations; How Secured) Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her."

This section was again amended September 3, 1912, so that it now reads:

> "Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her;

except that stockholders of corporations authorized to receive money on deposit shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporations, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares. No corporation not organized under the laws of this state, or of the United States, or person, partnership, or association shall use the word 'bank,' 'banker' or 'banking,' or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation as may hereafter be provided by the laws of this state."

The question you submit was considered and answered by the court of common pleas of Greene county, Ohio (Honorable Charles H. Kyle, judge), upon demurrer to the petition in the case of State ex rel. Emery Lattanner, etc., vs. Osborn Bank, et al. This opinion was handed down on December 30, 1914, but so far as I am able to ascertain has not yet been reported. The opinion is quite lengthy, and involves the determination of a number of other questions not pertinent here; therefore, without quoting it at length, it is sufficient to state that I am in accord with the reasoning and conclusion of the court relative to the question submitted by you, and I am therefore of the opinion that, article XIII, section 3, as amended September 3, 1912, was self-executing, going into effect January 1, 1913, without the necessity of legislative action to make it operative, and that the stockholders of banks organized and doing business prior to January 1, 1913, are subject to double liability, or in the language of the constitution (article XIII, section 3) they "shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares."

The court further stated in the opinion above referred to, that the "double liability" clause inserted in article XIII, section 3 as now amended extends only to debts, etc., which were incurred prior to November 3, 1903, and to debts incurred after January 1, 1913, and does not extend to debts incurred between November 3, 1903, and January 1, 1913, because during that period article XIII, section 3, as first amended did not require or permit the imposition or assessment of such double liability.

In answering the question submitted by you, however, it is unnecessary to adopt the holding of the court to the effect that the double liability of bank stockholders does not extend to nor include debts of such bank incurred between November 3, 1903, and January 1, 1913, and as the case mentioned is still in court and that particular question will later again be brought directly to the court's attention, I prefer to withhold my opinion until that point is directly raised.

Respectfully,

EDWARD C. TURNER,

Attorney General.

76.

WHOLESALE SALOON LICENSES DO NOT COME WITHIN THE PROVISIONS OF THE LAW PROHIBITING THE ISSUANCE OF SALOON LICENSES WITHIN CERTAIN DISTANCE OF SCHOOL BUILDINGS.

The provisions of the last paragraph of section 1261-33, *G. C., section* 19 *of the liquor license law,* 103 *O. L.,* 216, *prohibiting the issuance of saloon licenses after Aug.* 1, 1915, *to places within certain distance of school buildings and premises, apply only to places lawfully operating under saloon license as defined in section* 22 *of the license law, G. C.,* 1261-37.

COLUMBUS, OHIO, February 10, 1915.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I have yours enclosing copy of letters from Mr. Chas. F. Pryor, in which you ask for an opinion as to the construction of that part of section 19 of amended senate bill 203, as enacted April 18, 1913, 103 O. L., 216, which is as follows:

> "No license shall be granted after August 1, 1915, to operate a saloon within three hundred feet of any permanent, public or parochial school building, measuring the distance in a straight line following the street from the nearest point of the premises on which such school building is located, nor two hundred feet in a straight line following this street from the nearest point of the premises. This provision shall not apply to a bona fide reputable hotel or club; or to a saloon located within three hundred feet of a school house in the central or a main business section of the city."

Article 15, section 9 of the constitution of the state, as amended September, 1912, providing for the licensing of the sale of intoxicating liquors in this state, defines the word "saloon" as follows:

> "The word 'saloon' as used in this section, is defined to be a place where intoxicating liquors are sold, or kept for sale, as a beverage in quantities of less than one gallon."

Section 22 of the liquor license law, as enacted pursuant to the constitutional amendment, providing for the licensing of the sale of intoxicating liquors in this state, is as follows:

> "Licenses shall be either wholesale licenses or saloon licenses. Under a wholesale license, intoxicating liquors may not be sold in smaller quantities than two gallons at one time of the same kind of liquor, and not to be consumed upon the premises. Under a saloon license, intoxicating liquors may be sold in any quantity and consumed on or off the premises."

Coming now to construe the provision of section 19 of the liquor law, providing that "no licenses shall be granted after August 1, 1915, to operate a saloon," etc., in the light of the definition of the word "saloon" as found in the constitution, and "saloon license" as found in section 22 of the liquor license law, it is conclusive, to my mind, that the provisions of that part of section 19 of the liquor license law referred to by you, apply only to the operation of a place where intoxicating

liquors may be sold in any quantity, and consumed on or off the premises, and do not apply to places where intoxicating liquors are sold only within the provisions of section 22, as defining a wholesale license.

I am, therefore, of the opinion that after August 1, 1915, a saloon license may not be granted for the operation of a place where intoxicating liquors may be sold in any quantity, and consumed on or off the premises, within three hundred feet of any permanent, public or parochial school building, or within two hundred feet of the nearest point of the premises on which such building is located, measuring these distances as provided in section 19, as above quoted. This provision, however, in my opinion, is not applicable for reasons that are obvious, to the granting of a wholesale license for a place within these limits.

Yours very truly,
EDWARD C. TURNER,
Attorney General.

77.

DEPUTY STATE SUPERVISORS OF ELECTION—A MEMBER APPOINTED AND QUALIFIED IS ENTITLED TO PAY FROM THE DATE HE ASSUMES OFFICE.

A person theretofore duly appointed and qualified as a member of the county board of deputy state supervisors of elections and who on the first Monday of August, 1914, *assumed and thereafter performed the duties of such office is entitled to compensation therefor from and after said first Monday of August, notwithstanding that the board did not organize as provided by section* 4811, *et seq., G. C., until after said first Monday of August.*

COLUMBUS, OHIO, February 10, 1915.

HON. C. A. WILMOT, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication of February 1, 1915.

While your communications are somewhat indefinite, I gather from them and our conversation relating to the same subject-matter, the following facts upon which you request an opinion, and to which the same is confined.

> "F. was appointed and commissioned deputy state supervisor of elections for Geauga county, for a term of two years, prior to and began his term of service as such on the first Monday of August, 1912. Prior to the first Monday in August, 1914, W. was duly appointed and qualified as the successor of F. Subsequent to the first Monday in August, 1914, and until about August 13, 1914, both F. and W. attended all the meetings of the board and assumed to discharge the duties of a member of such board, together with the three other members. No attempt was made by the deputy state supervisor of elections to organize after the appointment of W. until about August 13, 1914. Both F. and W. now claim compensation for services for the time between the first Monday in August, 1914, and August 13, 1914, that being the date upon which organization was effected."

That part of section 4804, G. C., under which appointments of deputy state supervisors of elections for Geauga county, whose terms of office began on the first Monday of August, 1912, were authorized to be made, is as follows:

"On or before the first Monday in August of each year, the state supervisor of elections shall appoint for each such county two members of the board of deputy state supervisors of elections, who shall each serve for a term of two years from such first Monday in August. * * *."

That part of the above section as amended in 103 O. L., 215, which is applicable to the question submitted, reads as follows:

"And on or before the first Monday in August, 1914, such state supervisor of elections shall appoint for each such county, two members of the board of deputy state supervisors of elections who shall each serve until the first day of May in the year 1917, and whose successors shall then be appointed and serve for a term of two years from and after such date. One member so appointed shall be from the political party which cast the highest number of votes at the last preceding November election for governor, and the other member shall be appointed from the political party which cast the next highest number of votes for such officer at such election."

Section 4809, G. C., is as follows:

"Before entering upon his duties, each deputy state supervisor of elections shall appear before a person authorized to administer oaths, and take and subscribe to the following oath, which shall be filed with the clerk of the court of common pleas in the county where such deputy resides:

State of Ohio _____County, SS.

"I do solemnly swear that I will support the constitution of the United States and of the State of Ohio, and perform the duties of deputy state supervisor of elections to the best of my ability.

Signed _____

"Sworn to and subscribed before me this _____ day of _____, in the year _____.

_____

(Title of officer.)"

Bearing in mind the fact stated by you, that W. was duly appointed and qualified prior to the first Monday in August, 1914, it follows that section 8, G. C., providing that persons holding an office of public trust will continue therein until their successors are elected or appointed, and qualified, does not apply, so that F. would not be authorized under the provisions of that section to continue in office, after the expiration of the term for which he was appointed and commissioned.

It may here be observed also that the organization of the board, as provided by section 4811, G. C., is not essential to the qualifications of persons appointed as members of such board, and that the only qualification required by such appointees is that prescribed by section 4809. I am of the opinion that W. having been theretofore duly appointed and qualified as deputy state supervisor of elections, was on and after the first Monday of August, 1914, duly authorized to exercise the powers and functions of such officer and therefore entitled to compensation therefor as provided by law, notwithstanding the postponement of the organization of the board until August 13th.

It will be observed that the board of deputy state supervisors of elections consists of four members, and that a vote of three such members is necessary to

perfect an organization. It therefore follows that whatever may have been the disposition of W. toward such organization, it could not of itself affect a continuance of the power and authority of F. as such officer, the duty of organizing the board as imposed by section 4811, G. C., being thereby required to be performed after F. ceased to be a member of such board. W. could not of himself have effected an organization, nor on the contrary could he of himself have prevented the other members of the board from effecting an organization as prescribed by law.

I am further of the opinion, from the facts above stated, that all the right and authority of F. to exercise the powers and discharge the duties of a member of the board of deputy state supervisors of elections wholly ceased upon the first Monday of August, 1914, and that he is therefore not entitled to compensation for services attempted by him thereafter to be rendered in that capacity.

Respectfully,
EDWARD C. TURNER,
Attorney General.

78.

COLLATERAL INHERITANCE TAX ORIGINATES WHERE SAID REAL ESTATE IS LOCATED.

Under the collateral inheritance tax, section 5331, *"said tax originates" as to the right to succeed to real estate in the city, village or township in which said real estate is located.*

COLUMBUS, OHIO, February 11, 1915.

HON. MEEKER TERWILLIGER, *Prosecuting Attorney, Circleville, Ohio*

DEAR SIR:—I have yours of February 4, 1915, requesting my written opinion on the proposition therein propounded, to wit:

> "I desire to have your official opinion as to the construction of a portion of section 5331 of the General Code of Ohio, (103 O. L., 463) with reference to the distribution of the collateral inheritance tax, and that particular part of said section which I desire to have construed is that part which reads as follows:
>
> " 'Fifty per cent. of such tax shall go to the city, village or township *in which said tax originates.*'
>
> "The question has arisen with reference to the distribution of the collateral inheritance tax collected under the will of Sidner J. Ward, deceased, and the facts are as follows:
>
> "Sidner J. Ward, who was a resident of the village of Ashville, within Harrison township, Pickaway county, Ohio, died intestate and willed land located in Walnut township, Pickaway county, Ohio, to a niece who resides in Columbus, Ohio; said devise was appraised by the appraisers appointed by the probate court and a collateral inheritance tax of $150 has been paid into the county treasury of this county by the devisee.
>
> "Under the above statement of facts in what village or township did said tax originate?"

Section 5631, G. C., 103 O. L., 463, provides in part as follows:

"All property within the jurisdiction of this state and any interest therein * * * which passes by will or by the intestate laws of this state * * * to a person in trust or otherwise, other than for the use of the father, mother, husband, wife, lineal descendant * * * shall be liable to a tax of five per cent. of its value above the sum of five hundred dollars. Fifty per cent. of such tax shall be for the use of the state; and fifty per cent. of such tax shall go to the city, village or township in which said tax originates."

In enacting that part of the above statute which provides for the distribution of the tax, the legislature simply followed the language of the constitutional amendment (article XII, section 9).

I find myself unable to get at a practicable interpretation of the words "in which said tax originates," except by a process of elimination. This process is justified under the doctrine that if a statute can fairly be given any interpretation that workably carries out the intention of the legislature, it is the duty of a court to do so. This duty is even greater when the statute is simply attempting to carry out the provisions of the constitution, which constitutional provision must be construed with the statute.

Notwithstanding the wording of the statute the tax is not one on property, but on the right to inherit or to succeed to the property of a decedent.

I find that the same difficulty confronted my predecessor, Mr. Hogan, and he too had to reach a conclusion in the same manner in an opinion under date of March 19, 1914, to Honorable Arthur Van Epp, prosecuting attorney of Medina county. I approve that opinion and hand you a copy of same herewith.

Answering your question, I hold that as the right to succeed to the real estate referred to in your letter the tax originated in Walnut township, Pickaway county, which township is entitled to fifty per cent. of said tax.

Respectfully,
EDWARD C. TURNER,
Attorney General.

79.

BOARD OF EDUCATION MUST ADVERTISE THE SALE OF BONDS—RESOLUTION CHANGING RATE OF INTEREST REQUIRES BONDS TO BE AGAIN TENDERED TO BOARDS, AUTHORIZED TO RECEIVE THEM BEFORE ADVERTISING THE SALE OF THE BONDS.

It is necessary to advertise the sale of bonds by a board of education under section 7626, G. C., and a board of education is not authorized to dispense with competitive bidding in the sale of the same.

A board of education which has advertised the sale of bonds bearing a certain rate of interest, and has received no bids for the same, and which then preceeds by resolution to raise the rate of interest on said bonds, must again offer said bonds to the board of commissioners of the sinking fund of the school district, if such there be, and then to the industrial commission of Ohio, prior to again advertising the same for sale.

COLUMBUS, OHIO, February 11, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Under date of January 26, 1915, I have from the office of Hon. Jno. V. Campbell, prosecuting attorney of Hamilton county, an inquiry in reference

to certain school matters, the letter from Mr. Campbell's office having been written by Hon. Chas. A. Groom, assistant prosecuting attorney. In order to make your files complete as to the opinions of this department upon school matters, I am directing to you my answer to the inquiries contained in Mr. Groom's letter, which reads as follows:

"The board of education of Finneytown special school district No. 10 of Springfield township, Hamilton county, Ohio, passed a resolution to issue twelve thousand dollars of bonds for the erection of a new school building and furnishing of same under sections 7625, 7626 and 7627 of the General Code, submitted the matter to an election which resulted favorably and thereafter by proper proceedings, provided for bonds with interest at 4¾%, offered same to the industrial commission, which declined to purchase them, and then advertised the bonds for sale as required by law, but received no bids for same. They now have an opportunity to dispose of the bonds at private sale, provided they raise the interest to 5%, and request an opinion as to whether they can legally dispose of the bonds at private sale, without offering to the industrial commission or advertisement.

"I have no doubt on the proposition that they are required to offer the bonds at the higher rate of interest to the sinking fund trustees and to the industrial commission before the same may be otherwise disposed of.

"The last part of section 7626, General Code, provides that the issue and sale of bonds by a school district shall be provided for by resolution fixing the amount of each bond, the length of time they shall run, the rate of interest they shall bear and the time of sale 'which may be by competitive bidding at the discretion of the board.' This section was enacted April 25, 1904.

"Section 2294, General Code, provides that all bonds issued by boards of county commissioners, boards of education, etc., shall be sold to the highest bidder after being advertised as therein provided. Section 2295, General Code, provides that if bids are rejected, the bonds shall again be advertised. These sections were enacted March 22, 1883.

"Attorney General Denman, in January, 1909, annual report of attorney general 1909-1910, page 517, rendered an opinion that apparently section 2294 was superseded and supplanted as to the matter of competitive bidding by section 7626, General Code, but that the provision for advertisement was not superseded.

"I enclose herewith what is given me as a copy of an opinion of Judge Kyle of the Greene county common pleas court apparently holding that neither advertisement or competitive bidding is necessary in the sale of school bonds.

"As I understand, the department of inspection and supervision, follows Denman's opinion which is apparently contrary to the recent common pleas opinion of Judge Kyle and it is desirable that the question be finally settled and a uniform ruling on the matter be had. Will you kindly advise me whether it is necessary to advertise the sale of school bonds issued under sections 7625 to 7627, General Code, and whether the same may be sold without competitive bidding."

The problem presented by this inquiry is that of reconciling, if possible, the provisions of sections 7626 and 2294 of the General Code, and of sustaining, if possible, all the provisions of both sections.

Let it be noted, in the first instance, that under the provisions of section 7626, the issue and sale of bonds under this and the related sections shall be provided for by a resolution fixing, among other things, "the time of sale."

In passing upon the question presented, this fact is most significant, and must be taken to mean, under any view of the law, that the board of education must sell the bonds at a certain definite time, which time must be fixed in the resolution. In other words, the board of education cannot either omit from the resolution all reference to the time of sale, or fix a continuing period of time during which the board shall make the sale.

It must also be observed that despite the conclusion reached by Judge Kyle, there is no language in section 7626 which refers to the subject of advertisement. It is equally true that there is nothing in section 7626 from which there could reasonably be drawn the inference that the legislature intended in enacting that section, to dispense with the requirement of an advertisement of the sale provided for by section 2294. It would therefore seem quite clear that bonds sold under the provisions of section 7626 and related sections, must be advertised in accordance with the provisions of section 2294.

Keeping in mind the fact that the time of sale of the bonds in question must be fixed by the board of education in its resolution, and the further fact that the bond sale must be advertised by the board of education under the provisions of section 2294, and that the advertisement must state, among other things, "the day, hour and place in the county" where the bonds are to be sold, it next becomes necessary to determine the effect of the expression "which may be by competitive bidding at the discretion of the board," which expression constitutes the concluding phrase of section 7626.

To hold that a board of education is to be permitted to make a private sale of its bonds without reference to whether or not the purchaser is the high bidder therefor, would do violence to the provision requiring the board to fix the time of the sale in its resolution, and to the provision requiring an advertisement of the sale, one of which provisions, to wit: the one requiring the board in its resolution to fix the time of the sale, is contained in the same section with the language now under consideration. If a private sale under the conditions above named is contemplated by the statute, then there would be absolutely no purpose to be served in requiring the board to fix the time of the sale and to advertise the same. Since the board is plainly required by the law to fix the time of the sale and to advertise the same, a permission to sell at private sale must not be inferred from any uncertain or ambiguous phrase.

The language under consideration does not directly excuse competitive bidding. The statute does not say that the sale may be had without competitive bidding, at the discretion of the board, but only that it "may be by competitive bidding at the discretion of the board." Any holding that competitive bidding is excused, in the discretion of the board by the use of this phrase, must be founded on a mere inference. As bearing upon this proposition, my predecessor Hon. U. G. Denman, in the opinion above referred to, cited an apt declaration of the law, as found in Cincinnati v. Guckenberger, 60 O. S., 353, the language of the court being as follows:

> "True, it is not uncommon to find in legislation special provisions intended to supplant or supersede, for the special subject-matter, some general provision on the same general subject, but such instances are expected to be so marked, either by the force of the language itself, or by necessary implication as to the purpose to be accomplished, as that the meaning shall be plain."

I cannot say that the language "which may be by competitive bidding at the discretion of the board" carries with it a necessary implication that the sale may be without competitive bidding at the discretion of the board. At least it is not

necessarily implied that the legislature intended to remove all restrictions along this line and permit a board of education to sell an issue of bonds to one prospective purchaser at his offer while another bidder, equally responsible and able to carry out his engagements, was standing by and offering a higher price.

For the reasons above stated, I am of the opinion that when bonds are sold by a board of education under section 7626, it is necessary to advertise the sale in accordance with the provisions of section 2294 of the General Code, and that competitive bidding may not be dispensed with.

In regard to the other inquiry, it is my opinion that the board of education after raising the rate of interest on the bonds from 4¾ per cent. to 5 per cent. must offer the bonds first to the board of commissioners of the sinking fund of the school district, and then to the industrial commission of Ohio, before proceeding to readvertise the same.

Section 7619 of the General Code of Ohio, provides as follows:

> "When a board of education issues bonds for any purpose, such issue first shall be offered for sale to the board of commissioners of the sinking fund, who may buy any or all of such bonds at par. Within five days of the time when notice is given, the board shall notify the board of education of its action upon the proposed purchase. After that time the board of education shall issue any portion not purchased by such commission according to law."

Section 1465-58 of the General Code of Ohio, provides among other things that:

> "It shall be the duty of the boards or officers of the several taxing districts of the state, in the issuance and sale of bonds of their respective taxing districts, to offer in writing to the state liability board of awards (now the state industrial commission) prior to advertising the same for sale, all such issues as may not have been taken by the trutsees of the sinking fund of the taxing district so issuing such bonds."

Permit me to also call attention to the fact that under the provisions of section 7626 of the General Code, which provides among other things for a resolution by the board of education fixing the rate of interest of bonds issued under that and the related sections, it will be necessary for the board of education to adopt a new resolution supplanting the one fixing the rate of interest at 4¾ per cent., the new resolution fixing the rate of interest of the bonds at 5 per cent.

Yours very truly,
EDWARD C. TURNER,
Attorney General.

80.

APPROVAL OF LEASE FOR THREE TRACTS OF GROUND IN CITY OF AKRON, OHIO.

Contract for lease of three tracts of ground in city of Akron, Summit county, Ohio, complies with the requirements of the statutes and is approved.

COLUMBUS, OHIO, February 11, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have examined the contract for lease, in triplicate, of three

tracts of ground in the city of Akron, Summit county, Ohio, the parties to said lease being the superintendent of public works and John J. Breen.

I find that said lease complies with the requirements of the statutes and am therefore returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

81.

FILING ARTICLES OF INCORPORATION DOES NOT CONSTITUTE A BODY CORPORATE—SECRETARY OF STATE MAY FILE DECLARATION OF INCORPORATORS OF ABANDONING PURPOSE TO FORM CORPORATION.

Merely taking out articles of incorporation, with no further act thereafter, does not constitute a body corporate. Secretary of state may receive and file declaration of all incorporators of abandonment of purpose to form corporation.

COLUMBUS, OHIO, February 11, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

MY DEAR MR. SECRETARY:—I acknowledge receipt of your letter of January 29th, enclosing a copy of an instrument received from Joseph L. Stern, attorney at law, Cleveland, and an original letter addressed to you by Mr. Stern.

You request my opinion as to whether the original instrument, if signed by the original incorporators of the company, should be received and filed by you and, if so, whether a certificate of the tax commission of Ohio, under the provisions of section 5521, G. C., should be filed therewith.

The enclosures indicate the following state of facts, to wit:

> "After filing articles of incorporation for the proposed corporation, 'The Roofing and Insulating Company,' in the office of the secretary of state, as provided by law, that no further steps were taken by the persons subscribing such articles looking toward a fulfillment of the further requirements relating to the organization of private corporations."

One of said enclosures is a certificate of the persons who subscribed such articles, setting out that:

> "No part of the capital stock of said company was subscribed; no installments of the capital stock of said corporation have ever been paid in; no investments of any kind have been made; no debts or obligations of any kind have ever been incurred; and all the incorporators, having become satisfied that the objects of said corporation cannot be accomplished, desire to abandon the project and surrender said articles."

In response to an inquiry from this office, you state, in your letter of February 10th, that no certificate of subscription of ten per cent. of the capital stock of the corporation in question had ever been filed in your office.

Section 5521, et seq., of the General Code contemplates organized corporations. I am clearly of the opinion that until a certificate showing that ten per cent. of the capital stock of a corporation has been subscribed has been filed with the secretary of state, and the stockholders have elected a board of directors, that there is no corporation in existence. The so-called articles of incorporation are merely an authority from the state to organize a corporation.

While there is no statutory authority by which you could be compelled to file the certificate in question, I think that it is desirable, from a public standpoint, that the records of your office should show the abandonment of the purpose to form a corporation.

I am further of the opinion that under section 8626, which provides:

> "* * * Articles of incorporation shall be filed in the office of the secretary of state, who shall record them and shall also record certificates relating to that corporation thereafter filed in his office,"

you have the authority to file the certificate in question and to make a charge therefor, under subsection 12 of section 176 of the General Code. Such a certificate, however, should not be filed unless all of the original incorporators have signed it.

Respectfully,
EDWARD C. TURNER,
Attorney General.

82.

EXPENSES OF ELECTION—PAID FROM COUNTY TREASURY—EXCEPTION, AN ELECTION FOR BOND ISSUE IN TOWNSHIP ROAD DISTRICT.

All the expenses of municipal local option elections coming within the terms of section 5052, *G. C., must be paid out of the county treasury and may not thereafter be charged back against the municipality. The same is true of the expenses of special elections for township bond issues, except that in case of an election for the issue of bonds for a township road district, the expense of the ballots for such election shall be paid by the township.*

COLUMBUS, OHIO, February 12, 1915.

HON. JOHN M. MARKLEY, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—In your letter of February 3, 1915, requesting an opinion thereon, you state:

> "Section 5052 of the General Code of Ohio provides that all expenses of printing and distributing ballots and cards, etc., and other necessary expenses of any general or special election, including the compensation of precinct election officers, shall be paid from the county treasury as other county expenses.
>
> "On the 29th day of December, 1914, a municipal election was held in Georgetown to determine whether or not the sale of intoxicating liquors as a beverage should be prohibited in such municipality. The question has arisen whether or not the expenses of this election shall be borne by the

town or whether the same shall be paid by the county. The same question has also arisen with reference to a special election to issue bonds recently held in Eagle township of this county."

Your inquiry refers only to expenses mentioned in section 5052, G. C., and I shall confine my opinion to such expenses of elections as is included within its terms, which are as follows:

"All expenses of printing and distributing ballots, cards of explanation to officers of the election and voters, blanks and other proper and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid from the county treasury, as other county expenses."

The language of this section is unequivocal and expressly includes both the general and special elections, so that in the absence of a special provision to the contrary, all the expenses therein enumerated will be governed by its provisions and therefore be payable from the county treasury.

The act of April 15, 1902 (95 O. L., 88), sections 6127 to 6130, G. C., governs elections in municipalities upon the question of prohibiting the sale of intoxicating liquors therein, and no provision is there made for the payment of the expenses of such election, nor is there elsewhere found any provision for the payment of such election expenses other than the general statute above quoted, requiring the same to be paid out of the county treasury.

I am, therefore, of the opinion that all the expenses of the municipal local option election, coming within the terms of 5052, G. C., must be paid out of the county treasury, and that they may not thereafter be charged back against the municipality. Nor, is there found any special provision for the payment of the expenses of elections held in townships upon the question of bond issues, other than found in section 5052, G. C.

As suggested by you, section 5053, G. C., is as follows:

"In November elections held in odd numbered years, such compensation and expenses shall be a charge against the township, city, village or political division in which such election was held, and the amount so paid by the county shall be retained by the county auditor from funds due such township, city, village or political division at the time of making the semi-annual distribution of taxes. The amount of such expenses shall be ascertained and apportioned by the deputy state supervisors to the several political divisions and certified to the county auditor. In municipalities situated in two or more counties, the proportion of expense charged to each of such counties shall be ascertained and apportioned by the clerk or auditor of the municipality and certified by him to the several county auditors."

The operation of this section is by its terms expressly confined to the expenses enumerated in section 5052, G. C., and to "November elections held in odd numbered years." It is significant that the legislature in the enactment of that part of section 14 of the act of April 8, 1908 (99 O. L., 84), amending the enactment of May 15, 1894 (91 O. L., 243) which was carried into and is now section 5053, G. C., expressly restricted its application to "November elections held in odd numbered years," when it is considered that the statute previous to such amendment (91 O. L., 243) required the charging back of all election expenses except for November elections.

It then appearing that there is no provision for the payment of the same otherwise, the expenses of elections for township bond issues are therefore governed by the general provisions of section 5052 as above quoted, and are not, in my opinion, chargeable to the township in which they are held, except that in case of an election for the issue of bonds for a township road district, as provided in sections 7033 to 7042, G. C., inclusive, the expense of the ballots for such election shall be paid by the township according to the provisions of section 7039 G. C., as follows:

> "* * * The deputy state supervisors of elections shall cause to be prepared and furnished, at the expense of the township, ballots for the election, on which shall appear the words 'road improvement bonds—yes,' 'road improvement bonds—no.'"

Very truly yours,
EDWARD C. TURNER,
Attorney General.

83.

COUNTY LIQUOR LICENSE BOARD HAS NO AUTHORITY TO COLLECT ANY FEE OTHER THAN FIFTY DOLLARS WHERE LICENSEE SELLS OR TRANSFERS HIS BUSINESS TO ANOTHER AND THEN JOINS IN AN APPLICATION WITH ANOTHER

Where a licensee under the state liquor license act desires to sell or transfer his business to another and joins in an application with the latter under section 1261-50 *G. C., there is no authority for the collection of any fee other than the fee of* $50.00 *provided for by said section.*

COLUMBUS, OHIO, February 12, 1915.

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

DEAR SIR:—I have yours dated February 4, 1915, as follows:

> Section 26 of the state liquor licensing act (O. L. vol. 103, p. 226) provides a fee of $5.00 for each application. Section 35 of the same act, p. 230, provides that a dealer who desires to transfer his business to another person who is properly qualified, shall make joint application with such person for the transfer of said license.
>
> "Query. Has the state board any legal authority to direct the local boards to charge a fee of $10.00 for said joint application to transfer a license?"

The sections of the state liquor licensing act, (103 O. L., 216), to which you refer, are, insofar as applicable to your question, as follows:

Section 1261-41 (section 26):

> "Application for license in proper form shall, upon their filing, be marked 'filed' by the secretary of the board, with the date of filing endorsed thereon, and the applicant or applicants shall thereupon be given a receipt for said application.

"Every applicant shall pay to the county board, upon the filing of the application, the sum of five dollars, which amount shall be immediately transmitted to the state board."

Section 1261-50, G. C. (section 35):

"Upon the application of any licensee who desires to sell or transfer his business to another, joined with the application of the latter, and upon the payment of a fee of fifty dollars the county licensing board shall, unless the proposed purchaser or transferee shall not have the qualifications required by law of a licensee, endorse upon the license certificate of the original applicant the words: 'Transferred to—inserting the name of the transferee with the date; and the person to whom the said license is transferred shall hold the license for the remainder of the said license year and shall have all the privileges and obligations of the original licensee under the license. The said fee so paid to the county licensing board shall be immediately transmitted to the secretary of the state board, in the same manner as application fees heretofore provided for herein, together with a report of the transfer thereof.

"The said transferee must, however, in the application for transfer, set forth all the facts required to be set forth by an original applicant. The said transferee shall be in all respects qualified by law as is an original applicant. * * *."

In the act of April 18, 1913, (103 O. L., 216), in which the above quoted sections were originally enacted, I find the term "applicant" used some fifty times or more and in various and distinct relations.

"Applicant" as a generic term, includes within its meaning, in a general sense, any person who makes for any purpose an application. On the contrary, it must be conceded that the term may be properly used in a much restricted sense. So upon an examination of the whole act referred to, I find this term used not uniformly in any particular sense, but varied application and with distinctly differing significance.

In different sections of this act, various subjects of application are treated, and from this it must follow that there are different and distinct classes of applicants. For instance, there will be found throughout the act, numerous reference to applicants for saloon license, applicants for original license, applicants for wholesale license, applicants for removal, applicants for transfer, applicants for removal and perhaps other classes of applicants.

Since, then, as above stated, this term may be properly used either in its general sense and including all classes of applicants, or in a restricted or limited sense, referring only to a particular class of applicants, to determine its meaning in any given instance will necessitate an examination of the relation in which it is there used.

The scope and meaning of the term will, in such case, be governed by the subject-matter thus being treated. If the sole subject-matter treated in a particular case is found to be the granting of a license, or what is by the act itself distinguished as an "original license," it seems incontrovertible that the term "applicant" would there include within its scope only applicants for such "original license." If the sole subject-matter treated be a removal, it would not be argued that the term "applicant" used in relation thereto, had any meaning other than applicants for removal, and the same rule would apply to every other subject-matter treated within the act relative to which an application might be properly made.

Coming now to an examination of section 1261-41, G. C., (section 26 of the license law) and an application of this rule or principle, it will be found that the sole subject-matter there treated is "applications for license;" that it to say, "original licenses" as elsewhere distinguished in the act (sections 35, 32 and 37). It then follows that the phrase "every applicant" as used in this section, includes within its meaning only every applicant for license as distinguished from applicants for removal or transfer, or such other applicants as may be referred to elsewhere within the act.

Not only is the absence of a provision in section 1261-50, G. C. (section 35 license law) that the fee therein required shall be in addition to other fees, of significance, but that a fee is therein required to be paid which is far in excess of that otherwise required, carries with it much force.

I am, therefore, for the reasons heretofore stated, of the opinion that the county license boards may not require the payment of $10.00 as stated by you, in addition to the fee of $50.00 required by section 6150, G. C., for the transfer of license.

Respectfully,
EDWARD C. TURNER,
Attorney General.

84.

AMENDMENT TO ARTICLES OF INCORPORATION—THE REPUBLIC CASUALTY COMPANY.

Amendment to articles of incorporation of The Republic Casualty Company approved.

COLUMBUS, OHIO, February 13, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 11th, transmitting to me for my examination and approval the certificate of amendment of the articles of incorporation of The Republic Casualty Company. The amendment of the company's articles of incorporation consists of the insertion of the following language in the third paragraph:

> "guaranteeing the fidelity of persons holding places of public or private trust, who are required to, or, in their trust capacity do receive, hold, control, disburse public or private moneys or property; guaranteeing the performance of contracts other than insurance policies; and execute and guaranteeing bonds and undertakings required or permitted in all actions or proceedings, or by law allowed;"

The inserted language is copied verbatim from paragraph 2 of section 9510 of the General Code.

I am of the opinion that The Republic Casualty Company has authority under this section to so amend its articles of incorporation. I am therefore returning to you the certificate of amendment with my certificate of approval written thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

85.

JUVENILE COURT--JURISDICTION TO PROSECUTE SCHOOL TEACHER FOR PUNISHING CHILD.

The jurisdiction of the juvenile court to prosecute an adult must be predicated on delinquency, dependency or neglect of minor under eighteen years of age.

COLUMBUS, OHIO, February 13, 1915.

HON. EARL K. SOLETHER, *Prosecuting Attorney, Wood County, Bowling Green, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your letter of February 6, which is as follows:

> "In this county the probate judge has been designated as the juvenile court under section 1639 as amended in 103 O. L., 868, and I would like to have your opinion as to whether or not this juvenile court has jurisdiction to try a school teacher for the offense of cruelly whipping a pupil of the age of thirteen years.
>
> "Section 1642 as amended in 103 O. L., 869, gives the general jurisdiction of the juvenile court, and section 1654 as amended in 103 O. L., 873, provides the penalty. You will note that section 1642 as amended says that such courts shall have jurisdiction to try and determine any charge or prosecution against any person, persons, corporation or their agents, for the committing of any misdemeanor involving the care, protection, education or comfort of any such minor under the age of eighteen years.
>
> "Would the juvenile court have jurisdiction under this section to try a person charged with abusing a child?"

In connection with the consideration of your inquiry as to whether or not the juvenile court has jurisdiction to try a school teacher for the offense of cruelly whipping a pupil thirteen years of age, you refer to sections 1642 and 1654 of the General Code as amended in 103 O. L., pages 869 and 873. Section 1642 as amended is as follows:

> "Such courts of common pleas, probate courts, insolvency courts, and superior courts within the provisions of this chapter shall have jurisdiction over and with respect to delinquent, neglected and dependent minors, under the age of eighteen years, not inmates of a state institution, or any institution incorporated under the laws of the state for the care and correction of delinquent, neglected and dependent children and their parents, guardians or any person, persons, corporation, or agent of a corporation, responsible for, or guilty of causing, encouraging, aiding, abetting or contributing toward the delinquency, neglect or dependency of such minor, and such courts shall have jurisdiction to hear and determine any charge or prosecution against any person, persons, corporations, or their agents, for the commission of any misdemeanor involving the care, protection, education or comfort of any such minor under the age of eighteen years."

A perusal of the section quoted above at once discloses the purpose of the juvenile court act as being specifically enacted "for the care and protection of *delinquent, neglected* and *dependent* children" under the age of eighteen years, and the jurisdiction conferred upon the juvenile court over parents, guardians or any

person, persons, corporations or agents of a corporation, responsible for a guilty of encouraging, aiding, abetting or contributing toward the delinquency, neglect or dependency of *such* minor only attaches in the case of a minor under the age of eighteen years whose status is that of delinquency, neglect or dependency as provided in the juvenile act.

Section 1654 of the Juvenile court act, as amended on page 873, volume 103 Ohio Laws, is as follows:

> "Whoever abuses a child or aids, abets, induces, causes, encourages or contributes toward the dependency, neglect or delinquency, as herein defined, of a minor under the age of eighteen years, or acts in a way tending to cause delinquency in such minor, shall be fined not less than ten dollars, nor more than one thousand dollars or imprisoned not less than ten days nor more than one year, or both. Each day of such contribution to such dependency, neglect or delinquency, shall be deemed a separate offense. If in his judgment it is for the best interest of a delinquent minor, under the age of eighteen years, the judge may impose a fine upon such delinquent not exceeding ten dollars, and he may order such person to stand committed until fine and costs are paid."

A reading of section 1654 and construing the same in connection with section 1642, quoted above, together with the general purpose of the juvenile court act, leads to but one conclusion, and that is, the necessity of a pre-existing condition of dependency, delinquency or neglect on the part of a minor child under the age of eighteen years or some condition tending to cause delinquency in such minor before prosecution may be had of an adult in juvenile court. (See the case of State v. Hugh Hawkins, Licking County Juvenile Court March term, 1910, reported in 56 weekly law bulletin, page 166.)

It is my opinion, therefore, that unless the child referred to in your communication was a ward of the juvenile court by reason of its being a dependent, delinquent or neglected child, as comprehended in the juvenile court act, that the juvenile court would be without jurisdiction to prosecute a school teacher for the whipping of a child thirteen years of age.

Respectfully,
EDWARD C. TURNER,
Attorney General.

86.

ORDINANCE DIRECTING CITY AUDITOR TO PUBLISH ALL LEGAL ADVERTISING APPLIES TO THE PUBLICATION OF ORDINANCES, RESOLUTIONS AND NOTICES OF BOND SALE, BUT SUCH ORDINANCE DOES NOT APPLY TO PUBLICATION OF NOTICES FOR BIDS IN DEPARTMENT OF PUBLIC SERVICE.

A city ordinance directing the city auditor to publish all legal advertising of the city in two certain newspapers does not apply to the publication of notices for bids in the department of public service; but it does apply and govern the publication of ordinances and resolutions of the council, and notices of bond sales.

COLUMBUS, OHIO, February 13, 1915.

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

GENTLEMEN:—On January 25, 1915, I received a letter from you requesting my opinion upon the following question:

"The council of the city of Hamilton has directed the city auditor to place the legal advertisements which require publication in the 'Journal' and the 'Hamilton Socialist,' two newspapers designated by council for legal publications of the city.

"Does this ordinance govern the municipal officers in the placing of the following advertisements, viz.: the ordinances and resolutions of council, the notice of bond sales, and the notice for bids by the director of service?"

This question involves the distribution of the powers of municipal government. There is no statute expressly authorizing council to choose the mediums of publication, required by law, to be made in newspapers. Nor, except in one of the three cases named by you, is there any provision of law committing authority in the premises to any executive officer. The case I have in mind is that of the publication of the notice for bids by the director of public service. The statute involved here is section 4328, General Code. It provides as follows:

"* * * When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

I am clearly of the opinion that the duty to advertise, which exists under this section, is imposed upon the director of public service. Whether publication is limited to that provided in this section, or whether, under section 4329, council has the power to authorize and require additional publication of notices of this character, and to stipulate that such publication shall be made, for example, in two newspapers of opposite politics; and whether or not, finally, council might lawfully direct in what newspapers advertisements for bids in the department of public service should be published, I am of the opinion that the legislation of council may not impose the duty to advertise such notices upon any city official other than the director of public service. Inasmuch as you state that the ordinance of the city of Hamilton, in question, directs the *city auditor* to publish all legal notices in certain designated newspapers, it follows that the same does not apply to or govern the director of public service in advertising for bids for work in his department.

You do not submit a copy of the ordinance to me and, should it appear that specific duties are therein expressly imposed upon the director of public service, a question would be raised which is not herein determined.

The statutes being silent with respect to the execution of the duty to advertise ordinances, resolutions and notices of bond sales, and both the passage of ordinances and the issuance of bonds being, of course, actions which council alone can take, consideration of section 4211, General Code, is invoked, it provides that:

"The powers of council shall be legislative only, and it shall perform no administrative duties whatever and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contracts has been given and the necessary appropriation made, council shall take no further action thereon."

In McCormick v. Niles, 81 O. S. 246, it was held, under this section, in the language of the syllabus:

> "Where the statute has not prescribed the person who shall execute such a contract (for the publication of legal notices) in behalf of a municipal corporation, it is consistent with section 1536-653, Revised Statutes, (which prescribed the duties of the clerk of council) for the council, by ordinance or resolution, to authorize the clerk thereof to execute such contract according to the directions of the council."

In the opinion per Price, J., is found the following:

> "It would seem that the council may authorize, by resolution or ordinance, the board or department of public service to contract for the public printing, and we see no valid objection to giving the clerk of council authority to make such contract. Council appears to be the source of authority to contract, and it is the authority to make the necessary appropriations. * * *"

While the language of the opinion is, perhaps, in the nature of a dictum and lacks positiveness, it suggests what I believe to be the only rule which can be followed in the premises, viz.: the council not having authority to execute contracts, but only to authorize them, and the execution of the given contracts not being provided for by law, the council may, by its own legislation, select the municipal agency or officer who shall execute the contract; and to the extent that it may select such an agency, it may determine what degree of discretion will be lodged therein.

On the last point see also Akron vs. Dobson, 81 O. S., 66 at page 77.

I am of the opinion, therefore, that council has the power to pass an ordinance such as is described by you, and thereby to impose upon the city auditor the additional duty of making contracts for the legal publication of ordinances, resolutions and notices of bond sales; and at the same time to direct that the auditor shall cause such publication to be made in certain designated newspapers.

Respectfully,
EDWARD C. TURNER,
Attorney General.

87.

LAND TITLE REGISTRATION—TORRENS LAND ACT—PROCEDURE WHERE LAND IS SOLD BY SHERIFF.

Where registered land is sold by the sheriff, under order of the court, there should be filed with the recorder a certificate that the terms of the sale have been complied with; a certified copy of the order of sale, return thereof and confirmation, before the transfer of the property; registration of title and new certificates issued under the provisions of section 8752-52, *G. C.*, 103 *O. L.*, 944.

COLUMBUS, OHIO, February 13, 1915.

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

GENTLEMEN:—Permit me to acknowledge receipt of your favor of February 10th, with which you submitted an inquiry from Mr. E. C. Rush, recorder of Mt. Vernon, Ohio, which is as follows:

"In section 62 of the registration act, will you please explain what is meant by 'on file with recorder a certificate of the officer that the terms of the sale have been complied with and a certified copy of the order of sale and return thereof and confirmation * * * shall be entitled to have the property transferred.'

"All papers have been filed in the recorder's office from the clerk and the sheriff has sold the property and given to the purchaser a deed for the same. Is that all that is necessary for having the transfer made or does the quotation above need to be complied with?"

You also attach a copy of your letter of February 6 to Mr. Rush and his reply of February 8, in which he states there is some doubt in his mind as to the meaning of section 62 and asks for an opinion from this office.

Section 62 of the act entitled, "To provide for the settlement, registration, transfer and assurance of land titles and to simplify and facilitate transactions in real estate," is as follows:

"Whenever registered land shall be sold to satisfy any judgment decree or order of the court, or the title is transferred or affected by a decree or judgment of the court, the purchaser, or the person in whose favor such decree was rendered, on filing with the recorder a certificate of the officer that the terms of sale have been complied with and a certified copy of the order of sale and return thereof and confirmation, or a certified copy of the decree of the court transferring or affecting the title, as the case may be, shall be entitled to have the property transferred to him and his title registered accordingly and a new certificate of title issued therefor."

Answering the question propounded by Mr. Rush, it is my opinion that in a case wherein registered land is sold by the sheriff under an order of the court that, in accordance with the provisions of section 8752-62 of the General Code (103 O. L., 944), there should be (before the purchaser shall be entitled to have the property transferred to him and his title registered accordingly and a new certificate of title issued therefor), filed with the recorder a certificate from the sheriff to the effect that the terms of the sale have been complied with a certified copy of the order of sale and return thereof and confirmation. In other words, the instructions contained in section 62 heretofore referred to should be complied with strictly.

Respectfully,
EDWARD C. TURNER,
Attorney General.

88.

ALLOWANCE IN PLACE OF FEES IN MISDEMEANOR CASES CANNOT BE MADE BY COUNTY COMMISSIONERS TO A MAYOR OR JUSTICE OF THE PEACE, UNLESS DEFENDANT IS CONVICTED AND PROVES INSOLVENT.

No allowance in place of fees can be made in misdemeanor cases by the county commissioners to a justice of the peace or other officer under section 3019, *G. C., unless the defendant is convicted and proves insolvent.*

COLUMBUS, OHIO, February 15, 1915.

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

GENTLEMEN:—I am directing to you my opinion upon a question raised by Hon. D. Finley Mills, prosecuting attorney of Shelby county, in a communication to me dated February 11, 1915. Mr. Mills' question is as follows:

> "Where a person is charged with having committed a misdemeanor and the charge is brought before a justice of the peace or mayor, and on preliminary hearing before the justice of the peace or mayor, the defendant is bound over to common pleas court to await the action of the next grand jury, and the grand jury returns no indictment against the defendant, or having returned an indictment against him, he is acquitted upon the trial of the case. Can the costs created in the mayor's court or the court of the justice of the peace be paid out of the $100 allowance made to respective officers by the county commissioners?"

The language of section 3019 of the General Code which governs this matter is so clear and unambiguous as to leave little doubt as to the intent of the legislature. The section in question reads as follows:

> "In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners at any regular session, may make an allowance to any such officers in place of fees, but in any year the aggregate allowance to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

Under the provisions of this section, no allowance can be made to the officers in misdemeanor cases, unless the defendant *"proves"* insolvent. It may be a matter of common knowledge that a defendant is insolvent and that a judgment against him for fine and costs would be worthless, but within the meaning of the statute it could hardly be said that a defendant has been *proven* insolvent until there has been a conviction or a plea of guilty and until sentence has been passed and there is a commitment for failure to pay the penalty assessed.

Answering specifically the question propounded by Mr. Mills, I am of the opinion that where a person is charged with having committed a misdemeanor and the charge is brought before a justice of the peace or mayor, and on preliminary hearing before the justice of the peace or mayor the defendant is bound over to the common pleas court to await the action of the next grand jury, and the grand jury returns no indictment against the defendant, or having returned an indictment

against him he is acquitted upon the trial of the case, an allowance in place of fees cannot be made by the county commissioners to the mayor or justice of the peace or to officer who served the warrant and other writs.

Respectfully,
EDWARD C. TURNER,
Attorney General.

89.

ENTIRE TEXT OF AN ORDINANCE NOT REQUIRED TO BE PRINTED UPON BALLOT WHEN ORDINANCE IS REFERRED TO ELECTORS—SUFFICIENT IF IT PERMITS AN AFFIRMATIVE OR NEGATIVE VOTE.

Under the municipal initiative and referendum law, it is not required that the full text of an ordinance be printed upon the ballot, but it is necessary that the title of the ordinance be so placed upon the ballot as to permit an affirmative or negative vote thereon.

COLUMBUS, OHIO, February 16, 1915.

HON. H. W. HOUSTON, *Prosecuting Attorney, Urbana, Ohio.*

DEAR SIR:—In your letter of February 3, 1915, you submit for an opinion the following:

> "1. Under the municipal initiative and referendum law, is it necessary to print on the ballots the entire text of an ordinance passed by council and referred to the electors at a special election?
>
> "2. Is any special form of ballot required, so long as the question is intelligibly and plainly set forth?"

Your questions involve a consideration of the provisions of the constitution and statutes, as follows:

> "Article II, section 1 f. The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.
>
> "Article II, section 1 g. * * * Unless otherwise provided by law, the secretary of state shall cause to be placed upon the ballots, the title of any such law, or proposed law, or proposed amendment to the constitution, to be submitted. He shall also cause the ballots so to be printed as to permit an affirmative or negative vote upon each law. * * * * * * The foregoing provisions of this section shall be self-executing, except as herein otherwise provided."

General Code, 5018-1, 103 O. L., 831, provides:

> "The secretary of state, at least thirty days before any election at which any proposed amendment to the constitution or proposed law is to be submitted to the people, shall cause to be printed in pamphlet form a copy

of the title and text of each measure to be submitted, with the form in which the ballot title thereof will be printed on the official ballot. Such pamphlet shall also contain an explanation of any proposed measure, not exceeding a total of three hundred words for each, to be filed as hereinafter provided."

General Code, 5018-7, 103 O. L., 832, provides in part:

"In all municipal corporations which have not or may not provide by ordinance or charter for the manner of exercising the initiative and referendum powers reserved by the constitution to the people thereof, as to their municipal legislation, the duties required of the secretary of state by this act, as to state legislation, shall be performed as to such municipal legislation by the clerk of the municipality; * * * * * * * * *."

Authorizing referendum of municipal ordinances at a special election, G. C., 4227-5, reads:

"Whenever twenty per cent. of the electors of any municipality file a petition with the city auditor if it be a city, or village clerk if it be a village, proposing or against an ordinance or other measure, requesting in the petition that the ordinance or measure be submitted to the electors of the municipality at a special election, the auditor or village clerk, after ten days, shall certify the same to the board of deputy state supervisors of elections who shall submit the same at a special election to be held on the fifth Tuesday after the petition is filed. The petition shall not be submitted at a special election if a regular or general election will occur not later than ninety days after the petition is filed, but shall be submitted at the regular or general election."

By the above provisions of article II, section 1-g, and G. C., 5018-1, the duty is clearly imposed upon the secretary of state in the submission of any constitutional amendment or law, to "place upon the ballots the title of any such law" and "cause the ballots to be so printed as to permit an affirmative or negative vote upon each law;" and cause to be printed in pamphlet form a copy of the title and text of each measure to be submitted "with the form in which the ballot title thereof will be printed on the official ballot."

By no other officer or authority is it provided that the form of the ballot in such case shall be determined, and it is to my mind an authority necessarily essential to the performance of the duties thus imposed upon the secretary of state, to prescribe the form of ballot in such case to conform to the provisions of the constitution and statutes here referred to.

It is a well established principle of law that public officers have such implied powers as are necessarily essential to the performance of such duties as are specifically imposed upon them by law.

Section 5018-8, G. C., 103 O. L., page 833, is as follows:

"The provisions of this act shall apply in every municipality in all matters concerning the operation of the initiative and referendum in its municipal legislation, unless otherwise provided for by the legislative authority of the municipality, and shall likewise apply insofar as possible in every county in all matters concerning the operation of the initiative and referendum; provided, that the printing and distribution of the pamphlet

of measures and the sample ballot of measures therewith shall not be dispensed with in any municipality or county. The printing and binding of measures in municipal legislation and county matters shall be paid by the municipality or county in like manner as payment is provided for by the state as to state legislation, and said printing shall be done in the same manner that other municipal or county printing is done; distribution of such pamphlets shall be made to every voter in the municipality or county, so far as possible, by the clerk of such municipality or county commissioner, as the case may be, either by mail or carrier, not less than ten days before the election at which the measures are to be voted upon."

From this section it will be observed that the provisions of sections 5018-4, 5018-5 and 5018-6, G. C., enacted in 103 O. L., page 832, are made applicable to the municipal elections in initiative and referendum matters.

By virtue of the provisions of section 5018-7, G. C., the duties of the secretary of state, above referred to, are imposed upon the clerk of the municipality in case of a referendum upon a municipal ordinance, and he is accordingly required to place upon the ballot the title of an ordinance, referred in such form as to permit an affirmative or negative vote thereon in the manner prescribed for marking ballots by section 5069, G. C., requiring all marks upon the ballot to be made with black lead pencil. It therefore follows, that it is not necessary that the entire text of such ordinance be printed upon the ballot. On the contrary, while the specific form of ballot is nowhere in the statute prescribed in every detail, it is required that the title of each ordinance submitted under municipal initiative or referendum be so printed upon the ballot as to permit an affirmative or negative vote thereon.

Respectfully,

EDWARD C. TURNER,

Attorney General.

90.

SUPERINTENDENT OF BANKS MAY TESTIFY AS TO FACTS LEARNED FROM EXAMINATION OF A BANK WHICH HAS BEEN IN LIQUIDATION.

The superintendent of banks, a deputy or an examiner may testify in a court of competent jurisdiction relative to facts learned from an examination of a bank which has since become solvent and is not in the process of liquidation.

COLUMBUS, OHIO, February 16, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 10, 1915, requesting my advice as follows:

"I have a request from Mr. A. M. Lewis, representing the plaintiff in the case of Homer Brooks and others in the defunct Albany State Bank, asking that we have our Mr. Walters go to Athens and testify in this case. We thought perhaps this would be in contravention of section 12898, R. S. We would like to have your advice in the premises and would appreciate any suggestion you might have to make.

"Copy of the pleadings and letter from Mr. Lewis herewith enclosed."

The copy of the pleadings referred to and enclosed in your letter discloses an action brought by Homer C. Brooks for himself and other depositors of the defunct Albany State Bank against Frank E. Baxter, former superintendent of banks, and his bondsmen for damages suffered by the said depositors to the amount of their respective unpaid deposits and occasioned by the negligence of the said Baxter, as superintendent of banks, in issuing his certificate authorizing said bank to commence business knowing that fifty per cent. of its capital stock had not been paid in, and for permitting it to continue its banking business after it was known by him to be insolvent.

Section 12898 of the General Code is as follows:

> "Whoever, being the superintendent of banks, a deputy assistant, clerk in his employ or an examiner, fails to keep secret the facts and information obtained in the course of an examination, except when the public duty of such officer requires him to report upon or take official action regarding the affairs of the corporation, company, society or association so examined, or wilfully makes a false official report as to the condition of such corporation, company, society or association, shall be fined not more than five hundred dollars or imprisoned in the penitentiary not less than one year nor more than five years, or both. Nothing in this section shall prevent the proper exchange of certain valuable information relating to banks and the business thereof, with the representatives of the banking departments of other states, or with the national bank authorities."

The reason for this legislative enactment forbidding the superintendent of banks and bank examiners to reveal facts and information contained in their report of the examination of banks was clearly for the protection of the bank and its business as a going concern. The Albany State Bank was declared insolvent prior to the institution of this suit and its liquidation is now practically completed, therefore, the reason of the rule of the statute is removed, and it is inconceivable that a bank which has been closed and practically liquidated would receive any injury by a public revelation of its business secrets.

I am also informed that the testimony which is desired in the trial of this case was heretofore given in the case of the State of Ohio v. C. B. Bowers, tried in the court of common pleas of Athens county, and this testimony was furnished by your department. Since this information is a matter of public record the reason of the statutory rule is again removed.

Without going into the question of whether or not you, as superintendent of banks, or your examiners may lawfully be required to testify in a court of competent jurisdiction relative to facts and information obtained in the course of an examination of a bank, I am of the opinion, under the facts stated above, that it would be proper for Mr. Walters to furnish testimony in the case pending in Athens county. Whether or not he should go to Athens and there give his testimony, or require them to take his deposition at your office or wherever they succeed in securing service on him of a subpoena, is purely a matter of policy for you, as superintendent of banks, to determine.

If Mr. Walters goes to Athens to testify, I suggest for his protection that he call the court's attention to the provisions of section 12898 and ask instructions before testifying to any facts or information which have been obtained by the state banking department in the course of its examination of any bank.

Respectfully,
EDWARD C. TURNER,
Attorney General.

91.

TAXES COLLECTED BY JUVENILE COURT UNDER THE MOTHERS' PENSION ACT ARE NOT AVAILABLE UNTIL APPROPRIATED FOR THAT SPECIFIC PURPOSE AT THE ENSUING FISCAL HALF YEAR.

Under the mothers' pension act, taxes collected under a levy in pursuance of section 1683-9, G. C., are not available for the requirements of the juvenile court, until appropriated for that specific purpose at the beginning of the fiscal half year next after their collection.

COLUMBUS, OHIO, February 16, 1915.

HON. C. H. CURTISS, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—I have your letter of January 29th, requesting my written opinion upon the following proposition:

> "In relation to the availablity of mother's pension.
>
> "The county commissioners of this county made no transfer of funds for the purpose of paying awards under mother's pension act as authorized by them to do under section 1683-10 as passed in 1914, found in Session Laws 104, page 193.
>
> "A levy was made, however, as directed by section 1683-9, found in Ohio Laws 103, page 879, the first half of which levy has been collected under the December collection. Are these funds available for the payment of proper awards at this time, or must the awards by the probate court commence on and after March 1, 1915?"

Section 1683-10, 104 O. L. page 199, as enacted in 1914, provides:

> "For the purpose of providing a sum which will meet the requirements of the juvenile court until the proceeds of the tax required to be levied under the provisions of section 1683-9 of the General Code, shall become available, any board of county commissioners may transfer from any surplus moneys in the county treasury to the credit of any fund therein to a fund for the use of the juvenile court under the provisions of sections 1683-2 to 1683-9, inclusive, of the General Code, the creation of which for such purpose is hereby authorized. The moneys so transferred shall be paid as provided in section 1683-9 of the General Code, upon the order of the juvenile judge, under allowances made either before or after this act shall become effective."

This bill was passed as an emergency act. The purpose of the foregoing section was to supplement the act of 1913, 103 O. L., 879 (mothers' pension act), and to enable the county commissioners to provide necessary money to meet the requirements of the juvenile court under said act until the proceeds of the tax therein authorized to be levied, shall become available.

You state, however, that no such transfer of funds was in fact made. It follows, therefore, that no funds are available for such purpose until appropriation has been made therefor from the proceeds of taxes collected under the provisions of section 1683-9, G. C.

Section 1683-9 provides:

"It is hereby made the duty of the county commissioners to provide out of the money in the county treasury such sum each year thereafter as will meet the requirements of the court in these proceedings. To provide the same they shall levy a tax not to exceed one-tenth of a mill on the dollar valuation of the taxable property of the county. Such levy shall be subject to all the limitations provided by law upon the aggregate amount, rate, maximum rate and combined maximum rate of taxation. The county auditor shall issue a warrant upon the county treasurer for the payment of such allowance as may be ordered by the juvenile judge."

Section 5649-3d, General Code, provides:

"At the beginning of each fiscal half year, the various boards mentioned in section 5649-3a of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

You state that "a levy was made as directed by section 1683-9 (103 O. L., 879), and that the first half of such levy has been collected under the December collection."

The next semi-annual settlement between the auditor and the treasurer, to wit: the February settlement, will determine the amount of moneys in the treasury, from which appropriations may be made for the requirements of the juvenile court under the mothers' pension act so-called.

At the beginning of the ensuing fiscal half year, to wit: March 1st, the commissioners are directed by section 5649-3d to

"make appropriations for each of the special objects for which money has to be provided from moneys known to be in the treasury,"

and it is further provided that

"all expenditures within the following six months shall be made from and within such appropriations."

It is my opinion that the funds levied and collected under authority of section 1683-9 aforesaid, are not available for requirements of the juvenile court under the mothers' pension act until appropriated for that specific purpose, and that this appropriation must be made at the beginning of the ensuing fiscal half year, to wit, March 1, 1915.

Respectfully,
EDWARD C. TURNER,
Attorney General.

92.

FEES OF MAGISTRATE—ENTERING JUDGMENT—JUDGMENT ON DOCKET WHERE DEFENDANT WAIVES EXAMINATION IN LOWER COURT AND CONSENTS TO BE BOUND OVER.

A magistrate is entitled under section 1746, G. C., to forty cents for entering judgment and fifteen cents for judgment on docket in a case where defendant waives examination and consents to be bound over to higher court.

COLUMBUS, OHIO, February 17, 1915.

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

GENTLEMEN:—Under date of January 21, 1915, you submit for my opinion the following question:

> "Is a magistrate, under section 1746, General Code, entitled to forty cents for entering judgment, and a fee of fifteen cents for judgment on docket in a case where the defendant waives examination and consents to being bound over to a higher court?"

Section 1746, General Code, to which you refer provides:

> "Except as otherwise provided, justices of the peace, for the services named when rendered, may receive the following fees: * * *
> "Entering judgment, forty cents; * * * Judgment on docket, fifteen cents; * * *."

When a defendant in a criminal case waives examination and consents to be bound over to a higher court it is necessary that a justice of the peace order him to enter into a recognizance that he will appear either forthwith before such court or at the first day of the next term of court and having done so his jurisdiction of the matter ends. His order however is a determination by him of the matter before him and in my opinion is within the definition of the term "judgment as used in the above provisions of section 1746." Respectfully,

EDWARD C. TURNER,
Attorney General.

93.

PREMIUM ON BOND GIVEN BY OHIO NATIONAL GUARD OFFICER, DESIGNATED AS DISBURSING OFFICER FOR THE UNITED STATES, CAN BE PAID OUT OF STATE MILITARY FUND.

Premium on official bond of Ohio national guard Officer, designated by the governor to act as disbursing officer for the United States, may be paid out of state military fund.

COLUMBUS, OHIO, February 18, 1915.

HON. BENSON W. HOUGH, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—I have the honor to reply to your communication of February 10, 1915, as follows:

"I have the honor to request an opinion of your department upon the following matter:

"The custody of federal appropriation and funds issued by the federal government to the states is given to a United States disbursing officer designated by the governor of the state. Colonel William H. Duffy has been so designated by the governor of Ohio. He is required to give bond to faithfully account for the safekeeping and payment of the public moneys entrusted to him for disbursement, as provided by section 149, organized militia regulations of the war department.

"In those regulations no provision is made for the expense in connection with the furnishing of such bond, as appears in section 154, O. M. R. The regulations of the Ohio national guard, paragraph 726, provide in part that 'the payment of the premium on surety company bonds is a legitimate charge against the funds of the organization to which the officer is assigned for duty.' This regulation has been sustained by the courts, as is shown by the opinion of the attorney general furnished this department dated April 27, 1914, under the signature of Charles Follett, first assistant attorney general.

"Colonel Duffy being a statutory appointive officer, namely, assistant quartermaster general of Ohio, it is desired that this department be informed whether his status in reference to being bonded is the same as an officer of the Ohio national guard, or, in other words, whether the premium on his bond as disbursing officer is a proper and legitimate charge against the military fund."

I am asked whether the premium on the bond of Colonel William H. Duffy, who has been designated by the governor of Ohio as United States disbursing officer for the Ohio national guard is payable from the funds appropriated for the maintenance of the Ohio national guard.

It appears that by the act of congress, approved January 21, 1903, as amended by an act of May 27, 1908, and April 21, 1910, 36 statutes, 329, section 14, it is provided that:

"In states where certain requirements with respect to the national guard of such state are complied with, that the secretary of war is authorized to pay to the quartermaster general thereof, or to such officer of the militia of said state as said governor may designate and appoint for the purpose, so much of its allotment * * * as shall be necessary for the payment, subsistence and transportation of such portion of said organized militia as shall engage in actual field or camp service * * * and he shall be required to give good and sufficient bonds to the United States in such sums as the secretary of war may direct faithfully to account for the safe-keeping and payment of public moneys so entrusted to him for disbursement."

Pursuant to the quoted provisions, it is provided by sections 150, 151, 152 and 153, regulations of the war department for organized militia (1910, page 46) in what manner such bonds shall be given. By a decision of the comptroller, under date of November 4, 1903, it is held that the expense of bond premiums may not be paid for from the fund appropriated by section 1661, R. S., as so amended.

The question then resolves itself to this: By congressional appropriation a large sum of money is made available to the national guard of the state of Ohio. As a condition precedent to the receipt of such fund an officer of the Ohio national guard must be designated as "disbursing officer" and he must give bond to the

United States for the proper disbursement of the fund. The appropriation made for maintenance is thereby relieved of a portion of the burden of the support of the national guard and the state is thus relieved of a corresponding burden of expenditure. While the advantage to the state as a proposition of economy is instantly apparent, yet, nevertheless, it becomes still a question as to whether this expenditure is proper from the fund appropriated for the maintenance of the Ohio national guard. The court of appeals of the sixth circuit has rendered an opinion in the case, not yet reported, of Berry Brothers v. Eddy. The opinion not being as yet in print, I here quote at length:

"2. This action is a test case brought for the purpose of obtaining a judicial decision with respect to the right of an officer of the Ohio national guard to pay a premium upon his official bond as such to a surety company from public funds of the state under appropriations either for maintenance of the Ohio national guard or for incidental expenses of militia companies, as prescribed in section 5267, General Code.

"Section 3104, R. S., now section 5314 of the General Code, 83 O. L., 95 provides as follows:

" 'All officers, commissioned under this title, in whose hands is placed public money or other public property, shall give bonds in the sum not to exceed four thousand dollars for a company commander, and five thousand dollars for a regimental quartermaster, and all other officers such sums as the commander-in-chief, may direct, conditioned faithfully to account for all public moneys and property which they may receive. The commander-in-chief may at any time increase the sum so prescribed.'

"Section 3105, R. S., now section 5314, General Code, 94, O. L., 314, provides as follows:

" 'Each person elected or appointed to have the custody of any funds of a military organization, before receiving such fund, shall enter into bond in twice the amount likely to be in his hands at any time, but not less than five hundred dollars, with at least two good and sufficient sureties, to be approved by the auditor of the proper county, payable to the state of Ohio for the use of such organization, for the faithful discharge of his duties, and the careful keeping and disbursement of such funds, as directed by the council of administration of such organization.'

"Nowhere is there an express provision as to the source of the fund from which payment for such bonds shall be made.

"By 103, O. L., page 628, the following general appropriation is made:

"Maintenance, Ohio national guard ---------- $290,000.00.

"100, O. L., 27, paragraph 4, provides as follows:

" 'Section 5265. The auditor of state shall credit to the "state military fund" from the general revenues of the state a sum equal to ten cents for each person who was a resident of the state, as shown by each last preceding federal census. Such fund shall be a continuous fund and available only for the support of the organized militia. It shall not be diverted to any other fund or used for any other purpose.'

" 'Section 6255. The general assembly shall appropriate annually, and divide into two funds, the amount authorized by the preceding section. Such funds shall be respectfully known as the "state armory fund" and "maintenance Ohio national guard fund." '.

" 'Section 5267. From the "maintenance Ohio national guard fund" the adjutant general shall pay the per diem, transportation, subsistence and in-

cidental expenses of militia companies, inspections and incidental expenses of camp, including horse hire, fuel, lumber, forage of horses and medical supplies'

"By the act of April 28, 1886, O. L., 95 98, it is provided:

" 'The national guard shall be governed by the military laws of the state, the orders of the commander-in-chief and the code of regulations.'

"The following section provides:

"The commander-in-chief shall be authorized to make and publish such regulations as will increase the discipline and efficiency of the national guard.'

"Under this authority such a military code has been established which affirmatively provides among other things that a premium paid to a surety company for official bonds of officers of the Ohio national guard is a proper expenditure of that portion of the funds appropriated for maintenance of the Ohio national guard.

"We are inclined to think that this provision is a valid one. 'Maintenance is defined to be the supply of necessaries and convenience.'

"25 Cyc. 664.

"33 N. E. 183.

"19 L. R. A. 187, opinion page 193.

"See also Webster and Bouvier 'maintenance.'

"Counsel for defendant in error gives as a definition of incidental expenses of a military organization 'anything not specifically excepted for which there is a military necessity.'

"In any event we are clearly of the opinion that the giving of these bonds to the state for its protection and the protection of the United States, being required by law, and especially required of officers rendering a loyal and patriotic service for which they receive no salary and to which they devote a large portion of their time, the expense would be properly included in the appropriations for the incidental expenses of military organizations, especially inasmuch as the military code governing such matters has affirmatively declared such expenditures to be proper ones.

"It is stated in argument that these premiums have been constantly paid throughout the national guard for a period of over fourteen years. We would be unable to attach any significance to this fact were we not of the opinion that they have been rightly so paid.

"The judgment of the court below is affirmed without penalty."

The only differentiation between the case decided above and that passed on with approval by the opinion of the attorney general, dated April 27, 1914, and the subject-matter of this discussion is that, in the former case the question raised was whether a bond premium given by a national guard officer to the state for its protection might be paid for from the maintenance fund; and in the case covered by the enquiry the question is as to whether a bond given to the United States for the security of and a proper accounting for the public funds of the United States placed at the disposal of the state for its military department might be so paid. I can see no difference in law or in principle between the cases. Clearly, under the definition of maintenance above quoted, it would be properly payable, and I am of the opinion that a payment out of such fund would be fully within the letter and spirit of the law.

Respectfully,

EDWARD C. TURNER,

Attorney General.

94.

BUREAU OF VITAL STATISTICS--MAY DEMAND PAYMENT FOR COPIES OF BIRTH AND DEATH CERTIFICATES.

The bureau of vital statistics may demand payment from other state departments for certified copies of birth and death certificates issued to such other deparments.

COLUMBUS, OHIO, February 19, 1915.

Bureau of Vital Statistics, Deparment of Secretary of State, Columbus, Ohio.

GENTLEMEN:—I have your letter of February 16, 1915, requesting my opinion as follows:

"Kindly give me your opinion on the following question:

"'May certified copies of birth and death certificates be issued by the bureau of vital statistics, to other state departments for use in those departments without the payment of the statutory fee as stipulated in section 231, G. C.'

"The incident which has brought forth this question is this:

"On February 15, 1915, Mr. McKee, a claim investigator for the industrial commission of Ohio secured six certified copies of death certificates for the use of the commission. All of the deceased were foreigners with no dependents in this country. There were no persons therefore who could be required to furnish the certified copies in prosecuting claims as dependents.

"For these certified copies a statement was rendered to the industrial commission of Ohio for the full amount of $3.00. This statement has been returned with the following letter:

"Dr. A. C. Holland,

"State Registrar of Vital Statistics, Columbus, Ohio.

"Dear Doctor:—We are returning herewith your statement for $3.00 covering six certified copies of certificates of death secured from your department by one of our claims investigators.

"Inasmuch as the certificates in question are used in connection with the activities of another state department, it is our opinion that no charge should be made by your department for the certificates so furnished.

"Yours very truly,

"(Signed) H. H. Hamm."

Section 231 of the General Code referred to in your letter, provides as follows:

"The state registrar shall furnish any applicant therefor a certified copy of the record of a birth or death registered under provisions of this chapter relating to vital statistics, for which he shall receive a fee of fifty cents from the applicant. Such copy, when properly certified by the state registrar to be a true copy thereof, shall be prima facia evidence in all courts and places of the facts therein stated.

"For a search of the files and records when no certified copy is made, the state registrar shall receive a fee of fifty cents from the applicant for each hour or fractional hour of time of search; provided, that the United States census bureau may obtain without cost to the state, transcripts of births and deaths without payment of the fees herein prescribed."

I assume from your letter that Mr. McKee was authorized by the industrial commission of Ohio to secure the six certified death certificates mentioned, and without discussing the right or necessity of the industrial commission to secure these certificates, I deem it sufficient to call your attention to section 280 of the General Code, which is as follows:

> "All *service* rendered and property transferred from one institution, *department,* improvement, or public service industry, to another, shall be paid for at its full value. No institution, department, improvement, or public service industry, shall receive financial benefit from an appropriation made or fund created for the support of another. When an appropriation account is closed, an unexpended balance shall revert to the fund from which the appropriation was made."

The furnishing of these death certificates was without doubt a "service" such as is contemplated in the statutes and this "service" was furnished by one state department to another. Therefore, I am of the opinion that the bureau of vital statistics is entitled to receive and may demand payment under section 231, G. C., from other state departments for certified copies of births and death certificates issued to such other departments by the bureau.

Respectfully,
EDWARD C. TURNER,
Attorney General.

95.

EMPLOYE OF RAILROAD COMPANY, WHO IS A MEMBER OF THE GENERAL ASSEMBLY OF OHIO MAY BE ISSUED A PASS.

Railroad company may issue pass to employe who is a member of the general assembly.

COLUMBUS, OHIO, February 19, 1915.

HON. DAVID HEINSELMAN, *Member House of Representatives, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your letter of February 17th, in which you request my opinion upon the following question:

> "Will you please give me your opinion on the federal and state laws in regard to railroad companies issuing passes to employes who are members of the house and senate?"

Section 516, General Code of Ohio, provides in part as follows:

> "No railroad company, owning or operating a railroad wholly or partly within this state, shall directly or indirectly, issue or give a free ticket, free pass, or free transportation for passengers, except to its employes and their families, its officers, agents, surgeons, physicians and attorneys at law; * * * Provided, that the term 'employes' as used in this paragraph shall include furloughed, pensioned, and superannuated em-

ployes, persons who have become disabled or infirm in the service of any such common carrier, * * * and ex-employes traveling for the purpose of entering the service of any such common carrier; * * *."

Section 8563-5, United States Compiled Statutes, 1913, provides as follows:

"No common carrier subject to the provisions of this act shall after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employes and their families, its officers, agents, surgeons, physicians and attorneys at law; * * * Provided further, that the term 'employes' as used in this paragraph shall include furloughed, pensioned, and superannuated employes, persons who have become disabled or infirm in the service of any such common carrier, * * * and ex-employes traveling for the purpose of entering the service of any such common carrier; * * *."

The above sections quoted in part are the provisions of law which prohibit free transportation by railroad companies in Ohio and the United States.

You will note that the one exception above quoted in both the United States and Ohio Statutes especially excepts employes, their families, surgeons, physicians and attorneys at law of railroad companies, from the provisions of such acts, and also further defines the term "employe."

It would seem that if the employe referred to in your letter comes within the provisions of the term "employe" as here defined in both the Ohio and the United States Statutes, he would become an exception to the rule. I am, therefore, of the opinion that employes of railroad companies, who are members of the house and senate can be issued passes, provided said employes come within the purview of the exceptions enumerated in the section quoted.

In this opinion, I have merely answered the question as submitted and have not considered the question of an employe of a railroad company, who is a member of the house or senate, traveling on his pass, as to whether or not he is entitled to mileage as provided by section 50, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

96.

REASONABLE LIMITATION ON AMOUNT OF MONTHLY EXPENSES MAY BE MADE BY THE INDUSTRIAL COMMISSION FOR ITS EMPLOYES—NO POWER TO GRANT A LUMP SUM FOR EXPENSES.

The industrial commission may make reasonable limitation on amount of monthly expenses, but has no power to grant a lump sum in lieu thereof.

COLUMBUS, OHIO, February 19, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter dated February 12, 1915, you submit to me for my opinion thereon the following inquiry:

"Has the industrial commission authority under section 915, Ohio Laws 103, page 468, to allow the mine rescue car attendant the sum of $25.00 per month for meals, and permit him to make such arrangements for his meals as will be satisfactory to him, providing, of course, he makes arrangements that will be satisfactory to the commission as to the amount of time it would take him away from the car in order to get his meals?"

Section 915 of the General Code, as amended 103 Ohio Laws 467, after providing for the manner of the equipment of the said rescue car, provides that:

"The rescue car with its equipment, shall be stationed at such point as may be designated by the chief inspector of mines, and may be transferred, by his direction, at any time to any point within the state for the purpose of facilitating the efficient inspection of mines and conducting rescue work, and to demonstrate the various appliances and instruct persons in their use in first aid and rescue work.

"The rescue car with its equipment shall be continuously in charge of one person who shall be appointed by the chief inspector of mines, with the approval of the governor, and who shall receive a salary of twelve hundred dollars per annum, together with all necessary expenses incurred in the discharge of his duties."

To comply with this law it is necessary for this attendant to sleep in said car and to be available thereat for service at all times in order to respond to emergency calls.

As to taking his meals away from the rescue car your commission may make such reasonable regulations as will carry out the spirit of the law.

As to expenses you are not authorized to enter into an arrangement for a lump sum. You may, however, within your reasonable discretion fix a maximum which the employe may not exceed. It will be necessary for such employe to itemize his expenses in order that the auditor may draw warrant for same upon the treasury.

Respectfully,
EDWARD C. TURNER,
Attorney General.

97.

PRIVATE CORPORATION — PUBLICATION OF NOTICE OF STOCKHOLDERS' MEETINGS—CERTIFICATE OF DISSOLUTION SHOULD CONTAIN PROOF OF PUBLICATION OF SUCH NOTICE.

Publication of notice of stockholders' meeting for purpose of dissolution of a private corporation under section 8749, G. C., cannot be waived, a certificate which fails to show that such publication has been made should not be filed or recorded by the secretary of state as a certification of dissolution.

COLUMBUS, OHIO, February 19, 1915.

HON. CHAS. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You request my opinion as to your power and duty to file and record a purported certificate of dissolution under section 8740 of the General Code,

which contains recitals conformable to the provisions of the statutes in all respects save one, viz., the requirement that notice to meet of the stockholders at which the dissolution shall be effected, shall be given

> "by publication for four weeks in some newspaper published and of general circulation in the county wherein the principal office of the corporation is located and by written notices addressed to each of the stockholders whose residence is known."

Instead of a recital of such facts the certificate contains the following:

> "that all of the stockholders of said corporation in writing waived notice of the time and place of the meeting of said stockholders authorized and directed to be given under section 8740 of the General Code of Ohio."

Technical objections might be made to this waiver in that the statute requires that not only the *time and place* of the meeting be given, but also *its object.*

But waiving this technicality, I am brought to the consideration of the fundamental question as to whether or not the notices required to be given by section 8740 of the General Code can be waived at all.

A strong inference against the possibility of waiver is found in the fact that elsewhere in the related statutes upon the general subject of the organization and power of a corporation, there are specific provisions for the waiving of certain notices. (See sections 8631, 8635, 8698, 8711 and 8723.)

In fact, in nearly all if not every case in which notice of any particular kind is required by law to be given, respecting a corporate meeting, there is also specific provision for waiver except in the *dissolution statutes.* Neither section 8738 nor section 8740, General Code, authorizes a waiver of the notice therein provided for.

It is at least reasonable to conclude, in the fact of the general legislative policy disclosed by the statutes cited, that if the general assembly had intended that the notices provided in the dissolution statutes could be waived by the stockholders, it would have made express provision therefor. We are dealing with a question of legislative intention; for whatever may be the purpose of such a notice, it is clear that if the statute is found to have an unmistakable meaning, it must be followed in every case.

But I incline strongly to the view that the notices provided for by statute are not for the exclusive benefit of the stockholder and that this undoubtedly is the reason why the statute does not provide that the stockholders may waive them. Under section 8740, for example, the stockholders are entitled to personal notice in writing as well as to notice by publication. The requirement of the giving of notice in both these ways in all cases, whether there are stockholders whose addresses are unknown or not, constitutes a strong indication that the newspaper publication is for the benefit of parties other than the stockholders.

I believe that the newspaper publication is for the benefit of the creditors of the corporation and the general public; despite the corporation's own determination that it has "closed its business and paid all of its debts and liabilities," which under the statute must be made and which is certified to in the instrument which is tendered to you for filing, the statutes contemplate that those whom the managers of the corporation may not consider to be creditors and who believes notwithstanding that they have a claim against the corporation, shall have notice of its contemplated dissolution. It is at least not clear under the statutes that the notice is for the sole benefit of the stockholders and every inference which is ap-

parent from the words of the statute points in the opposite direction. Therefore, I am of the opinion that the certificate of dissolution which has been tendered to you is not legal in form and that you are not obliged to file and record the same.

Nor do I think that having notice of the defects of the instrument, you have authority to accept for filing and record. While I do not wish in this opinion to question the authority of the secretary of state to file miscellaneous papers tendered to him for that purpose, on the payment of the proper fee, yet where a paper is tendered as a certificate of dissolution, which in point of fact is not valid as such, and the secretary of state has notice of its invalidity from its own terms, I believe it is his duty to refuse to file and record it.

Respectfully,
EDWARD C. TURNER,
Attorney General.

98.

CERTIFICATE OF AMENDMENT TO ARTICLES OF INCORPORATION MUST SHOW NOTICE HAS BEEN GIVEN TO ALL MEMBERS OF SUCH CORPORATION BY PUBLICATION OR WAIVER BY ALL MEMBERS IN WRITING—AMENDMENT MUST BE CONCURRED IN BY THREE-FIFTHS OF ALL MEMBERS OF SUCH CORPORATION.

A certificate of amendment to the articles of incorporation of a mutual fire insurance association which fails to show that notice has been given either by publication or waived in writing by all of the members of such company, and which likewise fails to show that the amendment was concurred in by three-fifths of the members of such company should not be filed and recorded by the secretary of state.

COLUMBUS, OHIO, February 19, 1915.

HON. CHAS. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return herewith proposed amendment of articles of incorporation of the Norton Mutual Fire Association sent to me in your letter of February 12th. I have not endorsed my approval thereon nor am I able to advise that the certificate is in such form as that it ought to be filed in your office.

The statutes relative to amendments to articles of incorporation, sections 8720 et seq., General Code, very clearly provide that notices of the corporate meetings must be either given by newspaper publication or waiver in writing by all the stockholders or members. While the giving of notice by mail might be regarded as constituting a substantial compliance with these statutes, it is certainly not a literal compliance with them, and where the waiver of all the members is not secured, I could not advise that the proceedings were in accordance with law.

Because, therefore, the certificate which I return herewith shows the giving of notice by mail instead of by newspaper publication, and because newspaper publication was not waived in writing by all the members of the company and for the additional reason, which I believe I have not yet mentioned, that while the certificate recites that the proposal to amend was adopted without a dissenting vote, it does not show that it was concurred in by at least three-fifths of the members of the company. I am obliged to advise that you refuse to file and record the same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

99.

AGRICULTURAL COMMISSION—SECTIONS OF THE GENERAL CODE WHICH APPLY TO COUNTY EXPERIMENT FARMS.

The law of the state relating to county experiment farms is to be found in sections 1174, 1175. 1176, 1177, 1177-1, 1177-5, 1177-6, 1177-8 *and* 1177-9 *of the General Code, as found in the agricultural commission act,* 103 *O. L.* 304, *and in sections* 1165-6, 1165-7, 1165-8 *and* 1165-11 *of the General Code as amended in* 103 *O. L.,* 436, *with the added proviso that in reading the last four amended sections referred to, the expression "board of control of the Ohio agricultural experiment station" where it occurs therein, must be read "agricultural commission."*

COLUMBUS, OHIO, February 20, 1915.

The Agricultural Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of February 8, 1915, I have a communication from Mr. Benj. F. Gayman, secretary of the agricultural commission, which communication reads as follows:

> "On page 341, O. L., 103, you will notice that the agricultural commission act was passed April 15, 1913, approved May 3, 1913, filed in the office of the secretary of state May 7, 1913.
>
> "On page 437, O. L., 103, you will notice that an act amending the county experiment farm law was passed April 14, 1913, approved May 5, 1913, filed in the office of the secretary of state May 8, 1913.
>
> "I am authorized by the agricultural commission to request an opinion from your department which of these acts is to be recognized by the commission as the law relating to county experiment farms."

A consideration of this inquiry involves a brief reference to the history of the legislation relating to county experiment farms. The first act upon this subject is found in 101 O. L., 124. The sections of this act were designated as sections 1165-1 to 1165-13 inclusive, of the General Code. This act which was adopted in 1910, remained in force without modification until the regular session of the general assembly in 1913, when two acts were passed dealing with the subject of county experiment farms.

One of these acts passed in 1913, and dealing with the subject of county experiment farms is the agricultural commission act found in 103 O. L., 304. This act is entitled "an act to create the agricultural commission of Ohio, and to prescribe its organization, its powers and its duties," etc. This act specifically repeals sections 1165-1 to 1165-13, inclusive, of the General Code, said sections being the original law relating to county experiment farms, but the act contains a re-enactment of those sections and as re-enacted they were given different section numbers by the attorney general, being designated as sections 1174 to 1177-9, inclusive. The only change made in these sections by the agricultural commission act was to substitute in said sections the expression "agricultural commission" for "board of control of the Ohio agricultural experiment station," where the latter expression occurred. It is manifest that the legislature in passing the agricultural commission act, did not intend to change in any way the law relating to county experiment farms, and that its only object in repealing and re-enacting these sections was to make the language thereof correspond with the change in the law brought about by the abolition of the board of control of the Ohio agricultural experiment station and the casting of its duties upon the newly created agricultural commission.

The other of these acts passed in 1913, and dealing with the subject of county experiment farms, is found in 103 O. L., 436. This act is entitled "an act to amend sections 1165-6, 1165-7, 1165-8 and 1165-11 to authorize the establishment of county experiment farms." The act amends these four sections in important particulars, the object of most of the changes being to take certain powers away from the county commissioners and lodge these powers in a central board which at the time of the passage of this act was the board of control of the Ohio agricultural experiment station. It is apparent from the title and substance of this act that the legislature in passing it had in mind and intended to make important changes in the law relating to county experiment farms. The order of the passage, approval and filing of these two acts is indicated in the letter of your secretary above quoted.

From the above statement, it will be seen that when the general assembly convened in 1913, there existed a certain law relating to county experiment farms, and that the legislature intended and attempted to do two things with this law. One of these things was to change the phraseology of the law to make it correspond with certain changes in other laws, and the other was to amend four sections of the law in important particulars. Unfortunately the legislature did not have in mind both things at the same time, and proceeded on April 14th, to adopt an act amending in a substantial way four sections of the law relating to county experiment farms, and upon the following day adopted the agricultural commission act repealing all of the sections of the code relating to county experiment farms and re-enacting the same, the law as re-enacted containing a change in phraseology, but absolutely no change in its substance, as compared with the original law.

I am of the opinion that the intention of the legislature can be clearly gathered from a consideration of the original law as adopted in 1910, and the two acts adopted on succeeding days in 1913. When the legislature convened in 1913, it found in existence a certain law relating to county experiment farms. On April 14th, it sought to substantially amend four sections of this law, the main purpose of the amendment being to destroy the divided authority of the county commissioners and board of control of the Ohio agricultural experiment station as to certain matters and to vest the entire authority as to these matters in the board of control. On April 15th, it sought to strike out of every section relating to county experiment farms and containing the expression "board of control of the Ohio agricultural experiment station" said expression, and to substitute therefor the expression "agricultural commission," the sole reason for this change being that in the same act the legislature abolished the board of control of the Ohio agricultural experiment station and cast its duties upon the agricultural commission created in the same act.

It is elementary that statutes upon the same matter or subject are to be construed together, and this rule is the stronger where both acts under consideration were passed at the same session of the legislature. The main intention of the legislature in the matter under consideration was two-fold; to amend the substance of the law relating to county experiment farms and to change the phraseology of said law so as to make it correspond with those other new sections of the code which abolished the board of control of the Ohio agricultural experiment station and cast its duties upon the newly created agricultural commission.

Insofar as two statutes are irreconcilable, effect must be given to the one last approved. This rule is based upon the theory that the act of approval is part of the usual legislative program, and that therefore if two acts are irreconcilable, the one last approved is the last expression of the law making authority. This theory finds support in Ohio in the case of State ex rel. v. Halliday, 63 O. S., 165. The application of this rule to the matter under consideration would require that force and effect be given to sections 1165-6, 1165-7, 1165-8 and 1165-11 as amended

in 103 O. L., 436, for the reason that the act containing these amended sections was approved by the governor two days after he approved the agricultural commission act.

For the reasons above given, I am of opinion that both acts must be read together and that full force and effect should be given to the expressed intention of the legislature in both acts; that part of the one act and part of the other are to be recognized by your commission as the law relating to county experiment farms; that sections 1165-6, 1165-7, 1165-8 and 1165-11 as amended in 103 O. L., 436, are to be regarded as amendments of sections 1177-2, 1177-3, 1177-4 and 1177-7 as found in the agricultural commission act; and that the law now applicable to county experiment farms is to be found in sections 97, 98, 99, 100, 101, 105, 106, 108 and 109 of the agricultural commission act, being sections 1174, 1175, 1176, 1177, 1177-1, 1177-5, 1177-6, 1177-8 and 1177-9 of the General Code, and in sections 1165-6, 1165-7, 1165-8 and 1165-11 of the General Code as amended in 103 O. L., 436. To this statement must be added the proviso that the four amended sections last referred to must be read in the light of the provision of the agricultural commission act found in section 11 of said act, being section 1089 of the General Code, to the effect that the agricultural commission shall succeed to and be possessed of the rights, authority and powers previously exercised by the board of control of the state agricultural experiment station. In reading said sections 1165-6, 1165-7, 1165-8 and 1165-11, as amended in 103 O. L., 436, the expression "board of control of the Ohio agricultural experiment station" where it occurs in said sections, must therefore be read "agricultural commission."

Respectfully,
EDWARD C. TURNER,
Attorney General.

100.

ARTICLES OF INCORPORATION—THE TRINITY MUTUAL FIRE INSURANCE ASSOCIATION.

Articles of incorporation of The Trinity Mutual Fire Insurance Association relating to mutual protective associations for the insurance of property are legally drawn.

COLUMBUS, OHIO, February 20, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return to you herewith the proposed articles of incorporation of The Trinity Mutual Fire Insurance Association, having attached thereto my certificate that the same are in accordance with the provisions of law relating to mutual protective associations for the insurance of property. I am in doubt as to whether or not the certificate of the attorney general is required to be attached to such articles of incorporation, under the strict language of the present code, although such certificate was required under the original Revised Statutes. Inasmuch, however, as the articles of incorporation are in all respects legal I have no objection to attaching the same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

101.

STATE BOARD OF HEALTH HAS AUTHORITY TO ISSUE GENERAL ORDER FOR PUBLIC WATER SUPPLY, LEAVING IT OPTIONAL WITH MUNICIPALITY BETWEEN ALTERNATIVE REMEDIES—BONDS MAY BE ISSUED BY A MUNICIPALITY FOR CARRYING OUT PROVISIONS WITHOUT SUBMITTING THE QUESTION TO VOTE, BUT SUCH ORDINANCE MUST SET FORTH THE NECESSITY FOR AN EMERGENCY.

A general order to install a public water supply may be issued by the state board of health, under section 1254, *G. C., the municipality to choose between alternative measures to carry out the order, subject to approval by the state board of health. Bonds may be issued under section* 1259, *G. C., without submitting same to vote. An ordinance to carry out order of state board of health is not subject to referendum when an emergency necessity is declared.*

COLUMBUS, OHIO, February 20, 1915.

DR. E. F. MCCAMPBELL, *Secretary and Executive Officer, State Board of Health, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your favor of February 12, 1915, which is as follows:

"I should like to have your advice and opinion in reference to the following matters:

"In August, 1914, a complaint was made under the provisions of section 1252, G. C., by the health officer of the city of Wooster against the quality of the public water supply. After due investigation the state board of health determined that the complaint was justified and observing the formalities required adopted the following order:

"'Be It Ordered by the state board of health of the state of Ohio that the city of Wooster shall install and have in operation prior to January 1, 1916, a public water supply satisfactory to the state board of health.'

"This order, and the proceedings relative thereto, was submitted to and approved by the governor and the attorney general as required in section 1254, G. C.

"Objection is now made that the order is too general and an attempt has been made to enjoin an issue of bonds, the proceeds of which is to be used in securing a new water supply. Other questions have been raised in this case and I shall be glad to have an answer to the following questions:

"1. When the state board of health has determined that improvement or change is necessary in a public water supply and two or more methods are available, can the board order the improvement or change to be made in a specified way, to the exclusion of any other way or method that would possibly give as good results; or, may the board issue an order that would give the municipality the option of choosing as between two or more available methods of securing the results that the state board of health finds necessary?

"2. Can the council of the city of Wooster, for the purpose of carry-out the order of the state board of health, as quoted above, issue bonds under the provisions of section 1259, G. C., or would it be necessary to submit the question to a vote as required by section 3939, G. C.?

"3. Can an ordinance providing for an issue of bonds, the purpoes of which is to provide funds to comply with an order of the state board of health, be declared an emergency measure and, therefore, not subject to referendum?"

Answering your first question permit me to advise that a reading of section 1254 of the General Code does not disclose any provision which makes it mandatory on the state board of health to prescribe specific means whereby the public water supply referred to in the order quoted in your letter is to be provided, nor does it preclude the state board of health extending to any particular locality the privilege of taking advantage of anyone of several means, if there be more than one, for carrying out the provisions of the order; and in addition it may be observed that so far as possible the expense of making the necessary improvement should be borne by the city of Wooster, except insofar as it is necessary for the state board of health to make its investigations, finding, report, etc. All that is contemplated by the statute is that the state board of health shall be satisfied that the plan suggested for the fulfillment of its order is a workable one and designed to carry out the terms of the order. A municipal corporation, through its expert engineering corps, may inaugurate plans and devices for the development of the water supply, and, if there be alternative remedies, may choose between them subject only to the approval of the state board of health.

In answering your second question permit me to call your attention to the provisions of section 1259 of the General Code, which is as follows:

"Each municipal council, department or officer having jurisdiction to provide for the raising of revenues by tax levies, sale of bonds, or otherwise, shall take all steps necessary to secure the funds for any such purpose or purposes When so secured, or the bonds thereof shall have been authorized by the proper municipal authority, such funds shall be considered as in the treasury and appropriated for such particular purpose or purposes, and shall not be used for any other purpose. The bonds authorized to be issued for such purpose shall not exceed five per cent. of the total value of all property in any city or village, as listed and assessed for taxation, and may be in addition to the total bonded indebtedness otherwise permitted by law. The question of the issuance of such bonds shall not be required to be submitted to a vote."

The section above quoted clearly states the question of the issue of such bonds shall not be put to a vote and is clear as to its provisions on this subject.

Answering your third question as to whether or not an ordinance providing for an issue of the bonds, the purpose of which is to provide funds to comply with an order of the state board of health, is subject to a referendum, permit me to invite your attention to the provisions of section 4227-3, as amended in 103 Ohio Laws, 212, which is as follows:

"Whenever the council of any municipal corporation is by law required to pass more than one ordinance or other measure to complete the legislation necessary to make and pay for any public improvement, the provisions of this act shall apply only to the first ordinance or other measure required to be passed and not to any subsequent ordinance or other measure relating thereto. Ordinances or other measures providing for appropriations for the current expenses of any municipal corporation, or for street improvements petitioned for by the owners of a majority of the feet

front of the property benefited and to be especially assessed for the cost thereof as provided by statute, and emergency ordinances or measures necessary for the immediate preservation of the public peace, health or safety in such municipal corporation, shall go into immediate effect. Such emergency ordinances or measures must, upon a yea and nay vote, receive the vote of two-thirds of all the members elected to the council or other body corresponding to the council of such municipal corporation, and the reasons for such necessity shall be set forth in one section of the ordinance or other measure. The provisions of this act shall apply to pending legislation providing for any public improvement."

In the section quoted above it is specifically provided that emergency ordinances or measures necessary for the immediate preservation of the public health in such municipal corporation shall go into immediate effect and therefore not be subject to the referendum provisions. It will be noted, however, that the reason for such necessity shall be set forth in one of the sections of the ordinance or other measure. In other words, it should contain a declaration to the effect that it is an emergency ordinance, being a matter for the preservation of the public health.

The cases of Charles U. Shyrock (a taxpayer on behalf and for the benefit of the city of Zanesville, Ohio, v. the City of Zanesville, et al., case 16533 in the Muskingum county court of common pleas, now pending in the supreme court), and William H. Koch v. the City of Zanesville, which are not yet reported, throw considerable light on the question of the issuance of bonds under the provisions of section 1259 of the General Code, as well as on the application of the referendum to an ordinance of council passed in connection with the carrying out of an order of the state board of health, and your familiarity with those cases, of course, acquaints you with the finding to the effect that the bonds issued under section 1259, G. C., need not be submitted to a vote of the people, nor is an emergency ordinance made necessary for the preservation of the health such an ordinance as to invoke the referendum provisions.

It is therefore my opinion that the state board of health has authority to issue a general order for a public water supply, leaving it optional with the municipal corporation to take advantage of alternative remedies, if there be such, for the enforcement of the order so long as the plan suggested or adopted be satisfactory to the state board of health under the provisions of section 1254 of the General Code; and a municipal corporation affected has authority to issue bonds to provide for the raising of necessary revenue to carry out the provisions of the order under section 1259, G. C., without submitting such bond issue to a vote of the people; that an ordinance providing means for the preservation of the public health in a municipal corporation shall go into immediate effect, and is not subject to a referendum when in such ordinance there is set forth a statement showing the necessity for the emergency.

Respectfully,
EDWARD C. TURNER,
Attorney General.

102.

"BLUE SKY LAW"—COMMISSIONER IN INSURANCE MATTERS—CORPORATION—TRUSTS FOR CONTROL OF INSURANCE COMPANIES AMOUNT IN SUBSTANCE TO CONSOLIDATION—ILLEGAL—"BLUE SKY LAW" CERTIFICATE SHOULD NOT BE ISSUED WHEN SCHEME IS ILLEGAL AND CANNOT BE CONSUMMATED.

The superintendent of insurance is the "commissioner" under the "blue sky law" to whom application should be made for a certificate authorizing the sale or distribution of trust certificates to be issued by a trust declared for the purpose of acquiring control of insurance companies and bringing about their consolidation into one company.

The expenses incurred by such a trust and for which common trust certificates are to be issued constitute promotion expenses and commissions with respect to the organization of the company to be consolidated.

A trust formed for the purpose of controlling several insurance companies and ultimately bringing about their consolidation, under the terms of which stockholders are to surrender their shares in the constituent companies in return for trust certificates and the trustees are to exercise all the rights of stockholders excepting the receipt of dividends, is illegal and void under the laws of Ohio.

A declaration of trust which attempts to create a capital which shall alone be liable for the debts of the trust and to relieve trustees and members of all personal liability, and which attempts to give trust certificates such assignability as to make the trust perpetual in legal contemplation with succession of persons who are to be its beneficiaries is illegal and void as an attempt to create a corporation and to authorize the exercise of corporate powers otherwise than in the manner prescribed by law.

The consolidation of several insurance companies, having an aggregate capital stock and surplus greatly in excess of $100,000, *into a single company with a capital stock of* $100,000 *only, under a scheme which contemplates the distribution (to holders of common trust certificates) of surplus assets to the amount of* $2,000,000, *could not lawfully be sanctioned. But if the law would require that the terms of consolidation be such as to preclude the distribution of such surplus assets, then the state could not sanction their disposal under the "blue sky law."*

The consolidation of companies writing participating policies with those writing non-participating policies only is at least questionable as a matter of law, when the proposed terms thereof are such as to require the distribution of a large part of the combined assets of the companies to be consolidated.

The terms of the disposal of the securities of a trust are unfair within the meaning of the "blue sky law" when the purposes of the trust are so vague and indefinite as to make it impossible to ascertain in advance what companies are to be brought within its operation.

Trust certificates issued under the agreement above described have no value whatever independent of the successful consummation of the proposed consolidation through effective control of the constituent companies.

The "commissioner" under the "blue sky law" is without power to authorize by certificate the disposal of securities when it appears that the plan involves a violation of the law, and that the terms of disposal are grossly unfair, and unless it appears that the issuer is solvent.

COLUMBUS, OHIO, February 23, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, and* HON. FRANK TAGGART, *Superintendent of Insurance, Columbus, Ohio.*

GENTLEMEN:—The superintendent of banks on February 10th, requested my opinion and advice relative to the issuance by him as commissioner under the

"blue sky law" of a certificate under 6373, G. C.—and at his request I attended a hearing of the matter on the same morning. I have also received from the superintendent of banks his files pertaining to the matter.

I have considered several legal questions arising out of the application made to said superintendent of banks in such capacity for a certificate authorizing the disposal of "trust certificates" to be issued by certain trustees acting under the name and style of "The Consolidated Companies."

The existence of the questions which I have considered can be shown only by a somewhat elaborate statement of the facts involved, all of which are either matters of record or beyond dispute. Such a statement of facts begins most appropriately with the quotation of an instrument styled "agreement and declaration of trust of the consolidated companies" which with certain material portions thereof italicized and with the omission of certain names is in full as follows:

> *"It is desired to bring about a consolidation of four or more of a number of insurance companies now in operation in Ohio and adjoining states,* for the purpose of uniting them into one strong company whose assets will be a guaranty of progressive business methods, whose surplus shall justify such expenditures of money as may be necessary to place a strong agency organization throughout Ohio and adjoining states, and whose net earnings by reason of savings in management, operating expense and maintenance of competing solicitors, will produce immediate dividends to its stockholders.
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> "For this purpose *trustees* have been selected to act under the following trust agreement:
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> *"The plan contemplates the turning over to these trustees of all or a large majority of the outstanding stock of the companies sought to be consolidated, so that the trustees will then control the various companies, and the matter of consolidation then becomes a detail.*
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> "Inasmuch as the period of time within which the consolidation sought can be brought about *is indefinite,* the trustees propose *to issue certificates for stocks obtained by them and held as trustees, and when the last of the desired consolidation is brought about, to retire said certificates with cash dividends and a distribution of stock or the proceeds of sale of all or any part of the stock of the one insurance company.* This company will be organized under the laws of the state of Ohio and will have outstanding *not in excess of* $100,000 *of capital stock,* and will have secured a very large amount of outstanding insurance. If all the companies whose consolidation is desirable are consolidated, the consolidated company will have at least sixty millions of insurance.
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> "Consolidation will be brought about as rapidly as possible, so that the objects of this trust may be rapidly accomplished, the property in the trustees' hands distributed, *and the trust terminated within the shortest period of time possible.*
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> *"In the discretion of the trustees, they may* at any time, so long as the stock remains in their possession, *call in the certificates therefor and surrender* to the holders of *preferred certificates* the stock of any company for which such certificates were issued and abandon the attempt to consolidate or liquidate such company and they may, *in their discretion,* surrender all stock obtained by them and call in *all outstanding preferred certificates* and cancel the same.
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> "Any holder of preferred certificates may at any time after two years from date of issue thereof *demand the return of the stock exchanged therefor* and the trustees, *if said stock is still in their possession, i. e.,* if

they have not surrendered or cancelled the same in the process of effecting a consolidation, *shall return the same* upon surrender to them of the preferred certificates issued therefor.

"The original trustees under the designation of the consolidated companies will be composed of the following persons, who will serve until their successors are appointed and qualified in the manner herein provided.

"(Here follows a list of the names of fifteen trustees.)

"They will, from time to time, issue as much of *preferred certificates up to four million dollars* in one dollar certificates and *common certificates up to two million dollars* in one dollar certificates and additional common certificates to redeem preferred certificates if required as may be necessary to carry out the object of this trust, *the preferred certificates to be exchanged at par for stock in the various companies at a price to be fixed by the trustees and entered on their minutes*—this price to be based on the par value of the stock of the respective companies, the surplus and the amount of outstanding insurance, *assuming this insurance to be worth* $20 *per thousand* and making proper allowance for any impairment of the reserve of such company which may be disclosed. The price fixed by the trustees may not be increased unless the increase applies as well to all stock exchanged theretofore. *All stocks purchased to be trust property and to be administered under the terms of this trust. No preferred certificates may be issued except in exchange for stock of insurance companies at the prices fixed by the trustees. The trustees, immediately on organization, may contract for the work of soliciting and securing the exchange,* but the price to be paid therefor, and for the initial expense thereof shall be payable, *in common certificates only and the trustees themselves may accept pay in such certificates from the party or parties* until such time as dividends are received from the new company *when they may be paid for services as provided herein.*

"One. *The trustees as such in their collective capacity shall be designated as the consolidated companies, so far as practicable, and under that name shall conduct all business, execute all instruments in writing in the performance of their trust.*

"Two. *The present trustees shall serve for a period of three* (3) *years, or until resignation, and they may at any time increase the number of trustees by appointment of additional trustees until the entire number shall not be in excess of twenty-one.* In case of the resignation or death of any trustee, the remaining trustees shall fill such vacancies by a majority vote thereof. Any trustees which have been appointed as additional trustees and any trustees who may be elected to fill vacancies caused by resignation or death *shall succeed to the rights of the present trustees and the trust shall vest in such trustee or trustees together with the continuing trustees without any further conveyance.* Any new trustees appointed or trustees who have been elected to fill vacancies caused by resignation or death shall serve *until the expiration of the three-year period above mentioned or until resignation. If, at the end of said three-year period, the trustees by a majority vote resolve that the trust has not been fully completed or that the bringing into the consolidation of any other company or companies is desirable, the period of termination of the trust may be extended for one year, and similarly at the end of one year the termination may be postponed another year under the same conditions, and so each successive year in the discretion of the trustees; said trustees in the event of such extension, but the certificate holders by a vote of a majority of each class*

may at any annual meeting terminate the trust. In the event of dissolution, the trustees shall convert the securities in their hands into money and distribute the same among the certificate holders according to their and distribue the same among the certificate holders according to their respective interests.

"Three. *For the purpose of laying before the cestui que trust* a statement of the conditions of the business, the trustees shall annually call a *meeting of all the certificate holders,* both common and preferred, at the office of the trustees and shall submit a financial statement of the affairs of the trust. *Certificate holders may be represented by written proxies.*

"Four. *The trustees as such shall own the legal title to all property or assets of any kind at any time belonging to their trust, and shall have and exercise the exclusive management and control of same.* They shall not be personally liable upon any obligation incurred by them in the management of the trust and *they may vote in person or by proxy any shares of stock belonging to them as trustees.*

"Five. So far as strangers to this trust are concerned, *a resolution of the trustees authorizing a particular act to be done shall be conclusive evidence in favor of such strangers that such act is within the power of the trustees.*

"Six. The trustees may *make any rule* in reference to the management of the trust not inconsistent with the terms of this instrument which they may deem necessary or favorable for the conduct of the business, and may repeal or change the same from time to time by majority vote. *They may adopt and use a common seal.* These rules shall provide for the number of trustees constituting a quorum and shall be recorded in the record book of the trustees and on demand a copy shall be furnished any certificate holder.

"Seven. The trustees shall annually elect a *president and vice-president* from their number and shall also elect a *secretary and treasurer from certificate holders.* They shall have the authority *to appoint such officers, agents or attorneys,* which they may, from time to time, deem necessary or expedient for the conduct of their business. They shall keep *minutes of all actions taken by them, which shall be open to the inspection of the certificate holders.* They shall fix the compensation of all their agents, and after the dividends are earned and paid on the preferred certificates they are likewise authorized *to pay to themselves reasonable compensation for their own services out of the income received by them.*

"Eight. The trustees shall not be liable for errors in judgment in holding property or assets of any kind originally conveyed or assigned to them or in acquiring and afterwards holding additional property, or assets nor for any loss arising out of any investment, nor for any act performed or omitted by them in the execution of this trust in good faith.

"Nine. Certificates hereunder shall be of the par value of $1.00 each and shall be divided into preferred and common certificates. The preferred certificates shall be entitled to *a cumulative semi-annual dividend at the rate of seven* (7) *per cent. per annum,* the same to be paid or set apart before any dividend shall be set apart for the common certificates. The dividends to cumulate *only from time of consolidation* and on resolution of the trustees to that effect. *In the meantime all dividends declared by any company are to be paid to the owner of the stock of such company at the time of its transfer.* The trustees may at any dividend period redeem outstanding preferred certificates at par, but they must redeem the same

fractional part of the holdings of each certificate owner and for this purpose *may issue fractional certificates* if necessary. As soon as one-half of the outstanding preferred certificates in amount are redeemed the holder *may exchange his remaining preferred for common certificates,* and for this purpose the trustees are authorized *to issue additional common certificates* for the requisite amount without the consent of the holders of common certificates. In case of liquidation the proceeds of the liquidation shall be first applied to the payment to the holders of the preferred certificates in the amount of $1.00 per certificate and any accrued and unpaid dividends thereon, and the balance remaining thereunder shall be divided among the holders of the common certificates in proportion to their holdings. Provided, however, that after a dividend of seven (7) per cent. shall have been paid on common certificates from earnings in any calendar year, then all certificate holders shall participate in any further dividend distribution during that year without distinction.

"Ten. The form of the common certificate shall be such as is adopted by the trustees.

"Eleven. The form of the preferred certificates shall be as follows:

"AUTHORIZED CERTIFICATES, $6,000,000.

"CONSOLIDATED COMPANIES.

"Unincorporated.

"Common 2,000,000—preferred certificates—preferred 4,000,000.

"This certifies that ---------- is the owner of ---------- Preferred Certificates in the consolidated companies of the par value of one (1) dollar each which he holds subject to an agreement and declaration of trust dated January 6, A. D., 1915; a duplicate original of which is on file at the office of the superintendent of banks and banking at Columbus, O., and in the office of the superintendent of insurance of Ohio, and which is hereby referred to and made a part of this certificate.

"It is mutually agreed between the certificate holders and the trustees of the consolidated companies that there may be an issue of 4,000,000 shares of preferred certificates, of the par value of $1.00 each, such certificates to be cumulative and bear dividends at the rate of seven (7) per cent. per annum, payable on the first days of January and July of each year, and to be paid or provided for before any dividends shall be paid or set apart on the common certificates. Dividends to commence to accumulate as provided in the declaration of trust.

"This certificate to be valid must be signed by the president or vice-president and by the secretary of the trustees of the consolidated companies, and neither the trustees nor the holder of this certificate assume any liability in reference to the shares or business of the consolidated companies.

"After a divident of 7 per cent. shall have been paid on both preferred and common certificates from earnings in any calendar year, then all certificate holders shall participate in any further dividend distribution of that year without distinction.

"On vote of the majority of the trustees this certificate may be redeemed at any dividend paying period at par and accrued dividends.

"After one-half in amount of preferred certificates are redeemed, the holder may exchange his remaining certificates for common certificates at par.

"In Witness Whereof, Under said declaration of trust the trustees herein designated as the consolidated companies have caused their seal to

be hereto affixed and this certificate to be executed in the name and on behalf of the consolidated companies by its president and secretary, this ---------- day of ----------, 1915.

"By----------

"President of Trustees.

"Twelve. The trustees may, from time to time, declare and pay dividends *out of the net earnings* made by them, but the amounts of the dividends and the payment of them shall be wholly in the discretion of the trustees except as provided above.

"Thirteen. The fiscal year of the trustees shall end with the calendar year. The trustees shall serve until their successors shall be appointed and qualified as provided herein. Of meetings of the trustees notices shall be given by mail to each trustee at his registered address at least three days before such meetings. Five (5) days' notice shall be given of meetings of certificate holders.

"Fourteen. The ownership of certificates hereunder shall not entitle the holders *to any title in or to the trust property or assets of any kind whatsoever, or right to call for a partition or division of the same.*

"Fifteen. The trustees *shall have no power to bind the certificate holders personally,* and the certificate holder and his assigns, all personal or corporations extending credit to, contracting with, or having any claim against the trustees, *shall look only to the funds and property of the trust for payment of such contracts or claim,* or for the payment of any debt, damage, judgment or decree, or any money that may otherwise become due and payable to them *from the trustees,* so that *neither the trustees nor certificate holders,* either present or future, *shall be personally liable therefor.*

"Sixteen. This declaration of trust *may be amended at any time by agreement of a majority of the certificate holders and a majority of the trustees,* but no amendment shall be adopted *which shall charge the trustees or certificate holders with any personal liability,* or which shall change the rights of priority of the holders of preferred certificates, nor shall the number of certificates authorized to be issued be at any time increased, except as herein provided as to common certificates.

"The signature hereto of the trustees selected signifies their acceptance of the trust and their agreement to administer the same in accordance with its terms.

"Witness the hands of the several trustees at Columbus, Ohio, this 26th day of January, 1915.

"(Here follow the signatures of the fifteen trustees.)"

With certain possible exceptions to which I shall hereinafter refer, the meaning of the terms of the above instrument is plain. Although no certificates have been issued or disposed of the fifteen trustees named in the original "agreement and declaration of trust" have met, organized and entered into a contract with a certain licensed dealer in industrial securities by which they agree to turn over to the dealer the entire authorized issue of common certificates, i. e., such certificates of the par value of $2,000,000 in consideration of an agreement by the dealer to secure and turn over to the trustees a majority in interest of the stock of the life insurance companies sought to be consolidated.

Here I think I ought to point out that whereas to the best of my recollection nothing was said in the course of the hearing before the superintendent of banks to the effect that the "agreement and declaration of trust" and the certificates

to be issued thereunder related or would relate in any way to insurance companies other than life, there is nothing in the above quoted instrument itself, which is the measure of the scope of the enterprise, to indicate that the trust is to be limited to life insurance companies only. The word "life" is not found in the "declaration of trust." The narrowest interpretation to be put upon the instrument in this respect is that the trust may extend to the conrol of the stock of any kinds of insurance companies which may be consolidated under the laws of Ohio.

As stated the trustees and the dealer above referred to have made application to the superintendent of banks as "commissioner" under the "blue sky law" for a certificate authorizing the disposal of the "trust certificates referred to and designated in the above quoted "agreement and declaration of trust" as "preferred certificates" and "common certificates."

The foregoing are all the facts which can be regarded as established. In addition thereto I may mention, however, that in the hearing before the superintendent of banks the names of certain life insurance companies were mentioned, the consolidation of which was said to constitute the real object of the enterprise; and that the aggregate capital stock and surplus of these companies so named amounts to something over two millions of dollars ($2,000,000).

The first question which was encountered under the foregoing facts was that respecting the status of the enterprise and of the trustees as "issuer" under the "blue sky law" as reflecting upon the jurisdiction of the superintendent of banks as "commissioner" and upon the application of the "blue sky law" to the terms of the contracts of subscription or disposal of the "trust certificates." This question, which is really divisible into two distinct parts, has in my opinion however become subordinate to another general question which has been raised in my own mind and which I may state thus:

> "Should the sanction of the state through any of its departments be given to the disposal of the above described 'trust certificates?'"

I raise this general question because I have encountered the following specific questions:

(1) Is the so-called "declaration of trust" effective to create a trust in the proper sense? And if not would the issuance of a "trust certificate" upon the terms therein specified perfect the declaration of trust and bring a trust into existence in behalf of the certificate holder as *cestui que trust?*

(2) Considered as a trust is the arrangement legal; this question being predicted upon the following subordinate questions:

(a) Could Ohio life insurance companies themselves enter into a partnership or pooling arrangement; and if not can the stockholders bring about the same result by assigning their stock in trust? And if the answer to both of these questions be in the negative would the consummation of the purposes of the trust agreement bring such a condition of affairs?

(b) Is it lawful for any number of persons as agents of stockholders or otherwise, and whether they be called "trustees" or not, to control and dominate the affairs of more than one corporation?

(3) Are the "trustees" under the above "agreement and declaration of trust" usurping a franchise; and would the mutual relations attempted to be created thereunder be such as to render their acts thereunder attempts to exercise corporate powers?

I may pause here to state that I am clearly of the opinion that if the answers to any one of these three subordinate questions are such as to demonstrate that

the arrangement in question is void or illegal the certificate applied for should not be issued by any state officer. To hold otherwise would be to do violence to the controlling purpose of the "blue sky law."

(4) The declared object of the "declaration of trust" being the consolidation of a certain number of insurance companies doing business in Ohio according to a specified plan, does not the answer to the main question depend upon whether or not such a consolidation if attempted could lawfully be carried into effect? This question is suggested by two subordinate questions which have arisen in my mind, namely:

(a) Would the commission which by law is to pass upon the proposed consolidation be justified as a matter of law in permitting a consolidation by which the policy holders of all of the companies which it is proposed to consolidate would be relegated so to speak to the existence of a company having but one hundred thousand dollars ($100,000) capital (it being admitted that the aggregate capital of the several companies mentioned by the promoters of the scheme as within its purview is greatly in excess of one hundred thousand dollars ($100,000)?

(b) Would such commission be justified in sanctioning the proposed consolidation, should it appear that the capitalization of the companies to be consolidated had been expended by the issuance of "trust certificates" without any actual increase in assets, (1) upon which dividends are to be paid to stockholders and participating policy holders; or (2) which are to be accounted for and disposed of at the time of the proposed consolidation.

In explanation of this question I repeat the statement that the combined assets of all the companies mentioned by the promoters as within the purview of the scheme are about two millions of dollars ($2,000,000), (the value of outstanding insurance cannot be counted as an asset in favor of policy holders), whereas this sum is to be practically absorbed in the first instance under the consolidation arrangement by the issuance of "common trust certificates" and that preferred trust certificates are to be exchanged for stock in the company at a price fixed upon the basis not only of par value of such stock but also upon the surplus and the amount of outstanding insurance assuming the same to be worth twenty dollars per thousand.

(c) Would not the fact (which I ascertain by independent investigation from public records) that some of the proposed constituent companies limit themselves in their articles of incorporation to certain dividends to stockholders and issue policies entitling the holder thereof to participate in dividends, preclude the consummation of the proposed consolidation?

(5) What other than control of the proposed constituent companies and their later consolidation into a company hereafter to be organized, has the so-called "the consolidated companies" of value to offer to investors?

Arguments on the jurisdictional question were heard by the superintendent of banks; and I have investigated and have received from counsel on both sides briefs respecting the other questions which have suggested themselves to me.

Of course the question of jurisdiction is encountered first. It is raised by consideration of the following section of the "blue sky law" so called; (section 6373-19, General Code, as enacted 103 O. L., 752):

> "If the issuer of such securities be a company incorporated, organized or formed to make any insurance named in subdivisions I and II, division III, title IX of the General Code, the 'commissioner,' for all the purposes named in sections 14 and 16 of this act, shall be the superintendent of insurance of this state. In addition to the powers given to, and the duties prescribed to be performed by, such 'commissioner,' under said sections, the

superintendent of insurance shall have, over any such company disposing or attempting to dispose of any of its securities within this state, the powers of regulation, supervision and examination conferred on him by law, with reference to companies licensed to transact the business of insurance within this state."

The effect of making the superintendent of insurance the "commissioner" for all purposes named under "sections 14 and 16 of this act" is to confer upon the superintendent of insurance, instead of the superintendent of banks, among other things the authority and jurisdiction to issue or to refuse to issue a certificate or license entitling a dealer to dispose or attempt to dispose of a given security.

The terms "issuer" and "company" as used in the above section are defined in section 6373-2, General Code, as amended 104 O. L., 110, as follows:

"As used in this act, the term 'company' shall include any corporation, co-partnership or association, incorporated or unincorporated, and whenever and wherever organized; 'dispose of' shall be construed to mean 'sell, barter, pledge or assign for a valuable consideration or obtain subscriptions for;' 'issuer,' the original issuer of the security; and, where the context demands it, words in the present tense include the future tense; in the masculine gender include the feminine and neuter gender; in the singular number include the plural, and in the plural, the singular number; the word 'whoever' includes all persons, natural and artificial, principals, agents and employes; 'and' may be read 'or' and 'or' 'and.'"

In my opinion one effect of the "declaration of trust" above quoted is to form or organize an unincorporated association or co-partnership; and to this extent the trustees constitute or represent a "company" within the meaning of section 6373-2.

Presumably the word "company" as used in section 6373-19 is controlled by the definitions of the other section just quoted as I have stated it. The presumption becomes a certainty when it is considered that the word "company" as found in section 6373-19 is immediately followed by the words "incorporated, organized or formed." That is, the force of section 6373-19 is obviously not intended to be limited to *incorporated companies,* but to those which have been "organized or formed" by methods less formal than incorporation as well. The ultimate question then becomes as to whether or not the "trust" is formed "to make * * * insurance."

It is not my purpose in this connection to analyze the "declaration of trust" as exhaustively as might be deemed appropriate for the reason that a more complete analysis thereof is necessary in order to answer the more fundamental questions which I have myself suggested and hereinbefore stated. It is sufficient in this connection to state that the trust is certainly not a mere "dry trust." The trustees are not constituted a mere "holding" agency, but obviously are to engage in a business enterprise. That this is true is evidenced by the following provisions of the "agreement and declaration of trust:"

"(1) The plan contemplates the turning over to these trustees of all or a large majority of the outstanding stock of the company sought to be consolidated so that the trustees will then control the various companies.

"(2) The trustees as such in their collective capacity shall be designated as 'the consolidated companies' * * * and under that name shall conduct all business.

"(3) For the purpose of laying before the *cestui que trust* a statement of the *condition of the business,* the trustees shall annually call a meeting of all the certificate holders.

"(4) The trustees as such shall own the legal title to all property or assets of any kind at any time belonging to their trust, and shall have and exercise the exclusive management and control of same.

"(5) The trustees * * * shall have the authority to appoint such officers, agents or attorneys, which they may, from time to time, deem necessary or expedient for the conduct of their business. * * * They shall fix the compensation of all their agents, and after the dividends are earned and paid on the preferred certificates they are likewise authorized to pay themselves reasonable compensation * * *.

"(6) The trustees shall not be liable for errors in judgment in holding property or assets of any kind * * * or in acquiring and afterwards holding additional property * * * for any act performed or omitted by them in the execution of this trust in good faith.

"(7) The trustees may, from time to time, declare and pay dividends out of the net earnings made by them, but the amounts of the dividends and the payment of them shall be wholly in the discretion of the trustees except as provided above."

It being clear that the trust is declared for a business purpose, the next question is as to whether or not that business is the making of insurance. This is a question of considerable difficulty. The trustees themselves are not to make contracts of insurance, but they are, pending consolidation (which is to take place at their discretion), to control corporations engaged in making contracts of insurance. Looking through the form of the transaction to the substance thereof I think it must be held that the purpose of the trustees is to conduct, through the proposed constituent companies and pending their consolidation, the business which those companies are authorized to conduct. This will be done of course by controlling the selection of the directors and other officers of the companies and thus dictating their respective policies. So that in this somewhat liberal but substantially accurate view of the case "the consolidated companies" is a company formed to make insurance.

But there is another angle of view involving the raising of the second of the two specific questions into which the first general question resolves itself which justifies the adoption of the interpretation which I have put upon the first sentence of section 6373-19. Section 12 of the blue sky law being section 6373-12 as amended 104 O. L., 115, provides as follows:

> "No person or company shall, for the purpose of organizing or promoting any insurance company, or of assisting in the flotation of its stock after organization, dispose or offer to dispose, within this state, of any such stock, unless the contract of subscription or disposal shall be in writing, and contain a provision substantially in the following language:
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> "'No sum shall be used for commission, promotion and organization expenses on account of any share of stock in this company in excess of ___ per cent. of the amount actually paid upon separate subscriptions, or, in lieu thereof there may be inserted, $____ per share from every fully paid subscription, and the remainder of such payments shall be invested as authorized by the law governing such company and held by the organizers (or trustees, as the case may be), and the directors and officers of such company after organization, as bailees for the subscriber, to be used only in the conduct of the business of such company after having been licensed and authorized therefore by proper authority.'
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> "The amount of such commission, promotion and organization expenses shall in no case exceed fifteen percent. of the amount actually received upon the subscription.

> "Funds and securities held by such organizers, trustees, directors or officers, as bailees, shall be deposited with a bank or trust company of this state or invested as provided in sections ninety-five hundred and eighteen and ninety-five hundred and nineteen of the General Code until such company has been licensed as aforesaid."

I am unable to see why "the consolidated companies" and the trustees thereof are not mere promoters of an insurance company, viz.: a company proposed to be formed by the consolidation of the several companies contemplated by the trustees. It is true that said section 6373-12 in terms applies only to the contract of subscription or disposal of the stock of the company to be organized; and that the trustees of "the consolidated companies" in issuing the "trust certificates" which are provided for are not disposing or offering to dispose of stock in the new company. This is guarded against in the "agreement and declaration of trust" in the following language:

> "The trustees propose to issue certificates for stocks obtained by them and held as trustees, and when the last of the desired consolidation is brought about, to retire said certificates with cash dividends and a distribution of stock or the proceeds of sale of all or any part of the stock of the one insurance company."

In other words, while the "trust certificates" may at the discretion of the trustees be exchanged for stock in the new company their holders are not entitled to such stock as a matter of right under the terms of the trust agreement, but such certificates may be retired with the proceeds of sale of the stock. But it is obvious that the certificates on consolidation must be retired in one of these two ways. Whether retired by cash dividends (a matter that will be referred to later), and distribution of stock or by proceeds of the sale of the stock of the company which it is proposed to form, the common stock issued by the trustees and representing promotion expenses will have to be provided for. In either event the amount represented by the common certificates may be a charge upon the proceeds of the stock to be issued; and to the extent that this is possible I believe that the transaction will ultimately at least become subject to the regulatory provisions of section 6373-12. That is to say if the trust agreement has any lawful purpose at all it is the organization of the consolidated company; the two millions of dollars ($2,000,000) of common certificates authorized to be issued represent a part of the expense of such organization and the promotion of the consolidated company. To use any part of the proceeds of the sale of the stock of the new company, (or surplus assets of the constituent companies) to take up outstanding common certificates would be paying organization expenses; and *a fortiori* to issue new stock in exchange for outstanding common certificates would have the same effect. It is no answer to this to say as was claimed in the hearing before the superintendent of banks, that at the time of the proposed consolidation there will be no organization expenses whatever; for provision for the outstanding common certificates would be in my opinion the payment of promotion and organization expenses.

I am, therefore, of the opinion, for this reason, that "the consolidated companies" must be regarded as an agency to promote an insurance company within the meaning of section 6373-19 and that when the new or consolidated company is formed its stock cannot be disposed of unless on a basis that will bring the two million dollars of common certificates within the fifteen per cent. limitation of section 6373-12. That is, stock in the new company would have to be sold or exchanged on such a basis as to represent a capital and surplus aggregating over thirteen millions of dollars ($13,000,000).

There is a third reason for the view which I have taken on the first general question, a mere statement of which will suffice at this point as I shall have to elaborate upon it subsequently in this opinion. In my opinion the effect of the stockholders of the several companies which it is proposed to consolidate entering into a trust agreement and declaration is to make the various companies of which they are stockholders partners in a common enterprise involving the continuing conduct of their respective businesses under centralized control and management. In this sense "the consolidated companies" may be regarded as a partnership of insurance companies and of courses is an association or organization to make insurance. This alone would bring it within the scope of section 6373-19 of the "blue sky law."

Finally I think it is clear from an examination of the provisions of section 6373-19, General Code, that its scope is intended to embrace agencies in promotion of insurance companies as well as insurance companies, the organization of which has been perfected. If this were not the case there would be no reason for the second sentence of the section which in effect vests in the superintendent of insurance, when acting as "commissioner," the powers of regulation, supervision and examination which he possesses with reference to licensed insurance companies, to be exercised with respect to any "such company disposing or attempting to dispose of any of its securities within this state." In this way as well as by consideration of the meaning of the word "company" as defined elsewhere in the act and used in this section, the intention of the legislature to make the superintendent of insurance the "commissioner" in all matters relating to the promotion of insurance companies is made clear.

For the foregoing reasons then I am of the opinion:

First. That the superintendent of insurance is the "commissioner" under the "blue sky law," to whom application for a license and certificate authorizing a sale or disposal of the trust certificates of "the consolidated companies" should be made, and

Second. That the provisions of section 6373-12, General Code, while not directly applicable to the disposal of these securities (which are not stock of an insurance company within the meaning of the term as therein used) will be applicable to the sale or disposal of the stock of any consolidated company which is formed in pursuance of the "agreement and declaration of trust;" and that the retirement of outstanding "common certificates" as provided for in said declaration of trust at the time of such consolidation would constitute payment for "commission, promotion and organization expenses" within the meaning of said section 6373-12. For these reasons alone then the application which has been made to the superintendent of banks should not be considered by him.

As I have stated the jurisdictional question and that respecting the application of section 6373-12 of the blue sky law are doubtful because they involve the interpretation of a new statute. I have answered them with the view of carrying out the manifest object and purpose of the whole "blue sky law." It was very clearly the intention of the legislature that the superintendent of insurance should be the "commissioner" in insurance matters under the blue sky law; and I believe the terms which the general assembly has used in expressing its intention are sufficiently broad to justify the conclusion which I have reached. At any rate, assuming these terms to be of doubtful import on their face, consideration of the evil to be remedied and the purpose which animated the general assembly in imposing the duties of the "commissioner" upon the superintendent of insurance, justifies and compels I think the interpretation which I have put on these provisions.

In the view which I take of the merits of the application, however, the juris-

dictional question is really a subordinate one; for I think the "agreement and declaration of trust" is so manifestly illegal and void that no certificate entitling any person to dispose of the "trust certificates" provided for therein should be issued by any state authority, however the jurisdictional question be decided.

In the first place, I think it will be universally admitted that "the consolidated companies" does not at present exist as a trust. The fifteen persons who signed it in effect merely hold themselves out to the stockholders of any insurance company doing business in Ohio or elsewhere as willing to act as trustees for them for the accomplishment of the purposes mentioned. No trust relation will exist until someone's preferred certificate is disposed of, and then only as to the stockholder who surrenders his share of stock in return for such certificate or certificates. I do not think it necessary to go into this matter at any length or to give it any consideration as other reasons are sufficient for the conclusion reached herein.

The second specific question bearing upon the legality of the enterprise is a most serious one. The consolidation of life insurance companies, for example, is provided for by statute and it may be said to be the policy of the state to encourage such consolidation. But that policy is qualified by specific provisions prescribing the manner in which the consolidation shall be effected (sections 9351-9356, inclusive, General Code). These provisions are to the effect that one *company* desiring to consolidate with another shall present a petition to the superintendent of insurance incorporating the terms and conditions of the proposed consolidation and praying for the approval or any modification thereof. Thereupon the superintendent shall give notice of a hearing on such petition which shall be held by a commission consisting of the governor or some competent person to be appointed by him, the superintendent of insurance and the attorney general. This commission has authority as stated to approve or to modify the terms of the consolidation and to make orders with reference thereto, as well as to make orders relative to the distribution of surplus assets.

I think that it is so elementary as not to require the citation of authorities that power to consolidate is a franchise and can be exercised only in the manner prescribed by law. Furthermore, it is a power which inheres in the insurance *company* as such and constitutes a corporate act. That is to say, consolidation is not an incident of the right of the individual stockholders, but the power is an attribute of the corporation itself. Insurance companies organized under the laws of Ohio have no authority whatever to enter into any mutual arrangements having the effect of consolidation other than by virtue of the statutes just cited. Specifically, they may not enter into any contract of partnership or pool their respective interests or otherwise provide for joint management or control. If the enterprise now under consideration purported to be one entered into by the various companies proposed to be consolidated as such instead of by their stockholders acting through the trustees under the name and style of "the consolidated companies the arrangement would be clearly *ultra vires* of the corporations and void; or if the several companies themselves should enter into a mutual contract whereby their concerns were to be managed by a central executive board for an indefinite period or until the board deemed it wise to consolidate the companies into one, such a contract would be unlawful and void as against public policy whether the relation created thereby be regarded as a partnership or as a combination or otherwise.

(State v. The Standard Oil Co., 49 O. S., 137.)
(Geurinek v. Alcott, 66 O. S., 94.)

It is not necessary in order that this result shall follow that the combination of corporations affect the price of commodities or otherwise tend to monopolistic

restrictions in trade and commerce. The vice of such a contract is, from the standpoint of the corporation, a subjective one and finds expression in the following language from the Standard Oil case, supra, at page 185:

> "The law requires that a corporation should be controlled and managed by its directors in the interest of its own stockholders and conformable to the purpose for which it was created by the laws of its state."

Again, such a contract among the companies as such would involve delegation by them to the central managing board of practically all their corporate powers and functions of a substantial nature. A corporation is not permitted to delegate such powers and functions in this manner.

> Southern Electric Securities Co. v. State, 44 Southern 786.
> Noyes on Intercorporate Relations, section 315.
> Eddy on Combinations vol. 1, section 607, especially at page 555 and cases cited among which see Gould v. Head, 38 Fed. 886.

If the above "agreement and declaration of trust" were subscribed by the corporations as such there could be no doubt about its effect in this particular. It embodies a frank declaration of intention that "the plan contemplates the turning over to these trustees of all or a large majority of the outstanding stock of the companies sought to be consolidated *"so that the trustees will then control the various companies and the matter of consolidation becomes a detail."*

Parenthetically, it may be remarked that indeed and in truth should this agreement be carried out the "matter of consolidation" would actually become *unnecessary* save as a sort of formal compliance with the law.

Does the "agreement and declaration of trust" stand on any different footing because if carried out the parties to it will be stockholders of different companies and not the companies themselves? Common sense dictates a negative answer to this question; and such an answer is forced also by authorities. In the Standard Oil case, supra, this was the very question which controlled the decision of the court. The temptation is to quote liberally from Judge Minshall's opinion relative to the nature of a corporation and the impossibility of distinguishing in substance the corporation as an entity from its stockholders; and distinction, too, between these acts and agreements which the stockholders may commit and make as incident to their individual ownership of the shares of stock and those other acts and agreements which directly effect the corporation as such and are therefore held to be corporate acts. The limitations of space, however, forbid quotation save from the syllabus of the case which states the unanimous decision of the supreme court of this state.

> "That a corporation is a legal entity, apart from the natural persons who compose it, is a mere fiction, introduced for convenience in the transaction of its business, and of those who do business with it, but like every other fiction of the law, when urged to an intent and purpose not within its reason and policy, may be disregarded.
>
> "Where all, or a majority of the stockholders composing a corporation, does an act which is designed to affect the property and business of the company, and which, through the control, their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company, in the same manner as if it had been a formal resolution of its board of directors; and, the act so done is ultra

vires of the corporation and against public policy, and was done in their individual capacities for the purposes of concealing their real purpose and object, the act should be regarded as the act of the corporation; and, to prevent the abuse of corporate power, may be challenged as such by the state in a proceeding in quo warranto."

To the same effect see:

People v. North River Sugar Refining Co., 121 N. Y., 623.
Noyes on Intercorporate Relations, sections 313 to 317, inclusive.
Eddy on Combinations, section 607.

It is interesting to note in connection with The Sugar Refining Trust case decided by the court of appeals of the state of New York that the court of first instance and the supreme court of that state had forfeited the charter of the underlying company which was the defendant therein in at least partial reliance upon the fact that the effect of the combination was to destroy competition in a commodity of general use and consumption (54 Hun. 356); whereas the court of appeals in affirming the judgments of the lower courts planted its decision solely upon the grounds pertaining to corporation law as such. As stated in the opinion of the court:

"We have reached our conclusion, and it appears to us to have been established, that the defendant corporation has violated its charter and failed in the performance of its corporate duties and that in respects so material and important as to justify a judgment of dissolution. Having reached that result, it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade and the problems of political economy. * * * Without either approval or disapproval of the views expressed upon that branch of the case by the courts below, we are enabled to decide that in this state there can be no partnerships of separate and independent corporations, whether directly or indirectly through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints, but that manufacturing corporations must be and remain several as they were created, or one under the statute."

I mention this case not because anything is needed to supplement the decision of our own supreme court in The Standard Oil case, but because in spite of the very clear language of the decision in the latter case, of itself sufficient to support the judgment of the court, the economic considerations which the New York court put aside as immaterial were commented upon in The Standard Oil case. I think the Standard Oil case is authority for the rule as I have stated it; but the distinctions drawn by the New York court are at least helpful to show the existence of the rule separate and apart from the principles which make a combination in restraint of trade in a commodity illegal:

Returning again to the "agreement and declaration of trust" there can be no doubt that its intended effect is that which is prescribed by the rule as I have stated it. The trustees by means of exchanging preferred trust certificates for shares of stock in several insurance companies are to acquire control of those companies. That is the stockholders of the companies by surrendering their shares to the trustees are to aid in accomplishing a result which affects the management of the corporations as a whole and indeed will end in surrendering all their in-

dependent functions substantially to the trustees. The rule is not limited to a prohibition against a corporation entering into a technical partnership; it is violated when any agreement is entered into whereby agencies outside of the regular corporate agencies authorized by law, secure control of the corporate management and assets with a view to administering them for the benefit of the common scheme.

It will be observed that I have taken the ground that the combination or informal consolidation is illegal for want of corporate power to enter into it regardless of its effect as a restriction upon trade or commerce. Decisions of lower courts of this state are at variance with respect to whether or not insurance is within the purview of the anti-trust statute. Whether or not this is true that statute is expressly declared to be cumulative only of the common law. (Sec. 6402, General Code).

But there is another statute respecting corporations which shows quite clearly that the policy of the state is opposed to such intercorporate relations as tend to restrain competition. I refer to section 8683, General Code, which provides as follows:

> "A private corporation also may purchase, or otherwise acquire, and hold shares of stock in other kindred but *not competing* private corporations, domestic or foreign. This shall not authorize the formation of a trust or combination for the purpose of restricting trade or competition."

Finally, on this point, it may be urged that as consolidation which is the ultimate object of the "agreement and declaration of trust" is **permissible,** therefore, the trust agreement itself, which is designed to promote consolidation, should be looked upon with favor; or that putting it in another way, the power to consolidate on the part of the corporations implies the power on their part and on that of the stockholders acting in their corporate capacity to take all steps which may be deemed necessary and convenient for the accomplishment of that purpose. This does not follow. I have already stated that consolidation is a corporate power or franchise which must be exercised in the manner provided by law and not otherwise; whereas the effect of the trust agreement if carried out would be, as it declares on its face, to make consolidation a "detail;" i. e., a thing necessary merely to put the stamp of legality upon an affair already accomplished.

I think I have said enough on this point to demonstrate that insurance companies affected by this trust agreement are without power to enter into any sort of partnership or pool arrangement; that their stockholders through agents are likewise without power to do so; and that the persons denominated "trustees" are forbidden by the settled policy and law of this state to dominate the affairs of more than one corporation.

My attention has been called to decisions upholding the validity of voting trusts within a single corporation. There is a wide distinction between trust agreements of this kind and those of the kind exemplified by the one above quoted. This distinction was very clearly made in two cases decided by the same court within a short space of time and affecting the same corporation, viz.: Hafer v. Railroad company, 9 O. D., Reprint 470; Griffith v. Jewett, Id. 627.

The case of State ex rel. v. Railroad Company, 6 C. C., 415 has been cited to me. On its face, the trust agreement involved in that decision was a mere voting trust among the stockholders of a single corporation. It was claimed that in reality the scheme contemplated the control of the one corporation by the directors of another. The two companies were railroad companies owning connecting and not competing lines. The court held, first, that the agreement was

in form and substance a mere voting trust and that if any illegal use of the trust were contemplated or made that would be an entirely distinct matter; but that by virtue of the very broad provisions of section 3300, Revised Statutes, now section 8808, General Code, authorizing connecting railroad companies to "enter into any arrangement for their common benefit consistent with, and calculated to promote the objects for which they were created," it would be competent for one railroad company to permit itself to be managed and controlled by another provided their respective lines were connecting and not competing. Of course it is obvious that insurance companies or other corporations generally have no such powers as are expressly conferred by law upon railroad companies in this particular.

I am of the opinion, therefore, that for the reasons thus far stated the object sought to be accomplished by this trust agreement is an unlawful one.

I come now to consider another question which has suggested itself to me, namely, as to the validity of the trust considered with respect to whether or not it constitutes an attempt to create a corporation; or putting it in another way whether or not the trustees, should they proceed to carry out the terms of the trust, would be guilty of usurping corporate franchises and privileges.

While this question may not be free from doubt, I incline strongly to the view that the powers and duties vested in the trustees by the "agreement and declaration of trust" above quoted and to be exercised by them include several which are in the nature of corporate franchises.

The incidents of this trust are not substantially distinguishable from those of a corporation. The trust is to have a capital stock on which dividends are to be computed and paid. This capital stock is divided into shares represented by "trust certificates" of the two classes named therein. Those shares are transferable like the stock of any corporation, and the death of any certificate holder does not dissolve the association. There is to be a board of trustees consisting of a certain number and there is provision for filling vacancies therein. The trustees are to elect a president and vice-president and to appoint a secretary and treasurer. The trust is to continue until a certain object is achieved, but the determination as to whether or not the object has been achieved is to be made by the trustees themselves, although it may be dissolved by a majority vote of each class of certificate holders. The trust is to have a name and a common seal. The trustees are to have authority to enact by-laws and rules and to appoint agents and officers, and are required to elect certain officers.

Neither the trustees nor the certificate holders are to be personally liable to creditors who are to look only to the funds and property of the trust. Finally the declaration of trust may be amended at any time provided that such amendment does not affect the nature of the liability of either the trustees or the certificate holders.

It seems to me that there is no vital distinction between this kind of an organization and a corporation. Section 8627, General Code, describes the general corporate powers as follows:

> "Upon filing articles of incorporation, the persons who subscribed them, their associates, successors, and assigns, by the name and style provided therein, shall be a body corporate, with succession, power to sue and be sued, contract and be contracted with; also, unless specially limited to acquire and hold all property, real or personal, necessary to effect the object for which it is created, and at pleasure convey it in conformity with its regulations and the laws of this state. Such corporation also may make, use, and at will alter a common seal, and do all other acts needful to accomplish the purposes of its organization."

In State ex rel. v. Ackerman, 51 O. S., 163, it became material to inquire whether a certain group of individuals who had entered into articles of agreement could be ousted from carrying on business thereunder by action under the statute providing for quo warranto "against an association of persons who act as a corporation within this state without being legally incorporated." The articles of agreement involved in that case recited that the signers were desirous of entering into the business of guarantee and accident insurance. They thereupon agreed with each other to deposit a certain sum with an "advisory committee," such sums to be held for the individual account of each subscriber, together with all earnings thereon, as a fund to meet any loss which the subscriber might sustain upon any policy of insurance subscribed by him beyond the net amount of premiums earned and received on said policy. The committee was to supervise the business of the association and to direct certain attorneys in fact who were to be appointed by the subscribers. Those attorneys in fact were to manage the actual business of the enterprise which was to consist of the issuance to the subscribers of policies of insurance, all of which was provided for in great detail in the agreement. The supreme court of this state held that quo warranto would lie under the statute and that the defendants were unlawfully exercising a franchise. In the opinion of the court per Williams, J., at page 195 appears the following:

> "Where, by statute, the legal exercise of a right, which at common law was private, is made to depend upon compliance with conditions interposed for the security and protection of the public, the necessary inference is that it is no longer private, but has become a matter of public concern, that is, a franchise, the assumption and exercise of which without complying with the conditions prescribed would be a usurpation of a public or sovereign function. In this case, the legislature has done no more than was done by the court in the other instance, when it, from considerations of a public nature, declared, as a principle of the common law, that facts brought to its notice, or of which it then took judicial notice, warranted the application of principles existing independently of the legislative declaration to the effect that the right claimed was matter of public and not exclusively of private concern. Spelling on Extraordinary Relief, sec. 1807."

The same author further says:

> "There was no class of business, the transaction of which, as a matter of private right, was better recognized at common law than that of making contracts of insurance upon the lives of individuals. But now, by statute, in almost, if not quite all the states, stringent requirements as to security of the persons dealing with insurers and the making and filing reports with public officers for public information, are provided, and must be strictly observed and complied with before any person, association or corporation may make any contract of life insurance. The effect of such statute is to make that a franchise which previously had been a matter purely of private right. Id. section 1808."

It might be supposed that the gravamen of the complaint against the defendants in the case just cited lay in the fact that they were doing the business of *insurance* rather than in the fact that they had assumed to create a body corporate as such. That the court did not place its decision upon this ground alone, however, is apparent from its citation of and discussion of the case of Greene et al., v. People, 21 N. S. Rep. 605, which will be found on page 197 of the report of the Ackerman case. Judge Williams says at that page that:

"We fully concur in the doctrine announced by Scholfield, J., in the opinion,"

and proceeds to quote from that opinion in part as follows:

"We think it clear that in two respects at least, these respondents are acting as a corporation, and it is not pretended that they are actually incorporated, namely; First, in professedly limiting their liability to the amount of money contributed by each; second, in assuming to give perpetuity to the business by making membership certificates transferable by the assignment of the member or his personal representative. *It may be, as contended by counsel, that individuals may insure property against loss by fire.* They cannot limit their liability to any given amount of capital they choose to set apart for that purpose, nor can they perpetuate the business without change of capital, beyond their own lives indefinitely. These things can only be done by a corporation. * * *"

So it is that the Illinois supreme court held that whether or not insurance was itself a franchise, an association with limited liability and perpetual succession constituted a corporation and if not lawfully incorporated could be ousted from transacting that business; and the Ohio court clearly put the stamp of its approval by the rule laid down by the Illinois court.

I think the doctrine here is well stated in the case of People ex rel. Platt v. Wompel, 6 L. R. A. 303, which involved a corporation franchise tax and its application to what were known as "joint stock associations," the organization and existence of which were authorized by the laws of New York. In the opinion per Danforth, J., appeared the following:

"It seems obvious from these articles that the arrangement consummated by them has little in common with a private partnership, for they provide for a permanent investment of capital, the right of succession, the transfer of property by an assignment of the certificate of ownership and the prosecuting of suits in the name of one person. The company has therefore the characteristics of a corporation, and, so far as it can, it assumes to itself an independent personality, and asserts powers and claims privileges not possessed by individuals or partnerships. It is precisely such an association as, when formed without authority from parliament, was declared in England to be illegal and void, and to be deemed a 'public nuisance,' * * * the statute in this respect following, it was said, the common law and enforcing its rules by the imposition of penalties * * *.

"It is not necessary, however, to assert in what cases such a combination of individuals would not be deemed illegal at common law; for the statutes of the state render the arrangement possible and in our opinion the association in question is within their purview. * * *

"In view of the capacities and attributes with which, as we have seen, the United States Express Company is endowed, and in view also of the statutes which legalize its assumed capacities, and make valid and effective its asserted right of succession, its distinctive name, and the alienability of its shares, we find nothing to warrant the contention of the appellant that it is a mere partnership, existing only under its articles of agreement and association."

So in Express Company v. State 55 O. S., 69, the question was directly raised as to whether or not one of these express companies incorporated as joint stock

associations constituted a corporation under the laws of Ohio for the purpose of service of summons. The case just cited was followed and approved and it was held that an Ohio excise tax, said to be founded in part upon the corporate franchise as a subject of taxation, could be exacted from such organizations.

Now the laws of Ohio permit of but one form of association of individuals under a common name with perpetual succession and limited liability. (Limited partnership associations have not been overlooked.) Any voluntary organization attempting to arrogate to itself these attributes may be dissolved and terminated under the statute by the use of the writ of quo warranto. Therefore, I am of the opinion upon the question which I have been discussing, that the above "agreement and declaration of trust" amounts to an attempt to create a corporation and to vest in the trustees thereof corporate power, the exercise of which if attempted could be prevented by action in quo warranto. That being the case the agreement is unlawful and void and all things to be done in pursuance thereof would be illegal.

Consideration of the fourth question which I have suggested in connection with the merits of the application is introduced by referring to the sections of the General Code above cited which provide the method of consolidation of legal reserve life insurance companies, and particularly section 9355, General Code, which provides as follows:

> *"If satisfied that the interests of the policy holders* of such company or companies are properly protected, and that *no reasonable objection exists thereto,* the commission *may* approve and authorize the proposed consolidation or reinsurance, or such modification thereof as seems to it best for the interests of the policy holders, and *make such order with reference to the distribution and disposition of the surplus assets* of any such company thereafter remaining, as shall be just and equitable. Such consolidation or reinsurance shall only be approved by the consent of all the members of the commission, whose duty it will be to guard the interests of the policy holders of any such company or companies proposing to consolidate or reinsure."

The commission provided for in the foregoing section undoubtedly has some discretion. But the section clearly requires that the commission be *satisfied* that any proposal of consolidation properly protects the interest of the policy holders. Should, therefore, the commission sanction an arrangement which would do manifest violence to the interests of the policy holders or to the interests of the stockholders it would abuse its discretion and its acts would not be binding on the courts, so that a consolidation sanctioned by it could be enjoined.

It seems to me that plans of the promoters of the proposed consolidation as disclosed by the declaration of trust itself suggest strongly the conclusion that no statutory commission could sanction the consolidation which is to be effected without so abusing the power imposed in it by section 9355 as to render its act nugatory.

In the first place the trust agreement proposes that preferred certificates shall be issued for outstanding stock valued on a given uniform basis, dollar for dollar; and that in addition thereto there be issued two millions of dollars in common trust certificates. Then at the time of the consolidation there is to be redemption of all the outstanding preferred certificates at par and accrued dividends, and a further distribution of the assets of the trust among the holders of the common trust certificates. In other words it is at least highly probable that between four and six millions of dollars of assets would have to be distributed according to the terms of the trust agreement at the time of any consolidation.

This attempt to control the distribution of the surplus assets of the constituent companies after the merger is illegal as it attempts to forestall the prerogative, discretion and duty of the commission under section 9355, G. C. If it is admitted, as it must be, then the trust agreement is without force in this respect, then it must be admitted further that the trustees will be unable to carry out their agreement with the certificate holders who have surrendered their stock for certificates or who have otherwise acquired certificates for value.

This conclusion is based upon the only interpretation of the trust agreement which will give any value whatever to the trust certificates and constitute any foundation whatever for the guaranteed dividends referred to in the agreement. In short the issuance of the trust certificates constitutes an attempt to impose such a liability upon the assets of the enterprise as to cut down the assets of the proposed consolidated company as compared with the aggregate assets of the constituent companies to the extent which I have described. In this connection, too, the result would be the same whether four companies (the minimum under the declaration of trust) are consolidated or whether seven or more are brought into the consolidation; except that the promotion expense represented by the $2,000,000 par value of common trust certificates is the same regardless of the total assets of the companies brought into the consolidation.

Either the commission would feel that it could not sanction the consolidation except in recognition of the trust and the outstanding trust certificates; in which event the result to the policy holders would be anything but "just and equitable;" or, safeguarding the interest of the policyholders (especially those having a right to participation in dividends), the commission would decree that the net assets of the constituent companies be maintained substantially as capital and surplus of the consolidated company in which event the promised dividends on the preferred trust certificates and distribution to the holders of the common trust certificates could not be carried out. The one result would prevent consolidation; the other would destroy what speculative value the trust certificates had. So it seems to me that the effect of the plan contemplated in the trust agreement and in particular that feature of it which calls for the issuance of $2,000,000 common stock is such as is incompatible with a successful consolidation as proposed therein.

From the other angle suggested by the second part of my fourth question, has the statutory commission the discretion to permit the consolidation of a company writing participating policies with one writing non-participating policies? I have already pointed out the effect of the increase in "securities" upon which dividends are to be paid during the life of the trust and upon the basis of which distribution is to be made at the time of consolidation. The effect of such a process upon the interests of participating policy holders needs no elaboration.

I do not believe that a commissioner under the "blue sky law" would be justified in ignoring questions of this kind. The whole scheme of the trustees rests upon the supposition that at a certain time a consolidation may be perfected. If it be shown that such a consolidation as is contemplated by the "agreement and declaration of trust" is of a nature as to make it impossible that it will ever be sanctioned, I do not believe that the commissioner under the sections which define his duties and to which I shall call attention in a moment, would be justified in issuing his certificate authorizing the sale or disposal of trust certificates.

On the last question which I have suggested it seems to me that consideration of the entire trust agreement makes it clear that until consolidation is effected the only attribute of value which is possessed by the trust certificate lies in the control of the so-called constituent companies. No dividends are to be accumulated upon the preferred certificates until the time of consolidation. Prior to consolidation the dividends on the stock issued by any of the constituent companies are to be paid to the owner thereof at the time of the transfer. It is thus seen that neither

class of certificates in itself has any present value; and that the speculative value of the certificates depends upon the successful consolidation of the companies, a thing which is in the highest sense a contingency. (Although one is likely to be mislead in this respect by reading one of the trust certificates without also carefully reading the "agreement and declaration of trust.")

It occurs to me that the indefiniteness of the trust agreement on one of the many points on which it is indefinite, namely, the number, kinds and identity of the companies proposed to be consolidated, raises a serious question under the blue sky law, for even the speculative value of the certificates would depend very largely upon the identity of the companies proposed to be consolidated. The trustees are not bound to secure the consolidation of any particular companies, or even any particular kind of companies. Thus the foundation of the whole scheme is so vague and uncertain as to make the proposition hardly a fair one for the purposes of the blue sky law.

Heretofore I have been considering what would happen in the event that the proposed consolidation were attempted to be carried out. I have stated in substance that the holders of the common trust certificates would, if their certificates are to be given any value whatever, be entitled to share in whatever distribution of assets would then take place. In this connection I think I ought to mention a point which has not yet been considered. The second article of the "agreement and declaration of trust" provides for the termination of the trust in the following language:

> "The present trustees shall serve for a period of three years * * *. If, at the end of said three year period, the trustees by a majority vote resolve that the trust has not been fully completed or that the bringing into the consolidation of any other company or companies is desirable, the period of termination of the trust may be extended for one year, and similarly at the end of one year the termination may be postponed another year under the same conditions, and so each successive year in the discretion of the trustees; said trustees in the event of such extension but the certificate holders by a vote of a majority of each class may at any annual meeting terminate the trust."

As I have already stated, the broad effect of these provisions is to make the trust terminable by consolidation or otherwise in the discretion of the trustees. One qualification must, however, in the light of the above language be made, namely, the certificate holders by a vote of a majority of both classes at any annual meeting may also terminate the trust. This provision gives to the holders of the common certificates an effective veto against any movement on the part of the holders of preferred certificates in the direction of consolidation or dissolution of the trust. Under the trust agreement the promoter and the trustees who are to be compensated in common trust certificates, and their assigns, will constitute the holders of such common certificates. So that in the last analysis, while the trust purports to be created for the benefit of the holders of preferred certificates who are the real parties in interest, the actual control of the enterprise is in the hands of the holders of the common certificates who would have the power to say that no consolidation should ever be brought about except on terms which would provide for their interests. In the meantime, of course, should the trustees acquire a majority in interest of the stock of one or more companies, their control of such companies would effectually negative any disposition on the part of the stockholders thereof to withdraw from the scheme. However, this last

statement may be qualified by observing that any holder of preferred certificates may at any time after *two* years from the date of the issue thereof demand the return of the stock exchanged therefor.

The statute governing the "commissioner" whether the superintendent of insurance or the superintendent of banks, with respect to the issuance of certificates of this sort, is section 6373-16 which provides that:

> "Said 'commissioner' shall have power to make such examination of the securities or of the property named in the next preceding sections as he may deem advisable; and if it shall appear that the law has been complied with and that the business of the applicant is not fraudulently conducted, and that the proposed disposal of such securities or other property is not on grossly unfair terms, and in the case of securities that the issuer is solvent, upon the payment of a fee of ten dollars, the commissioner shall issue his certificate to that effect, authorizing such disposal."

For the reasons stated in considering the second group of questions above discussed, I am of the opinion that as a matter of law it appears with respect to the securities proposed to be issued by "the consolidated companies" that the law has not been complied with and that the proposed disposal of such securities is on grossly unfair terms. I question also whether it appears affirmatively that the proposed issuer, "the consolidated companies" is solvent, inasmuch as at the time of application it undoubtedly has some debts or liabilities incurred thus far in its organization whereas it does not thus far appear to have any assets whatever, and personal liability is sought to be disclaimed.

There are other matters that might be mentioned, but owing to the fact that this opinion has already become quite lengthy, I shall pass by them.

Accordingly, I am of the opinion that no "commissioner" under the "blue sky law" can issue his certificate authorizing a disposal of the trust certificates proposed to be issued by "the consolidated companies."

Respectfully,
EDWARD C. TURNER,
Attorney General.

103.

SUPERINTENDENT OF BANKS—EXPENSE OF LIQUIDATING DEPARTMENT PAID FROM ASSETS OF BANK UNDER CERTAIN RESTRICTIONS.

Compensation and expenses of liquidating a bank must be paid from the assets of such bank and can be so paid only after they are fixed by the superintendent of banks and approved by the court of common pleas of the county wherein the bank is located. In no event can such compensation and expenses be paid from the state treasury.

COLUMBUS, OHIO, February 23, 1915.

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

DEAR SIR:—I have your letter of February 18, 1915, requesting my opinion as follows:

"Under the provisions of section 742-4, General Code, requiring the compensation and expenses of liquidating agents to be fixed by the superintendent of banks subject to the approval of the common pleas court of the proper county, must said compensation and expenses be approved by the court before they can legally be paid out of the funds of the bank?

"If the court should disapprove any of the items fixed by the superintendent may the same be legally paid out of the state treasury, or will the person to whom said item of compensation or expense is due be compelled to refund the same if said compensation or expense had been in fact paid before the court had taken any action on the same?

"If it should develop that the liquidating agent has paid claims either for compensation or expense without the same having been fixed by the superintendent and approved by the court, what finding should be made in the premises?"

Section 742-2 of the General Code is as follows:

"The expenses incurred by the superintendent of banks in the liquidation of any bank in accordance with the provisions of this act, shall include the expenses of deputy or assistants, clerks and examiners employed in such liquidation, together with reasonable attorney fees for counsel employed by said superintendent of banks in the courts of such liquidation. Such compensation of counsel, of deputies, of assistants, clerks and examiners in the liquidation of any corporation, company, society or association, and all expenses of supervision and liquidation shall be fixed by the superintendent of banks, subject to the approval of the common pleas court of the county in which the office of such corporation, company, society or association was located, on notice to such corporation, company, society or association. The expense of such liquidation shall be paid out of the property of such corporation, company, society or association in the hands of said superintendent of banks, and such expenses shall be a valid charge against the property in the hands of the said superintendent of banks and shall be paid first, in the order of priority."

By virtue of the provisions of this section all expenses of liquidating a bank, which include the compensation and expenses of the liquidating agent must, before payment, be fixed by the superintendent of banks, and the approval of the common pleas court secured as prescribed therein.

Therefore, considering your questions in the order in which they are asked, I am of the opinion that the expenses mentioned in your first question cannot legally be paid out of the assets of the bank until the amount thereof is fixed by the superintendent of banks with the approval of the common pleas court first secured.

Answering your second question, I am of the opinion that there is no authority for paying any of the expenses mentioned from the state treasury in any event. If any such items have been paid from the assets of the bank before being fixed by the superintendent of banks and approved by the court of common pleas, such payments were unauthorized and unlawful, and the officer making such unauthorized and unlawful payments can be compelled to refund the same. It does not necessarily follow, nor do I wish to be understood as holding or advising, that an individual who has been paid for services rendered or supplies furnished in good faith to the superintendent of banks or his deputy in the liquidation of a bank can be

required to refund the amount so paid to him, but only that the officer, or agent, entrusted with the liquidation of the bank can be compelled to refund the amount paid out by him without such authority.

Answering your third question, I desire to call your attention to the language in the last two sentences of section 742-2 of the General Code as follows:

> "The superintendent of banks may under his hand and official seal appoint one or more special deputy superintendents of banks as agent or agents to assist him in the duty of liquidation and distribution, a certificate of appointment to be filed in the office of superintendent of banks and a certified copy in the office of the clerk of the county in which the office of such corporation, company, society or association was located. The superintendent of banks shall require from such agent or agents such surety for the faithful discharge of their duties as he may deem proper. All bonds shall be deposited with the secretary of state and kept in his office."

By virtue of these provisions the liquidating agent appointed by the superintendent of banks to assist him in the duty of liquidation and distribution is clearly a deputy, and the superintendent of banks, together with his bondsmen, are liable for any default or breach of trust on the part of such deputy. This is made clear by the language of the last sentence of section 742-2, above quoted, which directs the superintendent of banks to "require from such agent or agents such surety for the faithful discharge of his duties as he may deem proper."

Therefore, if the liquidating agent (meaning, I assume, a special deputy superintendent of banks) has paid claims either for compensation or expenses without the same having been fixed by the superintendent of banks, and approved by the court, such payments being clearly unauthorized and unlawful, a finding should be made requiring such liquidating agent to refund the amount so unlawfully paid. In the event that he refuses or is unable to make such a refund, the superintendent of banks himself may be held for the default of his deputy and required to refund the amount unlawfully paid out. If the superintendent of banks should be compelled to answer in this manner for the default of his liquidating agent, he may recoup his loss by resorting to an action on the bond which he is directed by law to require from such agent.

My answers have been limited strictly to the scope of your several questions and I have not considered the legal possibility or curative effect of securing from the proper court a subsequent approval of such unauthorized expenditures.

Respectfully,
EDWARD C. TURNER,
Attorney General.

104.

RURAL SCHOOL DISTRICTS—ELECTORS VOTE IN PRECINCT IN WHICH THEY RESIDE, WHERE BOARD OF EDUCATION HAS MADE NO ASSIGNMENT OF DISTRICT.

When there has been no assignment of the voters of a rural school district by the board of education under section 4714, *G. C., the electors of the rural school district shall vote for school officers and on all school questions in the precinct in which they reside.*

COLUMBUS, OHIO, February 23, 1915.

HON. CHAS. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have yours of February 15, 1915, submitted for an opinion thereon communication from the deputy state supervisors of elections of Marion county, Ohio, as follows:

> "We are about to have an election for bond issue in a consolidated school district which lies in four townships and in these four townships there are five voting precincts and we are undecided as to where the voters in this consolidated school district should vote on the bond issue.
>
> "We are enclosing a plat showing the consolidated school district, together with the townships and the polling places. You will observe that one of the townships, Montgomery, is divided into two precincts and, the consolidated school district takes in part of both of these voting precincts. There is a small town lying practically in the center of the consolidated school district, but this town is unincorporated, and has no voting precinct in it. We understand that they expect to call this consolidated school 'The Montgomery Consolidated Rural School District,' and probably section 4714 of the school election laws would cover this proposition which reads as follows:
>
> " 'Electors residing in a rural school district may vote for school officers and on all school questions at the proper voting place in the township, in which such district is located.'
>
> "So that under this section we could probably hold election for this consolidated school district at the regular polling place in Montgomery East precinct, but in doing this a number of the voters in this district would have to drive, in the neighborhood of eight or ten miles to vote.
>
> "If we would hold an election in each one of the townships for the voters in this school district, we figure it would be a rather expensive election. In case we should compel all voters in the consolidated school district to vote in the polling place in Montgomery East precinct on this question of bond issue for a consolidated school, where would they vote this fall for members of the school board and then for their respective township officials?"

The consolidated school district is within that class which is by the terms of section 4679, G. C., as amended in 104 O. L., 133, styled a rural school district.

The question submitted by you involves a consideration of section 4714, G. C., as amended in 104 O. L., 135, as follows:

> "Electors residing in a rural school district may vote for school officers and on all school questions at the proper voting place in the township in which such district is located. If the township is divided

into different voting precincts, the board of education of such district shall assign the voters thereof to the proper precinct or precincts, and a map shall be prepared showing such assignment, which map shall be made a part of the records of the board. Electors may vote according to such assignment, but, if no assignment of territory is made, they shall vote in the precinct nearest their residence."

Since it is not so stated by you it is assumed that there has been no assignment of territory made as above provided. It appears, however, that the territory of the consolidated school district lies in five different voting precincts. It then follows that the last provision of the above section will govern, requiring that the electors shall vote for school officers and on all school questions in the precinct nearest their residence. What, then, are we to understand by the phrase "precinct nearest their residence?" If the word "precinct" is here used in its ordinary sense, the precinct nearest the residence of the elector is the precinct in which he resides—that is, the precinct in which his domicile is situated. If the word "precinct" as here used relates to the polling place rather than to the territory constituting what is usually termed a precinct, the application of this provision might then work even greater inconvenience to the electors and occasion more excessive and unnecessary expenses of elections.

I am, therefore, of opinion that in the absence of a substantial reason for a contrary construction, the word "precinct" should be given its usual and ordinary meaning. From this it results that the phrase "precinct nearest their residence" in effect means the precinct in which the electors reside.

It will be noted that the above section is equally applicable to elections of school officers and elections on all other school questions, so that the electors should vote in the same precinct for members of the board of education as upon any other school question.

As suggested by you, to hold an election in each of the five precincts within which electors of the consolidated school district reside will be of considerable expense, but in the absence of lawful authority for any other course, it is my opinion necessarily that the provisions of the section of the statutes hereinbefore quoted be complied with and that such election be held at the usual polling places in the five several precincts.

The above question could not arise when the board of education has made an assignment of the voters of the school district in accordance with the provisions of 4714, G. C., in which event such assignment would control.

Respectfully,
EDWARD C. TURNER,
Attorney General.

105.

BUDGET COMMISSION—ELECTIVE COUNTY OFFICES.

County budget commission may be composed only of elective county officers.

COLUMBUS, OHIO, February 26, 1915.

To the Committe on Taxation and Revenues, House of Representatives, Columbus, Ohio.

GENTLEMEN:—My attention has been called to the provisions of house bill No. 342, which seeks to enact an amendment to section 5649-3b of the General Code, and to provide for the personnel of the budget commission.

This proposed bill is clearly unconstitutional. As this is the only bill pending in the legislature upon this subject, I call your attention to the urgent and absolute necessity of enacting a proper law for the creation of a budget commission, otherwise our taxation laws cannot be enforced or administered, as both the Kilpatrick bill and the original provision of the Smith one per cent. law, known as section 5649-3b, were clearly unconstitutional. So that there is no law upon this subject at all.

In the case of the State ex rel. Pogue, Prosecuting Attorney, v. Groom, City Solicitor, the supreme court held, in the fourth branch of the syllabus of that case, as follows:

> "4. The general assembly has the authority to create new duties and require such duties to be performed by the encumbents of an existing office, but where the duties so created are in their nature and extent county official duties, they must be attached to a county office and must be required to be performed by a county officer duly elected by the electors of the county, or lawfully appointed to fill a vacancy in that office."

Whatever may be said or urged in favor of the policy of having others than county officials upon the budget commission, we are confronted with the constitution and its provisions must be observed. The duties of the budget commission may be required of and performed by only elective county officers. Unless legislation is passed by this session of the general assembly remedying the defects above referred to, we will be confronted with a serious situation. It will be advisable to attach an emergency clause to such legislation.

Respectfully,
EDWARD C. TURNER,
Attorney General.

106.

TEACHERS' PENSIONS—DEDUCT ONLY PROPORTIONATE PART OF TWO DOLLARS WHEN TEACHER BEGINS HER SERVICES DURING THE MONTH AND RESIGNS BEFORE ENTIRE MONTH'S SERVICE IS RENDERED.

A board of education should deduct from the salary of a teacher only a proportionate part of the $2.00 *for a pension fund when such teacher begins her service during the month, or resigns before the entire month's service has been rendered.*

COLUMBUS, OHIO, February 26, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Under date of February 8, 1915, you submit to this department a request for an opinion upon the following question:

> "Section 7877 of the General Code, authorizes the proper officers to deduct $2.00 from the monthly salary of each teacher who accepts the provisions of this section of the law. A certain teacher is entitled to only a part of a month's salary.
>
> "Our question is, shall the board of education deduct $2.00 from this

salary or only a proportionate part of the $2.00? This teacher either begins her service during the month or resigns before the entire month of service has been rendered."

Section 7877, General Code of Ohio, provides in part as follows:

"* * * After the election of the board of trustees herein provided for, two dollars ($2.00) shall be deducted by the proper officers from the monthly salary of each teacher who accepts such provisions, and from the salary of all new teachers such sum to be paid into and applied to the credit of such pension fund; and such sum shall continue so to be deducted during the term of service of such teacher.

"All persons employed for the first time as teachers by a board of education which has created such a pension fund shall be deemed new teachers for the purpose of this act, but the term new teachers shall not be construed to include teachers serving under reappointments. New teachers shall by accepting employment as such accept the provisions of this act and thereupon become contributors to said pension fund in accordance with the terms hereof. And the provisions of this act shall become a part of and enter into such contract of employment."

I am of the opinion that the board of education should deduct from the salary of a teacher only a proportionate part of the $2.00 for a pension fund when a teacher either begins her service during the month, or resigns before the entire month of service has been rendered.

Respectfully,
EDWARD C. TURNER,
Attorney General.

107.

AGRICULTURAL COMMISSION — PROSECUTIONS FOR FRAUDULENT USE OF COLORING MATTER IN ARTICLES OF FOOD, SUCH AS MACARONI, ETC., SHOULD BE BROUGHT UNDER STATUTES AND NOT UNDER DEPARTMENT RULINGS.

Department ruling number 4 of the dairy and food division of the agricultural commission of Ohio, relating to the use of coloring matter in macaroni and kindred products, is invalid and prosecutions for the fraudulent use of coloring matter in such articles of food should be brought under appropriate sections of the General Code, and not under said department ruling.

COLUMBUS, OHIO, February 27, 1915.

The Agricultural Commission of Ohio, Dairy and Food Division, Columbus, Ohio.

GENTLEMEN:—On February 1, 1915, you submitted to me, for written opinion the following proposition:

"We desire to call your attention to department ruling number 4, of the dairy and food division, which was adopted by the agricultural commission under the provisions of section 1177-12 of the General Code, which provides that the agricultural commission shall make such rules and

regulations as may be necessary for the enforcement of the food, drug, dairy and sanitary laws of this state. We are confronted by a situation that may make it necessary for us to file several prosecutions for violations of this ruling and we desire to know whether, in your opinion, we can successfully make a prosecution for such violation.

"The state is flooded with macaroni, spaghetti and noodles, artificially colored, and it is evident that this has been done for fraudulent purposes. The national food department permits the use of coloring matter when it is clearly and conspicuously indicated on the label. However, the ruling of our department is one of long standing, having been adopted by a former commissioner of the dairy and food department and readopted recently by the agricultural commission. Our ruling does not permit the use of coloring matter other than that imparted by the eggs used in the manufacture of the product, and it differs from the national ruling in that the national ruling permits its use if indicated on the label. We would be pleased to have you rule on this matter at your earliest convenience."

Section 1177-12 of the General Code passed April 15, 1913, (103 O. L., page 327) contains, among other provisions, the following: "The agricultural commission shall establish standards of quality, purety and strength for foods, *when such standards are not otherwise established by any law of this state.*" This section also contains the following provision: "The agricultural commission shall make such uniform rules and regulations as may be necessary for the enforcement of the food, drug, dairy and sanitary laws of this state."

Department ruling number 4, referred to by you in your communication, is as follows:

"Until further notice from this commission the use of coloring matter, other than that imparted by the eggs used in the manufacture of the substances, will not be permitted in macaroni or egg macaroni, noodles or egg noodles, spaghetti or egg spaghetti, vermicelli or egg vermicelli, and all kindred products."

Section 5774, General Code, prohibits the manufacture or sale, offer for sale, sale or delivery, or the having in possession with intent to sell or deliver, of a drug or article of food which is adulterated within the meaning of the chapter containing said section, and also prohibits the offering for sale, selling or delivering, or having in possession with intent to sell or deliver, a drug or article of food which is misbranded within the meaning of the chapter containing said section.

Section 5778 of the General Code provides that food, drink, confectionery or condiments are adulterated within the meaning of the chapter containing said section in case any one of eleven conditions named in said section exists. The sixth condition named in said section is that the food, drink, confectionery or condiments shall be regarded as adulterated if colored, coated, polished or powdered, whereby damage or inferiority is concealed, or if by any means the article is made to appear better or of greater value than it really is.

Coming now to consider department ruling number 4, this ruling must be regarded either as an effort under section 1177-12, General Code, to establish a standard of quality, purity and strength or it must be regarded as a rule or regulation necessary for the enforcement of the food, drug, dairy and sanitary laws of the state. It is apparent that it cannot be regarded as the latter for the reason that it is not aimed at the enforcement of an existing law, but seeks to establish, in effect, a new law relating to the quality, purity and strength of foods.

I am of the opinion that it is not valid when regarded as an effort to establish

a standard of quality, purity and strength for foods, for the reason that a standard in this respect had been otherwise established by a law of the state, to wit: By the provisions of section 5778, General Code, to the effect that an article of food shall be regarded as adulterated if it is colored, whereby damage or inferiority is concealed.

The legislature having chosen to regulate, in section 5778, General Code, the use of coloring matter in articles of food and having established a standard of quality, purity and strength in this particular, I am of the opinion that it is beyond the power of the agricultural commission to establish by a department ruling a standard other or different from that contained in the statutes.

I am therefore of the opinion that contemplated prosecution for fraudulent use of coloring matter in articles of food in question should be made under the appropriate sections of the statutes and not under your department ruling number 4.

Respectfully,
EDWARD C. TURNER,
Attorney General.

108.

GENERAL ASSEMBLY—NO AUTHORITY TO EXTEND TERM OF COUNTY OFFICERS.

The legislature is without power to extend the terms of county officers so as to produce a term not consisting of an even number of years.

COLUMBUS, OHIO, February 27, 1915.

To the Committee on County Affairs, House of Representatives of the Eighty-First General Assembly, Columbus, Ohio.

GENTLEMEN:—I have been asked by members of your committee to consider house bill No. 214, Mr. Hake, which has been referred to the committee. The bill is entitled "a bill to amend (certain) sections * * * of the General Code, to reduce the time between the election of certain county officers and their taking office, and to extend the terms of such officers."

It will be sufficient for my purposes to describe the detailed provisions of the bill as calculated to accomplish the objects stated in the title.

I have considered but one question, namely, as to whether or not the legislature has the power to extend the terms of county officers for the purpose of adjusting them to a given date of commencement, so as to produce temporarily terms of three years and perhaps a few months.

I am of the opinion that this cannot be done without a constitutional amendment.

Article XVII, section 2 of the constitution provides that:

> "The term of office of all elective county * * * officers shall be such *even* number of years not exceeding four (4) years as may be so prescribed (by the general assembly)."

Under this provision it is not competent for the general assembly to construct a term of office for a county officer which shall be otherwise than "an even number of years."

It is true that under the old constitution as it existed prior to the amendment of 1905, terms were frequently extended. At that time, however, there was no

such limitation in the constitution as there now is. For example, section 2 of article X provides that "county officers shall be elected * * * for such term, *not exceeding three years,* as may be provided by law."

There is another view of the case which leads to the same conclusion. Section 2 of article XVII of the constitution provided further that "the general assembly shall have power to so extend existing terms of office as to affect (effect) the purpose of section 1 of this article."

The words "existing terms of office," as used herein, mean the terms of office as they existed at the time of the proposal of the amendment and its adoption. Pardee v. Pattison, 73 O. S., 305.

Under favor of this section the legislature, in 1906, passed an act to conform the terms of office of various state and county officers to the constitutional provisions of (relating to) biennial elections. Section 1 of that act extended the terms of all county officers so as to conform to the constitutional amendments, and fixed the commencement of such terms of office as they are now fixed by law.

It was said in State ex rel. v. Harris, 77 O. S., 481, that the act just referred to was to be regarded as a part of the constitutional amendment in the sense that it was the legislation required to make that amendment effective.

I think the power of the legislature to extend existing terms to conform the same to the provisions of article XVII of the constitution, was a power which could be exercised but once. If in 1906 the legislature had deemed it proper to make the terms of all county officers to begin on January 1, that might have been done at that time. But the legislature having failed to do so then, it is too late to act now. In other words, the grant of power in article XVII of the constitution is exclusive and when the power was executed it was exhaustive.

I am strongly inclined therefore to the belief that house bill No. 214, which I have examined at your request, would be unconstitutional.

Respectfully,
EDWARD C. TURNER,
Attorney General.

109.

TAXATION OF A BENEFICIARY'S INTEREST IN AN INSURANCE POLICY AFTER MATURITY OR IN CASE OF THE DEATH OF INSURED WHERE OPTIONAL CLAUSES OCCUR.

The interest of the beneficiary under an insurance policy after the death of the insured and under an option to leave the proceeds of the policy with the company during the life of the beneficiary, and to withdraw the whole or any part thereof at any time or at specified periods, the principal sum to bear interest at a stipulated rate or at not less than a stipulated rate, and the balance, if any, remaining at the death of the beneficiary to be paid to his personal representatives, constitutes a credit and is taxable as such to the beneficiary.

COLUMBUS, OHIO, March 1, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of February 9th, requesting my opinion as to what, if any, taxable interest arises under an insurance policy after maturity or the death of the insured under optional clauses of which the following are types:

"(1) To have the whole, or any designated fraction, of the proceeds of this policy at its maturity retained by the company until the death of the beneficiary, the company in the meantime to pay the beneficiary interest on the amount so retained at the rate of three per cent. per annum, the first interest payment to be made one year after the maturity of this policy, and the last interest payment to be a pro rata one for the expired fraction of the year in which the beneficiary may withdraw the amount retained by the company, in which case the interest payments will cease.

"(2) Upon approval of proof of the death of the insured this policy shall be surrendered to the company, and a supplementary contract will be issued to each beneficiary evidencing his or her rights and benefits under the option selected.

"Option 1. The proceeds of this policy, or any part thereof, may be left with the company subject to withdrawal in whole or in part at any time on demand in sums of not less than one hundred dollars. The company shall pay interest annually on the sum so left with it at such rate as it may each year declare on such funds, not less, however, than three per cent. per annum. Upon the death of a beneficiary the sum then remaining with the company, together with any interest accrued thereon to the date of such death, shall be paid to the executors, administrators or assigns of the beneficiary, unless otherwise agreed in writing."

I find that my predecessor, Honorable Timothy S. Hogan, advised the commission, in an opinion found at page 590 of volume 1 of the annual report of the attorney general for 1912, that prior to the beneficiary's election under a policy affording several options, his interest not being fixed is not taxable at all; but that should the beneficiary make an election to have the proceeds of the policy paid to him in a lump sum his interest prior to the actual payment would be a "credit" (citing Cooper v. Board of Review, 207 Ill., 432). With these conclusions I agree.

I am unable to find that an election to take the option expressed in either of the above clauses would in any wise change the nature of the beneficiary's primary interest after the death of the insured. It is true that it is held to be essential to a "credit," subject to taxation as such under section 5327, General Code, that it shall be fixed and liquidated in amount and not dependent upon any contingency whatsoever. But while the company, under such a clause as the above, is under no immediate obligation to pay any specified sum to the beneficiary except upon the contingency of demand or the death of the beneficiary, in which event the entire sum then remaining unpaid to the beneficiary will become payable to his personal representatives, yet the whole amount which will ultimately be payable by the insurance company to the beneficiary or his representatives is fixed and liquidated; while a credit payable on demand, whether in a lump sum or otherwise, is "due or to become due" within the meaning of section 5327.

I need only add that there is nothing in the contract which would arise by the exercise of either of the above options creating any relation of agency or trusteeship as between the company and the beneficiary whereby the duty of listing the fund for taxation would be devolved, under the provisions of section 5370, General Code, upon the company as such agent or trustee. The relation between the parties is that of debtor and creditor created by the contract.

Accordingly, I am of the opinion that the beneficiary's interest, under either of the above quoted optional clauses, is taxable to the beneficiary as a credit.

Respectfully,

EDWARD C. TURNER,

Attorney General.

110.

COST OF COUNTY BRIDGES SHOULD BE PAID FROM COUNTY BRIDGE FUND AND NOT FROM PIKE FUND.

Where a pike is built under the provisions of sections 6956-1 *to* 6956-15, *inclusive, of the General Code, the cost of any bridges thereon should be paid from the county bridge fund.*

COLUMBUS, OHIO, March 1, 1915.

HON. JOSEPH W. HORNER, *Prosecuting Attorney, Newark, Ohio.*

SIR:—I have your communication of February 22, 1915, inquiring whether the cost of bridges should be charged to the pike fund or to the bridge fund, where a pike is being built under the provisions of sections 6956-1 and 6956-15, inclusive, of the General Code, and the necessity for the new bridges arises only from the building of such pike, the new bridges being outside the limits of any city or village. You further state that this question becomes important by reason of the fact that objections are being raised to assessments which include the cost of bridges.

A careful examination of these sections fails to disclose any provision whatever in reference to bridges. The sections in question establish a certain method or scheme of road improvement, one provision being for an assessment of a part of the cost and expense, including all damages and compensation awarded, the assessment to be made upon and collected from the owners of certain benefited real estate. No reference is made in the entire law under consideration to the subject of bridges, and there is no provision for assessing all or any part of the cost of any bridges upon any benefited real estate.

Reference to the road laws discloses the fact that the legislature has seemed to have in mind in the enactment of these laws, the necessity for providing that bridges should be regarded as a part of the road improvement in order to warrant assessing any part of the cost of bridges against benefited real estate. An illustration is found in the law relating to turn pikes, section 7186, G. C., providing that the bridges and culverts shall be built as a part of the road and paid for out of the turn pike funds. Other sections of the turn pike law provide for assessments upon benefited real estate.

There being no reference to bridges in sections 6956-1 to 6956-15, inclusive, no provision therein that bridges should be regarded as a part of the improvement, and no language from which such an intent could be inferred, I am of the opinion that the provisions of section 2421 must prevail, said section requiring the commissioners to construct necessary bridges over streams and public canals on state and county roads, free turn pikes, improved roads, abandoned turn pikes and plank roads in common public use, except only such bridges as are wholly in certain cities and villages; and that therefore, where a pike is being built under the provisions of sections 6956-1 to 6956-15, G. C., inclusive, the cost of any bridges thereon should be paid from the county bridge fund.

Respectfully,

EDWARD C. TURNER,

Attorney General.

111.

SUPERINTENDENT OF PUBLIC WORKS—NO AUTHORITY TO CANCEL EXISTING LEASE AND ACCEPT NEW ONE.

The superintendent of public works has no authority to cancel an existing lease of state lands or accept a surrender of the same, merely in order that a new lease may be entered into between him and the original lessee.

COLUMBUS, OHIO, March 1, 1915.

HON. JOHN I MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of February 12th, in which you request my opinion as to whether or not parties holding a lease for state land, which lease still has a few years to run, can surrender the same and take a new lease for the same property for a period of some fifteen years, the same as if it were an original lease.

You state that it frequently happens that parties holding leases for state lands desire to make improvements thereon, which they would not be justified in making for the short unexpired term of the lease and that these parties often ask to have their old leases cancelled and that they be granted new leases for the full period of fifteen years. You also state that it has been the practice to grant such requests upon being satisfied that the lessee was acting in good faith and proposed to make substantial improvements, and that in such cases there was always a reappraisement of the property in order to arrive at the proper rent under the statutes.

This inquiry raises a question as to the implied power of the superintendent of public works to cancel existing leases. Under section 13965 of the appendix to the General Code, it is necessary that land shall not be under an existing lease before the superintendent of public works is authorized to lease the same. Section 13966 authorizes leases of land "for fifteen years" and leases of the right to erect buildings across canals "for the term of fifteen years."

I have carefully examined all the statutes relating to the leasing of state lands and find no provision authorizing the superintendent to cancel any lease under the circumstances suggested by you, and indeed the only circumstances under which he is authorized to cancel a lease seems to be in case rent shall not be paid by the lessee at the time specified in the lease, or within ten days thereafter, this provision being contained in section 13968. The statute expressly requiring that land be not under an existing lease before the superintendent has any authority to lease it, it would seem that the superintendent would be without authority to lease land under an existing lease unless the power to make the original lease conferred by statute, carries with it the implied power to cancel the lease.

As to the powers of public officers, Mechem in his work on public offices and officers, section 511, makes the following observation:

> "Express grants of power to public officers are usually subjected to a strict interpretation and will be construed as conferring those powers only which are expressly imposed or necessarily implied. Such an officer, therefore, can create rights against the state or other public authority represented by him only while he is keeping strictly within the limitations of his authority as so construed.
>
> "A state officer can only deal or contract in relation to the property of the state when he is authorized so to do by the express provisions of

law, and any agreement he may make or attempt to make in relation to such property, when he is so authorized, is void as against the state. (McCaslin et al. v. State ex rel., 99 Ind., 428.)"

It is also significant that in section 431 of the General Code, as amended in 103 O. L., 119, 122, the legislature in giving the superintendent of public works authority to lease surplus water power, also, expressly conferred on him authority to "cancel existing leases with the consent of the lessees;" while, as above stated, no such authority is conferred in the statutes relating to the leasing of state lands. If the legislature had intended and understood that in giving authority to make a lease it was also conferring implied authority to cancel the same, then there would have been no purpose to be served by inserting in the section relating to the leasing of surplus water power a clause expressly authorizing the superintendent of public works to cancel existing leases with the consent of the lessees.

While recognizing the force of the suggestion that authority to cancel existing leases and make new ones under the conditions named by you might result in advantage to the state by way of increased rentals, I am unable to say, as a matter of law, that the power lodged in a public officer to make a lease carries with it by necessary implication, the power to cancel such lease. On the other hand, I am of the opinion that the power to make such a lease does not carry with it an implied power to cancel the same, and that in the present state of the law the superintendent of public works has no authority to cancel an existing lease of state lands unless there be a default in the payment of rent as set forth above.

Answering your question specifically, I am therefore of the opinion that the superintendent of public works has not the authority to cancel an existing lease or accept a surrender of the same, merely in order that a new lease may be entered into between him and the original lessee.

Respectfully,
EDWARD C. TURNER,
Attorney General.

112.

COMMON PLEAS JUDGES — ADDITIONAL SALARY AND EXPENSES AS AFFECTED BY THE ACT OF FEBRUARY 16, 1914, (104 O. L.,250).

1. *A common pleas judge, elected prior to January* 1, 1913, *is entitled to additional salary at the rate of sixteen dollars per one thousand population of the county in which he resides, to be not less than one thousand dollars* ($1,000) *nor more than three thousand dollars* ($3,000) *per annum, payable wholly from the treasury of such county; and that the law, with respect to the source of such compensation, which formerly provided that the same should be paid from the treasury of the counties in the subdivision in proportion to their respective populations, was changed on June* 8, 1914, *after which date it was no longer lawful to draw such additional compensation from the treasuries of the counties in the subdivision.*

2. *That a common pleas judge elected prior to January* 1, 1913, *is entitled to his actual and necessary expenses incurred while holding court under the assignment of the supervising judge of his district, in any county in the district other than in which he resides, payable from the treasury of the state and not to exceed one hundred and fifty dollars* ($150) *in any one year; and to his actual and necessary expenses incurred while holding court in any county in the state outside of his*

district, under the assignment of the chief justice of the supreme court, payable from the treasury of the county in which court is held, not to exceed three hundred dollars ($300) *in any one year.*

3. *That under the provisions of amended section* 2253, *G. C., the additional compensation at the rate of ten dollars per day for each day of the assignment of a common pleas judge by the chief justice of the supreme court, to hold court in any county in the state other than that of the residence of the judge may be drawn only by judges elected subsequent to the taking effect of amended section* 2253, *to wit: June* 8, 1914.

4. *The common pleas judge elected in Clark county in the year* 1914, *to fill out the unexpired term of a common pleas judge (elected prior to January* 1, 1913, *as a district judge and residing in Clark county at the time of his election) is to be regarded, for purposes of compensation, as the resident common pleas judge of Clark county. Accordingly such judge is entitled to additional salary at the rate of twenty-five dollars* ($25.00) *per one thousand population of Clark county, not to exceed three thousand dollars* ($3,000) *a year, which is payable wholly from the treasury of Clark county; and Clark county, upon his election and qualification, is no longer liable to contribute to the salaries of other common pleas judges in the subdivision of which said county was formerly a part, (which result, in the specific case, would have occurred, at any rate, on and after June* 8, 1914, *by reason of the fact that in all the other counties of the subdivision common pleas judges, elected prior to January* 1, 1913, *were residing) such judge is also entitled to his actual and necessary expenses incurred while holding court in any county of the state other than the one in which he was elected and resides, under the assignment of the chief justice of the supreme court, such expenses to be paid from the treasury of the county in which such court is held and not to exceed three hundred dollars* ($300) *in any one year; but to no expenses payable from the state treasury.*

5. *A common pleas judge, appointed after June* 8, 1914, *to fill out the unexpired term of a judge elected as a district judge prior to January* 1, 1913, *is entitled to receive additional compensation at the rate of twenty-five dollars* ($25.00) *per one thousand population of the county in which he resided when appointed, such compensation to be paid from the treasuries of the counties constituting the subdivision at a given time; so that upon the election and qualification of a resident common pleas judge in any county of the original subdivision, such county is no longer to be regarded as in the subdivision for the purpose of contribution to the additional salary of such judge; such additional salary is not to exceed three thousand dollars per annum; such judge is also entitled to receive his actual and necessary expenses not to exceed three hundred dollars* ($300) *in any one year, payable from the treasury of state, when incurred in holding court in any county remaining in the district of which his county is a part, other than the county of his residence; and also to expenses not exceeding three hundred dollars* ($300) *in any one year, incurred while holding court in any county in the state other than in his own district, under assignment of the chief justice, to be paid from the treasury of the county in which court is held.*

6. *The quarterly payments of the additional salary of common pleas judges should be based upon the official year of the term of each judge.*

COLUMBUS, OHIO, March 1, 1915.

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

DEAR SIRS:—I acknewledge receipt of two letters from you submitting questions relative to the additional salary of common pleas judges. I am also in receipt of a letter from Honorable A. C. Reynolds, common pleas judge residing in Lake

county, submitting related questions. After I had prepared separate opinions in answer to these several communications, it occurred to me that a single opinion addressed to the bureau, and covering all the questions which have been submitted to me would be preferable. Accordingly I shall, in this letter, state my answers to the following questions:

"(1) To what 'additional' salary is a common pleas judge, elected prior to June 8, 1914, entitled; from what source or sources should such salary be paid; and, if there has been a change in the law in the latter respect, when did such change become effective?

"(2) Is the judge, described in the first question, entitled to additional compensation at the rate of ten dollars per day when holding court in a county other than that in which he resides, by assignment of the chief justice of the supreme court; and is he entitled to his actual expenses not to exceed three hundred dollars ($300.00) in any one year when so serving?

"(The foregoing questions are general statements of the specific inquiries submitted to me by Judge Reynolds.)

"(3) In Clark county in 1914, a common pleas judge was elected by the electors thereof, under the proviso of section 1532, General Code, 104 O. L., 243, for the unexpired term of a common pleas judge who had been elected thereto prior to January 1, 1913, and had subsequently resigned therefrom, prior to June 8, 1914. To what 'additional' salary is such judge entitled; from what source or sources is it to be paid; and is Clark county required to contribute to the additional salary of common pleas judges of the other counties in the original common pleas subdivision of which the county was a part?

"(4) To what additional salary is a judge, appointed to fill a vacancy caused by the resignation, subsequent to the November election in 1914, or less than thirty days prior thereto, of a common pleas judge elected prior to January 1, 1913, entitled; and from what source or sources should it be paid?

"(5) Running through all these questions is one which is directly submitted in connection with the last one, viz.: as to the application of the word 'quarterly' as used in the statutes providing for the payment of the additional compensation of common pleas judges."

All of these questions arise out of the change in the constitution, article IV, section 3, affected by the amendment adopted in 1912, and becoming effective as provided by the schedule thereto. In order to show the nature of the change, I quote original section 3 of article IV of the constitution, and the same section as amended:

"Article IV, section 3 (original): The state shall be divided into nine common pleas districts, of which the county of Hamilton shall constitute one, of compact territory, and bounded by county lines; and each of said districts, consisting of three or more counties, shall be subdivided into three parts, of compact territory, bounded by county lines and as nearly equal in population as practicable; in each of which, one judge of the court of common pleas for said district, and residing therein, shall be elected by the electors of said subdivision. Courts of common pleas shall be held by one or more of these judges, in every county in the district, as often as may be provided by law; and more than one court, or sitting thereof, may be held at the same time in each district.

"Article IV, section 3 (amended): One resident judge of the court of common pleas, and such additional resident judge or judges as may be provided by law, shall be elected in each county of the state by the electors of such county; and as many courts or sessions of the court of common pleas as are necessary, may be held at the same time in any county. Any judge of the court of common pleas may temporarily preside and hold court in any county; and until the general assembly shall make adequate provision thereof, the chief justice of the supreme court of the state shall pass upon the disqualification or disability of any judge of the court of common pleas, and he may assign any judge to any county to hold court therein."

The general schedule of the amendments of 1912, is as follows:

"The several amendments passed and submitted by this convention when adopted at the election shall take effect on the first day of January, 1913, except as otherwise specifically provided by the schedule attached to any of said amendments. All laws then in force, not inconsistent therewith shall continue in force until amended or repealed; provided that all cases pending in the courts on the first day of January, 1913, shall be heard and tried in the same manner and by the same procedure as is now authorized by law. Any provision of the amendments passed and submitted by this convention and adopted by the electors, inconsistent with, or in conflict with, any provision of the present constitution, shall be held to prevail."

The schedule to article IV, provides as follows:

"If the foregoing amendment shall be adopted by the election, the judges of the courts of common pleas in office, or elected thereto prior to January first, 1913, shall hold their offices for the term for which they were elected and the additional judges provided for herein, shall be elected at the general election in the year 1914; each county shall continue as a part of its existing common pleas district and subdivision thereof, until one resident judge of the court of common pleas is elected and qualified therein."

It, of course, was obvious that the amendment of article IV, section 3 required that certain adjustments of a legislative nature be made. In other words, the constitution, or rather the transition from the original provision to the amended provision, was not perfectly self-executing. In order to supply the deficiency, the general assembly first passed an act which is found in 103 O. L., 673, and then amended the same by an act found in 104 O. L., 243.

Section 1 of the act of 1913 provided as follows:

"There shall be a court of common pleas in each county of the state, held by one or more judges, residing therein and elected by the electors thereof. Each judge shall hold office for six years, and his successor shall be elected at the election in the even numbered year next preceding the expiration of his term. Each judge heretofor elected as a judge of a common pleas district shall, after the year 1914, serve as a judge of the common pleas court of the county of which he was a resident at the time of his election.

"The times for the next election of common pleas judges in the several counties and for the beginning of their terms, shall be as follows:

"(Here follows detailed provisions for the election of common pleas judges in each of the counties in the state.)"

This act was designated as section 1532, General Code, and as such was amended in 1914, by inserting between the first and second paragraphs thereof, the following:

"Provided that when a vacancy may have occurred in the office of any judge of the court of the common pleas, in office or elected thereto prior to January 1, 1913, his successor shall be elected for the unexpired term at the first annual election that occurs in an even numbered year more than thirty days after such vacancy may have occurred, and such election shall be by the qualified electors of the county in which the judge, whose office becomes vacant, resided at the time of his election."

With the exception of the correction of some six or seven errors, the detailed provisions of the act of 1914, were the same as those of the act of 1913; so that enactment of the proviso, just quoted, seems to have been one of the primary purposes of the general assembly in passing the act of 1914.

None of the foregoing provisions relate, in any direct way, to the subject of compensation. It was not until the year 1914, that there was any legislation on that subject whatsoever. Then the general assembly passed the act found in 104 O. L., 250, amending section 2252, General Code, relating to the additional compensation of common pleas judges and enacting section 2252-2, General Code.

Original section 2252, General Code, need not be quoted here. Suffice it to state that it provided, for each judge of the court of common pleas, a salary in addition to the uniform salary of three thousand dollars ($3,000.00) per annum, payable out of the state treasury and fixed by section 2251, General Code, such additional salary being at the rate of sixteen dollars ($16) for each one thousand population of the county in which he resided when elected or appointed, as ascertained by the federal census next preceding his assuming the duties of such office. Such additional salary was, in case the judge resided in a subdivision comprising more than one county, to be paid from the treasuries of the several counties of the subdivision in proportion to the population thereof. It was provided that in no case should the additional salary be more than $3,000 or less than $1,000. The present state of the law, with respect to salary, is best shown by a full quotation of amended section 2252 and section 2252-2, as enacted by the law which became effective on or about June 8, 1914.

"Section 2252. In addition to the salary allowed by section 2251, each judge of the court of common pleas and of the superior court, shall receive an annual salary equal to twenty-five dollars for each one thousand population of the county in which he resided when elected or appointed, as ascertained by the federal census next preceding his assuming the duties of such office. In no case shall such additional salary be more than three thousand dollars.

"Such additional salary shall be paid quarterly from the treasury of said county upon the warrant of the county auditor. If the judge resides in a county which comprises a judicial subdivision, such additional salary shall be paid quarterly from the treasury of the county in which he resides; and if he resides in a county which is a part only of a judicial subdivision

such additional salary shall be paid quarterly from the treasuries of the several counties of the subdivision, in proportion to such population thereof, upon the warrants of the auditors of such counties. If such judge resides in any county which is now a part only of a judicial subdivision, and which hereafter ceases to be a part only of such judicial subdivision, such additional salary shall, after such time as such county ceases to be a part of such subdivision, be paid quarterly out of the treasury of such county upon the warrant of the auditor of such county.

"Section 2252-2. All judges of the court of common pleas and superior courts and probate courts heretofore elected, shall, during the term for which they were elected, receive the salary, additional salary, compensation and expenses provided for by law at the time of their election, the additional salary to be paid quarterly out of the treasury of the county in which such judge resides upon the warrant of the auditor of such county."

The case suggested by the first of these questions is that of a judge elected prior to January 1, 1913, by the electors of a judicial subdivision and as a judge of a judicial district. For while my statement of the question refers to the judge as having been elected prior to June 8, 1914, it is obvious that no *election* for the office of common pleas judge could have been held prior to that date and subsequently to November, 1912. (Constitution of Ohio, article IV, section 13, article XVII, section 1.)

The changes in the rate of the compensation of a judge of the common pleas court and the limitations thereon effective by the amendment to section 2252, General Code, could not, of course, affect the compensation of a judge in office at the time the amendment became effective. (Article IV, section 14 of the constitution.) It is obvious, therefore, that at least a part of section 2252, as amended, does not apply to the compensation of judges in office on June 8, 1914. Careful reading of the section discloses that grammatically, at least, all of its provisions relate to the salary of twenty-five dollars ($25) per one thousand population. So that, primarily, no part of the section applies to the compensation of judges in office on the date named. What would otherwise be, perhaps, a mere inference, however, is made certain by consideration of section 2252-2, General Code, which, in express terms, governs the additional compensation of judges of the court of common pleas "heretofore elected * * * during the term for which they were elected." I cannot escape the conclusion that nothing in amended section 2252 applies to the salary of a judge of the class suggested by the first question now under consideration, and that section 2252-2 is the only statute now in force which, in any way, governs such additional salary. This statement requires qualification in that in order to ascertain what "additional salary compensation and expenses 'were' provided for by law at the time of their election," recourse must be had to original section 2252, General Code, fixing the additional compensation at the rate of sixteen dollars per one thousand population, originally payable from the treasuries of the counties in the subdivision. At least, for the purpose of determining the rate and maximum and minimum limitations on the amount of the salary, referred to in section 2252-2, original section 2252, though expressly repealed by the act of 1914, must be considered.

For the present, at any rate, I desire to qualify the broad statement which I have just made, further, by reserving the question as to whether or not, in spite of the positive terms of section 2252-2, General Code, a judge "heretofore elected," within the meaning of that section, is entitled to the special compensation provided by section 2253, General Code, for the service of holding court in a county other

than that in which the judge resides, under the assignment of the chief justice of the supreme court. This question will be dealt with in answering the second general query, above stated.

Now, while section 2252-2, General Code, in effect, adopts by reference, the amount of salary fixed by original section 2252, General Code, it clearly provides a rule of its own with respect to the *source* from which such compensation shall be paid. Its language is "the additional salary to be paid quarterly out of the treasury of the county in which such judge resides on the warrant of the auditor of such county."

While it would undoubtedly be most appropriate for the general assembly to provide that the additional salary of judges "heretofore elected" should continue to be paid from the treasuries of the counties of the subdivisions until such time as each county in the state should have one resident common pleas judge, and thereafter from the treasury of the county in which the judge resided, this was not done. In order to make the law mean any such thing it would be necessary to read into section 2252-2, language which is not there at all. I know of no other provision of law or constitutional provision which would require such an interpolation. I have considered, in this connection, the provisions of article IV, section 14, of the constitution, and those of amended section 2252 of the General Code, both of which relate to the subject of compensation; but for reasons, which are, I think, obvious, I have concluded that they do not necessitate reading anything into section 2252-2.

I have also considered the broad intent and purpose of amended article IV, section 3 of the constitution and its schedule, and the somewhat ambiguous language of the last sentence of the first paragraph of section 1532, General Code, as enacted in 1913, and as amended in 1914. Giving to these provisions the most liberal interpretation, I might be justified in concluding that "after the year 1914" (and it is not clear just what this means) every common pleas judge in the state should be considered as being the resident common pleas judge of his own county. Assuming this to be the effect of all these provisions, it would seem appropriate, at least, as I have already stated, that the judges, holding over under favor of the schedule, should continue to be paid from the counties of the subdivision until such time (designated by the ambiguous phrase just referred to) as that at which they would become county judges; and that thereafter they should be paid from the treasuries of their own counties.

But this course of reasoning, whether valid or not, merely suggests what the legislature, in justice to the several counties in the state, *ought to have enacted.* It does not serve to force an unnatural interpretation of that which the assembly *did enact,* unless some constitutional principle can be invoked to establish a direct connection between the nature of the services such judges were to perform and the source or sources of the additional compensation they must receive.

I can think of no such constitutional principle, though I have considered, in this connection, the well understood underlying principle of taxation, to the effect that the purposes for which a tax is laid must pertain to the district taxed.

(Wasson v. Commissioners, 49 O. S., 622.)
(Hubbard v. Fitzsimmons, 57 O. S., 436.)

However, I find that at no time in the history of the state has the additional compensation of common pleas judges borne, in this respect, a direct relation to the nature of the duties which such judges have been required to perform, for under the constitution of 1851, common pleas judges were judges of the *district,* and not of the subdivision; and at all times the major part of the salaries of all the common pleas judges in the state has been paid from the state treasury.

Being unable, therefore, to assign any reason, satisfactory to myself, whereby any unnatural interpretation should be given to section 2252-2, General Code, I find myself forced to accept the meaning of its plain and unambiguous terms as it is manifested on the face thereof.

For similar reasons I am unable to say that the effectiveness of any part of section 2252-2, General Code, is to be postponed after the date when the law, of which it is a part, became effective as a law, viz.: on or about June 8, 1914. The legislature could have very easily added to the act of 1914, a section in the nature of a schedule, providing, when, with respect to any judge, section 2252-2, or any part of it, should go into effect. Not having done so, it follows, I think, that this provision, as well as all other provisions contained in the act of which it is a part, must be deemed to have gone into effect on June 8, 1914.

I am of the opinion, therefore, in answer to the first question:

(1) That a common pleas judge, elected prior to June 8, 1914, is entitled to additional salary at the rate of sixteen dollars for each one thousand population of the county in which he resided when elected; such salary not to be less than one thousand dollars ($1,000) nor more than three thousand dollars ($3,000).

(2) That such salary is to be paid wholly from the treasury of the county in which such judge resides, in the manner provided by section 2252-2, General Code.

(3) That the change, with respect to the source from which such salary is to be paid, was effective on June 8, 1914.

I have not considered, in this opinion, the question as to the proper manner of paying the salary of such a judge, payable at the end of the quarter in which June 8, 1914, fell. This is a matter of adjustment among the treasuries of the counties of a subdivision, which will have to be provided for under the supervision of the bureau, and if your department desires my advice on this point, when the time comes for such adjustment, I shall be glad to make it the subject of an independent investigation. For present purposes, it is sufficient to state that all future quarterly payments, on account of the additional salary of a common pleas judge, elected prior to June 8, 1914, should be made from the treasury of the county in which such judge resides.

(2) The second question, as I have stated it, requires consideration of article IV, section 3 of the constitution, as amended, the schedule thereto, section 2252-2 and section 2253 of the General Code, as it originally existed; the same section as amended in 103 O. L., 419, and as amended 104 O. L., 251, and article IV, section 14 of the constitution.

Amended section 3 of article IV of the constitution, and its schedule, together with section 2252-2 have been quoted. Section 2253, General Code, as originally enacted, it as follows:

> "In addition to the annual salary provided in the two preceding sections, each judge of the court of common pleas shall receive his actual and necessary expenses, not exceeding one hundred and fifty dollars in any one year, incurred while holding court in a county in which he does not reside, to be paid from the state treasury upon the warrant of the auditor of state."

The same section, as amended 103 O. L., 419, (effective sometime in August, 1913) provided as follows:

> "In addition to the annual salary and expenses provided in sections 1529, 2251 and 2252, each judge of the court of common pleas and of the court of appeals, shall receive his actual and necessary expenses, not exceeding three hundred dollars in any one year, incurred, while holding

court in a county in which he does not reside, to be paid from the state treasury upon the warrant of the auditor of state, issued to the judge and upon presentation of a sworn itemized statement of such expenses."

Section 2253, G. C., as last amended, provides as follows:

"In addition to the annual salary and expenses provided for in sections 1529, 2251, 2252, 2252-1, each judge of the court of common pleas and of the court of appeals, shall receive his actual and necessary expenses, not exceeding three hundred dollars in any one year incurred, while holding court in a county in which he does not reside, to be paid from the state treasury upon the warrant of the auditor of state, issued to such judge; each judge of the court of common pleas who is assigned by the chief justice by virtue of section 1469, to aid in disposing of business of some county other than that in which he resides, shall receive ten dollars per day for each day of such assignment, and his actual and necessary expenses incurred in holding court under such assignment, to be paid from the treasury of the county to which he is so assigned upon the warrant of the auditor of such county, and the amount allowed herein for actual and necessary expenses shall not exceed three hundred dollars in any one year."

I encounter first, in this connection, a mere question of statutory interpretation disclosed by comparison of section 2252-2 with section 2253, General Code, as they both appeared on the same page of 104 Ohio Laws. Section 2252-2, as I have pointed out, is the section which particularly deals with the subject of compensation and expenses of judges of the court of common pleas "heretofore elected." If this section stood alone, it would clearly provide fully for the compensation and expenses of such judges. It is only by virtue of section 2253 that any additional compensation or any expenses of a nature different from those allowed under the law "at the time of their election" could be claimed.

Now, section 2253 begins by providing that "in addition to the annual salary and expenses provided for in sections 1529, 2251, 2252, 2252-1, each judge of the court of common pleas * * * shall receive his actual and necessary expenses, not exceeding three hundred dollars in any one year," etc.

In other words, with section 2252-2, directly before it, so to speak, the general assembly did not provide, in section 2253, that expenses to the amount of three hundred dollars in any one year, incurred while holding court in a county other than that in which the judge resides, might be paid from the state treasury in addition to the annual salary and expenses provided for in section 2252-2. That is to say, the clear inference from the first clause of section 2253 is that it is intended to apply only to common pleas judges, the additional salary compensation and expenses of whom are not governed by section 2252-2.

This inference carries, I think, at least as far as the semi-colon in section 2253, and would, at once, justify the conclusion that the general assembly did not intend that the judges of the court of common pleas "heretofore elected" should receive actual and necessary expenses not exceeding three hundred dollars in any one year, under amended section 2253.

Without anticipating anything at this time I may say that I am of the opinion that the very explicit language of section 2252-2 certainly limits the expenses of judges of the court of common pleas, as the same were limited by the law "at the time of their election," insofar as the expenses covered by such law are concerned. The law "at the time of their election" is found in original section 2253, which provides that " in addition to the annual salary provided in the two preceding sections, each judge of the court of common pleas shall receive his actual and necessary

expenses not exceeding one hundred and fifty dollars in any one year, incurred while holding court in a county in which he does not reside, to be paid from the state treasury upon the warrant of the auditor of state."

Accordingly, I am of the opinion that at least to the extent that original section 2253, General Code, provided for the payment of expenses of judges of the court of common pleas, incurred while holding court in a county other than that of their residence, such section still governs, by reason of its adoption in section 2252-2; and that judges elected prior to June 8, 1914, are entitled to expenses not exceeding one hundred and fifty dollars in any one year, when incurred while holding court in a county in which they do not reside.

But this conclusion is by no means final with respect to the matter of expenses, nor does it foreclose further inquiry as to the matter of the special compensation of ten dollars per day, provided for in the latter part of section 2253, as amended, for though a common pleas judge be limited to one hundred and fifty dollars, by way of expenses, by section 2253 in its original form, still it does not follow that as to expenses incurred in the performance of services not required by law, with reference to which original section 2253 was drawn, the same limitation is to apply. Or to anticipate, one hundred and fifty dollars in each year might still be the limit on the amount of the expenses payable from the state treasury, provided the expenses are incurred in holding court in such counties other than the county of the residence of the judge in which, under the old law, such a judge might have been required to hold court; and this would not, preclude such a judge from receiving additional expenses incurred in performing services other than those which he might have been required to perform under the old law.

In this connection, the repetition of the three hundred dollar limitation, in amended section 2253, is not without its significance. So that it now becomes incumbent upon me to consider the scope of the application of that part of section 2253 which follows the semi-colon.

Such consideration discloses another fact, anomalous at first glance, but significant when properly considered. The expenses referred to in the first half of the section are to be paid from the state treasury upon the warrant of the auditor of state, while the expenses, referred to in the second part of the section, are to be paid from the treasury of the county to which the judge is assigned upon the warrant of the auditor of such county.

It seems clear to me that the legislature has recognized, in making this distinction, the difference between the duty of a common pleas judge to hold court in a county in which he does not reside, under the original law, and that of holding court in such a county under the assignment of the chief justice, as provided by the more recent law, authorized by the amendment to article IV, section 3 of the constitution. I have already remarked that under original section 3 of article IV of the constitution, common pleas judges were judges of the district. Under sections 1529 and 1540 of the General Code, still in force, a common pleas judge may be required to hold court in any county in his district. Now, the schedule to amended article IV, section 3 provides that:

> "Each county shall continue as a part of its existing common pleas district and subdivision thereof, until one resident judge of the court of common pleas is *elected and qualified* therein."

I am clearly of the opinion that the old districts and subdivisions continue in existence, not merely until "after the year 1914," as may be inferred to have been the legislative conception of the question, but until in every county in the district or subdivision there has been an election of a resident judge and a qualification thereunder.

Therefore, common pleas judges, elected prior to June 8, 1914, (and, of course, elected as district judges in subdivisions), still rest under the duty to hold court in any county of their respective districts, under certain circumstances, and expenses so incurred by them while so holding court, are to be paid in accordance with original section 2253, and the amount thereof is limited to one hundred and fifty dollars in any one year.

But, at the same time, it is provided that these judges shall, "after the year 1914," *serve* as judges of the court of common pleas of the counties of which they are respectively residents. The general assembly evidently desired to make all judges in the state subject to the provision of article IV, section 3, which is to the effect that any common pleas judge may hold court in any county. In my opinion this legislative interpretation is not entirely out of harmony with the constitution, for the second sentence of amended section 3 of article IV, taken in connection with the first clause of the schedule thereto, plainly means that the power to "temporarily preside and hold court in any county" shall be vested in any common pleas judge, whether in office at the time the amendment was adopted and became effective, or not.

So that it was not even necessary for the general assembly to enact that "after the year 1914" each judge of the common pleas court, elected prior to the passage of the act designated as section 1532, General Code, in 1913, should serve as a resident common pleas judge of the county in which he resided, for the purpose, at least, of making such judges, after such time, subject to the call of the chief justice.

From all this it follows that a judge of the court of common pleas, in office prior to the amendment of the constitution, may, under the constitution, be required to go into any county in the state to hold court, by assignment of the chief justice of the supreme court; whereas, both before and after the amendment, he could be required to go into any county in his district to hold court, under the direction of the supervising judge of his district.

Now the general assembly, in enacting section 2253, General Code, as last amended, has clearly recognized the distinction between holding court in another county of the district and holding court in another county of the state outside the district; for the section provides that expenses in the one case shall be paid from the state treasury and in the other case from the treasury of the county to which the judge is assigned. Any other view of section 2253 would make the two clauses of section 2253, with respect to expenses, irreconcilably inconsistent. The question, however, is complicated by the fact that section 2253 was amended in 1913, after the constitutional amendment had taken effect. In the law, obviously passed to conform the procedure of the various courts of the state to the constitutional changes and found in 103 O. L., 405, the general assembly amended section 2253, General Code, so as to increase the limitation on the amount of expenses incurred while holding court in a county other than that in which the common pleas judge resided, receivable, in any one year, from one hundred and fifty to three hundred dollars. Being made in full view of the constitutional amendment, the statutory amendment must be considered, I think, as responsive to the change in the constitution. That is to say, when the legislature increased the allowance for expenses from one hundred and fifty dollars to three hundred dollars, after the constitution was amended, such increase is fairly referable to an intention to provide for the additional expenses which a common pleas judge might incur by reasons of resting under the duty to go, when called upon, into any county in the state and hold court. I find that my predecessor, Honorable Timothy S. Hogan, held, in 1913, that this amendment of section 2253 was effective during the terms of office of judges then in office. Assuming that to be the case, then the subsequent enactment, in 1914, of section 2252-2, General Code, restoring, as

to judges in office on June 8, 1914, the additional salary, compensation and expenses provided for by law at the time of their election, was equally effective to reduce such allowance again to one hundred and fifty dollars. But whether or not the legislature, in restoring the law as it existed at the time of the election of these judges, (none of whom could have elected after January 1, 1913), intended to make the limitation of one hundred and fifty dollars in any one year, and the provision that such expenses should be paid from the state treasury, applicable to expenses of such judge, incurred while holding court in any county of the state, is a question to be considered. Section 2253, General Code, as enacted in 1913, clearly governs the expenses of a judge of the common pleas court, incurred while holding court in any county in the state, under the constitution as it then existed, which, as I have pointed out, authorized the chief justice of the supreme court to assign any common pleas judge to hold court in any county. The question now is as to whether, in restoring the old limitation of one hundred and fifty dollars, by the enactment of section 2252-2, the general assembly intended that the restored limitation should apply to expenses incurred in any county, or only to expenses incurred in any county of the district, which was the application of original section 2253. For reasons which will, perhaps, be made clearer in the course of this opinion, it is my view that when the old law was restored, the general assembly intended that it should have the same application that it formerly had; so that section 2252-2, as enacted in 1914, adopting the law in force at the time such judges were elected, had the effect of restoring that law exactly as it was; and so that, further, the scope of original section 2253, so adopted by reference, was the same as it had been, viz.: limited to expenses incurred while holding court in another county of the district.

As a matter of statutory interpretation, then, I am of the opinion that so far as the subject of expenses is concerned, a common pleas judge, in office prior to June 8, 1914, and necessarily holding the position of district judge, as distinguished from that of resident county judge, is entitled to reimbursement for expenses incurred when holding court in a county in his district other than that in which he resides, to be paid from the state treasury, and the amount of which may not exceed one hundred and fifty dollars in each year; but that expenses incurred when holding court in any county in the state, outside of his district, under the assignment of the chief justice of the supreme court, are to be paid from the treasury of the county to which such judge is assigned, and the amount of such expenses is not to exceed three hundred dollars in any one year. In other words, the aggregate limitation upon expenses incurred in holding court in a county other than that of such a judge's residence, is four hundred and fifty dollars, one hundred and fifty dollars of which limits the amount payable from the state treasury for expenses incurred in holding court in another county in the district, and three hundred dollars of which limits the amount of expenses payable from the treasury of the county in which court is held, incurred in any county outside of his district, under assignment of the chief justice.

A question, which I would prefer not to pass upon here, is as to whether or not the chief justice of the supreme court may assign a judge, elected prior to the amendment of the constitution, to hold court in a county other than that of his residence, but within his own district. This question invites consideration of section 1469, General Code, as amended 103 O. L., 408, and is, perhaps, not directly involved in the question, as I have stated it. As this matter, however, is one which will necessarily have to be determined, in the first instance, by the chief justice of the supreme court, I would, for obvious reasons, prefer not to express a view thereon.

The next question which is encountered is whether or not the general assembly, in amending section 2253, General Code, intended that the special compensation

of ten dollars per day, to be paid to any common pleas judge assigned by the chief justice of the supreme court to hold court in another county other than that in which he resides, should be received by judges in office at the time the statute was amended.

Section 14 of article IV of the constitution, provides in part as follows:

> "The judges * * * of the court of common pleas shall at stated times, receive, for their services, such compensation as may be provided by law; which shall not be *diminished, or increased,* during their term of office; but they shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state or of the United States."

I find that my predecessor, Honorable Timothy S. Hogan, in an opinion to Honorable Cyrus Newby, a judge of the common pleas court, held that this special compensation could be received by a judge in the situation of the judge inquired about in the first question as I have stated it. However, Mr. Hogan interpreted, in arriving at his conclusion, article II, section 20 of the constitution, and entirely overlooked article IV, section 14 thereof. It is clear to me that article II, section 20 has no application to the case, and that article IV, section 14 is the only constitutional provision which need be considered. Under said section 14 of article IV, I am clearly of the opinion that no judge elected or appointed prior to the taking effect of amended section 2253, to wit, on or about June 8, 1914, may receive the ten dollars ($10) per day compensation provided for in said amended section 2253, and that such compensation may be drawn only by judges elected or appointed subsequent to June 8, 1914.

However, as I have already indicated that the inapplicability of amended section 2253 to judges elected prior to the time of its amendment is limited to that provision thereof which changes the *compensation* of such common pleas judges the expense allowances do not constitute "compensation" in the sense in which the word is used in the constitution. Therefore no judges elected or appointed prior to June 8, 1914, would not be entitled to receive the ten dollars ($10) per day provided for in said section. They would be entitled to receive their expenses not to exceed three hundred dollars ($300) in any one year incurred while holding court outside of their district under assignment of the chief justice of the supreme court.

(3) It appears, from the above statement of the third general question, that the judge elected in Clark county in 1914, was chosen by the electors of that county under favor of the proviso of amended section 1532, above quoted. This proviso the quotation of which I need not repeat here clearly evinces an intention on the part of the legislature that judges elected in 1914, to fill vacancies previously occurring, shall be chosen as resident common pleas judges of their respective counties. Of course the vacancy which occurred existed in the office of a judge, elected as a district judge by the electors of an entire subdivision. The term, to fill out which the election was held under the proviso above quoted, is the constitutional term attached, so to speak, to such district office. But the general assembly evidently desirous of putting the scheme of amended section 3 of article IV of the constitution into effect in each county at the earliest possible date, had expressly provided that the election shall be only in the county in which the judge, whose office became vacant, resided at the time of his election.

It is my opinion that this legislation has the effect of making such judge a resident common pleas judge of Clark county, at least for the purpose of determining the source of the compensation which he shall receive.

The judge mentioned in the statement of the question is clearly not within

the purview of section 2252-2, General Code, not having been "heretofore elected," as therein provided. It is equally clear that amended section 2252, General Code, as above quoted, provides for the salary of this judge, and that, according to its terms, he is to receive an annual salary equal to twenty-five dollars for each one thousand population of Clark county, as ascertained by the 1910 federal census, to be not more than three thousand dollars, unless the effect of article IV, section 14 of the constitution, which has been considered in another connection, is such as to limit this judge to the salary which his predecessor, had he served out his term, would have received.

I am of the opinion that the constitutional limitation, just cited, does not preclude the judge, now in question, from receiving the salary fixed by amended section 2252, General Code, which was enacted before he was elected and assumed office. The abstract question here is as to whether or not article IV, section 14 prohibits an increase or diminution of the compensation of a common pleas judge during an official term, or only during the service of a judge. There is a wide difference between the two statements, as will be instantly observed. The question has been raised under various constitutional provisions similar to that now under consideration, and superficially, at least, the authorities appear to be in conflict.

See Storke v. Goux, 129 Cal. 526.
Larad v. Newman, 81 Cal. 588.
Greene v. Hudson Co., 44 N. J. L., 388.
State v. Frear, 138 Wis., 536.
Horn v. State ex rel. Conway, decided by the court of appeals, 8th district, April 24, 1913, (not yet reported).

I am inclined to the view that the Ohio constitution is to be interpreted as applicable only to the term of the judge actually in office at the time the change was made and not to the whole official term; and that, consequently, it would not preclude a person, appointed or elected to fill out an unexpired term, from receiving the salary fixed by a law taking effect prior to his appointment or election, but during the official term which he is to fill out. Such indeed is the holding of the court of appeals of the eight district in Horn v. State ex rel. Conway, supra. This decision interprets section 20 of article II of the constitution. But, in this respect, article IV, section 14 is similar to article II, section 20. The phraseology of the one is "during their term of office;" that of the other, "during his existing term." The use of the possessive personal pronoun is equally prominent in both provisions, and a perusal of the opinion in the court of appeals, in the case cited, shows that this word, occurring in article II, section 20, was regarded as significant.

I call attention, too, to the fact that section 2252, General Code, both in its original and its amended form, provided that the additional salary of the common pleas judge shall be based upon the population of the county in which he resided "when elected or appointed," as ascertained by the federal census "next preceding his assuming the duties of said office." So that under the plain terms of both the old and the new sections, if the official term of a judge of the common pleas should extend over the period of the taking of the federal census, and if an appointment were made to fill a vacancy in such term after such census had been taken, then the salary of the appointee would not be the same as that of the person elected for the original term.

Because section 2252, General Code, as amended, is clearly intended to apply to the amount of the salary of the Clark county judge in question; because the only available decision in this state upon the constitutional question here involved supports the validity of the section, so applied; and because, finally, of the pre-

sumption which favors the constitutionality of any act of the general assembly, I am of the opinion that section 2252, General Code, as amended, fixes the amount of the salary of the judge in question.

These conclusions make it unnecessary for me to consider whether or not the proviso of amended section 1532, General Code, had, or could have the effect of constituting the office, for which the election therein provided for is held, a different one from that in which the vacancy had occurred. This question is more nearly raised in consideration of the remaining parts of the third question. I am of the opinion that the election in Clark county of a judge to fill the vacancy in the office of a district judge, resident thereof, whatever be the effect of such an election upon the identity of the office filled, constituted the election of a "resident judge of the court of common pleas * * * therein," within the meaning of the schedule to article IV, section 3 of the constitution, above quoted. That being the case, such election, and the qualification of the judge thereunder, had the effect *ipso facto*, of withdrawing Clark county from the district and subdivision in which it had formerly been. Therefore, the sources of the additional compensation of the judge in question are governed by the first and third sentence of the second paragraph of amended section 2252. That is to say, Clark county is a county "now, (i. e., on June 8, 1914) a part only of a judicial subdivision and which hereafter (i. e. on the election and qualification of the judge in question), ceases to be a part only of such judicial subdivision."

I am of the opinion, therefore, in answer to your third question:

(1) That the judge inquired about therein is entitled to additional salary at the rate of twenty-five dollars ($25) per one thousand population of Clark county as ascertained by the federal census of 1910, not in any case to be more than three thousand dollars ($3000).

(2) Such salary is to be paid quarterly from the treasury of Clark county on the warrant of the auditor of that county.

(3) And that Clark county, being withdrawn from the district and subdivision of which it was formerly a part, is no longer required to contribute to the additional salary of common pleas judges of the other counties in such subdivision. On this last point I may say, also, that this result would have been brought about by the operation of section 2252-2, General Code, as I have interpreted it, in answering the first general question, with respect to those counties, at least, in the former subdivision, the resident judges of which were elected prior to June 8, 1914. Inasmuch as, in point of fact, every county of the second subdivision of the second district had a resident common pleas judge in office on June 8, 1914, the mutual contribution of the various county treasuries to the additional salaries of these judges ceased, on and after that date, for this reason alone.

Though my opinion is not requested thereon, I may add, with respect to the judge with whose case I have been dealing, that he is undoubtedly entitled to his actual and necessary expenses incurred while holding court in another county in the state, under the assignment of the chief justice, in accordance with the last half of section 2253, General Code, as amended; and that, Clark county no longer constituting a part of the judicial district, the first half of said section does not apply to him at all.

(4) The judge inquired about in the fourth question must, of course, have been appointed after June 8, 1914. The office to which he was appointed was that of a district judge, elected as such, under the constitution of 1851. It, therefore, becomes necessary to inquire, first of all, as to the effect, on the status of such judge, of the peculiar language of the last sentence of the first paragraph of section 1532, General Code, as enacted in 1913, and amended in 1914, viz.:

"Each judge heretofore elected as a judge of the common pleas

district shall, after the year 1914, *serve* as a judge of the common pleas court of the county of which he was a resident at the time of his election."

This provision would have applied to the predecessor of the judge whose case is now under consideration, and in my opinion it applies as well to the judge himself. As hinted previously in this opinion, I am somewhat at a loss to understand just what the legislature had in mind in employing this language. Just what is meant by "serving" as a resident common pleas judge is not entirely clear to me. If the object of the legislature was to make the "hold over" judges subject to the call of the chief justice, under amended section 3 of article IV of the constitution, this legislation was, in my judgment, unnecessary, for reasons which I have already stated. If, on the other hand, it was the intention of the legislature to put an end to the districts and subdivisions "after the year 1914," in my judgment this legislation is unconstitutional. While it is true that legislation necessary to carry into effect these changes in the constitutional framework of government that are not perfectly self-executing, is to be interpreted as if a part of the constitutional amendment itself. (State ex rel. v. Harris, 77 O. S., 481)—this principle being perhaps more appropriately applied in support of the proviso of section 1532 than in connection with the sentence of the same section now under consideration—yet, in spite of the principle, I cannot reconcile this sentence of section 1532, if interpreted as just suggested, with the plain language of the schedule to article IV, section 3. For the schedule provides that "each county shall continue as a part of its existing common pleas district and subdivision thereon until one resident judge of the court of common pleas is elected and qualified therein." Plainly, the event which will, under this language, terminate the connection of a county with its existing district and subdivision, is the election and qualification therein of a resident judge." Such a judge must be elected in the county as a county judge.

So that I do not think that the sentence, now under consideration, can be given the effect of putting an end to the districts and subdivisions, either on January 1, 1915, or at such date, in the year 1915, as the official year of the term of any judge in any county in the subdivision or district may terminate.

For present purposes it is not necessary to inquire further as to what the purport and effect of the sentence, which has just been considered, may be, it being sufficient to state that it does not have either of the two possible effects which have been considered, and that, at the most, it has the effect of authorizing and directing each judge "heretofore elected," (i. e. elected prior to January 1, 1913) to *serve* as a resident county common pleas judge for any and all purposes for which there may be necessity for such a resident judge, as distinguished from a district judge, in addition to discharging the functions of the office for which he was elected, viz.: that of district judge.

This, then, being the status of the judge inquired about in the fourth question, who is serving as the appointive successor of a judge elected prior to January 1, 1913, the application of the statutes, covering the matter of additional salary to his case, becomes clear. Section 2252-2, General Code, being limited, in its application, to judges "heretofore elected" does not govern this case. Section 2252, General Code, as amended, which clearly applies to judges who shall be "elected or appointed" *prima facie* does govern the matter. Inasmuch as the judge in question is still serving as a district judge, his county not yet having been separated from its original district and subdivision, the second sentence of the second paragraph of said section 2252, as amended, applies to his case. The facts stated by you show that the judge inquired about is a resident of Van Wert county and was appointed to succeed a judge residing in such county at the time of his election. Van Wert county is a part only of a judicial subdivision. Accordingly, the additional salary to which this judge is entitled is to be paid quarterly from the

treasuries of the several counties of that subdivision, as it is now constituted, in proportion to the population of such counties, and upon the warrants of the auditors thereof.

I have already stated that the makeup of a judicial subdivision may have changed so that it may no longer be composed of the same counties which originally constituted it. Thus, Van Wert county is in a subdivision which originally consisted of five counties, in two of which, however, resident common pleas judges were elected in 1914. The present subdivision, therefore, consists merely of the three remaining counties, viz.: Defiance, Van Wert and Williams counties. So long as these three counties continue to be parts only of the subdivision, they will contribute to the salary of the judge concerning whom you inquire.

This result is somewhat incongruous because in Defiance and Williams counties there are resident common pleas judges elected prior to January 1, 1913, whose salaries, on the principles laid down in answering the first question, will be, and since June 8, 1914, should have been paid wholly from the treasuries of their respective counties; also the judge, whom the common pleas judge inquired about, succeeded, should have drawn his salary wholly from the treasury of Van Wert county between June 8, 1914, and the time when he resigned. The incongruity, however, results from the plain provisions of section 2252 and 2252-2, General Code.

Of course, the same constitutional question is even more squarely presented in this case than in the case presented in the third question, just considered. Upon the grounds stated in answering that question, however, I am of the opinion that the fact that the appointed judge will receive a salary, different in amount and in the source from which it is to be paid, from the salary payable to his predecessor, and which that judge would have received had he served out his term, does not violate article IV, section 14 of the constitution.

Coming then to a direct answer to the fourth question, I am of the opinion that the judge, appointed to fill a vacancy caused by the resignation, subsequent to the November election in 1914, of a common pleas judge elected prior to January 1, 1913, is entitled to additional salary at the rate of twenty-five dollars ($25) for each one thousand population of the county in which such appointed judge resided when appointed, as ascertained by the federal census next preceding his assuming the duties of the office, to be in no case more than three thousand dollars ($3000); and that if such judge resides in a county which comprises a part only of a subdivision, such additional salary is to be paid quarterly from the several counties now constituting the subdivision, in proportion to the population thereof; otherwise, such additional salary would be paid from the treasury of the county in which the judge resides.

I may add here, too, as I did in answering the third question, a word respecting the expenses and compensation to which such a judge is entitled under section 2253, General Code, as amended. The section, having taken effect before this judge was appointed, and the judge being a district judge, clauses of section 2253, in my opinion, apply to his case. That is, when holding court in any county in his district, other than the one in which he resides, he is entitled to receive his actual and necessary expenses not to exceed three hundred dollars in any one year, to be paid from the state treasury upon the warrant of the auditor of state; and when assigned by the chief justice to hold court in any other county in the state, outside of his district, he is entitled to his actual and necessary expenses not exceeding three hundred dollars in any one year, that the compensation of ten dollars ($10) per day to be paid from the treasury of the county to which he is so assigned upon the warrant of the auditor of such county.

(5) In my opinion the word "quarterly," as used in sections 2252 and 2252-2, General Code, refers to quarterly periods of the official year of the terms of office of the judge whose compensation is to be ascertained. Various dates are provided

by law for the commencement of official terms of common pleas judges; so that there is no uniform official year for all common pleas judges; accordingly, the quarterly payment periods, being fixed in accordance with the respective official years, are not uniform.

Respectfully,
EDWARD C. TURNER,
Attorney General.

113.

COMMON PLEAS JUDGES ELECTED PRIOR TO JANUARY 1, 1913—ADDITIONAL SALARY AS AFFECTED BY ACT OF FEBRUARY 16, 1914, 104 O. L., 250.

A common pleas judge, elected prior to January 1, 1913, *is entitled to additional salary at the rate of sixteen dollars per one thousand population of the county in which he resides, to be not less than one thousand* ($1,000) *dollars nor more than three thousand* ($3,000) *dollars per annum, payable wholly from the treasury of such county; and the law with respect to the source of such compensation, which formerly provided that the same should be paid from the treasury of the counties in the subdivision in proportion to their respective populations, was changed on June* 8, 1914, *after which date it was no longer lawful to draw such additional compensation from the treasuries of the counties in the subdivision.*

COLUMBUS, OHIO, March 1, 1915.

HON. JOHN M. MARKLEY, *Prosecuting Attorney, Georgetown, Ohio.*

MY DEAR MR. MARKLEY:—I am in receipt of your request for opinion reading:

"Section 2251 of the General Code of Ohio, relative to the salary of common pleas judges provides that each common pleas judge shall receive yearly from the state treasury the sum of three thousand dollars. Section 2252 of the General Code provides that each common pleas judge shall receive as additional compensation sixteen dollars for each one thousand of population in the county in which he resided at the time of his election, such additional compensation not to exceed three thousand dollars nor to be less than one thousand dollars, and that if said common pleas judge is elected from a subdivision containing two or more counties, such additional compensation shall be paid to him from the treasuries of the counties comprising such subdivision in proportion to their respective population.

"In 1912, Hon. James W. Tarbell was elected common pleas judge of the first subdivision of the fifth judicial district of Ohio, which subdivision is comprised of the counties of Brown and Clermont. Since the beginning of his term of office the additional salary as provided in section 2252 has been paid to him from the treasuries of Brown and Clermont counties in proportion to their population. In 1914, W. A. Joseph was elected common pleas judge of Clermont county under the provision of the new constitution; of course the additional salary to be paid to him will have to be paid from the treasury of Clermont county.

"Kindly give me an opinion as to whether or not the additional salary of Judge Tarbell will have to be paid from the treasuries of Brown and

Clermont counties in proportion to their population, as has heretofore been done, or will Brown county be compelled to pay the entire amount thereof.

"It is my opinion that, as Judge Tarbell was elected from the first subdivision of the fifth judicial district prior to the adoption of the new constitution, the two counties will be compelled to continue to share such additional compensation, as heretofore, and that the new constitution would not affect him during his term of office. I am going to advise the commissioners of Brown county to that effect at least until I am in receipt of an opinion from you holding otherwise."

Section 2252-2 of the General Code, as amended 104 O. L., 251, provides:

"Judges of the court of common pleas and superior courts and probate courts heretofore elected, shall, during the term for which they were elected, receive the salary, additional salary, compensation and expenses provided for by law at the time of their election, *the additional salary to be paid quarterly out of the treasury of the county in which such judge resides upon the warrant of the auditor of such county.*"

Under the foregoing statute I am of the opinion that Judge Tarbell's additional salary of sixteen dollars a thousand was and is payable from and after June 8, 1914, solely out of the treasury of the county of his residence.

I enclose you herewith a copy of an opinion covering generally the subject of judicial salary and expenses this day rendered to the bureau of inspection and supervision of public offices, the substance of which opinion is as follows:

"A common pleas judge, elected prior to January 1, 1913, is entitled to additional salary at the rate of sixteen dollars per one thousand population of the county in which he resides, to be not less than one thousand ($1,000) dollars nor more than three thousand ($3,000) dollars per annum, payable wholly from the treasury of such county; and that the law, with respect to the source of such compensation, which formerly provided that the same should be paid from the treasury of the counties in the subdivision in proportion to their respective populations, was changed on June 8, 1914, after which date it was no longer to draw such additional compensation from the treasuries of the counties in the subdivision.

"2. A common pleas judge, elected prior to January 1, 1913, is entitled to his actual and necessary expenses incurred while holding court under the assignment of the supervising judge of his district, in any county in the district other than that in which he resides, payable from the treasury of the state and not to exceed one hundred and fifty ($150) dollars in any one year; and to his actual and necessary expenses incurred while holding court in any county in the state outside of his district, under the assignment of the chief justice of the supreme court payable from the treasury of the county in which court is held, not to exceed three hundred ($300) dollars in any one year.

"3. Under the provision of amended section 2253, General Code, the additional compensation at the rate of ten dollars per day for each day of the assignment of a common pleas judge by the chief justice of the supreme court, to hold court in any county in the state other than that of the residence of the judge, may be drawn only by judges elected subsequent to the taking effect of amended section 2253, to wit, June 8, 1914.

"4. The common pleas judge elected in Clark county in the year 1914,

to fill out the unexpired term of a common pleas judge, (elected prior to January 1, 1913) as a district judge residing in Clark county at the time of his election) is to be regarded, for purposes of compensation, as the resident common pleas judge of Clark county. Accordingly such judge is entitled to additional salary at the rate of twenty-five ($25) dollars per one thousand population of Clark county, not to exceed three thousand ($3,000) dollars a year, which is payable wholly from the treasury of Clark county; and Clark county, upon his election and qualification, is no longer liable to contribute to the salaries of other common pleas judges in the subdivision of which said county was formerly a part, (which result, in the specific case, would have occurred, at any rate on and after June 8, 1914, by reason of the fact that in all the other counties of the subdivision common pleas judges, elected prior to January 1, 1914, were residing); such judge is also entitled to his actual and necessary expenses incurred while holding court in any county of the state, other than the one in which he was elected and resides, under the assignment of the chief justice of the supreme court, such expenses to be paid from the treasury of the county in which such court is held and not to exceed three hundred ($300) dollars in any one year; but to no expenses payable from the state treasury.

"5. A common pleas judge, appointed after June 8, 1914, to fill out the unexpired term of a judge elected as a district judge, prior to January 1, 1913, is entitled to receive additional compensation at the rate of twenty-five ($25) dollars per one thousand population of the county in which he resided when appointed, such compensation to be paid from the treasuries of the counties constituting the subdivision at a given time; so that upon the election and qualification of a resident common pleas judge in any county of the original subdivision, such county is no longer to be regarded as in the subdivision for the purpose of contribution to the additional salary of such judge; such additional salary is not to exceed three thousand dollars per annum; such judge is also entitled to receive his actual and necessary expenses not to exceed three hundred ($300) dollars in any one year, payable from the treasury of state, when incurred in holding court in any county remaining in the district of which his county is a part, other than the county of his residence; and also to expenses not exceeding three hundred dollars in any one year incurred while holding court in any county in the state other than in his own district, under assignment of the chief justice, to be paid from the treasury of the county in which court is held.

"6. The quarterly payments of the additional salary of common pleas judges should be based upon the official year of the term of each judge."

Respectfully,

EDWARD C. TURNER,

Attorney General.

114.

COMMON PLEAS JUDGE—SALARY FROM AND AFTER JANUARY 8, 1914 —EXPENSES OF JUDGES ELECTED PRIOR TO JANUARY 1, 1913— CONSTRUCTION OF PER DIEM COMPENSATION WHEN IN ANOTHER COUNTY.

1. *The salary of a common pleas judge from and after June* 8, 1914, *should come from the treasury of the county in which the judge resides. The apportionment of the quarterly additional salary should be based upon the official year of the term of each judge.*

2. *A common pleas judge elected prior to January* 1, 1913, *is entitled to his actual and necessary expenses incurred while holding court under the assignment of the supervising judge of his district, in any county in the district other than that in which he resides, payable from the treasury of the state and not to exceed one hundred and fifty dollars* ($150) *in any one year; and to his actual and necessary expenses incurred while holding court in any county in the state outside of his district, under the assignment of the chief justice of the supreme court, payable from the treasury of the county in which court is held, not to exceed three hundred dollars* ($300) *in any one year.*

3. *A common pleas judge elected prior to June* 2, 1914, *is not entitled to the ten dollars per day compensation when assigned by the chief justice of the supreme court to a county other than that of his residence.*

COLUMBUS, OHIO, March 1, 1915.

HON. A. G. REYNOLDS, *Painesville, Ohio.*

MY DEAR JUDGE:—I beg to acknowledge receipt of your request for opinion reading as follows:

> "As you know heretofore the compensation of common pleas judges, in judicial districts like our own, has been a certain amount from the state and the balance comes as extra compensation from the counties. In this subdivision three counties have contributed, Ashtabula, Lake and Geauga.
>
> "Under the act of the legislature, as found in volume 104 page 250, arises this trouble, at least as far as I am concerned. This act provides for the payment of the additional salary from the county which the judge is a resident after such county ceases to be a part of such subdivision.
>
> "The additional judge in this subdivision, to wit: Geauga county, took his seat January 1st, so that, I suppose, the act is in force from that time. Our quarter ends February 9th. Do I understand that the computation from each county, instead of being made to February 9th, should be made to January 1st and each county contribute pro rata to that time and the balance to be paid, for instance in Lake county, to myself on the treasury of Lake county, and in Ashtabula county, where Judge Roberts resides, from the treasury of Ashtabula county?
>
> "Second. As I understand the law if Judge Roberts or myself should be assigned by Judge Nichols to some other county to hear cases in which we are not residents, we receive under the new law our expenses and ten dollars per day during the time that we are engaged in hearing cases in other counties. This, I understand, is to be paid from the treasury of the county to which we are respectively assigned."

I regret that owing to the large number of similar questions arising it has been

impossible for me to answer you sooner. I have rendered a general opinion to the bureau of inspection and supervision of public offices, and I enclose a copy of same herewith.

Answering your first question: It is my opinion that from and after June 8, 1914, your salary should have come from Lake county only and Judge Robert's salary from Ashtabula county only. The matter of apportionment of the quarter current on June 8, 1914, when the law in question took effect, I have held in the opinion to the bureau that that is a matter for the respective county auditors.

Answering your second question: I am of the opinion that in case either you or Judge Roberts are assigned to one of the counties which previously constituted your judicial district, you will be entitled to your expenses not to exceed $150.00 in any one year, to be paid from the treasury of the state. If either you or Judge Roberts are assigned by the chief justice to a county other than the county of your respective residences, and other than to a county of your judicial district, then you will be entitled to your actual and necessary expenses not exceeding in any one year the sum of $300.00 payable from the treasury of the county to which you may be assigned.

I am of the opinion that since both you and Judge Roberts were elected prior to June 8, 1914, by virtue of the provisions of section 4, article XIV of the constitution, neither you nor Judge Roberts are entitled to the $10.00 per day compensation when assigned by the chief justice to a county other than that of your residence.

Respectfully,
EDWARD C. TURNER,
Attorney General.

115.

STATE TREASURER—FORMS OF WAIVERS OF PROTEST, i. e., "NOTICE AND PROTEST WAIVED," OR "PRESENTATION DEMAND NOTICE, PROTEST WAIVED."

The state treasurer may waive notice and protest of check for state revenues deposited by him for collection by using either of the following forms of waiver: (a) "Notice and protest waived," (b) "Presentation demand notice, protest waived."

COLUMBUS, OHIO, March 2, 1915.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—You submit to me two forms of waiver of protest used by you in the endorsement of checks received by you in payment of revenues of the state, and ask my opinion as to which affords the greater security to the treasurer of state in case of the protest of the checks; the two forms being as follows:

"Notice and protest waived.
"Presentation demand notice, protest waived."

Section 8216 of the General Code provides as follows:

"A waiver of protest whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor."

Under this section of our negotiable instruments code either of the forms you submit is sufficient. The latter form in using the words "presentation" and "demand" sets out more fully the requirements of the section quoted above, but from the standpoint of your protection, and as a matter of law, there is no difference between the two forms.

Respectfully,
EDWARD C. TURNER,
Attorney General.

116.

BOARD OF ADMINISTRATION—RECEIPTS FROM SALE OF MANUFACTURED ARTICLES MUST BE PAID INTO STATE TREASURY.

Under section 24, G. C., 104 O. L., 178, receipts from the sale of manufactured articles under section 1866, G. C., must be turned into the state treasury, and an appropriation by the legislature must be made to make said receipts available.

COLUMBUS, OHIO, March 2, 1915.

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

DEAR SIR:—Under date of February 26th, you submitted the following request for opinion:

> "Receipts from the sales of manufactured articles under section 1866, G. C., have been turned into the state treasury.
>
> "*Query.* May this money be paid out of the state treasury, under the constitution and laws of Ohio, without further and specific appropriations?"

Section 1864 contained in the statutes relating to the board of administration, provides in part as follows:

> "The state treasurer shall have charge of all funds under the jurisdiction of the board (board of administration) and shall pay out the same only in accordance with the provisions of this act. * * * Moneys collected from various sources, such as the sale of goods, farm products and all miscellaneous articles, shall be transmitted on or before Monday of each week to the state treasurer and a detailed statement of such collections made to the fiscal supervisor by each managing officer, but the receipts from manufacturing industries shall be used and accounted for as provided in section 32 (G. C., section 1866) hereof."

Section 1866, 103 O. L., 551, provides in part as follows:

> "For the purchase of material and machinery used in manufacturing industries, * * * a special appropriation shall be made to be known as the manufacturing fund. Receipts from the sales of manufactured articles shall not be turned into the state treasury, but shall be credited to said fund, to be used for the purchase of further materials, machinery and supplies for

such industries * * * and the board of administration shall make a full monthly report of the products, sales, receipts, disbursements and payments to and from said fund to the state auditor * * *."

The above sections 1864 and 1866 govern the matter under consideration up to the time that section 24 of the General Code was amended, and therefore prior to the amendment of said section 24, hereinafter referred to, the amount received from the sales of manufactured articles were not to be turned into the state treasury.

In 1914, section 24 of the General Code was amended, after the amendment of section 1866 hereinbefore referred to, by what is known as the "Mooney bill" to be found in 104 O. L., p. 178. Said section reads in part as follows:

> "On or before Monday of each week every state officer, state institution, department, board, commission, * * * shall pay to the treasurer of state all moneys, checks and drafts received for the state, or for the use of any such state officer, state institution, department, board, commission, * * * during the preceding week, from * * * sales * * * and file with the auditor of state a detailed, verified statement of such receipts."

It is to be noted that said section 24 simply requires that said moneys be paid to the *treasurer* of state, but does not state that the moneys are to be paid into the treasury. However, section 4 of said act provides as follows:

> "Immediately upon the taking effect of this act all moneys, checks and drafts in the possession of any state officer, state institution, department, board, commission or institution received for the state for any such state officer, department, board or commission from the sources mentioned in section 24 of the General Code, as herein amended, shall be paid into the state treasury in the manner provided by said section."

In said section 4 of said act it is specifically stated that all moneys, etc., in the possession of state officers, received for the state or for any such state officer, etc., "from the sources mentioned in section 24, G. C., as herein amended shall be paid into the state treasury in the manner provided by said section."

Taking the whole act together as it appears in 104 O. L., it seems clear to me that it was the intention of the legislature that the moneys received under section 24 by the state treasurer shall be paid by him into the state treasury.

Section 3 of the Mooney bill provides that "all sections or parts of sections of the General Code which provide for the custody, management and control of moneys arising from the payment to any state officer, state institution, department, board, commission, * * * of any * * * sales," * * * and which are inconsistent with the provisions of section 24 of the General Code as herein amended, are, to the extent of such inconsistency, hereby repealed." Were it not for section 3 of the Mooney bill it might well be argued that since the provisions of section 1866, G. C., were special, and the provisions of section 24, 104 O. L., 178, were general, the special would govern. However, such construction cannot be given in this instance for the reason that section 3 of the act specifically repeals any provisions of former acts which are inconsistent with the provisions of section 24.

Consequently, I am of the opinion that the receipts from sales of manufactured articles, under section 1866, G. C., must, under section 24, G. C., be turned into the state treasury, and being in the state treasury may not be paid out of the said treasury without appropriation by the legislature.

In examining the appropriation bill found in 104 O. L., at page 64, I note that on page 69 thereof there is appropriated to the board of administration the following:

"Manufacturing fund, receipts and _____$50,000.00."

The legislature has, therefore, recognized that it is necessary that the moneys in the manufacturing fund and the moneys to come into such manufacturing fund required appropriation for expenditures to be made from such fund.

Respectfully,
EDWARD C. TURNER,
Attorney General.

117.

AGRICULTURAL COMMISSION—AUTHORITY TO ISSUE ORDERS TO PREVENT SPREAD OF HOOF AND MOUTH DISEASE AMONG LIVE STOCK.

The Agricultural Commission of Ohio has authority to take means against railroad companies to prevent the spread of the hoof and mouth, contagious disease, among live stock.

COLUMBUS, OHIO, March 3, 1915.

HON. A. P. SANDLES, *President Agricultural Commission of Ohio, Columbus, Ohio.*

MY DEAR MR. SANDLES:—As carrying out the purposes of our interview of a few days ago in regard to the serious situation in Ohio on account of the foot and mouth disease, I am of the opinion that under the authority given your commission you may make orders against any railroad company in this state, requiring said railroad company to clean and disinfect the cars specified. And, to cover the matter from another angle, your board might make an order prohibiting the loading of live stock for intra-state shipment in any car that has not been cleaned and disinfected.

Further, under section 1120, General Code, which provides in part (103 O. L., 313):

> "Whoever, being a person, firm or corporation * * * moves an animal from a district declared by the commission to be infected with dangerously contagious or infectious disease * * * except under such conditions as the commission may prescribe, shall be fined not more than five hundred dollars."

you may prosecute any person moving an animal from a district declared by your commission to be infected with a dangerously contagious or infectious disease.

We may experience some trouble with the enforcement of this statute, as the court may take the position that it will be necessary to bring home to the defendant the knowledge of the fact that your commission had made an order declaring the particular district to be infected and ordering no live stock moved therefrom. However, I believe that the proper interpretation that should be given

to this statute is that proof by the defendant that he had no such knowledge would be a defense rather than that it is the duty of the state in the first instance to prove that the defendant did actually have knowledge.

This department will lend all possible aid to your commission in enforcing the quarantine as we realize the serious consequences that are going to follow unless you are able to effectively maintain quarantine and thus stamp out the spread of the disease.

Respectfully,
EDWARD C. TURNER,
Attorney General.

118.

"BLUE SKY LAW"—CERTIFICATE NOT REQUIRED TO SELL GOVERNMENT LAND, LOCATED IN ANOTHER STATE, IN OHIO.

The purchase by an Ohio citizen either in person or through an agent, who is present, and under written authority to bid for him, of land located in Oklahoma, which is owned and offered for sale at public auction by the United States government, does not come within the scope of the "blue sky law" to the extent of making it necessary to secure from the "blue sky" commissioner a certificate of such government land.

COLUMBUS, OHIO, March 3, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of February 26th, requesting my opinion as follows:

> "This department has on file an application by the McAlester Real Estate Exchange for a license to deal in Ohio, in real estate not located within this state.
>
> "McAlester Real Estate Exchange is in strict sense a corporation for profit, representing the city of McAlester, Okla. Its membership is made up of the business men of that city and locality. The method of operation is, briefly, this:
>
> "Representatives and employes of the exchange travel through Ohio, Indiana and other states, in a special car, stopping at certain points for a limited time, inviting the citizens of that locality to visit the car, talking with the representatives of the exchange and seeing the exhibits contained in the car, relative to the products of that section of the country. The residents of Ohio are to be asked to purchase a lot in the city of McAlester. Those lots are located in what is now the outer section of that city, containing about seventeen thousand inhabitants at this time.
>
> "We are enclosing herewith a copy of the contract which the residents of Ohio are solicited by the representatives of the exchange to sign, together with some literature which they purpose to circulate in Ohio. The main talking point—the chief consideration offered to residents of Ohio—is that to all who sign the contract for the purchase of a lot in McAlester, the McAlester exchange agent will act as agent, purchasing for them government lands which are to be offered at public auction, to take place in McAlester next fall, the exact date of which has not yet been fixed. These

government lands are designated as segregated lands, having been reserved by the government on account of timber, oil, coal, and asphalt, from the original allotment made to the Indian tribes, and it is now the purpose of the government to offer these lands at public auction to the people of the United States.

"You will, of course, realize at once that it will be impossible to obtain a definite description of these lands and incorporate the same in the application for a certificate of compliance, under section fifteen of the law. It will be possible to practically describe the lots which the exchange is offering for sale in an application for a certificate of compliance.

"The title to the town lots above mentioned is now vested in the McAlester Real Estate Exchange, that organization having title from the individuals who originally purchased the lots from the government, when the town site of McAlester was opened up and the lots sold. Those individuals have held the lots since that time, but have engaged in business or farming in that section, and are now desirous of increasing the population of McAlester and the surrounding country, and have therefore turned over to the exchange the lots, to dispose of for them, and the proceeds derived from the sale are used in defraying the expenses of the exchange, paying the employes, paying the expenses of the car, and maintaining a corps of engineers and representatives, generally.

"The question is:

"Does this method of procedure constitute an offering of those government lands for sale, within the meaning of the Ohio blue sky law and necessitate the certification of those lands under sections fifteen and sixteen of the law?

"We should state that while the McAlester Real Estate Exchange, some months ago, obtained a great deal of unpleasant notoriety on account of an adverse ruling by Mr. Cato Sells, commissioner of Indian affairs, in Washington, to the effect that the exchange had no right to offer the lands for sale, as above outlined; the adverse ruling was widely advertised and nearly all of those who purchased lots under the arrangement above mentioned, were notified that the McAlester Real Estate Exchange could not fulful its promise with regard to the Indian lands. This ruling by Cato Sells was reversed by Franklin K. Lane, secretary of the department of the interior, which not only held that the exchange had a right to offer these government lands as above mentioned, but that it should be encouraged in so doing.

"An application by the McAlester Real Estate Exchange has been pending undisposed of for quite a while, and the representatives are anxious that a final disposition be made of the same. Consequently, a ruling on the question submitted at the earliest possible moment will be appreciated.

"I might add that the car of the exchange is now in the state and the representatives are at considerable expense, though are doing nothing until authorized by this department. You will see, therefore, that justice requires that the matter be disposed of at the earliest possible moment."

Attached to the original letter copied above, as therein recited, is a form of contract of deed. As this contract is of considerable length, I quote only the sections or parts thereof pertinent to the purposes of your question.

"Section VI. First party also agrees to represent second party in the purchase of Indian lands when sold by the government, it being specifically understood that in doing so said first party merely acts as locator and

attorney, and is in no way connected with the government, neither has it any preferential rights concerning the sale of said lands, and it is further agreed that all services rendered in connection therewith are to be governed by the rules of the interior department, said services to consist of supplying second party with photos, maps, plats, soil samples, descriptions of land and an independent appraisement of 2,000 tracts, from which second party may choose land in accordance with his or her expressed desires; and first party further agrees to secure for second party at least one tract of land at the lowest price obtainable or cancel this contract and return all money paid thereon; provided, however, said second party shall comply with all conditions of the interior department at time of sale.

"Section VII. It is further agreed that said first party will undertake the following leasing and selling services; that is, to secure profitable leases on all lands purchased through the fulfillment of this contract within ninety days after the date of purchase, or sell same prior to one year from said date, and net said second party a profit sufficient to reimburse him or her for all money paid on the above mentioned lots in addition to the amount paid the government; provided, however, second party complies with all of his or her agreements as stated herein, and is only released from making payments as per contract in case of loss of employment or sickness."

The portions of sections 15 and 16 of the Ohio blue sky law (sections 6373-15 and -16 of the General Code) referred to in your question are as follows:

"Section 15. No person or company, other than a licensed dealer as hereinbefore provided, shall within this state, in repeated or successive transactions, deal in real estate not located in Ohio; and, unless so licensed and the 'commissioner' shall issue his certificate as provided in the following section, and, prior to such issuance, there shall, together with a filing fee of ten dollars, be filed with the 'commissioner' an application for such certificate, and a written statement of the dealer containing a pertinent description of the real estate the disposal of all or a part of which is sought to be made; the nature and source of the title of the owner thereto, and the amount or value and the nature of the consideration paid or allowed by him therefor, it shall, within this state, be unlawful:

"(a) For any corporation or any person, association or co-partnership doing business under any name other than the name or names of such person or of all the members of such association or co-partnership to dispose or offer to dispose of any real estate not located in Ohio.

"(b) For any person or company to sell or offer for sale any such real estate, the owner of which is, or is represented to the purchaser to be, a corporation, or any person or company of the character described in the foregoing paragraph, where such corporation, person or company is engaged in the business of dealing in real estate. * * *

"Section 16. Said 'commissioner' shall have power to make such examination of the issuer of the securities or the owner of the property, named in the two preceding sections, and of such securities or property, as he may deem advisable; and if he shall find that the law has been complied with, and is satisfied that said company is solvent, that its business is properly and legitimately conducted, and that its proposed disposal of its securities or other property is not on unfair terms, upon the payment of a fee of twenty dollars he shall issue his certificate to that effect, authorizing such disposal; but if he shall not affirmatively so find, and is not so satisfied,

he shall notify the applicant, in writing, of such finding and of his refusal to issue such certificate. Said applicant shall have the right of review of such finding given to a dealer by section eight hereof."

From the information contained in your letter and the form of contract for deed attached, it is clear that the McAlester Real Estate Exchange is not within the purview and purpose of the law dealing or attempting to deal in the government lands referred to. The company, in part consideration for the purchase from it of certain town lots in the city of McAlester, is offering to act as agent or attorney in fact for the purchasers of said lots in securing for them United States government lands which are to be sold at public auction. The company does not hold itself out as being the owner or the agent of the United States government as owner of said land, nor does it pretend to have authority to sell or to deal in the same. In fact, in section VI of the form of contract for deed, above quoted, the company stipulates that:

"It is in no way connected with the government, neither has it any preferential rights concerning the sale of the said lands."

The company simply offers to sell its services for the purposes prescribed and limited in this same section of the contract for deed. Sections 15 and 16 of the blue sky law were enacted to regulate and prevent fraud in the *sale* of lands not located in Ohio. The *purchase* by an Ohio citizen either in person or through an agent who is present and under written authority to bid for him, of land located in Oklahoma, which is owned and offered for sale at public auction by the United States government does not come within the scope of the act.

I am therefore of the opinion that the plan of procedure set forth in your letter and as revealed by the provisions of the contract for deed does not constitute an offering of such government lands for sale within the meaning of the Ohio blue sky law, and therefore a certification of those lands under sections 15 and 16 of the law is not necessary.

I have answered your question as asked, but there are other matters in connection with this application that should receive careful consideration and attention from your department.

Section 7 of the contract for deed is worded to catch the unwary. Nine persons out of ten who read the section will assume that it provides a guarantee that profitable leases will be secured within ninety days, or a sale will be made within one year sufficient to net the person signing one of these contracts sufficient to reimburse him for all money paid on both the government and the McAlester lands; whereas, in fact, the agreement only provides that the company will *undertake* to do that.

Your department should not sanction such a contract under authority of section 6376-16 of the General Code.

In section III of the contract for deed it is provided:

"When all of the purchase price of the property in the application above mentioned has been paid, the purchaser of that property will be given a gold bond issued by the Federal Guaranty Company, of Washington, D. C., in the name of and made payable to said purchaser, conditioned that the Federal Guaranty Co. will pay to the purchaser, his or her heirs or assigns, the full amount paid for said property, provided that at the maturity of said bond the owner is willing to sell said lot or lots for that price, and will legally convey merchantable title thereto."

This contract should not be sanctioned until your own investigation has shown not only that there is such a company as the "Federal Guaranty Company, of Washington, D. C.," and that it has agreed to do all the things provided for in said section III, but that in your opinion it is financially able to carry out this provision of the contract.

You should also be satisfied that the McAlester Real Estate Exchange is financially able to carry out the provisions of section V of the contract. I am assuming that you have made the statement as to the action of the secretary of the interior only after investigation.

Respectfully,
EDWARD C. TURNER,
Attorney General.

119.

MINORS MAY NOT WORK IN OR ABOUT A COAL MINE—MINES AND MINING.

A child under sixteen years of age may not work in or about or in connection with a coal mine.

COLUMBUS, OHIO, March 3, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your communication of March 1, 1915, asking for my opinion on the question submitted to you by The Hocking Mining Company, as follows:

> "Section 13002 of the mining laws of 1914, as compiled by you, states that no children under the age of sixteen years shall be employed or permitted or suffered to work in and about certain vocations therein named.
>
> "It is claimed by the mine committee of our mines that a boy who will be sixteen years of age on October 6, 1915, and who has been examined by the superintendent of schools and passed a satisfactory examination in the 6th grade, in reading, writing, spelling, geography, English grammer arithmetic, that the papers enumerated and described in section 7766 of the General Code of Ohio, and amended in 1913, and that this boy shows sufficient development, health and physical fitness to perform the labor required of him, that section 13002, therefore, is suspended under the schooling certificate, and that the boy is entitled to be employed. What do you say as to the proposition?"

In answering this question I beg to direct your attention to section 13002 of the General Code, which provides, in part, as follows:

> "No child under the age of sixteen years shall be employed, permitted or suffered to work in any capacity * * * in, about or in connection with any mine, coal breaker, coke oven or quarry. * * *"

It is true that under the provisions of section 7766 of the General Code, as amended April 28, 1913, 103 O. L., page 899, any male child over fifteen years of

age, or any female child over eighteen years of age, may be employed by any person, company or corporation in this state, provided said child obtains the schooling certificate therein provided for, save and except, however,

> "that the employment contemplated by the child is not prohibited by any law regulating the employment of such children."

The law as found in said section 13002 does prohibit the working in or about or in connection with any coal mine of children under the age of sixteen years. Hence, a boy who will not be sixteen years of age until October 6, 1915, cannot now work in, about or in connection with a coal mine in this state.

The letter of The Hocking Mining Company addressed to you is returned herewith.

Respectfully,
EDWARD C. TURNER,
Attorney General.

120.

ROAD IMPROVEMENT—CHANGE OF GRADE WHERE IT IS NECESSARY TO MAKE CUT IN INTERSECTING ROAD—COST TO BE APPORTIONED ON ROAD IMPROVEMENT.

Where a pike is improved under the provisions of sections 6956-1 *to* 6956-15, *G. C., inclusive, and the grade is changed at a point where the pike is intersected by another road, thus rendering it necessary to make a cut in the intersecting road, the cost of this cut must be regarded as part of the cost of improving the pike and apportioned accordingly.*

COLUMBUS, OHIO, March 4, 1915.

HON. JOSEPH W. HORNER, *Prosecuting Attorney, Newark, Ohio.*

SIR:—I have your communication of February 26, 1915, in which you state that in the construction of the Linnville Pike in Licking county, there was a cut of several feet at one point, and at this particular cut there was a road that intersected the Linnville pike. In making the cut the other road was left several feet above the grade of the new pike and in order that the other road could be used it was necessary to cut it back from the Linnville pike for a distance of about sixty feet. The Linnville pike was constructed under the provisions of sections 6956-1 to 6956-15, inclusive, of the General Code. The above statement of facts is gathered partly from your communication above referred to, and partly from your oral statements. You now inquire whether the expense of the cut for the other road should be added to the cost of the Linnville pike and apportioned as part of the cost and expense of said improvement, or whether the entire cost and expense of the cut should be paid by the county.

Section 6956-10, G. C., provides that when the improvement is wholly within one county "the cost and expense of said improvement including all damages and compensation awarded" shall be apportioned by the commissioners in accordance with certain provisions therein contained.

Section 6056-11, G. C., provides for dividing and assessing "the cost and expense of the entire improvement including all damages and compensation awarded," in cases where the improvement is in more than one county or along the line

between two or more counties. Sections 6956-5, 6956-6 and 6956-7 contain elaborate provisions for the filing of claims for compensation and damages and for the adjudication of the same. It is apparent from an examination of the above cited sections that it was the intention of the legislature that all the cost and expense of a highway constructed under the scheme of road improvement provided by sections 6956-1 to 6956-15, G. C., inclusive, should be apportioned according to section 6956-10 between the county, the township or townships in which the improvement is situated in whole or in part, and the owners of benefited real estate.

It appears from your statement of fact that the cut in the intersecting highway was rendered necessary solely by the construction of the Linnville pike at a new grade. If the grade of the Linnville pike had not been lowered, it would not have been necessary to do any work on the intersecting road. I am unable to see any distinction in principle between the cost of making the cut on the intersecting road and the compensation and damages that may be awarded, or indeed between the cost of the cut and the cost of any other part of the work.

I am, therefore, of the opinion that the cost of making the cut on the intersecting road must be regarded as part of the cost and expense or constructing the Linnville pike and apportioned according to the provisions of section 6956-10, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney General.

121.

REVENUES RECEIVED FROM WILBERFORCE UNIVERSITY COME UNDER THE PROVISIONS OF THE MOONEY BILL.

There is nothing in the Mooney bill, 104 *O. L.,* 179, *which repeals section* 7986, *G. C. However, said section must be read in connection with said Mooney bill and the revenues received under the latter part of section* 7986, *G. C., must be paid into the state treasury and appropriated out of same.*

COLUMBUS, OHIO, March 4, 1915.

HON. E. M. FULLINGTON, *Budget Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 2, 1915, wherein you inquire as follows:

> "I would like to have your opinion or construction of the last provision of section 7986 of the General Code, which reads as follows:
>
> "'All revenue arising from tuitions, sales of products or otherwise under the aforesaid department shall be applied by its board of trustees to defray its expenses, or to increase its efficiency, a strict account of which shall be kept by the department board, and accompany the report to the governor.'
>
> "The following is a statement of facts: The department referred to in the above quotation is the combined normal and industrial department at Wilberforce. This department was organized in 1887, reorganized in 1896, and carries on normal and industrial work. Effort is made by its board and management to encourage industry, thrift and intelligence of the pupils, and in so doing they are taught to work and take an interest in carrying on useful operations under the several industrial departments. There are

at times small returns from these products, amounting to about nine hundred dollars per year, which fund has heretofore been used in improving the condition of the institution under the above quoted section.

"This department having no rotary fund, under the Mooney bill this money has been paid into the treasury to the credit of the department producing it and utilized in the interest of said department by the purchase of material and supplies or increasing the work. We desire to know whether there in anything in the Mooney bill or subsequent enactments repealing this section."

Your specific inquiry as to whether there is anything in the Mooney bill or subsequent enactments repealing section 7986 can best be answered by referring to the Mooney bill which is found in 104 O. L., 179, and is an amendment of section 24 of the General Code. Section 3 of said act provides as follows:

"All sections and parts of sections of the General Code which provide for the custody, management and control of moneys arising from the payment to any state officer, state institution, department, board, commission, college, normal school or university receiving state aid of any fees, taxes, assessments, licenses, premiums, penalties, fines, costs, sales, rentals, or other charges or indebtedness and which are inconsistent with the provisions of section 24 of the General Code as herein amended, are, to the extent of such inconsistency, hereby repealed."

Under section 24 as amended in the Mooney bill it is the duty of the combined normal and industrial department at Wilberforce on or before Monday of each week to turn over the money referred to in your inquiry to the state treasurer to be paid by him into the state treasury; and if section 7986 is in any way in conflict with said section 24, the same is by reason of section 3 of the Mooney bill repealed, insofar as the same is inconsistent. However, the two can in my opinion stand together for the reason that section 7986 simply provides as to how the moneys received from tuition, sale of products, etc., shall be applied by the board of trustees. If the money is paid into the state treasury in accordance with the Mooney bill, and after appropriation by the legislature, the application of such money for the purposes of the combined normal and industrial school must be in accordance with section 7986. The money having been paid into the state treasury under the Mooney bill cannot be drawn from said treasury "except in pursuance of a specific appropriation made by law." (Article II, section 22 of the Ohio constitution.)

In order to overcome the difficulty which confronts the Wilberforce institution it will be necessary for the legislature not only to appropriate a specific sum which may equal the exact balance in the fund derived from the revenues in question, but also it will be necessary to appropriate the "receipts" which may come into the fund during the life of the appropriation.

I am informed that in the new budget about to be passed by the legislature to cover the period from February 15th to July 1, 1915, there are several funds therein appropriated, which funds not only appropriate specific sums but also "receipts" that will be received during said period and placed in such fund.

Nowhere in the law pertaining to the combined normal and industrial department at Wilberforce is there any provision for a specific fund to be kept in the state treasury; but since section 7986 requires that the revenues derived from tuition, sale of products, etc., shall be applied by the board of trustees to defray its expenses or to increase its efficiency, I am of the opinion that said funds can be used for no other purposes, and that consequently although there is no mention

of a fund by a specific name, nevertheless upon the payment into the state treasury of the revenues in question a specific fund would arise, the receipt being kept separate and apart from other receipts in the state treasury.

Specifically answering your question therefore I would state that there is nothing in the Mooney bill or subsequent enactments so far as I am aware that repeals section 7986. So much of said section as is quoted by you in your letter providing how the revenues arising from tuition, sales of products, etc., shall be applied by the board of trustees refers solely to the manner in which such revenues shall be used. The Mooney bill however requires that such revenues shall be paid into the state treasury and being so paid in a specific appropriation will be necessary. In order to constitute the fund created thereby a rotary fund, it will be necessary that the "receipts" received during the period of appropriation be likewise appropriated as well as whatever amount is in the fund at the time the appropriation is made.

Respectfully,
EDWARD C. TURNER,
Attorney General.

122.

EFFECT OF THE WORDS "HEREINAFTER" AND "HEREIN" AS USED IN CONNECTION WITH HOUSE BILL NO. 245.

The use of the word "hereinafter" in house bill No. 245, would render section 11425, G. C., inoperative.

COLUMBUS, OHIO, March 5, 1915.

HON. FRANK B. WILLIS, *Governor, Columbus, Ohio.*

DEAR SIR:—My attention has been called to house bill No. 245, Mr. Danford, which has passed, and is probably now before you.

In the amendment of section 11, 425, occurs the language:

> "* * * may appoint a judicious and disinterested person to take the pledge of such commissioner to perform the duties *hereinafter* provided for."

The legislature has attempted to amend the word "herein" in the original section, so as to make it read "hereinafter." As I read the entire act, as found in 103 O. L., page 512, this amendment would tend to make the section inoperative. In drawing this bill, it was doubtless thought that the word "herein" was ambiguous, and the drawer of the bill evidently assumed that the duties of the jury commissioner were provided for in *subsequent* sections, whereas as a matter of fact, while there are some duties provided in a subsequent section, the principal duties are provided for in *preceding* sections. If the legislature is not satisfied with the word "herein" it should use apt words to cover all of the duties in the original act. My own opinion is that the word "herein" would be sufficient, as this present bill would be read as a part of the original bill.

I am clearly of the opinion that this bill should not be signed, if the copy presented to you contains the word "hereinafter."

Respectfully,
EDWARD C. TURNER,
Attorney General.

123.

BOARD OF ADMINISTRATION—PENITENTIARY—SENTENCE ENFORCING SOLITARY CONFINEMENT OF A CONVICT.

A provision for solitary confinement included in sentence of a convict to the penitentiary is to be carried out in the enforcement of the sentence, until modified by competent authority. Sentence of the court is not to be supplemented or modified by non-judicial or ministerial officer.

COLUMBUS, OHIO, March 5, 1915.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge receipt of your favor of March 2, which is as follows:

> "I am enclosing herewith a letter from Mr. P. E. Thomas, warden of the Ohio penitentiary, concerning Aleck Kish, No. 43394, who was sentenced by the common pleas court of Seneca county to serve a life sentence in the Ohio penitentiary for murder in the first degree.
>
> "As you will note, the warden advises us that the commitment papers provide also that the first five days of each month of said life sentence shall be spent in solitary confinement.
>
> "Your opinion is respectfully requested as to whether or not this provision of the commitment must be obeyed."

With your letter you enclose the communication from the warden of the Ohio penitentiary addressed to you under date of February 26, 1915, which is as follows:

> "The commitment paper of Aleck Kish, alias Alexander Kish, No. 43394, received from Seneca county to serve a life sentence for murder in the first degree, with mercy, calls for the first five days of each month to be spent in solitary confinement.
>
> "I am questioning the propriety of executing the solitary confinement end of this commitment, and I would like to be advised whether I should carry it into execution or not."

With reference to the question submitted, permit me to invite your attention to the provisions of section 12374 of the General Code, which section is as follows:

> "When sentencing a person to imprisonment in the penitentiary, the court shall declare for what period he shall be kept at hard labor, and for what period, if any, he shall be kept in solitary confinement without labor."

It was under the authority granted in the above section and that contained in section 12400 that the judge sentenced the prisoner, Aleck Kish, to serve a life sentence for murder in the first degree and included as a part of the sentence that the first five days of each month be spent in solitary confinement. The purpose of the law was fully carried out by the court in inflicting the aforesaid sentence in that it is certain and definite and comes within the rule laid down in the case of In re Calvin L. Moore, which was decided in 14 O. C. C. reports, at page 237. In that case it was held that:

> "A sentence in a criminal case must be so complete as to need no

construction of a court to ascertain its import, so that the offender may not have to look between the lines for its meaning, and it cannot be supplemented by a non-judicial or ministerial officer."

Pertinent to the observation of Warden Thomas as to his questioning the propriety of executing the solitary confinement end of the commitment, it will be noted that this matter has been passed on by the supreme court of the state of Ohio in the case of Ex parte Peter Clark and James Clark, reported at page 649, volume 50 of the Ohio state reports, and it was held in that case that under section 6799 (now section 12374, G. C.) of the Revised Statutes:

"* * * the court sentencing a person convicted of a crime punishable by imprisonment in the penitentiary, is authorized and required to declare in the sentence for what period he shall be kept at hard labor, and for what period, if any, he shall be kept in solitary confinement, and render judgment against him for the costs of prosecution."

Under the provisions of section 13720 it is provided that a prisoner sentenced to the penitentiary is to be delivered to the warden of the penitentiary with a copy of the sentence, there to be kept until the term of his imprisonment expires or he is pardoned.

I am of the opinion, therefore, that as the sentence inflicted by the court in the case under consideration was legal that there is no discretion lodged in the warden of the Ohio penitentiary to disregard its provisions, and that it should be carried into full effect until such time as it may be modified by competent authority.

Respectfully,
EDWARD C. TURNER,
Attorney General.

124.

BOARD OF ADMINISTRATION—RECEIPTS OF OHIO STATE SANATORIUM MUST BE PAID INTO STATE TREASURY—MONEYS RECEIVED CANNOT BE CREDITED TO A SPECIFIC FUND.

Section 2072, G. C., is amended so far as inconsistent with section 24, 103 O. L., 178. Moneys received under section 2072, G. C., are to be paid into the state treasury to the credit of a specific fund and not paid into the general revenue fund.

COLUMBUS, OHIO, March 6, 1915.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of March 3rd, wherein you state as follows:

"Section 2072, G. C., provides as follows:

"For the maintenance of the sanatorium the board of trustees may receive and expend all money paid to it by patients for treatment therein, or money received from other sources, but compensation for work done by patients in accordance with this chapter shall be paid from such moneys,

if any part thereof is unexpended. The superintendent shall make monthly reports in detail to the auditor of state of all moneys received and expended under this provision.

"Will you please advise this department if the above section is still in force and effect; also, if the opinion rendered by you under date of March 2nd, to the auditor of state as to receipts from the sales of manufactured articles under section 1866, G. C., would hold good in the case of receipts at the Ohio State Sanatorium?

"The appropriation bill for the year ended February 15, 1915, reads as follows:

"Personal service, receipts from the Ohio State Sanatorium and * * * $1,384,657.00.

"The present appropriation bills do not provide for the appropriating of the receipts of that institution.

"Providing some arrangement is not made for the receipts at that institution to be reappropriated for the benefit of same, would they not go to the general revenue fund of the state?

"In preparing the budget for the maintenance of the Ohio State Sanatorium, the full amount required for that institution was requested with no offset on account of receipts."

Your inquiry divides itself into two questions to be answered. First, whether or not section 2072, G. C., set out in full in your letter, is still in force and effect.

Section 24 G. C., was amended 104 O. L., 178, by what is known as the "Mooney" bill, which provided for the amendment of section 24 so as to require each state department or board on or before the Monday of each week to pay to the treasurer of state

> "all moneys, checks and drafts received for the state, or for the use of such * * * state institution, department, board, * * * during the preceding week from * * * fees * * * costs * * * or otherwise, and file with the auditor of state a detailed verified statement of such receipts * * *."

The Ohio State Sanatorium which is provided for under sections 2052 to 2072, inclusive, of the General Code, is, by virtue of section 1838 of the General Code, to be administered by the board of administration. Therefore, the term "board of trustees" as used in section 2072, is to be read as if it stated "board of administration." Your board is authorized to receive and expend all money paid by patients for treatment in the Ohio State Sanatorium, and money received from other sources. The money as received under said section is, as I view it, undoubtedly received either for the state or for the use of your board.

Under section 2068 it is provided that any citizen of the state of more than seven years of age suffering from pulmonary tuberculosis may be admitted to the sanatorium upon payment in advance of $5.00 each week, which shall include all necessary medical expenses. Such a charge is, as I view it, a fee, or at least a cost of the state for the maintenance of the patient in the sanatorium. Therefore, I am of the opinion that the moneys received under section 2072 are, by virtue of section 24 as amended, to be paid to the treasurer of state when received by the board.

Section 2072 provides, however, that the board may "receive and expend all moneys paid to it by patients for treatment therein." It is clear from what will be hereinafter stated, that it was in the contemplation of the legislature at the time

of the enactment of section 2072, that the moneys so received should be received and expended by the board without the same being paid into the state treasury.

However, section 3 of the Mooney bill, 104 O. L., 178, provides that,

> "all sections and parts of sections of the General Code which provide for the custody, management and control of moneys arising from the payment to any * * * state institution, department, board * * * of any * * * fees * * * or other charges or indebtedness, and which are inconsistent with the provisions of section 24 of the General Code, as herein amended, are, *to the extent of such inconsistency, hereby repealed.*"

I am of the opinion, therefore, to the extent that section 2072 provided for the management and control of all the moneys received thereunder, that said section 2072 is repealed; that is to say, your board may no longer retain and pay out the moneys as such board, but must under the provisions of the Mooney bill pay the same into the state treasury, to be paid out of such treasury on voucher to state auditor.

The next question which naturally arises is: To what fund the moneys paid in under section 2072 by virtue of the Mooney bill are to be credited?

There is no provision in the Mooney bill specifying to what fund the moneys that are received thereunder, for which provision has not heretofore been made as to the creation of a fund in the state treasury, are to be credited. The only provision in the Mooney bill is that the same shall be paid to the state treasurer, but so far as the moneys concerning which you inquire as well as the receipts from the sale of manufactured articles under section 1866 concerning which I have heretofore given you an opinion, are concerned, it is to be noted that in each specific instance there is a provision as to the use to which such moneys shall be put. For instance, section 2072 states that your board may receive and expend the moneys paid to it by patients for treatment therein and moneys received from other sources "for the maintenance of the sanatorium" and also states that the compensation for work done by patients shall be paid from such moneys if any part thereof is unexpended. It is clear, therefore, that the general assembly did not attempt to make the charge for support and medical attendance against the patients of the Ohio State Sanatorium for the purpose of general revenue, but solely for the purposes of maintenance of such institution. Therefore, the money is, when paid into the state treasury, under the Mooney bill impressed with a trust to be used for the purposes for which raised.

In so stating I am not at all unmindful of the provisions of section 270, G. C., which provides in part as follows:

> "All moneys paid into the state treasury, the disposition of which is not otherwise provided for by law, shall be credited by the auditor of state to the general revenue fund,"

but such section does not, as I view it, require the payment of the moneys under discussion into the state treasury to the credit of the general revenue fund for the reason that the disposition of such moneys, that is to say, the ultimate purpose for which such moneys are required by the other statutes to be applied, is otherwise specifically provided for.

Answering your question, specifically, therefore, I would state that I am of the

opinion, and so advise, that said section 2072 of the General Code is still in force and effect, except insofar as its provisions are inconsistent with section 24, as amended 104 O. L., 178; that the moneys received under section 2072 paid in under section 24 as amended, are to be kept separate and distinct from the general revenue fund specifically for the purposes for which received.

In your letter you call attention to the fact that the appropriation for the year ending February 15, 1915, 104 O. L., 64, contained the following appropriation at page 69:

"Personal service, receipts from the Ohio State Sanatorium, $1,384,657.00."

Therefore, it would appear that the legislature has construed the amendment to section 24 in the same manner as I have herein indicated.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

125.

SUGGESTIONS FOR ENACTMENT OF LAWS BY SECTIONS.

COLUMBUS, OHIO, March 8, 1915.

To the Members and Officers of the 81st General Assembly of Ohio, Columbus, Ohio.

GENTLEMEN:—May I respectfully call your attention to what is probably an oversight.

The purpose of the recent codification of the statutes was to arrange them under separate and suitable titles, divisions, subdivisions, chapters and sections. The reason and necessity for such codification is obvious.

At the time of the adoption of the last codification, the general assembly enacted what is known as section 342-1, which provides:

> "The attorney general shall be the codifier of the laws of the state. When an act of a general and permanent nature is passed by the general assembly and has been enrolled and signed by the necessary officers and before it is filed with the secretary of state, the attorney general shall examine the same. If there is no sectional numbering in the act or such numbering is not in conformity to the General Code he shall give each section of the act so passed its proper sectional or supplemental sectional number by writing or printing on the left hand margin of the enrolled bill such proper number or numbers, and the number so designated by him shall be the official number. Such numbers so placed shall be published in the session laws and in any publication of the General Code. It shall be a sufficient reference to any section to refer to it by such official number."

It is highly essential that the duty under the foregoing section be carried out carefully but unless the legislature constantly keeps in mind the scheme of

codification, the attorney general will be seriously handicapped as his authority is limited to giving the sections numbers. Any power he had to edit was taken away by the repeal of section 342-3 (103 O. L., 860).

Let me offer an illustration: The honest election bill, H. B. No. 80, contains seventeen sections, covering (a) contest of elections, (b) conduct of elections, (c) corrupt practice, (d) penal sections, and there are appropriate divisions of the Code into which these various sections should fall. Under the codification scheme it is the duty of the attorney general to distribute these seventeen sections in various parts of the Code. Owing however to the fact that the bill has been so drawn that the various sections are hopelessly inter-related, this cannot be done.

The first seven sections apply to a contest and should appear in the Code as a part of chapter 11, title XIV, division V of part 1.

Sections 8, 9 and 10 relate to the casting and counting of votes and should appear in chapter IX of said title, division and part.

Section 15 relates to corrupt practices and should appear in chapter 12a of said title, division and part.

Sections 11, 12, 13, 14, and 17 make certain acts misdemeanors, and should appear in chapter 12, title I of part IV, but to place them there would make said sections meaningless. Section 11 provides:

> "Whoever violates any of the provisions of sections 9 *or* 10 *of this act* shall be guilty of a misdemeanor, etc.,"

and the attorney general has no authority to substitute for the words "section 9 or 10 of this act" any other words or even the Code section numbers he has given to sections 9 and 10 of the act.

Section 12 provides that a person who prevents or hinders an inspector or challenger "from performing his official duty under the provisions *of this act*" shall be guilty of a misdemeanor. But to find the penalty for this misdemeanor reference must be had to section 17 of the act.

Section 13 makes a misdemeanor the doing of certain things with respect to "any question or proposition submitted at *such* an election." Again reference must be had to section 17 for the penalty.

Section 14 is general but not complete for the reason that we must look to section 17 for the penalty.

Section 17 provides: "Any person convicted of a misdemeanor under sections 12, 13 or 14 *of this act*" shall be fined, etc.

Section 16 provides: "A violation of any of the provisions *of this act* shall constitute a prima facie case of fraud within the *purview of this act.*" If this section were separated from either of several parts of the act its relation to the other parts would not be apparent when it appears in the Code.

Section 10 relating to the counting of blank ballots is general, and applies to all elections. It should not be hidden away with sections under the wrong title. By reason of the relation of section 11 and other sections to said section 10, said section 10 cannot be separated. Election officials and others will read the chapter on "casting and counting of votes" and suppose that they have read the entire law yet they will have missed a very important section.

If this law is to be understandable in the Code, there remained nothing for me to do but to choose some one place where it should be put in its entirety—the very practice which the plan of codification sought to eliminate. One of the several places was just as appropriate (and just as inappropriate) as the other. I placed it

in the chapter on contests, although it might just as appropriately have been placed in the chapter on corrupt practice, or in the chapter on the casting and counting of votes.

Knowing that the general assembly as a body is desirous of having its acts clear and understandable and recognizing the right of the public to have the statutory law in such shape as that they might readily find it, may I not suggest that in instances like the above care be exercised to make the sections of such a bill independent of each other, keeping in mind that the sections of a bill are to be distributed throughout the General Code where the public will be able to find them. The use in the body of a bill of section numbers other than section numbers of the General Code is confusing and should be avoided if possible.

The practice to which I call attention is by no means new and so far as I can remember every preceding session has done the same thing. But the practice ought to be stopped and your session of the general assembly will, I am sure, receive the thanks not only of the bench and bar, but of the public generally if you will do your part toward clarifying the statutory law.

The foregoing is submitted not in any spirit of criticism but in the hope that the suggestions contained above may be helpful.

Respectfully,
EDWARD C. TURNER,
Attorney General.

126.

SUGGESTIONS TO THE STATE TREASURER IN REGARD TO THE EFFECT OF SENATE BILL NO. 280.

COLUMBUS, OHIO, March 8, 1915.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Your request for advice, under date of March 3, 1915, received, reading as follows:

> "The time for the biennial letting of state funds is drawing near, and as a consequence the treasurer is having quite a few inquiries concerning senate bill No. 280, section 2288-1, and known as, 'an act making first mortgage loans security for the deposits of public moneys.'
>
> "This act in my opinion is vicious and kills the real merit in the depository laws.
>
> "Suppose every bank in Ohio that wants to be a borrower of state money would take advantage of this act. The result would be we would not have a place large enough to keep the mortgages in.
>
> "Suppose some bank, with first mortgages held by the state for loans,

would collapse (and they occassionally do). The state would be placed in the shape of collecting on all these mortgages held * * * a fine position, I am sure.

"Any suggestions for the guidance of the treasurer in this important matter will be highly appreciated.

"As treasurer, I am anxious to serve the public; but my first duty is to the state and as I see it this act spells trouble for the treasurer, the attorney general and the state.

"As the bids for state money are opened Monday, March 15, at 1:30 p. m., an early reply is requested."

I agree fully with all that you may say and more, but as long as this law remains unrepealed nothing can be done, except follow it. Whatever may be said in favor of such a law as applied to local subdivisions where they are or may easily become familiar with values, with all the records accessible, etc., the law should not be applied to the state treasury funds. If this law is allowed to stand prudence dictates that we must not only review the appraisements but the abstracts and mortgages as well, and this would entail a very large amount of work on this department, together with its attendant expense.

In my opinion the theory of this law is wrong. Outside of the workmen's compensation fund and the school fund, the state has no money to invest and its subdivisions have none at all for investment. The moneys are collected for current expenses and to allow the funds of the state treasury or those of the treasuries of any of the subdivisions to be placed outside of the respective treasuries on anything but practically certain liquid assets, such as municipal bonds which may be readily sold, is a serious mistake in policy. Public moneys are collected for current use—not for use in a few years hence.

Mortgages may be sold, sometimes, but it would undoubtedly develop the first time that we have a failure (and failures will come as they have in the past), that a large part of such security cannot be realized on at once, except at a sacrifice. The result would be that the subdivisions would have to issue bonds to tide them over while they are waiting for the mortgage securities to mature and then, after maturity, for foreclosure proceedings, in many instances, to be brought.

A great majority of the mortgages of today are payable in monthly installments. The collection of these by a going concern is not difficult, but if the concern failed then you, as state treasurer, would be compelled to take up these collections in any part of the state, in case the mortgage could not be sold for one hundred cents on the dollar. Another serious question which would present itself is the matter of handling these installment payments for even going concerns, as the mortgagee has a right to have the amount credited as it is paid, and the office force of your department would undoubtedly have to be increased to take care of this matter.

Valuations and good title are both matters of opinion and on the former, especially, opinion frequently varies widely. It is a matter of common observation that some institutions will loan on a supposed fifty per cent. valuation where others have declined to do so on the same property.

It should be the policy of the state to allow nothing to be taken as security for the deposit of public moneys except such securities as may be realized on with certainty at once. The state ought not to allow surety bonds to be accepted unless such company has made a deposit in Ohio which may be reached promptly. We now have pending in this office a claim upon a judgment against a foreign

surety company as surety for public moneys and it will be necessary for this department to send a representative to Texas to bring another action in the courts to recover the money.

I think it would be quite appropriate to call this matter to the attention of the legislature.

Respectfully,
EDWARD C. TURNER,
Attorney General.

127.

COUNTY COMMISSIONERS HAVE AUTHORITY TO PROVIDE FOR DRAGGING OF ROAD.

Sections 7060-1 to 7060-4, G. C., 103 O. L., 402, do not prohibit county commissioners from expending money for the repairs, including dragging of highways which other sections of the code place in their charge.

COLUMBUS, OHIO, March 8, 1915.

HON. F. C. GOODRICH, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—I have your communication of March 4, 1915, in which you call my attention to sections 7060-1 to 7060-4, inclusive, of the General Code, found in 103 O. L., 402, and inquire whether or not these sections prohibit county commissioners from spending any money for the repair, including dragging, of highways which other sections of the Code place in their charge. You further state that some of the townships in Miami county have not made provisions in their tax levy to take care of all of the roads in these townships and that if these roads are maintained this year, it will be necessary for the county commissioners to act in the matter.

The act to which you refer is the township road dragging act, and section 7060-1, G. C., provides for the designation and compensation of the dragging superintendent. Section 7060-2 provides for the establishment of dragging districts and the purchase of road drags, prescribes a form for return cards and dragging records, and fixes the maximum compensation to be allowed for dragging and the time and method of paying the same. Section 7060-3 sets out in detail the duties of the dragging superintendent. Section 7060-4 provides a penalty for any violation of the dragging act, including neglect on the part of any township trustees to set aside the funds required by the act.

The township road dragging act does not expressly repeal any other sections of the General Code, and if it does operate to repeal any other sections or parts thereof, the repeal is by implication.

Repeals by implication are not favored and will not be indulged unless it is manifest that the legislature so intended.

The doctrine of implied repeal does not apply except where the inconsistency or repugnancy is such that the two provisions cannot stand as cumulative or concurrent rules of action. Raudebaugh v. State, 6 O. S., 307.

The repugnancy between the provisions of two statutes must be clearer and so contrary to each other that they cannot be reconciled in order to make the later operate as a repeal of the former. Cass v. Dillon, 2 O. S., 607.

If by fair and reasonable interpretation acts which are seemingly incompatible or contradictory, may be enforced and made to operate in harmony and

without absurdity, both will be upheld and the later one will not be regarded as repealing the former by construction or intendment. Eggleston v. Harrison, 61 O. S., 397.

I am unable to say that there is such inconsistency or repugnancy between the law requiring the township trustees to provide for the dragging of certain roads in their respective townships and the laws giving county commissioners authority to act in the same matter that the two cannot stand as cumulative and concurrent provisions. On the other hand, I am of the opinion that by fair and reasonable interpretation the township road dragging law may be enforced and made to operate in harmony with other statutes in force at the time of its adoption.

I am, therefore, of the opinion that sections 7060-1 to 7060-4, inclusive, of the General Code, 103 O. L., 402, do not prohibit the county commissioners from expending money for the repair, including dragging, of highways which other sections of the Code place in their charge.

Respectfully,
EDWARD C. TURNER,
Attorney General.

128.

STATE LIQUOR LICENSING BOARD—EXCESS OF ACTUAL COSTS OF RECORDS BEFORE COUNTY BOARDS TO BE PAID INTO STATE TREASURY.

The state liquor licensing board is without authority to issue vouchers to reimburse persons who have heretofore made deposits in excess of actual costs of records of proceedings before county boards, requested by them, which excess was thereafter paid into the state treasury.

COLUMBUS, OHIO, March 9, 1915.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—In yours of February 20, 1915, you submit for opinion the following:

> "Please permit us to direct your attention to sections 30 and 39 of the Greenlund act (state liquor license law) and to advise you that under the provisions of these sections there have been remitted to the secretary of the state board from time to time by the various county boards certain sums of money, which have been by him deposited with the state treasurer as provided by law. Amounts have been remitted in numerous instances in excess of the actual cost of transcript, etc.
>
> "Will you kindly advise the state board whether it may lawfully issue its vouchers to reimburse the persons making deposits for the amount in excess of the actual cost in the various instances?"

Section 29 of the license law, 1261-44, G. C., (103 O. L., 227) provides for a hearing before a county board upon the rejection of an application for license and in cases when county boards are about to consider the revocation of a license.

Section 30 of the license law, 1261-45, G. C. (103 O. L., 229, provides as follows:

"At said hearing upon the deposit of such sum as the board may require, the said board shall, if requested at the beginning of the hearing by the applicant or licensee, or the attorney designated by complainants, heretofore provided for, preserve a record of the testimony with all the proceedings of the board therein. Such sum so deposited shall be transmitted to the state board in the same manner as the application fee heretofore provided."

Section 38 of the license law, 1261-53, G. C. (103 O. L., 233), provides for an appeal to the state board from final decisions of any county board in certain cases.

Section 39 of the license law, 1261-54, G. C., (103 O. L., 233) provides as follows:

"In all cases where appeal to the state board is provided, the county board shall, within five days after personal notice of its final action to the applicant or licensee, cause to be prepared a complete and true record of the proceedings, providing the applicant or licensee shall have requested the same within one day after the receipt of such notice, and shall have paid to the board the amount estimated by the board to be necessary to cover the cost of the same which amount shall be immediately transmitted to the secretary of the state board as provided herein for transmission of other fees paid to the county board. The said record shall thereupon be transmitted by the board forthwith to the state liquor licensing board."

The manifest purpose of the preservation of the record of testimony and proceedings as provided in 1261-45, G. C., and a preparation of a complete and true record of the proceedings as prescribed in 1261-54, G. C., as contemplated in such enactments is for use upon appeal as set forth in section 1261-53, G. C. An applicant or licensee, however, will be entitled to such record for any purpose satisfactory to himself upon the deposit or payment of the sums by law required.

It will be noted that by section 1261-45, G. C., it is provided that "upon the deposit of such sum as the board may require," the board shall preserve a record of the testimony and proceedings, while section 1261-54, G. C., provides that the county board shall cause to be prepared a complete and true record of the proceedings "providing * * * the applicant or licensee shall have paid to the board the amount estimated by the board to be necessary to cover the cost of the same." Without extended discussion, it is clear to my mind that the sole purpose of these provisions and object to be attained by the "payment" and "deposit" required are the satisfaction and discharge of the necessary and proper costs of the preparation and preservation of a record of the proceedings referred to. That is to say, the payment and deposit required to be made are in effect in either case solely for the purpose of securing the payment of the costs necessarily incident to the preservation and preparation of a record of the proceedings had before the county board.

In my view notwithstanding the difference in phraseology of sections 1261-45 and 1261-54, G. C., here referred to, when it is borne in mind that the above quoted provisions are founded upon the same reason, and are intended to attain the same end and no other, the conclusion that in effect and to every intent and purpose of this act they are identical in meaning is fully warranted. In other words, when a record of the proceedings and testimony is desired by the applicant or licensee,

he is required to deposit with the county board at the time of making request therefor, such sum as the county board in the exercise of its discretion may then estimate to be sufficient to cover the costs of same.

Out of such deposit or payment, it is the duty of the county board to retain, as soon as the same is definitely ascertainable, the necessary and proper costs of the preservation or preparation of such record, as the case may be and, under the provisions of the sections above quoted, to transmit such costs of record to the secretary of the state board, which shall be "by him paid into the state treasury daily." (1261-61, G. C.)

Every purpose of the deposit then having been fully attained, the residue of such deposit, if any, should be by the county board repaid to the depositor. In the application of this view of the law, no part of the deposit to which the applicant or licensee may be entitled will reach the state treasury.

Coming to a consideration of those deposits in excess of the cost of the record which have already been paid into the treasury of state, it will be observed that they are clearly within the provisions of section 22 of article II of the constitution, and may not be drawn from the treasury, except in pursuance of a specific appropriation, made by law.

That part of the appropriation act of February 17, 1914, (104 O. L., 64), insofar as applicable hereto, is as follows:

> "There is hereby appropriated for the salaries, uses and purposes of the state liquor licensing board and the county liquor licensing boards the receipts and balances in the state liquor fund."

The "uses and purposes" therein referred to are confined to those expenditures from the state treasury which are by statute specifically authorized to be made by the state liquor licensing board and the county liquor licensing boards. Not only is there a lack of statutory authority for the payment of refunders from the state treasury in the cases referred to by you, but in my view of the law no occasion for such refunders was contemplated by the legislature.

I am, therefore, of opinion that any excess of deposits above actual costs of record which have heretofore been paid into the state treasury, may not be repaid to the depositors without further legislative authority therefor.

Respectfully,
EDWARD C. TURNER,
Attorney General.

129.

SUPERINTENDENT OF BANKS—LIQUIDATING DEPARTMENT—EMPLOYMENT OF EXPERT ACCOUNTANTS TO AUDIT AFFAIRS OF PARTICULAR BANK.

The superintendent of banks under sections 742 and 742-4, G. C., is authorized by and with the consent of the common pleas court of the county in which a bank in the process of liquidation is located, to employ expert accountants to audit and put in proper shape the affairs of such bank.

COLUMBUS, OHIO, March 9, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of March 3 requesting my opinion as follows:

"The liquidating division of this department has on its hands fourteen banks which are in the process of liquidation. The affairs of this department are in such a chaotic condition that in the judgment of the superintendent of banks a firm of expert accountants should be employed to audit its affairs and assist in putting it in such shape that the affairs of these banks may be disposed of in an economical and expeditious manner.

"It would appear from section 742-4 that the superintendent with the approval of the court, might employ such assistance, but before proceeding definitely in the matter we should like to have your advice."

Sections 742 and 742-4 of the General Code, are as follows:

"Section 742. Whenever in this act it is provided that the superintendent of banks may take possession of the property and business of any corporation, company, commercial bank, savings bank, safe deposit company, trust company or any combination of two or more of such classes of business or society for savings, or banking association, doing business under the provisions of the banking laws of this state, to liquidate its affairs, the superintendent of banks shall take possession of and administer the assets of such company or association as herein provided.

"The expenses incurred by the superintendent of banks in the liquidation of any bank in accordance with the provisions of this act, shall include the expenses of deputy or assistants, clerks and examiners employed in such liquidation, together with reasonable attorney fees for counsel employed by said superintendent of banks in the course of such liquidation. Such compensation of counsel, of deputies or assistants, clerks and examiners in the liquidation of any corporation, company, society or association, and all expenses of supervision and liquidation shall be fixed by the superintendent of banks, subject to the approval of the common pleas court of the county in which the office of such corporation, company, society or association was located on notice to such corporation, company, society or association. The expense of such liquidation shall be paid out of the property of such corporation, company, society or association in hands of said superintendent of banks, and such expenses shall be a valid charge against the property in the hands of said superintendent of banks and shall be paid first, in the order of priority."

Under the provisions of the two sections above quoted, the superintendent of banks has authority to employ such deputies, assistants, clerks and examiners as, in his discretion, may be necessary to carry on and complete the liquidation of any bank of which he has taken possession for that purpose.

Under section 742-4, the compensation of such employes must be fixed by the superintendent of banks subject to the approval of the common pleas court of the county wherein said bank was located, and paid from the assets of the liquidating bank. This latter provision being evidently intended as a proper check upon and guard against excessive expenditures from the assets of such bank.

I am, therefore, of the opinion that the superintendent of banks, if in his judgment it becomes necessary in the proper liquidation of any bank, may employ expert accountants to audit and put in proper shape the affairs of such bank. Inasmuch as the compensation for such employes must be fixed by the superintendent of banks, subject to the approval of the common pleas court of the county in which the office of such banking company, society or association was located, it follows that a separate and distinct contract of employment should be made by the superintendent of banks with the expert accountants, for their

services in connection with each of the liquidating banks; and as the amount of compensation to be paid such accountants for their services rendered in respect to each bank, must be approved by the common pleas court of the county in which such bank is located, it necessarily follows that the approval of the common pleas court of the proper county should be first secured before the expert accountants are employed to audit the affairs of any particular bank.

From the language you have used in your request for an opinion, to wit: "The affairs of *this department* are in such chaotic condition that in the judgment of the superintendent of banks a firm of expert accountants should be employed to audit its affairs and assist in putting it in such shape that the affairs of these banks may be disposed of in an economical and expeditious manner." I take it that the chaotic condition has arisen in the administration of the affairs of the banks by the state rather than that the chaotic condition is due to the internal affairs of the respective banks. If this be true, while it would make no difference in the interpretation of the law as above set out, yet the fault being with the state's administration rather than with the respective banks, common justice would suggest that the state itself, being at fault, should bear this expense, or, at least, that the expense should come out of your department.

I think, therefore, that before you take the matter up with the various common pleas courts you should present it to the legislative committee now making an investigation of the banking department.

Respectfully,
EDWARD C. TURNER,
Attorney General.

130.

ELECTION OFFICERS—NO COMPENSATION FOR RETURNS TO BOARD IN SCHOOL ELECTIONS.

No compensation is authorized by law to be paid to election officers for making returns to the clerk of the board of education in school elections.

COLUMBUS, OHIO, March 9, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have yours of March 1, 1915, in which you submit for opinion the following:

> "What compensation, if any, is payable to the judge for services for making returns to the clerk of the board of education in school elections?"

Section 5120, General Code, provides as follows:

> "In school elections, the returns shall be made by the judges and clerks of each precinct to the clerk of the board of education of the district, not less than five days after the election. Such board shall canvass such returns at a meeting to be held on the second Monday after the election, and the result thereof shall be entered upon the records of the board."

Section 5043, General Code, provides:

> "The judge of elections called by the deputy state supervisors to receive and deliver ballots, poll books, tally sheets and other required papers,

shall receive two dollars for such service, and, in addition thereto, mileage at the rate of five cents per mile to and from the county seat, if he lives one mile or more therefrom.

"The judge of elections carrying the returns to the deputy state supervisors, and the judge carrying the returns to the county or township clerk, or clerk or auditor of the municipality, shall receive like compensation.

"In cities where registration is required, the chairman selected at the meeting for organization shall receive one dollar for calling for the sealed package of ballots."

It is well settled that the compensation of public officers cannot be enlarged by implication beyond the terms or the statute.

Debolt v. Trustees, 7 O. S., 237.
Brundige v. Village, 62 O. S., 528.
State ex rel. Prosecuting Attorney, 66 O. S., 113.
Clerk v. Commissioners, 58 O. S., 107.
Eshelby v. Board of Education, 66 O. S., 71.

Since it will be readily observed that such duties as are imposed by the provisions of section 5120 of the General Code, above quoted, do not come within the terms of section 5043, General Code, it therefore follows that in the absence of express statutory provisions therefor, no compensation may be paid to election officers for the performance of the duties thereby imposed.

It may be difficult to suggest a satisfactory reason for the apparent discrimination by the legislature between the duty of carrying the election returns to the clerk of the board of education in one case and to the clerk of the township, or clerk or auditor of a municipality in another, but the reason or lack of reason for such discrimination is immaterial. The legislative expression alone will control.

Being unable to find any statutory authority therefor, in answer to your question I am of the opinion that no compensation may be paid to election officers for carrying the returns of school elections to the clerk of the board of education of the district.

Respectfully,
EDWARD C. TURNER,
Attorney General.

131.

VILLAGE MAYOR—NO AUTHORITY TO APPOINT JUSTICE OF PEACE TO ACT AS MAYOR—DISTINCTION BETWEEN CITIES AND VILLAGES.

A village mayor has no authority to appoint a justice of the peace to act for him in criminal matters during his disability. Section 4549, G. C., applies to "cities" as distinguished from villages.

COLUMBUS, OHIO, March 9, 1915.

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

GENTLEMEN:—I am in receipt of a letter from Mr. John F. Ballinger, J., P., of Plain City, Ohio, asking for an opinion, and which letter is as follows:

"I had a conversation over the phone this afternoon regarding an appointment of the mayor this morning in appointing me substitute mayor to fill his office in criminal proceedings and enforcing the village ordinances during his sickness and up to the time he would be able to resume his duties. Section 4549 designates the power of mayors. Section 4544 refers to appointment of police justices, which I think has no relation to section 4549, but in this section they use the term *city*, but the Code definition says that the word *city* means either city or village. In the notations at the bottom of the section it refers you to village, and cites you to Volk v. Westerville, and brings you under section 4544, which puts a person at sea. Take Arrest and Prosecution Law Procedure Evidence Forms by Jay Ford Lanning, A. M., page 167. I take it for granted that the mayor has the authority to make the appointment and that same will hold good without said appointment being confirmed by the council. Kindly advise me as to the proper construction."

The inquiry is directed to the question of the authority of the mayor of the village to make the appointment under the provisions of section 4549, G. C., which, in part, is as follows:

"* * * in cities having no police judge, in the absence or during the disability of the mayor, he may designate a justice of the peace to perform his duties in criminal matters, which justice shall, during the time, have the same power and authority as the mayor."

The provision in section 4549 is specific in its reference to cities not only by the use of the word "cities" but is further qualified by the words "having no police judge."

It is my opinion, therefore, that section 4549 of the General Code does not apply to villages, and the mayor has no authority to proceed under its provisions as indicated in the letter, but should resort to the provisions of section 4544 of the General Code under the title "villages" and which is as follows:

"Upon the recommendation of the mayor, the council may, by an affirmative vote of two-thirds of all the members elected, appoint a justice of the peace, resident of the corporation, or if there be no such justice of the peace, another suitable person resident of the corporation or a justice of the peace for the township in which such corporation is situated, police justice, who shall, during the term of office of such mayor, unless removed on suggestion of such mayor by a two-thirds vote of all the members of the council, have concurrent jurisdiction of all prosecutions for violations of ordinances of the corporation with full power to hear and determine them, and shall have the same powers, perform the same duties, and be subject to the same responsibilities in all such cases as are prescribed by law, to be performed by and are conferred upon the mayors of such corporations. Any person so appointed police justice, other than a justice of the peace, shall take an oath of office and give bond in such sum for the faithful performance of his duties as the council may require."

Respectfully,

EDWARD C. TURNER,

Attorney General.

132.

"BLUE SKY LAW"—CONSTRUCTION OF THE WORD "DEALER" AS USED IN THE ACT.

Under subdivision "f" of section 6373-2, G. C., a company exchanging any part of the issue of stock for property not located in this state is a "dealer" and must secure a license from the commissioner of the "blue sky law."

COLUMBUS, OHIO, March 10, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of March 2, 1915, requesting my opinion as follows:

> "In your opinion can the Chestatee Dredging Company properly make the statement authorized by section 2, subdivision F, of the Ohio blue sky law and thus be relieved of the requirements of the law as to the license, etc.?
>
> "Under the facts as stated in their letter of February 24, copy of which is herewith enclosed, the attorney general's department has already furnished this department with a written opinion holding that an authorized issue of the capital stock of a corporation cannot be divided for the purpose of meeting the requirements of section 2, subdivision F, of the law."

Also, the enclosed copy of a letter to your department containing a statement of the facts involved, which letter is as follows:

> "We have your letter of February 23, in reply to ours of February 18, and again write you relative to the Chestatee Dredging Company, a corporation for profit organized for the purpose of dredging and mining for minerals, under the laws of the state of Ohio, with a common capital stock of $25,000.00.
>
> "It is the intention of this company to dispose of $16,500.00 of its capital stock directly to its stockholders by its own officers, without commission or expense and for cash, under and by virtue of section 6373-2, subdivision F, of the General Code, and statement for that purpose is herewith furnished.
>
> "It is the further desire of this company to purchase from one of its stockholdes certain rights, privileges and leases for mineral properties, a dredgeboat and equipments, located in the state of Georgia. These properties have been exploited and tested by this stockholder at a large expenditure, and since same have been tested, and satisfactory results obtained, the company is now satisfied that said properties are well worth the sum of $8,500.00 and desire to purchase the same at that price. The stockholder holding and owning said properties is willing to accept $8,500.00 in stock of this company in payment for said rights and privileges, or is willing to purchase $8,500.00 of the stock of the company and pay for the same, and to assign his rights in said properties to this company for the sum of $8,500.00. Under these circumstances is it necessary that the company register and be licensed as a dealer by your department to

complete this arrangement? This is a very close corporation and all of the stockholders are fully acquainted with the facts and are satisfied with the arrangement, and while anxious to save the trouble and expense of registration and being licensed as a dealer if possible, yet they do not wish to violate the law in any way. We enclose you form No. 1 signed by the president and secretary of the company, statement covering the disposition of $16,500.00, and if under the circumstances heretofore reiterated, a statement covering the entire issue of $25,000.00 under form No. 1 would suffice, we will cheerfully furnish the same. If you will kindly advise us further as to what will be necessary to carry out this arrangement, we shall be obliged. Thanking you for your former prompt consideration of our inquiries, we are, * * *."

Section 6373-2 of the General Code (being section 2 of the Ohio blue sky law) is, in part, as follows:

"* * * The term 'dealer,' as used in this act, shall be deemed to include any person or company (except national banks) disposing, or offering to dispose, of any such security, through agents or otherwise, and any company engaged in the marketing or flotation of its own securities either directly or through agents or underwriters or any stock promotion scheme whatsoever, except: * * *

"(f) The issuer, organized under the laws of this state, where the disposal, in good faith and not for the purpose of avoiding the provisions of this act, is made for the sole account of the issuer, without any commission and at a total expense of not more than two percentum of the proceeds realized therefrom plus five hundred dollars and where no part of the issue to be disposed of is issued, directly or indirectly, in payment for patents, services, good will, or for property not located in this state; provided that the president and secretary, or the incorporators if done before organization, of the issuer shall, prior to such disposal, file with the 'commissioner' a written statement setting forth the existence of all such facts and that such issuer is formed for the purpose of doing business within this state. * * *"

If I properly understand the situation presented in the above quoted letter to your department, certain incorporators propose to organize a corporation under the laws of Ohio, to be known as The Chestatee Dredging Company, and having a total capital stock of $25,000.00. It is the intention of the company so oragnized to sell $16,500.00 of this stock directly to its stockholders for cash through its own officers and without selling commission or expense, and to exchange the remaining $8,500.00 of its stock for certain rights, privileges, leases for mineral lands and other properties located in the state of Georgia. I have assumed that this company is not yet incorporated and organized, otherwise it would not now have the total amount of its capital stock for disposal.

Under section 2 of the Ohio blue sky law, above quoted, a company engaged in the marketing or flotation of an issue of its own securities, which issues any part of such securities *"directly or indirectly in payment for * * * property not located in this state,"* is a "dealer" within the meaning of this statute, and must be licensed as such. The mere fact that the Chestatee Dredging Company's proposed total stock issue, to wit: $16,500.00 is to be sold in such manner and upon such terms as would relieve the company from the necessity of taking out a license if all of the said stock issue were to be sold in the same manner,

will not relieve the company from the necessity of securing a license if the remainder of such issue is exchanged, *directly or indirectly,* for property not located within this state.

Whether or not any part of the company's stock is in a given instance issued *directly or indirectly* for property not located within the state is a question of fact to be determined as occasion may arise, and I do not believe it proper for me, as legal adviser to the various officers and departments of Ohio, to either approve or indicate a method of procedure whereby the provisions of any law of the state can safely be circumvented or evaded.

I am, therefore, of the opinion that the Chestatee Dredging Company, in the event it issues, *directly or indirectly,* any portion of its capital stock mentioned in payment for any property not located in this state, is, by virtue of section 2 of the Ohio blue sky law, a "dealer" and as such must be licensed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

133.

STATE LIQUOR LICENSING BOARD—WITHOUT AUTHORITY TO MAKE REFUNDER OF APPLICANT'S FEES FOR TRANSFER OF LICENSES.

The state liquor licensing board is without authority to make refunders of fees of $5.00 *collected from applicants for transfers of licenses which have heretofore been paid into the state treasury.*

COLUMBUS, OHIO, March 10, 1915.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I have yours of March 3, 1915, in which you ask an opinion upon the question of whether or not your board may lawfully refund fees of $5.00 collected from applicants for transfers of licenses under section 1261-50, G. C. (103 O. L., 230), which have heretofore been collected and paid into the state treasury. These fees, as I understand, were voluntarily paid by numerous parties pursuant to an order or ruling of your board upon a mistaken interpretation of the section of the statute referred to above, and by your board paid into the state treasury.

These payments are not subject to the same rule of law as other statutory demands or obligations voluntarily paid under mistake of law and are not recoverable.

In McCarty v. City of Toledo, 11 C. C., 69, the court says:

> "We have held heretofore in this class of cases that where an assessment has been voluntarily paid in full by a property owner, an action to recover back the money so paid cannot be maintained; and we think that this doctrine is in plain conformity with the rules of law; the voluntary payment of a tax, although it was wrongfully laid, no steps having been taken to enforce payments, and no fraud or imposition having been practiced, the parties are thereby precluded from recovering back the money so paid."

In Hieatt v. Simpson, 12 C. C. (N. S.) 271, the court says:

> "The payment of taxes under mistake of law with full knowledge of the facts, cannot, when made voluntarily, be recovered."

It will also be further observed that these payments come within the reasoning of an opinion previously rendered by this department to your board upon the question of your authority to make refunders of payments and deposits made in excess of the actual costs of records of proceedings before county boards and your authority in this instance would be subject to the same limiations and restrictions as set forth in that opinion. That is to say, these funds now being in the state treasury, are subject to the provisions of section 22 of article 2 of the constitution of the state of Ohio, and may not now be drawn from the treasury except in pursuance of a specific appropriation made by law, and such refunders as are here referred to, do not come within the provisions of the appropriations for the uses and purposes of the liquor licensing board (104 O. L., 64) as follows:

> "There is hereby appropriated for the salaries, uses and purposes of state liquor licensing board and the county liquor licensing boards the receipts and balances in the state liquor fund."

For the reason above stated I am of the opinion that the fees above referred to which have heretofore been paid by you into the state treasury, may not now be refunded.

Respectfully,
EDWARD C. TURNER,
Attorney General.

134.

CONSENT OF OHIO BOARD OF ADMINISTRATION NECESSARY FOR ERECTION OF ELECTRICAL TRANSMISSION LINE ACROSS LAND OF ATHENS STATE HOSPITAL.

Under house bill No. 167 the consent of the Ohio board of administration is necessary for the location of an electrical transmission line across the land of Athens State Hospital.

COLUMBUS, OHIO, March 11, 1915.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—On March 2, 1915, you requested my opinion as to the rights of the board of administration under house bill No. 167 enacted by the present session of the general assembly and the facts stated by the enclosed letter from the chief clerk of Athens State Hospital.

House bill No. 167, which is an emergency act approved February 17, 1915, provides in part as follows:

> "Section 1. That the Hocking Power Company, its successors and assigns be given the right to enter in and upon such part or parts of said outlots No. 51 and 56 in said city of Athens and to construct, maintain and operate thereon an electrical transmission line consisting of poles, wires,

cross arms, insulators and other material and equipment, that is be used for transmission line only *and locate the same as may be agreed upon by said state board of administration* and said the Hocking Power Company.

"Section 2. The state board of administration is also hereby empowered to convey such right or rights to said the Hocking Power Company, its successors and assigns by deed or other proper instrument in writing, said conveyance to be made in the name of the state by said board; provided, however, that such instrument shall contain a condition that the state of Ohio shall not be liable to any person for any injury that may result from the construction, maintenance or operation of said transmission line across said premises."

The chief clerk of the Athens State Hospital writes that before this bill was passed the Hocking Power Company, without leave or license, erected poles and on them strung wires across the farms of the Athens State Hospital at a point which, in the judgment of the hospital authorities, interfered considerably with the farming operations carried on by the hospital.

In my opinion the Hocking Power Company is now occupying state lands without any right whatever, and your board has the power, and it is its duty, to take such steps as may be necessary to have the poles and wires of the company removed from their present location unless that location be agreed upon between the board and the company as the best location in outlots Nos. 51 and 56 of such a transmission line as house bill No. 167 authorizes.

The company is entitled to a right of way under the law passed by the present session of the legislature and to have such right-of-way located in lots Nos. 51 and 56; but it is the right and duty of the board of administration to fix the precise location, in outlots Nos. 51 and 56, of the right-of-way. This the board of administration should proceed to do, and having done so should order the Hocking Power Company immediately to move its line of poles and wires to such location.

Respectfully,
EDWARD C. TURNER,
Attorney General.

135.

REIMBURSEMENT OF LIVE STOCK OWNERS WHO HAVE SHIPPED ANIMALS FROM STATE WHICH ARE KILLED AT DESTINATION BECAUSE OF INFECTION OF HOOF AND MOUTH DISEASE.

Owners of live stock shipped from Ohio to eastern markets and there killed, because of infection of hoof and mouth disease, may not be reimbursed for half the value thereof by the state of Ohio under sections 1115 *and* 1116, *G. C.,* 103 *O. L.,* 312.

COLUMBUS, OHIO, March 11, 1915.

The Agricultural Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have yours of March 5, 1915, in which you ask an opinion as follows:

"In number of cases live stock has been shipped from Ohio to eastern

markets. Shippers complied with all requests such as disinfection of cars, inspection of stock and health certificates therefor. Upon arrival at desination point, animals were infected with foot and mouth diseases and slaughter made necessary.

"In such cases federal government pays one-half appraised value. Officials in charge in state where this slaughter occurs refuse to pay the other half, on the ground that shipment did not originate in their state and cattle were not owned by a citizen of that state.

"Our department has been asked whether under such circumstances the Ohio shipper could be compensated the same as he would be if the animals were condemned and slaughtered before they got out of Ohio."

The statutes of this state which are pertinent to your inquiry, are as follows (103 O. L., 312):

Section 1114. If, in order to prevent the spread of any dangerously contagious and infectious disease among the live stock of the state, the agricultural commission deems it necessary to destroy animals affected with or which have been exposed to dangerously contagious or infectious disease, it shall determine what animals shall be killed and appraise or cause to be appraised by disinterested citizens as provided by law. After being appraised, the commission shall cause such animals to be killed and their carcasses disposed of in such manner as it directs, but no animal shall be killed under the provisions of this section until it has been examined by a competent veterinarian in the employ of the commission, and the disease with which it is affected or to which it has been exposed adjudged a dangerous and contagious malady.

"*Section* 1115. If an animal is killed under the provisions herein relating to the agricultural commission, the compensation to be made for the slaughtered animal shall be computed on the basis of the actual value of such animal at the time of killing; for an animal that has been kept in the same building or enclosure, two-thirds of such value, and for any other animal, the full value of such animal without reference to the suspicion of contagion. No compensation, however, shall be made to a person who has brought animals into this state affected with such contagious disease, or from a district in which such contagious disease existed, or who has wilfully concealed the existence of such disease among his stock or on his premises, or who by wilful neglect or purposely has contributed to the spread of such contagion. In case of the destruction of a horse, mule, or ass affected with glanders or farcy, no compensation for it shall be made, if it was so diseased when it passed into possession of its owner. In appraising animals to be killed as hereinbefore provided, no allowance shall be made because such animals are thoroughbred or pedigreed stock.

"*Section* 1116. When approved by the agricultural commission all claims of owners of animals killed under the provisions herein relating to the commission shall be paid from funds appropriated by the general assembly for that purpose."

The primary purpose of the foregoing statutes is the prevention of the spread of dangerously contagious and infectious diseases among live stock of the state, as clearly stated in the first sentence of section 1114, G. C., above quoted, rather than the reimbursement of individuals for losses sustained by reason of such

disease. It will also be borne in mind that public funds may be expended only for public purposes as distinguished from the protection of private individuals from pecuniary loss and that in no case may public moneys be expended without an express authorization of statute. In other words, every expenditure of public funds must come clearly within the terms of a statutory authority.

An examination of section 1114, G. C., will readily disclose express and positive requirements of certain conditions precedent to any authority for the destruction of animals.

First, it must be deemed necessary by the agricultural commission of this state to prevent the spread of some dangerously contagious and infectious diseases among the live stock of this state. *Second,* such animals must be affected with or have been exposed to a dangerously contagious or infectious disease. *Third,* the animals to be killed must be determined by the agricultural commission of this state. *Fourth,* the animals killed must have first been appraised by the agricultural commission of this state or caused by it to be appraised by disinterested citizens as provided by law. *Fifth,* animals killed must have been first examined by a competent veterinarian in the employe of the agricultural commission of this state and the disease with which it is affected or to which it has been exposed by him adjudged to be a dangerous and contagious malady.

Each and all of these several conditions are essential to the authority for the compensation of individuals for the slaughter of animals and none of them are met in your statement except that cattle belonging to citizens of this state were presumably adjudged by some one in another state to have been infected and consequently slaughtered.

Aside from the exceptions in section 1115, G. C., which bar certain classes of persons from compensation for animals, although within all the above provisions which are not referred to in your statement, I am of the opinion, in answer to your inquiry, that the agricultural commission is wholly unauthorized to compensate persons for animals slaughtered in another state, under the conditions and circumstances set forth in your statement.

Respectfully,
EDWARD C. TURNER,
Attorney General.

136.

ARMORY BOARD—UNAUTHORIZED TO COMPROMISE A SUBCONTRACTOR'S CLAIM AGAINST PRINCIPAL CONTRACTOR.

The state armory board is unauthorized to compromise a subcontractor's claim against the principal contractor of the Bucyrus Armory unless through appropriation made under the provisions of section 29, article II of the constitution.

COLUMBUS, OHIO, March 11, 1915.

HON. BYRON L. BABGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your favor of March 6th, which is as follows:

> "I herewith have the honor to transmit copy of proceedings of the state armory board relative to the claims of creditors of the contractor who

built the Bucyrus Armory. These claims are for material and labor furnished the armory and would have been liens had the armory been owned by any other person than the state.

"An opinion is requested as indicated by the resolution of February 27, 1915."

With your letter you enclose extracts from the minutes of the meetings of the armory board held on August 16, 1913, September 20, 1913, and February 27, 1915. The minutes of your meeting of February 27, 1915, are as follows:

"MEETING OF FEBRUARY 27, 1915.

"BUCYRUS ARMORY CREDITORS:

WHEREAS, On August 16, 1913, and September 20, 1913, the board attempted to make a partial payment to the Bucyrus Armory creditors in the nature of a compromise of their claims, and under an assignment of the contractors' claims, and,

"WHEREAS, In attempting to make said compromise, the board tried to adjust subcontractor's attempted liens which had been filed with due notice to the board and settle its right to counterclaims against said Bope, and,

"WHEREAS, At the time of attempting to make said compromise for $550.00 there was and still is due to the material men and laborers on the Bucyrus Armory under their subcontract with Contractor Bope, the sum of $2,146.11, and said creditors are all represented by Col. Vollrath to whom Bope's said claim was assigned, and

"WHEREAS, No compromise with or payment of said armory creditors' claims has been carried out or made, and the said contractor has gone through bankruptcy since said attempt to compromise said claims, against the state being paid in the aggregate sum of $2,146.11; and said claims are moral but not legal obligations of the state, and ought to be paid or adjusted and the said creditors have agreed to accept, through Attorney Col. Edward Vollrath, the sum of said $550.00 in full satisfaction of their said claims to said aggregate sum of $2,146.11, and said five hundred and fifty dollars represents the unexpended balance of the allowance legally made for the construction of said Bucyrus Armory; it is therefore unanimously,

"*Resolved*, That a copy of this preamble and resolution and of the minutes of the board meetings of August 16, and September 20, 1913, relative to Bucyrus Armory be, together, referred to the attorney general of Ohio with request for authority to pay said sum of $550.00 to said Edward Vollrath, attorney, provided same is accepted in full compromise and satisfaction of the said claims of said armory creditors.

"I hereby certify that the foregoing is a correct copy of a part of the minutes of the state armory board meeting of February 27, 1915.

"B. L. BARGAR, *Secretary*."

You ask to be advised as to whether or not the armory board is authorized to use the $550.00, which is the unexpended balance of the allowance legally made for the construction of the Bucyrus Armory, for the purpose of effecting compromise settlements with certain material men and laborers who were subcontractors under Contractor Bope, who had charge of the construction of the armory.

From the papers submitted it appears that Mr. Bope made an assignment of certain claims for expense which he had to Colonel, Edward Vollrath, who at this time is acting for all of the creditors, and who has agreed to the proposed compromise settlement,

Your attention is invited to the provisions of section 29 of article II of the constitution of the state of Ohio, which is as follows:

> "No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor shall any money be paid, on any claim, the subject-matter of which shall not have been provided for by pre-existing law, unless such compensation, or claim, be allowed by two-thirds of the members elected to each branch of the general assembly."

In view of the fact that the claim which is being asserted by the subcontractors is not in any sense a legal claim against the state of Ohio, and in fact it is stated in the minutes of your meeting of February 27, 1915, that:

"said claims are moral but not legal obligations of the state,"

it is my opinion that there is no authority for the payment of the claims except by virtue of a special appropriation of the general assembly, the authority for which appropriation, if it be deemed expedient by the general assembly, being found in section 29 of article II of the constitution, quoted above; and the armory board is therefore precluded from effecting the compromise settlement in accordance with the provisions of the resolution adopted at the meeting of February 27, 1915.

Respectfully,
EDWARD C. TURNER,
Attorney General.

137.

LORAIN CRIMINAL COURT IS A POLICE COURT.

The Lorain criminal court is essentially a police court within the meaning of the statutes, following case of State ex rel. McCarty v. Oberlin, auditor of Stark county court of appeals.

COLUMBUS, OHIO, March 11, 1915.

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

GENTLEMEN:—Under date of January 19th, you submit for my opinion several questions relative to the disposition of moneys collected by way of fines by the judge of the Lorain criminal court. Your letter is as follows:

> "1. Should fines collected in prosecutions under state laws in ordinary criminal cases (misdemeanors) be paid to Lorain county, and if so, how often are such deposits required by law to be made?
>
> "2. If fines are collected in said court for violation of the local option laws, are they payable to the city or to the county?
>
> "3. If fines are collected for violation of the fish and game laws, what disposition should be made of same? Likewise, as to violation of the state pharmacy laws?"

You have advised me verbally that if it should be determined by this department that the Lorain criminal court is in contemplation of law a police court it

would not be necessary for me to consider the questions which you have propounded, but that if it should be determined that the Lorain criminal court is not in contemplation of law a police court, you would like answered the various questions submitted.

You have further informed me that the reason you have requested the opinion is because my predecessor, Honorable Timothy S. Hogan, on November 24, 1913, rendered an opinion to your department wherein he held that the criminal court established in the city of Lorain, Lorain county, Ohio, (101 O. L., 385) was not a police court.

The reason given by Mr. Hogan in said opinion for so holding was that the criminal court so established in the city of Lorain had at that time jurisdiction solely within the limits of said city, whereas a police court under section 4577 had jurisdiction not only within the limits of the city, but within four miles thereof. In 103 O. L., 397, section 1 of the act establishing the Lorain criminal court was amended so that its jurisdiction was extended to "any misdemeanor committed within the limits of Lorain county." In 99 O. L., 607, the Canton criminal court was established, which court had jurisdiction solely within the limits of the city of Canton (See section 14696, G. C.) and such jurisdiction has not been subsequently enlarged. Subsequent to the rendition of the opinion relative to the Lorain criminal court by my predecessor, hereinbefore referred to, the court of appeals of Stark county in the case of State ex rel McCarty et al., as trustees of the Stark County Law Library Association v. Oberlin as Auditor of Stark County, held that:

> "the jurisdiction of the criminal court of the city of Canton, Ohio, as defined by the statutes creating it, makes the court essentially a police court within the meaning of the statutes; that all fines and penalties assessed in said court in prosecutions in the name of the state of Ohio, should be paid to the trustees of the law library association, as required by section 3056, G. C."

There is, however, a clear distinction now existing in the statutes between the Lorain criminal court and the Canton criminal court in this, to wit: The jurisdiction of the Lorain criminal court is co-extensive with the county, whereas the jurisdiction of the Canton criminal court is co-extensive with the city only. The jurisdiction of the Canton criminal court is less than the jurisdiction of the police court, under section 4577, G. C.

The court of appeals of Stark county did not comment upon the fact that the jurisdiction of the Canton criminal court territorially was less extensive than the jurisdiction of a police court so far as the opinion of said court shows, but it determined that since the jurisdiction of said court was essentially that of the police court they would so consider it for the purpose of determining the disposition of the fines.

It is to be noted that both the Canton criminal court and the Lorain criminal court have jurisdiction of offenses under ordinances of their respective cities and the jurisdiction of a court over offenses committed under the penal ordinances of a city is essentially the jurisdiction of a police court.

Since the court of appeals of Stark county has determined that the Canton criminal court is essentially a police court, although its jurisdiction is over less territory than that of a police court, I believe that the opinion in said case is applicable to the question at hand, although the jurisdiction of the Lorain criminal court is more extensive than that of a police court. There is nothing in the statutes creating said court that undertakes in any way to provide for the disposition of the fines assessed and collected in said court, and although the con-

stitution of Ohio authorizes the legislature to establish special courts under the provision that it may establish such courts as it may deem necessary, nevertheless since there is a further provision in the constitution that all laws of a general nature shall have uniform operation, I do not believe that it was within the province of the legislature to undertake to make a special disposition of fines assessed in such cases as we have under consideration, but that the same must be dealt with by general law. Since the court of appeals, which is now in most cases the court of last resort, has determined that the Canton criminal court is, so far as the disposition of fines is concerned, to be considered as a police court, and since I am of the opinion that said opinion of said court of appeals is applicable to the Lorain criminal court, I have reached the conclusion that so far as the fines assessed and collected by the Lorain criminal court are concerned, they are to be disposed of in the same manner as if assessed by a police court.

Respectfully,
EDWARD C. TURNER,
Attorney General.

138.

EXPENSES ONLY OF THE CHAIRMAN OF SENATE AND HOUSE FINANCE COMMITTEES AS MEMBERS OF EMERGENCY BOARD CAN BE PAID—NO AUTHORITY TO EMPLOY CLERK FOR SUCH BOARD.

The only expenses allowed to be paid from appropriation for expenses of legislative committees for services on emergency board are expenses of the chairman of the senate and house committees, respectively, while engaged in their duties as such members.

COLUMBUS, OHIO, March 13, 1915.

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

DEAR SIR:—I am in receipt of your letter of February 24, 1915, wherein you state:

> "For a number of years the custom has been for the chairman of the house finance committee to employ a clerk to keep the minutes and records of the emergency board, and said clerk has been paid for such service upon a voucher approved by the chairman of the house finance committee from the fund for expenses of legislative committees.
>
> "Will you kindly give me your opinion as to whether the chairman of the house finance committee has authority to employ a clerk and pay for the services upon vouchers approved by himself, payable from the appropriation for expenses of legislative committees?
>
> "I call your attention to section 2312, which provides:
>
> " 'There shall be an emergency board to consist of the governor, auditor of state, attorney general, chairman of the senate finance committee, and chairman of the house finance committee. The governor shall be president and the chairman of the house finance committee shall be secretary of the board. The secretary shall keep a complete record of all its proceedings. The necessary expenses of the chairman of the senate and house finance committees, while engaged in their duties as such members, shall be paid

from the fund for expenses of legislative committees, upon itemized vouchers approved by themselves, and the auditor of state is hereby authorized to draw his warrants upon the treasurer of state therefor.'"

Section 2312 as set out in your letter is found in 103 Ohio Laws, 445, and is the only law that I have been able to discover which would bear in any way upon the subject. The only expenses which are allowed to be paid from the fund for expenses of legislative committees for services on the emergncy board are the expenses of the chairman of the senate and house finance committees while engaged in their duties "as such members."

There does not seem to be any provision of law for the payment of the expenses of the chairman of the house finance committee when acting as secretary. In view of such fact I am of the opinion that there is no authority in law for the chairman of the house finance committee to employ a clerk to keep the minutes and records of the emergency board, the services of the same to be paid for upon voucher approved by the chairman of the house finance committee from the fund for expenses of legislative committees.

Respectfully,
EDWARD C. TURNER,
Attorney General.

139.

PRESIDENT OF BOARD OF EDUCATION—INTERESTS IN COMPANY WHICH SELLS MATERIAL TO THE BOARD PROHIBITED UNDER SECTION 4757, G. C.—NOT CRIMINALLY LIABLE.

The president of a board of education who is also a director and stockholder of material company, which material company sells its material to the principal contractor dealing with said board of education, has such an interest in said contract as is prohibited by section 4757, G. C. No criminal penalty is attached to the violation of section 4857, G. C., but this section does affect the validity of contracts.

COLUMBUS, OHIO, March 13, 1915.

HON. ARCHER L. PHELPS, *Prosecuting Attorney, Trumbull County, Warren, Ohio.*
DEAR SIR:—Under date of March 3, 1915, you request my opinion, as follows:

"The board of education of Warren City School District has issued bonds in the sum of forty thousand dollars ($40,000) for the purpose of erecting four brick school houses in the city of Warren.

"After advertisement according to law, the contract for the labor and material for the buildings has been duly let. The contractor after having had submitted to him the bids of several brick companies for the furnishing of brick for the construction of these buildings, among them The Standard Brick Company, of Cleveland, Ohio, desires to award his contract for brick to said The Standard Brick Company, its price and quality of brick being more advantageous than the other bids.

"It now transpires that the president of the board of education of Warren City School District is also a stockholder and director in The Standard Brick Company. The question has been submitted to me as to

whether or not the president of the board of education, as a stockholder and director in The Standard Brick Company would violate any criminal law of the state, should The Standard Brick Company furnish to the contractor for these four school buildings any part of the brick necessary in their construction.

"Section 12910 provides as follows: (Officer or agent interested in contracts) Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year and not more than ten years.

"In my opinion the foregoing is the only one that would apply to a situation of this kind, and if this transaction comes with the provisions of the above section, it would be by virtue of the language '* * * is interested in a contract for the purchase of property * * *.' Is the letting of a contract by a board of education for the building of four school houses a contract for the purchase of property within the meaning of this section?

"Inasmuch as this matter will likely be gone over by the state examiners later on, and inasmuch as the president of the board of education is desirous of keeping within the law, I will very greatly appreciate your opinion as to whether or not the president of the board of education would violate any law, or become in any way liable, should The Standard Brick Company sell brick to the contractor for these school buildings."

I call your attention to section 4757, General Code, governing boards of education, which provides, among other things, that:

"No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board."

I am of the opinion, therefore, that if the bid of The Standard Brick Company should be accepted, the president of the board of education, as a director and stockholder of said brick company, would have such an interest in the contract of the board of education as is prohibited by the above provisions of section 4757 of the General Code. No criminal penalty is attached to the violation of section 4757. This section does, however, affect the validity of contracts.

In a letter under date of March 11th, Hon. Charles Fillius, president of the board of education, informs me that he is powerless to prevent the proposed action of the company in which he is a stockholder and director and that the company proposes to go ahead and sell the brick, having consulted attorneys who advised them that the company could collect from the contractor. As to the contract between the brick company and the contractor, that is a private matter and I shall not attempt to pass upon that.

The contract between the board of education and the principal contractor is a public matter and if the principal contractor, by some action of his own and with his eyes open, places himself to have performance or payment questioned, he assumes any risk that such action may involve.

Answering your question as to the application of section 12910, General Code: I am of the opinion that under the statement of facts you have submitted and assuming that the board of education has awarded the principal contract and has

no control over the contractor as to where or of whom he shall or may buy the bricks, the president of the board of education would not be subject to prosecution under such section.

Respectfully,
EDWARD C. TURNER,
Attorney General.

140.

AN APPROVED BANK MAY SUBMIT TWO SEPARATE AND DISTINCT BIDS FOR STATE FUNDS WITH DIFFERENT RATES OF INTEREST AND FOR DIFFERENT AMOUNTS.

Under the state depository act, sections 328, et seq., an approved bank may submit two separate and unconditional bids for state funds, one of which offers a certain rate of interest for a given amount of deposit, and the other a lower rate of interest for another amount of deposit.

COLUMBUS, OHIO, March 13, 1915.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*.

DEAR SIR:—I have your letter of March 12, 1915, requesting my opinion as follows:

"The following question has been submitted to me:

"'Will a bank be permitted to bid on state funds at different rates for different amounts?

"'For illustration: Can a bank bid on, say $50,000.00 at a rate of 3.85 per cent. and $50,000.00 at 3.50 per cent., and if their capital stock is $100,000.00, would they be allowed the full $100,000.00 at the different rates, or will only one bid be recognized and that the largest?'

"As bids will be opened on Monday, March 15, at 1 p. m., your immediate reply is requested so I can advise the bankers presenting this question."

The public depository act relative to state funds is found in sections 321, et seq., of the General Code. Sections 328, 329, 330-1, 330-2 and 330-4 of the General Code, provide as follows:

"Section 328. All awards for the deposit of state funds shall be made upon competitive bidding; bids shall be received by the treasurer of state every two years, beginning between one o'clock p. m., on the first Monday in March and closing at one p. m. on the third Monday in March, 1911, and every two years thereafter.

"Section 329. Each bid shall state whether it is for an active or inactive deposit, amount bid for and rate of interest, and must be accompanied by an application and shall be sealed and plainly marked on the outside 'bid for deposit.' Beginning at one o'clock p. m., on the third Monday in March of each bidding period the bids shall be opened by the treasurer of state at his office in the presence of the public; all bids shall be preserved and be open to public inspection at all times.

"Section 330-1. No bank or trust company shall have on deposit at any

one time more than its paid in capital stock and in no event more than three hundred thousand dollars ($300,000.00) as an inactive deposit.

"Section 330-2. The treasurer of state may withdraw any or all of the state funds on deposit for the purpose of paying the appropriations and the obligations of the state; when necessary to withdraw funds from the inactive depositories it shall be withdrawn from the banks and trust companies paying the lowest rates of interest and in proportional amounts as near as practicable.

"Section 330-4. Said banks and trust companies shall also file with the treasurer of state demand certificates of deposit in an amount equal to the total amount of the deposit and specify rate of interest to be paid. Said certificates shall be signed by the cashier or a duly authorized officer of said bank or trust company."

I assume that the bank presenting the form of bid described in your letter has been regularly approved and qualified as a state depository.

There seems to be no provisions of the state depository act which denies to a bank the right to submit two separate and distinct bids, or prevents the treasurer of state from accepting the same, provided they are separable and unconditional. Section 329 of the General Code provides that "each bid shall state whether it is for an active or inactive deposit, amount bid for and rate of interest." It may easily occur that a bank be willing to pay a higher rate of interest for a deposit of funds up to a certain amount than for funds in excess of that amount. The two bids must be unconditional, and should be considered as separate and distinct bids, in awarding funds under section 330, and also in withdrawing funds under section 330-2. For example: if the interest rate bid by any other approved bank is between the high and low bid of the bank submitting two bids, the bid of such other bank should be accepted before the low bid of the bank of two bids. Also, in withdrawing funds under section 330-2, the funds awarded a two-bid bank upon its lower bid should be withdrawn before funds are withdrawn from a bank whose interest bid is higher than the lower rate offered by such bank submitting two bids.

As there is nothing in the depository act which prevents certain banks from being depositories of both active and inactive funds, it follows, that if an approved bank, which has been designated by the treasurer of state as an active depository, desires to bid for both active and inactive funds, it must of necessity submit two bids, which in all probability will offer a different rate of interest for the two kinds of funds.

I am, therefore, of the opinion that a bank, which has been approved as a public depository of state funds, may submit two separate bids, one of which offers a certain rate of interest for a given amount of deposit and the other a lower rate of interest for another amount of deposit. Each bid, however, should be separate, unconditional, and complete in itself, and the statutory limitation as to the amount of deposits which the bank may be awarded should be taken into consideration in awarding funds, preference being given to the bid offering the higher rate.

Respectfully,
EDWARD C. TURNER,
Attorney General.

141.

PURCHASE OF BITUMINOUS COAL FOR STATE INSTITUTIONS FROM OHIO MINES UNDER AUTHORITY OF HOUSE BILL NO. 350 IS CONSTITUTIONAL.

House bill No. 350 relating to the purchase of bituminous coal for state institutions is not unconstitutional.

COLUMBUS, OHIO, March 15, 1915.

HON. EDWARD F. BOHM, *Secretary Committee on State and Economic Betterment, House of Representatives, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your valued favor of March 12, 1915, which is as follows:

> "I take the liberty of enclosing copy of house bill No. 350, Mr. Whitacre, referred to the committee on state and economic betterment. At the committee meeting of March 10, 1915, the question of violation of the provisions of federal and state constitutions was raised and it was decided by unanimous vote that the attorney general be requested at his earliest convenience to render an opinion on these phases to the committee.
>
> "Thanking you in advance for the courtesy, I remain, etc."

With your letter you enclose copy of house bill No. 350 introduced in the 81st general assembly by Mr. Whitacre, which bill is as follows:

"A BILL

"Relating to the purchase of bituminous coal for the state institutions.

"Be it enacted by the general assembly of the state of Ohio:

"Section 1. The Ohio board of administration and other purchasing agents of the state of Ohio, in making purchases of bituminous coal for the use of public institutions committed to their care, including those institutions enumerated in section 1835 of the General Code, shall confine such purchases, wherever possible, to coal produced from mines operated in the state of Ohio; and contracts in such cases shall be awarded to the lowest responsible bidder proposing to furnish such coal."

I have examined the various provisions of the United States and the Ohio constitutions and it is my opinion that house bill No. 350, if enacted into law, will not contravene any of the provisions of the United States constitution nor the constitution of the state of Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.

142.

SUPERINTENDENT OF BANKS MAY WITHHOLD CERTIFICATE ENTITLING BANK TO COMMENCE BUSINESS.

The superintendent of banks, in the exercise of the discretion conferred upon him by section 9721, G. C., may withhold a certificate entitling a bank to commence business.

COLUMBUS, OHIO, March 15, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of March 3, 1915, in which you request my opinion as follows:

> "Would you advise us if under section 9721, the superintendent of banks can withhold a certificate entitling a bank to do business.
>
> "The Ohio Bankers' Association are very much interested in this matter, and if in your opinion the superintendent cannot withhold a certificate, they wish to offer some amendment to the present law that will permit him to do so."

Section 9720 of the General Code, provides the method of procedure to be followed by a corporation organized under the laws of Ohio as a commercial bank, savings bank, safe deposit company, trust company or for two or more or all of such classes of business in order to secure a certificate from the superintendent of banks authorizing it to commence business, and is as follows:

> "Section 9720. When a certificate is transmitted to the superintendent of banks, signed by the president, secretary or treasurer of such corporation, notifying him that the entire capital stock of such corporation is subscribed, that fifty per cent. thereof has been duly paid in, and that such corporation has complied with all the provisions of law required to be done before it can be authorized to commence business, the superintendent of banks shall examine into its affairs, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each director, the amount of capital stock of which each is the owner in good faith, and whether such corporation has complied with all the provisions of law required to entitle it to engage in business."

Section 9721 of the General Code is relative to the duties and authority of the superintendent of banks in issuing such certificate, and is as follows:

> "Section 9721. If upon such examination of the facts referred to in section 9720, and of any other facts which may come to the knowledge of the superintendent of banks, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such corporation or otherwise, the superintendent of banks finds that such corporation is lawfully entitled to commence business, he shall give it a certificate under his hand and official seal that it has complied with all of the provisions required by law, and is authorized to commence business. But the superintendent may withhold such certificate when he has reason to believe that the stockholders have formed such corporation for any other purpose than the legitimate business herein contemplated, or

that the character and general fitness of the persons named as stockholders in the certificate are not such as to command the confidence of the community in which such bank is proposed to be located, or that the public convenience and advantage will not be promoted by its establishment. If the superintendent of banks withholds a certificate for any of the reasons named in this section an appeal may be made to a board composed of the governor, attorney general and superintendent of banks whose decision shall be final."

After a showing has been made to the superintendent of banks in the first instance that all the statutory requirements relative to the incorporation, organization, subscription to and payment for stock have been complied with by a banking company, the superintendent of banks may nevertheless in his discretion, by virtue of the second sentence of section 9721, above quoted, refuse a certificate to such banking company when he has reason to believe: first, "that the stockholders have formed such corporation for any other purpose than the legitimate business herein contemplated" or, second, "that the character and general fitness of the persons named as stockholders in the certificate are not such as to command the confidence of the community in which such bank is proposed to be located." or, third, "that the public convenience and advantage will not be promoted by its establishment."

The provisions of section 9721, G. C., referred to in your inquiry, and above considered, apply only to any company incorporated under Ohio law

"to establish a commercial bank, a savings bank, a safe deposit company, a trust company, or to establish as a company having departments for two or more, or all of such classes of business (G. C. 9702)."

Section 744-3 of the General Code, conferring like discretion and power upon the superintendent of banks, relative to licensing any "corporation not organized under the laws of this state, or of the United States, or person, partnership or association," is as follows:

"If upon examination of the facts which may come to the knowledge of the superintendent of banks, whether by means of a special commission appointed by him for the purpose of inquiring into the conditions of such applicants or otherwise, the superintendent of banks finds that such person or firm is lawfully entitled to commence business, he shall give a certificate under his hand and official seal that they or he have complied with the law, and are authorized to commence business. But the superintendent of banks may withhold such certificate when he has reason to believe that such person or firm has been formed for any other purpose than the legitimate business herein contemplated, or that the character and general fitness of the person or firm named in the application are not such as to command the confidence of the community in which such bank is proposed to be located, or that the public convenience and advantage will not be promoted by its establishment. If the superintendent of banks withholds a certificate for any of the reasons named in this section, an appeal may be made to a board composed of the governor, attorney general and superintendent of banks, whose decision shall be final."

The discretion conferred by the provisions of sections 9721 and 744-3, above quoted, is very broad, and I am of the opinion that the superintendent of banks,

in the exercise of the discretion reposed in him by the language therein, may withhold a certificate entitling any bank, whether a person, association or corporation, to do business. An abuse of discretion on the part of the superintendent of banks is guarded against by the provisions of the last sentences of sections 9721 and 744-3, respectively, wherein the right is given an applicant, which is refused a certificate, to appeal to a board composed of the governor, the attorney general and the superintendent of banks, whose decision shall be final.

In giving my opinion on the question submitted, I have not assumed to pass upon the constitutional power of the general assembly to confer upon the superintendent of banks the discretionary authority of withholding from a bank (especially a bank to be operated by an individual or partnership) a license to commence business upon the ground that "the public convenience and advantage will not be promoted by its establishment." If this constitutional power is conceded, this statute has taken a long step toward making the business of banking a monopolistic privilege or franchise. The legislative intent and policy is plain, however, and I believe the question of the constitutionality of the statute should be left to the determination of the courts.

Respectfully,
EDWARD C. TURNER,
Attorney General.

143.

SCHOOL LANDS, IN SECTION 16 OF ORIGINALLY SURVEYED TOWNSHIP, NOT AUTHORIZED TO PAY SHARE OF COST OF ESTABLISHING COUNTY DITCH—SCHOOL LANDS NOT HELD IN PERMANENT LEASE SUBJECT TO REVALUATION MAY BE ASSESSED FOR ESTABLISHING COUNTY DITCH THROUGH LANDS.

Township trustees are not authorized under section 3197, *G. C., to pay a proportionate share of the cost of establishing a county ditch through, and which is of benefit to, school lands in section* 16 *of the originally surveyed township.*

Lands in school section 16 *which have been sold or are held under a permanent lease subject to revaluation as unimproved land every thirty-three years, may be assessed, under the rule of benefits, to pay a proportionate part of the cost and expense of establishing a county ditch through said lands.*

COLUMBUS, OHIO, March 17, 1915.

HON. FRANK L. JOHNSON, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—In your letter of February 10, 1915, you state that certain school lands in section 16 of the original surveyed township, among other lands, will be drained and benefited by a contemplated county ditch, which the county commissioners of Green county propose to establish and construct in Beaver Creek township in said county, and that such school land will be benefited as much, as and more than, any other land along said ditch. You call my attention to section 3197 of the General Code, and ask whether or not the township trustees of Beaver Creek township can pay the proportionate share of the cost of said improvement.

Under date of February 25, 1915, in reply to my request for further information, you state that said school section 16 originally contained 643 acres, all of which has been sold, with the exception of 153 acres comprising the northwest quarter of said school section; that the 153 acres were, on September 14, 1822,

leased to John Nimerick for 99 years renewable forever; the leased land being subject to revaluation every 33 years; that appraisements were made in 1855 and 1888, and a third reappraisement will be made in 1921; that J. J. Johannes is the present owner of the lease, having held the same for about forty years, and that the present annual rental is $246.00.

Under date of March 8th, you enclose me a copy of the 99 year lease of said 153 acres to John Nimerick, and state that the 1822 appraisement was $404.00, the 1855 appraisement was $4,465.00, and the 1888 appraisement was $4,100.00. The lease recites that it was given under authority of an act of the Ohio legislature passed January 27, 1817, and recites in part:

> "* * * we, the trustees as aforesaid have proceeded to survey and lay off said section 16 * * *. and grant permanent leases thereon for the term of 99 years, renewable forever, *subject to a revaluation of the soil, or as unimproved land of the same quality and having the same natural advantages,* every 33 years, have granted, leased, and let to farm * * *."

Section 3197 of the General Code to which you call my attention is as follows:

> "The trustees may provide for improvements on the school lands in the lease or leases by which they are rented, or they may make up such improvements directly. Where such improvements are made directly by the trustees, when in their judgment they are necessary, and the estimate or probable cost thereof exceeds one hundred dollars, they shall advertise for bids for the period of at least twenty days, by posting notices in four of the most public places in the township, and the contract for making such improvement shall be awarded to, and made with the person or persons who offer to make such improvement at the lowest price. But a good and sufficient bond shall be executed and delivered to the trustees, as such trustees, conditioned for the honest and faithful performance of such improvement."

This section authorizes the trustees to either provide for improvements upon school lands in leases by which they are rented, or that they shall make such improvements directly. The section was enacted long after the execution of the lease for the 153 acres of school lands under consideration. Its apparent intent was to confer certain discretionary authority upon the township trustees in event that they thereafter executed a lease of school land, and it apparently applies only to such limited term leases as are provided for in the preceding section of the General Code (section 3196).

Whether or not said section 3197, G. C., confers any authority upon the township trustees relative to land held under permanent lease, it is unnecessary here to decide. It certainly gives them no authority—either specifically or impliedly, to pay or donate to the county commissioners the proportionate part of the cost of any improvement upon or through the school land in question, even though in the opinion of the trustees such improvement may be necessary or of material benefit to the land.

In no statute are the trustees authorized to contribute toward the cost of a county ditch established and constructed through school lands; neither can such school lands be assessed in the name of the township trustees. (Poock, Treas., et al., v. Ely, 4 C. C. 41.)

Answering the specific question asked by you, therefore, I am of the opinion that the township trustees cannot pay a proportionate part of the cost of the county ditch referred to, and since all of section 16 which composed the school

lands of said township have either been sold or permanently leased, the board of education of the district interested cannot under the provisions of section 6510 of the General Code pay any assessment which might be levied upon the land by the county commissioners.

Going beyond the specific question asked by you, I have considered the question of whether the cost of said county ditch may be assessed by the county commissioners directly upon school lands composing said section 16 and such assessments collected from the owners and the lessees thereof. As to the portion of school section 16 which has been sold under authority of law, there can be no doubt of question, and I am of the opinion that the same can be assessed and such assessments collected from the present owner under the same authority and to the same extent as upon other lands. These school lands were conveyed by the state in fee simple and the title thereof is of the same character as the title to lands generally.

Your letter, and the copy of the lease referred to, discloses that the 153 acre tract (being all of said school section 16 which has not heretofore been sold) is held under a 99 year lease, renewable forever, with an annual rental of 6 per cent. upon the land valuation, the lease containing a provision for a revaluation every 33 years. This valuation provision is peculiar and significant in that only the soil is to be revalued, viz.:

> "* * * subject to a revaluation of the soil or as unimproved land of the same quality and having the same natural advantages. * * *"

No improvement placed on the land can be considered in fixing the valuation upon which the rental is based, therefore the tenant is not obliged to pay rental for any improvement constructed by him or at his expense.

Section 8597 of the General Code provides:

> "Permanent leasehold estates, renewable forever, shall be subject to the same law of descent as estates in fee are subject to by the provisions of this chapter."

Section 11655 of the General Code provides:

> "Lands and tenements, including vested interest therein, permanent leasehold estates renewable forever, and goods and chattels, not exempt by law, shall be subject to the payment of debts, and liable to be taken on execution and sold as hereinafter provided."

Section 5742 of the General Code provides for the sale, etc., for taxes, of lands under permanent leases.

Under section 3221 of the General Code the holder of a permanent lease may surrender his lease and purchase the property upon written conditions and terms, one of the conditions being that the value placed on the land for purchase purposes shall not include the value of improvements upon the land.

In Lowering v. Melendy, et al., 11 Ohio, page 358, the court says:

> "We therefore declare that permanent leasehold estates are land, subject to all the rules and laws which attach to all lands for all purposes, and that judgment liens attach to them as land."

In the case of the Village of St. Bernard v. Kemper, 60 O. S., 244, the second branch of the syllabus reads as follows:

"The lessee in possession under a lease of real property for ninety-nine years, renewable forever, the property standing in his name for taxation, is so far the owner of such property as to authorize him to subscribe a petition for street improvements under section 2272, Revised Statutes; and in such case the signature of the lessor to such petition is not required in order to authorize an assessment against the corpus of such property."

In the case of Elison v. Foster, 19 O. D., (N. P.), page 853, appears the following:

"It must therefore be manifest that this lease is a perpetual or permanent leasehold estate and subject to all the burdens and entitled to the respect and reverence that attach to fee simple estates."

Section 5330 of the General Code provides as follows:

"All lands held under lease for a term exceeding fifteen years, and not subject to revaluation, belonging to the state, a municipal corporation, religious, scientific or benevolent society or institution, whether incorporated or unincorporated, or to trustees for free education only, and school and ministerial lands, shall be considered for all purposes of taxation as the property of the person or persons holding them, and shall be assessed in their names."

From the principles laid down in the numerous decisions of the courts, as well as by inference from the sections of the General Code above quoted, it follows that the owner of a 99 year lease, renewable forever, upon school lands in Ohio is to be considered as the general owner of the land, at least to the extent of authorizing the imposition and collection of an assessment for the construction of a local improvement, which, although enhancing the value of the property, cannot under the terms of the said lease be taken into consideration in arriving at a proper revaluation of the land for rental fixing purposes.

I am, therefore, of the opinion that that part of school section 16 mentioned in your letter, which has been sold and conveyed in fee simple may be assessed for local improvements as other land, and that the 153 acres in said section which are held under permanent lease may be assessed in the name of the owner of such leasehold estate, subject to the rule of benefits, for the cost and expense of establishing a county ditch through said lands.

Since the county commissioners may levy an assessment upon any of said school lands for the construction of the ditch referred to in your question and collect the same from owners and permanent lessees, all necessity or reason for a contribution by the township trustees toward the cost of such ditch is removed.

Respectfully,

EDWARD C. TURNER,

Attorney General

144.

OFFICE SUPPLIES, ETC., FURNISHED TO COUNTY SUPERINTENDENT OF SCHOOLS SHOULD BE PAID OUT OF COUNTY BOARD OF EDUCATION FUND.

Bills for office supplies, stationery, etc., furnished to the county superintendent of schools, should be approved by the county board of education and paid out of the county board of education fund on the warrant of the county auditor.

COLUMBUS, OHIO, March 17, 1915.

HON. A. L. DUFF, *Prosecuting Attorney, Port Clinton, Ohio.*

DEAR SIR:—In your letter under date of March 1, 1915, you request my opinion as follows:

> "The county board of education has presented to the county auditor, certain bills for office supplies, stationery, etc. Are these bills to be presented to the county commissioners for their approval, or are the same to be submitted to the auditor and paid by him out of the board of education fund?
>
> "The county superintendent has a letter from the state school superintendent stating that all such bills should be paid out of the board of education fund, after such bills had been approved by the county board of education. I do not see any authority for such a ruling as this. I am of the opinion that all of these bills should be paid out only upon the approval of the county commissioners.
>
> "I wish you would let me know of any ruling that has been made in your department relative to such bills."

While section 4744-6 of the General Code, as amended in 104 O. L., page 143, provides:

> "The county commissioners of each county shall provide and furnish offices in the county seat for the use of the county superintendent;"

I do not consider that this provision of the statute authorizes the payment of bills for stationery, telephone services and other expenses incident to the clerical work of the office of the county superintendent, out of the general county fund upon the approval of the county commissioners.

I am aware of the fact that bills for office supplies furnished to the various county offices are allowed by the county commissioners and paid out of the general expense fund of the county and that this is done with the approval of the bureau of inspection and supervision of public offices, although there is no statutory provision specifically authorizing the same.

I call your attention to section 4684, G. C., as amended in 104 O. L., p. 133, which provides:

> "Each county, exclusive of the territory embraced in any city school district and the territory in any village school district exempted from the supervision of the county board of education by the provisions of sections 4688 and 4688-1, and the territory detached for school purposes, and including the territory attached to it for school purposes, shall constitute a county school district. In each case where any village or rural

school district is situated in more than one county such district shall become a part of the county school district in which the greatest part of the territory of such village or rural district is situated."

You will observe that a county school district as defined by the above provision of statute, is not co-extensive with the county as a political subdivision of the state.

Answering your question, I am of the opinion that in the absence of an express provision of the statute authorizing the payment of bills for office supplies, stationery, etc., furnished to the county superintendent of schools, out of the general expense fund of the county upon the approval of the county commissioners, such bills should be approved by the county board of education and paid out of the county board of education fund on the warrant of the county auditor.

Respectfully,
EDWARD C. TURNER,
Attorney General.

145.

LEVY OF TOWNSHIP TRUSTEES TO PROVIDE A ROAD REPAIR FUND CANNOT BE MADE UPON ALL TAXABLE PROPERTY OF TOWNSHIP INCLUDING PROPERTY WITHIN CORPORATE LIMITS OF VILLAGE—OFFICES OF VILLAGE CLERK AND CLERK OF BOARD OF TRUSTEES OF PUBLIC AFFAIRS ARE INCOMPATIBLE.

1. *A levy of the trustees of a township, under authority of section* 7014, *G. C., to provide a repair fund for roads in a township, including a road running into a village within the township, improved under authority of sections* 6976, *et seq., G. C., must be made upon all the taxable property within the corporate limits of said village.*

2. *The offices of village clerk and clerk of the board of trustees of public affairs of a village are incompatible and may not be held by the same person.*

COLUMBUS, OHIO, March 17, 1915.

HON. T. B. JARVIS, *Prosecuting Attorney, Richland County, Mansfield, Ohio.*

DEAR SIR:—Permit me to reply to your letter under date of March 6, 1915, which is as follows:

"Yesterday the township trustees of Sharon township, Richland county, called on me for a reason why the village of Shelby was excluded in the tax levy from Sharon township for the repairing of certain macadamized roads.

"It seems that several years ago a vote was had and all the legislation regular under section 6976, General Code; bonds were issued and the election held as the chapter requires, but when it came to asking for a levy to keep this road in repair, the levy was made only in the township outside of the village of Shelby.

"While my construction of the statute would be, referring to section 7014, that the levy should have been made on the entire taxable property

of the township, including the village of Shelby. The valuation in Sharon township, including the village, is over $7,000,000, while the valuation of the property outside of the village corporation is about $1,500,000.

"The auditor of this county told us that the only reason he knew why the levy was not made for the whole property was that a certain examiner, while here last year, told him it was illegal; that the village could not be held for any part of the expense of repairing this road, although the road runs into the town, and, perhaps, some of it was repaired within the town, and the town voted for the bonds and the improvement originally and until this time have been paying on the bonds. But for the repairs the levy was not made. Will you please give me your opinion with reference to this matter?

"Second. Section 4357 of the General Code with reference to the board of trustees of public affairs shows when a board shall be established. Section 4360 indicates the way the organization of the board shall be effected, and you will note by this section that this board may elect a clerk who shall be known as the clerk of the trustees of public affairs. It so happens in this case that the clerk of the village elected by the people, was also selected by the board of trustees of the public affairs as the clerk of this body. The treasurer has been informed by some attorney that if he honors the warrants of the clerk of the village he cannot honor the warrants of the clerk of this board of trustees; that these offices are incompatible. He says that Attorney Hogan rendered such an opinion some time last summer. I do not have his opinion, but at this time cannot see why there is any inconsistency in the two offices.

"Will you please report at an early date whether the clerk of the village and the clerk of the board of trustees of public affairs under said section, may be the same person?"

Replying to your first question, I understand from your statement of facts that some years ago certain roads in Sharon township, including a road running into the village of Shelby, within said township, were improved by the trustees of said township under the provisions of section 6976, et seq., of the General Code; that said improvements were made in conformity with all the requirements of said statute; that after said improvements were made the trustees of said township determined to provide a fund for keeping said improved roads in repair and to make an annual tax levy for this purpose, under authority of section 7014 of the General Code, which provides:

> "To provide a fund for the keeping in repair of such improved roads and streets the trustees of the township may levy annually an amount not to exceed one-half of one mill upon each dollar of the valuation of all the taxable property in such township in addition to other road taxes by them levied,"

but that said levy was made only upon the valuation of taxable property within said township outside of the corporate limits of the village of Shelby.

You will observe that under the provisions of section 7014, General Code, above quoted, this levy for the repair fund for said improved roads is to be made *"upon each dollar of the valuation of all the taxable property in such township."*

I am of the opinion that the levy referred to in your inquiry, should have been made upon all the taxable property in Sharon township, including the taxable property within the corporate limits of the village of Shelby.

While, according to your statement of facts, the auditor of Richland county informed you that one of the state examiners advised him that the levy on all the taxable property in Sharon township, including the village of Shelby, would be illegal, I find, on investigation, that on May 26, 1914, Mr. E. N. Halbedel, of the bureau of inspection and supervision of public offices, addressed a letter to Mr. E. J. Ott, state examiner, in care of county auditor, Mansfield, Ohio, in answer to a letter from Mr. Ott under date of May 18th, in which this same question was asked, and Mr. Ott was advised that "the levy must be made upon all the taxable property of the township, including that of the corporation or municipality within it."

Replying to your second question, permit me to say that upon careful search of the files in this office I am unable to find an opinion rendered by my predecessor, Mr. Hogan, holding that the office of village clerk is incompatible with the office of clerk of the board of trustees of public affairs of the village.

I call your attention to section 4280, General Code, relating to the power and duties of the clerk of the village, which provides:

> "The clerk shall attend all meetings of the council and keep a record of its proceedings and of all rules, by-laws, resolutions and ordinances passed or adopted, which shall be subject to the inspection of all persons interested. In case of the absence of the clerk, the council shall appoint one of its members to perform his duties for the time."

Section 4281, General Code, provides:

> "The clerk shall keep the books of the village, exhibit accurate statements of all moneys received and expended and of all property owned by the village and the income derived therefrom and of all taxes and assessments."

The provisions of section 4283, et seq., of the General Code, relate to the duties of the auditor of a city and, insofar as applicable, to the duties of the clerk of a village. Section 4283, General Code, provides:

> "In the following provisions of this chapter, the word 'city' shall include 'village,' and the word 'auditor' shall include 'clerk.'"

Section 4284, General Code, provides:

> "At the end of each fiscal year, or oftener if required by council, the auditor shall examine and audit the accounts of all officers and departments. He shall prescribe the form of accounts and reports to be rendered to his department, and the form and method of keeping accounts by all other departments, and, subject to the powers and duties of the state bureau of inspection and supervision of public offices, shall have the inspection and revision thereof. * * *"

Section 4286, General Code, provides in part as follows:

> "On the first Monday in each month statements of the receipts and expenditures of the several officers and departments for the preceding month shall be made to the auditor by the heads thereof. * * *"

Under the above sections the village clerk is vested with power to examine and audit the accounts of all officers or departments of the village government.

The authority to establish a board of trustees of public affairs is found in section 4357, General Code, which provides:

"In each village in which waterworks, an electric light plant, artificial or natural gas plant, or other similar public utility is situated, or when council orders waterworks, an electric light plant, natural or artificial gas plant or other similar public utility, to be constructed, or to be leased or purchased from any individual, company or corporation, council shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall be each elected for a term of two years."

Section 4360, General Code, provides:

"The board of trustees of public affairs shall organize by electing one of its members president. It may elect a clerk, who shall be known as the clerk of the board of trustees of public affairs."

Section 4361, General Code, as amended in 103 O. L., 561, provides:

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

You will observe that the powers and duties of the board of trustees of public affairs in a village are similar to the powers and duties of the director of public service in a city. You inquire whether it would be permissive for the

village clerk to hold the office of clerk of said board of trustees. The statutes do not cover this case and the question arises whether the common law holds these two offices incompatible. The test under common law is as follows:

> "Offices are considered incompatible when one is subordinate or *in any way a check upon the other,* or when it is physically impossible for one person to discharge the duties of both. State ex rel. Attorney General v. Gebert, 12 O. C. R. N. S., 274."

The latter element is eliminated from this case, inasmuch as the duties of both offices might be discharged by the same person. The only question to be disposed of is as to whether one office acts as a check on the other.

It is the duty of the village clerk, acting as the auditor for the village, to examine the accounts of the board of trustees of public affairs, guard against overdrafts on appropriations, prepare detailed statements of receipts and expenditures, etc., in conformity with the requirements of section 4284, et seq., of the General Code, as above set forth. In other words, the clerk of the village is required to audit the books of said board of trustees and the office of the village clerk, therefore, acts as a check upon the office of the clerk of the board of trustees of public affairs of the village.

I am of the opinion, therefore, that the two offices are incompatible as measured by the common law test and may not be held by the same person.

Respectfully,
EDWARD C. TURNER,
Attorney General.

146.

OFFICIAL BOND EXECUTED BY A SURETY COMPANY—SATISFIES REQUIREMENT OF STATUTE WHEN LANGUAGE STATES "SURETIES" OR "TWO OR MORE SURETIES."

When the language of the General Code requires "sureties" or "two or more sureties" on an official bond, a bond executed by a surety company as sole surety complies with the requirements of the statutes by virtue of the provisions of section 9571, *G. C.*

COLUMBUS, OHIO, March 18, 1915.

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

GENTLEMEN:—I have your communication of March 12, 1915, in which you request my opinion on the following question, to wit:

> "When the language of the General Code requires 'sureties' or 'two or more sureties' on an official bond, will a bond signed by a surety company comply with the provisions of the law?"

This question is answered in the affirmative by the provisions of section 9571, G. C., which section reads as follows:

> "When a bond, recognizance or undertaking is required or permitted by law, with one or more sureties, its execution or the guaranteeing thereof,

as the case may be, as sole surety, by a company authorized to guarantee the fidelity of persons holding places of public or private trust, to guarantee the performance of contracts other than insurance policies, and to execute and guarantee bonds and undertakings in actions or proceedings or by law allowed is sufficient, and when so executed and guaranteed, shall be a full compliance with every requirement of law, ordinance, rule or regulation that such bond, or recognizance must be executed and guaranteed by one surety or two or more sureties, or that such sureties, shall be residents or householders or freeholders."

Respectfully,
EDWARD C. TURNER,
Attorney General.

147.

COUNTY SURVEYOR NOT ENTITLED TO PAY FOR SERVICES PERFORMED FOR COUNTY BOARD OF EDUCATION.

The county surveyor is not entitled to remuneration for services performed under section 4736, *G. C.*

COLUMBUS, OHIO, March 18, 1915.

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

GENTLEMEN:—Under date of February 2, 1915, you inquire as follows:

> "Section 4736 of the General Code provides that county boards of education, in changing boundary lines and other work of like nature, shall ask the assistance of the county surveyor, and that official is required by the section to perform the service. From what fund, if any, shall the surveyor be paid, and what amount?"

The county board of education was first created by the laws enacted at the first extraordinary session of the 80th general assembly. The fund under the control of the county board of education is created from the following sources. First: the surplus transferable from the dog tax fund under section 5653 of the General Code, 104 O. L., 145, which surplus it is provided shall be transferred "to the county board of education fund at the direction of the county commissioners." Another source for such fund is to be found in section 4744-3, 104 O. L., 143, which provides as follows:

> "The county auditor when making his semi-annual apportionment of the school funds to the various village and rural school districts shall retain the amounts necessary to pay such portion of the salaries of the county and district superintendents as may be certified by the county board. Such amount shall be placed in a separate fund to be known as the 'county board of education fund.' The county board of education shall certify under oath to the state auditor the amount due from the state as its share of the salaries of the county and district superintendents of such county school district for the next six months. Upon receipt by the state auditor of

such certificate, he shall draw his warrant upon the state treasurer in favor of the county treasurer for the required amount, which shall be placed by the county auditor in the county board of education fund."

A third source of said fund is found in section 7820, 104 O. L., being fees collected from applicants for examination by the board of county school examiners.

Section 4734, 104 O. L., 137, provides that

"each member of the county board of education shall be paid his actual and necessary expenses incurred during his attendance upon any meeting of the board. Such expenses, and the expense of the county superintendent, itemized and verified shall be paid from the county board of education fund upon vouchers signed by the president of the board."

Section 4744-1, 104 O. L., 142, provides that the salary of the county superintendent shall be fixed by the county board of education, and shall be paid out of the county board of education fund and further that

"the county board may also allow the county superintendent a sum not to exceed three hundred dollars per annum for traveling expenses and clerical help."

Section 7860, 104 O. L., 186, provides that the expense of conducting the county teachers' institute,

"shall be paid out of the county board of education fund upon the order of the president of the county board of education."

Section 4736 referred to in your inquiry is found in 104 O. L., 138. Said section authorizes the county board of education to make certain changes in boundary lines and further provides:

"in changing boundary lines and other work of like nature of the county board shall ask the assistance of the county surveyor and the latter is hereby required to give the services of his office at the formal request of the county board."

I have read the statutes in vain to find any specific provision therein that authorizes the county board to pay the county surveyor for the services performed by him under section 4736. Under familiar rules of statutory construction unless there is provision made by statute for the payment of a public servant for services performed for the public, the rendition of such services is regarded as a gratuity, or as being compensated by the fees, privileges and emoluments accruing to such officer in the matter pertaining to his office.

Clark v. Commissioners, 58 O. S., 107.
Jones v. Commissioners, 57 O. S., 189.

and as a settled rule of law it can be stated that laws providing for compensation of public officials are strictly construed and compensation is only allowed where clearly expressed.

State ex rel. v. Culbertson, 6 N. P. (n. s.) 311.

I am, therefore, of the opinion that the county board of education is without authority to pay the county surveyor for services performed under section 4736, there being no specific provision of law authorizing such payment.

In this connection I desire to call attention to the peculiar language of section 4736. Said section provides in part as follows:

> "In changing boundary lines and other work of like nature the county board shall ask the assistance of the county surveyor and the latter is hereby required *to give* the services of his office at the formal request of the county board."

The fact that the section provides that the county surveyor is required to give the services and the further fact that there is no specific provision of law for the payment of such services indicates to me that the legislature intended that the services performed by the county surveyor under section 4736 were to be performed without compensation.

Respectfully,
EDWARD C. TURNER,
Attorney General.

148.

RECEIPTS OF OHIO STATE SANATORIUM WHEN PAID INTO STATE TREASURY GO TO A SPECIAL FUND—UNEXPENDED BALANCE LAPSES INTO SPECIAL FUND, NOT INTO GENERAL REVENUE FUND.

Receipts of The Ohio State Sanatorium received under section 2072, G. C., when paid into the state treasury go to a special fund and therefore moneys appropriated out of such fund unexpended at the close of business February 15, 1915, lapse back into such fund and not into the general revenue fund.

COLUMBUS, OHIO, March 18, 1915.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Under date of March 8th, you write as follows:

> "I beg to acknowledge receipt of your opinion under date of March 5th, in reply to my request of March 3rd advising this department in regard to receipts at The Ohio State Sanatorium.
>
> "At the close of business February 15, 1915, there was a balance in the personal service fund for the Ohio board of administration of $14,305.50, of which $12,459.97 covered receipts from The Ohio State Sanatorium which had been credited to the personal service fund in compliance with the appropriation bill (104 O. L., p. 64).
>
> "Will you please advise as to whether this balance of $12,459.97 should revert to the general revenue fund or to the credit of The Ohio State Sanatorium?"

Under date of March 6th, we rendered an opinion to your department wherein we held that the moneys received under section 2072, General Code, when paid into

the treasury under the provisions of amended section 24, 104 O. L., 178, were to be kept separate and apart from the moneys paid in to the credit of the general revenue fund, for the reason that the moneys received under section 2072 were by virtue thereof impressed with a trust to be used solely for the purposes specified in such section. Such being the case, although there was not created in the state treasury a fund specifically named as the state sanatorium fund, yet in fact such a fund should be set up and all moneys paid in should be credited thereto. In view of such holding the $12,459.97, which you state were from receipts from The Ohio State Sanatorium should lapse back into such fund and not to the general revenue fund.

We are aware that heretofore it has been the custom of the legislature to appropriate all funds out of the general revenue fund and not take cognizance of the special fund in the state treasury. That custom, however, has been set aside in the recent appropriation bill passed to cover the period from February 15, 1915, to July 1, 1915, so that hereafter appropriations will be made so far as the various funds will warrant from the special funds in the state treasury. In view of this fact the amount of money which is appropriated to the Ohio board of administration for maintenance of the state sanatorium will come from the special state sanatorium fund so far as there are moneys in such fund to cover the amount of the appropriation for said sanatorium.

Respectfully,
EDWARD C. TURNER,
Attorney General.

149.

FUNDS APPROPRIATED FOR MAINTAINING AND EXHIBITING LIVE STOCK, AGRICULTURAL PRODUCTS, ETC., AT THE PANAMA-PACIFIC INTERNATIONAL EXPOSITION CANNOT BE USED FOR EXHIBIT TRAIN TO AND FRO.

Funds appropriated for the purpose of installing, maintaining and exhibiting live stock, agricultural products, resources and opportunities of the state of Ohio at the Panama-Pacific International Exposition in San Francisco, cannot be used for the purpose of defraying the expenses of running an exhibit train from Ohio to San Francisco and return, making an exhibit of live stock and agricultural products at stations between such points.

COLUMBUS, OHIO, March 19, 1915.

The Ohio Commission to the Panama-Pacific International Exposition, Columbus, Ohio.

GENTLEMEN:—I have your letter of March 18, 1915, requesting my opinion, which letter is as follows:

> "Can the appropriation or any part thereof made for the purpose of having an agricultural and livestock exhibit at the P.P. I. E. be used toward defraying the expenses of running an exhibit train from here to San Francisco and return, making an exhibit of livestock and agricultural products at stations between here and San Francisco, where said exposition is being held?"

Appropriations for the purpose of paying expenses of the Ohio exhibit at the Panama-Pacific International Exposition were made by H. B. 425, found in 101 O. L., page 216, H. B. No. 8 found in 104 O. L., p. 5, H. B. No. 53, found in 104 O. L., p. 211, and H. B. 314, passed by the 81st general assembly. I quote from H. B. No. 53 for the reason that it refers specifically to an exhibit of livestock and agricultural products, and the language of the other appropriation laws above mentioned can only be construed to mean the same. The portion of H. B. No. 53, so far as it is applicable to your question, is as follows:

> "Exposition commissioner for the purpose of installing, maintaining and exhibiting the livestock, agricultural products, resources and opportunities of this state at the Panama-Pacific International Exposition in San Francisco in the year 1915, $25,000."

The appropriation therefore being specifically limited to "the purpose of installing and maintaining an exhibit *at* the Panama-Pacific International Exposition *in* San Francisco," your question must be answered in the negative, and such funds cannot be used toward defraying the expenses of running an exhibit train from here to San Francisco and return, making an exhibit of livestock and agricultural products at other places.

Respectfully,
EDWARD C. TURNER,
Attorney General.

150.

CONDITION IN DEED OF CONVEYANCE RESTRICTING THE SALE OF BEER UPON PREMISES TO THAT BREWED BY THE GRANTOR DOES NOT GIVE TO GRANTOR SUCH INTEREST AS WILL NECESSITATE REVOCATION OF SALOON LICENSE BY THIRD PARTY.

A condition in a deed of conveyance restricting the sale of beer upon the premises to that brewed by the grantor exclusively does not give to the grantor such an interest in the business of conducting a saloon on the premises by a third party under a saloon license as will authorize the revocation of such saloon license under section 9 of article XV of the constitution of Ohio.

COLUMBUS, OHIO, March 19, 1915.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I have yours of March 5th, requesting an opinion as follows:

> "Will you kindly advise the state board whether it is the duty of a county board to revoke the saloon license of a licensee for the reason that a brewing company has an interest in the license of said licensee in violation of article 15, section 9 of the constitution, under the following state of facts:
>
> "A brewery company was the owner of a certain parcel of land and on the 5th day of June, 1914, sold and conveyed said premises to John and Martha Doe. The deed thus conveying said premises contains the following stipulation:
>
> "'It is made a condition of this deed and covenant running with the land that in case the said premises are used for the sale of intoxicating

liquors that the beer brewed by said grantor shall be sold on said premises exclusively, bottled beer excepted, for the period of five (5) years next ensuing.'

"A saloon is now being conducted on said premises by one Dick Rowe under a license issued by the county board. Said brewery company now insists on the provisions of the deed as above quoted being carried out by said licensee. Said company has, under an order of the court, restrained said licensee from handling on said premises keg beer brewed by any other person or company and said company is now furnishing to said licensee the keg beer brewed by it for exclusive sale on said premises?"

The answer to your question turns upon whether or not the grantor in the deed of conveyance to the grantee of the premises by reason of the condition and covenant contained therein as above quoted, thereby acquires any interest or such an interest in the business of the lessee who is now conducting a saloon upon the premises, as comes within the terms of the provision of the constitution and the like provision of the liquor license law, as follows:

"License shall not be granted to any applicant who is in any way interested in the business conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage nor shall such license be granted unless the applicant or applicants are the only persons in any way pecuniarily interested in the business for which the license is sought and no other person shall be in any way interested therein during the continuance of the license; if such interest of such person shall appear, the license shall be deemed revoked."

In the case of Sandusky Brewing Company v. Joseph Demke et al., 9 Ohio C. C. Rep. (n. s.) page 130, decided by the circuit court of Cuyahoga county, it was held:

"The condition in a mortgage, given to a brewing company for a sum of money advanced by it to enable the mortgagor to build a saloon upon the mortgaged premises, that the mortgagor shall not, for a period of twelve years, sell upon the mortgaged premises any beer, ale or porter except that manufactured by the mortgagee, is founded upon a valuable consideration, is not against public policy as in restraint of trade, and may be enforced by injunction to prevent the sale on the premises of other brews than that of the mortgagee."

In the case of Diehl Brewing Co. v. Louis A. Konst, decided by the circuit court of Putman county, 12 Ohio C. C. Rep., (n. s.) 577, and affirmed in 79 O. S., 469, it was said:

"2. The lessee of premises leased on condition that only beer manufactured by the lessor shall be sold on the premises, may be enjoined from a repudiation of his agreement not to sell other beer.

"3. A provision in a lease whereby the lessee engages to sell no beer on the leased premises other than that manufactured by the lessor, in nowise affects the public and is not invalid as in restraint of trade or in violation of the Valentine anti-trust law."

Those cases were both decided prior to the adoption of article 15, section 9

of the constitution, as above quoted. The question submitted by you, however, was passed upon in the case of Kopac Zowski v. The Huber Toledo Breweries Co., by the court of appeals of Lucas county, in which the court says:

> "We are not able to see how the transaction set forth in the petition is in any way in conflict with the language above quoted. No license to sell intoxicating liquors on the premises in question has been granted to the brewing company, nor is the brewing company interested in the license which has been granted, nor in the business conducted on the premises. The only relation set forth in the pleading is one showing that the defendants are, and are required to be for a limited period of time, customers of the plaintiff in the event that they sell beer on the premises. If the contention in this respect of the defendant, Szparagowski, were correct, it would follow that his own license to conduct the business on the premises should be revoked. Of course, a brewing company is naturally interested in the success of its customers but that interest is no different in a legal sense in this case from the interest which it has in the success of other customers. The fact that the brewing company is to furnish the entire supply of draught beer sold by the defendants does not give that company an interest in the business any more than an electric light company which supplied light for the saloon or a water company which supplied water, or a gas company which heated the saloon, would have an interest in the business there conducted. It is not such an interest as is within the inhibition of that section of the constitution from which quotation has been made."

I am not aware that this question has been considered by any other court of this state since the adoption of the constitutional provision above quoted. I am, therefore, of opinion that a license may not be deemed to be revoked by reason of the facts stated in your request.

Respectfully,
EDWARD C. TURNER,
Attorney General.

151.

STATE HIGHWAY COMMISSIONER—HAS AUTHORITY TO LINE TUNNEL OF INTER-COUNTY HIGHWAY—HOW PAID.

The state highway commissioner, acting under an application by county commissioners, has authority to line a tunnel on the route of an inter-county highway under process of construction, and to pay the state's portion of the cost and expense from the state highway fund.

COLUMBUS, OHIO, March 19, 1915.

HON. JAMES R. MARKER, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 1, 1915, in which you state that on March 21, 1913, the state of Ohio in co-operation with Lawrence county, let a contract for building a section of the inter-county highway No. 404, Ironton-Miller road, Lawrence county, which section begins with the corporation line of

the city of Ironton and extends eastward therefrom about one mile. This contract is now nearing completion, a delay having been caused by the contractor making an assignment.

At the corporation line of the city of Ironton on the said road is a tunnel extending on either side of the corporation line a distance of about seventy-five feet. The city of Ironton has recently let a contract for lining that portion of the tunnel within the city limits. The portion of the tunnel without the city limits and which is situated on the said road is dangerous to the public because of the roof of the tunnel disintegrating which causes rock to drop quite frequently therefrom. It is therefore very essential that this portion of the tunnel be lined with concrete or other material as is provided for by the city for the portion within the city limits. The contract for the building of the road, let March 21, 1913, was let under the old state highway law under which the state was no party to the contract for improving or constructing bridges. This contract did not provide for any improvement whatever on the tunnel but did provide for the improvement of the road surface in the tunnel.

You now inquire as to whose duty or authority it is to pay for the improvement of lining said tunnel. Your question also involves a consideration of the proposition of whether the state highway commissioner, if authorized to make said improvement, is also required to make it, or whether the making of the improvement is optional with him. You also inquire whether the improvement, if made by the state highway commissioner, should be paid for from the maintenance and repair fund or from the state highway fund.

The sections relating to the state highway department are silent with reference to the construction and repair of tunnels and any authority to repair the same must, if it exists, be inferred from other powers expressly granted. Under the law as it existed at the time of the letting of the contract in question, it was necessary for the officials making application to provide the requisite right of way and it was required that the cost of all bridges and culverts should be paid from the county bridge fund. All the remaining expense was divided in the first instance between the state and the county, the state paying not more than half. Any expense especially incurred by reason of the existence of a tunnel is closely analogous to the expense incurred in grading a highway; cuts, fills and tunnels all being designed to eliminate steep grades. There would have been no doubt about the authority of the state highway commissioner in the first instance to participate in making an improvement which would have involved the removal of that part of the roof of the tunneling over the section of inter-county highway to be improved. Such a removal would have amounted merely to making a deep cut and would have been clearly within the authority of the state highway commissioner. The reason for a cut and for a tunnel being the same, I am of the opinion that the state highway commissioner in the first instance might have included in the original plans and specifications for the improvement of the Ironton-Miller road a plan for lining that portion of the tunnel outside the city of Ironton, and upon proper action by the commissioners of Lawrence county would have been authorized to pay the state's portion of such cost.

It appears that the contract for the improvement of the road in question has not yet been completed. This being true, the state highway commissioner would not have authority under section 1225 G. C., 103 O. L., 459, to line the tunnel in question and pay the cost thereof from the maintenance and repair fund.

I am of the opinion that under the state of facts suggested by you, the lining of the tunnel is to be regarded as a separate and distinct improvement of an inter-county highway which may be undertaken by the state highway commissioner upon the application in the usual manner of the county commissioners. If the state highway commissioner approves the application, he shall make the necessary

plans, specifications and estimates and transmit copies thereof to the county commissioners. Upon the commissioners adopting a resolution that the improvement be made, the highway commissioner is authorized to proceed according to law to make the same, and to pay from the state highway fund the state's portion of the cost and expense as defined and limited by section 1207 G. C.

Answering specifically the questions propounded by you as to your authority to undertake the improvement of lining the tunnel in question, it is my opinion that you have the authority to make the improvement upon the application of the county commissioners, said authority being a necessary incident of the powers expressly granted to you; that the question of whether or not you shall exercise this authority rests in your discretion, being dependent upon your approval of the application; and that if you do undertake the improvement the state's portion of the cost and expense should be paid from the state highway fund.

The above statement is subject to the modification that if the county commissioners do not make use of the apportionment of Lawrence county, as provided in section 1185 G. C., then you would be authorized to make this improvement, either by contract or force account and pay the full cost thereof from any apportionment due Lawrence county.

Respectfully,
EDWARD C. TURNER,
Attorney General.

152.

COUNTY COMMISSIONERS—SHOULD NOT NOW ATTEMPT TO ISSUE BONDS FOR COUNTY EXPERIMENT FARM UNDER VOTE TAKEN IN 1910.

County commissioners should not now attempt to issue bonds for the purpose of purchasing a county experiment farm under a vote taken in 1910 *where no action has been taken in the matter for about three years.*

COLUMBUS, OHIO, March 20, 1915.

HON. GEORGE THORNBURG, *Prosecuting Attorney, St. Clairsville, Ohio.*
DEAR SIR:—On March 3, 1915, you wrote me as follows:

> "In 1910, under authority of section 1165-3 of the General Code, a vote was taken in Belmont county for the establishment of an experiment farm, which vote resulted in a majority of the voters favoring the purchase of a farm. Since that time an attempt has been made on one or two occasions to select a farm but without success. In volume 103, page 436, of Ohio laws, an amendment was made providing the manner for raising the money and selecting the farm. Belmont county now desires to take up the matter and purchase the farm, and the county commissioners are not satisfied that they have the right to purchase the farm under the vote taken in 1910."

On March 6, 1915, in response to my request for further information, you wrote me the following:

> "Replying to your letter of March 5th, I will say that about three years ago the county commissioners levied a tax for the purpose of raising money to purchase an experiment farm. They were about to issue

the bonds, but a difference of opinion arose as to the selection of a farm and the matter was dropped, and nothing has been done since. In the experiment farm fund there is now a balance of $1,219.00, but no levy was made for it last year.

"The question that we are particularly anxious to have answered is:

"Can we purchase a farm under the old vote or will it be necessary for the county to again vote on the subject before we can issue the bonds and purchase the farm?"

As indicated by you, a substantial amendment of the law relating to county experiment farms was made by the legislature in 1913, the amendment being found in 103 O. L., 436. Those changes in the law which are especially germane to the present inquiry are found in sections 1165-6 and 1165-7 G. C.

Under the provisions of section 1165-6, as that section stood at the time of the election in Belmont county, the proceeds of the bond sale were required to be deposited in the county treasury, to be applied by the commissioners to the purchase and equipment of a county experiment farm. Under the provisions of this section, as it now stands, and taking into consideration the fact that the board of control of the Ohio agricultural experiment station has been abolished by other legislation, and its duties cast upon the agricultural commission of Ohio, the proceeds of the bond sale must be deposited in the county treasury subject to the order of the agricultural commission of Ohio, to be applied by said agricultural commission to the purchase and equipment of a county experiment farm.

Under the provisions of section 1165-7, as that section stood at the time of the election in Belmont county, it was the duty of the board of control of the Ohio agricultural experiment station to visit the county and assist in the selection of a farm, but no farm could be purchased except with the approval of a majority of said board of control and also a majority of the board of county commissioners. Under this section as it now stands, it is the duty of the agricultural commission to visit the county and select the farm, and the county commissioners or other local officials are stripped of all power and authority in this particular.

It will thus be seen that since the election was held in Belmont county there has been a very substantial change in the law relating to the selection and purchase of the farm. Under the law as it stood at the time of the election, a majority of the county commissioners had the power to prevent the purchase of a farm which did not meet with their approval. Under the law as it now stands, neither the county commissioners nor any other local official or officials have any voice in the selection or purchase of the farm, the entire authority in that direction being lodged in the state commission. It might well be that the electors of Belmont county would be willing to authorize an expenditure of public money for a farm, in case local officials were to have a voice in its selection, and unwilling to authorize such expenditure in case the farm were to be selected without giving local officials any voice in the matter. While the proceeds of the bond issue are still to be devoted to the same purpose, yet a radical change has been made in the machinery provided for the selection and purchase of the farm, and in the absence of any other consideration, this change would raise a serious question as to the right to proceed under the vote had in 1910.

From your statement of facts it also appears that there has been in effect an abandonment of the original proposition of establishing a county experiment farm in Belmont county. The commissioners were about to issue the bonds, but a difference of opinion arose as to the selection of a farm and the matter was dropped, and nothing has been done since the commissioners made a tax levy about three years ago. In view of the lapse of over four years since the vote was taken, and the intervening change in the law, and the further fact that there

has been a practical abandonment of the proposition of establishing a county experiment farm in Belmont county through failure to take any action whatever in the premises for about three years, I advise you that the county commissioners of Belmont county should not now attempt to issue bonds under the vote taken in 1910.

Respectfully,
EDWARD C. TURNER,
Attorney General.

153.

FINES COLLECTED UNDER AUTHORITY OF SECTION 12965, G. C., ARE NOT TO BE PAID OUT TO INFORMERS.

No part of the fines collected under the provision of section 12965, *G. C., is to be paid as informers' fees.*

COLUMBUS, OHIO, March 20, 1915.

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

GENTLEMEN:—This office is in receipt of a request for an opinion as to the disposition of the fines collected under the provisions of section 12965 of the General Code, which deals with parties convicted of the unlawful sale of cigarettes. The request is contained in a letter from the clerk of the criminal court of Canton, Ohio, which is as follows:

> "Will you kindly inform me as to section 12965 of the General Code, relative to the division of the fine in case where an officer of the police department furnishes information leading to the conviction of parties engaged in the unlawful sale of cigarettes?
>
> "The case in question is one in which an officer furnishes the information which he obtained in the evening while off duty.
>
> "The conviction resulted, and defendant was fined fifty dollars and costs. Is the officer entitled to half the fine?
>
> "Kindly give me this information at your earliest convenience, for which I thank you in advance."

An examination of the statutes fails to disclose any provision of law relating to informers in connection with the section mentioned—12965—and the clerk of the court is evidently confusing the case under consideration with those coming under the provisions of sections 12680 and 5899 of the General Code, which provide for the payment of informers' fees in cases relating to other branches of the cigarette laws.

I am of the opinion therefore that there is no authority for the payment of any part of the fine either to an officer or anyone else who may have secured the information leading up to the conviction.

A copy of this opinion has been forwarded to Mr. Ross H. Hurford, clerk of the criminal court, Canton, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.

154.

COUNTY COMMISSIONERS SHALL MAKE ALLOWANCE TO SHERIFF FOR NECESSARY EXPENSES COVERING REPAIR ON AUTOMOBILES WHEN SAME IS USED IN DISCHARGING OFFICIAL DUTIES —NO AUTHORITY TO ERECT GARAGE ON JAIL YARD.

Under section 2997, G. C., county commissioners shall make an allowance to the sheriff for actual and necessary expenses incurred by him in paying for repairs on his automobile and in keeping it in good condition, only when said machine is used by him in the discharge of his official duties.

There is no authority in law for the county commissioners to erect a garage on the jail yard in which the machine owned by the sheriff and used by him in the discharge of his official duties might be kept.

COLUMBUS, OHIO, March 20, 1915.

HON. CHARLES L. BERMONT, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—In your letter under date of March 8, 1915, you request my opinion as follows:

> "I desire to submit for your opinion the following:
> "The sheriff of Knox county owns his automobile and is using the same for the transaction of county business. How far under section 2997, G. C., may the commissioners go in the maintenance of this machine and may the commissioners legally erect a building on the jail yard in which to keep said machine?"

Section 2997, G. C., provides in part as follows:

> "In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff for * * * and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office."

In the case of State ex rel. Sartain, as sheriff of Franklin county, Ohio v. Sayre, as auditor, etc., et al., Judge Rathmell of the court of common pleas of said county held that the word "vehicles" as used in the above statute, includes automobiles.

The county commissioners may, therefore, make an allowance to the sheriff for the expenses of maintaining his automobile when used in the proper administration of the duties of his office. The answer to your question calls for a definition of the word "maintaining" as above used.

In the case of State ex rel. Denormandie v. Commissioners of Mahoning County, 10 Ohio Cir. Ct. (n. s.) page 398, the court in construing the above section defined the word "maintaining" as follows:

> "The meaning of the word 'maintaining' as used in this section, in reference to horses and vehicles, means supporting; sustaining; keeping up; supplying with the necessaries of life; and the legislature, therefore, in this provision only meant and intended that sheriffs should be allowed the necessary expense incurred in supporting, sustaining and supplying their horses with the necessaries of life and *in keeping their vehicles in good condition,* and not in the purchase of them."

Replying to your question, I am of the opinion that the county commissioners should make an allowance to the sheriff for actual and necessary expense incurred by him in paying for repairs on his automobile and in keeping it in good condition only when said machine is used by him in the discharge of his official duties. This must not be taken to include an allowance for the purchase of an automobile or for claims on account of depreciation in value.

Replying to the second part of your question, I am of the opinion that there is no authority in law for the county commissioners to erect a garage on the jail yard in which the machine owned by the sheriff and used by him in the discharge of his official duties might be kept.

Respectfully,
EDWARD C. TURNER,
Attorney General.

155.

NO AUTHORITY EXISTS IN SUPERINTENDENT OF PUBLIC WORKS TO GRANT LEASE TO AGENT OF CERTAIN HEIRS.

The superintendent of public works is without authority to grant a lease to the agent of certain heirs; the lease should contain the names of the heirs and lessees and should be executed by them.

COLUMBUS, OHIO, March 22, 1915.

HON. JOHN I. MILLER, *Suprintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have examined the following lease of state lands, triplicate copies of which were transmitted to me for my approval under date of February 26, 1915:

Frank P. Corbett, agent, Columbus, Ohio, $266..

This lease names Frank P. Corbett, agent for heirs of Michael Corbett, as lessee, and is executed by "Frank P. Corbett, agent, for heirs of Michael Corbett."

I am returning this lease without my approval for the reason that no authority exists in the superintendent of public works to grant a lease to the agent of certain heirs. The lease should contain the names of the heirs as lessees, and should be executed by them.

Respectfully,
EDWARD C. TURNER,
Attorney General.

156.

APPROVAL OF CERTAIN LEASES OF STATE LANDS—LESSEES OF THURSTON, DEFIANCE AND COLUMBUS, OHIO.

Leases of state lands to lessees of Thurston, Columbus and Defiance, Ohio, have been executed in accordance with the provisions of law governing the same.

COLUMBUS, OHIO, March 22, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have examined the following leases of state lands, triplicate copies of which were transmitted to me for my approval under date of February 26, 1915:

S. M. Miller, Thurston, Ohio	$100.00
S. M. Miller, Thurston, Ohio	100.00
Chas. E. Fisher, Columbus, Ohio	100.00
F. G. Kronenbitter, Columbus, Ohio	100.00
F. G. Kronenbitter, Columbus, Ohio	100.00
F. G. Kronenbitter, Columbus, Ohio	100.00
F. G. Kronenbitter, Columbus, Ohio	100.00
F. G. Kronenbitter, Columbus, Ohio	100.00
W. E. Gest, Defiance, Ohio	300.00

I find that these leases have been executed in accordance with the provisions of law governing the same, and therefore return them with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

157.

WHERE PORTION OF A TOWNSHIP IS DIVIDED INTO SEPARATE TOWNSHIP, PAUPERS HAVING RESIDENCE IN TERRITORIAL LIMITS OF NEW TOWNSHIP ARE CHARGEABLE UPON IT—INFIRMARY.

Where a township is divided, and a part thereof is erected into a separate township, paupers having residence within the territorial limits of the newly erected township are chargeable upon it.

COLUMBUS, OHIO, March 22, 1915.

HON. CYRUS LOCHER, *Prosecuting Attorney, Cuyahoga County, Cleveland, Ohio.*

DEAR SIR:—I have a communication from your office under date of March 12, 1915, in which the following facts are stated:

> "Under proceedings recently had, a portion of the territory comprising the township of Independence was organized into the village of Independence, and such portion thereafter erected into a separate township under the name of East Independence township. Prior to the time of the commencement of these proceedings, one David Coburn has become a public charge upon the township, and by arrangement with the authorities of the city of Cleveland, was placed in the city infirmary. At the time he became a public charge he resided in that portion of the township of Independence which was later formed into the township of East Independence."

Attention is then called to the case of Pike Township v. Union Township, 5 O., 528, the court in that case holding that where a township is divided by competent authority and a portion of the territory formed into a new township, unless provision is made in the act of separation for a division of the property and paupers both remain with the old township, or that part which retains the name or corporate franchises.

Attention is further called to the fact that the above cited case was disapproved in the case of Trustees of Center Township v. Trustees of Willis town-

ship, 7 O. (part 2) 172, the court holding that when a new township is established, paupers having residence within its territorial limits are chargeable upon it, though before charged upon the entire township from which it is taken in whole or in part. This case was cited and followed in the case of Trustees of Williamsburg v. Trustees of Jackson, 11 O. 37, decided in 1841, all of the above cited cases being decided in the absence of any statutory provision dealing with the problem.

Attention is still further called to the fact that in 1852, 50 O. L., 260, the legislature enacted what is now section 3254, G. C., the language of the section being as follows:

> "When a township is altered, diminished, or in any way changed, by the formation of new townships, or additions to other townships, or otherwise, such original township, and all parts or portions thereof, shall remain liable, to the same extent, on contracts, engagements, or liabilities, contracted by such township, prior to the change as if no such alteration, diminution or change had taken place."

The case of Commissioners of Ashland County v. Directors of Richland County Infirmary, 7 O. S., 66, decided in 1857, is cited as authority for the proposition that a pauper remains or becomes a charge upon the township acquiring jurisdiction over the site of his residence, but is hardly applicable to the present state of facts, the dispute in that case being between two counties. The question now is as to whether the liability attaching to a township for the support of a pauper is such a liability as is contemplated by section 3254 of the General Code.

This section was enacted for the obvious purpose of preventing any impairment of the contractual obligations of a township by reason of an alteration in its boundary lines or a reduction in its size. The scope of the section is by its own language limited to contracts, engagements or liabilities *contracted* by the township.

The object of the section is to insure that all territory that was a part of a township when an obligation was contracted and which presumably shared in the benefit derived from the contract, should contribute to the payment of the obligation, and that a person to whom a township became indebted should be entitled to look for payment to all the territory that was a part of the township when the indebtedness was incurred.

I am, therefore, of the opinion that the liability of the original township of Independence, as it existed at the time that a public charge was placed in the city infirmary of Cleveland, for the support of such public charge until the erection of a part of Independence township into a separate township, is such a liability as is contemplated by section 3254, G. C.; and that the liability for the support of said public charge after the erection of the new township is not such a liability as is contemplated by said section. All of the territory comprised in Independence township, as said township existed at the time David Coburn became a public charge, would, therefore, be liable for any unpaid balance due for the care of said public charge prior to the date of the erection of East Independence township. For the care of said public charge, after the erection of East Independence township, that township alone would be liable.

Respectfully,
EDWARD C. TURNER,
Attorney General.

158.

SUBMERGED LANDS UNDER WATERS OF LAKE ERIE WHICH BELONG TO OHIO MAY BE DEEDED TO UNITED STATES FOR MARINE HOSPITAL.

COLUMBUS, OHIO, March 22, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio.*

DEAR SIR:—I return to you a letter addressed to you by the secretary of war, with its enclosures, all relating to a proposed bill to be introduced in the general assembly of Ohio with a view to granting to the United States all the right, title and interest of the state of Ohio in and to the submerged lands under the waters of Lake Erie, adjacent to a certain tract of land in the city of Cleveland occupied by the United States and used as grounds for a marine hospital.

The land which it is proposed to authorize the governor to deed to the United States includes some land which has been brought above the level of the water by the deposit of dredged material, and includes also the site of a pier which the government has built and maintained for its own convenience in connection with such hospital.

I have carefully investigated the legality and propriety of the proposed transaction and have no objection to make thereto.

I enclose herewith copies of letters written at my soliciation, directly or indirectly, by Hon. Geo. B. Harris, special counsel representing this department in the city of Cleveland; Hon. Robt. M. Morgan, who formerly represented this department in Cleveland in a similar capacity and has made a special study of the legal questions relative to the title to the submerged lands; and Hon. Newton D. Baker, Mayor of Cleveland, who may be regarded as in a sense representing the city.

Respectfully,
EDWARD C. TURNER,
Attorney General.

159.

EMERGENCY LAWS MUST RECEIVE VOTE OF TWO-THIRDS OF ALL THE MEMBERS ELECTED TO EACH BRANCH OF THE GENERAL ASSEMBLY—THE REASONS FOR SUCH NECESSITY SHALL BE SET FORTH IN ONE SECTION OF THE LAW WHICH SECTION SHALL BE VOTED UPON BY SEPARATE ROLL CALL AND SHALL RECEIVE A TWO-THIRDS VOTE.

Emergency laws must receive a vote of two-thirds of all the members elected to each branch of the general assembly and the reason for such necessity shall be set forth in one section of the law, which section shall be voted upon by separate roll call and shall receive a two-thirds vote.

COLUMBUS, OHIO, March 22, 1915.

To the Officers and Members of the 81st General Assembly of Ohio, Columbus, Ohio.

GENTLEMEN:—A question has been raised regarding the proper interpretation of section 1d of article II of the constitution. While there is no formal request pending before this department, yet in view of the fact that it will be necessary for me to take some definite action in the premises, I feel that the policy of this department should be made public at this time so that the legislature and other state departments may know the attitude of this department.

Section 1d of article II of the constitution provides:

> "Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and *emergency* laws *necessary* for the *immediate* preservation of the public peace, health or safety, shall go into immediate effect. *Such emergency laws* upon a yea and nay vote *must receive the vote of two-thirds* of all the members elected to each branch of the general assembly, and the reasons for such necessity shall be set forth in one section of the law, which section shall be passed only upon a yea and nay vote, upon a separate roll call thereon. The laws mentioned in this section shall not be subject to the referendum."

There has been a general misunderstanding as to the effect of this provision. It has been assumed that the tacking on of what has been called, erroneously, "an emergency clause" to a bill and the passing of that clause in a separate section by a two-thirds vote made the measure an emergency law. That this is not true must be apparent from a reading of section 1d above quoted.

A radical and fundamental change was made by the constitutional amendments of 1912. Up to that time the legislative power to pass laws not in contravention to the constitution was vested in the general assembly exclusively and absolutely (a discussion of the veto power of the governor is unnecessary here). By the 1912 amendments this exclusive and absolute power was taken away, the people constituting themselves a part of the legislative machinery and reserving to themselves the right to annul any law enacted by the legislature, saving only:

> "(1) Laws providing for tax levies.
>
> "(2) Laws providing for appropriation for current expenses of the state government and state institutions.
>
> "(3) *Emergency laws* necessary for the *immediate* preservation of the public peace, health or safety.

"Attached to this third class of laws were the conditions (a) that any such law could be passed only by the affirmative votes of two-thirds of all the members elected to each house, upon a yea and nay vote. (b) That the *reasons* for such *necessity* should be set out in one section *of the law,* which section could be passed only upon a separate roll call."

Before an emergency law may be passed the following conditions must exist and steps be observed:

"(a) An emergency in fact must exist.

"(b) The passage of such law must be *necessary* for the *immediate* preservation of the public peace, health or safety.

"(c) The emergency law (not one section of it, but all of it) must receive the affirmative votes of two-thirds of all the members elected to each branch of the general assembly. Such vote must be a yea and nay vote.

"(d) *The law* must contain one section in which are set forth *valid* reasons showing the *necessity* for the immediate preservation of either, any two of, or all, the public peace, health or safety.

"(e) The section last above referred to must be voted on, by yea and nay vote, on a separate roll call and must also receive the vote of two-thirds of all the members elected to each branch of the general assembly (this section being one section of *the law).*"

Furthermore, the bill must stand or fall as an emergency act. In other words, it cannot be offered as an emergency act and upon being put to vote and receiving a majority but less than two-thirds be declared passed as an ordinary law.

The essence of the bill must be to provide for an emergency and the reasons showing the necessity for the immediate preservation of the public peace, health or safety must be set forth in one section. An emergency is defined by Webster:

"a condition of things appearing suddenly or unexpectedly; an unforeseen occurrence; a sudden occasion. Any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency."

Standard dictionary:

"a sudden or unexpected occurrence calling for immediate action; a perplexing and pressing combination of circumstances, sometimes, less properly, used in the sense of urgent need or exigency."

That the word as used in the constitution is not used in the sense of either "urgent need or exigency" must be apparent from the context. Not all emergency laws may evade the referendum period, but only such laws as are *necessary* for the *immediate* preservation of the *public peace, health or safety,* and in one section of which there is set forth the *reasons* for *such necessity.*

I have examined the debates of the constitutional convention and find that the committee on phraseology changed the word "acts" to "laws" at the opening of the section and also changed "emergency measures" to "emergency laws." I do not consider this at all significant as the meaning was not changed in the slightest. We all know that no act or measure becomes a law until it has passed beyond

the control of the legislature and the governor has either signed it or allowed the ten days to elapse. The meaning must be gathered from within the four corners of each amendment interpreted in the light of the constitution as it stood immediately prior to such amendment.

In the absence of a decision by the court of last resort, I prefer not to express any final conclusion on the following matter, but it does occur to me that the only safe course for the legislature to pursue is to make a distinction between emergency laws and permanent laws. If the theory of the right of referendum be carried out it would seem clear to me that emergency laws must in their nature be temporary and the application of each should be limited to a particular emergency. A pure type of emergency law will be found in 103 O. L., 141, H. B. 640, being the act by which public authorities were authorized to disregard the general laws of the state in making *temporary* repairs, etc., of public property and ways destroyed by the floods of March and April, 1913.

Notwithstanding the mistake into which the proceding legislature fell in the attempted enactment of emergency laws, I do not think that by such mistake there has been established any precedent, especially as regards the necessity of a two-thirds vote upon the entire bill and a valid necessity clause, which the courts will feel bound to follow. It would be far better to halt now on this manifestly wrong course, and to start anew on the right course at this time than to have matters further complicated by following the erroneous interpretation of a preceding legislature.

I do not for a moment admit the contention that the courts will be bound by the declaration of the legislature that a particular measure is an emergency law. If such contention were true we might as well have no constitutional provision, as the constitution could then be disregarded with impunity.

Respectfully,
EDWARD C. TURNER,
Attorney General.

160.

BID OF KNOWLTON AND BREINIG FOR CONSTRUCTION OF ATHENS ARMORY MAY BE ACCEPTED.

Bid of Knowlton and Breinig for the construction of Athens Armory may be accepted as regular under advertisement and contract awarded on it.

COLUMBUS, OHIO, March 25, 1915.

HON. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your letter of March 1st, which is as follows:

> "I herewith transmit extract from the minutes of the meeting of the armory board on Saturday, February 27, 1915, together with the proof of publication of advertisement for bids for the Athens Armory, and the nine bids received pursuant thereto.
>
> "You will note that the award of contract for the Athens Armory is made to Knowlton and Breinig subject to your approval. In this connection you will also note that the bid of Knowlton and Breinig does not

contain separate bids on each item of the work. It is proper for me to also advise you that this bidder's certified check was a certificate of deposit made to the order of the Ohio state armory board.

"The Knowlton and Breinig bid was accepted because it was the lowest bid which complied with the plans and specifications as specified by section 5258 of the General Code.

"Please advise if the contract should be awarded to Knowlton and Breinig if their bid should not have been accepted please advise if the board can yet award a contract to the next lowest bidder, namely: Bart Davidson, of Athens, Ohio."

With your letter you enclose an extract from the minutes of the meeting of the armory board on Saturday, February 27, relative to the bid for the Athens Armory.

An examination of the bids submitted discloses the fact that that of Knowlton and Breinig is the lowest. I note from the minutes of your meeting that the bid of Knowlton and Breinig was accepted as the lowest bid which complied with the plans and specifications as specified by section 5258 of the General Code.

As the proceedings in connection with the awarding of this contract are regular, it is my opinion that the contract may be awarded to Knowlton and Breinig, of Athens, Ohio, under the provisions of section 5258 of the General Code, it appearing from an investigation of the matter that the provisions of section 2362 of the General Code do not apply.

When the contract and bond are prepared, I will be pleased to examine them immediately upon their receipt to the end that same may be returned to you without delay if approved. The bids submitted with your letter are returned herewith.

Respectfully,
EDWARD C. TURNER,
Attorney General.

161.

INTERPRETATION OF SECTION 13432, G. C.—APPLICABLE AND MANDATORY WHERE IMPRISONMENT IS PART OF PUNISHMENT.

The provisions of section 13432 *are applicable to all prosecutions before justices of the peace in which imprisonment is a part of the punishment and wherein final jurisdiction of the offense is by law conferred upon such justice.*

COLUMBUS, OHIO, March 25, 1915.

HON. GEORGE THORNBURG, *Prosecuting Attorney, St. Claisville, Ohio.*

DEAR SIR:—I have yours of March 11, 1915, requesting an opinion thereon, which is as follows:

"Several of the justices of the peace and mayors in Belmont county are requesting me to ask your interpretation of section 13432 of the General Code, which is as follows:

"'In prosecutions before a justice, police judge or mayor, when imprisonment is a part of the punishment, if a trial by jury is not waived,

the magistrate, not less than three days nor more than five days before the time fixed for trial, shall certify to the clerk of the court of common pleas of the county that such prosecution is pending before him.'

"They are claiming that under the above section in all misdemeanors where imprisonment is a part of the punishment and where a jury is not waived, the justice shall certify to the clerk of the court of common pleas that such action is pending before him, and proceed to have a jury drawn and try the matter finally before the justice. If this could be done a great deal of work would be taken from the court of common pleas, and yet it would be very expensive to the county, and inconvenient to jurors, and in the end would probably not avail much."

By an examination of section 13423 and its correlative sections, and sections 1153, 4414, 4416, 12519, 12520 and many others of the penal statutes of this state, it will be observed that there is conferred upon justices of the peace final jurisdiction of numerous offenses, a part of the penalty for which may be imprisonment, and it will be noted that the provisions of section 13432, G. C., above quoted, are applicable only to those cases in which the justice of the peace has final jurisdiction and is authorized to impose the penalty provided by law, a part of which may be imprisonment.

This section of the statute was enacted for the manifest purpose of making operative all those statutory provisions conferring final jurisdiction upon justices of offenses, a part of the punishment for which may be imprisonment, under the constitutional guaranty (article 1, section 10 of the constitution of Ohio) of a trial by jury in cases where imprisonment may be imposed as a penalty. Otherwise all statutory enactments conferring such final jurisdiction upon justices in cases where imprisonment may be imposed as a part or all of the punishment, would be null and void as in violation of the constitution of the state.

The language of said section 13432, G. C., is clear and unequivocal and subject to no other construction than the plain meaning of its terms, and its provisions are clearly mandatory.

The questions of expense and convenience or inconvience of jurors, as suggested by you, are purely matters of policy of administration to be considered in determining in what court a prosecution should be instituted, but can in no way affect the application and construction of a statutory provision so clearly unambiguous.

I am, therefore, of the opinion, and so advise you, that in every case of criminal prosecution before a justice, wherein a part of the punishment may be imprisonment and of which such court has under the law final jurisdiction, the provisions of sections 13432 and 13433, G. C., are applicable and mandatory.

It might also be added that in 11 Cyc., 983, the following rule is laid down:

"When a new cause of action is created by a statute which provides that a particular tribunal shall take cognizance thereof, no other court will have jurisdiction."

So that from this it follows that at least in many of those cases in which final jurisdiction is conferred upon justices of the peace, the court of common pleas would not have original jurisdiction.

Respectfully,
EDWARD C. TURNER,
Attorney General.

162.

OFFICES INCOMPATIBLE—MEMBER OF MUNICIPAL BOARD OF HEALTH AND CLERK OF SAID BOARD.

A member of a municipal board of health may not be lawfully appointed clerk of such board.

COLUMBUS, OHIO, March 25, 1915.

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

GENTLEMEN:—I am in receipt of a request for an opinion upon the following question:

> "May a member of a municipal board of health be lawfully appointed clerk of such board?"

This question is deemed of public importance and the opinion is therefore submitted to you.

By section 4408, G. C., it is provided that boards of health of municipalities may appoint a clerk. Section 4411-1, G. C., (103 O. L., 436) provides:

> "The board shall determine the duties and fix the salaries of its employes, but no member of the board of health shall be appointed as health officer or ward physician."

No other provision of the statute is found authorizing payment of compensation to the clerk of the board of health. Whatever salary or compensation the clerk in such case may then receive, must depend upon the action of the board of health of which the clerk himself in this case is a member. Is it in accord with sound public policy that an officer may appoint or participate in the appointment of himself to another position or office, the duties and compensation of which are subject to the control in whole or in part of himself, acting in a superior official capacity?

In 29 Cyc., 1381, the rule is stated as follows:

> "It is contrary to the policy of the law for an officer to use his official appointive power to place himself in office. So that even in the absence of a statutory inhibition, all officers who have appointing power are disqualified for appointment to the office to which they may appoint."

The statutes above referred to were originally embraced in section 2115, R. S., which provided, among other things, for the appointment of a health officer. As in the case of the clerk of the board of health, no term for which such health officer should be appointed was fixed, and the supreme court in the case of State v. Craig, 69 O. S., 246, held that such officer served only during the pleasure of the board. This rule is as clearly applicable to the clerk of such board. In view of the fact that the clerk is appointed by the board of health, that his duties are to be determined and salary fixed by the board and that his term of service is dependent upon the pleasure of the board, it cannot be maintained that the office or position of clerk is not subordinate to the board itself. In the absence of any statutory inhibition, we come to an application of the common law principle of incompatibility of office in the determination of the question of whether or not

the same person may at one time hold two official positions. It is a well recognized rule that where the duties of two offices are incompatible, both may not be held by one person at the same time.

In the case of State v. Gilbert, 12 C. C. (n. s.), 247, the rule of incompatibility of offices is clearly laid down as follows:

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

It having been heretofore determined that the clerk is subordinate to the board by which he is appointed, the offices of member of the board of health and the clerk by it appointed are then clearly within the rule of incompatibility as above stated, and may not be held by one person at the same time.

Respectfully,
EDWARD C. TURNER,
Attorney General.

163.

PARK COMMISSIONERS—CANNOT GRANT PERMISSION TO BASEBALL PLAYERS TO CHARGE ADMISSION FEE TO ENCOLSURES UPON PUBLIC PARK GROUNDS.

Park commissioners acting under authority of section 4053, *et seq., G. C., are without authority to grant permission to baseball players or associations to charge an admission fee to enter any enclosure upon the public park grounds while games are in progress.*

COLUMBUS, OHIO, March 25, 1915.

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

GENTLEMEN:—I have your letter of March 2, 1915, requesting a written opinion upon the following question:

> "May park commissioners, acting under authority of sections 4053, General Code, et seq., grant the use of a portion of the park grounds under their control to a baseball organization, which organization charges an admission fee to the baseball enclosure? See letter of the solicitor of New Philadelphia enclosed."

The letter of the solicitor states the following facts to wit:

> "The city of New Philadelphia owns a park, having been purchased by the issuing and selling of bonds for park purposes. Said park is managed and controlled by a board of park commissioners as provided by sections 4053, G. C., et seq. A baseball diamond is inclosed by a fence within the boundary lines of said park property. There is a demand for baseball playing here and the board of park commissioners contemplate a grant of permission to the baseball players to charge an admission fee to enter the inclosure while the games are in progress.

"Query. Can an admission fee be legally charged on public park grounds?"

Chapter 5, division IV, title XII of the General Code, entitled "Parks," sections 4053, et seq., provides for the establishment and maintenance of public parks, and vests the control and management of such parks in a board of park commissioners. The chapter provides for the acquiring of park grounds and the maintenance of public parks by a tax to be levied and collected on the general duplicate of the municipality.

Section 4057, G. C., provides:

> "The board of park commissioners shall have the control and management of parks, park entrances, parkways, boulevards and connecting viaducts and subways, children's playgrounds, public baths and stations of public comfort located in such parks, of all improvements thereon and the acquisition, construction, repair and maintenance thereof * * *."

Section 4059, G. C., provides:

> "The board may adopt and enforce regulations as to the proper use and protection of all such property and the improvements thereon and impose penalties for the violation of such regulations."

I do not find that the question you present has been determined by any court of this state. Two cases have reached the courts wherein a use of public park grounds, other than by the general public was involved, but in each instance the case was disposed of on other grounds and without expression of opinion by the court on the question of authority to grant such use. The cases referred to are:

> City of Columbus v. Biederman, 16 N. P. (n. s.), 140.
> Cincinnati v. University, 13 O. Dec., 284.

The term "public park" as used in the statutes contemplates grounds under the control of public authorities, set apart as a place of resort for the public, for recreation, exercise and amusement. Being provided at public expense, it is necessarily contemplated that it shall be maintained for the equal use and enjoyment of the inhabitants of the city wherein it is so maintained.

Such use and enjoyment by the public is subject, however, to the authority of the board to prescribe and enforce such reasonable regulations and limitations as to time and manner of use as tend to promote and enlarge the enjoyment thereof.

The line of demarcation between the proper and reasonable exercise of such discretion and authority by the board, and an abuse thereof which defeats the public enjoyment is dependent upon the facts and circumstances of each particular case, and is essentially a question of fact and not susceptible of definition or determination by general rule.

Answering your specific question: I am of the opinion that the park commissioners are without authority to grant permission to baseball players or associations to charge an admission fee to enter any enclosure upon the public park grounds while games are in progress.

Respectfully,
EDWARD C. TURNER,
Attorney General.

164.

COUNTY COMMISSIONERS — AUTHORITY TO EMPLOY ENGINEER OTHER THAN COUNTY SURVEYOR—SEWAGE DISPOSAL PLANT—COUNTY INFIRMARY.

County commissioners have authority to employ an engineer other than the county surveyor to supervise the construction of a sewage disposal plant where the plant is being built for the sole purpose of caring for the sewage from county infirmary buildings already constructed.

COLUMBUS, OHIO, March 25, 1915.

HON. G. A. STARN, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I have your communications of February 24, and March 6, 1915, in which you inquire whether the county commissioners have authority to employ an engineer other than the county surveyor to supervise the construction of a sewage disposal plant at the county infirmary, or whether the commissioners are obliged to permit the county surveyor to perform such work. You state that this plant is to be built to care for sewage from the infirmary buildings only, and not for any other purpose, and that the infirmary buildings were built several years ago, and nothing except the disposal plant is being constructed at the present time.

Section 2343, G. C., provides in part as follows:

> "When it becomes necessary for the commissioners of a county to erect or cause to be erected a public building or substructure for a bridge, or an addition to or alteration thereof, before entering into any contract therefor or repair thereof or for the supply of any materials therefor, they shall cause to be made by a competent architect or civil engineer the following: full and accurate plans showing all necessary details of the work and materials required with working plans suitable for the use of mechanics or other builders in the construction thereof, so drawn as to be easily understood; accurate bills, showing the exact amount of the different kinds of material, necessary to the construction, to accompany the plans; full and complete specifications of the work to be performed showing the manner and style required to be done, with such directions as will enable a competent builder to carry them out, and afford to bidders all needful information; a full and accurate estimate of each item of expense, and of the aggregate cost thereof. * * *"

Section 2792, G. C., provides in part as follows:

> "The county surveyor shall perform all duties for the county now or hereafter authorized or declared by law to be done by a civil engineer or surveyor. He shall prepare all plans, specifications, details, estimates of cost, and submit forms of contracts for the construction or repair of all bridges, culverts, roads, drains, ditches and other public improvements, except buildings, constructed under the authority of any board within and for the county. * * *"

I am aware that these two sections refer in their express terms only to the preparation of plans and not to supervision during the construction of any im-

provement, but the fact that the two sections impliedly authorize in proper cases the designation and employment of an architect, engineer or surveyor to supervise the construction of an improvement is recognized by the provisions of section 2359, G. C., which section authorizes the making of estimates by an architect employed by the commissioners to superintend construction. Sections 2343 and 2792, G. C., establish a rule as to when the commissioners may employ any competent architect or civil engineer and as to when they are compelled to accept the services of the county surveyor. In the erection of a public building or an addition thereto or alteration thereof, the commissioners may employ any competent architect or civil engineer to prepare the plans, while in the preparation of plans for other public improvements the commissioners must accept the services of the county surveyor. The same rule would apply in the work of supervising the construction of a public improvement, and hence the determination of your question depends upon whether or not a sewage disposal plant built for the sole purpose of caring for the sewage from county infirmary buildings already erected is to be regarded within the meaning of section 2343, G. C., as an addition to or alteration of said buildings.

I am of the opinion that this question must be answered in the affirmative and that in the work of supervising the construction of such a sewage disposal plant the county commissioners may under authority of section 2343, G. C., employ an engineer other than the county surveyor.

In determining the meaning of sections 2343 and 2792, G. C., reference must be had to the object sought to be obtained. In enacting section 2343 the legislature evidently had in mind the fact that in designing and supervising the construction of a public building the character of skill required would be different from that demanded of a county surveyor in meeting the problems of land surveying, road and ditch construction and similar engineering work. The legislature therefore gave the commissioners authority in the case of a public building or an addition to or alteration thereof to employ an architect or civil engineer other than the county surveyor. The manifest object of this enactment was to enable the commissioners to secure the services of a specialist in those matters pertaining to buildings. It is a matter of common knowledge that the planning and constructing of a sewage disposal plant involve special knowledge and the reason for the rule established by the legislature would therefore point to a holding that a sewage disposal plant is an addition to the building or buildings, the sewage from which is to be cared for by it.

If it were not for the buildings there would be no use for the disposal plant. The only use of the disposal plant is as an adjunct to the buildings and for the purpose of rendering them more sanitary and convenient. I am of the opinion that the character of the disposal plant and the purpose for which it is to be used are such that for the purposes of section 2343, G. C., it must be regarded as an addition to the infirmary buildings, and that the county commissioners therefore have the right under the state of facts set forth by you to employ an engineer other than the county surveyor to supervise the construction of the sewage disposal plant in question.

Respectfully,
EDWARD C. TURNER,
Attorney General.

165.

WARDEN OHIO PENITENTIARY—CANNOT MODIFY SENTENCE OF IMPRISONMENT BY SUSPENSION.

Warden of the Ohio penitentiary has no authority to release prisoners after commitment, except at expiration of sentence shown in commitment or under the laws governing parole or pardon.

COLUMBUS, OHIO, March 25, 1915.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge receipt of your communication of March 18th, which is as follows:

> "By direction of the board I am enclosing herewith communications from Mr. P. E. Thomas, warden of the Ohio penitentiary, together with four other enclosures concerning the case of Frank McCue, No. 43437, who is now serving an indeterminate sentence in the penitentiary for burglary. The warden states that he has this day received a certificate of suspension of sentence for this man from the trial judge, W. P. Barnum.
>
> "Your opinion is requested as to the duty of the warden in this matter."

With your communication you enclose several letters from Warden Thomas, two statements of the trial judge relative to Frank McCue, No. 43437, certified copy of the journal entry in the case of the State of Ohio v. Frank McCue et al., and the prosecuting attorney's statement concerning Frank McCue.

Permit me to call your attention to the provisions of section 13720 of the General Code, which is as follows:

> "A person sentenced to the penitentiary, or Ohio state reformatory, unless the execution thereof is suspended, shall be conveyed to the penitentiary or Ohio state reformatory by the sheriff of the county in which the conviction was had, within five days after such sentence, and delivered into the custody of the warden of the penitentiary, or superintendent of the Ohio state reformatory, with a copy of such sentence there to be kept until the term of his imprisonment expires or he is pardoned. If the execution of such sentence is suspended, and the judgment be afterwards affirmed, he shall be conveyed to the penitentiary or the Ohio state reformatory within five days after the court directs the execution of sentence; provided, however, that the trial judge, or any judge of said court in said subdivision may, in his discretion, and for good cause shown, extend the time of such conveyance."

It will be seen from a reading of the section quoted above that when a person sentenced to the penitentiary has been delivered into the custody of the warden of the penitentiary with a copy of the sentence, he is to be kept there until the term of his imprisonment expires or he is pardoned.

In the case of Lee v. State of Ohio, 32 O. S., 113, it was held that:

> "Where a court, in passing sentence for a misdemeanor, has acted under a misapprehension of the facts necessary and proper to be known in fixing the amount of the penalty, it may, in the exercise of judicial discretion and

in furtherance of justice, at the same term, and before the original sentence has gone into operation or any action has been had upon it, revise and increase or diminish such sentence within the limits authorized by law."

At page 604, volume 7, Nisi Prius Reports, under the heading: "Anonymous—Case of Habeas Corpus," it was held that:

"A police judge after having sentenced a party, and such party having entered upon his sentence, has no authority to then have such party brought again before the court to impose a heavier sentence."

Prisoners in the penitentiary are under the control of and subject to the orders of your board acting through the warden, and an examination of the statutes relating to the pardon and parole of prisoners fails to disclose any provision authorizing the warden to release the prisoner once lawfully committed to his charge, except under the established law relating to paroles, or as provided for in section 13720, quoted above, when a prisoner has completed the term of his imprisonment or he is pardoned.

It is my opinion, therefore, that as Frank McCue, No. 43437, has been lawfully committed to the Ohio penitentiary, where he is now serving an indeterminate sentence for burglary, the warden of the penitentiary is without authority to release him except under the provisions of law as referred to above. To hold otherwise would be to substitute the judge who has attempted to modify the sentence of imprisonment by suspension after it had been partly executed as the paroling power in opposition to the law which provides that such power shall rest in the board of administration.

While the question is not directly raised in your request, attention is also called to the provisions of sections 13761 and 13762 of the General Code, which, although not applicable to the particular case under consideration, provide for the discharge of a prisoner by the warden when by virtue of the reversal of the conviction the prisoner is either ordered discharged or granted a new trial.

The statement of the trial judge, the certified copy of the journal entry, and the prosecuting attorney's statement, submitted with your letter, are returned herewith for the files of your department.

Respectfully,
EDWARD C. TURNER,
Attorney General

166.

STATE BOARD OF HEALTH—WITHOUT AUTHORITY TO DEPRIVE ELECTORS OF THE RIGHT OF REFERENDUM ON AN ORDINANCE.

The state board of health has no authority to deprive electors of the right of referendum on an ordinance.

COLUMBUS, OHIO, March 25, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Permit me to acknowledge receipt of your communication with which you forward a letter addressed to you by Mr. James W. Jackson, secretary of the citizens' protective alliance, and W. A. Calhoun, chairman of the committee on referendum petition, which is as follows:

> "The city of East Liverpool is having a water fight against the chemical filtration gang in exactly the same manner as that of the people of Zanesville. We have before us a copy of the Sunday News of that city under date of February 14th, publishing the letters of yourself and that of the secretary of the state board of health.
>
> "To shorten this letter it will suffice to say that both situations are practically the same. The city council here have passed an ordinance to issue bonds for $375,000 for a chemical filtration plant when they well knew that 95 per cent. of our electors are against that system. They also have adopted and still have on the books a resolution for a natural filtration system, but the chemical gang got busy and won four councilmen over, how, we do not know, but it occurred all in one day.
>
> "We are getting out a referendum to confirm or reject the above named ordinance. Are we not strictly within our rights when we have filed the said referendum within the required thirty days?
>
> "Can an order of the state board of health take away from the electors the right of referendum as guaranteed by the constitution?"

Permit me to advise that in section 4227-2 of the General Code, as amended in 104 Ohio Laws, page 239, it is provided, among other things, that:

> "When a petition signed by ten per cent. of the electors of any municipal corporation shall have been filed with the city auditor or village clerk in such municipal corporation, within thirty days after any ordinance, or other measure shall have been filed with the mayor, or passed by the council of a village, ordering that such ordinance or measure be submitted to the electors of such municipal corporation for their approval or rejection, such city auditor or village clerk shall, after ten days, certify the petition to the board of deputy supervisors of elections of the county wherein such municipality is situated and said board shall cause to be submitted to the electors of such municipal corporation for their approval or rejection, such ordinance, or measure at the next succeeding regular or general election, in any year, occurring subsequent to forty days after the filing of such petition."

In answer to the last question contained in the enclosed letter, namely:

> "Can an order of the state board of health take away from the electors the right of referendum as guaranteed by the constitution?"

I have to advise that the state board of health is not clothed with any authority to deprive the citizens of their constitutional rights upon this or any other question.

You will recall talking with Mr. Price concerning the East Liverpool situation, and he informs me that there is now under consideration with the state board of health the question of an extension of the time specified in the order of the state board of health upon which all of the proceedings referred to in your letter have been based, it appearing that the ordinance passed by the council of East Liverpool does not contain a section setting out the reasons for emergency, and it is sought to begin anew.

The question of the validity of an emergency clause in ordinances is now under consideration by the supreme court in the case of Shryock v. The City of Zanesville.

Respectfully,
EDWARD C. TURNER,
Attorney General.

167.

COUNTY BOARD OF EDUCATION—ELIGIBILITY TO ELECTION OF DISTRICT AND COUNTY SUPERINTENDENTS.

COLUMBUS, OHIO, March 25, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of yours of March 13, 1915, in which you enclose communication from Mr. J. R. Walton of Perrysville, Ohio, and upon examination of the statutes I find that sections 4738, G. C., and 4739, G. C., provide for the election of district superintendents and section 4744-5, G. C., prescribes the qualifications essential to eligibility to election as such district superintendent, and further provides that the county board of education shall certify to the superintendent of public instruction the qualifications of each county and district superintendent.

I find, however, no statute imposing any duty upon the state superintendent of public instruction relative to determining the eligibility of district superintendents or to enforcing the statutory requirements therefor. It would, therefore, follow that responsibility for the appointment and service of such superintendents of one who is ineligible to election to such office, would not rest upon the state superintendent of public instruction. It might be stated, however, that if the ineligibility of one who is serving as such district superintendent could be substantiated, an action in quo warranto would lie.

Respectfully,
EDWARD C. TURNER,
Attorney General.

168.

SCHOOL FUNDS—SALARIES OF COUNTY SUPERINTENDENT OF SCHOOLS—DISTRICT SUPERINTENDENTS—SHOULD BE CHARGED AGAINST APPORTIONMENT OF THE STATE COMMON SCHOOL FUND, COMMON SCHOOL FUND AND TUITION FUND OF DISTRICT.

The amounts retained by the county auditor under section 4744-3, G. C., for the purpose of paying part of the salaries of the county superintendent of schools and the district superintendents should be charged against the apportionment of the state common school fund, the common school fund and against the tuition fund of the district.

COLUMBUS, OHIO, March 26, 1915.

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

GENTLEMEN:—Your letter of March 13, 1915, requests my opinion as follows:

> "Section 4744-3, page 143 vol. 104 Ohio Laws, reads in part:
>
> "'The county auditor, when making his semi-annual apportionment of the school funds to the various village and rural school districts, shall retain the amounts necessary to pay such portion of the salaries of the county and district superintendents as may be certified by the county board * * *.'
>
> "*Question.* Should county auditors retain the amounts referred to in this section from the tuition fund of the different districts, or from the total amount due the districts before distribution is made?"

You have yourself quoted all of section 4744-3, as amended, that bears in any way upon the question which you submit. Moreover, there are no provisions in the act enacting section 4744-3, or in any of the other measures passed by the same session of the general assembly and relating to schools, which shed any light upon the question unless the re-enactment of section 7600, General Code, by the act found in 104 O. L., 158, which was passed one day after the act enacting section 4744-3 was passed, may be regarded as material. That section provides for the apportionment of school funds in the following language:

> "* * * Each school district within the county shall receive thirty dollars for each teacher employed in such district, and the balance of such funds shall be apportioned among the various school districts according to the average daily attendance of pupils in the schools of such districts. If an enumeration of the youth of any district has not been taken and returned for any year and the average daily attendance of such district has not been certified to the county auditor such district shall not be entitled to receive any portion of that fund. The local school tax collected from the several districts shall be paid to the districts from which it was collected. Money received from the state on account of interest on the common school fund shall be apportioned to the school districts and parts of districts within the territory designated by the auditor of state as entitled thereto on the basis of thirty dollars for each teacher employed and the balance according to the average daily attendance. All other money in the county

treasury for the support of common schools and not otherwise appropriated by law, shall be apportioned annually in the same manner as the state common school fund."

As used in this section the word "apportionment" applies only to the division, among the school districts, of the state common school fund and other miscellaneous moneys to be distributed. In speaking of the local levies the word "paid" is used. This distinction in turn conforms to an obvious distinction in fact. It is not proper to speak of the distribution of local school taxes to the levying district as an "apportionment" because such moneys belong to the district, in the first instance, so that the word "payment" is much more appropriately used as descriptive of what takes place.

On the other hand, sections 7601 and 7603, General Code, which were not amended in 1914, provide that immediately after the apportionment referred to in section 7600 is made, a certificate thereof shall be furnished to each school treasurer and on the basis of the certificate the order for the amount due the district shall be based. In the sense in which the word "apportionment" is used in these two sections, it undoubtedly includes the moneys received from local levies. This makes the question suggested by the language of section 7600 a difficult one. It is not the precise question which you present, but a different one which may be phrased as follows:

Is the amount retained under section 4744-3 of the General Code to be withheld from any local school levies, or is it to be limited to the school moneys which are, in the exact sense, "apportioned?"

In this connection I observe that section 4744-3, General Code, does not state from what moneys the amounts necessary to pay the several districts the proportion of supervision salaries are to be retained. It is only an inference that would suggest a conclusion that such amounts are to be retained from the school funds subject to apportionment, from the school funds subject to distribution or even from any school funds. So long as something must be supplied in the section in order to give it any force and effect whatever, I think we should supply that provision which would most appropriately carry into effect the legislative intent. I do not think it could have been the legislative intent that the moneys should be retained, for example, from contingent levies or building levies whether it is to be retained from any local levies or not. On the othe hand I do not think that the legislature intended to limit the retention to the proceeds of the common school fund because in many supervision districts such proceeds would not be sufficient to pay the necessary amount. On the whole the only intelligible and workable meaning that can be given to the section is that which can be arrived at by holding that the retention is to be from the state common school fund and from the local tuition levy. Section 7603, General Code, provides as follows:

"The certificate of apportionment furnished by the county auditor to the treasurer and clerk of each school district must exhibit the amount of money received by each district from the state, the amount received from any special tax levy made for a particular purpose, and the amount received from local taxation of a general nature. The amount received from the state common school fund and the common school fund shall be designated the 'tuition' fund and be appropriated only for the payment of superintendents and teachers. Funds received from special levies must be designated in accordance with the purpose for which the special levy was made and be paid out only for such purposes, except that, when a balance remains in such fund after all expenses incident to the purpose for which

it was raised have been paid, such balance will become a part of the contingent fund and the board of education shall make such transfer by resolution. Funds received from the local levy for general purposes must be designated so as to correspond to the particular purpose for which the levy was made. Moneys coming from sources not enumerated herein shall be placed in the contingent fund."

As this section necessarily implies, the salary of the superintendent is chargeable as an expense of tuition. Accordingly it is chargeable primarily to the moneys received from the state, and if that is not sufficient, to the local levy for tuition purposes. The distribution should be made upon that basis.

Respectfully,
EDWARD C. TURNER,
Attorney General.

169.

APPROVAL OF AMENDATORY ORDER MADE BY STATE BOARD OF HEALTH, PROVIDING FOR INSTALLATION OF WATER PURIFICATION PLANT, EAST LIVERPOOL, OHIO.

COLUMBUS, OHIO, March 26, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Attached hereto please find an order of the Ohio state board of health adopted at the meeting held on March 24, 1915, and which is as follows:

"Be it ordered by the state board of health of the state of Ohio that the city of East Liverpool shall within eighteen months from the date upon which this order is approved by the governor and the attorney general of the state of Ohio, install and have in operation a water purification plant satisfactory to the state board of health; and shall within six months from the date of said approval award contracts for said improvement."

This order amends a previous order issued on the 26th day of June, 1913, providing for the installation of a water purification plant by the city of East Liverpool prior to January 1, 1915.

I have examined the provisions of the order and approve the same under the provisions of section 1254 of the General Code, which provides for the approval of the order by the governor and the attorney general before the same shall be effective.

Respectfully,
EDWARD C. TURNER,
Attorney General.

170.

COLLATERAL INHERITANCE TAX—DOES NOT APPLY TO TRANSFER OF SHARES OF STOCK IN OHIO CORPORATION, BELONGING TO ESTATE OF DECEASED RESIDENT OF ANOTHER STATE.

The Ohio collateral inheritance tax law is not applicable to the transfer of shares of stock in an Ohio corporation belonging to the estate of a deceased resident of Massachusetts.

COLUMBUS, OHIO, March 26, 1915.

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

DEAR SIR:—I acknowledge receipt of your letter of March 17th, requesting my opinion upon the following question:

> "If a deceased resident of Massachusetts at his death leaves shares of stock in an Ohio company, would this come under the provisions of the collateral inheritance act, and where must the tax be paid?"

Section 5331, General Code, as amended 103 O. L., 463, imposes a collateral inheritance tax on the privilege of succeeding by the laws of descent and distribution, or by will or deed of gift, intended to take effect in possession or enjoyment after the death of the grantor, to "all property within the jurisdiction of this state, and any interests therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible."

I am of the opinion that shares of stock in an Ohio company, belonging to the estate of a deceased resident of Massachusetts, do not constitute property "within the jurisdiction of this state" within the meaning of the statute cited.

The means of collecting the tax provided by the related sections are inappropriate to such a case, the shares themselves considered as taxable property do not have a situs in Ohio, and the privilege of inheriting them, which constitutes the real subject of taxation under the Ohio statute, is one which exists under, and is primarily at least protected by, the laws of Massachusetts.

For all of the above reasons, I am of the opinion that if the deceased is a resident of Massachusetts, and at his death leaves shares of stock in an Ohio company, the succession to or transfer of such shares to the personal representatives or legatees of the decedent would not be subject to the collateral inheritance tax of this state.

Respectfully,
EDWARD C. TURNER,
Attorney General.

171.

LIEN FOR ALL TAXES ON REAL PROPERTY ATTACHES THERETO ON DAY PRECEDING SECOND MONDAY OF APRIL OF EACH YEAR —TAXES WHICH BECOME LIEN UPON REAL PROPERTY AFTER DATE OF TRANSFER AND RECORD OF DEED MAY BE REFUNDED WHEN GRANTOR HAS PAID THE TAXES.

Taxes which cannot under the law become a lien upon real property until after the date of the transfer and record of a deed of conveyance of the same and which are thereafter erroneously charged against the grantor in such deed and by him paid, may be refunded.

The lien of the state for all taxes on real property attaches thereto on the day preceding the second Monday of April of each year.

COLUMBUS, OHIO, March 26, 1915.

HON. CHARLES E. BALLARD, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—In yours under date of March 19, 1915, you submit for opinion the following:

> "One J. C. Keller, by a general warranty deed, dated, delivered and recorded on February 25, 1914, conveyed to the board of commissioners of Clark county, Ohio, certain real estate. Taxes were returned as levied against said real estate on the auditor's and treasurer's duplicates, due in December, 1914, and June, 1915, in the sum of $50.00. In December, 1914, without any objection or protest, the said J. C. Keller paid said taxes. He now asks that the county return to him the said sum of $50.00, claiming that the lien did not attach until the day preceding the second Monday of April, 1915, and the real estate conveyed being the property of Clark county, Ohio, was not taxable for the year 1914.
>
> "Should the county refund him the $50.00 paid?"

Since the repeal of section 5547, G. C., (103 O. L., 803) and the enactment of the Warnes law, the time within which real estate is required to be returned for taxation is involved in much uncertainty. It is provided, however, by section 5624-3, G. C., (103 O. L., 798) that on or before the first Monday of February, 1914, the county auditor should deliver to the district assessor abstract books necessary to the appraisement of real estate for taxation.

By section 5624-11, G. C. (103 O. L., 801) it is provided that the district assessor shall transmit to the tax commission of Ohio, on or before the first Monday of July, an abstract of the real and personal property of each taxing district in the county, and by section 5624-12, G. C. (103 O. L., 801) the commission is given until August first to ascertain the correctness of the same and to order an increase or decrease thereof. From this it appears that the valuation of the real estate referred to by you could not have been completed earlier than July, 1914, for the taxes to be collected thereon in December, 1914, and June, 1915.

No statutory provision will be found fixing any particular day or date as of which the value of real estate is required to be assessed for taxation.

Section 5671, G. C., provides as follows:

> "The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with

any penalties accruing thereon, are paid. All personal property subject to taxation shall be liable to be seized and sold for taxes. The personal property of a deceased person shall be liable, in the hands of an executor or administrator, for any tax due on it from the testator or intestate."

By the plain terms of this statute, all taxes lawfully assessed against the real estate conveyed to the commissioners which were to become due and payable in December, 1914, and June, 1915, became a lien thereon on the day preceding the second Monday of April, 1914, subsequent to the date of the conveyance and transfer of the same I am unaware of any provision of law by authority of which it might be said that this real estate was in any way liable for taxes for the year 1914-1915, prior to the date on which the lien by the provisions of the state attached, or from which any personal obligation of the owner of such real estate would arise prior to that date. The taxes for the year 1914, if that be true, could not then be in any sense a claim against said real estate prior to the second Monday of April of that year.

That the taxes for that year could have been lawfully charged against the grantor of the real estate referred to by you at the time the lien therefor attached, is precluded by section 2573, G. C., so much of which as is pertinent here being as follows:

"On application and presentation of title, with the affidavits required by law, or the proper order of a court, the county auditor shall transfer any land or town lot or part thereof charged with taxes on the tax list from the name in which it stands into the name of the owner, when rendered necessary by a conveyance, partition, devise, descent or otherwise. * * *"

So that on the 25th day of February, 1914, the auditor was specifically charged by law with the duty of transferring upon the tax list of the county this real estate to the name of the grantee in this case, to wit: the commissioners, and this, as stated by you, was accordingly done. No taxes for the year 1914 could thereafter have been charged upon the real estate so transferred against the grantor except through error without further conveyance and transfer. If such taxes were so erroneously charged against the grantor for the year 1914, and the same by him paid, the provisions of section 2589, G. C., hereinafter set forth, would apply.

Section 2589, G. C., provides:

"After having delivered the duplicate to the county treasurer for collection, if the auditor is satisfied that any tax or assessment thereon or any part thereof has been erroneously charged, he may give the person so charged a certificate to that effect to be presented to the treasurer, who shall deduct the amount from such tax or assessment. If at any time the auditor discovers that erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto at a regular or special session of the board. If the commissioners find that taxes or assessments have been so erroneously charged and collected, they shall order the auditor to draw his warrant on the county treasurer in favor of the person paying them for the full

amount of the taxes or assessments so erroneously charged and collected. The county treasurer shall pay such warrant from any surplus or unexpended funds in the county treasury."

It may be further suggested that by the provisions of section 5624-17, G. C., as amended in 103 O. L., 802, the duty of certifying to the auditor all clerical errors in the tax list discovered by him is imposed upon the district assessor and the auditor is thereby required to enter corrections of the same upon the tax list and duplicate.

I am therefore of opinion that no lien for taxes for the year 1914, attached to the real estate in question prior to the second Monday of April and that if the grantor in the conveyance of date of February 25, 1914, paid taxes for that year, he is entitled to a refunder of such payment.

Respectfully,
EDWARD C. TURNER,
Attorney General.

172.

STATE LIBRARIAN—REQUIRED TO GIVE ONE BOND COVERING FULL AMOUNT—MAY NOT BE DIVIDED.

Bond of State Librarian to be one bond in the sum of ten thousand dollars.

COLUMBUS, OHIO, March 27, 1915.

Board of Library Commissioners, State Library, Columbus, Ohio.

GENTLEMEN:—I am just in receipt of a letter from C. B. Galbreath, who is to assume the duties of state librarian on April 1st, which letter is as follows:

"I have been elected by the board of library commissioners to the office of state librarian. Before entering upon the discharge of the duties of this office, I am required, under section 790, of the General Code, to give bond in the sum of $10,000.00, 'with two or more sureties approved by the board of library commissioners.' I wish to know if I may, under this section, give two bonds of $5,000.00 each, if said bonds are approved by the board of library commissioners. I expect to assume the duties of the office April 1st."

As the question of the approval of this bond rests with your board, the opinion is addressed to you, and a copy of the same furnished to Mr. Galbreath for his information.

Section 790 of the General Code, as amended on page 531 of 103 laws of Ohio, is as follows:

"Before entering upon the discharge of the duties of his office, the librarian and each assistant shall give bond to the state, the former in the sum of ten thousand dollars, and the latter in the sum of one thousand dollars, with two or more sureties approved by the board of library commissioners, conditioned for the faithful discharge of the duties of his

office. Such bond, with the approval of the board and the oath of office indorsed thereon, shall be deposited with the secretary of state and kept in his office."

It is my opinion that in enacting section 790 of the General Code, as amended, the legislature intended that one bond for ten thousand dollars with two or more sureties should be given, and it would therefore not be in accordance with law to accept two bonds of five thousand dollars each, as suggested by Mr. Galbreath in his letter.

I have to advise you, therefore, that unless the bond of the librarian submitted to you for your approval is in the sum of ten thousand dollars and contains the names of at least two sureties, if a personal bond, or a surety company under section 9573 of the General Code, the same should not be approved by you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

173.

DETENTION HOMES OF JUVENILE COURTS NOT REQUIRED TO BE CERTIFIED BY BOARD OF STATE CHARITIES.

Detention homes of juvenile courts are not required to be certified under section 1352-1, *G. C.*

COLUMBUS, OHIO, March 27, 1915.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge receipt of your letter of March 25th, which is as follows:

"In attempting to apply the provisions of section 1352-1 of the General Code, the question has arisen as to whether detention homes established in accordance with section 1670 comes under the class of institutions required to be certified by the board of state charities.

There seems to be no doubt that such places will be included under the general terms used in section 1352, but there is a difference of opinion among members of our board as to whether they come within the scope of the terms used in section 1352-1.

We desire your advice as to whether the juvenile court detention homes shall be considered as institutions to be certified."

There is no question but that the provisions of section 1352 of the General Code, as amended on page 865 of 103 laws of Ohio, include detention homes.

Section 1352-1 of the General Code (103 O. L., 865) is as follows:

"Such board shall annually pass upon the fitness of every benevolent or correctional institution, corporation or association, public, semi-public or private as receives or desires to receive and care for children, or places children in private homes. Annually at such times as the board shall direct, each such institution, corporation or association, shall make a report,

showing its condition, management and competency, adequately to care for such children as are, or may be committed to it or admitted therein, the system of visitation employed for children placed in private homes, and such other facts as the board requires. When the board is satisfied as to the care given such children, and that the requirements of the statutes covering the management of such institutions are being complied with, it shall issue to the association a certificate to that effect, which shall continue in force for one year, unless sooner revoked by the board. No children shall be committed by the juvenile court to an association or institution which has not such certificate unrevoked and received within fifteen months next preceding the commitment. A list of such certified institutions shall be sent by the board of state charities, at least annually, to all courts acting as juvenile courts and to all associations and institutions so approved. Any person who receives children or receives or solicits money on behalf of such an institution, corporation or association, not so certified, or whose certificate has been revoked, shall be guilty of a misdemeanor, and fined not less than $5.00 nor more than $500.00."

The provisions of the section quoted above relate to benevolent or correctional institutions, corporations and associations, public, semi-public or private that receive, or desire to receive and care for children or which place children in private homes.

Upon the information obtained by investigation as to the fitness of institutions enumerated in the section to care for children, the board bases its action in issuing the certificate referred to in the section. Upon issuing the certificate, or at least annually, it is provided that a certified list of the institutions shall be sent to all courts acting as juvenile courts and to all associations, corporations and institutions so approved. The detention home provided for under the provisions of section 1670 is to all intents and purposes a part of and under the control of the juvenile court. It is a place for the temporary detention only of children under the age of eighteen years who may be placed there for one reason or another, and in my opinion it is not one of the institutions referred to in section 1352-1, quoted above, and does not require certification as the other institutions enumerated in the section.

Respectfully,
EDWARD C. TURNER,
Attorney General.

174.

BOARD OF ADMINISTRATION—WITHOUT AUTHORITY TO MODIFY SENTENCE OF SOLITARY CONFINEMENT.

Board of administration without power to modify sentence of prisoner insofar as solitary confinement provision is concerned, except in case of illness. Power to modify rests with governor.

COLUMBUS, OHIO, March 27, 1915.

THE OHIO BOARD OF ADMINISTRATION, *Columbus, Ohio.*

GENTLEMEN:—Permit me to acknowledge receipt of your request for an opinion under date of March 24, 1915, which is as follows:

"I am directed to acknowledge receipt of your opinion under date of March 5th, concerning one Aleck Kish, No. 43394, Ohio penitentiary, the closing paragraph of which reads as follows:

"'I am of the opinion, therefore, that as the sentence inflicted by the court in the case under consideration was legal that there is no discretion lodged in the warden of the Ohio penitentiary to disregard its provisions, and that it should be carried into full effect until such times as it may be modified by competent authority.'"

"The board respectfully requests your further opinion as to whether or not the board of administration is a 'competent authority' with power to modify the conditions of the sentence referred to in said opinion."

An examination of the laws governing this question discloses the fact that prior to May 1, 1884, there was on the statute books, and known as "paragraph 3 of section 7427 of the Revised Statutes" a provision relative to the modification of a sentence of solitary confinement. Paragraph 3 of section 7427 is as follows:

"If a prisoner is sentenced to solitary confinement, the sentence shall be executed, subject to the right of the board to modify it so far as may be necessary to prevent any serious injury to health; and no unnecessary labor shall be required of any convict on Sunday."

Under date of March 24, 1884, there was passed an act "relating to the imprisonment of convicts in the Ohio penitentiary, and the employment, government and release of such convicts by the board of managers," which went into effect on May 1, 1884, and repealed section 7427 of the Revised Statutes, quoted above. The act referred to took from the board of managers of the Ohio penitentiary the authority previously had to modify a sentence insofar as the provision of solitary confinement when imposed would be any serious injury to the health of the prisoner.

Section 7427 of the Revised Statutes was considered in a case of the State of Ohio ex rel. Attorney-General v. Peters, reported at page 629 of volume 43, Ohio state reports, on the ground that the act was unconstitutional as contravening the provisions of section 11 of article 3 of the constitution of Ohio, which vests in the governor the exclusive right to grant reprieves, commutations and pardons for all crimes except treason and impeachment, and for the further reason that because the act and this regulation was in conflict with section 1 of article 4 of the constitution as being the exercise of a judicial power. The court, at page 647, speaking through Johnson, J., say:

"Revised Statutes, section 6799, authorizes and requires the court in sentencing a prisoner to declare for what period he shall be kept at hard labor, and for what in solitary confinement without labor, and in all cases of conviction the defendant shall pay the cost of prosecution. The trial, verdict and sentence provided by law are judicial functions, and yet no one doubts the power of the legislature as the representative of the state to mitigate the penalty by abolishing hard labor or solitary confinement, and substituting therefor a less severe form of executing the sentence. The manner in which the discipline of the prison shall be enforced must necessarily be left to the board of managers under appropriate legislation. * * *"

The question before the court was as to the right of the board of managers

of the Ohio penitentiary to establish and promulgate rules and regulations for the parole of prisoners under sentence other than for murder in the first or second degrees, etc.

Section 2169 of the General Code, as amended on page 474, of volume 103 laws of Ohio, is as follows:

> "The Ohio board of administration shall establish rules and regulations by which a prisoner under sentence other than for treason, or murder in the first or second degree, having served the minimum term provided by law for the crime of which he was convicted and who had not previously been convicted of felony or served a term in a penal institution, or prisoner under sentence for murder in the second degree having served under such sentence ten full years, may be allowed to go upon parole outside of the building and enclosure of the penitentiary. Full power to enforce such rules and regulations is hereby conferred upon the board, but the concurrence of every member shall be necessary for the parole of a prisoner. The board may designate geographical limits, within and without the state, to which a paroled prisoner may be confined, or may at any time enlarge or reduce such limits, by unanimous vote."

Section 2202 of the General Code provides as follows:

> "One or more apartments in the penitentiary shall be prepared for an infirmary. When the attending physician considers a convict so ill as to require removal from work or solitary confinement, he shall be placed in such infirmary until the physician reports to the warden that he is in a proper condition to be removed. The warden shall then order him back to his former labor or cell."

It will be seen from a reading of section 2202 that provision is made for the removal from solitary confinement of a prisoner who is, in the opinion of the physician, too ill to undergo such confinement and there is no other provision of law governing the incarceration of prisoners in the penitentiary which authorizes the board to modify the sentence as to solitary confinement.

It is my opinion, therefore, upon consideration of the questions involved in this case, that the Ohio board of administration is without authority to modify the sentence of Aleck Kish, except temporarily, as might be made necessary on account of illness, and which is provided for in section 2202 of the General Code. In fact, the provisions of section 2202 are mandatory as to the return of a prisoner to his cell after the disability has been removed, and in the absence of legislation there is no discretion lodged in the warden of the penitentiary as to the execution of the sentence until such a time as it might be modified by competent authority as heretofore stated, which authority would rest in the governor of the state.

Respectfully,

EDWARD C. TURNER,

Attorney General.

175.

ATHENS ARMORY—CONTRACT APPROVED

Contract and contract bond for construction of Athens armory is regular in form, subject to insertion of satisfactory surety on the bond.

COLUMBUS, OHIO, March 27, 1915.

HONORABLE BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, O.*—

DEAR SIR:—I have examined the form of contract and the contract bond submitted by you with your letter of March 25th, relative to the Athens armory, and I find said contract and the bond regular, with the exception that sureties on the bond are not named. The form of contract and the bond are approved, it being assumed, of course, that the same will not go into effect until your board is entirely satisfied as to the sureties on the bond.

Respectfully,
EDWARD C. TURNER,
Attorney General.

176.

INTOXICATING LIQUORS—PERSON COMBINING WINE ORIGINALLY PRODUCED FROM RAW MATERIAL BY ANOTHER WITH WINE PRODUCED BY HIMSELF NOT UNDER LIQUOR LICENSE LAW EXEMPTION.

A person who combines wine originally produced from the raw material by another with that so produced by himself is not as to the sale of the former within the exemption of section 6065, G. C., of the manufacture of intoxicating liquors from the raw material.

COLUMBUS, OHIO, March 27, 1915.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—In your letter of March 24, 1915, you request my opinion as follows:

> "Will you please advise this board whether the provisions of section 6065, G. C., exempt a manufacturer of wine who combines his own product with the wines of other manufacturers and sells the mixture in quantities of one gallon or more."

Section 6065, G. C., as amended in 103 O. L., 241, is as follows:

> "The phrase 'trafficking in intoxicating liquor,' as used in this chapter and in the penal statutes of this state, means the buying or procuring and selling of intoxicating liquor otherwise than upon a prescription issued in good faith by a reputable physician in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes. Such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof by the manufacturer thereof in quantities of one gallon or more at one time at the manufactory or the sale thereof in said quantities from the wagon or other vehicle of the manufacturer to

the holder of a liquor license or in said quantities to individual consumers where said liquors are delivered to the homes of said individual consumers in territory wherein the sale of intoxicating liquors is not prohibited by law."

From the first sentence of the above quoted section, it will be observed that "trafficking in intoxicating liquor" primarily means any buying or procuring and selling of any intoxicating liquor, as defined in section 6064, G. C. To this general statement it will be noted there are certain exceptions specifically defined in the further provisions of section 6065, G. C., as above quoted.

For the purpose of answering your question, it will be assumed that the wine referred to by you is intoxicating liquor within the definition of that term above referred to. It would not be practicable for a person to obtain "the wines of other manufacturers" in such manner as not to come clearly within the meaning of the term "buying" or "procuring." That is, a person would be unable to obtain wine manufactured by another without either buying or procuring the same. The sale of wine of other manufacturers so bought or procured would then be beyond question a transaction clearly within the primary meaning of the term "trafficking in intoxicating liquor." This your statement seems to presuppose, and your question is: Does such transaction come within the exceptions of section 6065, G. C.?

No reference being made thereto, it is also assumed that such sales were not made "upon a prescription issued in good faith by a reputable physician in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes," and that this exception does not apply to your inquiry.

Your question then may be put in the form following: Does a person who buys or procures wine manufactured by another, by the mere process of blending therewith, before sale, a quantity of wine of his own manufacture, become the manufacturer of the wine so bought or procured by him, or of the whole of such blended wine, within the meaning of the exception as to manufacturers in section 6065, G. C., above quoted?

It will be noted that the exemption of manufacturers under section 6065, G. C., is specifically confined to manufacturers of intoxicating liquors from the *raw material.*

Raw material is a relative term of varied significance, dependent upon the subject-matter in relation to which it is used and its meaning cannot be determined in a particular case by the application of any hard and fast general rule. In its present application, in view of the purpose and policy of the license law, it seems clear that the phrase "raw material" is intended to include only those materials, such as grains and fruits as are ordinarily used in the production of intoxicating liquors in the first instance. That is to say, "the manufacture of intoxicating liquors from the raw material" in contemplation of section 6065, G. C., includes only the original production of intoxicating liquors from grains, fruits and like materials, and the mere pouring of quantities of wine which had theretofore been originally produced by another from the raw material, as that phrase is above construed, with wine so produced by himself, would not bring a person within the meaning of the exemption of the manufacture of intoxicating liquors from the raw material of that section with respect to that portion of such wine originally produced by another.

Therefore, with respect to so much of such blended wine as was originally produced by another, my answer to your interrogatory must be in the negative.

Respectfully,

EDWARD C. TURNER,
Attorney General.

177.

OFFICES INCOMPATIBLE—MEMBER OF GENERAL ASSEMBLY OF OHIO AND CLERK OF THE VILLAGE BOARD OF EDUCATION.

A member of the Ohio general assembly cannot serve as a clerk of the village board of education of which he is a member and receive a salary as such clerk.

COLUMBUS, OHIO, March 27, 1915.

HON. RUPERT R. BEETHAM, *Member of House of Representatives, Columbus, Ohio.*

DEAR SIR:—I have your letter of March 15th, requesting my opinion as follows:

> "Is it lawful for a member of the Ohio general assembly to serve as clerk of the village board of education of which he is a member, and receive a salary as such clerk?"

Article II, section 4 of the constitution of Ohio provides:

> "No person holding office under the authority of the United States, or any *lucrative office* under the authority of this state, shall be eligible to, or have a seat in, the general assembly; but this provision shall not extend to township officers, justices of the peace, notaries public, or officers of the militia."

The office of member of the board of education of a village district is not a lucrative office under the authority of the state and does not come within the exceptions provided in the above section of the constitution. A member of a board of education of a village district may, therefore, hold said office if he is able to perform its duties while holding a seat in the general assembly.

The authority of a village board of education to elect a member of said board as clerk of said board, is found in section 4747, G. C., as amended in 104 O. L., 139, which provides in part as follows:

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

Section 4774, G. C., provides:

> "Before entering upon the duties of his office, the clerk of each board of education shall execute a bond, in an amount and with surety to be approved by the board, payable to the state, conditioned for the faithful performance of all the official duties required of him. Such bond must be deposited with the president of the board, and a copy thereof, certified by him, shall be filed with the county auditor."

Section 4781, G. C., provides:

> "The board of education of each school district shall fix the compensation of its clerk and treasurer, which shall be paid from the con-

tingent fund of the district. If they are paid annually, the order for the payment of their salaries shall not be drawn until they present to the board of education a certificate from the county auditor stating that all reports required by law have been filed in his office. If the clerk and treasurer are paid semi-annually, quarterly, or monthly, the last payment of their salaries previous to August thirty-first, must not be made until all reports required by law have been filed with the county auditor and his certificate presented to the board of education as required herein."

Under the above provisions of the statute, the office of clerk of a village board of education is a lucrative office under the authority of this state and, replying to your question, I am of the opinion that a member of the Ohio general assembly cannot serve as clerk of the village board of education of which he is a member and receive a salary as such clerk.

Respectfully,
EDWARD C. TURNER,
Attorney General.

178.

BOARD OF EDUCATION—AUTHORITY TO BORROW MONEY TO MEET UNPAID INSTALLMENTS OF TEACHERS' SALARIES—BOND ISSUE —LIMITATION FOR THIS AND LIKE PURPOSES.

A board of education may borrow money under section 5656, *G. C., for the purpose of paying unpaid installments of teachers' salaries.*

Bonds may not be issued under this section, however, unless within the limitations of the law interest and sinking fund levies sufficient to retire them may be made during the years for which they are to run. Such interest and sinking fund levies being preferred to current levies by the act found in 104 *O. L.,* 12, *the board should anticipate its needs for current purposes and its needs for interest and sinking fund purposes and so apportion its indebtedness as not to impair its future revenues for either purpose.*

COLUMBUS, OHIO, March 27, 1915.

HON. PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—I hasten, in compliance with your request, to answer your letter of March 23rd, requesting my advice upon the following question:

"The board of education of Roseville school district are now in debt $2,600.00. They have not paid their teachers for the month of January and February, and they owe their teachers about $1,500.00. Is there any law or provision of the statute by which they can pay their teachers their salary.

"Their levy for school purposes is 15.06 mills on the dollar of all taxable property."

I assume that the indebtedness of which you speak consists of unpaid salaries of teachers. The board of education may, by virtue of section 5661, General Code, contract with its teachers without the presence of money in the treasury sufficient to discharge such contracts on its part. Therefore, the unpaid teachers'

salaries constitute a valid indebtedness of the district. Such indebtedness may be funded by the issuance of notes or bonds under favor of section 5656, General Code, and related sections, to which I refer you, when the conditions therein referred to exist.

Inasmuch as you state that the levy for school purposes is 15.06 mills on the dollar (by which I presume you mean that the total levy in the district amounts to this number of mills), it is obvious that the inability of the school district to pay its obligations results from "its limits of taxation," within the meaning of section 5656, General Code.

If bonds are issued article 12, section 11 of the constitution requires that provision be made for the levy and collection of a sufficient amount annually to pay the interest thereon and to provide a sinking fund to retire them at maturity. The only question which arises under the facts stated by you grows out of the possible difficulty which the board will encounter in making such tax levies.

In Rabe v. Board of Education, 88 O. S., 403, it was held that a board of education is without power to issue bonds when it can not reasonably anticipate the possibility of making the tax levies necessary to retire the same; and the principle of this decision becomes even more important under article 12, section 11 of the constitution, above referred to.

However, since Rabe v. Board of Education, supra, was decided the general assembly has so amended the Smith one per cent law as to require that all interest and sinking fund levies shall be placed upon the tax duplicate before, and in preference to, levies for current expenses (104 O. L. 12).

It seems that under the law as it now stands it is possible for a board of education to incur a bonded indebtedness, so long as the sinking fund levies themselves on account of such bonded indebtedness, together with other sinking fund levies applicable in the taxing district, do not exhaust the levying power under the Smith law. The result of such a practice, however, would be in an extreme case to deprive the taxing authorities of the means of raising revenue for current expenses.

Therefore, when bonds of any kind are being issued the indebtedness thereby created should be spread over a sufficient number of years to bring the necessary sinking fund and interest levies within reasonable bounds, and so as not to impair, beyond the necessities of the case, the revenues for the anticipated current needs of the taxing district.

Of course, article 12, section 11, does not apply to notes such as may be issued instead of bonds under section 5656, General Code. There is little distinction, however, in practice between the issuance of notes and the issuance of bonds; for unless the district can provide by taxation sufficient money to pay the notes when they are due, they will ultimately have to be converted into bonds under the restrictions which I have laid down.

The questions which I have suggested are after all practical ones. So far as the power of the board of education to borrow the money inquired about is concerned, I am of the opinion, as above stated, that the authority exists and may be exercised within the limits which I have defined.

The provisions of the law relative to state aid to weak school districts would seem to afford at least partial relief in cases of this sort. You do not, however, state facts which show whether or not the school district in question is qualified to receive any such aid.

Respectfully,
EDWARD C. TURNER,
Attorney General.

179.

TAXATION—SCHOOL LEVIES—SECTIONS 7592, 7751, G. C., LIMITED BY SMITH LAW—STATE AID TO WEAK SCHOOL DISTRICTS—APPLICATION UNDER SMITH LAW.

Section 7592, G. C., is no longer in force and no levy outside the five mill limitation of the Smith law can be made thereunder.

Section 7751, G. C., cannot be so interpreted as to permit a levy thereunder outside of the five mill limitation of the Smith law.

The opinion of the attorney general to the auditor of state under date of February 26, 1912, relative to the application of the law for state aid to weak school districts concurred in, but limited to its application to the said law as it then existed.

Opinion of the attorney general to the auditor of state relative to the joint operation of the law for state aid to weak school districts and the Smith one per cent law, found in Vol. 1, annual report of attorney general, 1912, p. 89, modified 1b, p. 108, concurred in and followed, subject to the qualification that a board of education which has submitted a budget estimate requiring the levy of taxes to the full extent of any absolute limitation of the Smith law, such as five mill limitation of section 5649-3a, G. C., should not be held to have disqualified the district to receive state aid, if such amount is insufficient to operate the schools in accordance with the provisions of the state aid law.

COLUMBUS, OHIO, March 27, 1915.

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

GENTLEMEN:—I acknowledge receipt of your letter of February 27th, requesting my opinion upon the following questions:

> *"Question* 1: In a district in which the total levy is seven mills, two mills being under section 7592, G. C., must the tuition fund receive three-fourths of the seven mills before the district can receive state aid?
>
> *"Question* 2: When an additional two mills are levied by the board of education under section 7751, G. C., must the tuition fund receive three-fourths of the levy exclusive of the additional two mills?
>
> "The section provides that the proceeds of the levy shall be kept in a separate fund. The question is, must the tuition fund receive three-fourths of the seven mills levy and the special fund be provided for out of the remaining one-fourth?
>
> *"Question* 3: Do you concur in the opinion of Attorney General Hogan, rendered to E. M. Fullington, auditor of state, under date of February 26, 1912? Said opinion relates to the payment of teachers in excess of statutory amount, barring districts from receiving state aid.
>
> *"Question* 4: Do you concur in the opinion of Attorney General Hogan, rendered to E. M. Fullington, auditor of state, under date of January 17, 1912—page 89, volume 1—1912, as modified page 108, volume 1-1912?"

Your first question can not be answered because it involves a legally impossible state of facts. There can be no levy under section 7592, General Code, in addi-

tion to the five mill limitation of section 5649-3a, General Code. The later enactment of the latter section, which is a part of the Smith law, repealed the former section by implication. (Rabe v. Board of Education, 88 O. S., 403).

Your second question is founded upon a similar misapprehension. Section 7751, General Code, which was enacted before the Smith law was passed, provided as follows:

> "Such tuition (for the pupils of a district attending a high school in another district under agreement between the two boards of education) shall be paid from either the tuition or contingent funds and when the board of education deems it necessary it may levy a tax of not to exceed two mills on each dollar of taxable property in the district in excess of that allowed by law for school purposes. The proceeds of such levy shall be kept in a separate fund and applied only to the payment of such tuition."

The phrase in this section "in excess of that allowed by law for school purposes" can not be applied so as to permit a levy in excess of the five mill limitation of the Smith law, which applies to "the local tax levy for all school purposes." As originally enacted, the language of section 7751 referred to the limitations of sections 7591 and 7592, General Code, which, as above stated, were repealed by the Smith law.

Your first and second questions, therefore, do not require any answer.

Answering your third question, beg to state that I concur with the conclusions of Attorney General Hogan, expressed in the opinion of February 26, 1912.

I call your attention, however, to the fact that Mr. Hogan's opinion was an interpretation of the state aid law as it then existed. Since that time the law has been changed by the amendments and supplementary provisions found in 104 O. L., 165. In concurring in the opinion of Mr. Hogan I do not wish you to understand that I hold that that opinion necessarily applies to the present law. That question has not been considered.

Answering your fourth question, beg to state that I concur generally with the conclusions of Attorney General Hogan expressed in his opinion of January 17, 1912, as later modified, subject, however, to the following qualifications:

I am of opinion that when a board of education has filed with the county auditor for budgetary purposes an estimate of its needs for the incoming year, and such estimate of needs goes to the full extent of any *absolute* limitation imposed upon the district by the Smith one per cent. law, it may safely be assumed that the failure of the board of education to ask for more was due to the certain knowledge of the members of the board that if more had been asked for it would have been denied.

Putting it in another way, I do not think that any board of education ought to be required, in order to qualify the district for state aid, to submit a budget which would require a levy certainly in excess of any such absolute limitation.

By the phrase "absolute limitation" I mean, for example, the five mill limitation of section 5649-3a, General Code.

The inability of a school district to have a levy of more than five mills does not depend upon other levies in the same territory, and the function of the budget commission with respect to the reduction of any excessive levy, measured by this limitation, is purely ministerial.

Therefore, if a board of education should ask for an amount for a given year which fully exhausts the five mill limitation, I would not think that the

district would be disqualified for state aid merely because the amount asked for might not be sufficient to conduct an eight months' school and to pay the required minimum salaries to teachers.

The same principle could be applied to any other absolute limitation of law. Under the Smith law, as amended by the Kilpatrick law, however, the limitations provided in section 5649-3a are the only absolute limitations.

Respectfully,
EDWARD C. TURNER,
Attorney General.

180.

MUNICIPAL CORPORATION—MAY APPORTION PROCEEDS OF LEVY FOR HOSPITALS BETWEEN TWO INSTITUTIONS, BUT NOT WITH HOSPITAL ORGANIZED FOR PROFIT.

The arrangement authorized by section 4021, *G. C., whereby a municipal corporation may levy taxes and pay the proceeds thereof to a hospital for charity work, may be made with more than one hospital, but not with a hospital organized for profit.*

COLUMBUS, OHIO, March 27, 1915.

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

GENTLEMEN:—I acknowledge receipt of your letter of March 19th, submitting for my opinion the following questions:

> "*Question* 1. May the council of a city apportion the proceeds of a levy for hospital purposes between two institutions, if such are organized to furnish the hospital services mentioned in section 4021, General Code?
>
> "*Question* 2. If a hospital association is a corporation for profit, could such organization receive public funds if it otherwise complies with the law?"

It appears that the questions are submitted at the request of the prosecuting attorney of Licking county, who calls attention to the provisions of article 8, section 6 of the constitution.

Section 4021 of the General Code provides as follows:

> "The council of each municipality, annually, may levy and collect a tax not to exceed one mill on each dollar of the taxable property of the municipality and pay the amount to a private corporation or association which maintains and furnishes a free public hospital for the benefit of the inhabitants of the municipality, or not free except to such inhabitants of the municipality as in the opinion of a majority of the trustees of such hospital are unable to pay. Such payment shall be as and for compensation for the use and maintenance of such hospital. Without change or interference in the organization of such corporation or association, the council shall require the treasurer thereof, annually, to make a financial report setting forth all of the money and property which has come into its hands during the preceding year and the disposition thereof, together with any recommendations as to its future necessities."

The legislature has, in this section, seemingly undertaken to authorize munic-

ipalities to compensate hospitals for charity work, upon the theory that such work is a benefit to the municipality, in that it relieves the public of the burden of caring for the sick poor, which under the general statutes of the state would otherwise be cast upon it.

Inasmuch as the prosecuting attorney raises the constitutional question, this may be first considered.

In Zanesville v. Crossland, 8 C. C., 652, it was held that what is now section 4022, General Code, is constitutional. That section provides, and then provided as follows:

> "Such council may agree with a corporation or association organized in the municipality for charitable purposes, for the erection and management of a hospital for the sick and disabled, and a permanent interest therein to such extent and upon such terms and conditions as may be agreed upon between them. The council shall provide for the payment of the amount agreed upon for such interest, either in one payment or installments or so much each year as the parties may stipulate."

The circuit court, per Jenner, J., on the authority of Walker v. Cincinnati, 21 O. S., 15, limited the words "any joint stock company, corporation or association whatever," as used in article 8, section 6 of the constitution, to "projects originated by individuals, * * * *with a view to gain.*"

There was another question in the case cited, arising under the peculiar language of section 4022. It appeared that the municipality in that case had not acquired "a permanent interest" in the hospital with which it was proposed to enter into a contract, nor did the contract provide for such an interest. The circuit court held that this alleged defect was immaterial.

Now the case of Zanesville v. Crossland was reversed, without report, in Crossland v. Zanesville, 56 O. S., 735. Such reversal may have been upon constitutional grounds or upon grounds arising out of the interpretation of the statute. Inasmuch as the concurrence of a majority of the court was necessary for a reversal, and it is not to be supposed that the constitutional question would have been decided without an opinion, it seems that it must be assumed that the case was reversed upon the second ground above suggested, and that the supreme court did not intend to disapprove the opinion of the circuit court on the constitutional question.

I feel that it would be improper for me to hold that a given statute is unconstitutional where such a holding is not plainly required by the circumstances of the case; and where, as in this case, there is a decision interpreting the constitution in a given way, I feel that I ought to follow such a decision.

Accordingly, I am of the opinion that article 8, section 6 of the constitution should be so interpreted as to prohibit a municipality from in any way contributing to the support of a corporation or association of individuals organized *with a view to gain;* but that said section does not prohibit a reasonable arrangement under statutory authority between a municipality and a corporation or association not organized with a view to gain, whereby the municipality may be relieved of some of the burdens otherwise cast upon it.

Section 4021, General Code, is in its essential particulars similar to section 4022, which was involved in the Zanesville case. The decision in that case is, I believe, equally applicable to it.

In this connection, and before taking up the question as to the interpretation of section 4021, I wish to state, for the sake of clearness, that a contract between a municipal corporation and a hospital organized with a view to profit, whereby the municipality merely pays the hospital for actual services rendered

in the care of the sick poor, would not be prohibited by article 8, section 6 of the constitution. The distinction here is between payment for actual services rendered and the payment of the proceeds of a whole tax levy, regardless of the amount thereof. Even though the payment of such tax levy be regarded as compensatory, it would, in my opinion, constitute the raising of money for or in aid of a corporation, within the meaning of the constitutional provision, the other necessary condition defined in Zanesville v. Crossland, supra, being present.

It follows, therefore, that while section 4021, General Code, is constitutional within its proper sphere, it cannot be so interpreted as to authorize council to pay all, or any part, of the proceeds of a tax levy to a hospital corporation organized for profit.

This statement answers your second question.

Answering your first question, would advise that, in my opinion, the arrangement contemplated by section 4021, General Code, may be made with more than one hospital.

Respectfully,
EDWARD C. TURNER,
Attorney General.

181.

STATE BOARD OF HEALTH—APPROVAL OF ORDER FOR SEWAGE AND SEWAGE TREATMENT PLANT VILLAGE OF BRYAN, OHIO.

COLUMBUS, OHIO, March 29, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Attached hereto please find order of the Ohio state board of health directed to the village of Bryan, which is as follows:

> "Be It Ordered by the state board of health of the state of Ohio that the village of Bryan shall within five years from the date upon which this order is approved by the governor and the attorney general of the state of Ohio, install and have in operation the necessary sewers and a sewage treatment plant to correct the pollution of Joe run and Lynn run."

This order amends a previous one and is made pursuant to an agreement reached after a conference with the officials of the village of Bryan and those of the state board of health with your knowledge and consent.

I have examined the provisions of the order and I have approved the same. It is now forwarded to you for your approval in accordance with the provisions of section 1254 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

182.

FREE EMPLOYMENT AGENCIES—MONEYS APPROPRIATED IN HOUSE BILL NO. 218 TO EXTEND FREE EMPLOYMENT AGENCIES ARE CURRENT EXPENSES OF GOVERNMENT.

The appropriation of five thousand dollars for the purpose of extending the system of free employment agencies, made in house bill 218, *passed March* 4, 1915, *is for "current expenses" of the state government under the provisions of subdivision* 9 *of section* 871-22, *G. C.*

COLUMBUS, OHIO, March 29, 1915.

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

DEAR SIR:—I have your letter of March 25, 1915, with which you enclose certified copy of house bill No. 218. You ask my opinion as to whether or not this act is a current expense under the constitution of the state of Ohio; you also ask what constitutes current expenses of government. The act referred to is as follows:

> "Section 1. That the following sum, for the purpose hereinafter specified, be, and the same is hereby appropriated out of any moneys in the state treasury to the credit of the general revenue fund, not otherwise appropriated:
>
> "Industrial commission of Ohio.
>
> "For the purpose of extending the system of free employment agencies ----------$5,000.00."

The words "current expenses" are used in section 1b of article II of the constitution of the state of Ohio, but are not defined either in the constitution or in the statutes of this state.

The system of free employment agencies is established, extended, conducted and maintained in this state under authority of a law of a general and permanent nature, being subdivision 9 of section 22 of the industrial commission of Ohio act, (103 O. L., 95). This appropriation is made for the purpose of carrying into effect the provisions of this law, and to provide for the running expenses or the "current expenses" of the free employment agencies of this state as may be established and conducted under authority of subdivision 9 of section 2 of the industrial commission act.

Therefore, in my opinion, this appropriation is for "current expenses" of the state government.

It would be extremely difficult, indeed if it would not be impracticable, to attempt a definition of what would constitute "current expenses" of the state. A consideration of the question makes obvious the fact why a definition of these words has not heretofore been attempted, and I therefore suggest that this question can best be determined in each separate instance on the particular facts presented.

Respectfully,
EDWARD C. TURNER,
Attorney General.

183.

COUNTY BOARD OF EDUCATION—CANNOT DISCONTINUE RURAL SCHOOL DISTRICT AND JOIN SUCH DISTRICT TO A RURAL OR VILLAGE SCHOOL DISTRICT CONTIGUOUS THERETO—COUNTY BOARDS SHOULD RESCIND ATTEMPTED ACTION BY RESOLUTION—FUNDS OF RURAL SCHOOL DISTRICT SHOULD BE RETURNED TO ORIGINAL DISTRICT—VOTE OF ELECTORS NECESSARY TO ABOLISH RURAL SCHOOL DISTRICT—BOND ISSUE FOR SAME MAY BE SUBMITTED AT ONE ELECTION.

The county board of education has no authority under section 4736, *G. C., as amended,* 104 *O. L.,* 138, *to discontinue a rural school district and join it to a rural or village school district contiguous thereto.*

A county board having attempted to discontinue a rural school district by resolution of record, a copy of which has been filed with the county auditor under the provision of section 4736, *G. C., as amended, should rescind said resolution and furnish a copy of the rescinding resolution to the county auditor. A copy of such rescinding resolution should also be furnished to the clerks of the boards of education of the school districts mentioned in said former resolution.*

If the funds of such rural school district have been turned over to the treasurer of the board of education of the rural or village school district contiguous thereto, as a result of the action of the county board of education, upon receipt of the notice as above provided, said funds should be returned to the treasury of the rural school district from which they were transferred.

It is necessary, in order to abolish a rural school district, that the question be submitted to a vote of the qualified electors of such district under the provision of section 4735, *G. C., as amended, and supplemented by sections* 4735-1 *and* 4735-2, *G. C.,* 104 *O. L.,* 138.

The question of centralization under provision of section 4736, *G. C., as amended* 104 *O. L.,* 139, *and the question of issuing bonds under provision of section* 7625, *G. C., may be submitted to the qualified electors of a rural school district at one election.*

COLUMBUS, OHIO, March 29, 1915.

HON. CLARK GOOD, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—In your letter of March 6th, you request my opinion as follows:

> "The board of education of the county of Van Wert, Ohio, acting under the provisions of 4736 of the General Code, passed a resolution to discontinue several special districts in Ridge township, that is, put the special district back into the general township district.
>
> "1. If their action was contrary to law should they take any further action in reinstating these special districts?
>
> "2. If the funds of the special district have been transferred to the general township district fund, should there by any further action taken to transfer these funds back to the special school districts?
>
> "3. Is it necessary, to abolish special school districts, that there be an election held in these special school districts for that purpose?
>
> "4. In event an election is necessary and a majority voted to go back into the general township district, then in order to centralize in the township should there be an election held on the question of centralization, and then an election held on the question of bond issue, or would one election for the issuing of bonds be sufficient?"

Section 4679, G. C., as amended in 104 O. L., 133, relates to the classification of the schools of the state, and provides:

> "The school districts of the state shall be styled, respectively, city school districts, village school districts, rural school districts and county school districts."

Section 4735, General Code, 104 O. L., 138, provides:

> "The present existing township and special school districts shall constitute rural school districts until changed by the county board of education, and all officers and members of boards of education of such existing districts shall continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and qualified."

Section 4735-1 General Code, as found in 104 O. L., 138, provides:

> "When a petition signed by not less than one-fourth of the electors residing within the territory constituting a rural school district, praying that the rural district be dissolved and joined to a contiguous rural or village district, is presented to the board of education of such district; or when such board, by a majority vote of the full membership thereof, shall decide to submit the question to dissolve and join to a contiguous rural or village district, the board shall fix the time of holding such election at a special or general election. The clerk of the board of such district shall notify the deputy state supervisors of elections, of the date of such election and the purposes thereof, and such deputy state supervisors shall provide therefor. The clerk of the board of education shall post notices thereof in five public places within the district. The result shall be determined by a majority vote of such electors."

Section 4735-2 General Code, as found in 104 O. L., 138, provides:

> "The legal title of the property of the rural school district, in case such rural district is dissolved and joined to a rural or village district as provided in section 4735-1, shall become vested in the board of education of the rural or village school district to which such district is joined. The school fund of such dissolved rural district shall become a part of the fund of the rural or village school district which it voted to join. The dissolution of such district shall not be complete until the board of education of the district has provided for the payment of any indebtedness that may exist."

Section 4735-1 of the General Code, as above quoted, provides the proper procedure to dissolve a school district, formerly designated as a special school district, but now, under the above provision of section 4735 G. C., known as a rural school district, and to join it to a contiguous rural or village school district.

Section 4736 G. C., as amended in 104 O. L., 138, provides in part as follows:

> "The county board of education shall as soon as possible after organizing make a survey of its district. The board shall arrange the schools according to topography and population in order that they may be most

easily accessible to pupils. To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and transfer territory from one rural or village school district to another. A map designating such changes shall be entered on the records of the board and a copy of the resolution and map shall be filed with the county auditor. In changing boundary lines the board may proceed without regard to township lines and shall provide that adjoining rural districts are as nearly equal as possible in property valuation. In no case shall any rural district be created containing less than fifteen square miles."

While the county board of education has authority, under the above provision of section 4736 G. C., to change district lines and transfer territory from one rural or village school district to another for the purposes therein mentioned, no authority is given to said board to dissolve a rural district and join it to a rural or village school district contiguous thereto.

Replying to your first question, I am of the opinion that the action of the county board of education of Van Wert county, in passing a resolution to discontinue several "special" districts in Ridge Township within said county, had no effect in law and said county board should, by resolution properly passed, rescind its former resolution, correct its records and notify the county auditor of said county by furnishing him with a copy of the rescinding resolution. A copy of such rescinding resolution should also be furnished to the clerk of the board of education of Ridge township rural school district, and to each one of the clerks of the special school districts mentioned in said former resolution.

If the funds of the special districts have been turned over to the treasurer of the board of education of Ridge township rural school district, as a result of the action of the county board of education, above referred to, upon receipt of the above notice said board of education of the Ridge township rural school district should order said funds to be returned.

The answer to your third question is found in the above provisions of section 4735, 4735-1 and 4735-2 General Code (104 O. L., 138).

Your fourth question is answered in opinion No. 41 of this department, rendered to Hon. Frank W. Miller, superintendent of public instruction, under date of January 30, 1915, a copy of which is enclosed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

184.

RURAL SCHOOL DISTRICTS—AUTHORIZED TO CALL SPECIAL ELECTION TO SUBMIT QUESTION OF CENTRALIZATION TO VOTE OF QUALIFIED ELECTORS.

The provision of section 4726, G. C. as amended 104 O. L., 139, taken in connection with the provision of section 4839, G. C., authorizes the calling of a special election in a rural school district for the purpose of submitting the question of centralization to the vote of the qualified electors of such district.

COLUMBUS, OHIO, March 30, 1915.

HON. D. F. MILLS, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—I have your letter of March 6, 1915, in which you state:

"Several of the rural school districts of Shelby county are considering the question of centralization of their schools, and are contemplating submitting the question to the voters of their respective districts, at a special election to be called for that purpose, under section 4726, G. C.

The question raised by you and on which you ask my opinion is whether or not there is any statutory provision for the calling of a special election for such purpose.

Section 4726 G. C., as amended in 104 O. L., 139, provides:

"A rural board of education may submit the question of centralization, and, upon the petition of not less than one-fourth of the qualified electors of such rural district, or upon the order of the county board of education, must submit such question to the vote of the qualified electors of such rural district at a general election *or a special election called for that purpose.* If more votes are cast in favor of centralization than against it, at such election, such rural board of education shall proceed at once to the centralization of the schools of the rural district, and, if necessary, purchase a site or sites and erect a suitable building or buildings thereon. If, at such election, more votes are cast against the proposition of centralization than for it, the question shall not again be submitted to the electors of such rural district for a period of two years, except upon the petition of at least forty per cent. of the electors of such district."

Under the above provision of the statute, the board of education of a rural district has authority, and, upon the petition of not less than one-fourth of the qualified electors of such district or upon the order of the county board of education it becomes the duty of the board of education of such rural district, to submit the question of centralization to the vote of the qualified electors of such rural district at a general election or a special election called for that purpose.

As observed by you, this section of the General Code makes no provision for the calling of such special election nor for giving notice of the time when and the place where such special election shall be held.

I call your attention to the provision of section 4839, which provides:

"The clerk of each board of education shall publish a notice of all school elections in a newspaper of general circulation in the district or post written or printed notices thereof in five public places in the district at least ten days before the holding of such election. Such notices shall specify the time and place of the election, the number of members of the board of education to be elected, and the term for which they are to be elected, *or the nature of the question to be voted upon.*"

While section 4840 G. C. provides:

"Unless a statute providing for the submission of a question to the voters of a county, township, city or village provides for the calling of a special election for that purpose, no special election shall be so called. The question so to be voted upon shall be submitted at a regular election in such county, township, city or village, and notice that such question is to be voted upon shall be embodied in the proclamation for such election."

this provision does not apply to boards of education, and, replying to your question, I am of the opinion that the provision of section 4726 G. C., as amended

in 104 O. L., 139, taken in connection with the provision of section 4839 G. C., authorized the calling of a special election in a rural school district for the purpose of submitting the question of centralization to the vote of the qualified electors of such district.

A board of education, desiring to submit the question of centralization to the qualified electors of its district, at a special election to be called for that purpose, should pass a resolution declaring its intention and fixing the time and place of holding said election. A copy of said resolution should be certified to the board of deputy state supervisors of elections of the county, in order that said board may prepare the ballots and make the necessary arrangements for the submission of said question.

Respectfully,
EDWARD C. TURNER,
Attorney General.

185.

FUNERAL REFORM ASSOCIATION — ENGAGED IN MAKING CONTRACTS OF INSURANCE.

The Funeral Reform Association of the United States, as disclosed by the deposition of S. W. Mather, is engaged in making contracts substantially amounting to insurance.

COLUMBUS, OHIO, March 30, 1915.

HON. FRANK TAGGART, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—On January 25, 1915, I received from Mr. E. M. Small, deputy superintendent of insurance, the following request for an opinion:

> "Enclosed herewith you will find deposition entitled 'investigation in the matter of Funeral Reform Association of the United States by the state department of insurance, represented by Messrs H. L. Goodbread, J. W. Harsha and C. E. Nixon, held at Cleveland, Ohio, Thursday, January 14, 1915, for your consideration and advice.
>
> "The taking by this department of the enclosed deposition was prompted by complaint filed with this department that the Funeral Reform Association, Cleveland, Ohio, is doing an insurance business.
>
> "We wish to inquire if it is your opinion, based upon the facts as set out in said deposition, that the said association is conducting an insurance business."

At the time this request was submitted to me it was understood that additional information, together with a brief on the question involved, was to be submitted to me by Messrs. Pretzman and Nixon, attorneys of this city. The information desired has but recently been furnished me, and I call your attention to that fact as explaining my delay in submitting to your department my opinion.

The deposition of S. W. Mather, referred to in the request for opinion, discloses that said deponent, S. W. Mather, is and has been for many years past engaged in business as a funeral director and coffin manufacturer in Cleveland, his office and factory both being on the same premises known as No. 3227 West 25th street. His coffin manufacturing business is operated under the name of "The

S. W. Mather Casket Company," but is not incorporated, and said Mather is its sole owner. Said S. W. Mather is also vice-president and general manager of the Funeral Reform Association of the United States, a corporation having its offices and place of business at No. 3227 West 25th street, Cleveland, Ohio, in the same rooms or quarters occupied and used by the said Mather in the conduct of his business of funeral director. The office is maintained by S. W. Mather at his own expense. The Funeral Reform Association is a corporation not for profit. Its ostensible purpose and business is to secure for its members and their families a saving in burial expenses in the event of the death of any member or of one of his family, and in consideration of such membership privileges and benefits, each member is required to pay a fee of $1.00 in case such member is single, and $3.00 if he has a family. The following is a copy of a certificate of membership, designated "Exhibit A" in the deposition:

"THE FUNERAL REFORM ASSOCIATION OF THE UNITED STATES.

"To All Persons, Greeting:

"This certifies that ---------- having paid the sum of $3.00 is entitled to all the rights, privileges, and benefits of membership in this association as prescribed by its constitution and by-laws. Given under our hands and seal this ---------- day of ----------, A. D., ------.

"SEAL. President,

"Secretary."

A member receives and is promised no benefit except in the event of his death or of the death of a member of his family. In the event of any such death he is entitled to receive membership benefits only from S. W. Mather with whom the Reform Funeral Association has a contract to furnish undertaking services and casket at a reduced price to its members. If the member employ any undertaker other than S. W. Mather or purchases a casket elsewhere he loses the benefits to which his membership entitles him.

The following is an extract of a circular issued by the Funeral Reform Association, marked "Exhibit D" in the deposition:

"The membership is numbered by the thousands and applications for membership are constantly on the increase. To carry out its purpose a contract was entered into with the S. W. Mather Casket Company to manufacture and furnish funeral supplies for our members, and attend to the burial of our dead at prices designated by the association."

From membership fees paid into the association the agent securing the member gets one-half and the association the other half. It is only by employing Mather as undertaker and purchasing from him the casket and other burial furnishings that a member is able to secure the benefits promised by virtue of his certificate of membership. The association has no contract with any other undertaker or casket manufacturer, and at no other place is the certificate of such member of value to its owner or entitle him to any reduced rate or other benefit.

You inquire whether the Funeral Reform Association, under the facts above stated, is engaged in conducting an insurance business. Section 665 of the General Code, defines who may engage in the insurance business in Ohio, as follows:

"No company, corporation, or association, whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with."

Although the deposition discloses that the Funeral Reform Association only guarantees to its members that it will provide reduced burial rates in the event of the death of a member or of one of his family, and that the assessment or premium for this privilege is payable in a lump sum and at the origin of the contract, I do not believe that the character of the contract is changed thereby or that the definition of "insurance" is evaded.

While not altogether free from doubt, I am of the opinion upon the facts revealed in the deposition that the Funeral Reform Association is engaged in making contracts substantially amounting to insurance.

Although your question involves only the question as to whether or not the Funeral Reform Association is conducting an insurance business, yet in examining the testimony of Mr. Mather, my attention is called to the provisions of section 666 of the General Code relative to the insurance of burial and funeral expenses, which is as follows:

"No company, corporation or association engaged in the business of providing for the payment of the funeral, burial or other expenses of deceased members, or certificate holders therein or engaged in the business of providing any other kind of insurance shall contract to pay or pay such insurance or its benefits or any part of either to any official undertaker or to any designated undertaking concern or to any particular tradesman or business man, so as to deprive the representative or family of the deceased from, or in any way to control them, in procuring and purchasing such supplies and services in the open market with the advantages of competition, unless expressly authorized by the laws of this state and all laws regulating such insurance or applicable thereto have been complied with."

Apparently the Funeral Reform Association, under the facts revealed in the deposition, is, without being "expressly authorized by law" also engaged in a class of business prohibited by the above statute and liable to the penalty imposed for such violation.

Respectfully,
EDWARD C. TURNER,
Attorney General.

186.

WORKMEN'S COMPENSATION ACT—QUERIES RELATIVE TO RULES ADOPTED BY INDUSTRIAL COMMISSION GOVERNING RATES OF INSURANCE UNDER WORKMEN'S COMPENSATION ACT SHOULD BE CONSIDERED FIRST BY INDUSTRIAL COMMISSION.

COLUMBUS, OHIO, March 30, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—As per your request I have considered the letter of The Builders' and Traders' Exchange, of Columbus, Ohio, addressed to you under date of March 12, 1915, relative to the rules adopted by the industrial commission governing the rating system under the compensation act.

This body requests its special committee to appear before the "proper authority" and ask for some measure of relief, etc. The "proper authority" is the industrial commission of Ohio, which, under favor of sections 6, 7 and 8, is specifically authorized to fix the rates and penalty complained of.

Section 7 of the act, section 1465-54 of the General Code, provides that:

> "It shall be the duty of the state liability board of awards, in the exercise and discretion conferred upon it in the preceding section, ultimately to fix and maintain, for each class of occupation, the lowest possible rates of premium consistent with the maintenance of a solvent state insurance fund and the creation and maintenance of a reasonable surplus, after the payment of legitimate claims for injury and death that it may authorize to be paid from the state insurance fund for the benefit of injured and the dependents of killed employes. * * *"

For the governor or the attorney general to pass intelligently upon the question of rates it would be necessary to make an exhaustive examination of the nature of the business and the hundreds of various persons and industries coming under the provisions of this law.

Subdivision 3 of section 7 of this act (section 1465-54, G. C.) provides as follows:

> "3. On the first day of July, 1914, and semi-annually thereafter, a readjustment of the rates shall be made for each of the several classes of occupation or industry which, in the judgment of the board, have developed an average loss ratio, in accordance with the experience of the board in the adiministration of the law as shown by the accounts kept as provided herein."

It would be appropriate, and anyone aggrieved thereby would have the right, to appear before the industrial commission, file complaint against unreasonable rates, and be heard in support thereof. If upon such hearing said rates as amended, or as adhered to by the commission, are still unsatisfactory to the party so complaining, then recourse could be had by such party's appealing to the court and the rate attacked on the ground of unreasonableness as not "being the lowest possible rate of premium consistent with the maintenance of a solvent state insurance fund," etc.

The so-called "penalization charges" are the result of the commission's endeavor to maitnain the lowest possible rate. If there are no accidents in excess of what the general rule might contemplate, no so-called penalty attaches, but

if such unusual accident occurs, then the additional charge as provided for in rule 5 (bulletin of the industrial commission, January 1, 1915, vol. II, No. 1, page 45) would attach.

A careful personal inspection of all the plants insured in Ohio could be impossible with anything short of an army of inspectors; so this rule has been promulgated in Ohio in its developing stages, and is being amended every six months, as experience dictates. It is but the converse of the rule followed by liability insurance companies. Such companies inspect a man's factory and tell him that the rate will be lower to him if he makes certain changes suggested by the inspector. The plan of the commission is to estimate the lowest possible rate consistent with safety, reserving to itself under its authorized rule the right to attach additional rates if unusual accidents should occur.

A full analysis of this interesting feature of the industrial insurance requires a discussion of considerable length. Inasmuch as these rules are not permanent, but are subject to change, and are being changed, at the end of each six-month period, any complaint should be in the first instance filed and heard before the commission promulgating such rules complained against.

Respectfully,
EDWARD C. TURNER,
Attorney General.

187.

SECTIONAL NUMBER OF HOUSE BILL NO. 522, APPEARING IN 103 O. L., 767, SHOULD BE NO. 3515-1, G. C., FOR ENTIRE BILL—BALLOTS FOR SUBMITTING PLAN OF CITY GOVERNMENT SHOULD BE "CHAPTER 1, SECTION 3515-1, G. C."

House bill No. 522, passed by the general assembly, April 28, 1913, as found in 103 O. L., 767, to 786, both inclusive, has been officially designated as "section 3515-1 of the General Code."

The placing of the word and figures "section 3515-6" opposite section 6 of article 1 of the bill was a clerical error and should be disregarded.

The chapter and section number to be supplied in the blanks appearing in section 3 of article 1 of said house bill No. 522, on the ballots for the submission of the question of adoption of a plan of city government, should be "chapter 1, section 3515-1 of the General Code."

COLUMBUS, OHIO, March 31, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of March 26th, requesting my opinion, is received and is as follows:

> "We beg to submit for opinion a question submitted to this department by the board of deputy state supervisors of elections of Columbiana county, Ohio, which communication reads as follows:
>
> "'We have filed with us a petition to submit the city manager plan of government in the city of Wellsville. We note in section 3 as shown on page 767 of volume 103, that it should be submitted as provided in chapter

__, section __, of the General Code. What chapter and section shall we have printed on the ballot? The city manager plan is given on page 771 of volume 103 as article 4, which is confusing.'"

"Please give us your opinion upon this question as soon as possible."

The law providing for optional plans of government for municipalities and permitting the adoption thereof by popular vote is contained in house bill No. 522, passed by the general assembly April 28, 1913, and is found in volume 103, Ohio Laws, pages 767 to 786, both inclusive.

Opposite the first section of the law as it appears in 103 Ohio Laws, page 767, is found the official Code number, to-wit, section 3515-1. No other Code numbers have been given to any part of this bill, except that opposite section 6 of the bill, on page 769, 103 Ohio Laws, appears the Code number "section 3515-6."

An examination of the enrolled copy of said house bill No. 522 reveals the fact that the first six sections of the bill were originally given Code numbers, being section 3515-1 to 3515-6, both inclusive. Thereafter, all of said Code numbers, except section 3515-1 and section 3515-6, were erased from the enrolled copy, and the bill in this condition was filed with the Secretary of State and carried into 103 Ohio Laws.

It is therefore clear that the official whose duty it was to assign the Code numbers to this law intended to assign but one Code number to the entire bill, and that said number should be "3515-1," and that the number "3515-6" was left on the enrolled bill through a clerical error. This conclusion is supported by the fact that section 6 of the bill, opposite which the Code number "3515-6" appears, is at the top of a page, and in making the erasures above mentioned was evidently overlooked; and by the further fact that the certificate at the end of the bill is in the following words:

"The sectional *number* on the margin herein *is* in conformity to the General Code,".

thus indicating that only one sectional number had been assigned to this particular bill.

The Code number "section 3515-6" should, therefore, be disregarded and the entire house bill No. 522 should be regarded as "section 3515-1 of the General Code."

Your question therefore can be answered specifically by saying that there should be printed on the ballots the following question:

"Shall the city manager plan of government, as provided in chapter 1, section 3515-1 of the General Code, be adopted?"

Respectfully,
EDWARD C. TURNER,
Attorney General.

188.

COUNTY COMMISSIONERS—NOT AUTHORIZED TO ERECT MEMORIAL BUILDING WHERE LEVY AUTHORIZED BY ELECTORS WAS FOR "A MONUMENT OR OTHER SUITABLE MEMORIAL STRUCTURE."

Under sections 14848 *and* 14849, *Appendix General Code, the commissioners of a county are not authorized to erect a memorial building containing rooms for assemblage and other similar purposes, but only to erect a structure of a monumental character.*

When the tax provided for by these sections has been levied and is in the treasury, it may and must be expended for the purpose of erecting a monument or memorial structure, unless the project is formally abandoned. Lapse of time between the making of the levy and expenditure of the money does not affect the case.

COLUMBUS, OHIO, March 31, 1915.

HON. DEAN N. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—Your letter of March 22nd, the receipt whereof is acknowledged, is as follows:

> "In 1901, the Commissioners of Warren county, Ohio, by virtue of section 3107-38 of the Revised Statutes of Ohio in force at that time, submitted to a vote of the electors of Warren county the question of levying a tax as provided in section 3107-39 of the Revised Statutes, at which election a majority of the votes cast were in favor of such tax. Pursuant thereto, a tax was levied and there is now in the hands of Warren county a sum in excess of $9,000, the proceeds of said tax and the interest thereon.
>
> "The commissioners of Warren county desire to expend this money in the erection of a memorial building to commemorate the memory of soldiers from said county who served in the Union army in the war of the Rebellion.
>
> "In 1905, trustees were appointed by Gov. Herrick, as provided in section 3059 of the General Code, who submitted to the voters of this county the question of issuing bonds as provided in said section and those subsequent thereto. A majority of the votes cast upon such proposition were against the issuance of such bonds.
>
> "I write to request your opinion, first as to whether or not the commisioners may now proceed to erect a memorial building using the funds now in their hands and such additional funds as may be donated for that purpose; second, if your answer upon the first question is in the affirmative, have the commissioners the power to furnish and maintain such building when it is erected."

Section 3107-38 of the Revised Statutes, to which you refer, is now found in the appendix to the General Code under the sectional number "14848." The entire act of which it is a part is as follows:

> "Sec. 14848. The commissioners of any county in this state be and they are hereby authorized to submit to a vote of the people of said county, at any general election for state and county officers, the question whether or not a tax of not more than one-half mill upon each dollar shall be levied upon all property upon the tax duplicate of said county to raise a fund

wherewith to erect a monument or other suitable memorial structure to perpetuate the memory of soldiers from said county who served in the union army during the late rebellion."

"Sec. 14849. In case a majority of the voters of any county voting upon said question shall vote in favor of imposing said proposed tax for said purpose, said tax shall be made payable in two installments of one-quarter of a mill each, and shall be imposed and collected during the two years next succeeding the taking of said vote, and the moneys arising from said tax shall be expended by said commissioners in the erection of a monument or other suitable memorial structure, as said commissioners may deem best and most appropriate, at such place in said county as may be designated by said commissioners, and said money shall be applied to no other use or purpose whatever."

The tax having been levied, the commissioners, in my opinion, have the right to expend it for the purpose for which it was levied. Although a period of fourteen years has elapsed since the levy was made, it does not appear that there has been an abandonment of the project, as might have been the case had the vote been favorable, but had the commissioners neglected for an equal number of years to make the levy.

The proceeds of the special tax constitute a trust fund, in a sense, and this fund can be devoted only to the purpose contemplated, in the absence of express statutory authority to the contrary. Such statutory authority is found, if at all, in the provisions of section 5654, General Code, as amended 103 O. L., 521, which is as follows:

"The proceeds of a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was levied, issued or made, except as herein provided. When there is in the treasury of any city, village, county, township or school district a surplus of the proceeds of a special tax or of the proceeds of a loan or bond issue which cannot be used, or which is not needed for the purpose for which the tax was levied, or the loan made, or the bonds issued, all of such surplus shall be transferred immediately by the officer, board or council having charge of such surplus, to the sinking fund of such city, village, county, township or school district, and thereafter shall be subject to the uses of the sinking fund.

I question seriously whether the fund of which you speak can be regarded as a "surplus." Moreover, I do not think that it can be regarded as a fund not needed for the purpose for which it was levied, at least until the county commissioners so find. As long as the commissioners entertain the intention of ultimately using the fund for the purpose for which it was levied, a transfer thereof to the sinking fund can not be compelled, and, in that event, the first sentence of the section would have the effect of preventing the use of the fund for any purpose other than that for which it was levied.

In the came connection I observe that section 14849, supra, expressly provides that "said money shall be applied to no other use or purpose whatever." While this provision could, of course, be modified by the inconsistent provisions of any subsequently enacted statute, no such statute other than section 5654, which has been mentioned, exists.

While your question is possibly open to more than one interpretation, I assume that when you state that the wish of the commissioners is to erect a "memorial building" you mean that it is intended to erect such a building as is contemplated

by sections 3059 et seq., General Code, to which you refer. This, in my opinion, can not be done. While section 14849 of the appendix authorizes the use of moneys levied as therein provided for the erection of a "memeorial structure," the nature of the structure, in my judgment, is that indicated by the context. The whole phrase is "a monument or other suitable memorial structure." On familiar principles of statutory interpretation "the other suitable memorial structure" must be in the nature of a monument.

Such a "memorial structure" as might lawfully be erected by the use of the funds in question would, of course, not require furnishings; nor would it require maintenance in the full sense of that term. Such repairs as might be necessary in order to keep the structure in good condition might be lawfully made, I think, by the county commissioners by the use of public funds. The structure would be a "county" structure in the full sense of the word, and the commissioners would have the implied power to keep it in good condition.

Your letter mentions the fact that the commissioners are anticipating the possibility, at least, of receiving donations with a view to the erection of a memorial building. Power to receive donations and to apply them to their intended purpose is expressly conferred upon the county commissioners by section 18 of the General Code.

Just what might be done with a gift of this kind, and to what extent, if any, the commissioners might combine the project of building a monument or memorial structure by the use of the public funds and a memorial building containing rooms for patriotic organizations, etc., by the use of the privately donated funds, I would not undertake to advise without more specific information as to the terms of the proposed gifts. At all events, I am satisfied that the money which the commissioners now have on hand may not be applied to the construction of a "memorial building" in the exact sense, nor to the furnishing and maintenance of such a building.

Respectfully,
EDWARD C. TURNER,
Attorney General.

189.

COUNCIL IS WITHOUT AUTHORITY TO APPROPRIATE MONEY FOR PUBLIC NURSE.

A city council is without authority to appropriate money for a public nurse.

COLUMBUS, OHIO, March 31, 1915.

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

GENTLEMEN:—I am in receipt of a request for opinion from Hon. Allan C. Aigler, city solicitor of Bellevue, Ohio, which reads as follows:

> "May the council of a city appropriate money for a public nurse where there is no hospital located within the corporate limits of the municipal corporation? It is the intent of those back of the proposition that the so-called public nurse shall visit, in case of sickness, all homes where a regular nurse cannot be employed because of the financial situation of the parties and further render such aid to the people of the community as will tend to raise the standards of living and preserve the health of the citizens generally. I presume that if such expenditure of money can

be legally made, it would have to be done under the direction of the board of health of the city.

"It is my opinion that such nurse cannot be paid out of the funds of the city. So far as I have been able to determine from an examination of the statutes of Ohio there would be no warrant for such expenditure of money, unless it could be done under section 4411 of the General Code of Ohio, which authorizes the board of health to appoint as many persons for sanitary duty as in its opinion the public health and sanitary condition of the corporation require. However, I seriously question whether the duties of nursing are included in the term "sanitary duty" and also whether the police powers given to sanitary police can be legally exercised by a woman whom our board of health desires to aid in the work of a public nurse."

Under our arrangement, this being a municipal matter, I am addressing the opinion to you and sending a copy of same to Mr. Aigler.

I know of no authority by which council would be authorized to appropriate money for a public nurse as described in Mr. Aigler's letter.

Respectfully,
EDWARD C. TURNER,
Attorney General.

189-A.

FORMS OF BONDS PRESCRIBED FOR DEPUTY STATE TAX COMMISSIONER—DEPUTY ASSESSORS.

COLUMBUS, OHIO, March 31, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I hereby prescribe forms of bonds as follows:

"(1) Bond of deputy state tax commissioner, known as the 'district assessor' in and for an assessment district which contained, at the last preceding federal census, less than sixty-five thousand inhabitants.

"(2) Bond of deputy state tax commissioner, known as 'a member of the district board of assessors' in and for an assessment district which contained, at the last preceding federal census, sixty-five thousand or more inhabitants.

"(3) Bond of deputy assessor in and for an assessment district which contained, at the last preceding federal census, less than sixty-five thousand inhabitants.

"(4) Bond of deputy assessor in and for an assessment district which contained, at the last preceding federal census, sixty-five thousand or more inhabitants."

Respectfully,
EDWARD C. TURNER,
Attorney General.

Said prescribed forms are as follows:

BOND OF DEPUTY STATE TAX COMMISSIONER

"For a district which contained, at the last preceding federal census less than 65,000 inhabitants.

"KNOW ALL MEN BY THESE PRESENTS, That we,----------

---

as principal, and_____

_____

as suret _____, are held and firmly bound unto the state of Ohio in the penal sum of five thousand dollars ($5,000), for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally and firmly by these presents.

"THE CONDITION of the above obligation is such that, whereas, the said

_____

has been appointed as deputy state tax commissioner, known as the district assessor in and for the assessment district of_____ county, Ohio, for a term commencing on the_____ day of _____, A. D., 191___, and continuing until his successor is appointed and qualified;

"NOW THEREFORE, if the said _____

shall faithfully perform the duties of the said office, as provided by law or by the orders, rules and regulations of the tax commission of Ohio, so long as he shall continue therein, and shall not, while acting within the scope of his official duties, or under color of his official authority, be guilty of any neglect, default, fraud or unlawful act causing damage to any person, then these presents shall be void; otherwise to be and remain in full force and effect in law.

"IN WITNESS WHEREOF we have hereunto set our hands and seals this _____ day of _____, A. D., 191____

_____

_____

_____

_____

"I hereby certify that the form of the above bonds is that prescribed by me.

"EDWARD C. TURNER,

"Attorney General of Ohio.

"The execution of the above bond is hereby approved this _____ day of _____, A. D. 191_____

_____, Prosecuting Attorney,

_____ County, Ohio."

Form 2.

BOND OF DEPUTY STATE TAX COMMISSIONER

"For a district which contained, at the last preceding federal census 65.000 or more inhabitants.

"KNOW ALL MEN BY THESE PRESENTS, That we,_____

_____

as principal, and_____

_____

as suret _____, are held and firmly bound unto the state of Ohio in the penal sum of five thousand dollars ($5,000), for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally and firmly by these presents.

"THE CONDITION of the above obligation is such that, whereas, the said

_____

has been appointed as deputy state tax commissioner and member of the district board of assessors in and for the assessment district of _____ county, Ohio, for a term commencing on the _____ day of _____ A. D. 191____, and continuing until his successor is appointed and qualified;

"NOW THEREFORE, if the said _____

shall faithfully perform the duties of the said office, as provided by law or by the

orders, rules and regulations of the tax commission of Ohio, so long as he shall continue therein, and shall not, while acting within the scope of his official duties, or under color of his official authority, be guilty of any neglect, default, fraud, or unlawful act causing damage to any person, then these presents shall be void; otherwise to be and remain in full force and effect in law.

"IN WITNESS WHEREOF we have hereunto set our hands and seals this ---------- day of ----------, A. D., 191----

---

"I hereby certify that the form of the above bonds is that prescribed by me.

"EDWARD C. TURNER,
"Attorney General of Ohio.

"The execution of the above bond is hereby approved this ---------- day of ----------, A. D. 191------

----------, Prosecuting Attorney,
---------- County, Ohio."

Form 4.

BOND OF DEPUTY ASSESSOR

"For a district which contained, at the last preceding federal census less than 65,000 inhabitants.

"KNOW ALL MEN BY THESE PRESENTS, That we,----------

---

as principal, and----------

---

as suret ----------, are held and firmly bound unto the state of Ohio in the penal sum of one thousand dollars ($1,000), for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally and firmly by these presents.

"THE CONDITION of the above obligation is such that, whereas, the said

---

has been appointed as deputy assessor in and for the assessment district of--------
county, Ohio, for the period of ----------
(here insert the time or term of office as prescribed by the tax commission of Ohio specifically as to dates of commencement and termination or both);

"NOW THEREFORE, if the said ----------
shall faithfully perform the duties of the said office, as provided by law or by the orders, rules and regulations of the tax commission of Ohio, or by the deputy state tax commissioner, known as the district assessor, in and for the said assessment district, during his said term of office, and shall not, while acting within the scope of his said official duties, or under color of his said official capacity, be guilty of any neglect, default, fraud or unlawful act causing damage to any person, then these presents shall be void; otherwise to be and remain in full force and effect in law.

"IN WITNESS WHEREOF we have hereunto set our hands and seals this ---------- day of ----------, A. D. 191----

---

"I hereby certify that the form of the above bonds is that prescribed by me.

"EDWARD C. TURNER,
"Attorney General of Ohio.

"The execution of the above bond is hereby approved this _____ day of _____, A. D. 191_____

_____, Prosecuting Attorney,
_____ County, Ohio."

Form 3.

BOND OF DEPUTY ASSESSOR

"For a district which contained, at the last preceding federal census 65,000 or more inhabitants.

"KNOW ALL MEN BY THESE PRESENTS, That we,_____
_____
as principal, and_____
_____
as suret _____, are held and firmly bound unto the state of Ohio in the penal sum of one thousand dollars ($1,000), for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally and firmly by these presents.

"THE CONDITION of the above obligation is such that, whereas, the said _____
has been appointed as deputy assessor in and for the assessment district of_____ county, Ohio, for the period of _____
(here insert the time or term of office as prescribed by the tax commission of Ohio specifically as to dates of commencement and termination or both);

"NOW THEREFORE, if the said _____
shall faithfully perform the duties of the said office, as provided by law or by the orders, rules and regulations of the tax commission of Ohio, or by the deputy state tax commissioners, constituting the district board of assessors, in and for the said assessment district, during his said term of office, and shall not, while acting within the scope of his said official duties, or under color of his said capacity, be guilty of any neglect, default, fraud or unlawful act causing damage to any person, then these presents shall be void; otherwise to be and remain in full force and effect in law.

"IN WITNESS WHEREOF we have hereunto set our hands and seals this _____ day of _____, A. D. 191____

_____
_____
_____
_____

"I hereby certify that the form of the above bonds is that prescribed by me.

"EDWARD C. TURNER,
"Attorney General of Ohio.

"The execution of the above bond is hereby approved this _____ day of _____, A. D. 191_____

_____, Prosecuting Attorney,
_____ County, Ohio."

Form 1.

190.

SECTION 4665, G. C., GRANTS IMPLIED AUTHORITY TO PAY EXPENSES OF GRAND JURORS INCURRED IN MAKING INSPECTION OF CERTAIN INSTITUTIONS.

Section 4665, G. C., contains implied authority to pay actual and necessary expenses of grand jurors in making an inspection of benevolent and correctional institutions under order of the court.

COLUMBUS, OHIO, April 1, 1915.

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

GENTLEMEN:—I beg to acknowledge receipt of your letter of March 12th, requesting my opinion upon the following question:

> "The grand jury and judge of the common pleas court in a certain county visited three city institutions for the purpose of inspection, under the right granted by section 4665 of the General Code. A bill was presented to the county for the sum of $79.50, as expenses of the trip; of this sum $60.00 was for the hire of three automobiles, and $19.50 for the meals of the jury. This bill was O. Kd. by the foreman of the grand jury and by the judge of the court of common pleas.
>
> "*Question*: What section of the General Code authorizes the payment of this bill?"

Section 4665, General Code, is as follows:

> "The general assembly of the state, by a committee, the governor of the state, the council of the corporation, by a committee, the mayor or police judge of a corporation, the board of health of the corporation, the judge of any court of this state, and the grand jury of the county, may at any time visit and inspect any of the benevolent or correctional institutions established by any municipal corporation, and examine the books and accounts thereof."

Section 13556 provides the oath of the foreman of the grand jury, which oath is afterwards by adoption taken by each member of the grand jury and is as follows:

> "Saving yourself and fellow jurors, you, as foreman of this grand inquest, shall diligently inquire, and true presentment make, of all such matters and things *as shall be given you in charge*, or otherwise come to your knowledge, touching the present service * * *."

Section 13558 provides:

> "The grand jurors, after being sworn, shall be charged as to their duty by the judge * * *."

From independent investigation I have found that in the particular instance referred to one of the judges of the court of common pleas of Hamilton county,

whose duty it was to charge the grand jury, instructed them to inspect the benevolent institutions of Cincinnati under the authority given in section 4665, above quoted.

I am of the opinion that the authority to pay the necessary expenses incurred by a grand jury when making an investigation under said section 4665, G. C., is impliedly contained in said section. The duty rests upon the grand jury of making the investigation when so charged by the court, and to hold that the grand jury might not be reimbursed for its actual and necessary expenses incurred in the discharge of the duty performed would be in effect to hold the statute inoperative.

I am therefore of the opinion that the bill as presented, approved by the foreman of the grand jury and the judge of the common pleas court, should be paid from the county treasury from the judicial fund.

Respectfully,
EDWARD C. TURNER,
Attorney General.

191.

VACANCY—COUNTY AUDITOR—TO BE FILLED BY COUNTY COMMISSIONERS FOR UNEXPIRED TERM AND AGAIN RE-APPOINTED UNTIL SUCCESSOR IS ELECTED AND QUALIFIED.

L was a county auditor and was elected to succeed himself at the November, 1914, election. He died January 23, 1915, and D was appointed to the vacancy. D will hold the office until the third Monday of October, 1915, when it will be necessary for the commissioners to make a new appointment. The new appointee will hold office until his successor shall have been elected for the unexpired term at the November, 1916, election, and shall have qualified.

COLUMBUS, OHIO, April 2, 1915.

HON. A. C. MCDOUGAL, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—I have your communication of March 17, 1915, in which you state that J. G. Lapp, auditor of Monroe county, died January 23, 1915. The term which he was then serving would have expired on the third Monday of October, 1915. At the general election in November, 1914, he was elected for another term, which term would have commenced on the third Monday of October, 1915. Upon the death of J. G. Lapp, the county commissioners appointed T. A. Dougherty to fill the unexpired term caused by the death of Mr. Lapp. You now inquire whether the commissioners will have to make another appointment to fill the term commencing on the third Monday of October, 1915, or whether the present incumbent, T. A. Dougherty, will hold the office as J. C. Lapp would have done had he not died, i. e., by getting a new commission and given a new bond.

The above statement of facts made by you may be supplemented by the further statement that from the records in the office of the secretary of state it appears that the commissioners used the following language in their journal entry appointing Mr. Dougherty:

> "We hereby appoint T. A. Dougherty county auditor for the unexpired term of the said J. G. Lapp, and until his successor is elected or appointed and qualified."

This action was taken under authority of section 2562, G.C., which section reads as follows:

> "If a vacancy occurs in the office of county auditor, from any cause, the commissioners of the county shall appoint a suitable person, resident of the county, to fill the vacancy."

The question now is as to whether or not the commissioners will have to make another appointment for the term commencing on the third Monday of October, 1915. In answering this question attention should first be given to section 2558, G. C., which reads as follows:

> "A county auditor shall be chosen biennially in each county, who shall hold his office for two years, commencing on the third Monday in October next after his election."

From the language of the above section no power in a county auditor to hold over after the expiration of his term could be inferred. Section 8 of the General Code provides that a person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws, but this section does not apply for the reason that with respect to the office of county auditor it is otherwise provided by section 2561, G. C., which section reads as follows:

> "If a county auditor-elect fails to give bond and take the oath of office as required by law on or before the day on which he is so required to take possession of his office, it shall become vacant."

In the case of State ex rel. Adams v. Hopkins, 10, O. S., 509, the court in construing a similar statute said that, were it necessary, it would hold that under such statute an office became vacant upon the failure of a successful candidate, who had died after his election, to give bond and take the oath of office. The court observed that "this failure was caused by the act of God, and not by the laches of the party, but its effect upon the office is the same, whatever may have been its cause."

It, therefore, appears that the commissioners, in acting under section 2562, G. C., and filling the vacancy caused by the death of J. G. Lapp, had authority to appoint only for the unexpired term of Mr. Lapp, and that the term of the appointee, T. A. Dougherty, will cease and the office will become vacant on the third Monday of October, 1915. It, therefore, follows that it will be necessary for the county commissioners to make a new appointment on the third Monday of October, 1915.

Your inquiry also involves a consideration of the tenure of office of the person to be appointed on the third Monday of October, 1915. In this connection your attention is directed to section 10, G. C., which reads in part as follows:

> "When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred. * * *"

There being no other provision of law governing the matter, and the first

general election for the office of auditor occurring more than thirty days after the third Monday of October, 1915, being the general election that will occur in November, 1916, it follows that the successor to the person to be appointed on the third Monday of October, 1915, is to be elected at the general election to be held in November, 1916, and that the person so elected will serve until the third Monday of October, 1917. The person appointed on the third Monday of October, 1915, will, therefore, serve until his successor shall have been elected at the November election in 1916, and until that successor shall have qualified. At the same election there will also be chosen in Monroe county a county auditor to serve for the full term beginning on the third Monday of October, 1917.

Respectfully,
EDWARD C. TURNER,
Attorney General.

192.

DELEGATE—TOWNSHIP BOARD OF HEALTH CAN AUTHORIZE THE APPOINTMENT OF ONLY ONE DELEGATE AND PAY HIS EXPENSES TO ATTEND ANNUAL CONFERENCE OF LOCAL BOARDS WITH STATE BOARD OF HEALTH.

A township board of health is only authorized to appoint one delegate under section 1245, G. C., and pay his expenses for attending state health conference; if in addition it authorizes president of board to attend likewise, his expenses cannot be paid.

COLUMBUS, OHIO, April 2, 1915.

HON. DONALD F. MELHORN, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—Under date of March 6th, you submitted to me for opinion the following question:

> "Is a president of a township board of health, who attends a state health conference, not as an appointed delegate under G. C., 1245, but in accordance with a resolution of the township board of health directing him to attend such conference, entitled to draw pay for necessary expenses upon production of the certificate specified in G. C., 1245?"

You further state as follows:

> "Some time prior to July 9, 1912, the board of health of Hale township, Hardin county, in regular session, passed a resolution authorizing the president of the board of health, Mr. Mort Ansley, to attend the state health conference at Toledo, Ohio. By the same resolution Mr. John Dille was appointed delegate to the same conference. Both of these men attended said conference and on July 9, 1912, each drew from the township treasury $11.00 as expense money for the same."

A township board of health is provided for by sections 3391, et seq., of the General Code.

Section 3391 provides that township trustees shall constitute the board of

health for the township outside the limits of any municipality, and section 3394 grants them the same duties, powers and restrictions as are imposed upon or granted to boards of health in municipalities.

An examination of section 4404, et seq., of the General Code, relating to the boards of health of cities and villages, fails to disclose any power in such boards, by resolution to authorize any member of the board to attend an annual conference with the state board of health. The only provision for a representative of a township board of health to attend such a meeting is by virtue of section 1245 of the General Code, which provides in part as follows:

> "The state board of health may make provision for annual conferences of health officers and representatives of local boards of health. * * *. Each board of health or other body or person appointed or acting in the place of a board of health shall appoint *a delegate* to such annual conferences. The * * * township shall pay the necessary expenses of such delegate upon the presentation of a certificate from the secretary of the state board that the delegate attended the sessions of such conferences."

Section 1246 permits the board of health to provide for different conferences, but restricts the length of any one conference to three consecutive days, and further provides:

> "and no board of health shall be required or authorized to send a delegate to more than one conference in any year."

The above provisions of statute are clear that it was the intention of the legislature to provide for one delegate and no more to each such conference, and authorize each board of health to appoint such a delegate to attend the conference and to pay him therefor. The attendance at such a conference by any member of the board not appointed as a delegate under the provisions of section 1245, G. C., would not entitle such person so attending to draw pay for necessary expenses upon production of a certificate. The issuance of such certificate by the secretary of the state board of health to one who has not been duly appointed under section 1245 would be a nullity since the statute clearly provides for a certificate to a duly appointed delegate.

Respectfully,
EDWARD C. TURNER,
Attorney General.

193.

TOWNSHIP TRUSTEES—LIMITATIONS TO PROVIDE RELIEF FOR PROPER COUNTY CHARGES—COUNTY SUPERINTENDENT OF INFIRMARY—ALSO LIMITED TO PROVIDE OUTSIDE RELIEF FOR COUNTY CHARGE ONLY WHEN IMPRACTICABLE TO PROVIDE OTHERWISE.

Township trustees are authorized to provide relief for person who is proper subject of county charge only for such length of time as is practicable to effect the admission of such person to the infirmary in counties where there is a county infirmary.

The superintendent of a county infirmary may provide outside relief for a county charge only when for any reason it is impracticable to provide such relief in the infirmary of the county.

COLUMBUS, OHIO, April 2, 1915.

HON. CLARK GOOD, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—I acknowledge receipt of your request for an opinion as follows:

> "I should like to ask for an opinion from your department, on the following statement of facts:
>
> "We have a lady here whose husband is now in the penitentiary serving a term for abandonment of legitimate children and during the time he was absent prior to his incarceration in the penitentiary, the township trustees, of the township in which she lives, have been giving her some assistance, and since her husband is in the pentitentiary they have continued to assist her.
>
> "Can the county commissioners furnish her aid at her home?
>
> "Or would her case be considered temporary assistance and would the trustees be the proper ones to furnish her aid?
>
> "How long should the township trustees furnish aid in a case of this kind, and what is the distinction between temporary and permanent assistance?"

Section 3476, G. C., provides in general for the relief of poor by township trustees, as follows:

> "Subject to the conditions, provisions and limitations herein, the trustees of each township or the proper officers of each municipal corporation therein, respectively, shall afford at the expense of such township or municipal corporation public support or relief to all persons therein who are in condition requiring it."

Sections 3480, 3490, 3491 and 3492, G. C., prescribe the conditions under which and the method by which medical services shall be furnished by township trustees.

Section 3481 requires the visitation of such poor as require public relief by one or more of the trustees or other officers forthwith to ascertain such information as will enable them to determine whether or not such person is under the law entitled to public relief. In counties having infirmaries, provision for further relief is found in section 2544, G. C., as follows:

> "In any county having an infirmary, when the trustees of a township, after making the inquiry provided by law, are of the opinion that the person

complained of is entitled to admission to the county infirmary, they shall forthwith transmit a statement of the facts to the superintendent of the infirmary, and if it appears that such person is legally settled in the township or has no legal settlement in this state, or that such settlement is unknown, and the superintendent of the infirmary is satisfied that he should become a county charge, they shall forthwith receive and provide for him in such institution, or otherwise, and thereupon the liability of the township shall cease. The superintendent of the infirmary shall not be liable for any relief furnished, or expenses incurred by the township trustees."

From the provisions of this section it is manifestly the policy of the law that in case of all those persons who are entitled to admission to the county infirmary, and whose circumstances and conditions are such as to reasonably indicate the necessity of public relief for an indefinite or any considerable period of time, the matter of providing relief should in as expeditious a manner as is practicable and in conformity to law, be turned over to the superintendent of the infirmary and that in those cases the trustees should provide only such relief as is necessary for such person during the time required to transmit to the superintendent of the infirmary the statement of facts prescribed and for such person in due course of business to be received by the superintendent. The same rule would also apply in case of persons requiring public relief who have no legal settlement within the county in which they are found, under provisions of section 3842, G. C.

Under the provisions of section 3484, G. C., in counties in which there is no county infirmary, in the case of persons who have no legal settlement within the county, the trustees of the township in which he is found are required to furnish necessary relief until such person is removed to the county of his settlement or taken in charge by the officers of such county.

In counties where there is a county infirmary as well as in those where there is none, cases may be readily imagined in which persons would require public relief for a very short period of time or only to provide for a particular exigency and these I deem to be within contemplation of section 3488, G. C., and with all the foregoing to constitute what may be properly termed temporary relief. From an examination of the statutes above referred to, it will seem clear that there is no authority for trustees providing other than temporary relief in counties having infirmaries except in those cases, if such there be, where persons who for any reason are not entitled to be admitted to any infirmary require public relief.

In those counties having no infirmary, it is incumbent upon the trustees under the provisions of sections 3476, 3488 and 3489, G. C., to provide relief for all those persons having legal settlement within the township for such period of time as their condition and circumstances may require.

Attention is called to section 2544, wherein, after it is determined that a person should become a county charge by the superintendent of the infirmary, it is made the duty of the superintendent to "forthwith receive and provide for him in such institution or *otherwise*." Again in section 2545, G. C., the superintendent is required to report the names of all persons to whom relief has been given outside of the infirmary. From this it will hardly be doubted that it was the legislative purpose to vest in the superintendent authority to provide relief for persons other than those actually confined in the infirmary under certain contingencies.

In view of the manifest policy of the law as above stated, this provision must be considered in the light of an exception to such general scheme and policy, and by reason thereof be subject to a rather strict construction.

Cases suggest themselves which by reason of their peculiar circumstances

render it impracticable that the necessary relief of proper county charges be afforded at the infirmary. A county charge may be in such physical condition as to render his removal extremely hazardous or be affected with a contagious or infectious disease of such character as to render it dangerous to the safety and health of other inmates that he be admitted to the infirmary or by reason of epidemic or other such exigency it may become temporarily impracticable to furnish proper accommodations for all those persons who are properly subject of county charge in the infirmary, hence the necessity for some provision and authority for relief outside of the infirmary. It is my opinion, however, that outside relief by the superintendent should be carefully restricted to cases of a character similar to those above indicated and even in those, outside relief should continue only for such length of time as to render practical admittance to and relief within the infirmary.

Answering your question more specifically, insofar as the facts stated by you will warrant a conclusion, I am of opinion that if the lady referred to is a proper county charge, relief may not be provided her at her home by the superintendent of the infirmary.

As before stated, in counties where there is a county infirmary, township trustees may provide relief to persons who should become a county charge only for such length of time as may be necessary to have such person admitted to the infirmary in the manner provided by law.

The distinction between temporary and permanent relief may not be determined by any hard and fast rule, but depends upon the particular conditions and circumstances of each case.

It may be suggested that it does not follow of necessity from the above conclusion that the lady referred to should be committed to the infirmary and her children to the children's home.

Your attention is directed to section 13019, G. C., as follows:

> "The board of managers of the penitentiary or reformatory to which a person is sentenced or confined under this subdivision of this chapter, shall credit such person with forty cents per day for each working day during the period of such confinement, which shall be paid or cause to be paid by such board to such trustee."

The trustees in this section mentioned should be appointed by the court under the provisions of 13010, G. C.

I further call attention to sections 1683-2 to 1683-9, G. C., inclusive, (103 O. L., 877-79) and 1683-10, G. C., (104, O. L., 199) providing for mothers' pensions which it seems would, perhaps, be applicable to the case stated by you.

Respectfully,

EDWARD C. TURNER,

Attorney General.

194.

COSTS—HOW TAXABLE UNDER PROCEEDING PROVIDED BY SECTION 13530, G. C.—FEES, WITNESSES, SHERIFF AND PROBATE JUDGE.

Costs are taxable in the special proceeding provided by section 13530, *G. C. Fees of witnesses so taxed are to be paid from the county treasury under section* 3014, *G. C. Fees of the sheriff and probate judge may be recovered from the defendant upon conviction, if he is solvent, and in misdemeanor cases, if the defendant is insolvent; and in all cases, if the state fails to convict, subject, however, to the limitation upon the aggregate amount of such allowances in any one year.*

In no case are any such costs payable out of the state treasury.

The probate judge in his judicial capacity is not entitled to any fee for services in such cases.

COLUMBUS, OHIO, April 2, 1915.

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

GENTLEMEN:—Your letter of March 26th, requests my opinion upon the following question:

> "Is a proceeding brought under the provisions of section 13530 of the General Code a criminal case, and can costs be taxed in such a proceeding? If so, how are they payable and by whom?
>
> "We wish to call your attention to an opinion rendered by Hon. J. K. Richards, attorney general, to Mr. W. D. Guilbert, chief clerk of the auditor of state's office, on March 3, 1894, to be found at page 592, vol. 4 of the opinions of the attorney generals of Ohio.
>
> "If costs are taxable in such a proceeding can witnesses be paid as provided for in section 3014, General Code, and can the sheriff's fees be paid in accordance with the provisions of sections 2845 and 2846, General Code? We would also call your attention to the provisions of section 11204, General Code, in this connection."

The opinion of Attorney General Richards, to which you refer, is not responsive to your question. It goes only to the extent of holding that costs made and taxed in the proceeding about which you inquire are not to be regarded as "costs made in the prosecution" within the meaning of the statutes under favor of which costs are paid out of the state treasury in felony cases.

The sections referred to by you are as follows:

> "Sec. 13530. When a person is committed to jail charged with the commission of an offense, and wishes to be discharged therefrom, the sheriff or jailer shall forthwith give to the probate judge, clerk and prosecuting attorney of the proper county, at least three days' notice of the time of holding an examining court, to attend, according to such notice, at the court house. The judge, having examined the witnesses, including the accused, if he request an examination, shall discharge him, if he find there is no probable cause for holding him to answer; otherwise he shall admit him to bail or remand him to jail. Such judge may adjourn the examination from day to day or for such longer period as is necessary for the furtherance of justice, on good cause shown by the state or the accused.
>
> "Sec. 11204. The fees of witnesses, jurors, sheriffs, coroners, and

constables, for all services rendered in the probate court, or by order of the probate judge, shall be the same as is provided by law, for like services in the court of common pleas."

Section 11204 does not have the effect, in my judgment, of constituting the fees for which it provides taxable costs. In fact, in my opinion, it has no bearing whatever upon the question submitted, which is not as to what the amount of a given fee is, but rather as to whether or not, regardless of its amount, it may be taxed as costs.

Section 3014, General Code, provides as follows:

"Each witness attending under recognizance or subpoena, issued by order of the prosecuting attorney or defendant, before the court of common pleas, or grand jury, or other court of record, in criminal causes, shall be allowed the following fees: * * * When certified to the county auditor by the clerk of the court, fees under this section shall be paid from the county treasury."

Section 2845, General Code, is very lengthy and need not be quoted. It provides the schedule of fees for the sheriff, among them fees for serving subpeonas, for taking a prisoner before a judge or court, and for calling a witness. All fees to which the sheriff is entitled under this section are impliedly authorized to be taxed in the costs of the case.

Section 2846 provides that the sheriff may receive, in addition to his salary, fees for services in criminal cases wherein the state fails to convict and in misdemeanors upon conviction where the defendant proves insolvent, but the allowance is not to exceed three hundred dollars in any one year.

In considering whether these sections authorize the taxation of costs in the special proceeding provided by section 13530, it is of interest to note that section 1602, providing for the fees of the probate judge, makes special provision for his fees "for holding an examining court under section 13531" and makes no provision for holding an examining court under section 13530, nor for acting as a magistrate in any way whatever.

The capacity in which the probate judge acts under section 13530 might be described as in a sense that of an appellate magistrate. The court does not try the accused upon the issue of guilt or innocense, but only determines whether or not probable cause exists, in which particular his function is precisely that of a justice of the peace or other magistrate, except that the probate court is not called upon to act unless the party applying to him has been committed by some magistrate.

I find the following specific provisions respecting taxation of costs in examining courts as such:

"Sec. 3010. When required by an examining court to take charge of the defendant or defendants, during the examination of such defendant or defendants upon any charge for the commission of a crime or offense against the laws of the state, sheriffs, marshals and their deputies, constables, and watchman shall be allowed seventy-five cents for rendering such service, to be taxed and paid as other fees of such officers in like cases. When acting as the officer of such examining courts, such officer shall not receive fees for testifying upon such examination.

"Sec. 3016. In felonies, when the defendant is convicted the costs of the justice of the peace, police judge, or justice, mayor, marshal, chief of

police, constable and witnesses, shall be paid from the county treasury and inserted in the judgment of conviction, so that such costs may be paid to the county from the state treasury. In all cases, when recognizances are taken, forfeited and collected and no conviction is had, such costs shall be paid from the county treasury.

"Sec. 3017. In no other case whatever shall any cost be paid from the state or county treasury to a justice of the peace, police judge or justice, mayor, marshal, chief of police, or constable.

"Sec. 3018. In felonies, fees of witnesses before justices of the peace, mayors, and police justices, shall be paid upon the allowance of the commissioners from the county treasury, on the certificate of such officer, notwithstanding the state has failed.

"Sec. 3019. In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at any regular session, may make an allowance to any such officers in place of fees, but in any year the aggregate allowances to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

It is to be observed that the probate court is not mentioned with other examining courts and their officers in the group of sections beginning with section 3016 and ending with section 3019, General Code, as above quoted, although the functions of the probate court under section 13530 are, as above stated, those of a magistrate.

Your general question then is resolved into the following specific ones:

"(1) Is the proceeding provided for by section 13530, General Code, a criminal cause within the meaning of section 3014, General Code?"

If it is, then witnesses are entitled to the fees therein provided for, but they are not to be taxed as costs in the proceedings, but are to be certified to the county auditor by the clerk of court and paid out of the county treasury.

The term "criminal cause" as used in this section has not been defined by the courts. In view of the lack of provision for compensation of witnesses in the case under consideration, unless it be held to be a criminal cause (for it can not be held to be a "civil cause" as contemplated by section 3012, General Code), I am of the opinion that witness fees earned in the proceeding under section 13530, General Code, are to be certified by the probate judge as clerk of his own court to the county auditor and paid from the county treasury.

(2) The question respecting the sheriff's fees stands on a different footing. In the first place, there is specific provision for the sheriff's fee for taking charge of the defendant during the examination under section 3010. This is in addition to whatever fees the sheriff may be entitled to under sections 2845 and 2846, General Code. Section 3010 also manifests a legislative intention that the sheriff's fees for services rendered in an examining court shall be taxed as costs in the case.

Therefore, there is direct evidence that the legislature intended that the fees of the sheriff in connection with the proceeding authorized in section 13530 should be taxed as costs in the case.

When so taxed as costs, fees of the sheriff may be recovered from the defendant in a felony case, if the state convicts and the defendant is solvent; and under favor of section 2846, supra, he may receive his legal fees in such case if the state fails to convict, provided the three hundred dollars allowance therein provided for is not exceeded.

In misdemeanor cases the sheriff is entitled to his fees upon conviction, to be recovered from the defendant, if solvent, and to be paid out of the county treasury under section 2846, if the state fails to convict or if, upon conviction, the defendant is insolvent, subject to the limitations provided in said section.

The question is general, although the specific references in your letter are to the fees of the sheriff and witnesses.

Respecting the probate judge, I am of the opinion that in his judicial capacity he is not entitled to tax any fees whatever or to receive any special fee or compensation out of the county treasury for services rendered under section 13530. This is because of the omission of specific mention of such proceedings in section 1602, which does provide a specific fee for services under section 13531, which provides for a proceeding in some ways similar to that provided for by section 13530.

In his clerical capacity, however, the probate judge is entitled to such fees as might be allowed to the clerk of the court of common pleas for similar services, and by force of section 2902, General Code, he is protected from losing such costs exactly to the same extent as the sheriff is protected by section 2846, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

195.

INTOXICATING LIQUORS—AGENT FOR DISTILLING COMPANY IN ANOTHER STATE IS NOT LIABLE TO TAXATION—WHEN FOREIGN DISTILLING COMPANY IS LIABLE FOR TAXATION.

An Ohio agent for a distilling company of another state, whose activities are confined to solicitation, receiving and forwarding orders to such distilling company or its other representatives and collecting from Ohio purchasers on such orders, is not liable to taxation under the provisions of section 6071, *G. C.*

A foreign distilling company which ships into Ohio and there keeps at a railroad warehouse or other place a stock of intoxicating liquors from which sales and deliveries by it or its agents are thereafter made, is liable to taxation under section 6071, *G. C.*

COLUMBUS, OHIO, April 3, 1915.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I acknowledge the receipt of yours under date of March 29, 1915, enclosing request from the auditor of state, for an opinion, in which you join, as follows:

"1. Where a person has an office in the state of Ohio and acts in the capacity of agent for a distilling company in another state, transmitting to such distilling company the orders taken, to be filled by the distilling company by shipment from the distillery direct to the purchaser in Ohio, is the agent liable for the Aiken-Dow tax?

"2. Upon the same state of facts as recited in question 1, is the distilling company so liable?

"3. Where a person has an office in Ohio and acts as the agent for

a distilling company in another state, and sells in the state of Ohio the product of such distilling company, sending his orders to a representative of the distilling company in Kentucky, the latter representative directing deliveries to be made from a railroad warehouse in Ohio from a stock on hand held by such warehouse in the name of such distilling company, is the agent liable under the Aiken-Dow law?

"4. Given the same state of facts as recited in question 3, is the distilling company so liable?

"5. Given the same state of facts as recited in question 3 except in the following respect, to wit, that deliveries from the Ohio warehouse were made upon the direct order of the distilling company, is either the agent or the distilling company so liable?

"6. Would the fact that the agent made collections from the purchaser for the distilling company vary the rule of law in either of the foregoing cases?

"Liability under each of these several states of facts concerns the county auditor in at least one county in the state, and this department desires to advise county auditors in the premises, as well as have the information for its own use."

Section 6071, G. C., as amended 103 O. L., 241, provides as follows:

"Upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquors, there shall be assessed yearly and paid into the county treasury, as provided by sections 6072, and following, of the General Code, by each person, corporation, or co-partnership engaged therein the sum of one thousand dollars."

The phrase "trafficking in intoxicating liquors" as used in the above section, is defined in section 6065, G. C., as amended 103 O. L., 241, in the language following:

"The phrase 'trafficking in intoxicating liquor,' as used in this chapter and in the penal statutes of this state, means the buying or procuring and selling of intoxicating liquor otherwise than upon a prescription issued in good faith by a reputable physician in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes. Such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof by the manufacturer thereof in quantities of one gallon or more at one time at the manufactory or the sale thereof in said quantities from the wagon or other vehicle of the manufacturer to the holder of a liquor license or in said quantities to individual consumers where said liquors are delivered to the homes of said individual consumers in territory wherein the sale of intoxicating liquors is not prohibited by law."

Each of your questions, then, resolves itself into whether or not the facts therein stated constitute the conducting of the "business of trafficking in intoxicating liquors" as above defined, within the state of Ohio. From your statement it is assumed that the agent referred to has no ownership in the liquor sold nor has he possession of or control over the same at any time. In other words, the agent has no connection with the transactions stated in question one, two, three,

four or five, further than soliciting orders, receiving the same and forwarding to the distilling company or its other representatives, and to this assumed state of facts is this opinion confined.

From this it may be observed that the solicitation of orders, receiving the same and forwarding to the vendor, at a permanently located office, is in legal aspect not materially different from the ordinary solicitation of sales by a traveling salesman. In neither case does the agent himself buy or procure the subject matter of the sale nor, in a technically legal sense, does such agent sell. So that it would not be seriously contended that such agent comes within the terms of the statute which defines the trafficking in intoxicating liquor as the buying or procuring and selling of the same.

It has accordingly been held in Brooks v. Van Nes, 38 Bulletin, 262, affirmed without report 57 O. S., 642, and Voss v. Hagerty, 26 Bulletin, 268, that:

> "A whiskey broker who negotiates sales of liquor between different parties, but who neither buys nor procures the liquor so sold, is not subject to tax * * * under the Dow law."

Assuming, as above stated, that the activities of the agent referred to are confined to the solicitation and delivery of orders and the negotiation of sales between other parties, I am of opinion that such agent is not liable to the Aiken-Dow tax, and the answer, therefore, to your second, third and fifth question, in so far as the latter relates to the agent, must be in the negative

I come now to a consideration of your second question as to the liability of the distilling company for the Aiken-Dow tax, under the state of facts set forth in your first question.

In an opinion under date of April 25, 1906, rendered to Hon. W. D. Gilbert, auditor of state, by this department, it is said:

> "The negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made, is inter-state commerce.
> "Robbins v. Shelby Co., 120 U. S., 497;
> "Enert v. Mo., 156 U. S., 319;
> "Toledo Company v. Glenn Co., 55 O. S., 221;
> "Vance v. Vanderhook, 170 U. S., 444;
> "Bowman v. Chicago, etc., Railway, 125 U. S., 489."

Aside, however, from the question of inter-state commerce, it will be borne in mind that the Dow-Aiken law is an exercise of the police power of the state which cannot operate extra-territorily, as held in the case of Voss v. Hagerty, supra, and that therefore only such sales of intoxicating liquors as are made within the state of Ohio are subject to the provisions of such law and constitute the business subject to the tax thereby imposed.

While the question of the particular place at which a particular class of sales may be said to be made, often involves much difficulty, the rule applicable to those classes of sales represented by your several statements seems well established in this state.

In the case of Bellefontaine v. Vassaux, 55 O. S., 323, it is held.

> "As a general rule a sale of personal property is not completed when anything remains to be done to identify the thing sold or discriminate it from other like things."

Conversely, in the case of Jung v. Talbot, 59 O. S., 511, Bellefontaine v. Vassaux, 55 O. S., 325, Deihl Brewing Company v. Beck, 10 C. C. (n. s.) 361, it is held in effect that a place where a stock of intoxicating liquors is kept not in connection with a factory or other place where such liquors are lawfully sold, to which orders are directed and from which the same are filled and delivery is made by the keeper of such place or his agents, is within the terms of the law the place of sale.

In the application of this rule to the facts in your second question, we reach the conclusion that the sale was then made at the distillery and outside of the territorial operation of the Dow-Aiken law, and the answer, therefore, to such question, must be in the negative.

There is no material difference of fact in your fourth and fifth question. The direction of the filling of the orders from stock in a warehouse by a representative of the vendor is in legal effect and for the purposes of your question, under the direction of the vendor.

These two questions may then be considered and answered as one. It would seem from your statement to be unquestionably true that the persons in charge of the railroad warehouse and in possession of the liquor, are for the purposes of sale and delivery of the same the agents of the distilling company. From this is would then appear that the rule applicable thereto is stated in the case of Deihl Brewing Co. v. Beck, 10 C. C., 361, affirmed by the supreme court, as follows:

> "A brewing company manufacturing and selling beer at wholesale, which maintains a cold storage house in a location separate from its manufactory, and from which cold storage house daily deliveries of beer are made to customers on orders previously taken by a soliciting agent, thereby becomes a trafficker in intoxicating liquors within the meaning of Revised Statutes, 4864-9, and is subject to the Dow tax provided for by that act."

Following Jung Brewing Co. v. Talbot; Bellefontaine v. Vassaux, supra. See also Brewing Co. v. Brister, 179 U. S., 444.

The facts submitted by you are not distinguishable in principle from the above cases, and I am therefore of opinion that where orders are taken by an agent in Ohio and filled by an agent of the distilling company from a stock of liquor stored and kept in Ohio, in the manner stated by you, the sales so made constitute trafficking in intoxicating liquors within the terms of the statute, and my answer to your fourth and fifth questions is that the distilling company is liable under such circumstances to the Dow-Aiken tax in either case.

I am of the opinion, in answer to your sixth question, that the fact that the agent made collections from purchasers, would not alone vary the rule in either case, and that the agent would not in that case be liable to the Dow-Aiken tax.

Respectfully,

EDWARD C. TURNER,

Attorney General.

196.

THE WORD "YEAR" AS USED IN SECTION 2253, G. C., MEANS OFFICIAL YEAR OF THE TERM OF SUCH JUDGE.

The word "year" as used in section 2253, G. C., which limits the amount of expenses for which a common pleas judge may have reimbursement in any one year, means the official year of the term of such judge.

COLUMBUS, OHIO, April 3, 1915.

HONORABLE JOHN P. BAILEY, *Common Pleas Judge, Ottawa, Ohio.*

DEAR SIR:—In your letter of March 22, 1915, you ask me to state my opinion upon the following question:

> "What application should be given to the word 'year' as used in original section 2253, G. C., and in the same section as amended in 1913, 103 O. L., 419, and in 1914, 104 O. L., 251. That is to say, if a vacancy should occur in the office of common pleas judge, and a person should be appointed to fill the vacancy, would the 'year' for such appointee begin with his appointment under the statute or is it in all cases to be based upon the official year of the term of office of the position to which he is appointed?"

It will not be necessary to quote section 2253, G. C., in any form in which it has appeared. Suffice it to state that it has at all times provided that the judge of the common pleas court shall receive his actual and necessary expenses not exceeding a certain specified amount "in any one year" incurred in a certain manner. Transposed into its most simple form this provision means, of course, that the judge shall not receive more than a specified amount in any one year by way of reimbursement for expenses.

I think the word "year," as here used, must necessarily refer to the official year and not to the year of service, as such. This I think follows because section 2253, in all the forms in which it has appeared since its original enactment, has provided that the allowance of expenses shall be "in addition to the annual salary * * * in" certain other sections of the General Code. It is clear that the year contemplated by the phrase "annual salary" is the official year, and this idea being the controlling one of the section determines, I think, the meaning of the term "year" as therein used.

Of course some practical difficulties are encountered in applying the maximum limitation upon the allowance of expenses in the event that two judges occupy the same judicial position during different parts of the same year. These difficulties, however, are not insurmountable and they exist as well under one interpretation of the statute as under another.

I am of the opinion, therefore, that a common pleas judge, appointed to fill a vacancy in the middle of the official year determined by the day on which the term of office began, does not, on the day of his induction into office, commence a "year" for the purpose of the expense allowance under section 2253, G. C.; but that whatever may be the rule as to the amount of expenses that may be allowed him during the remainder of the first official year (which is not herein determined), he will begin a new year, for the purpose of the expense allowance, at the expiration of the official year during which he assumed office, and the beginning of the succeeding official year; in other words the word "year," as used in section 2253, G. C., means the official year.

Respectfully,

EDWARD C. TURNER,
Attorney General.

197.

SCHOOL BUILDING—CANNOT BE RENTED BY SECRET SOCIETIES FOR PURPOSES NOT OPEN TO ALL PERSONS OF THE COMMUNITY.

The board of education has no authority in law to rent a school building, or part thereof, to a secret society for the purpose of holding lodge sessions and such social functions and entertainments of such society as are not open to all persons in the community on equal terms or which will not, in the judgment of the board of education, benefit the people of the community.

COLUMBUS, OHIO, April 3, 1915.

HON. ELI H. SPEIDEL, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—In your letter of March 10, 1915, you request my opinion as follows:

> "The board of education of the Branch Hill Special School District has requested me for an opinion on the question as to whether or not such board of education can rent the second story of their new school building to the lodge of Modern Woodmen of the World, for the purpose of holding their lodge sessions, and also the social functions and entertainments of the order.
>
> "After giving this matter some thought, and believing it to be of general public importance, and knowing that the various boards of education of this county are in doubt as to just what purposes a school house can be used for, I am going to ask your office for an opinion on the question submitted."

Section 7622, General Code, provides:

> "When, in the judgment of a board of education, it will be for the advantage of the children residing in any school district to hold literary societies, school exhibitions, singing schools, religious exercises, select or normal schools, the board of education shall authorize the opening of the school houses for such purpose. *The board of education of a school district in its discretion may authorize the opening of such school houses for any other lawful purposes.* But nothing herein shall authorize a board of education to rent or lease a school house when such rental or lease in any wise interferes with the public schools in such district, or for any purpose other than is authorized by this chapter."

This section as originally enacted in 86 O. L., 11, and until it was amended in 91, O. L., 44, did not contain the provision "the board of education of a school district in its discretion may authorize the opening of such school house for any other lawful purposes." Until such provision was added, the purposes for which a school building or part thereof might be used, were confined to those enumerated in the statute.

It was evidently the intent of the legislature in adding this provision, to give to a board of education the authority to open a school building or part thereof for any lawful public purpose of a similiar nature to those above mentioned, providing its use for that purpose does not in any way interfere with its use for public school purposes. In other words, the school building is a social center of

the school district for educational purposes and, in addition to its use for public school purposes, it may be used for any other lawful purpose which, in the judgment of the board of education, will be for the advantage of the people of the community.

The use of a school building, or part thereof, by a fraternal order for the holding of lodge sessions and such social functions and entertainments of the order as are not open to all persons in the community on equal terms, is not public in its nature and meets with the objection that the benefits resulting from such use are confined to the purposes of the order and to such other persons as may be permitted by the order to enjoy said benefits. Such a use is not within the meaning of the above provision of the statute and there is no other statutory provision authorizing such use.

Replying to your question, I am of the opinion that the board of education of Branch Hill Special School District has no authority in law to rent the second story of their new school building to a secret society for the purpose of holding their lodge sessions and such social functions and entertainments of such society as are not open to all persons in the community on equal terms, or which will not, in the judgment of the board of education, benefit the people of the community.

Respectfully,
EDWARD C. TURNER,
Attorney General.

198.

COMMON PLEAS JUDGE—ADDITIONAL SALARY PAYABLE FROM COUNTY TREASURY QUARTERLY—COUNTY COMMISSIONERS—MAY PURCHASE COPIES OF OPINIONS OF COURT OF APPEALS FOR USE COMMON PLEAS COURT.

The additional salary of a county common pleas judge elected in 1914 *is payable wholly from the treasury of his county in quarterly installments based upon the official year.*

County commissioners may in their discretion, purchase typewritten copies of the opinion of the court of appeals of another county in the same appellate district, for the use of the common pleas court of the county.

COLUMBUS, OHIO, April 3, 1915.

HONORABLE ROY H. WILLIAMS, *Judge of the Common Pleas Court, Sandusky, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of March 15, 1915, requesting me to advise you upon the following questions:

(1) You were elected last fall and took office January 1, 1915, in Erie county, Ohio, under the new law. How should your additional salary be paid?

(2) May the county commissioners pay, out of the county treasury, for typewritten copies of the opinions of the court of appeals of Lucas county?

The first question which you submit is not directly covered by my general opinion relative to the additional salaries of common pleas judges, although the principles governing the answer thereto are laid down in dealing with the case of the common pleas judge elected in Clark county, therein referred to. Upon those principles I hold that your additional salary is payable from the county treasury of Erie county in quarterly installments, the quarters being based upon the

official year of your term which begins and ends upon January 1st. Of course the additional salary to which you are entitled is at the rate of twenty-five ($25.00) dollars for each one thousand population of Erie county as determined by the census of 1910, which additional salary must not exceed three thousand ($3,000) dollars.

Answering your second question I may say that there is no express statutory authority for the payment, by the county commissioners out of the county treasury, for typewritten copies of opinions of a court of appeals for the use of a common pleas court. In fact there is no direct statutory authority for the furnishing of any supplies to common pleas judges or for the use of the court, as such. There is an express provision for the furnishing of supplies for the use of the court of appeals which is to be upon a requisition issued by a clerk of courts. (1531, G. C., as amended 103 O. L., 414.)

It will not do, however, to apply the general rule that the expression of one thing is the exclusion of another in the matter of the expenses of different county offices. Long established practice justifies the conclusion that county commissioners have the power to furnish, for the use of any county officer including the common pleas judges, such supplies and needful things as they see fit to furnish provided they stay within the bounds of a reasonable discretion.

There being no hard and fast provision on the subject, therefore, I am of the opinion that the second question which you submit is one properly addressed to the discretion of the county commissioners.

Respectfully,
EDWARD C. TURNER,
Attorney General.

199.

JUSTICE OF THE PEACE—OFFICE RENT—JURISDICTION IN CRIMINAL CASES.

The trustees of a township are not authorized to pay office rent for justices of the peace of their respective townships.

A justice of the peace, having jurisdiction in criminal cases throughout the county, may hold criminal court in any township of the county in which he is elected and where he resides.

COLUMBUS, OHIO, April 3, 1915.

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

GENTLEMEN:—Under date of March 25, 1915, my opinion was requested by Mr. C. A. Kennedy, justice of the peace, Trenton, Ohio, and for the sake of uniformity I am addressing my opinion on such inquiry to you.

The inquiry is as follows:

"1. Is it not the duty of township trustees to pay the office rent of a justice of the peace in their respective townships, said justice not being a salaried justice?

"2. As a justice has jurisdiction in his respective county, in criminal cases, would it be legal for a justice to hold criminal court in the city of

Hamilton, Ohio, Butler county, when said justice is elected or appointed in another township outside of the city of Hamilton but in the same county of Butler?"

Upon examination of the statutes, I do not find that any provision is made for payment of office rent for justices of the peace, by the trustees of their respective townships.

The authority to withdraw moneys from the public treasury for such purpose will not, in this state, be implied, and I therefore advise that the township trustees are not authorized to pay the office rent for justices of the peace of their respective townships.

I find that my predecessor, Hon. Timothy S. Hogan, expressed the same conclusion in an opinion rendered to you on October 29, 1913, volume 1 of the attorney general's reports for the year 1913, page 384.

As to your second question, your attention is invited to section 13422, G. C., which provides:

"A justice of the peace shall be a conservator of the peace and have jurisdiction in criminal cases throughout the county in which he is elected and where he resides, on view or on sworn complaint, to cause a person, charged with the commission of a felony or misdemeanor, to be arrested and brought before himself or another justice of the peace, and if such person is brought before him, to inquire into the complaint and either discharge or recognize him to be and appear before the proper court at the time named in such recognizance, or otherwise dispose of the complaint as provided by law. He also may hear complaints of the peace and issue search warrants."

The supreme court has construed the foregoing section in the case of Steele v. Karb, sheriff, 78 O. S., 376, in which the court say:

"Under the provisions of section 610 (Sec. 13422, G. C.), Revised Statutes, a justice of the peace has 'jurisdiction in criminal cases throughout the county in which he is elected and where he resides,' and his authority to hear and dispose of a criminal case in the manner prescribed by the statute is not limited to the township for which he is elected and where he resides."

I do not find that the supreme court has departed from the construction announced in the foregoing case, and I therefore advise that a justice of the peace may hold criminal court in the city of Hamilton, Ohio, Butler county, although said justice is elected or appointed in another township of the county than that in which the city of Hamilton is located.

Respectfully,
EDWARD C. TURNER,
Attorney General.

200.

ROAD IMPROVEMENT WHERE COUNTY, TOWNSHIP AND VILLAGE CO-OPERATE—VILLAGE MAY ISSUE BONDS FOR ITS SHARE AND PAY INTO COUNTY TREASURY THE PROCEEDS—COUNTY BONDS SHOULD BE ISSUED FOR TOWNSHIP; COUNTY PORTION AND LEVIES MUST BE MADE UPON ALL TAXABLE PROPERTY OF COUNTY AND TOWNSHIP.

Where a county, township and village co-operate in the improvement of a road under sections 6903 et seq., G. C., the proportionate share to be contributed by the village is to be secured through the issuance of bonds by the village. The proportionate shares to be contributed by the county and township are to be secured through the issuance of negotiable notes or bonds of the county, and there is no authority in this scheme of co-operative road improvement for the issuance of township bonds. In making a levy to meet the county bonds, the commissioners and trustees must levy a tax upon all the taxable property of the county and township, respectively, including the taxable property within the village.

COLUMBUS, OHIO, April 3, 1915.

HONORABLE GEORGE C. VONBESELER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—Permit me to reply to your letter of January 25, 1915, requesting an opinion, and which is in part as follows:

"The owners of a majority of the foot frontage on certain county roads in Lake county, in accordance with the provisions of section 6903 of the General Code of Ohio, petitioned the commissioners to grade, drain, curb, pave and improve parts of said roads. Said roads run into and through the township of Perry and the village of Perry, lying within the said township of Perry. The county commissioners, in accordance with the provisions of section 6905, have entered into an agreement with the board of trustees of said township and with the council of said village whereby said board of trustees and said council have assumed and have agreed to pay certain proportions of the costs and expenses of such improvement. The proportions as established, if material to the question, are 45 per cent. to the county, 40 per cent. to the township or the village, and 15 per cent. to the owner of abutting property.

"By resolution the township trustees determined to issue bonds in the sum of $54,000, to pay its share of the cost and expense of improving said roads outside the limits of the incorporated village and the council of the incorporated village to issue bonds in the sum of $20,000, to pay its share of the cost and expense of improving said roads within the limits of the incorporated village.

"A majority of the electors of both the township and the village on the 20th day of January, 1915, voted in favor of issuing said bonds in the sums of $54,000 and $20,000 respectively. The electors of both the village and the township voted on the question of issuing the township's share in the sum of $54,000.

"QUERY:—In order to provide a fund sufficient to pay the interest on and to meet these bonds at maturity, shall the township trustees make the levy upon all the taxable property of the township, including that within the limits of the incorporated village of Perry, or merely upon the taxable property lying without the limits of the incorporated village?"

At the outset, permit me to call your attention to the section of the General Code which provides for the making of an agreement between the board of county commissioners and the township trustees and the council of a village for making an improvement such as is contemplated, and which is embraced in the provisions of section 6905 of the General Code, as follows:

> "The board of county commisioners may enter into an agreement with the board of trustees of any township or the council of any village, or both, into or through which a state or county road improvement is contemplated, whereby said board of trustees or council may assume and pay such a proportion of the costs and expenses of such improvement not assessed upon abutting land in accordance with section 6904 of the General Code, as may be agreed upon between said board of county commissioners and said board of trustees or council, and such agreement or agreements may be entered into at any time before the contract for said improvement is let."

The plan under which action has been taken in this matter embraces the co-operation of the county of Lake, township of Perry, and village of Perry, which lies within the said township of Perry.

The first requisite to the fulfillment of the proposed development of the improvement is to establish or raise a fund from which the expenses of the improvement may be met, and a reading of the statutes affecting the matter shows clearly that the fund is to be made up as follows:

First. A proportionate share to be contributed by the village, and which you state in your letter has been fixed, is provided for and may be secured by the village under the authority contained in section 6905-3 of the General Code, which provides that the village may issue bonds for the total estimated cost and the expenses of the improvement, and the proceeds of the sale of the bonds shall be paid into the county treasury into the fund established for the purpose of carrying out the proposed plan of the improvement. The section is as follows:

> "Sec. 6905-3. Upon receipt of such copy the council of such village by taking such action as is authorized by law for the improvement of its streets, may issue and sell its bonds in anticipation of the collection of the special assessments by it to be made upon the benefited property, or to be paid by any street railroad company operating in said road within the limits of said village, and for the purpose of meeting such cost and expense of such improvement as is by law required to be paid by said village, and the amount of the total estimated cost and expenses of so much of said improvement as is made necessary by reason of the additional width to which the same is to be improved. The proceeds of said bonds shall be paid into the county treasury, into a fund to be established for the purpose and in the manner hereinafter specified."

Second. That portion of the fund to be contributed by the county and township may be secured through the issuance of negotiable notes or bonds of the county as provided for in section 6912-1 of the General Code, which is as follows:

> "Sec. 6912-1. After so certifying said assessment to the auditor of the county, the commissioners may, in anticipation of the collection of all moneys from all sources, required to be raised for said improvement, whether by assessment, taxation, or by agreement with the township trus-

tees or village council, borrow money sufficient to pay the entire estimated cost and expense of the improvement, and may issue and sell negotiable notes or bonds of the county, bearing a rate of interest not to exceed five per cent. per annum. For the purpose of paying their respective shares of the principal and interest on the notes or bonds authorized to be sold, the county commissioners and the township trustees may levy a tax upon all the taxable property of the county or township in addition to all other taxes authorized by law of not to exceed two mills in any one year until said notes or bonds and interest are paid."

Referring to that part of your letter relating to municipal and township bonds in which you state that these bonds are issued under authority of sections 3295 and 3939-22 of the General Code, it is to be noted that while general authority for the issuance of the bonds

"for re-surfacing, repairing or improveing any existing street or streets as well as other public highways,"

is conferred upon municipalities and townships under and by virtue of the section referred to, particular authority is granted for the issuance of the bonds in connection with the improvement under consideration by municipalities under section 6905-3, quoted above; and in section 6912-1 it is provided that the bonds which otherwise would be issued by a township for the purpose of paying for a road improvement are to be issued by the county, and to be known as "county bonds." There is therefore no specific authority for the issuance of township bonds in the scheme of co-operative road improvement provided for in sections 6903, et seq.

Coming to consider the question of the taxable property upon which the commissioners and trustees should make a levy in order to meet the bonds issued by the county commissioners, it is my opinion that the commissioners and trustees should levy a tax upon all the taxable property of the county or township, including that within the village.

Section 5646 of the General Code confers the general power of township trustees to levy taxes and the taxes are to be levied on "the taxable valuation of the township." These taxes are to be levied "for township purposes including the relief of the poor."

Section 3444 of the General Code provides for a cemetery tax to be levied by township trustees without stating the taxable property upon which such tax shall be levied.

Sections 3282-1 of the General Code, et seq., provide for a tax for certain road purposes without stating the taxable property upon which such tax shall be levied, but these sections provide that the question of levying such tax shall be submitted "to the qualified electors of the township."

Section 7441 of the General Code provides for "an additional road tax" and states that if the trustees deem such tax necessary, they shall determine the per cent. "to be levied upon the taxable property of their respective townships."

Section 7171 of the General Code provides for a tax to be levied by the township trustees to redeem certificates issued for materials taken for road purposes, the tax to be levied by the trustees "upon the taxable property of their respective townships."

Section 7562 of the General Code provides for a tax to be levied by the trustees for bridge purposes without stipulating the taxable property upon which such tax shall be levied, but section 7562-2, General Code, 103 O. L., 198, which provides for a tax for foot bridges, stipulates that the tax shall be levied "upon all of the taxable property in said township."

In striking contrast to all of the above sections, section 7486 of the General Code provides for a road tax to be levied by the trustees on all of the taxable property in the township, "exclusive of an incorporated village."

I have not attempted to refer to all of the provisions authorizing the levying of taxes by township trustees, but have only alluded to a sufficient number of these provisions to illustrate the proposition that taxes which township trustees are authorized to levy, divide themselves into three classes: First, taxes which trustees are required to levy upon all of the taxable property in the township; second, taxes which township trustees are required to levy upon the taxable property in the township outside of an incorporated village therein; and third, taxes which the trustees are authorized to levy and in reference to which no specific direction is given by law as to the taxable property upon which such taxes are to be levied.

The tax which the township trustees are required to levy by section 6912-1 is of the first class named, for by the terms of that section the commissioners and trustees are required to levy a tax "upon all the taxable property of the county or township." It may be safely asserted on the authority of State ex rel. v. Ward et al., 17 O. S., 543, that territory within a township and comprising only a part thereof, does not cease to be a part of the township upon being organized into a municipal corporation.

Answering your specific question, I am therefore of the opinion that the tax which the county commissioners of Lake county, and the tax which the township trustees of Perry township are required to levy, must be levied upon all of the taxable property of said county and of said township, respectively, including the taxable property within the village of Perry.

In view of the fact that there is no provision for the issuance of township bonds, your supplemental question relative to the payment of fees to the township treasurer for the receiving, safekeeping, and paying out of moneys, etc., in connection with the bond issue becomes immaterial.

Respectfully,
EDWARD C. TURNER,
Attorney General.

201.

EMERGENCY LAW—EMERGENCY SECTION MUST STATE FACTS SHOWING LAW IS FOR IMMEDIATE PRESERVATION OF PUBLIC PEACE, HEALTH OR SAFETY—SENATE BILL NO. 14 PROVIDING EXTENSION OF TIME FOR BUILDING AND LOAN ASSOCIATIONS, WHICH ARE DEPOSITORIES FOR STATE FUNDS UNDER EMERGENCY LAW, IS DEFICIENT IN THIS RESPECT.

An emergency law, the emergency section of which does not state facts which show any necessity for the immediate preservation of the public peace, health or safety, is not a valid law. At the very least, such a law cannot go into immediate effect.

Senate bill No. 14, *passed February* 16, 1915, *and which provides that building and loan associations receiving state funds as depositories under the emergency law found in* 103 *O. L.,* 148, *shall have a further extension of time for two years after April* 10, 1915, *is deficient in this respect, and as it can in no event be effective prior to April* 10, 1915, *is of no effect whatever.*

COLUMBUS, OHIO, April 5, 1915.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Under date of March 12, 1915, you submitted for my opinion the following:

> "As treasurer of state, I am receiving numerous calls from the building and loan associations for loans under the Vonderheide bill, but before taking any action on the matter, I respectfully refer you to senate bill No. 14 which reads:
>
> "'AN ACT.
>
> "'To extend the time for repayment of funds of the state of Ohio deposited at interest with building and loan associations located in districts devastated by the flood of 1913.'
>
> "The question is: Are building and loan associations now not being a state depository permitted to receive these funds who did not receive this money at the original letting in April, 1913? Or would building and loan associations who were designated as depositories in 1913, under the senate bill No. 14 granted an extension of time, be entitled to receive more money from the state?"

An answer to your question requires consideration of the special emergency act, 103, Ohio Laws, at page 148, which was passed by the general assembly on April 10, 1913, and approved by the governor April 12, 1913. This act provided in part as follows:

> "*Section* 1. That in order to meet the emergency arising from the devastation caused by the unprecedented floods of _____, 1913, in portions of the state of Ohio, and in order to conserve and preserve the life, health and peace of the people of those portions of the state of Ohio, the state treasurer of the state of Ohio, with the approval of the governor, is hereby authorized to deposit funds of the state of Ohio, not exceeding in the aggregate three million dollars, with building and loan associations organized under the laws of the state of Ohio and located

in those portions of the state of Ohio so affected by the said floods, said sums to be deposited with said associations for a period not to exceed two years from the passage of this act.

"*Section* 2. Such of said associations in said portions of said state as desire to avail themselves of the provisions of this act shall have the right at any time from the date of the passage hereof to apply to become depositories of said funds, and upon said associations being approved by the state board of deposits, in writing, to be proper depositories for the state funds, the state treasurer shall apportion and deposit said funds among said associations as in his judgment may be in accordance with the respective needs of said associations and the territory in which they are located, but in no case shall any association have on deposit at any one time more than its paid-in capital stock, and in no event more than three hundred thousand dollars. The state treasurer shall apportion and deposit said funds from time to time as applications are received therefor.

"*Section* 6. This act is hereby declared to be an emergency law necessary for the immediate preservation of the public peace, health and safety, and shall take effect and be in force from and after its passage: the necessity arising from the fact that by reason of the widespread destruction of and damages to residences in such flooded districts and of the sewer connections and sanitary arrangements in the homes therein, the public peace, health and safety is menaced and would be conserved and benefited by depositing state funds in building and loan associations in such flooded districts for a period not to exceed two years to enable such associations to loan money to the owners of property in such districts for rebuilding and repairing their homes and residences and placing them in sanitary condition."

Section 1 above quoted provides, among other things, that the treasurer of state, with the approval of the governor, is authorized to deposit in building and loan associations organized under the laws of Ohio and located in those portions of Ohio affected by the flood a sum not to exceed three million dollars, and for a period of time not to exceed two years from the passage of the act.

Section 2 provides that such associations as desire to avail themselves of the privileges of this act shall have the right at any time from the date of the passage thereof to apply to become depositories of said funds, and that after approval of said institutions by the state board of deposits, the state treasurer shall apportion and deposit said funds as further provided in said sections.

As I construe this act, building and loan associations having the qualifications above mentioned may at any time between the date of the passage of this special act and the time limited, to wit: two years, apply to the treasurer of state and, when approved by the state board of deposits, receive deposits, provided the sum of three million dollars has not already been deposited.

Senate bill No. 14, to which you refer, provides as follows:

"Section 1. That, whereas, certain of the inactive funds of the state of Ohio, deposited with building and loan associations located in those parts of the state devastated by unprecedented floods of 1913, under an act of the legislature passed April 10, 1913, and entitled 'An act to make building and loan associations oragnized under the laws of the state of Ohio and located in those portions of the state of Ohio affected by the floods of 1913, depositories of state funds for a period not to exceed two years,' will be needed after the expiration of said period of two years to enable the further accomplishment of the purpose of said act, in securing the peace

and health of the people located in such districts, through the rehabilitation of homes and by effecting more complete sanitation of devastated property, the state treasury of the state of Ohio is hereby authorized and directed to extend the time for payment of such said funds as still remain on deposit, for a further period of two years from April 10, 1915, the date of the expiration of said original term.

"Section 2. Such deposits now outstanding shall be further held and repaid under all the terms and conditions prescribed in said original act of April 10, 1913, not in conflict with the extension herein provided.

"Section 3. This act is hereby declared to be an emergency act and its enactment is necessary for the immediate preservation of the public safety and welfare. The necessity thereof lies in the fact that the public safety and welfare requires the retention of said funds for a further period of two years from April 10, 1915, in securing the peace and health of the people located in those portions of the state of Ohio affected by the floods of 1913, and in the further fact that the period provided for in said act expires on April 10, 1915, and the withdrawal of said funds at said time would work a hardship upon many home owners, borrowers of said associations, to the detriment of the safety and welfare of the people in said districts of the state of Ohio."

I ascertain that both the original act of 1913, and senate bill No. 14, above quoted, received the proper number of votes when put upon their final passage to be enacted as emergency laws.

I am of the opinion, which I have expressed in a letter to the general assembly, that the reasons for the necessity of putting a law into immediate effect for the preservation of the public peace, health or safety, required by section 1d of article II of the constitution to be stated in a separate section of each emergency law, must be such reasons as show on their face the existence of a real necessity for the immediate preservation of the public peace, health or safety.

Section 3 of senate bill No. 14 does not satisfy this test. It states no facts which show any necessity for the immediate preservation of the public peace, health or safety. The emergency which existed when the original law was passed, as declared in section 6 thereof, no longer exists, nor does section 3 of senate bill No. 14 state that that precise emergency, which was the immediate need of replacing and repairing sewer connections, etc., is a condition which still exists. On the contrary, the only fact (as distinguished from legal conclusions) which is stated in section 3 of senate bill No. 14 is "that the withdrawal of said funds at said time (April 10, 1915), would work a hardship upon many home owners, borrowers of said associations."

The hardship which would be worked upon borrowers of the associations (if any) could not in any way affect the public peace, health or safety.

Therefore, I am of the opinion that senate bill No. 14 is not valid as an emergency law, and being passed as such is not valid at all. At the very least it will not be in effect on April 10, 1915, and if not effective then will never become effective, because its object is defeated unless it can go into effect prior to that date.

I am unable to advise you otherwise than that no action whatever is to be taken under senate bill No. 14, but that you should ignore the provisions of this act and proceed under the original law of 1913, to call in the deposits which were made in that year with certain building and loan associations in the flooded districts.

The matter is very clear to me, but if it is desired to raise the question for the determination of the courts, I shall gladly co-operate to the end that an action in mandamus may be speedily instituted in the supreme court for this purpose.

Respectfully,
EDWARD C. TURNER,
Attorney General.

202.

AUDITOR OF STATE—WHEN OFFICIAL TERM BEGINS AND ENDS—SALARY—SUPERINTENDENT OF BANKS—SALARY.

The official term of auditor of state begins on the second Monday of January next after his election and extends to the second Monday of January four years thereafter, and he is entitled to a salary of $26,000.00 *for the full term.*

The four-year term of the superintendent of banks is four calendar years, and he is entitled for each full month's service one-twelfth of his annual salary.

COLUMBUS, OHIO, April 6, 1915.

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

GENTLEMEN:—Under date of February 18, 1915, you submitted several inquiries to this department.

Your first inquiry is as follows:

> "Sec. 235, G. C., fixes the beginning of the term of the auditor of state on the second Monday of January and to run for a period of four years.
>
> "Sec. 2248, G. C., fixes the annual salary of said officer at $6,500.00.
>
> "The term of the present auditor of state began the second Monday of January, 1913, on the 13th day of the month and will terminate at 12 o'clock m., January 7, 1917, the day preceding the second Monday, or five days less than four calendar years.
>
> "Query. How many dollars is he entitled to receive for his whole term of office?"

Section 235 of the General Code provides that the auditor of state shall hold his office for a term of four years and until his successor is elected and qualified; that the term of office of the auditor "shall commence on the second Monday of January next after his election."

Section 2248, G. C., fixes the "annual" salary of the auditor of state at $6,500.00. The official year of the auditor of state begins on the second Monday of January and terminates on the day preceding the second Monday of January of the following year, and the $6,500.00 annual salary is to compensate him for services during his official year.

Specifically answering your question, the auditor of state is entitled to the sum of $26,000.00 for the four-year period of his term beginning on the second Monday in January next after his election and extending until the day preceding the second Monday in January, four years thereafter.

You next inquire:

"When does a state appointee's term begin—the day of appointment, the day of confirmation or approval, or the day on which he actually begins to perform his duties?"

As I view the question propounded by you it is entirely too comprehensive and broad to permit of a definite answer. I shall be glad to answer any specific question which you have in mind upon which you ask the general question.

You next inquire:

"The superintendent of banks is entitled to an annual salary of $5,000.00. If an appointee takes his office on January 1, 1915, and retires from office at the close of January 31, 1915, how much salary is he entitled to receive?"

The salary of the superintendent of banks is fixed by section 2250, G. C., which provides, in part, as follows:

"The annual salaries of the appointive state officers and employes herein enumerated shall be as follows: * * * Superintendent of banks, five thousand dollars. * * *"

The first question to be determined is as to what is the official year of the superintendent of banks and is to be answered by consideration of the statute under which he is appointed.

Section 710, G. C., provides:

"The governor, with the advice and consent of the senate, shall appoint a superintendent of banks, who shall hold his office for the term of four years and until his successor is appointed and qualified. * * *"

There is no definite day specified upon which the term of the superintendent of banks shall begin and, therefore, I am of the opinion, that the calendar year and his official year are the same.

Section 2260, G. C., provides:

"The salaries provided in this chapter to be paid by the state shall be paid in equal installments as follows:

"Lieutenant governor, judges, officers and employes of state institutions, monthly.

"All other salaries herein provided, semi-monthly.

"When an officer ceases to hold office, salary then due shall be paid him."

Section 2260 is included in the same chapter as section 2250 and, therefore, the provisions of section 2260 apply in reference to the annual salaries fixed by section 2250. The salary of the superintendent of banks, therefore, is to be divided into equal installments, payable semi-monthly, which would, of course, make twenty-four installments. The superintendent of banks, being entitled to an annual salary of five thousand dollars, who takes office on the 1st day of January and retires from office at the close of the 31st day of January would have served one full month, or two semi-monthly periods, and would, therefore, be entitled to one-twelfth of the annual salary. Respectfully,

EDWARD C. TURNER,
Attorney General.

203.

COURT CONSTABLES—COMPENSATION—MAY NOT BE TAXED AS COSTS—NOT SUBJECT TO ALLOWANCE BY COUNTY COMMISSIONERS.

The compensation of court constables is limited by the maximum fixed by section 1693, G. C., and may not be taxed as costs, nor is the same subject to allowance by county commissioners.

COLUMBUS, OHIO, April 6, 1915.

HON. C. P. KENNEDY, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—I have your request for an opinion under date of March 8, 1915, which is as follows:

"One of our common pleas judges has recently heard a election contest in which the present Democratic county recorder contested the election of the incoming county recorder, a Republican. In the course of the hearing the court directed a recount of the ballots, some twenty-eight thousand in all. The final judgment of the court was against the contestor.

"There being no provision of law governing or outlining the manner in which a recount should be conducted, the trial judge appointed six court constables under the authority of section 1692 of the General Code, found in Vol. 103, O. L., page 417, four of whom were to conduct the work of the recount. Their compensation was fixed at $5.00 per day. Each of the four were members of the board of elections. Three others were appointed to assist in the recount at a compensation of one dollar and a half per day. The entire count took 10½ days.

"The general authority under which the court made the order is found in the latter part of section 1692, Vol. 103, O. L., page 417, and is as follows:

"'And discharge such other duties as the court requires.'"

"The bills for services of the court constables have been presented to the county commissioners for payment, and they have referred the matter to our office. The question that presents itself is: Who is liable for the court costs? Section 5153 of the General Code provides in part:

"'The court shall render judgment against the party failing in the case for all the costs of the contest, including the costs of depositions.'"

"There is no other provision relating to the payment of costs in a contest for election of a county officer. The work done by the individual members of the election board in connection with the recount was not a part of their regular duties. I therefore see no reason why they cannot receive compensation for their services the same as if they were not election officials.

"Can the payment of the amount due be properly made by the county commissioners? And if it can, ought not the amount so paid by them be entered as a part of the costs of the contest and the same collected from the failing party and repaid into the county treasury? This is the way I have looked at the matter, but as it is of considerable importance and we may, perhaps, be establishing a precedent in other election contests, I am very desirous of having your opinion in the matter."

From a supplemental statement of facts submitted by Hon. E. D. Fritch, who

presided in the court during the trial of the case, it further appears that by the agreement and consent of all the parties thereto, the re-count of the ballots was made in open session and in the presence of the court, and under his personal supervision and control, with the ministerial assistance of those persons named as court constables, and every judicial function was performed by the court in person; that when the ballots were opened the undisputed ballots were by agreement of counsel tabulated and when that had been completed, the court passed upon the counting of all disputed ballots, and the result thereof added to the totals of undisputed ballots.

The question of the eligibility of deputy state supervisors of elections to appointment in this case, is deemed foreclosed by agreement of the parties and is, therefore, not here considered.

That part of section 1692, G. C., defining the duties for which court constables may be appointed, and from which you quote, is as follows:

> "to preserve order, attend the assignment of cases in counties where more than two common pleas judges regularly hold court at the same time, and discharge such other duties as the court requires."

Experience teaches, and it appears from the statute above quoted, that the duties of court constables are in the nature of a personal attendant upon the court and of a purely ministerial character, and it seems clear that the duties performed by the court constables appointed in this case were within this limit.

The sole authority for payment of compensation of court constables is found in section 1693, G. C., 103 O. L., 418, as follows:

> "Each constable shall receive the compensation fixed by the judge or judges of the court making the appointment. In counties where four or more judges regularly hold court, such compensation shall not exceed twelve hundred and fifty dollars each year, in counties where more than one judge and not more than three judges hold court at the same time, not to exceed one thousand dollars per year, and in counties where only one judge holds court two and one-half dollars each day, and shall be paid monthly from the county treasury on the order of the court. Such court constable or constables may, when placed by the court in charge of the assignment of cases, be allowed further compensation not to exceed one thousand five hundred dollars, as the court by its order entered on the journal determines."

While it is not disclosed in your statement how many judges regularly hold court in Summit county, it is assumed that no difficulty will be found in the application of the provisions of the above section to the facts in that particular.

It will be observed that in addition to fixing a maximum compensation it is provided that the same shall be paid monthly from the county treasury on the order of the court. Since the maximum compensation authorized in any case may not exceed twelve hundred and fifty dollars each year, it follows that such compensation must be fixed at a rate not in excess of twelve hundred and fifty dollars per year.

No statutory authority is found for taxing the compensation of court constables as a part of the costs in any case, nor does any more reason therefor appear than for the taxing of the compensation of the court as a part of the costs in the trial of a cause.

In answer to your question, I am therefore of the opinion that the compen-

sation of the court constables appointed in this particular case may be paid from the county treasury upon the order of the court, but that the same may not be in an amount in excess of the maximum rate prescribed in section 1693 above quoted, for the time employed. Such compensation may not be taxed as costs in the case nor is the same subject to allowance by the county commissioners.

Respectfully,
EDWARD C. TURNER,
Attorney General.

204.

COUNTY EXPERIMENT FARM—PURCHASE PRICE PAID ON WARRANT OF COUNTY AUDITOR, UPON CERTIFICATE OF AGRICULTURAL COMMISSION.

The purchase price of a county experiment farm is to be paid upon the warrant of the county auditor upon the proper certificate of the agricultural commission, and the allowance of a claim for such purchase price by the county commissioners is neither necessary nor proper.

COLUMBUS, OHIO, Apil 6, 1915.

The Agricultural Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have a communication from Mr. Benj. F. Gayman, secretary of your commission, under date of March 31, 1915, which communication is as follows:

> "The electors of Trumbull county, at the fall election in 1914, voted favorably on the proposition to purchase and equip a county experiment farm under the provisions of sections 1165-6-7-8. Bonds were issued and sold; the agricultural commission visited the county and selected a farm for the purpose specified in the act; the money for the purchase and equipment of said farm is now in the county treasury, the farm has been surveyed and all that is necessary is to know how to proceed under section 1165-6 to complete the purchase and equipment of this farm.
>
> "The agricultural commission will thank you for an interpretation of this section and particularly of the language 'and the proceeds of the sale thereof shall be deposited in the county treasury subject to the order of the agricultural commission,' etc."

It appears from the above statement of facts that the money derived from the bond sale has been deposited in the county treasury of Trumbull county and section 1165-6 of the General Code, referred to by you and found in 103 O. L., 436, stipulates that the deposit shall be subject to the order of the board of control of the Ohio agricultural experiment station to be applied by said board to the purchase and equipment of an experiment farm.

The board of control of the Ohio agricultural experiment station was abolished and its powers and duties were cast upon your commission by the agricultural commission act found in 103 O. L., 304. For this reason this department held in

an opinion to your commission dated February 20, 1915, that in reading section 1165-6, G. C., as amended in 103 O. L., 436, the expression "board of control of the Ohio agricultural experiment station" occurring therein must be read "agricultural commission." It therefore follows that the proceeds of the bond sale in question now in the county treasury of Trumbull county are subject to the order of your commission and are to be applied by your commission to the purchase and equipment of a county experiment farm. Your commission having proceeded under authority of section 1165-7, G. C., to visit Trumbull county and select a farm, the farm having been surveyed, and the purchase price having been agreed upon between your commission and the present owner of the farm, you now inquire as to the method of making payment from the funds in the county treasury.

It may be observed in the first instance that the purchase price of the farm cannot be paid upon the allowance of the county commissioners, for the reason that they do not have control over the fund from which payment is to be made, such fund being made by the statute "subject to the order of" the agricultural commission. Your attention is directed to section 2460, G. C., which provides in part as follows:

> "No claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal in which case it shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the claim."

The purchase price of the farm, being a payment authorized by law, is a claim within the meaning of this section. The agricultural commission being vested with the power of selecting the farm, the fund from which the payment of the purchase price is to be made being subject to the order of said commission, and said commission being enjoined by statute to apply said fund to the purchase and equipment of a county experiment farm, it would seem clear that this is a case in which the amount due is authorized to be fixed by some tribunal or person other than the county commissioners, to wit: by the agricultural commission. I am therefore of the opinion that the the purchase price of the farm is to be paid upon the warrant of the county auditor, upon the proper certificate of the agricultural commission, and that allowance of the claim by the county commissioners is neither necessary nor proper.

Some embarrassment is occasioned by the fact that while the fund for the purchase of the farm is to be disbursed on the order of the agricultural commission, yet the farm when purchased will belong to the county. The deed will therefore be made to the board of county commissioners, that board being a quasi corporation in whom is vested by law the title to all the property of the county. It therefore appears that the purchase price is to be ordered paid by one body, while the title is to be taken by and the deed delivered to another body. It will therefore be necessary for the agricultural commission to withhold its requisition upon or certificate to the county auditor to draw his warrant in favor of the present owner for the amount of the purchase price of the farm until the agricultural commission shall have been satisfied by proper certificates from the county commissioners that the deed has been delivered to them and from the prosecuting attorney that the deed is in proper form and that the title thereby conveyed is good. The same result might be obtained by the agricultural commission issuing to the county auditor a certificate to draw his warrant in favor of the present owner for the amount of the purchase price, upon his being satisfied by proper

certificates from the county commissioners and prosecuting attorney that the deed had been delivered and was in proper form and that the title thereby conveyed was good.

In paying for equipment for the farm the rule herein announced is to be followed, and the purchase price of equipment for the farm is to be paid upon the warrant of the county auditor, upon the proper certificate of the agricultural commission.

Respectfully,
EDWARD C. TURNER,
Attorney General.

205.

OFFICES COMPATIBLE—DEPUTY STATE SUPERVISORS OF ELECTION —CLERK OF MUNICIPAL COURT.

The office of deputy state superintendent and inspector of elections and the office of the municipal court are not incompatible.

COLUMBUS, OHIO, April 6, 1915.

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

GENTLEMEN:—You have requested my opinion upon the following proposition:

> "May the same person hold the positions of deputy state supervisor and inspector of elections in an annual registration city and the office of clerk of the municipal court of the same city at the same time and draw salaries out of the public treasuries for both positions? If not, what kind of a finding should be made in the premises?"

The deputy state supervisor and inspector of elections is a state officer and although part of his salary, at least, is payable by the city, nevertheless it does not change his status as a state officer.

The clerk of the municipal court is an officer of the city. You do not state in your letter what city you have in mind relative to the clerk of the municipal court, but generally speaking the clerk of such a court would have no duty to perform which would be inconsistent with the duties to be performed by the same person as one of the deputy state supervisors and inspectors of elections. It is true that he might be called upon to issue a summons or subpoena as clerk of such court upon himself as deputy state supervisor, but I do not consider that that is in any way a check of one office upon the other, nor do I see any other incompatibility of office between the two offices.

I am, therefore, of the opinion that the same person may hold both positions.

Respectfully,
EDWARD C. TURNER,
Attorney General.

206.

FOREIGN CORPORATION—STOCK NOT EXEMPT FROM TAXATION IF PART LOCATED IN FOREIGN COUNTRY.

Stock of foreign corporation not exempt from taxation if part of its property is located in a foreign country.

COLUMBUS, OHIO, April 6, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Acknowledging receipt of your letter of March 22nd, and noting your request that I consider Attorney General Hogan's opinion of December 15, 1914, construing the provisions of section 192, General Code, beg to advise that I have considered the opinion referred to and concur in the conclusions expressed by Mr. Hogan.

I reach this conclusion with regret, as what I regard as the unavoidable interpretation of section 192, General Code, makes the application of that section unequal and inequitable. However, it is not what is embodied in section 192 that produces the inequitable result, but rather the failure of the section to go far enough; for if there were no such provision the state of the law would be even more incongruous than it is now. (See Lee v. Sturges, 46 O. S., 153.)

The considerations which make one hesitate to reach the conclusion to which Mr. Hogan and myself have been driven are, after all, addressed to the legislature and not to those who interpret the laws.

Respectfully,
EDWARD C. TURNER,
Attorney General.

207.

MAIN MARKET ROAD LAW—STATE HIGHWAY COMMISSIONER—HAS IMPLIED AUTHORITY TO COMPENSATE ABUTTING LAND OWNER FOR DAMAGES SUFFERED BY REASON OF CHANGE OF GRADE IN HIGHWAY.

Under the main market road law, sections 6859-1 *to* 6859-8, *inclusive, of the General Code, the state highway commissioner has implied authority to compensate an abutting land owner for damages suffered by reason of a change of grade in the highway, the general manner or method of making compensation being subject to the approval of the governor.*

COLUMBUS, OHIO, April 6, 1915.

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

SIR:—On July 15, 1914, Maude E. Knapp brought suit against your predecessor in office, Hon. James R. Marker; William Keesecker, a contractor; and the county commissioners of Trumbull county, the suit being brought in the common pleas court of Trumbull county. On August 5, 1914, Frank Moyer and Minnie V

Moyer brought suit against the same defendants and in the same court, and both suits are still pending. In both cases the plaintiffs aver that the defendants are threatening to raise the grade of the highway in front of their premises to their great and irreparable injury, and in both cases temporary restraining orders were allowed and are still in force. It may safely be asserted that the threatened injury to the Moyer land is slight, if indeed any injury is threatened, and I am informed that the local officials of Trumbull county stand ready to deal with the Moyer case and secure a dismissal of the same in case some method can be devised of dealing with the Knapp case. I shall, therefore, in this opinion refer only to the Knapp case, and the conclusion herein expressed is limited to the facts of that case as herein stated.

Prior to the bringing of these suits, the state highway commissioner had begun the improvement as a main market road of the highway extending southeast from Warren to Youngstown. Knapp was the owner of a small farm abutting on this highway, most of his land lying in a rather deep ravine just north of Girard. Knapp's land is improved with an artificial pond, ice house and greenhouse. A number of years ago a trolley line was built on this highway, the track being constructed on the side of the highway next to the Knapp land. The track was carried over the ravine above referred to on a trestle, and the supporting piers were of considerable height, permitting a free passage under the track. At two points the span between the piers was shortened, thus permitting the use of narrow girders and increasing the clearance under the track. These two points were situated approximately opposite the ice house and greenhouse of Knapp and at these two points Knapp had convenient means of passing from the highway to his land, with a sufficient clearance under the track of the trolley company to permit the use of covered vehicles.

The improvement of the highway as now planned, involves a substantial raising of the grade through the ravine referred to, and the highway will be so far elevated, if the plans are executed, as to make it impossible to pass from the highway under the track of the trolley company onto the lands of Knapp. At the same time the highway will not be sufficiently elevated to permit passage from the same over the track of the trolley company on to the lands of Knapp, except at one corner of his farm and that the most remote from the improvements above named. Even at that point the driveway over the track will be less convenient than before the change in grade. It will thus be seen that Knapp will be substantially damaged by the change of grade. He has offered to settle on a basis of $1,000.00, and the local officials of Trumbull county regard this as an advantageous settlement from the point of view of the public.

As before observed, this improvement is being constructed as a main market road and the entire cost is to be paid from the fund for the construction, improvement, maintenance and repair of main market roads created by section 6859-3, G. C., 103 O. L., 155. The further fact should be noted that this improvement was undertaken at a cost of some $125,000 by the state highway commissioner, in consideration of an agreement on the part of the county commissioners of Trumbull county to similarly improve another section of highway at a cost of some $160,000. The county commissioners have fulfilled this contract, and, while the same was only a gentleman's agreement, yet the state is in honor bound to complete its part of the agreement if legal means can be found so to do. The improvement which consists of some regrading and the laying of a brick pavement has been completed except in front of the Knapp and Moyer premises. At that point sufficient grading to destroy the old highway was done before the restraining orders were secured. Since that time nothing could be done, and the highway is now very dangerous and well nigh impassible. The resulting danger and in-

convenience are all the greater by reason of the fact that this highway is a part of the main route from Cleveland through Youngstown to Pittsburgh, and the traffic is very heavy.

The legal question presented by the above facts is as to the right of the state highway commissioner to compensate a land owner for damages suffered by reason of a change of grade in the highway in front of his premises where such highway is being improved by the state highway commissioner as a main market road under the provisions of the main market road law, 103 O. L., 155.

Section 3 of the main market road law, being section 6859-3, G. C., provides that twenty-five per cent. of all moneys paid into the treasury of the state by reason of the state levy for state highway improvement purposes shall be used for the construction, improvement, maintenance and repair of certain main market roads located along and upon the route of portions of certain inter-county highways designated in the section.

Section 4 of the main market road law, being section 6859-4, G. C., reads as follows:

> "The construction, improvement, maintenance and repair of said main market roads as defined and designated in the preceding section hereof may be begun at any point and shall be executed in such manner and method. with such road materials and in accordance with such plans, details and specifications, as may be adopted by the state highway commissioner with the approval of the governor; and as to such main market roads there shall be no necessity for petitions being presented and filed as in other improvements and no procedure for construction, improvement, maintenance and repair of roads as is provided for in any other act or acts of the general assembly shall apply to such main market roads."

Section 5 of the main market road law authorizes the state highway commissioner to purchase equipment and materials and employ labor and to construct main market roads without letting contracts and to use convict labor in the building of such roads.

From a consideration of the above provisions, it is apparent that the legislature in enacting the main market road law, intended to free the highway commissioner from the restrictions of all other road laws, provide an elastic procedure in the construction of main market roads, and permit the building of these roads in any manner or method deemed wise by the state highway commissioner, subject only to the approval of the governor. The legislature must be taken to have known and had in mind when it enacted this law, that in the construction of such roads it would be highly expedient and well nigh necessary at times to change the lines of highways, secure additional land for wider rights-of-way, and change grades to the damage of owners of adjoining real estate. No express authority in the highway commissioner to expend money for these purposes is conferred, and the act by its express terms excludes all other procedure for the construction, improvement, maintenance and repair of roads as provided in any other law.

In view of the above, I am of the opinion that under the provisions of the main market road law the state highway commissioner has implied authority to compensate an abutting owner of real estate for damages sustained by reason of a change of grade in the highway, such implied power being necessary to enable the highway commissioner to carry out the powers expressly conferred.

Applying this principle to the facts in the Knapp case, I am of the opinion that in that case and under the facts thereof as stated herein, the state highway commissioner has implied authority to make a reasonable compensation to Knapp

for the damages suffered by him by reason of the change of grade in front of his premises. While this implied power to make such compensation clearly exists, I recognize the wisdom of the policy of invoking it only in exceptional cases, where the merit of the claim is beyond dispute, and desire to limit any implied recommendation of the wisdom of such a course to the particular facts of this case.

The general course of procedure in making such compensation will require the approval of the governor under section 4 of the main market road law, 103 O. L., 157, and no steps should be taken in the matter until his approval is secured.

Respectfully,
EDWARD C. TURNER,
Attorney General.

208.

INTER-COUNTY HIGHWAYS—MAIN MARKET ROADS—SELECTING AND CHANGING ROUTES—STATE HIGHWAY COMMISSIONER HAS NO AUTHORITY TO CHANGE ROUTE—COUNTY COMMISSIONERS—IF THEY PROCEED TO ABANDON LAND UNDER SECTION 6860, G. C., AND OBJECTIONS ARE FILED, AND THEY THEN PROCEED UNDER SECTION 6885, G. C., THEY CANNOT PROCEED UNDER SECTION 1195, G. C., THE LATTER WOULD BE INCONSISTENT.

In selecting additional routes as inter-county highways and main market roads, under section 1184-4, *G. C.,* 103 *O. L.,* 451, *and in changing to a more practicable location, the state highway commissioner acts under the same limitations that applied in the original designation of inter-county highways, and he must designate the original route or the altered route so that the same will follow the line of an existing highway. The state highway commissioner has no authority under the above section, to change a route from an existing highway and establish the same across privately owned lands.*

Where a board of county commissioners, for the purpose of acquiring a strip of land upon which to lay out and establish a county road, over which an inter-county highway may be established by the state highway commissioner, with the approval of the governor, proceeds under authority of sections 6860, *et seq., G. C., until objections are filed by certain property owners to the report of the viewers filed with said board, and an appeal is taken to the probate court under authority of sections* 7061, *et seq., G. C., if said board then decides to abandon said proceedings under authority of section* 6885, *G. C., it cannot proceed under authority of section* 1195, *G. C., as amended,* 103 *O. L.,* 453, *for the purposes above mentioned.*

COLUMBUS, OHIO, April 6, 1915.

HON. JAMES F. FLYNN, JR., *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—I have your letter under date of March 16, 1915, which is in part as follows:

"Confirming the conversation had over the long distance telephone today, with either Mr. Ramsey or myself, the question we have confronting us,

but to which, if it is to be of any use, we should have an immediate answer. is this: whether in view of the provisions of section 1184-4, G. C., the state highway commissioner having designated the inter-county highway extending from this city to Lorain, thence to Cleveland, as Main Market Road, No. 13, and having determined that a part of a section in this county which we now desire to improve is not a practicable location, but that its entrance into the city of Sandusky should be changed or altered, necessitating the construction of perhaps a mile and a half of new road, the commissioners of this county may proceed to acquire the requisite land for this mile and a half of new road, under the provisions of section 1195, G. C.

"As I understand it, this is substantially the question propounded to Mr. Ballard of your office by Mr. Ramsey over the telephone today, and it is with greater particularity perhaps, the same question covered in the next to the last paragraph of my letter of March 5th to Mr. Marker, which was turned over to your office for consideration, is indicated in my letter of the 5th instant, the commissioners here have proceeded under the provisions of section 6860, et seq., but the viewers' report has met with objection, which will probably result in an appeal to the probate court by perhaps three of the property owners, thereby working an extended delay, and probably precluding the carrying out of the improvement as planned by the county commissioners and the state highway commissioner jointly. If this section of a mile and a half of new road as located by the state highway commissioner under the provisions of section 1184-4 can be properly termed a 'deviation' or a change or alteration so that we may proceed under section 1195, then it is obvious that the right conferred by that section upon failure to agree for the commissioners to deposit the money with the probate court, institute condemnation proceedings, and thereupon take immediate possession of the land, will obviate the necessity and difficulty of delay, if we may legally proceed in that way at once, and abandon existing proceedings."

From the statement of facts set forth in your letter, supplemented by certain statements made by you and Mr. R. K. Ramsey over the telephone, and by information obtained from the state highway department, I understand that the highway in question is an inter-county highway extending from Sandusky through Huron to Lorain, which highway has been designated as a main market road under the main market road law.

It seems that the state highway commissioner contemplated the improvement of this highway as a main market road, and when said improvement was projected a sentiment arose in favor of establishing a new road and of changing the route of the main market road so that said main market road was run over the new road, the reason for this suggested change being that the new route would avoid a dangerous railroad crossing and would be more direct.

For the purpose of establishing this new road, the commissioners began proceedings under section 6860, et seq., of the General Code. While it is not clear just how far these proceedings had been carried at this date, it seems that the report of the viewers have been read twice as provided by section 6880 of the General Code. In your letter to Mr. Marker under date of March 5, 1915, you state:

"We have had our third reading of the viewers' report and intend letting the dissatisfied owners go into the probate court,"

I assume from this state that the county commissioners either have adopted or are about to adopt the favorable report of the viewers and cause the report, survey and plat to be recorded and make an order for the payment of the damages assessed.

It appears that three land owners interested in this improvement are dissatisfied with the damages assessed in their favor and propose to appeal to the probate court under sections 7061, et seq., of the General Code, providing for appeals in road cases. The order of the county commissioners cannot be executed for twenty days, pending a possible appeal. This appeal, if perfected, will result in a still further delay. The county commissioners cannot take possession of the land appropriated until the damages assessed for it are paid, and those damages cannot be paid, at least in the cases of the three land owners, because said land owners either have appealed or are going to appeal to the probate court on the question of damages.

This situation prevents the taking possession of the land appropriated and the opening of the new road and as a result the contract for the construction of the main market road improvement cannot be let at least in so far as this contract extends over the line of the new road now in process of establishment.

It should be observed that there is no intention to abandon any part of the old road and the proposed new road leads in a direction different from the old road and has a different western terminus.

On December 28, 1914, the state highway commissioner assuming to act under section 1184-4, G. C., 103 O. L., 451, made an order changing the route of the Cleveland-Sandusky inter-county highway, No. 3, and Main Market route, No. 33, and attempted to change the route from the existing highway and establish the said road over the projected new road which the commissioners of Erie county were seeking to establish in the proceedings above referred to, and this attempted action of the state highway commissioner was approved by the governor.

The state highway commissioner was without authority to make this change. As above stated, he assumed to act under section 1184-4, G. C., as amended in 103 O. L., 451, a part of which is as follows:

> "the state highway commissioner may, subject to the approval of the governor, designate additional routes as 'inter-county' highways and main market roads, and *he may change to a more practicable location,* the route of any 'inter-county' highway or 'main market road.'"

It seems clear from a careful reading of sections 1184-1 to 1184-4, inclusive, of the General Code, that the state highway commissioner has no authority to re-locate any inter-county highway or main market road in any location other than along the line of an *existing* public highway of the state. In other words, in selecting additional routes and in changing to a more practicable location, the state highway commissioner acts under the same limitation that applied in the original designation of inter-county highways and he must designate the additional route or the altered route so that the same will follow the line of an existing public highway. The state highway commissioner has no authority under this section, to change a route and establish the same across privately owned lands. That is what he undertook to do in this case for the reason that there was not yet any public highway along the line of the new route. There was only a pending proceeding for the establishment of a public highway, with the possibility that the proceeding would fail. The act of the state highway commissioner in attempting to change the route was, therefore, without legal effect and the legal location of the inter-county highway in question is still along the old route.

You now inquire whether the county commissioners of Erie county can aban-

don the pending proceedings under section 6860, et seq., of the General Code, and proceed under section 1195, G. C., as amended 103 O. L., 453.

Section 1195, G. C., as amended, provides:

"If the line of a highway proposed to be improved under the provisions of this act deviates from the existing highway, or if it is proposed to change the channel of a stream in the vicinity of the highway, the officials making application for such improvement must provide the requisite right of way. If the board of county commissioners are unable to contract upon fair and equitable terms with the owner or owners of such land, or property, as may be necessary for such change or alteration, or if additional right of way is required for the same and if such owner or owners of the land or property in question refuse to sell or contract with the commissioners of the county, for a reasonable compensation for such land or property required for such change or alteration, then the board of county commissioners as the case may be, may by resolution condemn and appropriate for public use such land or property, and upon the deposit of the amount of money as determined by said board of county commissioners with the probate court of the county, for such owner or owners, the board of county commissioners shall be authorized to take immediate possession of and enter upon said lands for such purposes. The county commissioners are hereby authorized to issue their order upon the county auditor. in favor of the probate judge, who shall hold such moneys until such litigation is decided. The right of appeal of any person in interest shall be allowed in the manner as contained in section 7517 of the General Code.

"If the line of any highway proposed to be improved by the state highway commissioner without the co-operation of county commissioners deviates from the existing highway, or if it is proposed to change the channel of a stream in the vicinity of such highway, the state highway commissioner may provide the requisite right of way, allowing reasonable damages and compensation in securing the same, which shall be charged as a part of the cost of such improvement. If the state highway commissioner is unable to contract upon fair and equitable terms with the owner or owners of such land or property as may be necessary for such change or alteration, or as may be necessary in order to secure material to improve such highway, or if additional right of way is required for the same, and if such owner or owners of the land, property or material in question refuse to sell or contract with the state highway commissioner for reasonable compensation or damages, or both, for such lands, property or material required for such change, alterations or improvement, the state highway commissioner shall condemn and appropriate for public use such lands, property or material, and upon the deposit of the amount of money, as determined by the state highway commissioner, with the probate court of the county in which the highway improvement is located, for such owner or owners, the state highway commissioner shall be authorized to take immediate possession of, and enter upon said lands for said purposes. The state highway commissioner is hereby authorized to issue an order upon the state auditor in favor of the probate judge, who shall hold such moneys until such litigation is decided.

"An appeal from the amount of compensation or damages allowed by the state highway commissioner for the payment of land, property or material so condemned, and appropriated for public use, shall be allowed to the probate court of the county. The appeal shall be perfected and dock-

eted and other proceedings followed as provided in sections 7517-7523 of the General Code, except that the appellants shall be the plaintiff and the state highway commissioner the defendant."

While the county commissioners of Erie county can abandon the proceedings under sections 6860, et seq., of the General Code, an abandonment being authorized by section 6885, G. C., if they determine so to do, their jurisdiction will be exhausted and they cannot proceed under the above provision of section 1195, G. C., as amended, for the reason that the provisions of section 1195 are applicable only to inter-county highways, and in this case no inter-county highway has ever been established over the line of the proposed new highway. No inter-county highway can be established except over the line of an existing public highway. The change in the route of the existing highway proposed by the board of county commissioners of Erie county is not a deviation within the meaning of the above provision of section 1195, G. C. The deviation referred to in said provision is a change deemed necessary for the purpose of eliminating curves or turns in the highway or to avoid bad grades, and involves an abandonment of the old road and a substitution of the new therefor. The attempt of the county commissioners in this case does not involve an abandonment of the old road and the proposed new road leads in a different direction and has a different terminus from the old road.

If the county commissioners of Erie county desire to have this inter-county highway established along the line of the proposed new road, they must first establish the new road and then the state highway commissioner can act under the above provision of section 1184-4 of the General Code.

Replying to your question, I am of the opinion that inasmuch as the board of county commissioners of Erie county has proceeded under the provisions of section 6860, et seq., of the General Code, for the purpose of laying out and establishing a new road, if said board abandons said proceedings under authority of section 6885, General Code, it cannot then proceed under the provisions of section 1195, General Code, as amended in 103 O. L., 453, for the purposes above mentioned.

Respectfully,
EDWARD C. TURNER,
Attorney General.

209.

PROSECUTING ATTORNEY—LEGAL ADVISER OF ROAD COMMISSIONERS

Road commissioners appointed under sections 7232 et seq., G. C., may not employ and compensate an attorney other than the prosecuting attorney, and the prosecuting attorney must serve as legal adviser without extra compensation.

COLUMBUS, OHIO, April 6, 1915.

HON. W. C. BROWN, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—I have your communication of March 27, 1915, in which you inquire whether road commissioners, appointed under favor of sections 7232 et seq., of the General Code, may employ an attorney other than the prosecuting

attorney to advise, counsel, prepare bonds, contracts, advertisements, etc., and pay him for such services from the special fund derived from the special taxing road district.

In connection with your inquiry you call attention to section 2917, G. C., which section makes the prosecuting attorney the legal adviser of the county commissioners and all other county officers and county boards, and provides that no county officer may employ other counsel or attorney at the expense of the county except as provided in section 2412, G. C. The exception created by section 2412, G. C., is that if it deems it for the best interests of the county, the county commissioners may, upon the written request of the prosecuting attorney, employ legal counsel to assist the prosecuting attorney in the prosecution or defense of any suit or action brought by or against the county commissioners or other county officers and boards, in their official capacity.

You suggest that your question might be answered in the affirmative and that road commissioners appointed under sections 7232 et seq., of the general Code, might be held to have authority to employ and compensate an attorney other than the prosecuting attorney, upon the theory that such road commissioners are neither county officers nor a county board.

While this matter, in the exact form in which it is presented by you, has not been passed upon by this department, yet my predecessor, Hon. Timothy S. Hogan, rendered an opinion upon a proposition so similar to yours that his opinion, if adhered to, would be decisive of your inquiry. The opinion to which I refer was rendered October 9, 1912, to the bureau of inspection and supervision of public offices, and is found at page 372 of the annual report of the attorney general for that year. In that opinion, after pointing out that road commissioners under the one mile assessment pike law are appointed by the county commissioners, are required to file their maps, profiles and reports with the latter, cannot levy a special tax but must act through the county commissioners, must turn over their completed work to the county commisioners, and are clearly made the agents of the county commissioners for the accomplishment of county work, it was held that under section 2917 of the General Code, the prosecuting attorney is made the legal adviser of the road commissioners and must serve them without compensation, and that a finding of the bureau of inspection and supervision of public offices is justified for the amount of any extra compensation paid to a prosecuting attorney for services rendered the pike commissioners.

In rendering the above opinion the then attorney general followed an opinion rendered by his predecessor, Hon. U. G. Denman, on Sept. 20, 1910, to the bureau of inspection and supervision of public offices, in which opinion the same conclusion was expressed.

Both of the above opinions contain copious references to the provisions of the one mile assessment pike law. It is sufficient to observe that under this law the laying out and establishing of free turnpike roads is very largely under the control of the county commissioners. Section 7232, G. C., provides that the original petition shall be filed with them. Section 7234 provides that the county commissioners shall appoint the three road commissioners. Section 7236 provides that the county commissioners shall have the power to remove road commissioners for cause and to fill vacancies. Section 7237 provides that the map and profile of the road shall be filed with the county commissioners. Section 7238 provides that the county commissioners shall direct the auditor to levy a tax for the construction of the road. Sections 7239 and 7240 authorize the county commissioners, under certain circumstances, to order that the work on the proposed road shall not be done and that no tax for said road shall be levied.

Under section 7241 the county commissioners must be satisfied that the extra

taxes to be levied will build a good and sufficient turnpike road before the proposed road shall be built. Under section 7255 the county commissioners have authority upon petition therefor to extend the boundaries of the road. Under section 7262 the road commissioners must make an annual settlement with the county commissioners. Section 7265 provides that the county commissioners shall designate the name by which the road commissioners shall be known. Under section 7268 the road when completed is received by the county commissioners who are to enter a finding to that effect upon their journal. Section 7270 provides that the expense of surveying and locating the road shall be paid out of the county treasury, and section 7275 provides that county commissioners may change the location of any part of a free turnpike road.

After alluding to the above provisions, my predecessor, Hon. U. G. Denman, in the opinion above referred to, observed that

> "while certain powers are given to the board of turnpike commissioners nevertheless one mile assessment pikes are laid out and established under the control and direction of the county commissioners and that expenses, other than the amount received from the levy upon property within the road district, are paid out of the county treasury.
>
> "If, therefore, the turnpike commissioners are officers at all, it would seem that they are county officers because they are engaged in county work. It is difficult, however, to term them county officers for the reason that, under sections 1 and 2 of article 10 of the constitution, county officers are elected, whereas turnpike commissioners are appointed by the county commissioners. I believe, therefore, that it is better to take the view that turnpike commissioners are the agents of the county commissioners in the construction of one mile assessment pikes.
>
> "Taking this latter view, it would be the duty of the prosecuting attorney to advise the county and turnpike commissioners as to all legal questions arising under the one mile assessment pike law. Taking the former view and considering the turnpike commissioners as a board with powers of its own, their work is nevertheless so largely of a county nature that I believe it would be the duty of the prosecuting attorney to serve the turnpike commissioners in the same manner as he serves county commissioners and county boards."

My predecessor, Hon. Timothy S. Hogan, in the opinion above referred to, in reaching a similar conclusion, used the following language:

> "The road commissioners are in fact the agents of the county commissioners in the construction of the one mile assessment pike. They are appointed by the county commissioners and are required to file their maps, profiles and reports with the county commissioners. They cannot levy the special tax but must act through the county commissioners. They are the agents of the county commissioners in this work."

I concur in the views expressed by my predecessors, and, answering your specific inquiry, I am of the opinion that road commissioners appointed under favor of sections 7232 et seq., of the General Code, may not employ and compensate an attorney other than the prosecuting attorney, and that the prosecuting attorney must serve them as legal adviser without extra compensation.

Respectfully,

EDWARD C. TURNER,

Attorney General.

210.

MUNICIPAL ELECTRIC LIGHT PLANT—COUNCIL HAS AUTHORITY TO FIX ELECTRIC CURRENT RATES TO PRIVATE CONSUMERS.

The council of cities owning municipal electric light plants has authority to fix the rate at which electric current shall be furnished to private consumers.

COLUMBUS, OHIO, April 6, 1915.

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

DEAR SIR:—I acknowledge receipt of yours under date of March 31, 1915, requesting an opinion as follows:

> "Does the council, or director of service of cities have the authority to fix the rates to be charged by municipally owned and operated electric light plants for service rendered by such plants to private consumers?"

Section 3636, General Code, as amended in 103 O. L., 263, enumerating the powers of municipal corporations, provides:

> "To regulate the erection of buildings and the sanitary condition thereof, the repair of, alteration in and addition to buildings, and to provide for the inspection of buildings or other structures and for the removal and repair of insecure buildings; to require, regulate and provide for the numbering and renumbering of buildings either by the owners or occupants thereof or at the expense of the municipality; to provide for the construction, erection, operation of and placing of elevators, stairways and the escapes in and upon buildings."

Section 3618, General Code, provides:

> "To establish, maintain and operate municipal lighting, power and heating plants, and to furnish the municipality and the inhabitants thereof with light, power and heat, to procure everything necessary therefor, and to acquire by purchase, lease or otherwise, the necessary lands for such purposes, within and without the municipality."

Section 2990, General Code, provides in part:

> "The council of a municipality may, when it is deemed expedient and for the public good, erect gas works or electric works at the expense of the corporation, or purchase any gas or electric works already erected therein, etc."

I am unable to find, after a careful examination, any express statutory provision for fixing the rates to be charged for electric current furnished to inhabitants of a municipal corporation from an electric light plant owned by it, and authority for such fixing of rates, therefore, comes by necessary implication arising from the specific grant of authority to own and maintain lighting and power plants and to furnish light therefrom to the inhaibtants of such municipal corporation.

An opinion was rendered upon this question by my predecessor, Hon. Timothy S. Hogan, under date of April 1, 1912, to Hon. C. T. Thomas, city solicitor of Troy, Ohio (in which I concur), as follows:

"Your question, however, presents a more difficult preliminary question, to wit: What department of the city government has the power to fix the rates chargeable for electric current furnished to citizens and inhabitants thereof? The director of public service, under the provisions of section 4326, is vested with the power to manage municipal water, lighting, heating, power, garbage and other undertakings of the city, and, therefore, there can be no question as to the authority of the director of public service to manage the municipal lighting and heating plants and other property of the corporation not otherwise provided for. But whether such a general grant of power suffices to confer upon the department of public service authority to fix rates and make contracts relating to the price of electric current; or whether council, in pursuance of its general legislative authority, and especially under section 127, Municipal Code, which provides that,

"'* * * All powers conferred by this act upon municipal corporations shall be exercised by council, unless otherwise provided herein,'

may fix such rates, is not exactly clear. It is my opinion, however, that section 127, Municipal Code, governs and the council should fix rates and direct the director of public service to enter into contracts respecting electric current to be furnished to consumers from the municipal plant. The authority was directly conferred by statute, upon the director of public service to fix the price to be charged for water furnished by the municipal water plant to consumers of water within the municipality, but the statutes do not confer such power upon the director of public service in relation to electric current furnished by the municipality from a municipal plant to users of current within said municipality. I am, therefore, of the opinion that the holding of my predecessor, Hon. U. G. Denman, that the council of a municipality should fix rates to be charged for electric current to be furnished consumers from a municipal plant, rendered to Hon. E. C. Long, city solicitor of Bellefontaine, Ohio, under date of October 22, 1910, is correct upon the reasoning therein set forth."

This, however, does not apply to villages.

Respectfully,
EDWARD C. TURNER,
Attorney General.

211.

OIL INSPECTION FEES—SHOULD BE CREDITED TO GENERAL REVENUE FUND—APPROPRIATION FOR OIL INSPECTION DEPARTMENT—SALARIES—CHIEF INSPECTOR AND STENOGRAPHERS, HOW PAID—FEES OF DEPUTIES—FEE SECTION OF LAW UNCONSTITUTIONAL.

Since the amendment of section 24, *G. C.,* 104 *O. L.,* 78, *oil inspection fees when paid into the state treasury should have been credited to the general revenue fund, there being no special fund consisting of such fees.*

In 1914 *the appropriation for the use of the oil inspection department consisted of the departmental receipts. Therefore, expenditures of the department between the time when the amendment to section* 24 *became effective and March* 11, 1915, *when that bill was repealed, could be made only from this appropriation.*

The partial appropriation of 1915 *for the use of the oil inspection department, however, is from the general revenue fund and is not limited to any specific receipts.*

The salaries of the chief inspector of oils and his stenographer and their expenses accruing and incurred prior to March 11, 1915, *may be paid only from the balances of the* 1914 *appropriation, consisting of receipts; but such salaries and expenses accruing and incurred since that date are payable out of the appropriation made from the general revenue fund.*

As to the deputies' fees earned prior to March 11, 1915, *the same rule applies, and such fees may be paid from any receipts during the official year, whether the receipts of a given month are sufficient to pay the fees earned in that month or not.*

On March 4, 1915, *the supreme court of Ohio held generally that the oil inspection law is unconstitutional because the fees exacted by it are excessive. Later the court of appeals held that the fee sections of the law were the only unconstitutional ones. In this condition of affairs the salaries and fees of the members of the oil inspection department should continue to be paid out of the appropriation made by the legislature for that purpose, at least until the question as to extent of the unconstitutionality of the oil inspection act is finally determined.*

COLUMBUS, OHIO, April 7, 1915.

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

DEAR SIR:—I acknowledge the receipt of your letter of March 19th, requesting my opinion as follows:

> "We have had presented to us for the issuance of warrants, several vouchers from the state oil inspector, some being for traveling expenses and salaries under section 848 G. C., and others for fees of deputies under section 849 G. C. We are in doubt as to whether we can legally draw our warrants therefor.
>
> "These vouchers are in two classes, one class being for salaries and fees earned prior to March 4th, the other being for salaries, traveling expenses and fees of deputies earned thereafter.
>
> "The compensation of deputies of three cents per barrel inspected during January, 1915, has been fully paid. The earnings of the state from inspections during February, 1915, have been paid into the state treasury, but are insufficient to pay the sum of the vouchers for deputies' fees and salaries for that period. That is to say, the fees received by the state for inspections in February are not equal to the fees allowed deputies for such inspections as were made.
>
> "The vouchers for compensation subsequent to March 4th, cannot be

drawn upon the funds prescribed by sections 848 and 849, G. C., because there is no money in that fund except an old balance which represents earnings of the state for inspections for which the inspector and deputies have been fully compensated.

"In addition to the doubts which these facts raise, the provisions of section 1 of the partial appropriation measure raised further doubts. I desire an opinion from your department upon the following questions so arising:

"1. Can I legally draw my warrant in favor of the inspector and his stenographer for salaries and expenses upon the moneys now on hand derived from inspections?

"2. If I cannot draw such a warrant can I draw one on the general fund?

"3. As to deputies' fees prior to March 4th, can I draw my warrants upon the moneys derived from inspections, without regard to whether the fees under section 850, G. C., for the inspections for which the deputy claims his compensation, have been paid?

"4. As to deputies' fees both preceding and after March 4th, can I draw my warrant for deputies' fees upon the money derived from inspections to the extent of the balance of such moneys on hand (provided it does not exceed the total appropriation)?

"5. If I cannot draw such warrants in favor of the deputies, can I legally draw the same upon the general fund?"

The following provisions of law give rise to the legal questions which are presented by the facts stated by you:

"Section 848. The state inspector of oils shall receive an annual salary of thirty-five hundred dollars, and an allowance for the salary of a stenographer, not to exceed seven hundred and twenty dollars in any year. He shall also be allowed his necessary traveling expenses not to exceed six hundred dollars in any year. Such salaries and expenses shall be paid monthly from moneys received by the state inspector under the provisions of this chapter.

"Section 849. For inspections under the provisions of this chapter, each deputy inspector of oils shall receive a fee of three cents for each barrel of oil of fifty gallons inspected by him. Such fees shall be paid from the fees collected under the provisions of the next following section, but no deputy inspector shall receive more than twelve hundred dollars in any year."

"Section 853. After payment of salaries due him and his deputies and the expenses incident to the conduct of his office, the state inspector of oils shall pay, quarterly, into the state treasury all moneys received by him under this chapter. On the second Monday of each year he shall make and deliver to the governor a report of inspections and a statement of the receipts and expenditures of his department during the preceding year."

The sections which I have quoted were passed in 1908 (99 O. L., 513).

In 1914 the general assembly passed what is known as the "Mooney Law," amending section 24 of the General Code and containing certain other provision, as follows (104 O. L., 78):

"Section 1. That section 24 of the General Code be amended to read as follows:

"Section 24. On or before Monday of each week every state officer, state institution, department, board, commission, college, normal school or university receiving state aid shall pay to the treasurer of state all moneys, checks and drafts received for the state, or for the use of any such state officer, state institution, department, board, commission, college, normal school or

university receiving state aid, during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals or otherwise, and file with the auditor of state a detailed, verified statement of such receipts. * * *

"Section 2. That said original section 24 of the General Code be and the same is hereby repealed.

"Section 3. All sections and parts of sections of the General Code which provide for the custody, management and control of moneys arising from the payment to any state officer, state institution, department, board, commission, college, normal school or university receiving state aid of any fees, taxes, assessments, licenses, premiums, penalties, fines, costs, sales, rentals or other charges or indebtedness and which are inconsistent with the provisions of section 24 of the General Code as herein amended, are, to the extent of such inconsistency, hereby repealed."

The appropriation law of 1914 (104 O. L., 54-71) appropriated to the state oil inspector the receipts of his department.

The partial appropriation law of 1915 (H. B. 314) appropriated to the state oil inspector for the current expenses of his department for the perod beginning February 16, 1915, and ending June 30, 1915, certain specific sums of money for his salary and that of his chief clerk and for the fees of deputy inspectors.

Section 6 of this act provides in part as follows:

"All balances in any appropriation account against which there is no liability on February 16, 1915, and any excess of such balances over liabilities, shall lapse into the fund from which the same were appropriated."

Section 8 of the same law provides that

"The law approved February 17, 1914, and entitled 'An act to make general appropriations and to repeal House Bill No. 670, approved May 9, 1913 (103 O. L., 627) entitled 'An act to make general appropriations,' is hereby repealed, provided, however, that such repeal shall not affect the balances now remaining in any appropriation accounts created by such act in so far as contingent liabilities have heretofore been created or incurred under contracts authorized by law."

This law was approved and went into effect on March 11, 1915.

Section 1 of the act last above referred to provides in part as follows:

"Appropriations hereinafter enumerated for departments * * *, for the uses and purposes of which, or of any activity or function thereof, specific funds in the state treasury are provided by law, are hereby made from such specific funds in so far as such funds are subject by law to appropriation and expenditure for the purposes hereinafter mentioned, and to the extent that the moneys to the credit of such specific funds on February 16, 1915, or credited thereto prior to July 1, 1915, shall be sufficient to satisfy such appropriations. Any sums necessary to supply the balance of such appropriations are hereby appropriated out of any money in the state treasury to the credit of the general revenue fund, except that no moneys shall be taken from the general revenue fund to support the highway department."

One of the questions which is encountered in dealing with the facts stated by you

is as to whether or not the department of oil inspection is a department "for the use and purposes of which, or of any activity or function thereof, specific funds in the state treasury are provided by law."

In order to answer this question the legislative history apparent on the face of some of the statutory provisions above quoted must be considered. In the first place, it is apparent that under the oil inspection act itself, without regard to the "Mooney Law," the revenue arising from the operation of the department did not constitute a specific fund in the state treasury.

Section 853, General Code, above quoted, provided as to the excess of moneys received by the state oil inspector over and above the salaries due him and his deputies and the expenses incident to the conduct of his office, merely that they should be paid "quarterly into the state treasury." They were not to be paid into the state treasury to the credit of any specific fund, and in law and in fact were always treated as belonging to the general revenue fund. (Section 2264, G. C.)

The Mooney law, being section 24 of the General Code as amended, with section 3 of the amendatory act as above quoted, effected no change in the character of the revenues derived from oil inspection by express provision; nor did this law have the effect, as a general rule at least, of creating in the state treasury any funds that did not theretofore exist therein.

The above quoted sections of the oil inspection act had the general effect of requiring certain expenses, salaries and fees to be paid from the inspection fees before the same were paid into the state treasury. The enactment of the Mooney law had the effect of repealing the requirements that such expenses should be so paid. The repeal, in my judgment, went to the length of dispensing with any implication that might have been derived from the former sections, to the effect that in no case should the fees, salaries and expenses in question be paid otherwise than from the fees in question. This was doubtless the intent of the original law, but after the Mooney law was passed and went into effect that intent could not be enforced or carried into effect by judicial or administrative action, but only by legislative action. Inasmuch as one session of the legislature can not bind its successors, it follows that after the Mooney law became effective there was no requirement of an existing law to the effect that the salaries, expenses and fees payable under the oil inspection act should be paid only from the oil inspection fees.

As I have remarked, the surplus at least of the oil inspection fees under the original law when paid into the state treasury were credited to the general revenue fund. There is no machinery provided by the Mooney law or by the oil inspection law whereby when all the proceeds of oil inspection fees are paid into the state treasury under the former, any portion of them can be set aside and constituted a fund for the use of the state inspector of oils, the remainder of them being credited to the general revenue fund. Therefore, all of such proceeds should, in my judgment, be credited to the general revenue fund.

I am of the opinion, for the reasons above stated, that since the Mooney law became effective the oil inspection fees when turned into the state treasury should be credited to the general revenue fund.

In the first budget bill of 1914 the legislature of that year preserved the practical separation of the oil inspection fees by appropriating from the general revenue fund all the receipts of the department. This appropriation remained in existence until March 11th last, and from the time when the Mooney law went into effect until March 11, 1915, all receipts from oil inspection were appropriated to the uses and purposes of the oil inspection department. Out of this *appropriation* and by virtue of its terms and not by virtue of the provisions of the oil inspection act, all fees of deputies and salaries and expenses of the department should have been paid.

Since March 11, 1915, however, when the appropriation law of 1915 took effect,

this appropriation has not been in existence except to the extent of liabilities against the same theretofore created.

The appropriations made in the current appropriation bill are like any other appropriations from the general revenue fund. They are not limited in amount or in expenditure to any particular revenues. The auditor of state should have on his books no appropriation account of the fund made up of oil inspection fees, except that represented by the unlapsed portion of the appropriation of receipts made in the year 1914.

In your statement of facts you seem to assume that for the purpose of paying the fees of deputies each month's business must be separately considered; or, in other words, if a deputy does not earn in a given month enough to pay one-twelfth of his maximum compensation for that month, but has earned enough in previous months in excess of such portion of his compensation to make up the deficiency for the month in question, he is not entitled to have the deficiency made up. This is not the case. Hon. U. G. Denman, as attorney general, advised the state inspector of oils on February 3, 1909, in an opinion to be found in the annual report for that year, page 352, that the year is the unit, and that each deputy is entitled to receive the full amount of his fees for the entire year beginning and ending on May 15th, provided the same does not exceed twelve hundred dollars.

Therefore, the facts stated by you that "the compensation of deputies of three cents per barrel inspected during January, 1915, has been fully paid" is immaterial. If the revenues for February, 1915, are insufficient to pay the fees actually earned in that month, the surplus, so to speak, from January or any preceding month can be used for that purpose.

Answering your questions specifically, beg to state that:

(1) You may legally draw your warrant in favor of the inspector and his stenographer for salaries and expenses accruing prior to February 16, 1915, upon any balance in the appropriation under the 1914 bill, consisting of receipts of the oil inspection department.

You may legally draw your warrant for salaries and expenses of the state oil inspector accruing subsequently to that date from the present appropriation account. Such warrants should be drawn upon the general revenue fund and the proper budgetary classification of the appropriation for the department of state oil inspector.

The salary of the inspector of oils and the expenses of his office are provided for by law, and it no longer being possible to pay them directly out of the oil inspection fees as such in the manner originally provided, there is no limitation upon the source from which they may be paid. The general assembly has appropriated moneys for this purpose and the appropriation is out of the general revenue fund, there being no such thing as a state oil inspection fund.

(2) The answer to your first question also constitutes an answer to your second question.

(3) As to deputies' fees earned prior to March 4th, you may lawfully draw warrants upon the proper appropriation as indicated by my answer to your first question, regardless of whether or not the state has received the inspection fees representing the inspections made. Even under the original oil inspection act of 1908 it was not necessary that a deputy collect the main or principal fee in order to be entitled to receive his inspection fee of three cents per barrel.

As to deputies' fees claimed to have been earned after March 4th, the most serious question involved in your inquiries arises. The same question is partially involved in your first question respecting the salaries and expenses of the state inspector and his stenographer, but I have purposely passed over the question in connection with that inquiry in order to deal with it here.

The supreme court in Castle v. Mason did not finally determine just how much

of the oil inspection act was unconstitutional. This question was directly raised in the court of appeals when that court came to enter judgment, after overruling the state's demurrer in accordance with the mandate of the supreme court. The court of appeals has just decided that the only provisions of the oil inspection law which are unconstitutional are sections 850 and 858 thereof, prescribing the fees to be collected from the owners of the oil for making inspections. Whether this finding of the court of appeals will be made the basis of further error proceedings in the supreme court or not, I am unable to advise at the present writing. However unless and until it is finally and definitely determined that the entire oil inspection act is unconstitutional I believe that the salaries and fees of the state inspector and the deputy inspectors and the other expenses of the department should be paid, provided the department is making the inspections and otherwise discharging all the duties imposed upon it by law, except, of course, the collection of the inspection fees from the owners of the oil.

I reach this conclusion because the appropriation bill of 1915, to which reference has already been made, was passed by the legislature a week after the decision of the supreme court in Castle v. Mason. Presumably the legislature acted with full knowledge of the court's decision, which, limited to the narrowest extent, must be regarded as putting an end to the right of the state inspector and his deputies to enact inspection and his deputies to exact inspection fees from the owners of oil inspected. Therefore, the appropriation bill must have been passed with the knowledge that the state revenue from oil inspection fees had been cut off and with the intention that the work of inspection should go on, and that the fees and salaries of the officials necessary to administer it should be paid from the appropriations which were made out of the general revenue fund. Of course, if the courts ultimately determine that the entire act is unconstitutional, all activities under it should cease and no money should be paid out of the state treasury for the salaries accruing, expenses incurred or fees earned thereunder after the date of such a decision.

(4) The answer to your fourth question with respect to deputies' fees is similar to that given to your first question with respect to salaries of the inspector and his stenographer. All fees earned and constituting liabilities against the appropriation of 1914 can be paid only from the receipts of the department, because the appropriation of 1914 was limited to such receipts. So long as the statutory maximum, or such proportionate part thereof as represents the part of the official year which has elapsed, is not exceeded, it makes no difference that the receipts paid into the state treasury during the month of February, for example, may not have been equal to the fees earned in that month.

(5) Your fifth question has been answered by the general statement that both the appropriation for the year 1914 and that for the year 1915 are from the general revenue fund, the one being limited to receipts of the department and the other being made generally without reference to the existence of any receipts.

Respectfully,

EDWARD C. TURNER,
Attorney General.

212.

NOTARY FEE—MUST BE PAID BY PUBLISHER ON AFFIDAVIT IN PROOF OF PUBLICATION.

A notary fee on an affidavit in proof of publication is not a public charge unless made so by statute, and the expense thereof is to be borne by the publisher.

COLUMBUS, OHIO, April 7, 1915.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Under date of February 25, 1915, your Mr. Groom wrote to this department wherein he stated that he understood that the bureau of inspection and supervision of public offices had given instructions pursuant to an opinion of the attorney general's office that the forty cents for notary fees on an affidavit in proof of publication is not a public charge, and further that the business manager of one of the local papers had stated to him that said business manager had received a letter from the bureau stating that he was not obliged to furnish an affidavit in proof of publication without pay for the same. Mr. Groom further states:

> "We have been cleaning up the forfeited lands duplicate by foreclosing the lien of the state and consequently have a large number of publications for non-resident defendants requiring the affidavit in proof thereof. On account of the limitations of section 5637, General Code, relating to the judiciary levy, we are compelled twice each year to file action for transfer of funds, which also requires publication and proof thereof.
>
> "The law requires proof of publication and undoubtedly contemplates payment for notary services for the affidavit, as a notary is not to furnish his services free. If payment cannot be made by assessing the notary fees as part of the costs of the case in public litigation, the burden falls upon the officer or board filing the suit. As the service is a public service this undoubtedly is not proper."

Mr. Groom then asks for a reconsideration of the former opinion if the same covers the matter referred to by him.

We have searched the files of the office and are unable to find any opinion which covers the question that you ask. However, section 6251, G. C., specifically states to what amount a publisher is entitled for the publication of a legal notice.

If the law requires him to furnish proof of the publication thereof, the charge for the same should be paid for by the publisher and not charged as costs in the case; nor is the same to be paid by the officer receiving the affidavit and proof of publication. The affidavit and proof of publication is the substantiation of the publisher under oath that the publication has been properly made, and that is and should be a prerequisite to his receiving compensation therefor.

I am therefore of the opinion that the forty cents for notary fees on an affidavit in proof of publication is not a public charge but one to be borne by the publisher who publishes the advertisement unless there is a specific provision in a particular statue which authorizes the payment of the notary fee on an affidavit in proof of publication of a particular advertisement such as is found relative to the affidavit on a proof of claim against a decedent estate, as is found in section 10717, General Code.

Respectfully,

EDWARD C. TURNER,

Attorney General.

213.

STATE BOARD OF HEALTH—BENSE ACT—NEW ORDER SHOULD BE MADE WHEN TIME LIMIT HAS EXPIRED ON OLD—SEWAGE, VAN WERT, OHIO.

The State Board of Health should make a new order under the Bense Act rather than attempt to enforce an old order concerning which there may be question, owing to the expiration of the time stated in the old order.

COLUMBUS, OHIO, APRIL 8, 1915.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge receipt of your favor of April 6, 1915, which is as follows:

> "I shall be glad to have your advice as to the procedure to be followed by the state board of health in the following case.
>
> "In 1908, upon receipt of complaint that the city of Van Wert was responsible for a nuisance in Town Creek, the state board of health caused an investigation to be made and found that the city of Van Wert had permitted the discharge of sewage and other wastes into said creek with the result that a nuisance had been created detrimental to the health and comfort of the persons who live in the vicinity of the stream. An order was adopted requiring the city of Van Wert to putify its sewage in a manner satisfactory to the state board of health on or before December 1, 1909. This order was approved by Governor Harris and Attorney General Denman on January 4, 1908. Owing to litigation pending in the case of the city of Greenville v. Demerest, et al., action was not taken by the state board of health to enforce the provisions of its order. This litigation was pending until May, 1912, when the supreme court handed down the decision to the effect that the law was constitutional.
>
> "No further complaints were received in regard to conditions at Van Wert until recently when an investigation shows that no steps have been taken by the city to obey the order of the state board of health and conditions still exist which would warrant the state board of health in taking action against the city of Van Wert. As I have stated the original order was adopted in 1908. The point on which I wish your advice is as to whether the state board of health should proceed under this order or should make another investigation and adopt a new order in which definite time would be fixed for compliance."

In view of the facts stated in your letter, which show clearly that the order made by your board in 1908 directing the city of Van Wert to purify its sewage was not enforced within the time limit set, to wit, December 1, 1909, there is grave doubt in my mind as to the advisability of attempting to proceed to its enforcement at this time, because the city of Van Wert, in order to accomplish the purpose designed by the order, will have to proceed under the statutory provisions relative to the issuance of bonds, and it is therefore my opinion that if the facts heretofore considered are at present existing and justify such course, another order covering the situation should be issued by your board, which would of course become effective upon the approval of the governor and the attorney general. It would be useless to proceed under any questionable authority when at the outset the doubt on that question may be removed.

Respectfully,

EDWARD C. TURNER,

Attorney General.

214.

SCHOOL DISTRICT—WHERE NO BONDED INDEBTEDNESS EXISTS, BOARD OF EDUCATION NEED NOT HAVE BOARD OF COMMISSIONERS OF SINKING FUND—NEED NOT BE APPOINTED BEFORE OFFERING BONDS TO INDUSTRIAL COMMISSION.

Where a school district has no bonded indebtedness, and a board of sinking fund commissioners has not been created, the board of education of the district in the issue and sale of its bonds, is not required to procure the appointment of a board of commissioners of sinking fund for the district before proceeding to offer such bonds to the Industrial Commission and to advertise and sell such bonds or any residue not purchased by the Industrial Commission.

COLUMBUS, OHIO, April 8, 1915.

HON. P. A. SAYLOR, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—On March 24th you requested my written opinion upon the following proposition:

"On March 20th Lanier township school district, Preble county, Ohio, voted on the question of issuing bonds in the sum of $59,000.00 for the purpose of purchasing a site and erecting and furnishing a school building thereon, the proposition being approved by a majority vote of the electors of the district and the boards of education are now proceeding to issue and sell bonds in the above amount.

"Lanier township rural school district has no bonded indebtedness as yet, and there is no board of commissioners of the sinking fund of Lanier township school district.

"Will it be necessary, under the requirements of the Code, to have the board of commissioners of the sinking fund for the district appointed before proceeding further with the bond issue, or in the absence of a board of commissioners of the sinking fund for the district, can the bonds be first offered to the state liability board of awards, and if not taken by that body advertised and sold according to law?"

Section 7614, G. C., provides in part:

"The board of education of every district shall provide a sinking fund for the extinguishment of all its bonded indebtedness, which fund shall be managed and controlled by a board of commissioners designated as the 'board of commissioners of the sinking fund of ----------' (inserting the name of the district), which shall be composed of five electors thereof, and be appointed by the common pleas court of the county in which such district is chiefly located, except that, in city or village districts the board of commissioners of the sinking fund of the city or village may be the board of the school district. * * *"

Section 7619 provides:

"When a board of education issues bonds for any purpose, such issue shall first be offered for sale to the board of commissioners of the sinking fund, who may buy any or all of such bonds at par. Within five days of the time when notice is given, the board shall notify the board of education of its

> action upon the proposed purchase. After that time the board of education shall issue any portion not purchased by such commission according to law."

By the terms of section 7614, supra, the board of education of the district is required to provide a sinking fund, only for the purpose of extinguishing the bonded indebtedness of the district together with interest accruing thereon, and only upon the creation of such sinking fund is there any requirement or occasion for the creation of a board of sinking fund commissioners and the appointment of five electors as such commissioners.

It appearing from your statement of facts that there is no bonded indebtedness against the Lanier township school district to this time, the condition has not arisen requiring the creation of the sinking fund and the appointment of the board of commissioners for such sinking fund. No requirement for the appointment of such board arises out of the issue of bonds now in process in the district until the bonds have been sold, thereby creating an indebtedness of the district, at which time the provisions of section 7614, G. C., will become operative.

As there is no board of commissioners in your district, and the conditions requiring the appointment of such board under the law have not yet arisen, I am of the opinion that the board of education may proceed with the sale of the bonds in question without the appointment of a board of commissioners of the sinking fund and offering the bonds to such board, as a preliminary to the further procedure prescribed by the statutes.

It is to be observed, however, that the industrial commission of Ohio has superseded that state liability board of awards, and therefore the bonds should, before being advertised, be first offered to the industrial commission of Ohio.

Section 12 of the act creating the industrial commission of Ohio, 103, O. L. 95, provides in part as follows:

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

I, therefore, advise that the board of education may proceed to offer the bonds in question to the industrial commission of Ohio, and if not purchased may advertise and sell such bonds or any portion thereof not so purchased by the industrial commission without reference to the provisions of section 7619 relative to offering said bonds to the board of sinking fund commissioners.

Respectfully,
EDWARD C. TURNER,
Attorney General.

215.

PROVISIONS OF SECTION 5265, G. C., IMPERATIVE—ARMORY BOARD RULES THAT NO ARMORY SHALL RECEIVE MORE THAN $40,000 —CANNOT CONTROL LEGISLATURE IN MAKING APPROPRIATIONS.

Section 5265, G. C., is an operative statute. Rules of the armory board cannot in anywise control the legislature in making appropriations.

COLUMBUS, OHIO, April 8, 1915.

HON. FRANK H. REIGHARD, *Chairman, The Finance Committee, 81st General Assembly Columbus, Ohio.*

GENTLEMEN:—I am in receipt of your chairman's request for opirion, under date of April 6, 1915, reading as follows:

> "I beg leave to call your attention to page 32 of the budget submitted to the 81st general assembly by W. A. Heffernan, Commissioner, and especially to the third paragraph of the critical comment, and to this clause 'that section' (5265) has no legal effect.
>
> "I desire to know exactly the meaning of that paragraph as it relates to appropriations for the national guard; (1) Must the auditor of state set apart each year 10 cents per capita? (2) Can more than $40,000 be appropriated out of the armory board fund for the erection of any armory? That is, I understand the board has adopted a rule that no armory shall receive more than $40,000 out of the national guard fund. Now, if the finance committee sees fit to appropriate $100,000 for the erection of an armory, can they appropriate this money out of the armory board fund?
>
> "These are two of the questions that are bothering us mostly, and we have given some consideration to the critical comment of the budget commissioner."

The criticism of Mr. Heffernan referred to is as follows:

> "The legislature has for several years past based its appropriation upon section 5265 of the General Code, which provides that the auditor of state set aside ten cents for each person in Ohio as enumerated in the last federal census to maintain the national guard. That section has no legal effect; it simply indicates the policy of the state as the particular session of the general assembly which passed that section saw it. To interpret it in any other way would be to admit that it is a continuing appropriation and therefore in violation of that provision of the constitution which forbids appropriations for more than two years."

Section 5265 of the General Code provides as follows:

> "The auditor of state shall credit to the 'state military fund' from the general revenues of the state, a sum equal to ten cents for each person who was a resident of the state as shown by each last preceding federal census. Such fund shall be a continuous fund and available only for the support of the organized militia. It shall not be diverted to any other fund or used for any other purpose."

The error into which Mr. Heffernan fell is shown in his last sentence above quoted. Mr. Heffernan assumed that section 5265 as an appropriation statute, but such is

not the case. This section simply directs the auditor of state to segregate a military fund equal to ten cents for each person who was a resident of the state as shown by the last preceding federal census. Such fund cannot be used unless there is an appropriation by the legislature.

I am, therefore, of the opinion that section 5265 of the General Code is a fully operative statute and that it is a duty of the auditor of state thereunder to segregate such a fund; but the auditor of state has no power to pay anything out of such fund until an appropriation has been made in regular form by the general assembly.

2. Your second question involves a consideration of section 5261 of the General Code, which provides as follows:

> "The maximum amount to be expended by the state for the building or purchase of an armory for a company or single organization, shall not exceed twenty thousand dollars, and ten thousand dollars additional thereto for each organization or headquarters provided for. In no city or village shall more than one building be erected or purchased until provisions have been made for all organizations therein, nor shall a building be leased or rented for the use of a company or single organization in excess of six hundred dollars per year for each organization provided for."

As will be seen from a reading of the above quoted section, the amount to be expended for the purpose of erecting an armory depends on how many organizations or headquarters are to be provided for.

Section 5261, G. C., has been amended by House Bill No. 217, passed March 8 1915, approved March 16, 1915, but not yet in effect. The only difference between the amended section and the present one is that the furnishing and equipment of armory buildings is provided for by the amendment.

The armory board is limited by the provisions of this section and the mere appropriation by the legislature of the sum of one hundred thousand dollars for the erection of an armory would not authorize such expenditure unless it was made clear in the appropriation bill that as to the particular expenditure the provisions of section 5261, G. C., were not to apply. The present legislature, of course, has the power to repeal or amend section 5261, so as to allow the sum of one hundred thousand dollars to be spent for an armory, providing the money is appropriated.

No rule of the armory board could control the legislative policy if the legislature saw fit to authorize a different amount to be spent than that provided for by any rule of the armory board. In the absence of legislation to the contrary and within the maximums provided for in section 5261, the armory board would have the power, by rules or otherwise, to limit the amount to be expended for a particular building.

Section 5261, G. C., provides simply that "not to exceed" certain amounts shall be expended, but, as above stated, this matter may be regulated by the legislature notwithstanding any rule that the armory board may have adopted and it is within the province of the legislature, if they see fit, to make the erection of a building costing not less than a certain amount mandatory.

Respectfully,
EDWARD C. TURNER,
Attorney General.

216.

JUSTICE OF PEACE—AUTHORITY TO APPOINT TOWNSHIP TRUSTEE—CONSTRUCTION OF WORDS "OLDEST COMMISSION."

The phrase "oldest commission" as used in section 3262, G. C., means the unexpired commission of earliest date.

COLUMBUS, OHIO, April 8, 1915.

HON. HAROLD W. HOUSTON, *Prosecuting Attorney, Urbana, Ohio.*

I acknowledge the receipt of your request for an opinion, under date of April 3, 1915, as follows:

Section 3262, G. C., provides in part:

> " 'When for any cause a township is without a board of trustees or there is a vacancy in such board, the justice of the peace of such township *holding the oldest commission,*' etc.
>
> "My question is directed to the meaning of the phrase 'holding the oldest commission.' Does the phrase refer to the present commission of the justices, or is it to be determined by taking into consideration former commissions, and ascertaining which of the justices is oldest in point of service?
>
> "My opinion is that the appointing power under the above section would be determined by considering the present commissions of the justices only, regardless of the fact of which justice had served the longest by virtue of former successive commissions. The rule seems to be entirely arbitrary, but I would like a ruling of your department on the matter."

In answer to your inquiry, I concur in your opinion on the question submitted. Section 3262 of the General Code, provides as follows:

> "When for any cause a township is without a board of trustees or there is a vacancy in such board, the justice of the peace of such township holding the oldest commission, or in case the commission of two or more of such justices bear even date, the justice oldest in years shall appoint a suitable person or persons, having the qualifications of electors in the township, to fill such vacancy or vacancies for the unexpired term."

The word "commission" as here used has reference to a live commission, that is to say, after the term of a commission has expired, it ceases to be a commission within the meaning of the terms of this statute. This view is strengthened by the provision of the above quoted section of the statute in case two commissions are of even date and is in accord with the former holding of my predecessor, Hon. U. G. Denman, under date of February 1, 1910, as follows:

> "I beg to advise that under date of August 8, 1906, this department rendered an opinion to the secretary of state in which it was held that section 1452, which provides that the justice of the peace 'holding the oldest commission,' in case of vacancy in the office of township trustees, shall fill the same by appointment, does not refer to a commission earlier than the one

under which the justice is now holding office, and it is entirely immaterial as to what terms were served or commissions held by either justice prior to the current term."

Respectfully,
EDWARD C. TURNER,
Attorney General.

217.

POSITION OF VILLAGE SOLICITOR IS NOT AN "OFFICE."

The position of village solicitor is not an "office" within the meaning of section 5617, G. C.

COLUMBUS, OHIO, April 8, 1915.

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

GENTLEMEN:—Under date of April 5, 1915, Hon. L. C. Davis, village solicitor, Middleport, Ohio, requested my opinion as follows:

> "Will you kindly advise me whether or not employment as village solicitor is included in the word 'office', as used in section 5617 of the General Code, which reads:
>
> " 'A district assessor, deputy assessor, member of a district board of complaints or any assistent, clerk or other employe of a district assessor or district board of complaints shall not, during his term of office or period of service or employment, as fixed by law or prescribed by the tax commission of Ohio, hold any office of profit, except offices in the state militia and the office of notary public.' "

Section 5617, to which reference is made in the inquiry, is found in 103 O. L. at page 796, and the quotation therefrom is of the section in full.

Section 4220, G. C., provides:

> "When it deems it necessary, the village council may provide legal counsel for the village, or any department or official thereof, for a period not to exceed two years, and provide compensation therefor."

In an opinion rendered by my predecessor, Hon. Timothy S. Hogan, to Hon. Frank W. Miller, superintendent of public instruction, under date of March 2, 1912 attorney general's report for 1912, vol. 1, at page 487, it was held:

> "The village solicitor being appointed by contract, fulfilling only contractual duties, serving for an indefinite term and not being obligated to take oath or give bonds, is not an 'official' within the meaning of section 4762, General Code, which stipulates that these duties shall fall upon any official serving in a similar capacity to that of prosecuting attorney or city solicitor."

In the course of the opinion it is stated as follows:

> "As stated by Gilmore, J., in State v. Wilson, 29 O. S., 345, let us examine to determine whether 'some of the indicia' of an officer may be found. Is

he appointed for a definite term? No, he is hired by contract and the hiring may be for one case, or for one month, or for any other time, so long as it does not exceed the limitation two years fixed by law. Must he take an oath of office or give a bond? No, no more than any other mere employe of the village. Must he be an elector of the village? Not at all; many cases have come to my notice where, by reason of there being no attorney-at-law in a village, or for some other good and sufficient cause, legal counsel have been employed from neighboring jurisdictions. In fact, I cannot find any legal necessity for his being an elector at all, nor (though I do not pass upon the question) would I see any objection to the employment of an alien or a woman counsel, if the village council saw fit. It does not appear to me that this position is such an 'office' as, under article 15, section 4, of the constitution, would render it necessary for the person to be possessed of the qualifications of an elector. The duties of village counsel are not prescribed by statute but fixed by contract. If he die or resign his duties are not cast upon a successor; a new contract is necessary, with a new party.

"So, I conclude that the legal counsel of the village is not an official in the true sense of the word, and was not contemplated under the provisions of section 4762, General Code."

I concur in the opinion of Mr. Hogan and therefore hold that the employment as village solicitor is not included in the word "office" as used in section 5617, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

218.

CONSTRUCTION OF SECTION 7600, GENERAL CODE, WHICH PROVIDES THAT EACH SCHOOL DISTRICT SHALL RECEIVE $30.00 FOR EACH TEACHER EMPLOYED IN DISTRICT MEANS EACH TEACHER EMPLOYED FOR ENSUING YEAR.

The provision of section 7600, G. C., which reads "each school district within the county shall receive thirty dollars for each teacher employed in such district" means for each teacher to be employed in such district for the ensuing year.

COLUMBUS, OHIO, April 8, 1915.

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

GENTLEMEN:—Under date of February 27, 1915, you request my written opinion upon the following question:

"Section 7600, vol. 104, O. L., page 159, reads in part: '* * * Each school district within the county shall receive thirty dollars for each teacher employed in such district * * *.' Does this mean the teachers employed at the time of the distribution of the funds, or teachers employed during the preceding year?"

Section 7582, G. C., 104 O. L., 159, provides as follows:

"The auditor of state shall apportion the state common school fund to the several counties of the state semi-annually, upon the basis of the enumeration of youth therein, as shown by the latest abstract of enumeration transmitted to him by the superintendent of public instruction. Before making his February settlement with county treasurers, he shall apportion such amount thereof as he estimates to have been collected up to that time, and, in the settlement sheet which he transmits to the auditor of each county, shall certify the amount payable to the treasurer of his county. Before making his final settlement with county treasurers each year he shall apportion the remainder of the whole fund collected, as nearly as it can be ascertained, and in the August settlement sheet which he transmits to the auditor of each county shall certify the amount payable to the treasurer of his county."

The above section governs the auditor of state in his distribution of the state common school fund to the several counties and is based upon the enumeration of youth. However, after the state auditor has made his settlement with the county treasurers, under the above section, for the state common school fund, the distribution of such fund within the county is governed by the provisions of section 7600. Section 7600 provides in part as follows:

"After each annual settlement with the county treasurer, each county auditor shall immediately apportion school funds for his county. The state common school funds shall be apportioned as follows:

"Each school district within the county shall receive thirty dollars for each teacher employed in such district, and the balance of such funds shall be apportioned among the various school districts according to the average daily attendance of pupils in the schools of such districts. * * *"

In an opinion rendered by my predecessor, Hon. Timothy S. Hogan, to your bureau, under date of August 3, 1914, No. 1086, it was held that the words "each annual settlement" as used in section 7600, G. C., means and designates the August settlement, and that the apportionment should take place at that time, although the actual distribution of the money might be made, part at the August settlement and the balance at the following February settlement.

Section 4744-2, 104 O. L., 142, provides as follows:

"On or before the first day of August of each year the county board of education shall certify to the county auditor the number of teachers to be employed for the ensuing year in the various rural and village school districts within the county school district, and also the number of district superintendents employed and their compensation and the compensation of the county superintendent; and such board of education shall also certify to the county auditor the amounts to be apportioned to each district for the payment of its share of the salaries of the county and district superintendents."

Section 4744-3, 104 O. L., 143, provides in part as follows:

"The county auditor when making his semi-annual apportionment of the school funds to the various village and rural school districts shall retain the amounts necessary to pay such portion of the salaries of the county and district superintendents as may be certified by the county board. * * *"

An opinion by my predecessor, Mr. Hogan to Hon. Benjamin Olds, prosecuting attorney of Morrow county, under date of October 8, 1914, referring to the difference

in the provisions of section 7600, G. C., which requires an annual apportionment and section 4744-3, G. C., which refers to the semi-annual apportionment, states that the difficulty thus encountered is more apparent than real; that while section 7600 provides only for an annual apportionment, yet insofar as it governs the actual distribution of taxes and at least insofar as it applies to the payment to the several district of rural school taxes levied by them, it covers the discharge of a function which must be exercised semi-annually.

Section 7600, supra, requires at each August settlement an apportionment, by the county auditor to each school district, of the state common school fund, and each school district within the county "shall receive thirty dollars for each teacher employed in such district."

Section 4744-2, which requires the county board of education to certify the number of teachers employed by the various school districts under the supervision of the county board of education, would seem to be for the purpose of advising the county auditor as to the number of teachers that would be employed during the ensuing year. There is nothing in section 7600 which in itself determines whether or not the language means the teachers employed at the time of the distribution of the fund or the teachers employed during the preceding year. However, so far as the rural boards of education are concerned section 4744-2 gives us some principle upon which to determine the question. Furthermore, since the Smith one per cent. law, so called, and particularly section 5649-3c thereof, requires all expenditures of a school district to be provided for out of appropriations made at the beginning of each fiscal half year, and since the amount of the state common school fund, which is apportioned to the various school districts within a county, is for the purpose of taking care of the expenses of such school district for the ensuing year or part thereof, I am of the opinion that the apportionment under section 7600 should not be made upon the basis of the number of teachers employed during the preceding school year, but should be made in accordance with the number of teachers to be employed for the ensuing year, as contained in the certificate by the county board of education to the county auditor to be made on or before the first day of August of each year.

Section 4744-2, supra, applies only to rural and village school districts within the county school district, but I construe the provisions of section 7600, which embraces all school districts within the county, to the effect that each school district within the county shall receive thirty dollars for each teacher employed in such district to mean "for each teacher to be employed in such district for the ensuing year."

Respectfully,
EDWARD C. TURNER,
Attorney General.

219.

PRIVATE BANKS—SUPERINTENDENT OF BANKS—LIQUIDATING DEPARTMENT—BOOKS AND PAPERS MAY BE RETURNED AFTER DEPOSITORS AND CREDITORS ARE PAID IN FULL.

The superintendent of banks, after depositors and creditors of a private bank, which is in the process of liquidation have been paid in full, may properly turn over to the owner or owners of such bank, or to a trustee or agent named by them, the books and papers belonging to the bank which came into his possession at the time it was taken over by him.

COLUMBUS, OHIO, April 8, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of April 6th, requesting my opinion as follows:

"We have in process of liquidation a private bank in which the depositors will be paid in full. After the declaration of the final dividend the remaining assets will be turned over to a trustee for the owners. In this connection the question has arisen, may we properly turn over to the trustee the books and papers that were received by this department at the time the bank's affairs came into its hands?"

I am considering your question in the light of the further supplemental information which you have orally furnished me, to the effect that there are no creditors of the private bank in question, except its depositors, and that the word "depositors" as used in your letter was intended to cover and include all creditors of the said bank.

By virtue of sections 744-1 to 744-13, inclusive, private banks are subject to inspection, examination and regulation of the state banking department. Sections 742-11, 742-12 and 742-13 of the General Code, being a part of the act relative to the liquidation of

"Any corporation, company, commercial bank, savings bank, safe deposit company, trust company, or any combination of two or more of such classes of business, or society for savings or banking association doing business under the provisions of the banking laws of this state."

are as follows:

"Section 742-11. Whenever the superintendent of banks shall have paid to each depositor and creditor of such corporation, company, society or association (not including stockholders) whose claim or claims as such depositor or creditor shall have been duly approved and allowed, the full amount of such claims, and shall have made proper provision for unclaimed or unpaid deposits or dividends, and shall have paid all the expenses of the liquidation, the superintendent of banks shall call a meeting of the stockholders of such corporation, company, society or association, by giving notice thereof for thirty days in one or more newspapers published in the county wherein the office of such company, corporation, society or association was located."

"Section 742-12. At such meeting the stockholders shall determine whether the superintendent of banks shall continue to administer its assets and wind up the affairs of such corporation, company, society or association, or whether an agent or agents shall be elected for that purpose; and in so determining the said stockholders shall vote by ballot in person, or by proxy, each share entitling the holder to one vote and the majority of the stock shall be necessary to a determination. In case it is determined to continue the liquidation under the superintendent of banks, he shall complete the liquidation of the affairs of such corporation, company, society or association, and after paying the expenses thereof shall distribute the proceeds among the stockholders in proportion to the several holdings of stock, in such manner and upon such notice as may be directed by the common pleas court of the county in which the office of such corporation, company, society or association was located."

"Section 742-13. In case it is determined to appoint an agent or agents to liquidate, the stockholders shall thereupon select such agent or agents by ballot—a majority of the stock present and voting, in person or by proxy, being necessary to a choice. Such agent or agents shall file with the superintendent of banks a bond to the state of Ohio in such amount and with such sureties as shall be approved by the superintendent of banks for the faithful performance of all the duties of his or their trust, and thereupon the superintendent of

banks shall transfer to such agent or agents all the undivided or uncollected or other assets of such corporation, company, society or association, then remaining in his hands; and upon such transfer and delivery the said superintendent of banks shall be discharged from all further liability to such corporation, company, society or association and its creditors."

By virtue of section 744-9 of the General Code, the provisions of the above quoted sections are made applicable to private banks which are being liquidated by the superintendent of banks.

The provisions of sections 742-11, 742-12 and 742-13, above quoted, were enacted to secure to the stockholders of an incorporated bank a proper distribution of such of its assets as remain in the hands of the superintendent of banks after all depositors and creditors have been paid. A private bank is either an individual, a partnership or an unincorporated association, therefore the provisions of the sections above quoted, insofar as they refer to stockholders, are not applicable to a private bank.

After all the depositors and creditors of the private bank under consideration are paid in full the interest of the superintendent of banks in the further liquidation of the assets of the said bank is at an end. It was the intent of the statutes relative to the liquidation of banks to protect and safeguard depositors and creditors. Therefore in the absence of any provision of law directing otherwise, it is the duty of the superintendent of banks to immediately turn over the remaining assets of the said bank to its owner or owners, or to a trustee or agent designated by the owner or owners.

I am therefore of the opinion that you may properly turn over to a trustee or agent named by the owners of a private bank, or to the owners themselves, after all depositors and creditors have been paid in full, such books and papers belonging to the bank as were received by your department at the time the bank was taken over for liquidation.

Respectfully,
EDWARD C. TURNER,
Attorney General.

220.

SMALLPOX EPIDEMIC—EXPENSES INCURRED NOT CHARGEABLE AGAINST COUNTY, EXCEPT FOR PROPER COUNTY CHARGES.

The county is not liable for expenses incurred due to epidemic of smallpox in township for persons other than those who are proper county charges.

COLUMBUS, OHIO, April 8, 1915.

HON. JOSEPH T. MICKLETHWAIT, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—Under date of January 25th, you state as follows:

"In January, 1914, an epidemic of smallpox broke out in Rush township, Scioto county, Ohio. The matter became very serious there being in all about forty-six cases. The township trustees realizing that they would be unable to deal adequately with the situation called a meeting and appointed one of their number to meet the then prosecuting attorney of this county. The prosecuting attorney advised the trustees to warrant all the poor and needy that were afflicted with smallpox over to the county infirmary, and

the trustees were to see that all persons so warranted were properly cared for and that the county would bear the expenses of all who were so warranted as above, to the infirmary.

"At the time the epidemic broke out only one family was a county charge.

"Subsequently claims for the expenses thus incurred were presented to the county commissioners who allowed the claim amounting in all to about five hundred dollars, but the county auditor upon a ruling from the bureau of accounting later refused to issue warrant on the treasurer, except the expense in caring for one family who was a charge at the time the epidemic broke out.

"Was it lawful for the commissioners to allow these claims and should the auditor now issue his warrant for the expenses thus incurred?"

The provisions of the General Code which govern relative to the duties of boards of health of cities in cases of epidemic are found in sections 4425, et seq., of the General Code.

Section 4436, G. C., provides as follows:

"When a house or other place is quarantined on account of contagious diseases, the board of health having jurisdiction shall provide for all persons confined in such house or place, food, fuel, and all other necessaries of life, including medical attendance, medicine and nurses, when necessary. The expenses so incurred, except those for disinfection, quarantine, or other measures strictly for the protection of the public, when properly certified by the president and clerk of the board of health or health officer where there is no board of health, shall be paid by the person or persons quarantined, when able to make such payment, and *when not by the municipality* in which quarantined. (Italics ours.)

Section 3391, G. C., constitutes the township trustees a board of health for the township outside the limits of a municapility, and section 3394 provides that such boards of health shall have the same duties, powers and jurisdiction within the township and outside of a municipality as by law are imposed upon and granted to boards of health in municipalities. There is, however, in the sections of the General Code constituting the township trustees the township board of health no provision relative to the payment of the expenses as is provided for in section 4436, *supra:* However in section 2128 of the Revised Statutes (section 1536-741) of which section 4436, G. C., purports to be a codification, it is provided in part as follows:

"When a house or other place is quarantined on account of contagious disease it shall be the duty of the board of health having jurisdiction to provide for all persons confined in such house or place, food, fuel, and all other necessaries of life, including medical attendance, medicine and nurses, when necessary; the expenses so incurred, except those for disinfection, quarantine, or other measures strictly for the protection of the public, when properly certified by the president and clerk of the board of health, or health officer where there is no board of health, shall be paid by the person or persons quarantined, when able to make such payment, and when not, by the *city, village, hamlet or township* in which he or they were quarantined; * * *"

It will, therefore, be seen that the Revised Statutes provided that when a person was unable to pay the quarantine expenses other than those specifically exempted the same should be paid by either the city, village or township. The failure to so include a township in the codification of section 2128, R. S., in section 4436, G. C., at

first blush appears to be a material change in the statute, but when we consider that section 3394, G. C., provides that the township boards of health shall have the same duties, powers and jurisdiction within the township outside of a municipality as are imposed on boards of health in municipalities, such provision to my mind is sufficient authority to require a township to pay the quarantine expenses of a person who is unable to pay the same, since there is no authority given for the payment of the same, and such obligations must be paid.

It appears from the facts submitted that there was but one family which was a county charge at the time the epidemic broke out, and I assume there is no controversy over the payment of the expenses of such family, and therefore all statements hereinafter made are made relative only to those persons who it is stated in your inquiry were warranted over to the county infirmary when the epidemic broke out.

I further assume from the statement of facts submitted that there is no dispute in regard to such persons having a legal settlement in the county.

On March 19, 1915, in response to a letter from me asking for additional information you state:

> "I am in receipt of your communication of March 12th, and in reply thereto will say:
>
> "1st. The superintendent of the county infirmary took no action whatsoever, so far as my information goes, under section 2544 of the Code.
>
> "2nd. The trustees' services were for guard duty and looking after enforcement of quarantine.
>
> "3rd. The claims are filed in the names of the merchants who furnished the merchandise.
>
> "If there is any further information I can furnish you on this matter I will be pleased to do so."

Section 2544, G. C., provides as follows:

> "In any county having an infirmary, when the trustees of a township, after making the inquiry provided by law, are of the opinion that the person complained of is entitled to admission to the county infirmary, they shall forthwith transmit a statement of the facts to the superintendent of the infirmary, and if it appears that such person is legally settled in the township or has no legal settlement in this state, or that such settlement is unknown, and the superintendent of the infirmary is satisfied that he should become a county charge, they shall forthwith receive and provide for him in such institution, or otherwise, and thereupon the liability of the township shall cease. The superintendent of the infirmary shall not be liable for any relief furnished, or expenses incurred by the township trustees."

In order that a person may be received into a county infirmary through township trustees it is necessary that such trustees transmit a statement of facts to the superintendent of the county infirmary and that such superintendent "be satisfied that he should become a county charge."

It appears from your letter of March 19th, that in the case in question the superintendent of the county infirmary took no action whatever in the premises. Therefore, the persons in question did not become county charges and the county is not liable for expenses growing solely out of the epidemic except for the one family which was a county charge, the expenses for which family have been paid.

Respectfully,

EDWARD C. TURNER,

Attorney General.

221.

STATE HIGHWAY DEPARTMENT—PRINTING OF STATIONERY AND BLANK FORMS—BULLETINS AND REPORTS—HOW PAID.

All the printing for the state highway department is to be ordered through the supervisor of public printing and executed under his supervision. The cost of printing stationery and blank forms for the highway department is to be paid out of the appropriation for printing for the department of public printing. The cost of printing bulletins and reports prepared by the highway commissioner and to be distributed by him is to be paid out of any fund or funds available for the use of the state highway department.

COLUMBUS, OHIO, April 8, 1915.

HON. J. E. CROSS, *Supervisor of Public Printing, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication of March 30, 1915, in which you inquire as follows:

> "In regard to the printing of *all* stationery and reports in connection with the annual report of the highway commission (a separate opinion in the latter which I herewith enclose), will you kindly give me an opinion as to our duties in this matter?"

I also have your supplementary communication of April 5, 1915, in response to my request for further information, in which communication you phrase your inquiry as follows:

> "Shall the supervisor of printing order the printing done for the highway commission? Heretofore they have done their own work along this line."

I am further informed by you and by the state highway commissioner, that the highway commissioner has ordered through you a considerable amount of printing. This order consists largely of stationery and blank forms for the highway department, but also includes four pamphlets as follows, to wit: (1) tabulation and results of bids received at contract letting on April 2nd, (2) bulletin containing instructions for dragging roads, (3) pamphlet containing instructions to superintendents, and (4) bulletin as to load distribution tests of reinforced concrete slab floors.

The opinion referred to by you was rendered by this department to Hon. Frank Harper, supervisor of public printing, on January 27, 1915, and that opinion was limited strictly to the printing of the annual report of the state highway commissioner, it being held that that report should pass through the department of public printing and that the expense of the same should be paid for out of the appropriation for printing for the department of public printing. Inasmuch as some confusion seems to exist on the subject, I will, in answer to your inquiry, state the rule that should govern as to all the printing for the state highway department, other than the annual report, the printing of that report being covered by the opinion referred to above.

Your attention is first directed to a number of the provisions of the chapter of the General Code relating to the supervisor of public printing. Section 748 G. C. provides that except as otherwise provided by law, the supervisor of public printing shall examine and correct the proof sheets of the printing for the state and see that the work is executed in accordance with law. This section also provides as follows:

> "* * * The printing for the executive documents shall be ordered

through him, and he shall see that the number of copies ordered is received from the printer and delivered to the proper department."

In this section as passed in 1880, the word "departments" was used in the above quoted sentence instead of the word "documents," the language being as follows:

> "* * * All printing for the executive departments shall be ordered through the supervisor, and he shall see that the full number of copies ordered is received from the printer and delivered to the proper department." 77 O. L., 53. Revised Statutes of Ohio, section 312.

Earlier forms of the same section also used the word "departments" instead of the word "documents"; 57 O. L., 94; 61 O. L., 11; 76 O. L., 132. The codifying commission changed the word "departments" to "documents" and the argument that this change was through inadvertence rather than design finds force in the concluding words of the sentence to the effect that the supervisor shall see that the number of copies ordered is received from the printer and delivered to the proper *department.*

Section 749, General Code, provides that the supervisor of public printing shall audit the accounts for printing and binding and keep a record of the cost thereof, the amount of paper used, and the expense of each document. This section further provides that a copy of each document, with the cost endorsed on it, shall be filed and preserved in the office of the supervisor of public printing. Section 786, G. C., provides that all printing and binding for the state not authorized by the provisions of the chapter relating to the supervisor of public printing shall be subject to the provisions of that chapter, so far as practicable These and other provisions of the chapter relating to the supervisor of public printing clearly indicate a legislative intent that all public printing for the various state departments should be ordered through the supervisor of public printing unless otherwise provided by law.

Coming now to consider those provisions of the law relating to the state highway department, and dealing with the subject of printing, it may be observed that the right of the state highway commissioner to be supplied with stationery is not left to inference, as it is provided in section 1180, G. C., that the office of the state highway commissioner shall be furnished by the state with necessary stationery. In section 1183, G. C., it is provided that the state highway commissioner "*may* prepare and publish and distribute bulletins and reports," and in the same section it is further provided that "all expenses incurred by reason of the provisions of this chapter shall be paid out of any fund or funds available for the use of the department."

It will be observed that this section does not provide that bulletins and reports shall be ordered in any manner other than through the supervisor of public printing. It merely permits the state highway commissioner, if he sees fit, to prepare and publish and distribute bulletins and reports, and provides that if he does see fit so to do, then the expense of preparing and publishing and distributing such bulletins and reports shall be paid out of any fund or funds available for the use of the state highway department. I am of the opinion that this section cannot be taken to alter the general rule that state printing is to be ordered through the supervisor of public printing. So far as the provisions of this section relate to printing, they can be taken only to authorize the printing of bulletins and reports for distribution, in case the state highway commissioner deems such action expedient, and to provide that if such bulletins and reports are printed, then the expense of such printing shall be paid from the funds available for the use of the state highway department instead of from the appropriation for printing for the department of public printing.

I therefore conclude that all the printing for the state highway department is to be ordered through the supervisor of public printing and executed under his supervision. The cost of printing all stationery and blank forms required by the highway

department is to be paid for out of the appropriation for printing for the department of public printing. The cost of printing all bulletins and reports prepared by the state highway commissioner and to be distributed by him is to be paid out of any fund or funds available for the use of the state highway department.

Respectfully,
EDWARD C. TURNER,
Attorney General.

222.

MAIN MARKET ROADS— STATE AID CANNOT BE USED UPON A HIGHWAY WITHIN THE LIMITS OF A VILLAGE—FUNDS.

Moneys raised under section 6859-1, *G. C.*, 103 *O. L.*, 155, *and which by the term of section* 6859-3, *G. C., are required to be used for the construction, improvement, maintenance and repair of main market roads, cannot be used upon a highway within the limits of a village.*

COLUMBUS, OHIO, April 8, 1915.

HON. CYRUS LOCHER, *Prosecuting Attorney, Cuyahoga County, Cleveland, Ohio.*

DEAR SIR:—I have your communication of February 19th, requesting my opinion upon a question which I interpret as follows:

> "Can moneys raised under section 6859-1 of the General Code, 103 O. L., 155, and which by the terms of section 6859-3 of the General Code, are required to be used for the construction, improvement, maintenance and repair of main market roads, be used upon a highway within the limits of a village?"

In reaching a conclusion as to this matter, considerable assistance may be derived by examining the history of the legislation relating to the state highway department. This department was created in 1904 by two acts found in 97 O. L., 511 to 514, and 97 O. L., 523 to 529. In section 4 of the first named act, which related to all applications for state aid in constructing highways, it was provided that the application should be accompanied by a certified resolution of the county commissioners "stating that the public interest demands the improvement of the highway described therein, *but said description shall not include any portion of a highway within the boundaries of any city or village.*"

In the creation of the state highway department the policy of the state was thus declared to be that the state should not aid in the construction of any highway within the limits of any city or village. This declaration of policy did not take the form of an express provision that the state highway department should not expend any of its funds upon any highway within the limits of a city or village, but the legislature adopted the equally effective method of providing that state aid should be extended upon application by the county commissioners, and that the county commissioners in describing the road for which they desired state aid must not include in the description any portion of a highway within the boundaries of any city or village.

No change in the section above referred to is found in 98 O. L., and in 99 O. L., 308 to 320, the legislature in repealing all existing legislation relating to the state highway department and enacting a new law upon the subject re-enacted this section without change.

This section was carried into the Code as section 1186 thereof, the language of the original code section being as follows:

> "Each application for state aid in the construction of an improvement of highways shall be accompanied by a properly certified resolution of the county commissioners having jurisdiction of the road to be improved, stating that the public interests demand the improvement of the highway therein described. *Such description shall not include any portion of a highway within the limits of a city or village.*"

This section was repealed in 102 O. L., 333, as such bill was passed by the legislature. The governor vetoed the repealing clause, but this section is probably repealed by implication, through the enactment and approval by the governor of section 13 of said act, which reads as follows:

> "Each application for state aid in the construction, improvement, maintenance or repair of highways, shall be accompanied by a proper certified resolution of the county commissioners or township trustees having jurisdiction of the road to be constructed, improved, maintained or repaired, stating that the public interest demands the improvement of the highway therein described; *that the description does not include any portion of the highway in the limits of any municipality.* Provided, also, that when all the inter-county highways within a county have been improved to the standard specified by the state highway commissioner, then the appropriation may be used, in the construction, improvement, maintenance or repair of any road within such county. Each application for state aid shall also contain an agreement on the part of the county commissioners or township trustees having jurisdiction over the road, to pay one-half of the cost and expense of surveys and other expenses preliminary to the construction, improvement, maintenance or repair of said road."

From the above it will be seen that the legislature, prior to 1913, and beginning in 1904, had four times limited state aid in highway construction to such highways as were situated outside of municipalities. Such was the state of the law when the legislature convened in 1913, and such had been the law during the entire nine years of the life of the state highway department.

In this connection it is important to consider the language of section 1186, quoted above, and also the language of the same section as amended in 103 O. L., 449, 452. Whether reference be had to the section as quoted or to the amended section, it is provided that each application for state aid shall be accompanied by a certified resolution of the commissioners, reciting, among other things, that the description of the highway to be improved does not include any portion of the highway in the limits of any municipality. This section also provides that when all the inter-county highways in the county have been improved the appropriation may be used on other highways within the county. Reading these two provisions together, it would seem that any part of a highway within a municipal corporation is not to be regarded as an inter-county highway. In other words, if the commissioners can only apply for state aid in the improvement of highways outside of municipalities, and if under this limitation they can eventually apply for and secure state aid in the improvement of *all* the inter-county highways in the county, it would seem to necessarily follow that only highways outside of municipalities can be regarded as inter-county highways.

Coming now to consider the act relating to main market roads, found in 103 O. L., 155, it is provided therein that main market roads "shall be located along and upon the route or portions of said inter-county highways designated as follows, to wit:"

etc. It is apparent from this act that in locating main market roads the legislature intended to designate as main market roads certain of the more important inter-county highways of the state, and did not intend to establish a main market road over any portion of any highway that had not previously been designated according to law as an inter-county highway. If only highways outside of municipalities can be regarded as inter-county highways, a conclusion which would seem to be well supported by the language of section 1186, G. C., then since the legislature in section 3 of the act relating to main market roads has provided for the location of said roads along and upon the routes of inter-county highways, it would follow that only highways outside of municipalities can be regarded as main market roads.

It might be urged against this conclusion that the descriptions of the various routes contained in section 3 of the act relating to main market roads, contain the statement that the various routes shall pass "through" certain municipalities therein named. In view of the statement in the first part of this section to all effect that main market roads shall be located along and upon routes and portions of inter-county highways, I do not regard this contention as well taken, and am of the opinion that the statement to the effect that the various routes of the main market roads shall pass "through" certain municipalities is to be taken only as indicating the general course of the main market roads, and not as enlarging the jurisdiction of the state highway department so as to include highways within municipalities.

So far as the provisions of section 4 of the law relating to main market roads are concerned, I am of the opinion that they relate only to procedure and not to jurisdiction. This section removes the necessity for the filing of a petition and also provides that "no procedure for construction, improvement, maintenance and repairs of roads as is provided for in any other act or acts of the general assembly shall apply to such main market roads." It will be noted that this last provision is limited solely to procedure and it could hardly be taken as enlarging, to include municipalities, the jurisdiction of the state highway department which had theretofore been limited strictly to highways outside of municipalities.

I am of the opinion, for the reasons above stated, that there is nothing in the law relating to main market roads to warrant the inference that the legislature, in passing that law, intended to reverse the policy of the state which had theretofore been to limit the state's participation in highway construction to such roads as were located outside of municipalities, and that therefore, in the present state of the law, the state may not expend upon a highway located within a village any of the moneys raised under section 6859-1, G. C., and required to be expended upon main market roads by section 6859-3, G. C. I am further of the opinion that it will be necessary to enact appropriate legislation before moneys raised under house bill 134, 103, O. L., 155, may be used to improve portions of highways that lie within the limits of any municipality.

Respectfully,

EDWARD C. TURNER,

Attorney General.

223.

BOARD OF PARK COMMISSIONERS—POWER TO CONTRACT—COUNCIL MUST AUTHORIZE EXPENDITURE OF CONTRACT IN EXCESS OF FIVE HUNDRED DOLLARS, UNLESS FOR COMPENSATION OF PERSONS EMPLOYED BY BOARD.

The power of boards of park commissioners to contract is governed by the provisions of sections 4063 and 4328, G. C., and is limited to contracts involving an expenditure not in excess of five hundred dollars, unless the same is first authorized and directed by ordinance of council, or such expenditure is for compensation of persons employed by such board.

COLUMBUS, OHIO, April 10, 1915.

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

GENTLEMEN:—I am directing to you an opinion upon a question submitted to me by Hon. George J. Carew, city solicitor of Youngstown, Ohio, which I deem of public importance, as follows:

> "We have a board of park commissioners in this city, by a vote of the people, who in turn have appointed a superintendent of parks, and he has referred to this department the following question, which we in turn refer to you: 'Has the board of park commissioners power to contract up to one thousand ($1,000.00) dollars without the authorization of city council?'
>
> "Section 4063, General Code, found in Ellis' Municipal Code, page 433, is as follows:
>
> " 'In letting of contracts, the board of park commissioners shall be governed by the same laws as govern the letting of contracts by the director of public service.'
>
> "I take it that this means that any contract involving an expenditure of more than five hundred ($500.00) dollars cannot be entered into by the board of park commissioners without the authorization of city council.
>
> "I understand that the park commissioners have had a ruling from my predecessor in office that they had the right to contract in any amount up to one thousand ($1,000.00) dollars, and he gave as his authority section 4077, General Code, found in Ellis' Municipal Code, page 436, which is as follows:
>
> " 'Before entering into any contract for the performance of any work, the cost of which exceeds one thousand ($1,000.00) dollars, the board shall cause plans and specifications and forms of bids to be prepared and when adopted by the board it shall have them printed for distribution among bidders.'
>
> "This section comes under 'trustees of park funds.' I believe this section does not apply to the board of park commissioners in the letting of contracts and think that they are governed by the same laws as govern the director of public service.
>
> "I would like to have your opinion on this matter as to whether the park commissioners are governed by section 4063, General Code, or section 4077. If, in your opinion, they are governed by section 4077, have they the right to expend any amount up to one thousand ($1,000.00) dollars without the authorization of council?"

Section 4077, G. C., was originally enacted as section 6 of an act passed March 17, 1898, 93 O. L., 464, and applicable only to cities of the second class, third grade *A* (Springfield) and was section 2515-45 of the Revised Statutes of Ohio.

Sections 4066 to 4069, G. C., were originally enacted as section 220 of the Municipal Code, of October 22, 1902, 96 O. L., 92, which contained the further provision that such park board should be governed by certain specifically designated statutes, among which was section 2616-45f, Revised Statutes, thus making the section thereafter of general application, for which reason it was carried into the General Code and became section 4077 thereof, and is a part of that plan provided by sections 4066 to 4082, General Code, inclusive, for the management, administration and control of property or funds owned, or held as trustee, by any municipality for park purposes under deed of gift, device or bequest, to which its application was specifically confined by section 220 of the act of 1902, under section 4066, G. C. The administration management and control of such property and funds were vested in a board of park trustees and complete machinery therefor provided.

Section 4053 to section 4065, General Code, authorizes the appointment of a board of park commissioners, which shall have control and management of all public parks, park-ways, park entrances, boulevards, connecting viaducts and subways, children's play grounds, public baths and stations of public comfort located in such parks, and of all improvements thereon and the acquisition, construction, repair and maintenance thereof, and prescribes the rule under which such authority of management and control may be exercised by such board of park commissioners.

The laws governing the letting of contracts by the director of public service, as referred to in section 4063 above quoted, and which by reason of the foregoing control the letting of contracts by the board of park commissioners, is as follows:

Section 4328, General Code:

> "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for nor less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

The provisions of this section adopted by reference to section 4063, G. C., is applicable to contracts made and entered into by boards of park commissioners.

From the above, answering your inquiry more specifically, I am of the opinion that a board of park commissioners may not make an expenditure in excess of five hundred dollars, unless the same is authorized and directed by ordinance of council, except for compensation of persons employed by such board.

Respectfully,

EDWARD C. TURNER,

Attorney General.

224.

TOWNSHIP BONDS NOT TAKEN BY SINKING FUND TRUSTEES ARE REQUIRED TO BE OFFERED TO THE INDUSTRIAL COMMISSION BEFORE ADVERTISING THEM FOR SALE.

Township trustees are required to offer to the industrial commission of Ohio such bonds issued by them as may not have been taken by the sinking fund trustees, before advertising the same for sale.

COLUMBUS, OHIO, April 10, 1915.

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

GENTLEMEN —A question has just been submitted to this office by Mr. C. B. McClintock, solicitor for the village of Brewster, Stark county, which is as follows:

> "Question has arisen as to the interpretation of section 11 of the duties of the state liability board of awards and taxing districts. This section is found on page 76 of the 103 Ohio Laws. The question that has arisen is whether or not it is the duty of the township trustees of a township before advertising bonds for sale to offer them to the state liability board of awards. The statute is clear as to villages and school districts, but it does not seem so clear as to township trustees. This question has arisen in the joint enterprize on behalf of the village of Brewster, and the township trustees, in which the trustees are issuing bonds and the village is paying a portion of the expense with reference to it. Would you kindly advise me at a very early date as to what your interpretation of this section is, as to whether or not it is the duty of township trustees before advertising bonds for sale to offer them to the state liability board of awards."

Section 11 of the act "To further define the powers, duties and jurisdiction of the state liability board of awards," etc., is to be found on page 76 of 103 Ohio Laws, and from it I quote as follows.

> "The state liability board of awards shall have the power to invest any of the surplus or reserve belonging to the state insurance fund in bonds of the United States, the state of Ohio, or of any county, city, village or school district of the state of Ohio, at current market prices for such bonds; provided that such purchase be authorized by a resolution adopted by the board and approved by the governor; and it shall be the duty of the boards or officers of the several taxing districts of the state in the issuance and sale of bonds of their respective taxing districts, to offer in writing to the state liability board of awards, prior to advertising the same for sale, all such issues as may not have been taken by the trustees of the sinking fund of the taxing district so issuing such bonds; and said board shall, within ten days after the receipt of such written offer either accept the same and purchase such bonds or any portion thereof at par and accrued interest, or reject such offer in writing; and all such bonds so purchased forthwith shall be placed in the hands of the treasurer of state, who is hereby designated as custodian thereof, and it shall be his duty to collect the interest thereon as the same becomes due and payable, and also the principal thereof, and to pay the same when so collected, into the state insurance fund. The treasurer of state shall honor and pay all vouchers drawn on the state insurance fund for the payment of such bonds when signed by any two members of the board upon delivery of said bonds to him when there is attached to such voucher a certified copy of such resolution of the

board authorizing the purchase of such bonds, and the board shall sell any of said bonds upon like resolution, and the proceeds thereof shall be paid by the purchaser to the treasurer of state upon delivery to him of said bonds by the treasurer."

A reading of the section quoted above discloses the fact that the state liability board of awards is therein authorized to invest in the bonds of the United States, state of Ohio, or of any county, city, village or school district of the state of Ohio *at current market prices for such bonds.* It is provided further, however, that it shall be the duty of the board or officers of the *several taxing districts in the state in the issuance and sale of bonds of their respective taxing districts* to offer in writing to the state liability board of awards prior to advertising the same all such bonds as may not have been taken by the trustees of the sinking fund of the taxing district so issuing such bonds.

I do not understand the nature of the "joint enterprise on behalf of the village of Brewster and the township trustees" referred to in the letter. However, it is my opinion that under the provisions of secton 1465-58 of the General Code (to be found on page 76 of the 103 O. L., section 11) and above quoted, township trustees are required to offer bonds issued by them to the state liability board of awards, now the industrial commission of Ohio, before advertising the same for sale.

A copy of this opinion has been sent to Mr. C. B. McClintock, solicitor for the village of Brewster.

Respectfully,
EDWARD C. TURNER,
Attorney General.

225.

OFFICES COMPATIBLE—DIRECTOR OF SAFETY AND CLERK OF COUNCIL.

The same person may hold office of director of safety and clerk of council.

COLUMBUS, OHIO, April 10, 1915.

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

GENTLEMEN:—Under date of March 1st you requested my opinion as follows:

"May the director of safety of a city legally serve as clerk of council and receive the salary attached to both positions?"

So far as I can ascertain there is no statutory inhibition prohibiting the same person from occupying the two offices named, at the same time, nor can I see that there is any check of one office upon the other, the two being entirely separate and distinct.

Therefore, I hold that the director of safety may legally serve as clerk of council and receive the salary attached to both positions, provided it is not physically impossible for the same person to occupy both positions at the same time.

Respectfully,
EDWARD C. TURNER,
Attorney General.

226.

BOARD OF EDUCATION—FAILURE TO OBSERVE PROPER PROPORTIONS IN PREPARING ANNUAL BUDGET DOES NOT PREVENT SCHOOL DISTRICTS FROM RECEIVING STATE AID.

If the certified statement of facts of the county auditor to the state auditor under the provision of section 7596 G. C., as amended in 103 O. L., 267, shows that the proper proportions required by section 7595, G. C., as amended in 104 O. L., 165, have been observed in the use of the funds of a school district, the negligence of the board of education of such district in the preparation of its annual budget and of the budget commissioners of the county in their consideration of said budget, in failing to observe said proportions, does not prevent the district from receiving state aid provided such district has complied with all the other requirements of the statutes governing state aid to weak school districts.

COLUMBUS, OHIO, April 10, 1915.

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

GENTLEMEN:—In your letter of March 26, 1915, you request my opinion upon the following question:

> "If a board of education asks in its budget for a sufficient sum to conduct its schools for a legal school year, making the request in a lump sum, then the budget commission, in separating the amount into the different statutory funds, does not observe the proportions required in section 7595, General Code, i. e., three-fourths tuition and one-fourth contingent, will the district be prevented from receiving state aid because of this, providing that when the money is received by the district that it is placed in the ratio required by law, i. e., three-fourths tuition and one-fourth contingent, assuming that the district has complied with the other state aid statutory requirements?"

Under the provision of section 5649-3a, General Code, the board of education of a school district, in submitting its annual budget to the county auditor, shall specifically set forth, among other things, "the amount to be raised for each and every purpose allowed by law for which it is desired to raise money for the incoming year."

Section 5649-3c, General Code, provides:

> "The auditor shall lay before the budget commissioners the annual budgets submitted to him by the boards and officers named in section 5649-3a of this act, together with an estimate to be prepared by the auditor of the amount of money raised for state purposes in each taxing district in the county, and such other information as the budget commissioners may request, or the tax commission of Ohio may prescribe. The budget commissioners shall examine such budgets and estimates prepared by the county auditor and ascertain the total amount proposed to be raised in each taxing district for state, county, township, city, village, school district, or other taxing district purposes. If the budget commissioners find that the total amount of taxes to be raised therein does not exceed the amount authorized to be raised in any township, city, village, school district or other taxing district in the county, the fact shall be certified to the county auditor. If such total is found to exceed such authorized amount in any township, city, village, school district or other taxing district in the county, the budget commissioners shall adjust the various amounts to be raised so that the total amount thereof shall

not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets, and may reduce any or all the items in any such budget, but shall not increase the total of any such budget nor any item therein. The budget commissioners shall reduce the estimates contained in any or all such budgets by such amount or amounts as will bring the total for each township, city, village, school district or other taxing district within the limits provided by law.'

"When the budget commissioners have completed their work they shall certify their action to the county auditor, who shall ascertain the rate of taxes necessary to be levied upon the taxable property therein of such county, and of each township, city, village, school district or other taxing district returned on the grand duplicate, and place it on the tax list of the county."

While the duty of fixing the rate of taxation for all school purposes in a school district is no longer imposed upon the board of education, it is the duty of the board under the above requirement of section 5649-3a, General Code, in the preparation of its annual budget, to estimate the amount of money needed for the incoming year in each one of the funds enumerated in section 7587, G. C., to wit, tuition fund, building fund, contingent fund and bonds, interest and sinking fund.

However, inasmuch as the budget commissioners, in their consideration of said budget, separated the amount requested by said board of education into the different statutory funds, the negligence of said board in failing to comply with the above requirement of section 5649-3a will not be material as affecting the right of the district to receive state aid.

For the purpose of meeting the requirements of section 7595, G. C., 104 O. L. 165, the board of education, in the preparation of its budget, should observe the proportions therein provided.

Section 7595, G. C., as amended, provides:

"No person shall be employed to teach in any public school in Ohio for less than forty dollars a month. When a school district has not sufficient money to pay its teachers such salaries as are provided in section 7595-1, for eight months of the year, after the board of education of such district has made the maximum legal school levy, *three-fourths of which shall be for the tuition fund,* then such school district may receive from the state treasurer sufficient money to make up the deficiency."

Section 7596, G. C., as amended, in 103 O. L., 267, provides as follows:

"Whenever any board of education finds that it will have such a deficit for the current school year, such board shall on the first day of October, or any time prior to the first day of January of said year, make affidavit to the county auditor, who shall send a certified statement of the facts to the state auditor. The state auditor shall issue a voucher on the state treasurer in favor of the treasurer of such school district for the amount of such deficit in the tuition fund."

According to the facts stated in your inquiry, the board of education in submitting its budget, and the budget commissioners in the consideration of said budget, failed to observe the proportions required by the above provision of section 7595, but when the distribution of funds was made by the county auditor, the money paid to the treasurer of the school district was placed to the credit of the different funds in the proper

ratio. This must result in an expenditure for tuition purposes of three-fourths of the money received from the school levy as allowed by the budget commissioners of the county.

The policy of the state as expressed by the legislature in the enactment of the statutes governing state aid to weak school districts, is to standardize the schools of the state and to equalize, as far as possible, the advantages of education.

I am of the opinion, therefore, that if the certified statement of facts of the county auditor to the state auditor, under the above provision of section 7596, G. C., as amended shows that the proper proportions have been observed in the use of the funds of the district, the negligence of the board of education in the preparation of its budget and of the budget commissioners of the county in their consideration of said budget, in failing to observe said proportions, does not prevent the district from receiving state aid, provided such district has complied with all the other requirements of the statutes governing state aid to weak school districts.

Respectfully,
EDWARD C. TURNER,
Attorney General.

227.

MAYOR—JUSTICE OF PEACE—MAY NOT REMIT FINES IN CASES BROUGHT FOR VIOLATION OF THE STATUTES.

Mayors of municipalities and justices of the peace may not remit fines in cases brought for violation of the statutes, except in proper proceedings for such purpose.

COLUMBUS, OHIO, April 10, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of March 30, 1915, in which you inquire if mayors of municipalities or justices of the peace have the power to remit fines in cases brought for violation of the statutes.

In reply thereto I advise you that former attorney general, Hon. Wade H. Ellis, was asked the same question by the bureau of inspection and supervision of public offices, and on October 24, 1907, gave his opinion thereon, holding that there is no authority for a mayor to remit any fines due the state of Ohio.

In concluding his opinion Mr. Ellis stated:

> "In the foregoing no question is made as to the authority of a mayor to revise or modify his judgment in any such cases by proper proceedings for such purpose."

I approve this opinion, found on page 161 of the attorney general's reports for the year 1907, and herewith enclose copy thereof.

Respectfully,
EDWARD C. TURNER,
Attorney General

228.

SCHOOL DISTRICTS—EXCESS LEVIES MADE ILLEGALLY—PROPORTIONS OF LEVIES NOT REQUIRED IN ORDER TO QUALIFY DISTRICT TO RECEIVE STATE AID—TUITION PURPOSES—LEVIES MUST BE COUNTED IN ASCERTAINING DEFICIENCY FOR WHICH STATE AID IS ASKED.

Levies illegally made in excess of the legal maximum for school districts are not required to be divided in the proportion of three-fourths for tuition and one-fourth for other purposes in order that a school district so levying may be qualified to receive state aid, but so much of the proceeds of such levies as are applied to tuition purposes must be counted as receipts of the board for the purpose of ascertaining the deficiency for which state aid is to be extended

COLUMBUS, OHIO, April 10, 1915.

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

GENTLEMEN:—I acknowledge receipt of your letter of April 2d, in which you re-submit for my consideration the first two questions considered by me in my opinion No. 179, under date of March 27, 1915, which questions are as follows:

> "*Question 1:* In a district in which the total levy is seven mills, two mills being under section 7592, G. C., must the tuition fund receive three-fourths of the seven mills before the district can receive state aid?
>
> "*Question 2:* When an additional two mills are levied by the board of education under section 7751, G. C., must the tuition fund receive three-fourths of the levy exclusive of the additional two mills?
>
> "The section provides that the proceeds of the levy shall be kept in a separate fund. The question is, must the tuition fund receive three-fourths of the seven mills levy and the special fund be provided for out of the remaining one-fourth?"

I answered these two questions in the opinion referred to by pointing out that no additional levy under either of the sections mentioned could lawfully be made.

You now state that such levies have actually been made in cases that have come under the observation of the bureau, and in which the school districts so levying are applicants for state aid. You then request me to advise you on the following question:

> "How must money thus raised be distributed in order to entitle a district to receive state aid under sections 7595 to 7597, page 165 of Vol. 104, Ohio Laws?"

I take it that you are concerned only with the following qualifying language of the state aid law, found in amended section 7595, General Code, to which you refer, viz.:

> "after the board of education of such district has made the maximum legal school levy, three-fourths of which shall be for the tuition fund."

The grammatical construction of this phrase is simple. The requirement is that three-fourths of the maximum legal school levy shall be for the tuition fund. The levies of which you speak are not included in the legal school levies. As you have been previously advised, they are, in the most accurate sense, illegal levies and could have been enjoined as such by any objecting taxpayer.

I am therefore of the opinion that if additional levies have been illegally made

beyond the limits fixed by law, the proceeds of such levies are not required to be distributed in the proportion of three-fourths to the tuition fund and one-fourth to the purposes for which taxes may be locally levied.

Of course, the proceeds of such levies are to be regarded as receipts of the board and, to the extent that any part of them has been used for tuition fund purposes, must be taken into consideration in determining the amount of the actual or anticipated deficiency for which the district may receive state aid.

Respectfully,
EDWARD C. TURNER
Attorney General.

229.

LAWS ESTABLISHING DAYTON STATE HOSPITAL.

The legislature creating and constituting the Dayton State Hospital will be found by reference to the following:

50 *O. L.*, 196	71 *O. L.*, 139
52 *O. L.*, 22	73 *O. L.*, 80
53 *O. L.*, 22	84 *O. L.*, 203
53 *O. L.*, 81	91 *O. L.*, 23

COLUMBUS, OHIO, April 10, 1915.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—An inquiry of April 3, 1915, from Dr. E. A. Baber, superintendent of Dayton State Hospital, has been received and is as follows:

> "I desire to obtain a certified copy of the legislation creating and constituting the Dayton state hospital. I request this document for the use of the commissioner of internal revenue it being necessary to file with the papers applying for the withdrawal of alcohol from warehouses, free of government tax for the use of the institution.
>
> "I have been referred by the Ohio board of administration with whom I took this matter up originally, to the secretary of state, whose office has replied as follows:
>
> " 'Replying to your letter of March 19th, we respectfully beg to state that if you will furnish us with the sectional number or volume and page of the session laws of the acts of which you desire certified copies, we will notify you of the cost of same.'
>
> "I would be appreciative, if your office will supply me with the necessary references to procure the copies referred to."

The Dayton state hospital is quite an old institution, and the legislation by which it was established, and by which it has come to be known as "The Dayton State Hospital" extends over quite a long period of time. As the name of the institution has been changed several times, it will be necessary for you to have certified copies of several acts of the legislature in order to properly connect the institution with the original act by which it was created, and satisfy the commissioner of internal revenue that it is a duly created and constituted state hospital.

The following are deemed sufficient to meet the needs however:

"1. An act creating two additional asylums, in pursuance of which the asylum at Dayton was constructed. 50 O. L., p.196.

"2. An act making appropriations for the year 1854 and 1855 in which an appropriation is made for heating apparatus, etc., for the lunatic asylum at Dayton. 52 O. L., 146.

"3. An act making appropriations to pay the indebtedness of benevolent institutions, in which $67,682.49 was appropriated for the Dayton asylum. 53 O. L., 22.

"4. An act for the uniform government and better regulation of lunatic asylums. By this act the Dayton Asylum was designated as the Southern Ohio Lunatic Asylum. 53 O. L., 81.

"5. An act to provide for the management and better regulation of hospitals for the insane. By this act the Dayton Asylum's name was changed to Western Hospital for the Insane. 71 O. L., 139.

"6. An act to provide for the organization, regulation and management of hospitals for the insane. By this act the name was again changed to the Dayton Hospital for the Insane. 73 O. L., 80.

"7. House Bill 887, passed March 21, 1887. 84 O. L., 203. By this act the name was again changed to Dayton Asylum for the Insane.

"8. House Bill No. 58, passed February 13, 1914. 91 O. L., 23. By this act the name was changed to the present name, Dayton State Hospital."

Appropriations have been made from year to year for this institution under the various names above mentioned. The above acts will show the history of the institution from the beginning, and will undoubtedly be sufficient for your needs. If the commissioner should require anything further the same will be furnished, upon request.

A copy of the opinion has been sent to Dr. Baber.

Respectfully

EDWARD C. TURNER,

Attorney General.

230.

AN APPROPRIATION FOR "PROSECUTION AND TRANSPORTATION OF CONVICTS" UNDER HEADING "PERSONAL SERVICE," IS AVAILABLE TO PAY COSTS OF APPREHENDING PAROLE VIOLATORS—SALARIES AND EXPENSES OF PAROLE OFFICERS PAID UNDER AUTHORITY OF SECTIONS 2212-3 AND 2215, G. C.—COSTS OF CONVICTION PAYABLE UNDER SECTION 13727, G. C.

The partial 1915 *appropriation for "prosecution and transportation of convicts" under the single specific heading "personal service" is available to pay costs of apprehending parole violators under section* 103, *G. C., the salaries and expenses of a parole officer and field agents of the Girls' Industrial Home, the Penitentiary, the Boys' Industrial School, under sections* 2212-3 *and* 2215, *G. C., and the costs of conviction and transportation fees payable out of the state treasury under section* 13727, *G. C.*

COLUMBUS, OHIO, April 12, 1915.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of April 7, 1915, which is in full as follows:

"Section 103, G. C., provides for the settlement by the state of claims for the arrest, examination and transportation of convicts who have been pardoned and have broken the conditions of the pardon. Sections 2112-3 and 2215 provide for the payment of salaries and necessary expenses of field officers. The former claim is expressly payable out of the appropriations made by the general assembly for the prosecution and transportation of convicts and the second is expressly payable out of the appropriations made by the legislature for the conviction and transportation of convicts.

"The partial appropriation bill makes the following appropriation:

" 'Prosecution and transportation of convicts, personal service, unclassified, $48,500.00.'

"In the appropriation the letter and figure 'A3' precedes the word 'unclassified,' but nowhere in the bill is any meaning given to the letter and figure.

"Section 2 of the appropriation act provides: 'The moneys appropriated in the preceding section shall not be in any way expended to pay liabilities or deficiencies existing prior to February 16, 1915, or incurred subsequent to June 30, 1915.'

"Section 3 of this act provides: 'The sums set forth in the column designated "terms," in section 1 of this act, opposite the several classifications of detailed purposes, shall not be expended for any other purposes except as herein provided.'

"In this particular appropriation the sum '$48,500.00' is set opposite the classified purpose 'personal service, unclassified.'

"We are in doubt as to the construction to be given to this rule of action laid down for the guidance of the auditor of state and other officers by this act, in relation to claims under section 103, G. C., and in relation to the payment of salaries and expenses under sections 2112-3 and 2215, G. C., and desire an opinion upon the subject, particularly in the following respects:

"1. Where the appropriation is for 'prosecution and transportation of convicts' is that appropriation available under sections 2112-3 and 2215 as being an appropriation for 'conviction and transportation of convicts?'

"2. Does the appropriation, being for 'personal service' become available for the payment of claims that are not 'personal service?'

"3. Are the expenses anticipated by sections 2112-3 and 2215, 'personal service?'

"4. Is a claim for costs under section 103, G. C., a claim for personal service?

"The questions of construction presented herein will also determine the attitude of this department in regard to cost bills that may be presented under section 13727, G. C."

Section 103, G. C., provides as follows:

"The probate judge shall prepare and approve under his official seal a bill of the costs of the arrest and examination of a convict, which the sheriff shall deliver to the warden of the penitentiary. The warden shall allow so much thereof as he finds in accordance with law and certify such amount to the auditor of state, who shall draw his warrant in favor of the sheriff upon the treasurer of state for its payment *from the appropriation for the prosecution and transportation of convicts.*"

Section 2112-3 relates to the appointment, duties, salaries and expenses of parole

officers of the Girls' Industrial Home, and its pertinent provision is that "their salaries and expenses shall be paid as provided in section 2215 of the General Code."

Section 2215 relates to salaries and necessary expenses of field officers of the Penitentiary, the Boys' Industrial School and the Girls' Industrial Home, and provides as follows:

> "Upon presentation of itemized vouchers properly approved by the board of managers, the auditor of state shall issue his warrant upon the state treasurer to pay the salaries and necessary expenses of field officers from the appropriation for conviction and transportation of convicts. In like manner shall be paid the salaries and expenses of the parole officers of the Boys' Industrial School and the Girls' Industrial Home."

You have yourself sufficiently quoted the provisions of the appropriation bill of 1915.

Answering your questions specifically I beg to advise that in my opinion the phrase "prosecution and transportation of convicts," and the phrase "conviction and transportation of convicts," as used in the pertinent statutes and in the appropriation bill, are synonomous. Your first question is, therefore, answered in the affirmative.

Answering your second question I beg to advise that as a general rule the term "personal service," as used in the appropriation bill, is limited in its meaning to services in the exact sense. However, in a given case where the intent is clear, other related expenditures may be made from an appropriation for personal service, so that it is not safe to lay down any hard and fast general rule.

Answering your third and fourth questions together I beg to advise that in my opinion the expenses and costs payable under all the statutes referred to herein constitute personal service, as the term is used in the specific appropriation for the prosecution and transportation of convicts. I think the intention of the legislature here is very clear despite some inadvertence in the use of the term. The controlling account for which the appropriation is made is prosecution and transportation of convicts. In contemplation of law this phrase includes the matters and things referred to in the statutes which have been quoted. Not all of the expenditures coming under this head in the statutes constitute "personal service" in the exact sense, yet in a more liberal sense they do constitute personal service, as nothing is included in the catalogue of expenditures which may be made under these sections which is not either compensation or reimbursement for expenses. It is unreasonable to suppose that the legislature would deliberately appropriate for salaries and personal service, in the exact sense, and withhold an appropriation available for expense reimbursement when the statutes expressly provide that both classes of expenditures shall be treated alike and paid from the same appropriation. Therefore, I hold that the intent of the legislature in appropriating the sum of $48,500 for the prosecution and transportation of convicts, under the heading of "personal service," is to provide for all expenses under the sections just considered properly chargeable to an appropriation for prosecution and transportation of convicts.

I note that you say that the attitude of your department in regard to cost bills that may be presented under section 13727, G. C., would also be governed by the interpretation which I have placed upon the above appropriation.

I agree with you that the application of the appropriation to payments under section 13727 is governed by the principles which I have above laid down, but the question is not, after all, quite as easy of solution to my mind as the others which have been considered. Said section 13727 is the concluding section of a group of statutes relating to the execution of a sentence for a felony. Other related statutes provid

e

that in felony cases, upon conviction, the costs of the prosecution, if not made on execution, shall be paid out of the county treasury, and the complete bill thereof properly certified shall be presented by the sheriff to the warden of the Penitentiary.

The sheriff is entitled to certain transportation charges consisting of fees fixed by section 13725, G. C., for taking a prisoner to the Penitentiary. The sheriff's fees and costs paid by the county are to be certified to by the warden of the Penitentiary, and if the auditor of state finds them to be correct are to be paid to the order of the clerk of courts of the county. It is not necessary to quote sections 13726 and 13727 further than to state that both of them provide merely that the charges "shall be paid by the state."

These sections then differ from the other sections that have been considered in that there is no express provision therein for payment out of any designated appropriation. However, as I understand it, the appropriation "for the prosecution and transportation of convicts," or the "conviction and transportation of convicts" had its origin by reason of the existence of the sections now under consideration. In order that they might be made effective it was and has always been necessary to make biennial appropriations, and in practice these appropriations to be disbursed by the auditor of state have been named by succeeding sessions of the general assembly in the manner in which they are designated in sections 103 and 2215, G. C. That is to say because of sections 13726 and 13727, which are very old provisions, the payment of costs and transportation fees in connection with conviction of felons became, so to speak, a fixed charge of the state and had to be provided for by an appropriation which eventually took on a stereotyped name: so that when, in later legislation, the general assembly provided for the payment of costs, salaries and expenses of the other kinds considered, it adopted and referred to this customary appropriation account.

Except as to sheriff's fees for transportation, payments under section 13727 partake, least of all cases which have been considered, of the nature of personal service. Although the costs taxed in the criminal prosecution represent personal services, in a sense, in the first instance, yet when paid by the state they constitute reimbursement to the county treasury for expenditures already made from it. Nevertheless, on the principles which I have laid down in stating my view of the intention of the legislature in passing the current appropriation bill, I am of the opinion that all charges payable under section 13727 are to be paid out of the appropriation referred to by you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

231.

SPENCERVILLE ARMORY—APPROVAL OF CONTRACT.

Award of contract for Spencerville Armory to J. W. & P. H. Sereff of Lima, Ohio, approved.

COLUMBUS, OHIO, April 12, 1915.

COLONEL BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your communication of April 9th, which is as follows:

"I herewith transmit the following papers relating to the Spencerville Armory:

"1. Extract from the armory board minutes of April 3, 1915, showing receipt of bids and tabulation thereof and action thereon.

"2. The four bids just received and opened.

"3. The proof of publication of advertisement for bids.

"Please advise whether or not you approve of the award of contract shown by enclosure No. 1."

With your letter you submitted the original bids set out in the extract from the armory board minutes of April 3, 1915, relative to the Spencerville Armory, which is as follows:

"*Spencerville Armory*: Prior to twelve o'clock noon, four sealed proposals for the construction of Spencerville Armory were received and filed at the adjutant general's office, pursuant to law. At 12:05 p. m., these bids were publicly opened by the board and found to be as follows:

"Clemner & Johnson, Hicksville, Ohio.	
"Material	$13,125 00
"Labor	5,669 00
"Building complete	18,794 00
"Certified check	400 00
"Meyers Brothers, Leipsic, Ohio.	
"Material	$18,580 00
"Labor	---
"Building complete	18,580 00
"Certified check	380 00
"Ernst Kroemer, Dayton, Ohio.	
"Material	9,500 00
"Labor	9,000 00
"Building complete	18,500 00
"Certified check	380 00
"J. W. and P. H. Sereff, Lima, Ohio.	
"Material	16,950 00
"Labor	16,950 00
"Building complete	16,950 00
"Certified check	380 00

"*Spencerville Armory Continued*: After consideration of said bids it was unanimously

"*Resolved*: That the bid of J. W. and P. H. Sereff, of Lima, Ohio, proposing to construct building complete for the aggregate sum of sixteen thousand, nine hundred and fifty ($16,950.00) dollars is the lowest bid which complies with the plans and specifications for said armory and is filed and made pursuart to law. A contract is therefore awarded to said Sereff Bros. for the construction of said Spencerville Armory at said bid price on condition that the contract and this award be approved by the attorney general of Ohio. The contract bond is hereby fixed at eighty-five hundred ($8,500.00) dollars.

"I hereby certify that the above is an axact copy of the minutes of the meeting of April 3, 1915, relative to the Spencerville Armory.

(Signed) B. L. BARGAR,
Secretary O. S. A. B."

After an examination of the bids, it is my opinion that the award of the contract made to J. W. and P. H. Sereff, of Lima, Ohio, is in accordance with law, the bidders having conformed to the advertisement and submitted with their bid a check of $380.00 as stipulated.

When contract and contract bond have been prepared, the same will receive prompt consideration by this office.

Respectfully,
EDWARD C. TURNER,
Attorney General.

232.

MUNICIPAL CORPORATION—COUNCIL MAY NOT IMPOSE LICENSE FEE UPON A BUSINESS WHEN AGENTS GO FROM HOUSE TO HOUSE AND DO NOT SELL ON THE STREETS.

Council of a municipal corporation may not impose a license fee upon the business of soliciting sales and delivering goods through agents who go from house to house and do not sell on the public streets.

COLUMBUS, OHIO, April 12, 1915.

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

GENTLEMEN:—Your letter of April 3d requests my opinion as follows:

> "We are requested to pass upon the legality and constitutionality of an ordinance of a city council imposing a license fee of ten dollars per day upon agents soliciting business in such municipality for a corporation organized under the laws of the state, and doing business within the state. Said agent goes from door to door soliciting sales and delivering goods for said corporation. The question is whether or not a fee of ten dollars per day has the effect of being prohibitive and, therefore, unconstitutional. In order that we may give advice in regard to said ordinance, we would respectfully ask your opinion thereon."

The only section of the General Code which authorizes a municipal corporation to exercise powers like those inquired about is section 3673, which is as follows:

> "Section 3673. To license transient dealers, persons who temporarily open stores or places for the sale of goods, wares or merchandise, and each person who, on the streets, or traveling from place to place about such municipality, sells, bargains to sell, or solicits orders for goods, wares or merchandise by retail. * * *"

The syllabus in the case of The Great Atlantic & Pacific Tea Co. v. The Village of Tippecanoe, 85 O. S., 120, is as follows:

> "In view of the guaranties of the bill of rights, section 3673 of the General Code, cannot be so interpreted as to authorize a municipal council to impose a license fee upon merchants who do not sell upon the public streets or places, but only solicit orders and negotiate future sales at the residences of their customers."

In view of this decision, it seems clear that an ordinance of the kind described by you would be void, regardless of the amount of the per diem license fee.

Respectfully,
EDWARD C. TURNER,
Attorney General.

233.

APPROVAL OF CERTAIN LEASES, VAN WERT, OHIO.

COLUMBUS, OHIO, April 13, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

SIR:—I have your communication of April 2, 1915, transmitting to me for my consideration the following leases, to wit:

	Valuation.
C. F. Palmer, Van Wert, Ohio	$300 00
G. A. Berger, Van Wert, Ohio	200 00

I find that these leases have been executed in accordance with law, and am therefore returning the same to you with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

234.

CORPORATION NOT FOR PROFIT—BY AMENDMENT TO ITS ARTICLES OF INCORPORATION MAY ACQUIRE CAPITAL STOCK—COST OF FILING CERTIFICATE OF AMENDMENT.

A corporation not for profit and originally having no capital stock may, by amendment to its articles of incorporation, acquire authority to have capital stock.

The fee for filing a certificate of amendment of this character is twenty cents for each hundred words, and in no case less than five dollars.

COLUMBUS, OHIO, April 13, 1915.

HON. CHAS. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department the correspondence between yourself and Messrs. Freiberg & Lewis, attorneys-at-law, Cincinnati, Ohio, relative to the filing of a proposed amendment to the articles of incorporation of The Cincinnati Tennis Club, a corporation not for profit. While no letter accompanies the papers, it is very clear to me that the following two questions are presented:

> "(1) May a corporation not for profit, and originally having no capital stock, by amendment to its articles of incorporation acquire authority to have a capital stock, if such amendment does not so change the purpose of the corporation as to make it a corporation for profit?

"(2) If the answer to the first question be in the affirmative, what should be the fee for filing such a certificate of amendment?"

That a corporation not for profit may lawfully have a capital stock, divided into shares, is settled in Snyder v. Chamber of Commerce, 53 O. S., 1.

While there are special statutes applicable to corporations of the character of the one which was a party to this action, yet a perusal of the syllabus and the opinion in the case shows that no reliance was placed upon such special statutes, but general sections relative to the formation of corporations were the only ones considered.

Inasmuch, therefore, as the articles of incorporation of the club might originally have provided lawfully for a capital stock, I am of the opinion that such a provision for capital stock is something "omitted from or which lawfully might have been provided for originally in such articles" within the meaning of paragraph 4 of section 8719 of the General Code, relative to amendments to articles of incorporation.

Inasmuch as the corporation has no capital stock whatever, provision for such stock would not, in my opinion, constitute "an increase of capital stock" within the meaning of the same paragraph, which provides further that "the capital stock of the corporation shall not be increased or diminished by such amendment."

Therefore, my answer to the first question which is suggested by the correspondence is in the affirmative.

The question as to the fee is not difficult so far as the statutory provisions themselves are concerned. Paragraph 9 of section 176, General Code, provides that the secretary of state shall charge and collect "for filing an amendment to articles of incorporation, twenty cents for each hundred words, but in no case less than five dollars."

From your point of view, however, the difficulty arises by reason of the fact that if the corporation had been organized originally with a capital stock, it would have had to pay a minimum fee of ten dollars under paragraph 1 of section 176, whereas by organizing without capital stock and as a non-mutual corporation not for profit and then acquiring capital stock by amendment, it escapes, so to speak, with a charge of seven dollars.

The practical result of the application of the statute in this respect is, in my opinion, immaterial, and I advise that the proper fee for filing a certificate of amendment of the character referred to is five dollars.

I herewith return the correspondence submitted to me by you, together with the check of Stanley W. Lewis for $5.00, payable to your order. I have a letter from Messrs. Freiberg & Lewis which will constitute a sufficient reference file for the purposes of this office.

Respectfully,
EDWARD C. TURNER,
Attorney General.

235.

DISTRICT TAX ASSESSORS—REMOVAL—SUCCESSORS—PAY OF NEW ASSESSORS BEGINS AT THE SAME TIME THEY ASSUME DUTIES OF THEIR OFFICE.

The procedure for the removal of district assessors on March 31, 1915, and the subsequent appointment of their successors considered, and held that under the facts as they occurred the pay of the outgoing assessor should cease and that of the incoming assessor begin at the same time, viz.: upon the assumption by the latter of the duties of his office after proper qualification.

COLUMBUS, OHIO, April 13, 1915.

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

GENTLEMEN:—Under date of April 7th, you request my opinion upon the following question:

> "When does the pay of the district assessors, removed by Governor Willis, in the counties of the state, stop, and when does the compensation of the newly appointed district assessors commence?"

The so called "Warnes law," 103 O. L., 786, provides that "the tax commission of Ohio may, with the consent of the governor, remove any district assessor," but vests in the governor the exclusive power to appoint.

I find upon investigation that what actually transpired in connection with the matter about which you inquire was as follows:

On March 31, 1915, the tax commission entered upon its journal a declaration that all the district assessors in the state "are hereby declared to be removed from office with the consent of the governor." The consent of the governor was given to this act in writing.

The commission, however, did not certify any removal to the local authorities as required by section 33 of the Warnes law until the appointment of successors. It appears that the successors were not all appointed at the same time, but that in each case, upon receiving notice of an appointment by the governor, the commission notified the outgoing and the incoming assessor contemporaneously and instructed each outgoing assessor to turn over the office as soon as the incoming assessor had qualified.

I am satisfied that, in substance, the removals in question were not effected until the new appointees had qualified and until when, in pursuance of the orders of the tax commission, the outgoing assessors had turned over their respective offices to the incoming assessors.

I am not advised of any case in which the outgoing assessor refused to turn over the office to his successor upon the appointment and qualification of the latter, and therefore assume that this took place in all cases.

I am, therefore, of the opinion that the compensation of the outgoing district assessors stopped and that of the incoming assessors commenced in each case on the date on which the latter qualified and assumed the duties of their respective offices.

Respectfully,

EDWARD C. TURNER,

Attorney General.

236.

SCHOOL DISTRICTS—HOW TO CORRECT ERRORS IN ESTIMATING RECEIPTS AND EXPENDITURES FOR CURRENT SCHOOL YEAR WHEN DISTRICT RECEIVES MORE OR LESS THAN IS REQUIRED BY LAW.

If a school district, because of an error in estimating receipts and expenditures for the current school year, receives an amount more than sufficient to make up its actual deficit for such year, it is the duty of the state auditor, upon discovering such error, to correct the same by drawing on the treasurer of such school district for the extra amount. If there is not a sufficient amount of money in the treasury of such school district to the credit of the tuition fund to honor said draft, the state auditor should withhold said amount from the next allowance made to such district on its application for state aid. On the other hand, if the district, because of such an error, fails to receive an amount necessary to make up its deficit, the state auditor upon discovering such error, should pay to the treasurer of such school district an amount sufficient to make up such deficit.

COLUMBUS, OHIO, April 14, 1915.

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

GENTLEMEN:—In your letter of March 18, 1915, you request my written opinion upon the following question:

> "Section 7595, General Code, provides that if a board of education does not have sufficient money in the tuition fund to conduct its school for eight months, paying salaries fixed by statute, it may receive from the state treasurer sufficient money to make up the deficiency.
>
> "Section 7596, Vol. 103 O. L., page 267, reads:
>
> " 'Whenever any board of education finds that it will have such a deficit for the current school year, such board shall on the first day of October, or any time prior to the first day of January of said year, make affidavit to the county auditor, who shall send a certified statement of the facts to the state auditor. The state auditor shall issue a voucher on the state treasurer in favor of the treasurer of such school district for the amount of such deficit in the tuition fund.'
>
> "*Question*: Provided the application for state aid does not correctly set up the receipts and expenditures and it is ascertained at the end of the year that an error has been made, is it the duty of the auditor of state to correct such error, or is the payment of the application final?
>
> "In other words if a district, because of an error in estimating receipts and expenditures for a given period, received $100.00 more than sufficient to make up the actual deficit for a year, is it the duty of the auditor of state to recover that amount from the district either by withholding it from the next amount of state aid paid, or by making draft on the district when the error is discovered? Or, if a district fails to receive, because of an error in application, an amount necessary to make up the deficiency amounting to $100.00, is it the duty of the auditor of state to pay this additional amount when the error is discovered?"

To comply with the above provision of section 7596, G. C., the board of education of a school district, for the purpose of securing state aid, must file a sworn statement of facts with the county auditor before the first day of January of the current school year. At the time of filing such statement, it is impossible for said board to

determine what its exact deficit will be at the end of the school year. Errors in estimating receipts and expenditures for the balance of the school year are liable to be made, and this gives rise to your question.

If, as the result of such an error, a school district receives an amount more than sufficient to make up its actual deficit for the school year, I am of the opinion that it is the duty of the state auditor, upon discovering the error, to correct the same by drawing on the treasurer of such school district for the extra amount. If there is not a sufficient amount of money in the treasury of such school district to the credit of the tuition fund to honor said draft, the state auditor should withhold said amount from the next allowance made to such district on its application for state aid. On the other hand, if the district, because of such an error, fails to receive an amount necessary to make up its deficit, the state auditor, upon discovering such error, should pay to the treasurer of such school district an amount sufficient to make up such deficit, provided the appropriation for state aid has not been exhausted.

Respectfully,
EDWARD C. TURNER,
Attorney General.

237.

BOARD OF EDUCATION—PROPORTIONS FOR LEVY AS REQUIRED BY SECTION 7595, G. C., NOT FOLLOWED—NEVERTHELESS DISTRICT MAY RECEIVE STATE AID IF OTHER REQUIREMENTS PERFORMED.

If the board of education of a school district, in its annual budget, fails to observe the appropriations required by section 7595, G. C., as amended in 104 O. L., 165, to wit: three-fourths tuition fund and one-fourth for all other purposes, but in making the levy of the amount allowed by the county budget commissioners said proportions are observed, said district is not prevented from receiving state aid on account of the negligence of the said board of education, provided said district has complied with all the other requirements of the statutes governing state aid to weak school districts.

COLUMBUS, OHIO, April 14, 1915.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I have your letter of March 19, 1915, in which you enclose a copy of your letter to Hon. A. V. Donahey, auditor of state, under date of December 21, 1914.

The question raised by you and upon which you request my opinion, may be stated as follows:

> "If, in the preparation of its annual budget the board of education of a school district in estimating 'the amount to be raised, for each and every purpose allowed by law, for which it is desired to raise money for the incoming year,' fails to observe the proportions required by section 7595, G. C., as amended in 104 O. L., 165, to wit: three-fourths for tuition fund and one-fourth for all other purposes, but in making the levy for all school purposes of the amount allowed such district by the county budget commissioners, said porportions are observed, is such district prevented from receiving state aid by the above provision of section 7595, G. C., as amended, provided said district has complied with all the other requirements of the statutes governing state aid to weak school districts?"

Your question has been answered in opinion No. 226 of this department, rendered to the bureau of inspection and supervision of public offices, under date of April 10, 1915, a copy of which is herewith enclosed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

238.

DISAPPROVAL OF CERTAIN LEASES EXECUTED BY SUPERINTENDENT OF PUBLIC WORKS, AKRON, THORNPORT AND DAYTON, OHIO.

Leases executed between the superintendent of public works and John J. Brady, Harvey Walker and the Dayton Pure Milk & Butter Company, as submitted for approval, are irregular.

COLUMBUS, OHIO, April 14, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR.—I acknowledge the receipt of your communication of April 2, 1915, transmitting to me for my consideration the following leases, to wit:

	Valuation.
John J. Brady, Akron, Ohio	$1,000 00
Harvey Walker, Thornport, Ohio	250 00
The Dayton Pure Milk & Butter Co	3,666 66

In connection with the lease to John J. Brady, permit me to call your attention to my communication to you under date of February 8, 1915, suggesting the necessity of reciting in a lease of this character that the land sought to be leased is not under an existing lease and is not now in possession of any person or persons or corporation having a building or buildings or other valuable structures thereon. The lease to Mr. Brady does not contain a recital of such facts.

I note that a plat is attached to the original and duplicate copies of the lease to Harvey Walker, and that no reference to this plat is made in the body of the lease, the appropriate reference to the plat being scriken out of the body of the lease. I suggest that the appropriate reference to the attached plat be inserted in the body of the lease and that a copy of the plat be attached to the triplicate copy thereof. I also note that the signature of the lessee is attached by the signature of only one witness instead of two, and therefore suggest that the signature of a second witness to the signature of Mr. Walker be attached to the lease.

In reference to the lease to the Dayton Pure Milk & Butter Company, it does not appear from an examination of the lease whether the lessee is a corporation or whether it is a partnership operating under a fictitious name. I learn by an investigation of the records in the office of the secretary of state that the Dayton Pure Milk & Butter Co. is a domestic corporation. I therefore suggest that there be inserted in the first clause of the lease following the name of the lessee, a recital to the effect that said lessee is a corporation duly organized and existing under the laws of the state of Ohio. The lessee being a corporation, it follows that proper evidence that the directors

of the corporation authorized the making of the lease should also be required by you. The directors of the corporation, if they have not already done so, should adopt a resolution authorizing the making of the lease by the corporation and instructing the president and secretary thereof to execute the same on behalf of the company. Triplicate copies of this resolution, properly certified, should be furnished, and one copy attached to each copy of the lease.

The signature to this lease on the part of the lessee is as follows:

"The Dayton Pure Milk & Butter Co.
By Harry Burkhart, Pres.
L. J. Burkhardt, Secy."

but the seal of the company is not attached. While it has been held in Ohio that it is not necessary for a corporation to use its seal in the execution of instruments of this character, yet inasmuch as it is necessary to return this lease for the correction above suggested, I suggest the advisability of having the officers of the corporation attach the corporate seal, if the company has a seal.

For the reasons above stated, I am returning the three leases above referred to without my approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

239.

PROPER FORM FOR BOND RESOLUTION UNDER SECTION 1223, G. C.

Proper form for bond resolution, under section 1223, G. C., prescribed.

COLUMBUS, OHIO, April 13, 1915.

HON. FRANKLIN J. STALTER, *Prosecuting Attorney, Upper Sandusky, Ohio.*

DEAR SIR:—I have your communication of March 19, 1915, enclosing a proposed form of bond resolution under section 1223 of the General Code of Ohio, and also your communication of March 31st, regarding the same, and note that you desire my opinion as to the regularity of the resolution submitted.

The resolution submitted by you is of considerable length and I deem it unnecessary to set forth the same in this opinion.

The resolution is irregular in that it omits certain preliminary recitals which should be included. I refer to the recitals of the fact of an application by the county commissioners to the state highway commissioner for state aid in the improvement of an inter-county highway, the approval of said application by the state highway commissioner, the making of a map and plans, specifications and estimates for said proposed improvement by the state highway commissioner, and the transmission of such plans, specifications and estimates to the county commissioners. There are also certain other minor irregularities, and the section of the resolution in question which relates to tax levies is somewhat longer and more involved than necessary. It might be that the omission of the preliminary recitals referred to by me would not be fatal, but it would certainly be the part of wisdom to include them.

For your guidance in framing a resolution in accordance with the above suggestions, I am herewith submitting a form of resolution proper in this case. In the preparation of this form I assume that the facts recited in the resolution submitted by you are correct.

The form which I suggest is as follows:

RESOLUTION.

Whereas, The commissioners of Wyandot county, Ohio, on the_____day of_____, 19___, in accordance with section 1185 of the General Code of Ohio, duly made application to the state highway commissioner of the state of Ohio, for state aid in the improvement of section No. 3 of Upper Sandusky-Findlay inter-county highway No. 222, to wit:

Beginning at the south end of section No. 2 of the Upper Sandusky-Findlay road, inter-county highway No. 222, thence in a south-easterly direction along the route of said inter-county highway No. 222, to the northwest corporation line of the village of Upper Sandusky, a distance of 20,600 lineal feet or 3.90 miles, being the Crane and Salem townships in said county. _____lineal feet of said improvement lying in said Crane township and _____lineal feet of said improvement lying in said Salem township, and

Whereas, The state highway commissioner, in accordance with sections 1190 and 1191 of the General Code of Ohio, has duly approved said application and has caused a map of said highway, and plans and specifications for said improvement, and an estimate of the cost and expense thereof to be prepared and has transmitted a certified copy of such plans, specifications and estimates, together with his certificate of approval thereof, to the county commissioners of Wyandot county, Ohio, and

Whereas, The county commissioners of Wyandot county, on the____day of_____, 19___, in accordance with section 1194 of the General Code of Ohio, by a majority vote, duly adopted a resolution that said highway above described be constructed under the provisions of sections 1178 to 1231-4, inclusive, of the General Code of Ohio, and transmitted a certified copy of said resolution to the state highway commissioner, and

Whereas, The total estimated cost and expense of improving such highway according to said plans and specifications is thirty-six thousand, five hundred dollars ($36,500.00) of which total estimated cost and expense one-half thereof, or eighteen thousand, two hundred and fifty dollars ($18,250.00) is to be paid by said Wyandot county, said Crane and Salem townships, and the owners of the property abutting on the said improvement, and

Whereas, In accordance with the provisions of section 1208 of the General Code of Ohio, twenty-five per cent. of the total estimated cost and expense of improving such highway according to said plans and specifications is apportioned to and is to be paid by said Wyandot county, _____per cent. of said cost is apportioned to and is to be paid by the whole of said Crane township, _____per cent. of said cost is apportioned to and is to be paid by the whole of said Salem township, _____per cent. of said cost is apportioned to and is to be paid by the owners of the property in said Crane township abutting on said improvement according to the benefits accruing to said owners of the lands so located, and_____per cent. of said cost is apportioned to and is to be paid by the owners of the property in said Salem township abutting on said improvement according to the benefits accruing to the said owners of the lands so located; and

Whereas, The amount of bonds herein proposed to be issued, added to the total amount of bonds heretofore issued by said county under the authority of section 1223 of the General Code of Ohio, does not exceed in the aggregate one per cent. of the tax duplicate of said county, and

Whereas, No part of said highway sought to be improved is situated within the limits of any municipality; *Now Therefore*;

Be It Resolved: By the board of county commissioners of Wyandot county, Ohio, that in the judgment of said board of county commissioners it is now necessary, in anticipation of the collection of taxes and assessments, to issue and sell the bonds of said county in the aggregate sum of eighteen thousand, two hundred and fifty dollars ($18,250.00) to provide a fund for the payment of that part of the cost and expense of improving said highway above described according to the terms of said resolution of said county commissioners above referred to, to be paid by Wyandot county, Crane and Salem townships, and the owners of the land assessed for said improvement;

Be It Further Resolved: That the bonds of said county be issued in said aggregate sum of eighteen thousand, two hundred and fifty dollars ($18,250.00) for the purposes aforesaid, under and by virtue of the authority of section 1223 of the General Code of Ohio; each of said bonds to be in the denomination of $_____, and numbered consecutively from one to_____, dated_____and payable as follows, to wit:

Numbers_____ _____

Numbers_____ _____

etc.

Said bonds shall state on their face the purpose for which they are issued and that they are issued in pursuance of this resolution and under and by virtue of section 1223 of the General Code of Ohio, and said bonds shall bear interest at the rate of _____ per cent. per annum, payable semi-annually on _____and_____of each year, the interest on said bonds to be evidenced by coupons attached thereto, authenticated by the signature of the county auditor, or he may have his signature printed or lithographed thereon. Both principal and interest shall be payable at the office of the county treasurer of Wyandot county, Ohio. Said bonds shall be prepared, issued and delivered under the direction of the county commissioners and county auditor, and shall be signed by the county commissioners and attested by the signature and official seal of the county auditor. Said bonds shall be first offered to the industrial commission of Ohio at par and accrued interest, and if said industrial commission of Ohio refuses to take all or any part of said bonds, such bonds so refused shall be advertised for public sale once each week for four consecutive weeks in the Daily Chief and Union-Republican, two newspapers published and having a general circulation within said county of Wyandot. Said bonds shall be sold to the highest bidder in the manner provided by law, but not for less than par and accrued interest, and the proceeds of the sale thereof shall be deposited in the county treasury and used exclusively for the payment of the cost and expense of the construction and improvement of said inter-county highway aforesaid.

Be It Further Resolved: That for the purpose of paying the interest upon and retiring at maturity the bonds herein authorized to be issued, and to create and maintain a sinking fund for that purpose, there shall be and is hereby levied, in addition to all other levies authorized by law for county and township purposes, respectively, subject, however, to the maximum limitation upon the total aggregate amount of all levies now in force, the following annual taxes, to wit:

Upon all the taxable property within the county of Wyandot, an annual tax sufficient to yield the county's proportion of the amount required to pay the interest coupons on said bonds when due and to retire said bonds at maturity.

Upon all the taxable property within the township of Crane, an annual

tax sufficient to yield said township's proportion of the amount required to pay the interest coupons on said bonds when due, and to retire said bonds at maturity.

Upon all the taxable property within the township of Salem, an annual tax sufficient to yield said township's proportion of the amount required to yield said township's proportion of the amount required to pay the interest coupons on said bonds when due, and to retire said bonds at maturity.

The township trustees of said Crane and Salem townships are hereby ordered to apportion the amount of the cost and expense of said improvement to be paid by the owners of the abutting property, making said apportionment according to the benefits accruing to the said owners of the land so located and to certify said assessments to the county auditor of Wyandot county, who is hereby directed to place said assessments upon the tax duplicate to be collected in the same manner as other taxes are collected and in such payments as may be approved by the county auditor of Wyandot county.

The taxes hereby levied shall be and are hereby ordered to be certified, levied, and extended upon the tax duplicate of Wyandot county and collected by the same officers, in the same manner and at the same time that the taxes for general purposes in each of said years are certified, extended and collected, and all funds derived from said taxes and from the assessments to be made by the township trustees of Crane and Salem townships, as hereinbefore provided, shall be placed in a separate and distinct fund, which, together with all interest collected on the same, shall be irrevocably pledged to the prompt payment of the interest and principal of the said bonds when and as the same falls due, and the said board of county commissioners of Wyandot county, Ohio, hereby orders and directs that all other and further action be taken that may now or hereafter be required in providing the funds to pay the interest on and to retire said bonds at maturity.

You will note that the above form follows closely the one suggested by you, the principal changes being in the addition of a number of preliminary recitals and in the section relating to tax levies. I would not want to be taken as holding that the resolution submitted by you would be invalid, and therefore expressly state that in this opinion I am not passing upon the validity of said resolution. I am merely suggesting that the resolution omits some recitals that might be regarded by the courts as jurisdictional, and am submitting a form of resolution containing these recitals in proper form.

In calculating the division between the townships of the fifteen per cent. of the total estimated cost and expense of the improvement apportioned to the whole of the two townships and the division between the townships of the ten per cent. of said cost apportioned to the owners of abutting property, the division is to be made according to the number of lineal feet of the improvement lying in each township, this being provided in section 1208, G. C. Not having the necessary information on which to base this calculation, I am unable to make the same.

I trust the above will be a complete answer to your inquiry.

Respectfully,

EDWARD C. TURNER,

Attorney General.

240.

STATE REGISTRAR OF VITAL STATISTICS—MAY NOT PREPARE TRANSCRIPT OF BIRTHS AND DEATHS FOR FEDERAL GOVERNMENT.

The registrar of vital statistics may not lawfully act as the agent of the United States census bureau in procuring transcripts of births and deaths for said bureau as provided in section 231, General Code.

COLUMBUS, OHIO, April 14, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of April 3d, requesting my opinion as follows:

> "We find upon investigation in the bureau of vital statistics that the practice of the former registrar of vital statistics has been to furnish United States census bureau transcripts of deaths and births, and has received fees for doing so from the United States census bureau; that said registrar, after paying from said fees collected for labor performed in compiling said statistics, has retained the balance of said fees so collected by him.
>
> "We are unable to ascertain by what authority of law said registrar would be entitled to retain any fees coming into his hands while in his official capacity, he, as registrar, being on a salary basis.
>
> "We are submitting this question to you for the purpose of obtaining an opinion by which the present registrar of vital statistics may be guided, and an early opinion from you will be appreciated."

The question invites consideration of the following provisions of the statutes relative to the department of vital statistics in the office of the secretary of state:

> "Section 231. The state registrar shall furnish any applicant therefor a certified copy of the record of a birth or death registered under provisions of this chapter relating to vital statistics, for which he shall receive a fee of fifty cents, from the applicant. * * * For a search of the files and records when no certified copy is made, the state registrar shall receive a fee of fifty cents from the applicant for each hour or fractional hour of time of search: *Provided, that the United States census bureau may obtain without cost to the state, transcripts of births and deaths without payment of the fees herein prescribed.*
>
> "Section 232. The state registrar shall keep a correct account of fees by him received under these provisions, and pay the same to the state treasurer on or before the fifteenth day of each month. * * *"

I take it that the fees of which you speak in your letter were agreed upon by the United States census bureau and the registrar, and that in compiling the statistics required by the federal department the registrar was acting as its agent, so that in this capacity he was receiving compensation from the federal government. It is apparent, therefore, that the fees so received are not "the fees herein prescribed" within the meaning of section 231, General Code, nor are they "fees by him received under these provisions" within the meaning of section 232, General Code.

The clear intention of section 231, General Code, is to enable the census bureau to employ some one to obtain for it the transcripts of births and deaths desired by it

without the payment of fees. The bureau has actually employed the registrar himself, and the question is as to whether or not the registrar may lawfully accept such an employment.

I find no reason for holding that the employment by the federal government is incompatible with the position of registrar of vital statistics. Because the registrar is as you point out, compensated for his service to the state by his annual salary, he is not thereby precluded from pursuing any gainful occupation which will not interfere in any way with the discharge of his duties as registrar. The census bureau and the state can have no contractual relation with respect to the obtaining of the transcripts of births and deaths of which section 231 speaks by the express terms of that section itself, for the state is to suffer no cost and is to reap no benefits from the obtaining of such transcripts. Therefore, that species of incompatibility which arises when the incumbent of one office or employment is required to or may deal with the incumbent of another office or employment in an adversary capacity or relation does not exist in this case.

The question which is raised in my mind exists by reason of the language "without cost to the state" as used in section 231. The primary intention of the general assembly in using this language is clear. The idea undoubtedly was to guard against the use of the state's agencies in preparing the transcripts in question. The state could only incur costs in connection with such a service in two ways:

(1) By consuming blank forms and other supplies used up in the preparation of such transcripts; and

(2) By consuming the time of the state's employes.

Manifestly the first item of cost is inconsequential and could not have been the chief object of the legislature. Therefore, I think it is clear that the legislature intended that the time of the state's employes should not be taken up with the preparation of transcripts for the use of the census bureau, but that the bureau, as already observed, should employ its own agents for that purpose.

In contemplation of law at least the registrar of vital statistics is precluded from entering into such a contract with the federal government because he is an employe of the state, and in rendering services to the federal government in the preparation of transcripts for the use of the census bureau he is subjecting the state to the very kind of "cost" which is prohibited by section 231, General Code.

Your question, however, suggests that in point of fact the registrar may not have devoted any of his personal time to the work of preparing transcripts at all, but may have employed a clerk on his private account to do the work for him. If this be the case, it is, in my opinion, immaterial on the principle that what one may not do directly he is not permitted to do indirectly; so that there is no more authority for the state registrar to receive compensation from the federal government for doing the work referred to and paying a clerk part of such compensation to do the work for him than there is for the doing of the work by the registrar himself.

I therefore conclude that though the positions are not in a sense incompatible, yet the state registrar of vital statistics may not lawfully enter into a contract with the federal government for furnishing transcripts of births and deaths for the use of the census bureau.

Respectfully,
EDWARD C. TURNER,
Attorney General.

241.

HOUSE BILL No. 549—EFFECT ON SMITH ONE PER CENT. LAW.

Effect of the levy prescribed by House Bill No. 549 upon the limitations of the so-called Smith one per cent. law.

COLUMBUS, OHIO, April 14, 1915.

HON. EDWARD BOHM, *Secretary Committee on State and Economic Betterment, House of Representatives, Columbus, Ohio.*

DEAR SIR:—I hasten to comply with your request of even date herewith for an opinion as to the effect of the levy prescribed by House Bill No. 549 upon the limitations of the so-called Smith one per cent. law

You also refer me to House Bill No. 567, but as to this bill, which relates to the purchasing and holding of forestry lands by a municipality, I do not find that there is any question under the Smith one per cent. law whatsoever.

Returning to House Bill No. 549, I note the following provisions thereof:

> "Section 7622-7. The board of education of any school district may levy annually upon the taxable property of such school district or such city within the limitations of sections 5649-2 and 5649-3 of the General Code, but in addition to all other taxes allowed by law, not to exceed two-tenths of a mill for a social center fund to be used for social and recreational purposes."

Answering your specific question beg to advise that the levy therein provided for is to be made within the limitations of section 5649-2 of the General Code, and by reason of this fact is subject to what is known as the ten mill limitation of the Smith law and also to the fifteen mill limitation of the Smith law, for any levy which is subject to the ten mill limitation is likewise subject to the fifteen mill limitation.

The effect of the provision that the levy shall be "in addition to all other taxes allowed by law" is to take the particular levy out of the five mill limitation which is prescribed by section 5649-3a. Perhaps I may best illustrate the effect of this provision by saying that it makes the levy like the state levy for common school and university purposes, except that the latter cannot be reduced by the budget commission, while the proposed levy may be reduced by the budget commission in case such reduction is necessary to enforce the ten mill or fifteen mill limitation.

I wish it to be distinctly understood that I do not in any way pass upon the policy of the bill nor that of the specific provision thereof under consideration. I may be permitted, however, to point out that the reference to "section 5649-3" of the General Code in line 51 of the bill is an error, because that section of the original Smith law was repealed by the Kilpatrick law and is no longer in force.

I question also whether the words "or such city" in line 50 are proper. I do not believe that authority can be given to a board of education to levy taxes upon the duplicate of the city as such. The taxing district under their control is the school district and not the city.

Respectfully,
EDWARD C. TURNER,
Attorney General.

242.

CLERK OF COMMON PLEAS COURT—HOUSE BILL No. 527 EXTENDING TERM FROM TWO TO FOUR YEARS, CONSTITUTIONAL.

The term of the clerk of the court of common pleas may be in even number of years not exceeding four, and the legislature may extend such term provided the extended term expires at the time when the term would otherwise have expired had no extension been made.

COLUMBUS, OHIO, April 14, 1915.

HON. ADAM OBERLIN, *Member House of Representatives, Columbus, Ohio.*

DEAR SIR:—As requested by you, I have examined House Bill No. 527, amending section 2867 of the General Code so as to provide that the term of the clerk of the court of common pleas shall be four years instead of two years. You invite my particular attention to section 2 of the bill, which extends the terms of the clerks elected on November 3, 1914, from the time when they would otherwise expire to the first Monday in August, 1919. The effect of this section is to make these terms four years instead of two.

Without in any way passing upon the policy of this measure, I beg to advise that, in my opinion, it conflicts with no constitutional provision.

It was held in the recent case of State ex rel Young v. Cox, 90 O. S. 219, decided May 26, 1914, that the provisions of article XVII, sections 1 and 2 of the constitution control, to the exclusion of those of article IV, section 16, which originally fixed the term of office of the clerk of courts at three years, so that now the term of the clerk may be such even number of years, not exceeding four years, as may be prescribed by law, this being the provision of article XVII, section 2.

Respectfully,
EDWARD C. TURNER,
Attorney General.

243.

SPENCERVILLE ARMORY—CONSTRUCTION CONTRACT AND CONTRACTOR'S BOND APPROVED.

The construction contract and contractor's bond for the construction of the Spencerville Armory are drawn in compliance with the provisions of the General Code.

COLUMBUS, OHIO, April 15, 1915.

COL. BYRON L. BARGAR, *Secretary of Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 13, 1915, which is as follows:

> "In compliance with your instructions of the 12th inst., I herewith have the honor to transmit triplicate copies of the tentative construction contract and contractor's bond for erection of the Spencerville Armory."

I have carefully examined the copies of the tentative construction contract and the contractor's bond referred to in your letter, and I am of the opinion that they are drawn in compliance with the provisions of the General Code relative to the making of contracts by your board.

I am herewith returning you the several copies of the contract and bond with my approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

244.

STATE HIGHWAY COMMISSIONER—WITHOUT AUTHORITY NOW TO MAKE CONTRACTS FOR CONSTRUCTION OF INTER-COUNTY HIGHWAYS IN EXCESS OF AMOUNT APPROPRIATED IN HOUSE BILL No. 314—DISTINCTION OF APPROPRIATION BILLS UNDER WHICH RULINGS OF THIS DEPARTMENT WERE MADE.

The state highway commissioner has not at the present time any authority to enter into contracts or incur contingent liabilities for the construction of inter-county highways in excess of the amount appropriated for that purpose in the current appropriation measure, house bill No. 314.

COLUMBUS, OHIO, April 15, 1915.

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

DEAR SIR:—I have your communication of April 6, 1915, which reads as follows:

> "Your interpretation and opinion is respectfully asked *in re* section 6859-2 and section 1222 of the General Code.
>
> "After the collection of the taxes and the settlement by the respective counties with the state auditor, in compliance with the law governing the same, that officer certifies to this department a lump sum, three-fourths of the three-tenths mill levy, which he terms 'The state road building funds,' whereupon we divide this gross sum by eighty-eight, the number of counties in the state, and regard such amount as set aside for use in each county. Some of the counties which are at times delinquent do not make use of this particular allotment during the year in which it is appropriated, while other counties wish to anticipate the collection of the June taxes and enter into contracts for road improvement.
>
> "Would it be proper for this department to contract for the aggregate amount of money that has been levied for the entire calendar year to construct roads while the last half of such levy is in the process of collection, taking into account the fact that such amount has been levied and placed on the tax list and is due the state from the respective counties?
>
> "In other words, this department desires to enter into contracts at present, the money to pay same being due the state, and which will be paid into the state treasury immediately following the August settlement."

The levy of three-tenths of a mill referred to by you is authorized by section 6859-1, G. C., the levy being made on all the taxable property within the state for the purpose of creating the state highway improvement fund.

Section 6859-2, G. C., provides that seventy-five per cent. of all money paid into the treasury of the state by reason of said levy, shall be applied to the maintenance of he state highway department and for the construction, improvement, maintenance t

and repair of inter-county highways, in the manner designated in the chapter of the General Code relating to the state highway commissioner, being sections 1178 to 1231-4, inclusive.

Section 1222 of the General Code, referred to by you, reads as follows:

> "Moneys appropriated by the state for the purpose of carrying out the provisions of this chapter, shall not be used in any manner or for any purpose except as provided herein. Moneys so appropriated shall be equally divided among the counties of the state, except such moneys as are appropriated for the use of the department and for surveys, plans and estimates, and the maintenance and repair of state highways."

The question propounded by you was passed upon by my predecessor, Hon. Timothy S. Hogan, in an opinion rendered to Hon. James R. Marker, state highway commissioner, on May 23, 1914. In that opinion it was held that it would be both proper and legal for the state highway department to contract for the aggregate amount of money that had been levied for the entire tax year, less the expense of said department even though the second installment of the tax was not in the state treasury and would not come into the treasury until August. This holding was based on the reason that such second installment of tax was in process of collection, and would be in the state treasury before it was actually needed and before the fund arising from the first installment of the tax would have been exhausted in making payments to contractors on estimates.

The opinion above referred to is of little value in reaching a conclusion as to the present rights of the state highway department, for the reason that at that time the state highway department was operating under one appropriation bill, while at the present time the department is operating under another and radically different appropriation bill. The appropriation bill under which the department was operating at the time the opinion of my predecessor was rendered, appropriating for the state highway department generally, and without stipulating the amount of the appropriation all the proceeds of the tax authorized by section 6859-1, G. C., and also the revenue paid into the state treasury for the repair, maintenance, protection, policing or patroling of the public roads or highways of the state under the law, providing for registration, identification and regulation of motor vehicles.

Permit me to direct your attention to house bill 314, passed by the legislature now in session, being an act to make appropriations for the current expenses of the state government and state institutions, for the period beginning February 16, 1915, and ending June 30, 1915. Section 1 of this act provides that no moneys shall be taken from the general revenue fund to support the state highway department. In the part of this act relating especially to the highway department, instead of appropriating generally the proceeds of the tax authorized by section 6859-1, G. C., the legislature appropriated for the construction, improvement, maintenance and repair of inter-county highways the specific sum of $780,976.50. No appropriation bill has yet been passed covering the period following June 30, 1915. It is therefore manifestly beyond the power of the state highway commissioner to create any contingent liabilities against the money that will come into the treasury for the construction, improvement, maintenance and repair of inter-county highways under sections 6859-1 and 6859-2, G. C., at the next semi-annual settlement, for the reason that such funds have not yet been appropriated for the use of the state highway department. Your authority in making contracts and creating contingent liabilities is, at the present time, limited by the current appropriation measure now in force, being house bill 314 referred to above, and when you have exhausted the $780,976.50 appropriated in said act, for the construction, improvement, maintenance and repair of inter-county high-

ways, you will have no further authority to enter into any contracts involving the expenditure of money upon the inter-county highways of the state, until the legislature by appropriate action has appropriated and placed at your disposal further funds for this purpose.

I deem it proper in this connection to call your attention to the further fact that under the current appropriation measure, house bill 314 referred to above, the moneys therein appropriated cannot be in any way expended to pay liabilities or deficiencies existing prior to February 16, 1915, or incurred subsequent to June 30, 1915. See section 2 of said act.

The legislature not yet having passed an appropriation measure governing the period following June 30, 1915, it is impossible at the present time to render any opinion as to what your rights in this matter will be after such appropriation measure shall have been passed and shall have gone into effect.

Respectfully,
EDWARD C. TURNER,
Attorney General.

245.

BOARD OF EDUCATION—EXPENSES OF REPRESENTATIVES WHO VISIT OTHER SCHOOL BUILDINGS FOR IDEAS CANNOT BE PAID FROM SCHOOL FUND—COUNTY BOARD OF EDUCATION MUST AUTHORIZE INSTITUTE BEFORE TEACHERS ATTENDING SAME CAN BE PAID SUBSEQUENT TO MAY 20, 1914—MEMBER OF GENERAL ASSEMBLY AND TEACHER IN SCHOOLS, COMPATIBLE.

Rural or village boards of education are unauthorized to pay from school funds the expenses of "representatives" whom the boards designate and send to inspect schools or school buildings.

Superintendents and teachers may not be paid for attending a teachers' institute held subsequent to May 20, 1914, unless such institute was duly authorized to be held by the county board of education.

Members of the general assembly may be employed as teachers in the public schools during the time the legislature is not in session.

COLUMBUS, OHIO, April 15, 1915.

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

GENTLEMEN:—I acknowledge the receipt of your request for opinion as follows:

"1. May rural or village boards of education pay from school funds the expenses of representatives whom they send to inspect schools, or school buildings, to the end that a report of conditions may be given said board so that the members may act with more definite and intelligent knowledge in planning for the betterment of schools of the district over which they have jurisdiction?

Section 7620, General Code, reads as follows:

"The board of education of a district may build, enlarge, repair and furnish the necessary schoolhouses, purchase or lease sites therefor, or rights of way thereto, or purchase or lease real estate to be used as playgrounds

for children, or rent suitable schoolrooms, provide the necessary apparatus and make all other necessary provisions for the schools under its control. It also shall provide fuel for schools, build and keep in good repair fences inclosing such school houses, when deemed desirable plant shade and ornamental trees on the school grounds and make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts.

"Does the closing paragraph of section 7620 authorize the payment of expenses of the nature referred to above?

"2. May superintendents be allowed fees for attending an annual teachers' institute held after section 7870 became a law, before such institute has been authorized by the county board of education?

"3. Can members of the state legislature legally be paid from school funds for services rendered by them as teachers during the time the legislature is not in session?"

In consideration of your first question, a careful examination of the statutes fails to disclose any authority for the payment of expenses of representatives of boards of education in making such inspections as are referred to by you, nor indeed for the appointment or designation of such representatives for making any such inspections, unless the same may be found within the terms of the statute above quoted. (Section 7620, General Code.)

It is a principle of law too familiar to require reference to authorities, that public officers may exercise only such authority as is specifically conferred by the statute, or is, of necessity, essential to a proper discharge of a duty so imposed or exercise of power so granted.

It is also a well established rule of statutory construction to be uniformly observed, that "general words following particular words must be confined to things of the same kind as those specified." State v. Johnson, 64 O. S., 270.

While this rule is subject to that other familiar principle that where the reason altogether fails the rule does not apply, the facts must be sufficient to bring the case clearly within the latter that it may operate as an exception to the former.

In the application of the foregoing principles to the provisions of section 7620, G. C., and more properly to the last sentence of the same, since it is not anticipated that it would be contended that the first sentence is at all applicable to the first case, it cannot be maintained, in my opinion, that the legislature in the requirement that the board of education should provide fuel, build fences, and when deemed desirable plant trees, had in contemplation the appointment of representatives of the board to make inspection of schools and school buildings beyond the territorial jurisdiction of the board at public expense for any purpose.

My answer to your first question must, therefore, be in the negative.

Section 7870, G. C., as amended in 104 O. L., 157, referred to in your second question, provides as follows:

"When a teachers' institute has been authorized by the county board of education the boards of education of all school districts shall pay the teachers and superintendents of their respective districts their regular salary for the week they attend the institute upon the teachers or superintendents presenting certificates of full regular daily attendance, signed by the county superintendent. If the institute is held when the public schools are not in session, such teachers or superintendents shall be paid two dollars a day for actual daily attendance as certified by the county superintendent, for not more than five days of actual attendance, to be paid as an addition to the first month's salary after the institute, by the board of education by which such teacher or superintendent

is then employed. In case he or she is unemployed at the time of the institute, such salary shall be paid by the board next employing such teacher or superintendent, if the term of employment begins within three months after the institute closes."

Section 7868, G. C., as amended in 104 O. L., 157, which is deemed pertinent to this question, is as follows:

"The teachers' institutes of each county shall be under the supervision of the county boards of education. Such boards shall decide by formal resolution at any regular or special meeting held prior to February 1st of each year whether a county institute shall be held in the county during the current year."

The provisions of the above section, it will be noted, were effective on or after May 20, 1914, the same having been filed by the governor in the office of the secretary of state on February 19, 1914.

The language of the statutes above set forth is clear and unequivocal insofar as pertinent to the matter under consideration, and it is the manifest policy of the law that teachers' institutes shall be subject to the control and supervision of the county boards of education and that the same be conducted in accordance therewith is made a condition precedent to the payment of teachers and superintendents for their attendance. In other words, it was clearly the purpose of the legislature that teachers and superintendents should receive pay for attending only such institutes as are held within the provisions of section 7868, G. C., and by the county board of education formally authorized and approved.

I am, therefore, of the opinion, in answer to your second inquiry, that superintendents of schools may not be paid for attending a teachers' institute held subsequent to May 20, 1914, unless such institute was authorized to be held by the county board of education.

In answer to your third question, your attention is called to an opinion of my predecessor, Hon. Timothy S. Hogan, under date of July 14, 1913, rendered to Hon. George S. Crawford, member of house of representatives, Grayville, Ohio, a copy of which is herewith enclosed, in which I concur. That opinion holds that "the position of teacher in public schools is not considered a public office, consequently there is no inhibition against a member of the general assembly being employed as a teacher in the public schools."

This opinion was rendered, however, prior to the amendment of section 15, G. C., by an act passed February 16, 1914, 104 O. L., 252, as follows:

"Section 12. No member of either house of the general assembly except in compliance with the provisions of this act shall:

"1. Be appointed as trustees or manager of a benevolent, educational, penal or reformatory institution of the state, supported in whole or in part by funds from the state treasury;

"2. Serve on any committee or commission authorized or created by the general assembly, which provides other compensation than actual and necessary expenses;

"3. Accept any appointment, employment or office from any committee or commission authorized or created by the general assembly or from any executive, or administrative branch or department of the state, which provides other compensation than actual and necessary expenses.

"Any such appointee, officer or employee who accepts a certificate of election to either house shall forthwith resign as such appointee, officer or

employee, and in case he fails or refuses to do so his seat in the general assembly shall be deemed vacant. Any member of the general assembly who accepts any such appointment, office or employment shall forthwith resign from the general assembly and in case he fails or refuses to do so his seat in the general assembly shall be deemed vacant. But the provisions of this section shall not apply to township officers, justices of the peace, notaries public or officers of the militia."

It may be first observed that it is not altogether clear that boards of education by whom teachers are employed constitute either an executive or administrative branch or department of the state. While the whole scheme of common school education is controlled by state law, members of boards of education are neither state officers nor employes of the state. On the contrary they are the agencies of the local government of a territorial subdivision of the state only. The establishment, alteration, maintenance and repair of township roads are subject to authority and operation of state law alone, yet it could hardly be maintained that a board of township trustees charged with the administration of a part or all the statutes of the state relative thereto, was a department of the state.

Practically all government outside of municipalities is based solely, immediately and directly upon state law, yet much of the administration and execution of that law is entrusted by the state to local governmental agencies which may not be said in any strict or true sense to be branches or departments of the state government. For instance, relief for the poor is subject to state legislation, but that the administration thereof by the township trustees, the county commissioners and the superintendent of the infirmary in a given township is an administrative branch or department of the state is involved in much doubt.

While the constitutionality of this statute may be seriously questioned, it is not deemed necessary to the present consideration that the same be here passed upon. If it be conceded that the provisions of this statute are valid and operative under the constitution, it will be observed that there is prescribed a definite and specific remedy or penalty for its violation, and this is emphasized by change in this respect in such amendment making more clear the intent of the legislature that a violation of this statute should work a forfeiture of the seat in the general assembly.

If we may then in the construction of this statute apply that familiar maxim of the law *Expressio Unius est exclusio alterius*, it results that it is inoperative insofar as it relates to the question now before us; that is, whether a member of the general assembly may be lawfully paid for services as teacher in the public schools of the state when the legislature is not in session. That is to say, the provisions of this statute have no application to the payment of persons for services rendered as teachers of public schools even though at the same time a member of the general assembly.

Your third question is therefore answered in the affirmative.

Respectfully,

EDWARD C. TURNER,

Attorney General.

246.

WHAT CONSTITUTES "BUSINESS IN THIS STATE" AS USED IN SECTION 5502, G. C., FOR PURPOSE OF DETERMINING THE TAX TO BE IMPOSED ON FOREIGN CORPORATIONS FOR PRIVILEGE OF EXERCISING CORPORATE FRANCHISES IN OHIO.

The word "business" as used in section 5502, G. C., is synonymous with the same word as used in sections 5499 and 183, G. C.

Sales of a foreign corporation to customers in Ohio solicited by traveling salesmen or by mail and necessitating the interstate transportation of the articles sold are not to be regarded as representing "business" of such a corporation in Ohio under section 5502, G. C., although the corporation also carries on other activities in Ohio which do constitute Ohio business.

But if a stock of goods of foreign manufacture is maintained in Ohio and sales are made in this state from that stock, or are made wherever negotiated to an Ohio customer from such stock, the business is "Ohio business" within the meaning of said section.

The operation of a factory in Ohio by a foreign corporation having its principal place of business in another state constitutes "doing business" in Ohio, regardless of where the products of such factory are sold or transported; and it is reasonable and lawful under section 5502 to measure the volume of such business by sales of manufactured articles, whether such sales otherwise represent interstate commerce or not.

COLUMBUS, OHIO, April 15, 1915.

The Honorable Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of February 2d, requests my opinion upon the following facts:

> "Swift & Company is a corporation organized under the laws of the state of Illinois, with its principal place of business and actual business office in that state. The company has various manufacturing plants located throughout the country. Two of these plants are in Ohio; one of them, a packing house, at Cleveland, and the other a fertilizer works, at Parma.
>
> "In its report to the commission as a foreign corporation for the year 1914, the company reports as the amount of business transacted in Ohio the following items:
>
> " 'Sales from the Cleveland packing house to customers within the state of Ohio;
>
> " 'Sales from the Cleveland packing house to branch houses within the state of Ohio;
>
> " 'Sales from the Parma fertilizer works to customers within Ohio.'
>
> "The company fails to report the following business:
>
> " 'Sales from the Cleveland packing house to customers or branch houses located in states other than Ohio;
>
> " 'Sales from the Parma fertilizer works to customers or branch houses in states other than Ohio;
>
> " 'Sales from plants located outside of the state of Ohio to customers or branch houses in Ohio.' "

You request my opinion as to whether any of the items which the company does not report may be legally taken into consideration by the tax commission in determining the proportion of the authorized capital stock of the corporation in question represented by property owned and business transacted in this state.

This question invites consideration of section 5502, General Code. It is obvious on the face of this statute that in order to determine the "proportion" of which it speaks "the property and business in this state" must be compared with the property and business of the company everywhere. The ultimate question then being as to what constitutes "business in this state" for the purposes of this statute it at once appears that this term has no fixed and definite meaning of its own independent of the context in which it is found. That is to say, the words used do not have any such primary meaning as to make the statute plain on its face. That being the case a consideration of the object and intent of the whole body of the law applicable to the subject-matter is invoked.

The section which is to be interpreted is a part of the law imposing an annual tax upon foreign corporations with respect to their privilege of exercising corporate franchises in Ohio; and the section itself prescribes the rule of apportionment of the tax.

The operative section, i. e., the provision imposing primary liability for the tax, is section 5499, General Code, which provides as follows:

> "Annually, during the month of July, each foreign corporation for profit, *doing business in this state, and owning or using a part or all of its capital or plant in this state, and subject to compliance with all other provisions of law,* and in addition to all other statements required by law, shall make a report in writing to the commission in such form as the commission may prescribe."

I think that the phrase "doing business in this state, and owning or using a part or all of its capital or plant in this state," as used in section 5499, General Code, must necessarily mean the same thing as the same phrase as it is found in the identical words in section 183, General Code.

I call attention then to the fact that the phrase "business in this state" is used three times in the body of the law applicable to foreign corporations, namely, once in section 183, which provides that "before doing business in this state," foreign corporations, organized for profit and owning or using a part or all of their capital or plant in this state, shall do certain things; once in section 5499, General Code, providing that foreign corporations "doing business in this state" and owning or using a part or all of their capital or plant in this state, shall make certain reports and pay certain taxes; and once in the section immediately under consideration; that is in section 5502, which apportions the tax in part on the basis of "business in this state." I think it is apparent that the word "done" is to be understood in, or read into section 5502, so that the complete phrase is "business (done) in this state." The identity of the three phrases becomes clearer on the making of this interpolation.

I am of the opinion that the meaning of the phrase in question is the same in each of its uses, and that that is "business (done) in this state," within the meaning of section 5502, General Code, which constitutes the "doing of business," within the meaning of sections 5499 and 183, General Code.

Therefore, the question as to what constitutes "business in this state," under section 5502, may be answered by considering what would constitute "doing business" within the meaning of section 183, General Code.

The application of such a test results in at least a partial elimination of the third class of sales, which the company concerning which you inquire has refused to report.

If any of these sales are made upon solicitation in Ohio, of orders by mail, or through traveling salesmen or local agents, requiring deliveries to be made from the foreign factories to the customer and thus necessitating interstate transportation, such sales do not represent "business done in Ohio."

Toledo Commercial Co. v. Glen Mfg. Co., 55 O. S., 217.

Robbins v. Shelby County Taxing District, 120 U. S., 489.
Brennan v. Titusville, 153 U. S., 289.

In this connection, see section 188, General Code, which provides that the compliance section shall not apply *inter alia* "to foreign corporations entirely non-resident soliciting business or making sales in this state by correspondence or by traveling salesmen."

But if any of the sales of this class, consisting of the products of factories located in other states, are made in Ohio from stocks of such products located in Ohio, or, whether entirely negotiated in Ohio or not, involve merely a delivery from an Ohio warehouse or stock room to an Ohio customer, such sales do represent "business done in Ohio."

The other two classes of sales may be considered together because they present the same legal questions. I am of the opinion that the operation of factories in Ohio by a foreign corporation constitutes "doing business" in Ohio regardless of where the products of such factories are sold.

Kidd v. Pearson, 128 U. S., 1.
United States v. E. C. Knight Co., 156 U. S., 1.
Diamond Glue Co. v. United States Glue Co., 187 U. S., 611.
Baltic Mining Co. v. Massachusetts, 231 U. S., 68.
Treadway v. Reilly, 32 Neb., 495.
Baltic Mining Co. v. Massachusetts, 207 Mass., 387.
S. S. White Dental Mfg. Co. v. Mass., 212 U. S., 35.
Attorney General v. Electric Storage Battery Co., 188 Mass., 239.

I am of the opinion that under the provisions of section 5502, General Code, it is the duty of the commission to select some factor or criterion which will represent the volume of the business done in Ohio as compared with the volume of the business of the company as a whole; and that the business being manufacturing, and all manufacturing being for the purpose of sale, the sales of the products of the factories may be used as such a measure of the volume of the manufacturing business. When so used the sales do not represent commerce at all, but manufacture, and may just as appropriately be used for this purpose as any other criterion, such as the total value of the manufactured articles.

I am therefore of the opinion that sales, being the apparent factor which has been chosen by the commission as a measure of the business of the company in Ohio and elsewhere, all the sales of the two factories in Ohio must be reported by the company in question as business done in Ohio.

I think I should supplement the statement of my conclusions respecting your specific question by pointing out that though it may seem inconsistent to use sales as a measure of volume of manufacturing business in the first instance, and then to consider some sales like those dealt with in answering your third question, as representing commerce instead of manufacturing, such inconsistency is rather apparent than real. When a manufacturing company sets up in another state a separate selling agency, maintaining a warehouse or a stock of goods from which sales are made, it in effect embarks in a separate and distinct enterprise and the business in which it engages in such a guise is not that of manufacturing only. Under such circumstances, the corporation must, so to speak, pay for the special privilege of conducting such a selling business in addition to paying for whatever privileges it may exercise in the state as a manufacturing company only.

It must not be forgotten that in all excise and franchise taxation it is possible to use the same receipts, or sales, or earnings, as the case may be, more than once in the

apportionment of the tax. This is not double taxation, because these factors are not themselves subjects of taxation, but are used merely for the purpose of apportioning a tax upon a privilege.

My predecessor, Hon. Timothy S. Hogan, in an opinion addressed to the commission, held on authority of Baltic Mining Co. v. Massachusetts, supra, that any and all business which might be regarded as carried on in Ohio, whether interstate in character or not, should be reported as Ohio business under section 5502, General Code. It will be observed that my conclusion as to the interpretation of the statute does not agree with that of Mr. Hogan. Baltic Mining Co. v. Massachusetts is authority for the conclusion that the state may apportion an annual franchise tax against foreign corporations upon the basis of the total authorized capital stock thereof, without distinction as to the relative amount of business transacted in the state and that transacted elsewhere, provided the law imposing the tax does not apply to corporations engaged in the actual carrying on of interstate commerce or engaged in the state exclusively in interstate commerce. But the Ohio law and the Massachusetts law are very different in phraseology.

Respectfully,
EDWARD C. TURNER,
Attorney General.

247.

EFFECT OF CERTAIN AMENDMENTS IN HOUSE BILL No. 615 ON EIGHT HOUR DAY ON PUBLIC WORK.

The amendments proposed in House Bill No. 615 relative to the eight hours a day on public work, will not relieve any department or office or contractor performing public work from necessity of complying with the provisions of article II, section 37 of the constitution of Ohio.

COLUMBUS, OHIO, April 15, 1915.

Agricultural Committee, House of Representatives, Columbus, Ohio.

I have your letter of April 14, 1915, requesting my opinion as follows:

> "The agricultural committee would respectfully request an opinion from you on the constitutionality of house bill 615, as amended, and also the effect the amendment suggested by the state highway commission would have on the constitutionality of the bill, if so amended."

House bill No. 615, as amended, is as follows:

> "A BILL
>
> To amend section 17-1 of the General Code, relating to the provision for an eight hour day on public work in the state.
>
> *Be it enacted by the General Assembly of the State of Ohio:*
>
> "Section 1. That section 17-1 of the General Code be amended to read as follows:
>
> "Section 17-1. Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work * * * for workmen engaged on any public work carried on or aided by the state, or any political

subdivision thereof, whether done by contract or otherwise, and it shall be unlawful for any person, corporation or association, whose duty it shall be to employ or to direct and control the services of such workmen, to require any of them to labor more than eight hours in any calendar day or more than forty-eight hours in any calendar week, except in cases of extraordinary emergency. This section shall not be construed to include policemen or firemen, nor employes of the agricultural experiment station who are engaged in field work of any kind.

"Section 2. That said original section 17-1 of the General Code, be and the same is hereby repealed."

The amendment proposed in your letter is as follows:

"After the words *extraordinary emergency in line 2:*

" 'But this shall not be construed to forbid any workman, or workmen, employe or employes, engaged in road or highway construction, maintenance or repair from contracting for extra hours of labor to be performed by him or them; and shall not be construed to include policemen or firemen, nor employes of the agricultural experiment station who are engaged in field work at any time.' "

In considering the effect of this amendment, permit me to call your attention to article II, section 37 of the constitution of Ohio, which is as follows:

"Except in cases of extraodinary emergencies, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract, or otherwise."

This section of the constitution is undoubtedly self-executing and the only practical effect secured by the passage of section 17-1 of the general Code as enacted in 103 O. L., 854, was to add the sanction of a penalty to the provisions of the section of the constitution above quoted. Prior to the adoption of section 17-1 of the General Code, no means of enforcing the provisions of this section of the constitution existed except by resorting to a court of competent jurisdiction and securing an injunction.

The effect of the proposed amendment to section 17-1 of the General Code is to remove from the operation of its penalty clause, contained in section 17-2 of the General Code, the doing of certain things which are prohibited by the constitution.

Whether or not the entire act will be rendered unconstitutional by the proposed amendments is, for all practical purposes and results, immaterial, because in either event the constitutional provision referred to will remain intact and operative, and the doing of certain things which it is apparently the intention of the amendment to make lawful will still be prohibited by the constitution. The removal of the sanction of the penalty would doubtless render more difficult the enforcement of the constitutional rule, but the duty of limiting the work day to eight hours and the work week to forty-eight hours on all public work carried on or aided by the state, etc., will still remain the law of Ohio.

The effect of the first proposed amendment, i. e., omitting the words "or permit" in line nine will render the penalty clause practically inoperative by reason of the difficulty in securing proof of any violation.

The second amendment, i. e., omitting the words "and not to exceed forty-eight hours a week's work" will remove the sanction of a penalty for labor on more than six days per week.

The last amendment removes the penalty for any violation of the constitutional provision relative to all "highway construction, maintenance or repair." The provision relative to firemen, policemen, and employes of the agricultural experiment station, etc., is, in my opinion, meaningless, as this character of work and employment is not included in the class of work contemplated by the constitutional provision.

I am, therefore, of the opinion that the effect of the amendments suggested will not relieve any department or officer or contractor performing public work from the necessity of complying with the provisions of article II, section 37, of the constitution of Ohio.

Respectfully,
EDWARD C. TURNER.
Attorney General.

248.

BOARD OF CENSORS—MAY NOT DELEGATE ASSISTANTS TO VIEW PICTURE FILMS FOR APPROVAL OR REJECTION BY BOARD.

The board of censors may not delegate assistants to view picture films and make to the board a report upon which the board may approve or reject such picture film.

COLUMBUS, OHIO, April 15, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of a request for an opinion submitted by Hon. Chas. G. Williams, chairman of the Ohio board of censors, as follows:

> "We are acting as the board of censors under the provisions of O. L. Vol. 103, page 397.
>
> "The industrial commission furnishes clerks, stenographers and typists to assist us in our work.
>
> "In many instances it is necessary that the board have assistance in the viewing of pictures; that is, to view a picture submitted to the board for approval and make notes as to its character, and submit same to the board; the board rendering the final judgment.
>
> "We desire to know if it is legal for us to use the employes furnished us by the industrial commission to assist us in the manner above stated. In other words, does the law require the members of the board to actually view each picture passed upon by said board, before rendering final judgment, or may they render judgment on the information furnished them by the employes who have viewed the picture."

Section 871-46, G. C. (103 O. L., 399), provides for the appointment of a board of censors of motion picture films by the industrial commission of Ohio. The further provisions of the statutes pertinent to your inquiry, are as follows:

Section 871-47, G. C. (103 O. L., 399-400), provides:

> "The industrial commission shall furnish the board of censors with suitable office rooms and with sufficient equipment to properly carry out the provisions of this act. The board of censors may organize by electing one of its members as president. The secretary of the industrial commission shall

act as secretary of the board. Each member of the board of censors shall receive an annual salary of one thousand five hundred dollars per year. Such salary and expenses shall in no case exceed the fees paid to the Ohio board of censors for examination and approval of motion picture films.

"The members of the board shall be considered as employes of the industrial commission and shall be paid as other employes of such commission are paid. The industrial commission shall appoint such other assistants as may be necessary to carry on the work of the board."

Section 871-48 (103 O. L., 400), in so far as pertinent to the question submitted, is as follows:

"It shall be the duty of the board of censors to examine and censor as herein provided, all motion picture films to be publicly exhibited and displayed in the state of Ohio. Such films shall be submitted to the board before they shall be delivered to the exhibitor for exhibition. * * *"

Section 871-49 (103 O. L., 400) reads:

"Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board. They shall be stamped or designated in an appropriate manner and consecutively numbered. Before any motion picture film shall be publicly exhibited, they shall be projected upon the screen the words 'Approved by the Ohio board of censors' and the number of the film."

While it will be noted that the legislature has chosen to make it clear that the members of the board of censors are employes of the industrial commission, it will be also observed that by the provisions of section 871-48, G. C., above quoted, the duty of the examining and censoring all motion picture films to be publicly exhibited and displayed in the state of Ohio, is imposed upon the board of censors.

It is further provided, that only such films as are in the judgment and discretion of the board of censors of moral, educational or amusing and harmless character, shall be passed and approved by such board.

There is thus imposed upon the board the duty to exercise its judgment and discretion after an examination specifically required to be made by the board. That is to say, it seems clearly within the contemplation of the legislature that the examination of films by the board itself is essential to the exercise of that judgment and discretion required by the statute.

It would scarcely be argued with seriousness that the legislature in the enactment of the picture censor law had in contemplation the delegation by the censor board of a stenographer, however efficient in that line, to censor picture films. Nor would it be permissible for such clerk, stenographer or other employe to make an examination of such film for the purpose of making a report thereon, that the board from such report may approve or reject the same.

I am therefore of opinion, in answer to your inquiry, that each picture passed upon must be actually examined by the board of censors.

Respectfully,
EDWARD C. TURNER,
Attorney General.

249.

IN RE: APPROPRIATIONS—STATE AGRICULTURAL COMMISSION—STATE BOARD OF AGRICULTURE—BOARD OF CONTROL OF OHIO EXPERIMENT STATION.

Form of appropriation in case of abolition of state board and evolution of its powers and duties upon other agencies by laws subject to referendum.

COLUMBUS, OHIO, April 15, 1915.

HON. FRANK H. REIGHARD, *Chairman Finance Committee, House of Representatives, Eighty-first General Assembly, Columbus, Ohio.*

DEAR SIR:—In your letter of the 12th inst., you call my attention to the fact that laws have passed or are pending in the general assembly, abolishing the state agricultural commission and distributing its powers and duties between two agencies to be known as the "board of control of the Ohio Experiment station" and the "state board of agriculture," respectively. You also call attention to the fact that the general assembly is about to appropriate money for the current expenses of the various state departments and institutions for the year commencing July 1, 1915, and ending June 30, 1916; that the present agricultural commission will continue to exist at least until the third week in July, 1915, and, if referendum petitions are filed requiring the submission of the measures it passed, and signed by the governor, to a vote of the people, for some time thereafter.

You inquire how the appropriation for carrying on the several activities and functions of the present agricultural commission can be so made as to be properly available for expenditure by appropriate agencies of the state at all times during the fiscal year for which appropriations are to be made. You also inquire specifically whether the necessary result can be accomplished by framing what you term "a section with an inheritance clause."

It will be manifestly impracticable, for reasons which you yourself suggest, to make separate appropriations for the state agricultural commission and for its two successor agencies for definite and specific parts of the fiscal year for which appropriations are to be made, because of the uncertainty respecting the possibility both of the filing of referendum petitions and the defeat by the electors of the measures, if signed by the governor. It would be much better from a practical viewpoint to do as you suggest and to prepare "an inheritance clause." I take it that by the use of this expressive phrase you mean to refer to a provision like that which was inserted in the 1913 appropriation act with regard to the organization of the very commission which the present legislature has determined to abolish. This provision is found in 103 O. L., 633, and is as follows:

> "Whatever sums herein specified and appropriated for the purpose of the dairy and food commissioner, state board of agriculture, the secretary of the state board of agriculture, the board of live stock commissioners, the board of control of the state agricultural experiment station, the commission of fish and game, the state board of veterinary examiners, and the state board of pharmacy; and whatever sums have been appropriated or may be appropriated for the purposes of said departments shall, on and after July 15, 1913, be available for the uses and purposes of the agricultural commission of Ohio."

In my judgement, such a provision as this is valid and intelligible, and, with the necessary adaptation to present conditions, should be employed by the framers of the appropriation bill for the year 1915–16.

In order to avoid confusion, I suggest that the appropriations for those activities and functions of the present agricultural commission, which are to be devolved upon the board of control of the Ohio experiment station, be separated wholly from the appropriations for the current expenses for other purposes of the present commission relative to the matters and things which are to be devolved upon the new state board of agriculture. Then let the initial appropriations in each instance be made to and for the use of the state agricultural commission, with two inheritance clauses, one following the specific appropriations for the one class of expenditures and the other following those for the second class of expenditures. Then let the form of the "inheritance clause," as you call it, be as follows:

> "1. The sums hereinbefore specified and appropriated for the uses and purposes of the agricultural commission of Ohio shall, on and after the day on which (here refer to the act creating the board of control of the Ohio experiment station, designating it by bill number, date of passage and approval, and title) shall become effective, be available for the uses and purposes of the board of control of the Ohio experiment station."

(Following this clause should be all appropriations to the agricultural commission for the second class of purpose above defined. Then should follow the second inheritance clause, as follows:)

> "2. All sums herein specified and appropriated for the uses and purposes of the agricultural commission of Ohio, excepting the sums which are to be hereafter available for the uses and purposes of the board of control of the Ohio experiment station in accordance with the provisions of this act, shall, on and after the day on which (here refer to and describe the law creating the new state board of agriculture) shall become effective, be available for the uses and purposes of the state board of agriculture."

I understand that the measure creating the state board of agriculture is separate and distinct from the one creating the board of control of the Ohio experiment station, and that they severally repeal different sections of the present act providing for the powers and duties of the agricultural commission. My opinion is based upon this assumption.

Respectfully,
EDWARD C. TURNER,
Attorney General.

250.

JUDGES OF COURT OF APPEALS—EXPENSES WHEN HOLDING COURT OUTSIDE OF THEIR DISTRICTS—IN COUNTIES OF THEIR DISTRICTS—EXPENSES OF COMMON PLEAS JUDGES IN OFFICE.

When holding court outside of their respective districts under the assignment of the chief justice, as provided in section 1528, *G. C., judges of the court of appeals are entitled to the expense allowance of five dollars per day provided in section* 1529, *G. C., and to no other reimbursement for expenses. In other cases such judges are entitled to be reimbursed for their actual and necessary expenses incurred while holding court in a county other than that in which they reside, as provided in section* 2253, *G. C., as amended,* 104 *O. L.,* 252, *such expenses not to exceed* $300 *in any one year; but the* $300 *limitation does not include expenses payable under section* 1529, *G. C.*

A common pleas judge in office June 8, 1914, *was entitled to receive for expenses not more than* $300 *in the portion of his official year preceding that date; if on that date he had been reimbursed for expenses in an aggregate amount exceeding* $150 *he could have received lawfully from the state treasury thereafter no further allowance for expenses; if the amount received by him prior to that date was less than* $150, *he could lawfully have received thereafter such amount only by way of reimbursement for expenses as together with the sums already paid to him would equal* $150.

COLUMBUS, OHIO, April 16, 1915.

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

DEAR SIR:—I acknowledge receipt of your letter of March 10th, submitting for my opinion the following questions:

> "1. To what amount of actual and necessary expenses are the judges of appeals annually entitled?
>
> "2. To what amount for actual and necessary expenses would a judge of the court of common pleas, whose official year began January 1, 1914, and ended December 31, 1914, be entitled for said year? Please give basis for computing amount due, when part of official year was prior and part subsequent to June 8, 1914.
>
> "3. In view of section 2253-2, 104 O. L., 252, are judges of the court of appeals entitled to $5.00 per day as provided by section 1529, General Code? When so serving, if they are entitled to five dollars per day, are they entitled in addition thereto to their actual and necessary expenses as provided in section 2253, General Code?"

Your first and third questions are of similar character, both relating to the expenses of judges of the court of appeals, while your second question relates to the expenses of judges of courts of common pleas. Therefore I shall consider the first and third questions together. These questions require an interpretation of the following existing provision of law: Section 2252-2, G. C., as enacted 104 O. L., 251, section 2253, G. C., as amended 104 O. L., 251, section 1528 G. C., as amended 103 O. L., 414, and section 1529, as amended 103 O. L., 414. These sections read as follows:

> "Section 2252-2. All judges of the court of common pleas and superior courts and probate courts heretofore elected, shall, during the term for which they were elected, receive the salary, additional salary compensation and ex-

penses provided for by law at the time of their election, the additional salary to be paid quarterly out of the treasury of the county in which such judge resides, upon the warrant of such county.

"Section 2253. In addition to the annual salary and expenses provided for in sections 1529, 2251, 2252, 2252-1, each judge of the court of common pleas and of the court of appeals, shall receive his actual and necessary expenses, not exceeding three hundred dollars in any one year, incurred, while holding court in a county in which he does not reside, to be paid from the state treasury upon the warrant of the auditor of state, issued to such judge; * *

"Section 1528. Upon request of the presiding judge of a district to the chief justice of the court of appeals, to assign a judge, or judges of the court of appeals to hold court with the judge or judges of such district or to assign judges to hold an additional court in such district, the chief justice of the court of appeals, upon being satisfied that the business of such district requires it, shall assign such judge or judges of the court of appeals, as in his opinion can be so assigned without impairing the business of the district of which he is a resident, to hold court in such district.

"Section 1529. A judge so assigned, shall be paid five dollars a day for expenses for each day he shall perform such judicial duties, including the time necessarily devoted to going to and returning from such assignment and to the examination and decision of cases heard by him while he is so engaged ontside of the district for which he was elected. Such expenses shall be paid from the state treasury upon the warrant of the auditor of state, issued upon the certificate of the chief justice of the court of appeals, or the judge making the assignment."

I have quoted section 2252-2, G. C., as amended 104 O. L., 251, because you mention it in stating your third question. As a matter of fact, this section has no relation whatever to the compensation or expenses of the judges of courts of appeals. The phrase "superior courts," as used therein, does not contemplate courts of appeals, but is a technical term which applies solely to the superior court of Cincinnati. That this is the legislative intention is, I think, made manifest not only because the act in which the section is found makes no change in the salary or compensation of judges of the courts of appeals save with respect to expenses which are provided in section 2253, so that there would seem to be little reason for the operation of any such saving clause as is embodied in said section 2252-2, G. C., with respect to the judges of courts of appeals; but also because in section 2252, G. C., as amended in the same act, and not quoted herein, a change is made in the salary of judges of the superior court, and the phrase as used in that section is clearly limited in its application to the superior court of Cincinnati. The only element of doubt respecting the interpretation of section 2252-2 in this particular is introduced by the fact that the word "courts," as therein used, is in the plural, whereas there is but one superior court in the state. The plural number may have been used by inadvertance; or it may have been used with a view of providing against the creation of other superior courts in addition to the superior court of Cincinnati. In any event, the mere use of the plural number is not sufficient in my mind to give to the phrase "superior courts," as used in section 2252-2, a distinct meaning inclusive of courts of appeals.

With section 2252-2, G. C., eliminated, the first part of your third question is answered, and the answer to the remainder of that question, and to your first question, becomes dependent upon the remaining statutory provisions above quoted.

Sections 1528 and 1529, G. C., as amended 103 O. L., 414, are plain and unambiguous. They provide for the assignment of judges of the court of appeals to hold court in districts other than their own and for the payment of a certain sum for ex-

penses incurred by such a judge in connection with such an assignment. The allowance is $5.00 a day for each day such judge shall perform such duties, including the time necessarily devoted to traveling and to the examination and decision of cases heard outside of the district. This allowance is the same as that formerly payable to judges of circuit courts under sections bearing the same numbers. The changes in the sections other than those necessary to eliminate the words "circuit courts" and introduce the words "courts of appeals" are scarcely material in this connection.

Section 2253, General Code, as amended 104 O. L., 251, is clear in at least one respect, viz.: that the expense allowance therein provided for is to be in addition to that provided for in section 1529. Section 2253 expressly so provides. The doubtful question is as to whether or not the actual and necessary expenses allowed by section 1523, G. C., are receivable by a judge of the court of appeals when incurred in connection with holding court in a county outside of his own district; that is to say, the question is as to whether or not when holding court outside of his district under the assignment of the chief justice of the court of appeals a judge of the court of appeals is entitled to receive the allowance of $5.00 a day for expenses provided for in section 1529, and also the actual and necessary expenses as provided by section 2253, as amended.

Preliminary to a discussion of this question I may point out that in this respect section 2253 was not amended in 1914; for this part of section 2253 as it appears in 104 O. L., 251, is in the same language as section 2253 as amended, in the same act in which sections 2253 and 1529 are amended (103 O. L., 419) is phrased, so that the question must be approached in the light of the fact that sections 1529 and 2253, G. C., as they now appear, were put in their present form by the same legislative enactment.

I think that it is fair to presume that the legislature would not have provided two district expense allowances in connection with the same service; as a result of which presumption it would follow that section 2253, G. C., insofar as it applies to the judges of courts of appeals is limited to expenses in connection with holding court in the county other than the county in which the judge of the court of appeals resides, but in the same appellate district; while section 1529 is intended to provide for expenses incident to holding court outside of the district.

Over against this presumption is the fact which may be imagined that five dollars a day may not be in a given case an adequate amount for expenses—that is, this amount may not be sufficient to cover the actual and necessary expenses incurred by a judge of the court of appeals in traveling; for example, half way across the state, paying hotel bills and proper incidental expenses and returning again to his home county, under assignment of the chief justice of the court of appeals. So it might be argued that the legislature sought to provide for actual and necessary expenses in all cases by section 2253, and so to speak, to convert section 1529 into a provision for special compensation rather than an allowance for expenses. There is no constitutional limitation against providing such special compensation for judges of the courts of appeals, because section 14 of article IV of the constitution, which is the only provision which might be interpreted as a limitation of this character within its proper field, does not apply to the judge of courts of appeals, so that in view of this case, the five dollars a day provided by section 1529 might be viewed in the same light as the ten dollars a day provided by section 2253, G. C., to be paid to common pleas judges in addition to expenses, for the special service of holding court in counties other than those in which they reside, under the assignment of the chief justice of the supreme court.

I think, however, that this view of section 1529 must be rejected because of the language employed in that section itself. In the first place, the allowance is expressly stated to be "for expenses" although it is to be for days in which the judges engage in the examination of cases and is in effect, if not in theory, a per diem fee. In the second place, the second sentence of the section refers to the allowance as "such expenses." Whatever one may regard as the effect of the section, it is clear that the allowance is

intended to be in lieu of expenses, and I think it may be most appropriate to describe it as per diem fee inclusive of expenses.

This conclusion makes it necessary, then, to determine whether it is to be finally presumed that the general assembly did not intend that in a given case a judge of the court of appeals should be entitled to the $5.00 allowance under section 1529 and to his actual and necessary expenses under section 2253. Against such a presumption might be urged the fact already alluded to that section 2253 expressly provides that the allowance for actual and necessary expenses shall be "in addition to the * * * expenses provided for in section 1529." I do not think, however, that this phraseology necessarily imports that there shall be a double allowance of expenses in a given case. It would be a fair interpretation of the section to hold that the allowance under section 2253, which is limited to $300.00 in any one year, is in addition to the allowance of $5.00 a day under section 1529, and applicable in another class of cases. That is to say, the legislature may have used this language in order to make it clear that the $300.00 limit in section 2253 did not include the $5.00 a day special allowance under section 1529. In point of fact I think this must have been the legislative intent. It is much more reasonable to suppose that this is the case than it is to suppose that the legislature intended that for one day's expenses incurred while holding court under the assignment of the chief justice outside of his district there should be an allowance of $5.00 "for expenses," and in addition a complete allowance of actual and necessary expenses (unless, of course, the $300.00 maximim had been reached).

I am of the opinion, therefore, that section 2253, General Code, does not apply to the case to which section 1529, G. C., applies, or, in other words, that when a judge of the court of appeals is holding court outside of his district, as provided by section 1528, G. C., he is entitled to the special allowance of $5.00 a day, including the time devoted to travel and to the examination and decision of cases, and to that allowance only; and that the allowance provided in section 2253, as amended, is limited to the actual and necessary expenses incurred in holding court in a county in the district other than that in which the judge resides.

I reach this conclusion without consideration of the whole of section 2253 as it is found in 104 O. L., 251, because, as already stated, the language now under consideration was the same in section 2253, as amended in 103 O. L., 419. I am not so sure, however, that present section 2253 does not shed some light upon the meaning of the same section as it existed before the amendment. The remainder of this section in its present form, other than that which I have quoted, provides for an allowance of special compensation and expenses to judges of the court of common pleas in holding court under the assignment of the chief justice of the supreme court. This provision for expenses indicates that the general assembly placed upon section 2253 of the General Code, as amended in 1913, an interpretation which would exclude its application to cases of this character: that is, it seems likely at least, that the general assembly repeated its provisions for expenses in the second part of section 2253 in its present form because it supposed that the first part of the section, which had been put in its present form in 1913, could not provide for expenses incurred while holding court under the assignment of the chief justice, but would be limited, as held in my opinion of recent date respecting the salary and expenses of common pleas judges, to expenses otherwise incurred.

If this inference is proper, it strengthens the view that the first part of section 2253, G. C., was never intended to apply to expenses incurred outside the district in aiding in disposing of business under the order of the chief justice, either as to judges of the court of common pleas, or as to judges of the court of appeals.

For all of the foregoing reasons, then, I answer your first question and the second part of your third question as follows:

Judges of the court of appeals are entitled to receive their actual and necessary

expenses, not exceeding $300.00 in any one year, incurred while holding court in counties other than those in which they reside, otherwise than upon the assignment of the chief justice under section 1528, G. C.; such expenses to be paid from the state treasury upon the warrant of the auditor of state; in addition to such expenses to the amount of $300.00 such judges are entitled to receive the $5.00 allowance for expenses provided by section 1529, G. C., when holding court under the assignment of the chief justice of the court of appeals, outside of their respective appellate districts; such expenses to be paid from the state treasury upon warrant of the auditor of state, issued upon the certificate of the chief justice or the judge making the assignment. There is no limit upon the amount of expense allowance of this character which such judges may receive. Therefore, looking at both sections together, I can answer your first question by saying that there is no all-inclusive limitation upon the amount of actual and necessary expenses to which judges of the courts of appeals are annually entitled; but that the $300.00 limitation of section 2253, G. C., applies only to expenses of the first class.

The second part of your third question is answered generally in the negative.

Your second question is based principally upon my opinion of recent date respecting the salaries and expenses of common pleas judges, in which I held among other things, that judges elected prior to June 8, 1914, are entitled under the law becoming effective on that date, to expenses incurred while holding court in their districts, in an aggregate amount not to exceed $150.00 per year, as provided by original section 2253, G. C., adopted by reference in section 2252-2, G. C., as enacted 104 O. L., 251; although section 2253, as amended in 1913 had increased the limit provided by the original section to $300.00 in any one year. That is to say, I hold that as to judges elected prior to June 8, 1914, the limit on the amount of expenses payable annually from the state treasury had been raised in 1913 and lowered again in 1914.

I interpret your second question as general, rather than as particular in scope, and considering it as such, answer it as follows:

All expenses of the common pleas judge elected prior to June 8, 1914, incurred since the beginning of the official year in which that date fell, and prior to that date, are to be paid out of the state treasury provided they do not exceed in the aggregate $300.00. If on June 8, 1914, the amount of such expenses incurred during the official year in which that date fell was equal to, or in excess of, $150.00, then such judge was not entitled to reimbursement for any expenses thereafter incurred while holding court in a county within his district other than that in which he resided. If such amount was less than $150.00, then the expenses subsequently incurred during the official year would be limited to $150.00 for the whole year.

In other words, I do not think that the change in the law had the effect of imposing what would be termed a pro rata limit on the expenses for the entire year. The situation is rather the precise reverse of what it was in 1913, when the limit was increased, and although the result might in conceivable cases be such as to allow some judges more than $150.00 in the official year in which June 8, 1914, fell, and to limit other judges to that sum by way of reimbursement for such expenses, this result in my opinion cannot be avoided.

Respectfully,
EDWARD C. TURNER,
Attorney General.

251.

SUPERINTENDENT OF CEMETERIES—CITY—SUSPENSION AS AFFECTING RIGHT OF SALARY—CIVIL SERVICE.

The superintendent of cemeteries of a city suspended by the director of public service having been suspended pending determination of charges of misconduct, and not as a disciplinary measure, and thereafter having been restored to office by the director, is entitled to receive his salary for the time he was so suspended.

COLUMBUS, OHIO, April 16, 1915.

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

GENTLEMEN:—Under date of March 24, 1915, you requested my written opinion upon the following proposition, to wit:

> "The superintendent of cemeteries was suspended by order of the director of service pending investigation by the civil service commission, said commission reinstating the superintendent. Is said superintendent entitled to the regular salary fixed by ordinance during the time he was under suspension?"

You enclose a letter of the director of public service of the city of Cambridge, which together with a supplemental statement from said director of public service furnish the following facts and details in addition to your statement, to wit:

On the first of March the superintendent of cemeteries of the city of Cambridge, Ohio, was suspended by order of the director of public service, pursuant to charges of fraud and bad faith and misconduct in office, preferred by an investigating committee.

Subsequent to the suspension aforesaid the civil service commission held a hearing on said charges and declined to sustain same, but recommended the reinstatement of the superintendent, which was accordingly done on the 20th of March. It appears that the salary has not been paid for the time such superintendent was so suspended, his compensation being a monthly salary.

The order of suspension was in the following form:

> "H. T. Hall is this day suspended from the service of the city of Cambridge, Ohio, as superintendent of cemeteries, for the following reasons, to wit:
>
> "Upon the investigation of the cutting of certain trees in Northwood cemetery, I have learned that there was an agreement between superintendent H. T. Hall and his assistant, Ross Gibson, that Gibson was to act as the purchaser and secretly divide the lumber with superintendent Hall. That Hall fraudulently deceived the director of public service as to the value and amount of the lumber cut from these trees. That Hall authorized and permitted the cutting of one ash tree without authority or the knowledge of the director of public service, and delivered the same as part payment of his saw bill for the sawing of the other lumber.
>
> "[Signed] DIRECTOR OF PUBLIC SERVICE."

A copy of said order and reasons was filed with the civil service commission. Section 4162, General Code, of the chapter entitled "cemeteries" provides:

> "The director shall direct all improvements and embellishments of the

ground and lots, protect and preserve them, and subject to the approval of the council appoint necessary superintendents, employes and agents, determine their term of office and the amount of their compensation."

Under the civil service law, 103 O. L., 698, the office of superintendent of cemeteries of a city would fall within the classified service, as defined by section 8 of said act.

Section 2 of the civil service act (G. C., section 486-2), provides in part:

"On and after January 1, 1914, no person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted, or reduced as an officer or employe in the civil service under the government of this state, the counties, cities and city school districts thereof, in any manner or by any means other than those prescribed in this act."

Section 17 of the civil service act (G. C., 486-17), provides:

"No person shall be discharged from the classified service, reduced in pay or position, laid off, suspended or otherwise discriminated against by the appointing officer for religious or political reasons. In all cases of discharge, layoff, reduction or suspension of a subordinate, whether appointed for a definite term or otherwise, the appointing officer shall furnish the subordinate discharged, laid off, reduced or suspended, with a copy of the order of discharge, layoff, reduction or suspension and his reasons for the same, and give such subordinate a reasonable time in which to make and file an explanation. Such order together with the explanation, if any, of the subordinate, shall be filed with the commission.

"Nothing in this act shall limit the power of an officer to suspend *without pay*, for the purposes of discipline, a subordinate for a reasonable period not exceeding thirty days: provided, however, that successive suspensions shall not be allowed."

Obviously, a distinction is made in the statute between a suspension as a disciplinary measure, limited as to time not to exceed thirty days and in which case a suspension of salary may be imposed, and suspension on the other hand looking to the final dismissal and elimination of the officer from the service.

The order of suspension under consideration does not impart any of the conditions specified in the statute as distinguishing a suspension for discipline.

The conditions upon which a suspension of salary may be imposed, being specified in the statute, it would seem to be exclusive, and being of the opinion that the order of suspension, neither in its terms nor as intended and contemplated by the director of public service, falls within the proviso of section 17 of the civil service act, it may not now be converted by construction into such disciplinary measure, but must be considered as a measure, in its effect, merely holding in a state of indecision or indetermination the right of the officer to further exercise and enjoy the privileges and emoluments of the office pending a final determination of charges preferred.

Without discussing or determining the force of the considerations leading to the restoration of the superintendent to the exercise of his office, or the jurisdiction and authority of the civil service commission in relation thereto, the operative fact remains that the superintendent of cemeteries has been restored to office by the order of the director of public service.

The order of restoration must be taken as a determination by the director that the suspension was without sufficient cause, and this together with the fact that the

council of the city did not concur in the action of the director, determines that, in contemplation of law, the superintendent of cemeteries was never out of the service of the city. His separation from the service, not coming within the authority of the proviso as a disciplinary measure, therefore, was wrongful, and I am of the opinion that the superintendent is entitled to draw his salary for the period during which he was so under the order of suspension.

Answering your questions specifically: I advise that the superintendent of cemeteries will be entitled to draw his salary for the period elapsing from the date of his suspension to the date of his restoration.

Respectfully,
EDWARD C. TURNER,
Attorney General.

252.

PANAMA-PACIFIC INTERNATIONAL EXPOSITION—LITERATURE EXPENSES—HOW PAID.

Literature may be printed as part of exhibits authorized by law for the Panama-Pacific International Exposition, and not necessarily ordered through the supervisor of public printing. Expense of such printing must be paid from specific appropriations for such exhibits.

COLUMBUS, OHIO, April 17, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR SIR:—You ask me:

First. If literature in pamphlet form or otherwise may be edited, printed and published, and the expense incurred thereby paid from the appropriations made by the legislature for the various exhibits authorized to be made by the state of Ohio at the Panama-Pacific International Exposition to be held in the city of San Francisco, in the year 1915.

Second. Is such printing, if authorized, to be ordered through the supervisor of public printing and executed under his supervision.

Third. May the expense of such printing, if authorized and done, be paid from funds appropriated to the supervisor of public printing.

Replying to your enquiries in the order of their presentment, I beg to advise that on May 31, 1911, the legislature passed an act, by the terms of which the governor of Ohio was appointed commissioner, to be known as the "Panama-Pacific International Exposition Commissioner," for the purpose of installing, maintaining and exhibiting the products and resources of the state of Ohio at an international exposition to be held in San Francisco, in the year 1915, known as the "Panama-Pacific International Exposition."

On February 28, 1914, the legislature passed an act conferring additional powers upon the governor with reference to making such exhibits, in addition to appropriating "from any moneys in the state treasury to the credit of the general revenue fund and not otherwise appropriated, the sum of one hundred thousand dollars, for the purpose of erecting a state building to house and exhibit the state products, of securing complete and creditable display of the interests of the state at such international exposition", etc.

On February 26, 1914, the general assembly passed an act to make sundry appropriations, in which is contained the following item:

"Exposition commissioner, for the purpose of installing, maintaining and exhibiting live stock, agricultural products, resources and opportunities of this state at the Panama-Pacific International Exposition, in San Francisco in the year 1915, $25,000.00."

It is apparent that the legislature intended that the governor, as such exposition commissioner, should cause to be exhibited at such exposition a proper representative exhibit of the products and resources of this state at such exposition. Because of the diversity of Ohio's products and the richness of the resources and opportunities which the state affords, it would be difficult, if not impossible, to make such exhibits and advisements relating thereto without resorting to the use of placards, pamphlets and publications descriptive thereof.

In my opinion such publications would be necessary and convenient incidents to the making of such exhibits and promulgating the resources of the state and may be done to such extent as in the sound discretion of the governor, as such exposition commissioner, he may authorize and approve.

In answer to your second enquiry I beg to say that owing to the character of the printing that may be required, the distance of the location of the exposition and the exhibits to be made from Ohio, and the language used by the legislature in these several enactments, conferring extraordinary power upon the governor, as such commissioner, I am of the opinion that in this particular instance the printing that may be done is not necessarily subject to be ordered through the supervisor of public printing and executed under his supervision.

In answer to your third enquiry, I beg to advise that Ohio's exhibit at this exposition is to be made by reason of authority especially conferred and with money appropriated for that exclusive purpose by the legislature. It therefore follows that all expense incurred under this authority, either directly or indirectly, must be paid from such funds so appropriated, exclusive of all other appropriations.

Respectfully,
EDWARD C. TURNER,
Attorney General.

253.

BOARD OF EDUCATION—HAS AUTHORITY UNDER PROVISIONS OF SECTION 5656, G. C., TO FUND INDEBTEDNESS CONSISTING OF UNPAID TEACHERS' AND JANITORS' SALARIES, BUT NOT FOR CONTINGENT EXPENSES.

The board of education of a school district has authority under the provisions of sections 5656, et seq., G. C., to fund indebtedness consisting of unpaid salaries of the teachers and janitors of the schools of such districts.

The board of education of a school district does not have authority, under the provisions of sections 5656, et seq., G. C., to fund indebtedness consisting of unpaid bills for contingent expenses.

COLUMBUS OHIO, April 17, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 26th, which is as follows:

"Several city solicitors and members of boards of education have sub-

mitted to this department requests for an opinion as to the authority of boards of education issuing bonds under section 5656 of the General Code, to fund indebtedness caused by a lack of funds (1) to pay the salaries of the teachers and janitors of their schools, and (2) to pay the current contingent expenses after such indebtedness has been incurred. We therefore ask your interpretation of the authority given in section 5656 toward the payment of (1) teachers' and janitors' salaries, and (2) contingent expenses."

Your question as to the authority of the board of education of a school district to issue bonds under the provisions of section 5656 et seq. of the General Code, to fund indebtedness consisting of unpaid salaries to teachers, is answered in opinion No. 178 of this department rendered to Honorable Perry Smith, prosecuting attorney of Muskingum county, under date of March 27, 1915. A copy of this opinion is enclosed.

This opinion holds that the board of education of a school district may, under the authority of section 5661, G. C., contract with its teachers without the presence of money in the treasury sufficient to pay the salaries of said teachers, and that the unpaid salaries of its teachers, therefore, constitute a valid indebtedness of the district, which may be funded by the issuance of notes or bonds under favor of section 5656, G. C., and related sections referred to in said opinion.

Section 5661, G. C., provides:

"All contracts, agreements or obligations, and orders or resolutions entered into or passed contrary to the provisions of the next preceding section, shall be void, but such section shall not apply to the contracts authorized to be made by other provisions of law for the employment of teachers, officers, and other school employes of boards of education."

The provision "other school employes of boards of education" includes janitors of school buildings, and the reasons given and authorities cited in the above opinion apply, therefore, to the salaries of janitors as well as to the salaries of teachers of the school district.

I am of the opinion, therefore, that the board of education of a school district has authority under the provisions of section 5656 et seq. of the General Code, to fund indebtedness consisting of unpaid salaries of the janitors of its schools.

Under the above provision of section 5661, G. C., contracts for the employment of teachers, officers and other school employes are excepted from the provisions of section 5660, G. C.

Section 5660, G. C., provides:

"The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any contract, agreement, or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappro-

priated until the county, township or board of education is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

Inasmuch as indebtedness, consisting of unpaid bills for contingent expenses, does not come within the exceptions to the provision of section 5660, G. C., as provided in section 5661, G. C., I am of the opinion that the board of education of a school district does not have authority under the provisions of section 5656 et seq. of the General Code, to fund such indebtedness by the issue of notes or bonds.

Respectfully,
EDWARD C. TURNER,
Attorney General.

254.

STATE SUPERVISOR AND INSPECTOR OF ELECTIONS—COUNTY EXECUTIVE COMMITTEE—MAY MAKE RECOMMENDATIONS FOR APPOINTMENT OF DEPUTY STATE INSPECTOR OF ELECTIONS—TIME—PRIOR TO NOVEMBER ELECTION FOR STATE OFFICERS.

A county executive committee which represents a party from which the law requires such appointment to be made at the time of the appointment, may make recommendation to the state supervisor and inspector of elections of a person for appointment as deputy state supervisor and inspector of elections, prior to the November election for state officers next preceding the time such appointment is required to be made.

COLUMBUS, OHIO, April 17, 1915.

HON. CHAS. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Under date of April 15, 1915, you submit for an opinion the following question:

"May a county central committee or a county executive committee legally recommend, on August 22, 1914, a person for appointment as a deputy state supervisor and inspector of elections for a term beginning May 1, 1915?"

This inquiry involves a consideration of the statutes relative thereto, as follows:

Section 4789, *G. C.* "On or before the first day of May, biennially, the state supervisor and inspector of elections shall appoint for each such county two members of the board of deputy state supervisors and inspectors of elections, who shall each serve for a term of four years from such first day of May. One member so appointed shall be from the political party which cast the highest number of votes at the last preceding November election for governor, and the other member shall be appointed from the political party which cast the next highest number of votes for such officer at such election."

Section 4790, *G. C.* "If the executive committees of the two political parties in the county, casting the highest and next highest number of votes in the state at the last preceding November election for state officers, recommend qualified persons to the state supervisor and inspector at least five days before the first day of May the state supervisor and inspector shall appoint

the persons so recommended to the number of which such party is entitled. If no such recommendation is made, the state supervisor and inspector shall make the appointments as provided in this chapter."

It will be observed that the statute authorizes recommendations to be made only by executive committees, and that by section 4961, G. C., each county central committee is required to elect an executive committee. The central committee may constitute such executive committee if it so determines, and for the purposes of the present inquiry, it is assumed that the central committee had determined to constitute itself the executive committee of the county.

The matter here under consideration is much simplified by holding, as I do, that the question here presented is to be determined by the state supervisor and inspector of elections, when such appointments are by him to be made. In other words, the question becomes material only at the time when such appointments are by virtue of law to be made, and the provisions of the statutes above quoted are referable to that date. That is to say, the last sentence of section 4789, G. C., as above quoted, is clearly applicable to the state supervisor and inspector of elections only.

By the operation of section 4790, G. C., the state supervisor and inspector of elections is restrained from making appointment for the term beginning May 1st until within five days prior thereto, and when he comes to make such appointment, the question which confronts him, the answer to which solves the question here submitted, is this: Is there then before the state supervisor and inspector of elections the recommendation of a qualified person for appointment for deputy state supervisor and inspector of elections, made by the executive committee of the county for which such appointment is required to be made, then representing the party which is under the law entitled to such officer and which was filed at least five days prior to the first day of May?

In determining which two parties are entitled to the officer so required to be appointed, whose term begins on the first day of May biennially, the state supervisor and inspector of elections must refer to the vote for governor at the lastpreceding November election at which a governor was elected, or, which is otherwise phrased in section 4789, G. C., to the highest and next highest number of votes cast in the state at the last preceding election for state officers, and this, of course, has no other meaning than the election for state officers next preceding the first day of May on which such term will begin.

It being determined which political parties are entitled to the appointment by the above rule, the state supervisor and inspector of elections is next to determine whether or not there is before him a recommendation of a qualified person for such office made by the executive committee then representing the party, from which such appointment is by law required to be made. If the state supervisor and inspector of elections finds filed with him, at least five days prior to May 1, 1915, the recommendation of a qualified person for the office of deputy state supervisor and inspector of elections for any county in which such officer is then required to be appointed, which recommendation was made by the *same* executive committee that then represents the party from which such appointment is required to be made, it is mandatory upon such state supervisor and inspector of elections to appoint the person so recommended.

It may be observed that if an executive committee of any party should choose to make a recommendation prior to a November election of state officers next preceding the date of such appointment, and from the result of such election it developed that the party represented by that committee cast neither the highest or next highest number of votes for governor, such recommendation would not be recognized or considered by the appointing officer. On the other hand, if the *same* committee which represents a party entitled to such appointment at the time the same is made, has

chosen to make its recommendation prior to an election, the result of which entitles such party to the appointment, no provision of law or reason would require such committee to make a re-recommendation.

I therefore, for the reasons above stated, answer your question in the affirmative.

Respectfully,
EDWARD C. TURNER,
Attorney General.

255.

OFFICES COMPATIBLE—DISTRICT ASSESSOR OR DEPUTY DISTRICT ASSESSOR AND MEMBER OF COUNTY BOARD OF EDUCATION.

The offices of district assessor or deputy district assessor and member of county board of education are not incompatible.

COLUMBUS, OHIO, April 19, 1915.

HON. TOM S. MADDOX, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—I acknowledge the receipt of your request for an opinion upon the following question:

> "Are the offices of an assessor and member of the county board of education compatible?"

It may be noted that section 5617, G. C. (103 O. L., 796), provides:

> "A district assessor, deputy assessor, member of a district board of complaints or any assistant, clerk or other employe of a district assessor or district board of complaints shall not, during his term of office or period of service or employment, as fixed by law or prescribed by the tax commission of Ohio, hold any office of profit, except offices in the state militia and the office of notary public."

So that no person holding any office within the terms of this statute could be lawfully appointed to or hold the office or position of district assessor, deputy district assessor, member of district board of complaints, clerk or other employe of a district assessor or district board of complaints. This inhibition, however, is confined by specific terms to offices of profit. From this it clearly follows that an office, to come within the provisions of this statute, must yield to the incumbent thereof some profit. He must of necessity be under the law entitled to receive some such salary, remuneration, fees or compensation by reason of such incumbency as might fairly be termed profit.

Members of county boards of education may be paid only actual and necessary expenses incurred during attendance upon meetings of the board under the provisions of section 4734, G. C. (104 O. L., 137), as follows:

> "Each member of the county board of education shall be paid his actual and necessary expenses incurred during his attendance upon any meeting of the

board. Such expenses, and the expenses of the county superintendent, itemized and certified, shall be paid from the county board of education fund upon vouchers signed by the president of the board,"

and are therefore not within the inhibition of section 5617, G. C., above quoted.

In the absence of constitutional or statutory inhibition, the same person may hold two or more offices unless they are in law incompatible and the compatibility of public offices is dependent upon the nature and character of the duties necessary to proper exercise of the powers and functions of such offices.

The rule as to incompatibility of public offices at common law is stated in Throop on public offices, section 33, as follows:

> "Offices are said to be incompatible and inconsistent, so as not to be executed by the same person, when from the multiplicity of business in them they cannot be executed with care and ability, or when, there being subordinate and interfering with each other, it induces a presumption that they cannot be executed with impartiality and honesty."

And in Dillon on Municipal Corporations (section 166, note) it is said that

> "incompatibility in offices exists, where the nature and duty of the two offices are such as to render improper, from considerations of public policy, for one incumbent to retain both."

And in State v. Gebert, 12 C. C. (n.s.), 275, the court says:

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

The duties of the district assessors and deputy district assessors, as defined by house bill No. 571, known as the Warnes law, sections 5579 to 5624-20, G. C. (103 O. L., 786), are confined to the valuation and listing of property for taxation, while the powers and duties of members of county boards of education, as prescribed in house bill No. 13, 104 O. L., 133, relate to the administration of public schools.

It does not appear that the duties of one of these offices are in any way in conflict with those of the other, that one office is in any way a curb upon or subordinate to the other, nor that it would be physically impracticable for the same person to fully and efficiently discharge the duties of both at the same time.

I am therefore of the opinion that the office of assessor (whether district assessor or deputy district assessor be referred to) and member of the county board of education are not incompatible.

It may be observed, however, that, in some instances, members of the county board of education are at the same time members of rural boards of education, and that by reason of the provisions of section 5617, G. C. (103 O. L., 796), and section 4715 G. C. (104 O. L., 135), a person may not be at the same time a member of a rural board of education and a district or deputy district assessor.

Respectfully,
EDWARD C. TURNER,
Attorney General.

256.

COUNTY COMMISSIONERS—CONTRACTS—NO AUTHORITY FOR BONUS PROVISION IN A CONTRACT—LIQUIDATED DAMAGES—MAY BE PROVIDED IN CONTRACT IF CONTRACTOR FAILS TO COMPLY WITH TIME LIMIT SPECIFIED.

There is no authority in law for the incorporation of a bonus provision by a board of county commissioners in any contract made by such board, and where, as the result of such a provision, money has been paid out of the county treasury, a finding should be made against the contractor for the amount so paid.

A board of county commissioners may provide in a contract that for each day's delay in the performance of the contract, after the time specified therein for its completion, for which the contractor is responsible, said contractor shall forfeit a reasonable sum to be fixed by the terms of the contract and agreed upon by the parties to said contract as liquidated damages accruing to the county because of such failure to perform, and to be withheld by the board of county commissioners from any payments due or to become due said contractor upon the proper completion of said contract.

COLUMBUS, OHIO, April 19, 1915.

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

GENTLEMEN:—In your letter of March 10, 1915, you request my opinion as follows:

"We respectfully ask your written opinion upon the following matter:

"One of our examiners reports that in a certain county the commissioners entered into an agreement with a firm to make the quadrennial tax maps, we presume as provided by section 5549, General Code. The contract or agreement was entered into March 20, 1913, and the work was to be completed by January 1, 1914, for a total sum of $12,800.00. The agreement further provided that the firm should forfeit $20.00 per day for each day's delay after January 1, 1914, and also that the firm should be allowed a bonus of $20.00 per day for each and every working day said maps were completed prior to January 1, 1914. The work was completed forty-six (46) days prior to January 1, 1914, and the commissioners allowed the firm the sum of $13,720.00, the aggregate of the bonus, as will be seen, amounting to the sum of $920.00.

"*QUESTION:* Did the county commissioners have any legal authority to make such a contract or agreement?

"Are the commissioners legally empowered to incorporate bonus, or forfeiture, provisions in any contract made by them under the laws governing their actions? If not, what findings should our examiners make under circumstances like those stated above?

"Section 4330, General Code, seems to indicate that this may be done in municipal affairs, but we fail to find any laws under which the county commissioners can do this."

There is no provision of the statutes authorizing the allowance of a bonus by a board of county commissioners in any contract made by such board.

The objection to such a provision in the particular contract to which you call my attention is apparent for the reason that the contracting firm, by increasing its working force, could have furnished the quadrennial maps in less time, and the bonus

would have been correspondingly greater, while no additional advantage or benefit could result to the county in having said maps furnished prior to the day specified in said contract for the completion of the work.

The contract, above referred to, was made by the county commissioners under authority of section 5549, G. C., which provided for competitive bids and for the letting of a contract for furnishing the quadrennial maps to the lowest and best bidder, if it was to the interest of the county to do so.

The allowance of a bonus of $20.00 per day for each day the work was completed prior to the time specified in said contract was contrary to the plain purpose of the statute in having the work done at the least possible expense to the county. Such an allowance was without authority in law, is opposed to public policy, and the bonus allowed by the county commissioners and paid to the contracting firm should be returned to the county treasury.

On the question of the validity of a forfeiture provision in a contract made by a board of county commissioners, permit me to say there is no statute authorizing the incorporation of such a provision in said contract.

While section 2331, G. C., provides:

> "All contracts under the provisions of this chapter (relating to building regulations) shall contain provision in regard to the time when the whole or any specified portion of work contemplated therein shall be completed, and that for each and every day it shall be delayed beyond the time so named the contractor shall forfeit and pay to the state a sum to be fixed in the contract, which shall be deducted from any payment or payments due or to become due the contractor,"

this provision applies to contracts for the construction of state buildings and does not apply to a contract made by a board of county commissioners for the construction of a county building.

The question arises—Can a board of county commissioners, in the absence of express statutory authority, lawfully provide for the forfeiture of a definite sum by the contractor, in case the contract is not completed at the time specified therein and the contractor is responsible for the delay?

The necessity of such a provision in contracts made by boards of county commissioners seems clear. It is the duty of the board of county commissioners of a county to require prompt performance of such contracts, and the incorporating of a provision that for each day's delay in the completion of the performance of the contract after the time specified therein, for which the contractor is responsible, said contractor shall forfeit a reasonable sum to be fixed by the terms of the contract and agreed upon by the parties thereto as liquidated damages accruing to the county because of such failure, and to be withheld by the board of county commissioners from any payment or payments due or to become due said contractor upon the completion of said contract to the satisfaction of said board of county commissioners—tends to make such requirement effective and cause the contractor to be diligent in the performance of the contract.

I think the general authority of the board of county commissioners to make a contract carries with it the implied authority to incorporate such a provision in said contract.

While the validity of such a provision in a contract made by a board of county commissioners has not been passed upon by any court, I am of the opinion that the rule of law applicable to such a provision in a private contract applies with equal force to a contract made by a board of county commissioners.

The rule of law governing a provision for liquidated damages for the breach of a private contract is laid down by the supreme court of Ohio in the case of Doan v. Rogan, 79 O. S., 372. The second branch of the syllabus provides as follows:

"Whether a stipulation providing for liquidated damages for the breach of a contract is to be construed as liquidated damages or as a penalty, depends upon the intention of the parties to be gathered from the entire instrument. While courts will not construe contracts in a way authorizing recovery for liquidated damages simply because the parties have used that term in the agreement, yet, where parties to a contract otherwise valid have in terms provided that the damages of the injured party by a breach on the part of the other of some particular stipulation, or for a total breach, shall be a certain sum specified as liquidated damages, and it is apparent that damages from such breach would be uncertain as to amount and difficult of proof, and the contract taken as a whole is not so manifestly unreasonable and disproportionate as to justify the conclusion that it does not truly express the intention of the parties, but is consistent with the conclusion that it was their intention that damages in the amount stated should follow such breach, courts should give effect to the will of the parties as so expressed and enforce that part of the agreement the same as any other."

Replying to your question, I am of the opinion that there is no authority in law for the incorporation of a bonus provision by a board of county commissioners in any contract made by such board, and where, as the result of such a provision, money has been paid out of the county treasury, a finding should be made against the contractor for the amount so paid.

On the other hand, I am of the opinion that a board of county commissioners may provide in a contract that for each day's delay in the performance of the contract, after the time specified therein for its completion, for which the contractor is responsible said contractor shall forfeit a reasonable sum to be fixed by the terms of the contract and agreed upon by the parties to said contract as liquidated damages accruing to the county, because of such failure to perform, and to be withheld by the board of county commissioners from any payment or payments due or to become due said contractor upon the proper completion of said contract.

Respectfully,
EDWARD C. TURNER,
Attorney General.

257.

TAX LIMITATIONS—DO NOT APPLY WHEN QUESTION OF BOND ISSUE IS SUBMITTED TO ELECTORS—ON CONTRARY, LIMITATIONS DO APPLY AFTER FAVORABLE VOTE OF ELECTORS AND MAY PREVENT THEIR ISSUANCE—EFFECT OF RABE CASE LIMITED BY AMENDMENT OF 1914.

The tax limitations do not operate as debt limitations in the manner defined in Rabe v. Board of Education, 88 O. S., 403, nor under article XII, section 11, of the constitution, when a board of education, under section 7625, G. C., merely determines to submit the question of the issuance of bonds in a given amount to a vote of the electors. Such limitations apply, however, when after a favorable vote the board proceeds to issue the bonds, and prevent their issuance, unless within the period for which the bonds are to run sufficient interest and sinking fund levies can be made within the tax limitations.

Even in such case the principles referred to have a limited application because of the fact that the bonds are issued by a vote of the people and because of the amendment to section 5649-1, G. C. (104 O. L., 12.)

COLUMBUS, OHIO, April 19, 1915.

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

GENTLEMEN:—I am in receipt of a letter under date of April 5, 1915, fro n Hon. Harry W. Koons, city solicitor of Mt. Vernon, in which he requests my advice as to the effect of the decision in Rabe v. Board of Education, 88 O. S., 403, upon the powers of the board of education under section 7625 et seq. of the General Code, and particularly with respect to the form of the resolution calling the election under section 7625.

The matter is of such importance that I have deemed it proper to address an opinion to the bureau in the premises.

I am of the opinion that nothing in the decision referred to or in article XII, section 11 of the constitution, materially affects the action of the board of education under section 7625 in merely fixing the date of an election and estimating the amount of money required for any of the purposes therein referred to. It is only when, after a favorable vote, the board of education comes to the passage of the resolution provided by section 7626, General Code, and must determine the length of time bonds should run that the effect of the principles embodied in the decision and in the constitutional provision is exerted. When the bonds have been authorized they may not be issued unless they are spread over a sufficient number of years to enable the district, within the limitations allowed by law, to provide for the interest and sinking fund requirements thereof in the manner required by the constitution.

So far as the Rabe case itself is concerned, its effect is somewhat mitigated at least by the subsequent amendment of section 5649-1 (104 O. L., 12). That is, it is no longer strictly true that interest and sinking fund issues must be postponed to current expenses. Of course, practically, the necessity of providing for current expenses first, still exists and should be borne in mind when the bonds are issued.

Moreover, the Rabe case concerned the issuance of bonds without a vote of the people. Interest and sinking fund levies for the retirement of bonds like those about which Mr. Koons inquires, would be met by levies outside of the limitations applicable to current expense levies. Insofar, however, as the operation of the combined maximum rate limitations of fifteen mills provided by law might, in a given case, tend to limit available interest and sinking fund levies, the principles which Mr. Koons has in mind and to which I have referred to would apply.

Repeating my specific conclusion with respect to the question submitted I am

of the opinion that a board of education is in no wise limited by considerations arising out of tax limitations and the necessity of making sinking fund and interest levies when the question of issuing bonds for school improvement purposes is submitted to the electors under section 7625; but that such practical limitations do operate upon the powers of the board of education when it comes to *issue* the bonds under section 7626 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

258.

COUNTY BOARD OF EDUCATION—CANNOT DISSOLVE RURAL SCHOOL DISTRICT AND JOIN IT WITH CONTIGUOUS RURAL OR VILLAGE SCHOOL DISTRICT—ELECTION FAVORABLE TO DISSOLUTION AND REORGANIZATION OF RURAL SCHOOL DISTRICT MUST FIRST BE HELD.

The board of education of a county school district has no authority under the provisions of sections 4735 *and* 4736, *G. C., as amended 104 O. L., 138, to dissolve a rural school district and join it with a contiguous rural or village school district, within said county district. An election for this purpose must be held under authority of section* 4735-1 *and* 4735-2, *G. C., as found in* 104 *O. L.,* 138, *resulting in a vote favorable to the dissolution of such rural school district and to its union with the contiguous rural or village school district, before the question of centralization can be submitted to the electors of the rural or village school district resulting from such union.*

The provisions of section 4726, *G. C., as amended,* 104 *O. L.,* 139, *apply only to the schools of a school district, now known as a rural school district, under the provision of section* 4735, *G. C., as amended,* 104 *O. L.,* 138.

COLUMBUS, OHIO, April 19, 1915.

HON. CHARLES F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I have your letter of March 25, 1915, requesting my opinion as follows:

> "In Columbia township, Lorain county, are three school districts, two special districts organized under the old statute, by application to the probate court, etc., and one township district consisting of the remainder of the township after the organization of the special districts, all rural districts under present section 4735.
>
> "Recently an election was held in said township in which one of the special districts and the former township districts participated, the question being the centralization of the schools under section 4726. The proposition carried, and upon applying to me for advice in reference to the details of centralization, it occurs to me that if as stated in 4735, "present existing township and special school districts constitute rural school districts" no election under 4728 could be held upon the question of the centralization of the schools of the former township and special district, but that before such election could be held, one of the districts must be dissolved and joined to the other.
>
> "I would like your opinion upon the following questions:
>
> "*First.* Has the county board of education authority under sections 4735 and 4736 to change the boundary line of these districts, to the end that

one district shall exist, without a vote upon the question under 4735-1, or must action under 4735-1 or 4741, General Code, by the former special district, be taken to consolidate before election to centralize can be held?

"*Second.* Am I right in assuming that the question of centralization, according to 4726, comprehends only the centralization of schools within a district now designated as a rural district?"

The first part of your question is answered in opinion 183 of this department, rendered to Hon. Clark Good, prosecuting attorney of Van Wert county, under date of March 29, 1915, a copy of which is herewith enclosed. This opinion holds that it is necessary, to dissolve a school district, formerly known as a special school district, now known as a rural school district, under the provision of section 4735, G. C., as amended in 104 O. L., 138, and to join it to a contiguous rural or village school district, that there be an election held for that purpose, under the provisions of sections 4735-1 and 4735-2 of the General Code, as found in 104 O. L., 138, resulting in a majority vote of the electors of such district in favor thereof.

It follows, that this election, resulting in a vote favorable to such dissolution and union with a contiguous rural school district, must be held in either the special school district, or the township rural school district, referred to in your inquiry, before the question of centralization can be submitted to the electors of the rural school district of the township, as consolidated with said special school district within said township.

The authority of the board of education of a rural school district to submit the question of centralization to a vote of the qualified electors of such district is found in section 4726, G. C., as amended in 104 O. L., page 139. This section, as amended provides:

"A rural board of education may submit the question of centralization, and, upon the petition of not less than one-fourth of the qualified electors of such rural district, or upon the order of the county board of education, must submit such question to the vote of the qualified electors of such rural district at a general election or a special election called for that purpose. If more votes are cast in favor of centralization than against it, at such election, such rural board of education shall proceed at once to the centralization of the schools of the rural district, and, if necessary, purchase a site or sites and erect a suitable building or buildings thereon. If, at such election, more votes are cast against the proposition of centralization than for it, the question shall not be again submitted to the electors of such rural district for a period of two years, except upon the petition of at least forty per cent. of the electors of such district."

Replying to your second question, I am of the opinion that the above provisions of section 4726, General Code, as amended, apply only to the schools of a district, now known as a rural school district, under the provision of section 4735, G. C., as amended, 104 O. L., 138.

Respectfully,
EDWARD C. TURNER,
Attorney General.

259.

TAX LISTING DAY—AGREEMENT ENTERED INTO PRIOR TO TAX LISTING DAY PURPORTING TO PROVIDE FOR LEASE OF CERTAIN REAL ESTATE FOR TERM COMMENCING AFTER TAX LISTING DAY IS NOT SUCH INTEREST IN LESSOR AS TO BE TAXABLE—SUCH TAXES SHOULD BE REFUNDED—TAX COMMISSION—HAS NO JURISDICTION OVER COMPLAINT FILED IN 1915 ABOUT REAL ESTATE VALUATION MADE IN 1910.

An agreement entered into prior to tax listing day, purporting to provide for the lease of certain real estate for a term to commence after tax listing day, in consideration of which the lessee promises to pay, on the first day of the term, a certain sum, and on a subsequent date a certain other sum, with interest from the first day of the term, the lessor agreeing to convey property on demand to the lessee for a further payment in addition to the two payments called "rents" does not create in the lessor any taxable interest existing on tax listing day; and an assessment so made should be corrected, if taxes have been paid thereon (unless voluntarily) they should be refunded under section 2589, *G. C.*

The tax commission of Ohio has not jurisdiction to entertain a complaint filed in the year 1915 *respecting a valuation of real estate made by the quadrennial appraisers in the year* 1910.

COLUMBUS, OHIO, April 19, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have submitted to me the papers and correspondence in two matters which are pending before the commission and requested my advice upon the questions presented thereby, which are as follows:

"(1) An instrument styled 'Lease with option to purchase' provides that the lessee shall have and hold the premises to which it relates for a period of ten years; and that he shall pay to the lessor $5,000 on the first day of the leasehold and $5,000 five years later, with interest at five per cent. per annum, payable annually on the anniversary of the commencement of the estate. The lessor agrees that he will at any time during the continuance of the lease, and not later than the expiration of a period of ten years, convey the premises to the lessee for the sum of $17,000 in cash, with interest from the commencement of the leasehold estate until paid, said sum of $17,000 to be in addition to the principal sum of $10,000, which is referred to as 'rental.' The lessee is to pay the taxes.

"The lease was executed October 28, 1913, but was to be effective on March 1, 1914, on which date the estate was to begin and the initial payment of $5,000 was to be made. In fact, the term of the lease is described as being 'ten years next ensuing from the first day of March, 1914,' while the first payment was to be made 'on the first day of March, 1914.'

"At tax listing time on February, 1914, the district assessor for the proper county, considered the interest of the lessor, arising under the instrument above described, as his 'credits,' and valued the same at $20,000.

"Is the lessor's interest taxable as a credit and, if so, what is its value?

"What is the remedy of the taxpayer in the event his interest is not taxable, or in the event that it has been over-valued?

"(2) A complaint was filed March 18, 1915, with the tax commission against the valuation of real estate made by the quadrennial appraisers in the

year 1910. The original valuation of the land in question was complained of to the board of review of the city in which it is located and a reduction thereon was made by said board in the year 1911.

"Has the commission jurisdiction to entertain the complaint and to afford any relief that may be proper in the premises?"

In February, 1914, the lessor had no absolute rights under the lease above described. Unless the lessee took possession of the land under the lease he would not be obliged to pay the $5,000 initial payment, which may be regarded as rent in advance for a period of five years. If the lessee had refused on March 1st to take possession of the land and abandoned the lease, the lessor would have a right of action, but the action would have been for damages for breach of contract. He could not have sued as upon an absolute promise to pay either $5,000 or $10,000.

As to the option of purchase, I can discover nothing in the terms of the lease which would give to this feature of it any effect other than that which the same purports. The effect of the whole instrument is not that of sale, creating the right of absolute demand for purchase money; but if it had been there would have been no credit due or to become due in February, 1914, for at that time the strongest effect which could have been given to the relation of the parties was to regard the lease as a contract to sell and not as a sale.

I therefore conclude that the interest of the lessor under the lease above described, as it existed in February, 1914,was not a credit: that is, a legal claim or demand due or to become due.

Of course, the interest of the lessor does not come under any of the other classes of subjects of property taxation.

Therefore, I am of the opinion that the assessment made by the district assessor in 1914 was erroneous.

I note from the papers submitted that the taxes in question have been paid. If they were voluntarily paid under a mere mistake of law and without any compulsion on the part of the taxing authorities, either actual or constructive, there is at least grave doubt as to whether there is any authority of law for refunding them. (See State ex rel. v. Louis, 20 C. C., 319; Bridge Co. v. Commissioners, 9 Bull. 16.) The correspondence, however, seems to indicate that the taxpayer has at all times vigorously asserted his rights by such proceedings as were open to him without recourse to the courts. That being the case, it seems likely that his payment could not be regarded as voluntary, in which event the case is one for adjustment under section 2589, General Code, which provides in part as follows:

"Section 2589. * * * If at any time the auditor discovers that erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto at a regular or special session of the board. If the commissioners find that taxes or assessments have been so erroneously charged and collected, they shall order the auditor to draw his warrant on the county treasurer in favor of the person paying them for the full amount of the taxes or assessments so erroneously charged and collected. The county treasurer shall pay such warrant from any surplus or unexpended funds in the county treasury."

I understand that the matter is now pending in the office of the district assessor, who writes to the tax commission for advice in the premises.

The proper procedure would be for the district assessor to call the attention of the auditor to the facts of the case, whereupon it would become the auditor's duty to lay such facts before the commissioners, and it would be the commissioners' duty to order a warrant drawn as provided in the above section.

In answering your second question, I beg to advise that at the present time the tax commission has no authority or power whatsoever to reduce the valuation of individual tracts of real property, save by way of appeal from a decision of a district board of complaints as provided in the Warnes law. The power which the commission formerly had in such cases existed under favor of sections 5617-2 and 5617-6 of the General Code (102 O. L., 224; sections 147 and 151, respectively), but these sections were expressly repealed by section 68 of the Warnes law (103 O. L., 803). The general provisions of section 26 of the General Code, would operate to save from the effect of such repeal, any pending proceeding or cause of proceeding; but it having been held in Standard Oil Co. v. Hopkins, 24 O. C. D., 170, that the powers of the commission were not available to an aggrieved taxpayer as a remedy of which he might avail himself as a matter of right, it follows that the section could not apply in a case like the one under discussion.

I am advised further by you that the controversy inquired about in your second question is involved in an action pending in the common pleas court of one of the counties of the state, which court, under the decision last above cited, has jurisdiction of the action without any appeal to the tax commission. It would seem that under such circumstances the commission should not attempt to exercise jurisdiction where its power to do so may be at all doubtful.

Respectfully,
EDWARD C. TURNER,
Attorney General.

260.

CRIMINAL CASES—ATTENDANCE AND MILEAGE OF WITNESSES FROM OUTSIDE OF STATE MAY BE PAID FROM STATE LINE—ANY DEFICIENCY CHARGES MAY BE MADE, UNDER SECTION 3004, G. C., AGAINST "IN FURTHERANCE OF JUSTICE FUND."

Attendance and mileage of foreign witness from state line may be taxed in costs in criminal cases by order of the court. Deficiency in actual mileage from place of residence of foreign witness may be made up out of prosecuting attorney's 3004 *General Code fund.*

COLUMBUS, OHIO, April 19, 1915.

HON. OTHO W. KENNEDY, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—I am in receipt of yours of the 17th requesting an opinion upon the following state of facts:

> "I desire your opinion at the earliest date possible upon the following matters, for the reason that I have cases pending in this county involving the questions herein submitted, and they will be on trial very soon:
>
> "First: When a person has been indicted and the case is set for trial, but one or more material witnesses are not within the state of Ohio, but in the state of Pennsylvania, and it is very necessary to have these witnesses on the witness stand before the jury, and they are willing to come on the condition that they receive the usual allowance for witnesses and the usual mileage for witnesses, but on no other conditions. Under this state of facts, has the prosecuting attorney a right to request them to come and promise them the usual mileage for witnesses and the usual fees, and thereby obligate the

county to pay same, provided such witness comes pursuant to such request? There is no argument but that they are without the jurisdiction of our court, and they cannot be served with subpoenas.

"Second: Or should this matter be first taken before the commissioners and have them to give the prosecutor the authority to make such an arrangement, or would the commissioners have any jurisdiction over it, even though they were inclined to grant the request?

"Third: Could the prosecuting attorney charge it up as part of his expense account, as provided in section 3004, G. C.?

"Fourth: Or if the same cannot be done as above suggested, how can it be done, or at all?

"Depositions probably could be taken, but you are fully aware of the fact that depositions are always unsatisfactory and it is much better to have the witnesses themselves before the court and the jury.

"Your full and complete reply to the foregoing at the very earliest date possible, in view of the fact that I, within a very few days, will be required, to resort to some means of getting evidence from foreign states, will be much appreciated."

If you will have the subpoenas issued and you mail them to the witnesses you may then have their attendance, and mileage from the state line, paid by order of the court, showing that the witnesses came upon the call of the prosecuting attorney, and taxed as costs in the case. Any deficiency in the amount of their actual mileage is a proper charge against your "in furtherance of justice fund" under section 3004, G. C.

Respectfully,

EDWARD C. TURNER,

Attorney General.

261.

COLLATERAL INHERITANCE TAX—APPLICATION TO CERTAIN BEQUESTS—INCOMES TO AID WORTHY THEOLOGICAL STUDENTS, EXEMPT—TO AID NEEDY MINISTERS OF CERTAIN RELIGIOUS DENOMINATION, TAXABLE—IN TRUST TO BE DISTRIBUTED FOR BENEVOLENT AND CHARITABLE PURPOSES, TAXABLE—TO A CHURCH FOR CHARITABLE PURPOSES, TAXABLE—TO CEMETERY CORPORATION, WHEN EXEMPT—TO CHARITABLE HOME FOR JEWISH AGED AND INFIRM, TAXABLE, UNLESS OPEN TO ALL MEMBERS OF CERTAIN RACE—TO JEWISH HOSPITAL ASSOCIATION, OPEN TO ALL, EXEMPT—TO COLLEGE, FOR LIBRARY, IF OPEN TO ALL, EXEMPT.

A bequest to a college, the income of which is to be used in aiding worthy students of a theological seminary, is exempt from the inheritance tax, when the seminary is open to all the public upon the same terms, and if not operated for profit.

A bequest to a society for aiding needy ministers of a certain religious denomination is subject to the inheritance tax.

A bequest to executors in trust to be distributed to any societies and corporations organized for benevolent and charitable purposes is subject to the inheritance tax.

A bequest to an individual to be administered for charitable purposes is subject to the inheritance tax.

A bequest to a church to be administered for charitable purposes in the discretion of the trustees of the church is subject to the inheritance tax.

Two bequests in the same will to the same cemetery corporation, the income of which is to be used, respectively, for the maintenance of different cemetery lots, are to be regarded as separate estates for the purpose of the inheritance tax, and if neither exceeds five hundred dollars in amount no tax is assessable.

A bequest to a charitable home for Jewish aged and infirm, which is open only to members of a specified religious denomination or sect, or those entertaining a given religious belief, is not exempt from taxation; but if the home is open to all members of a certain race upon the same terms, the bequest is exempt from the inheritance tax.

A bequest to a Jewish hospital association maintaining a hospital which is open to all on the same terms and is charitable in its nature is exempt from the inheritance tax.

A bequest to a college, the income of which is to be used in sustaining a library therein, is exempt from taxation, if the college is open to all on the same terms, and is not operated for profit.

COLUMBUS, OHIO, April 19, 1915.

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

DEAR SIR:—I acknowledge receipt of your letter of April 3d, requesting my opinion upon the application of the collateral inheritance tax law to certain devises and bequests:

> "1. A bequest to the German Wallace College, a corporation under the laws of Ohio, the income of which is to be used in aiding worthy students of a theological seminary in connection therewith.
>
> "2. A residuary devise and bequest to executors in trust, the first $50,000 to be distributed to 'the preacher's aid society or their equivalent societies in such German Conferences of the Methodist Episcopal Church as they may select,' and the balance to 'any societies and corporations organized for benevolent and charitable purposes as in their judgment they may deem best.'
>
> "3. A bequest in trust, with direction to invest and pay the net income

'for the relief and assistance of needy and deserving persons, in such manner and in such amounts as he (the trustee) may deem wise.' The codicil making this bequest states it is the wish of the testator 'to provide a fund to help in emergencies occasioned by sickness, accident and other trouble,' but the distribution of the income shall rest wholly in the discretion of the trustee, who shall serve without bond.

"There is a further provision that upon the death or incapacity of the trustee, the bequest, and any undistributed income, shall be 'turned into the hands of trustees of the Methodist Episcopal Church, incorporated under the laws of Ohio, to be administered in the manner above provided for.'

"4. Two bequests in the same will to the proprietors of a cemetery corporation in trust, the income to be used for the care, preservation and improvement of certain lots and monuments therein. Each bequest is in the sum of $500 and they relate to different cemetery lots.

"The question in this case is as to whether or not the exemption of $500 applies to each bequest or to both together (in which latter event it is assumed that the remaining $500 of the aggregate bequest will be subject to taxation).

"5. A bequest to a home for the Jewish aged and infirm, which is open only to Israelites, that is, persons of this particular religious faith.

"6. A bequest to a Jewish hospital association, the income of which is to be used for the general benefit of the hospital. The hospital is open to all persons of whatever creed, nationality or color, on equal terms."

With respect to the first question which you submit, it is to be noted that the theological seminary therein referred to is under the control and supervision of a certain church; yet it is stated that the pupils therein are or may be of all denominations and that there are no restrictions as to creed or nationality for admission. I take it, therefore, that a pupil might prepare himself for the ministry or some related life work in the theological seminary under consideration, without being obligated in any way to enter the ministry of the church which supervises the seminary.

Therefore, in my opinion, the mere fact that the seminary is under the supervision of the church and is perhaps primarily designed and intended to inculcate the religious doctrines of that church, does not deprive it of its public character any more than a college of liberal arts or a parochial school maintained under the supervision of a church would, by reason of that fact, be deprived of a similar character.

Gerke v. Purcell, 25 O. S., 229.
Little v. Seminary, 72 O. S., 417.

The case last cited is almost directly in point, being distinguishable only on the ground that it related to exemption from general property taxation, which, however, is I think analogous to the question submitted by you. It appeared that the institution involved in that case was a theological seminary free and open to all on the same conditions, and controlled and managed by the synods of the United Presbyterian Church of North America. The court held that it was as institution of purely public charity for the purpose of the statutes relating to general property taxation.

The exemption provisions of the collateral inheritance tax laws are found in section 5332, General Code, as follows:

"Section 5332. The provisions of the next preceding section shall not apply to property, or interests in property, transmitted to the state of Ohio under the intestate laws of the state, or embraced in a bequest, devise, transfer or conveyance to, or for the use of the state of Ohio, or to or for the use of a municipal corporation or other political subdivision thereof for exclusively pub-

lic purposes, or public institutions of learning, or to or for the use of an institution in this state for purpose only of public charity or other exclusively public purposes. The property, or interests in property so transmitted or embraced in such devise, bequest, transfer or conveyance shall be exempt from all inheritance and other taxes while used exclusively for any of such purposes."

The bequest in question, while made to the college as such, is not, in my judgment, to be regarded as one "to or for the use of * * * public institutions of learning" because the use is not the general maintenance of the college, but the aid and support of worthy students in the seminary. Therefore, the question presented is as to whether or not it is "to or for the use of an institution in this state for purpose only of public charity."

I am of the opinion that the bequest is "for purpose only of public charity" within the meaning of the statutes. The distinction between a public and a private charity is found, I think, in the case of Philadelphia v. Masonic Home, 160 Pa., 572. The opinion in that case, which related to the taxation as property of an institution maintained for the benefit of members of certain fraternal order and their dependents, contains the following language:

"A charity may restrict its admissions to a class of humanity, and still be public; it may be for the blind, the mute, those suffering from special diseases, for the aged, for infants, for women, for men, for different callings or trades by which humanity earns its bread, and as long as the classification is determined by some distinction which *involuntarily* affects or may affect any of the whole people, although only a small number may be directly benefited, it is public. But when the right to admission depends on the fact of *voluntary* association with some particular society then a distinction is made which concerns not the public at large. The public is interested in the relief of its members, because they are men, women and children, not because they are Masons. A home without charges exclusively for Presbyterians, Espiscopalians, Catholics or Methodists, would not be a public charity. But then to exclude every other idea of public, as distinguished from private, the word 'purely' is prefixed by the constitution; this is to intensify the word 'public,' not 'charity.' It must be purely public: that is, there must be no admixture of any qualification for admission, heterogeneous, and not solely relating to the public. That the appellee is wholly without profit or gain only shows that it is purely a charity, and not that it is a purely public charity."

It will be observed that the line of demarcation between what is a public charity and what is a private charity may be finely drawn. For example, the Pennsylvania court seems to classify occupations as creating involuntary distinctions, and it must be admitted that occupational classifications have always been upheld as public charities. It seems to me that the somewhat liberal definition which has been given to the phrase "public charity" includes a gift for the benefit of a class of students in a particular public institution of learning.

The principles upon which I have reached my conclusion then would apply to any gift for the benefit of students of a particular institution, as distinguished, for example, from gifts for the benefit of needy students or apprentices of a particular branch of learning. The institution to the students of which the bequest is limited, being itself open to all on equal terms, the charity is public.

The doctrine of Philadelphia v. Masonic Home, supra, is in accord with the rule in Ohio.

Morning Star Lodge v. Hayslip, 23 O. S., 144.

I have chosen to cite the Pennsylvania case because of the careful distinctions which are drawn from the opinion, and which are serviceable in connection with your question.

I therefore conclude as to the first bequest concerning which you inquire that the same is exempt from the collateral inheritance tax.

2. Coming now to the second bequest, I advise, on the principles above discussed, that the primary distribution thereunder to the preacher's aid society or equivalent societies of certain conferences of the Methodist Episcopal Church is not exempt. In so advising I assume that the societies mentioned exist for the purpose of relieving and aiding the ministers of a certain denomination. See the opinion of my predecessor in the matter of the Western Methodist Book Concern, vol. 1, annual report for 1912, page 617, with which I agree. Mr. Hogan's opinion relates to property taxation, but the underlying principles are the same with respect to inheritance taxation.

The question as to the balance of the residuary devise and bequest is more difficult. It is for the use of "any societies and corporations organized for benevolent and charitable purposes." As pointed out in the Pennsylvania case, a corporation or institution may be organized for benevolent or charitable purposes without being *publicly* charitable in its nature. Moreover, an institution might be one of public charity, and yet not be within the exemption because the same is limited to institutions *"in this state."*

Humphreys v. State, 70 O. S., 67.

The residuary bequest and devise is therefore so general and vague in its terms as, in my opinion, to deprive it of the privilege of exemption. In order to be entitled to exemption it must satisfy the statutory requirements, whereas the trustees might, within the terms of the trust, apply its proceeds for the use of institutions other than those mentioned in the statute.

3. The initial bequest which is next mentioned in your letter is clearly not exempt from taxation, because it is not made "to or for the use of * * * an institution in this state." The trustee is an individual and so are the intended beneficiaries. The rule here is that a bequest to an individual trustee for the relief of needy individuals is not exempt. The charity in order to take by will or inheritance exempt from the tax must be institutional.

The difficulty here arises from the fact that upon the decease or incapacity of the original trustee, the principal sum, together with the accumulated and undistributed income, is to be turned over "to trustees of the Methodist Episcopal Church, incorporated under the laws of Ohio," to be administered for the benefit of needy individuals, in the manner provided for.

Although I incline to the opinion that a church, which is not an institution of purely public charity, is such an "institution" as may administer a gift "for the purpose only of public charity" within the meaning of the inheritance tax law, I question whether this part of the bequest is exempt from taxation, if indeed it is valid at all. My reasons for expressing this doubt are two:

> "1. I do not believe that there is in existence any such specific institution as 'the trustees of the Methodist Episcopal Church incorporated under the laws of Ohio.' If this is the exact language of the codicil, it would seem that the gift over would fail for lack of definiteness. Every local society of this church is, as I understand it, incorporated, but there is no central incorporated organization of this name.
>
> "2. The original trust was to be administered 'in the discretion of the

trustee.' The trustee might exercise this discretion so as to limit the charity and thus make it not public in character."

For both of these reasons I am of the opinion that no part of the bequest in question is exempt from taxation, so that the division of it into two successive estates becomes immaterial, and the tax should now be assessed and collected upon the whole estate.

4. The answer to your fourth question also is suggested by observing the exact language of the statutes. Although the five hundred dollars minimum of section 5331, General Code, is often spoken of as an exemption, in strict contemplation of law it is not an exemption, as inheritances of less than five hundred dollars are simply not subject to the tax at all. The section provides in part as follows:

"All property within the jurisdiction of this state, and any interests therein * * * which pass by will or by the intestate laws * * * or by deed * * * made or intended to take effect in possession or enjoyment after the death of the grantor, *to a person* in trust or otherwise, other than to or for the use of the * * * lineal descendant * * * shall be liable to a tax of five per cent. of its value, above the sum of five hundred dollars."

Of course, a corporation is a "person" within the meaning of the section. On the other hand, it must be admitted that two or more gifts, devises or bequests might be made to the same trustee for distinct and separate uses, and would then have to be regarded as separate inheritances, it being the rule that the beneficial use, and not the legal title, determines the quality of the inheritance.

The case you submit then presents the question as to whether the purposes of the trust are so far separate and distinct as to keep the bequests themselves separate; or whether, the trustee being the same, the two should be added together for the purpose of determining the value of the property passing to "a person," within the meaning of the statute.

I am of the opinion that the bequests are separate and distinct, and that the fact that the trustee is the same in each case is immaterial. Therefore, I am of the opinion that the exemption attaches to each, and that no tax is chargeable on account of both or either.

5. Before answering your question respecting the fifth bequest mentioned by you, I feel obliged to place an interpretation upon your letter so that the conclusion which I shall express will not be misunderstood.

You say that you are advised "that no one can be admitted to the home except he be an Israelite." If by this statement you mean that membership in any religious body or denomination, or adherence to any particular religious belief is a prerequisite to admission to the home, then on the principles laid down in Philadelphia v. Masonic Home, supra, and in the opinion of my predecessor in the matter of the Western Methodist Book Concern, to which I have referred, the bequest would be taxable. This is the meaning which I have given to your letter in stating the question at the outset of this opinion.

But if you mean that persons of the Hebrew race are admitted without discrimination on the grounds of religious belief or otherwise, then on the principles laid down in the authorities above cited, the charity would be a public one and the inheritance would be exempt from taxation.

6. The principles just referred to will result, of course, in the conclusion that the sixth bequest of which you speak is exempt from inheritance taxation.

I acknowledge receipt in connection with the letter of a brief prepared by Messrs Webber & Webber and a statement prepared by John C. Marting, treasurer of the Baldwin-Wallace college, mailed under separate cover.

The information and arguments set forth in these papers bear upon the question as to the exemption of another bequest which is mentioned by you in your letter, viz:

> "A bequest to the German Wallace college of $5,000 in trust, the same to become and remain a part of the library fund of the college and its theological seminary, and the income to be used in sustaining a library for the use of the college and seminary."

You stated in your first letter that you were of the opinion that this bequest is exempt. In this opinion I concur. In view of your expression of opinion I have refrained from discussing the question more elaborately.

Respectfully,
EDWARD C. TURNER,
Attorney General.

262.

ABSTRACT OF TITLE—LAND IN CITY OF CINCINNATI BELONGING TO THE RIDING CLUB—ARMORY SITE.

Abstract, The Riding Club of Cincinnati, property, to Ohio state armory.

COLUMBUS, OHIO, April 20, 1915.

Ohio State Armory Board, Columbus, Ohio.

GENTLEMEN:—Complying with your request for an opinion in reference to the title of certain real estate situated in the city of Cincinnati, Hamilton county, Ohio, as the same is shown by an abstract furnished by the Guarantee Title and Trust company of Cincinnati, under date of Janauary 23, 1915, said abstract purporting to contain the chain of title of the following described real estate, I beg to state that my examination of the title discloses the following situation:

The property under examination is as follows:

> "Situate in section 13, township 3, fractional range 2, of the Miami purchase, and in the city of Cincinnati, Hamilton county, Ohio, and more particularly described as follows: Commencing at a point on the north side of Helen or Nellie street, thirty-five (35) feet west of the east line of section 13 Millcreek township; thence northwardly on a line making a northwest angle with the north line of Helen or Nellie street of 75 degrees, 34 minutes, 225.80 feet, to the north line of the McCormick property; thence westwardly with the said McCormick line 107.30 feet; thence southwardly parallel with the first described line 247.13 feet to a point in the north line of Helen or Nellie street; thence east with the north line of Helen or Nellie street, to the place of beginning.
>
> "Also the following described real estate, situate in the same state, county, city, township, section and fractional range as aforesaid, and more particularly described as follows: Commencing at a point in the north line of Helen or Nellie street, 135 feet west of the east line of section 13, Millcreek township; thence northwardly on a line making a northwest angle with the north line of Helen or Nellie street of 75 degrees, 34 minutes, 247.13 feet, to the north line of the McCormick property; thence westwardly with the said McCormick's line 5.365 feet (plat shows 5.305); thence southwardly parallel

with the first described line 248.20 feet to the north line of Helen or Nellie street; thence east with said north line of Helen or Nellie street, 5 feet to the place of beginning.

"Also, the following described real estate, situate in the city of Cincinnati, Hamilton county, Ohio, and being part of lot No. 26 of Reakirt and Donaldson's subdivision, as the same is recorded in plat book 5, pages 62 and 63 of the records of Hamilton county, Ohio, and more particularly described as follows: Beginning at a point on the east side of Cumberland street at the northwest corner of said lot No. 26; thence eastwardly along the north line of said lot 26, 58 feet more or less, to a point where said line is intersected by the middle of Burnet avenue produced northwardly; thence southwardly along said middle line of Burnet avenue produced 30 feet more or less, to the south line of said lot 26; thence westwardly along said south line 60 feet, more or less, to the east line of Cumberland street; thence northwardly along the east line of Cumberland street 18.65 feet to the place of beginning.

"Also, the following described real estate in the city of Cincinnati, Hamilton county, Ohio, and being part of lot 73 of Reakirt and Donaldson's subdivision as aforesaid, and bounded and described as follows, towit: Beginning at a pcint in the south line of said lot 73, where the same is intersected by the west line of five-foot (5) strip conveyed to The Riding Club of Cincinnati, by William J. McCormick, by deed recorded in deed book No. 778, page 502, Hamilton county, Ohio, records of deeds; thence westwardly along the west line of said five (5) foot strip extended 59.55 feet, more or less, to the north line of said lot 73; thence eastwardly along the said north line of said lot 73_____feet to the west line of Cumberland street; thence southwardly along the west line of Cumberland street 59.55 feet, more or less, to the southeast corner of said lot 73; thence westwardly along the south line of said lot 73; to the place of beginning."

I find, upon the showing made by the abstract hereinbefore mentioned, that the title to the above described property is good of record in fee simple in the name of "The Riding Club of Cincinnati" (except as hereinafter noted), subject to the following:

1. To the taxes for the year 1914, which are a lien, and unpaid.
2. To the taxes for the year 1915, which are now a lien (amount not yet determined).
3. The Riding Club of Cincinnati is a corporation (not for profit) organized under the laws of Ohio.

I have examined the minutes of the aforesaid corporation, a copy of which is attached to the abstract and considered in forming this opinion. It appears that on the 10th day of December, 1914, a proposition, covering among other things, the property under examination, was made by the Seton Realty Company, wherein an option was asked until the 30th day of April, 1915. Thereupon, on the same day, the trustees of said corporation, by a three-fourths (¾) affirmative vote (voting in person and not by proxy) adopted a resolution accepting the proposition of purchase, granting the option, and instructed its secretary to legally notify the members of a called meeting, stating the time, place and purpose of the same. Notice was given both by publication in a newspaper and by registered mail. Pursuant to the notice, the meeting of the members was held at the time and place stated therein, and by an affirmative vote of three-fourths (¾) of the members, either in person or by proxy, the action of the trustees was ratified. A ten cent United States revenue stamp, duly cancelled, appears on each proxy, and the vote of the individual member is endorsed thereon.

I have also examined senate bill No. 80, passed and approved February 11, 1915, the same providing funds and having reference to the manner in which this property is to be acquired.

I have also had an inventory made of the chattel property situated in the building located on the property herein described, the same being included in the contract between the state of Ohio and the Seton Realty Company, and a copy of which I herewith enclose.

I am informed, that it was the intention of the Seton Realty Company, in accordance with the terms and provisions of its contract with the Riding Club of Cincinnati, to designate the state of Ohio as the purchaser, and have the Riding Club execute instruments of conveyance directly to the state.

The Riding Club cannot legally comply with the provisions of senate bill No. 80. Aside from its contract with the Seton Realty Company, the Riding Club has no authority in law to make a gift of its property. The mere designation of the state as a purchaser would not relieve the conveyance of its gift character.

In order for the Seton Realty Company to comply with the terms of its contract with the state, there must first be a conveyance to it by the Riding Club.

An examination of the Hamilton county records fails to disclose anything that would prevent the Seton Realty Company from conveying this property free, clear and unincumbered, in the event of the transfer as above suggested.

At a conference had with the officers of both the corporations, it was agreed that the above suggestions be carried out, and the Riding Club has executed, and is ready to deliver warranty deed and bill of sale, conveying to the Seton Realty Company the real estate and the chattel property covered by the contract, and the Realty Company will in turn convey to the state.

A certified copy of the minutes of the Riding Club of Cincinnati has been prepared and the same will be made a matter of record, and I am informed that the matter can be closed up without any delay.

Respectfully,
EDWARD C. TURNER,
Attorney General.

263.

MIAMI UNIVERSITY LANDS—LEASED PRIOR TO 1851, UNDER ACT INCORPORATING UNIVERSITY ARE EXEMPT FROM STATE TAXES.

Miami University lands held under leases executed prior to 1851 *are under the terms of the act incorporating the university are exempt from all state taxes.*

COLUMBUS, OHIO, April 20, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of April 14th, which is as follows:

> "For the past twenty-five years or more, no state sinking fund or university fund taxes have been laid on university lands in the townships of Hanover, Milford and Oxford, Butler county, Ohio. These lands are held under lease by the present holders who pay an annual rental direct to Miami University.
>
> "Please give the commission your written opinion whether or not such lands are exempt from the payment of state or any other taxes."

The lands in question are evidently a part of those which were vested by the con-

gress of the United States, by the act of March 3, 1803, in the state of Ohio, for the purpose of establishing an academy to be located in the John Cleves Symmes' purchase, and which were in turn vested by the legislature in the corporation designated by the name and style of "The President and Trustees of the Miami University" created by the act of February 9, 1809, 7. O. L., 184. This act created Miami University, and its president and trustees as a body politic, erected certain designated individuals into a body politic and corporate, defined the powers of the trustees and corporation as such, and with respect to the lands made the following, among other provisions:

> "Section 10. * * * That the said lands * * * be and the same are hereby vested in the said corporation, which, by this act is created, and their successors forever, for the sole use, benefit and support of the said university, to be held by said corporation, in their corporate capacity, with full power and authority to divide, sub-divide and expose the same to sale in tracts of not less than eighty, nor more than one hundred and sixty acres, and for the term of ninety-nine years, renewable forever, subject to a valuation every fifteen years, always considering the land in an unimproved state for the purpose of valuation * * * and the said tenants or lessees shall enjoy and exercise all the rights and privileges which they would be entitled to enjoy did they hold the said lands in fee simple, any law to the contrary notwithstanding * * *."
>
> "Section 11. That the clear, annual rents, issues and profits of all the estate, * * * of which the said corporation shall be seized * * * in their corporate capacity, shall be appropriated to the endowment of the said university. * * *"
>
> "Section 13. That the lands appropriated and vested in the corporation, with the buildings which may be erected thereon, for the accommodation of the president, professors and other officers, students and servants of the university, and any buildings appertaining thereto; and also the dwelling-house and other buildings which may be built and erected on the lands, *shall be exempt from all state taxes.*"

In Armstrong v. Treasurer of Athens County, 10 Ohio Reports 235, it was held that Ohio University lands vested in the trustees of that institution under circumstances quite similar to those above outlined with respect to Miami University, lost their exemption when under authority of subsequent legislation they were sold and deeded in fee simple to the purchasers. The court, in its opinion per Hitchcock, judge, however, clearly recognizes the application of article I, section 10 of the constitution of the United States, prohibiting passage by the state of laws impairing the obligation of contracts.

In Matheny v. Golden, 5. O. S., 361, other Ohio University lands which had not been sold, but were still held under lease for ninety-nine years, renewable forever, were held exempt from taxation under a provision of the act establishing the Ohio University, which corresponded with the provisions of the act incorporating Miami University which is now being considered. The syllabus of the case is, in part, as follows:

> "Where the state, by an act incorporating the Ohio University, vested in that institution two townships of land for the support of the university and instruction of youth, and in the same act authorized the university to lease said lands for ninety-nine years, renewable forever, and provided that lands thus to be leased, should forever thereafter be exempt from all state taxes: *Held,* that the acceptance of such leases at a fixed rent or rate of purchase by the lessees, constitutes a binding contract between the state and the lessees.

"A subsequent act of the legislature, levying a state tax on such lands, is a 'law impairing the obligation of contracts,' within the purview of the 10th section of the 1st article of the constitution of the United States, and is therefore, *pro tanto*, null and void."

Elaborate opinions in support of the judgment and dissenting therefrom were filed by Brinkerhoff, J., and Bartley, C. J., respectively, but the majority of the court sustained the opinion of the former, in which it was held, conformably to the syllabus, that the state having offered lands on terms and conditions which included perpetual exemption from state taxes could not by subsequent statutes, or even by subsequent constitutional amendment, impair the corresponding obligation of contracts which were entered into when the leases were executed. The following language from the opinion is pertinent:

"Here, then, were parties competent to contract; for no one will question the competency in this respect of the complainant and those for whom he sues. Did those parties agree? Did their minds meet? What were the facts? The state opens the negotiation, and, speaking through her legislative act, makes her proposition to the complainant and his associates to this effect: If you will lease these lands at a fixed rent, payable to the Ohio University, for ninety-nine years, your lands thus leased shall be perpetually exempt from all states' taxes. This is the proposition of the state. The complainant and his associates lease the lands accordingly; they bind themselves to pay, have paid and must continue to pay, a fixed rent accordingly; a rent fixed, as a matter of course, at a considerably higher rate than they would have been willing to pay had it not been for the proposed exemption. Relying on the faith of the state for the fulfillment by her of a contract based on her own proposition, they take leases; and thus accept the proposition of the state pure and simple, without modification; and thus the minds of the parties have met. They have respectively agreed to do other particular things.

"Was there a good and valid consideration? To promote and secure the instruction of her youth, may properly be said to have been the primeval, as it is the fundamental and favorite policy of Ohio. This policy originated with the congress of the old confederation, is indicated in the resolutions of that body authorizing the first sale of lands within the limits of our state to the Ohio Company of Associates, and was provided for in the contract of sale between the board of treasury and the agents of that company, while the state was still in embryo. In the constitution of 1802, the first organic law of the state, it is declared that 'religion, morality and knowledge, being essentially necessary to good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience.' Our present constitution declares that 'the general assembly shall make such provision, by taxation or otherwise, as * * * will secure a thorough and efficient system of common schools throughout the state.' And this very year the state is levying a tax for educational purposes alone, amounting in the aggregate to not less than one million two hundred thousand dollars.

"In the payment by those lessees, then, of a larger rent, in faith of the promised exemption, than they otherwise would have been willing to pay, to be paid to the Ohio University, the trustee of the state, and the creature of her legislation, in trust for the promotion of her wise and favorite policy, we find an adequate and valuable consideration for the exemption proposed by the state, and accepted as a material part of the contract by the lessees.

"Here, therefore, we have parties competent to contract; a meeting of

minds, and mutual agreements to do and not to do particular things; and finally a good and valid consideration; and thus there is filled, in every particular, the legal definition of a binding contract.

"Contracts stipulating for exemptions of this kind are not favored in law, and will never be presumed. Charles River Bridge v. Warren Bridge, 11 Peters 420; Taney, C. J., in Ohio Life Ins. & Trust Co. v. Debolt, 16 How. 435. And, as an individual member of this court, and speaking for myself alone, I am free to say that I am very far from being friendly to the policy of such exemptions, and am gratified that our present constitution has effectually prohibited the grant of them in future. But the question of constitutional and legislative policy is one thing, and the questions of law and fact now before us are other and very different things. That here was a contract, perfect in all its requisites, is clear; the language and conduct of the parties is unequivocal, admits of but one interpretation, and leaves no room for presumptions.

"Is the recent legislation of the state such as to impair the obligation of this contract? The question, unfortunately, can have but one answer. It has attempted to tax lands which it had solemnly contracted never to tax. Perhaps we ought to presume—and we should certainly be very glad to be able to presume—that this recent legislation complained of was the result of oversight. But—and we feel neither pride nor pleasure in saying it—the language of that legislation seems to be too explicit, and too direct in its application to those lands, to admit of so charitable a presumption."

That the principles of this decision apply to all state taxes, and not merely to such state taxes as might have been reasonably anticipated at the time the contract was entered into is settled in State ex rel. Treasurer v. Auditor of State, 15 O. S., 482.

If, then the lands concerning which you inquire were leased prior to the adoption of the constitution of 1851, under the terms and conditions of the act of 1809, they are exempt from the state taxes which you mention, and also from all other state taxes such as those for state common school purposes and state highway levies.

I cannot answer your question more specifically without tracing the history of the title of the lands in question.

Respectfully,
EDWARD C. TURNER,
Attorney General.

264.

PUBLIC WORKS—APPROVAL OF CERTAIN RAILROAD LEASES.

COLUMBUS, OHIO, April 20, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication of April 13, 1915, relating to the following leases, to wit:

	"Valuation.
"The P. C. C. & St. L. Ry	$250 00
"The P. C. C. & St. L. Ry	400 00
"The Wheeling & Lake Erie R. R. Co., W. M. Duncan, receiver	300 00"

I am returning these leases with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER.
Attorney General,

265.

ARTICLES OF INCORPORATION—AMENDMENT NOT TO BE FILED IF TO RETIRE PREFERRED STOCK BY ISSUING COMMON STOCK.

The secretary of state should not accept or file an amendment to articles of incorporation, whereby it is sought to retire preferred stock by issuing common stock, thereby exceeding the authorized amount of common stock.

COLUMBUS, OHIO, April 20, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for an opinion under date of April 1st, transmitting the letter of the firm of lawyers stating the facts upon which you desire said opinion. This letter reads as follows:

> "We have your favor in reference to the conversion by amendment of charter of preferred stock into common stock, in which you say you know of no law which will permit it.
>
> "We know of no law which will permit the conversion of common stock into preferred, but nevertheless past attorney generals have advised that it can be done and we did it within the last year.
>
> "We would like very much if you would get an opinion from the attorney general upon this point, as we would like to know what position you will take if we undertake to file an amendment to the charter of the company automatically converting preferred as retired into common."

This department has a further letter from the same firm of attorneys which states the facts a little more fully as follows:

> "We represent a corporation that has seven million dollars of preferred capital outstanding and eight million dollars of common.
>
> "Under their charter they are compelled to retire $350,000.00 of the preferred stock annually.
>
> "We would like to know whether we can amend the charter and convert the preferred stock when it is retired into common stock, and we would like further to know whether you will consider it proper for us to so amend the charter that the preferred stock would automatically become common whenever it was retired and cancelled, so that in the end we would have a corporation with fifteen million dollars of common stock.
>
> "We are writing a similar letter to the secretary of state. We do not seem to have any authority in Ohio upon this subject, except we have an authority that common stock may be converted into preferred. We can see no reason why preferred stock could not be likewise converted into common. We also see no reason why it should not be automatically converted after it is retired, but before taking any action we thought we ought to confer with you in reference to the same."

As to the statement contained in the letter to you that "past attorney generals have advised that common stock may be converted into preferred," I can find no such ruling in the office. However, that is immaterial at the present time.

Section 8719, G. C., provides as follows:

> "A corporation organized under the general corporation laws of the state may amend its articles of incorporation as follows:

"1. So as to change its corporate name, but not to one already appropriated, or to one likely to mislead the public.

"2. So as to change the place where it is to be located, or its principal business transacted.

"3. So as to modify, enlarge or diminish the objects or purposes for which it was formed.

"4. So as to add to them anything omitted from, or which lawfully might have been provided for originally, in such articles. *But the capital stock of a corporation shall not be increased or diminished, by such amendment, nor the purpose of its original organization substantially changed.*"

I assume from the statement of facts that at the time of the incorporation of this company it was authorized to issue eight million dollars of common stock and seven million dollars of preferred stock, the preferred stock to be retired at the rate of $350,000.00 per annum.

A conversion of preferred stock into common stock beyond the amount of common stock authorized would create an increase in common stock, and as provided in paragraph four of section 8719 of the General Code, this may not be accomplished by amendment.

The authorized capital stock of this company is not unconditionally fifteen millon dollars. It is authorized to issue eight million dollars of common stock and *no more.* It is also authorized to issue seven million dollars of preferred stock, but this amount is to be annually reduced until there is no preferred stock, at which time the total authorized capital of the company will be eight million of dollars.

Apparently no right was reserved in the original charter to redeem the preferred stock with *authorized* common stock.

Without going into the rights of the stock holders of the respective classes to object to the proposed amendment (which I am clear they have a right to do), I am of the opinion that you are not authorized by law to allow the filing of the proposed amendment.

Respectfully,
EDWARD C. TURNER,
Attorney General.

266.

BONDS—AUTHORITY TO ISSUE UNDER BENSE ACT FOR PURPOSE OF INSTALLING NEW WATER SUPPLY OR PUMPING WORKS THEREBY ENLARGING EXISTING WATERWORKS—DECISION COURT OF APPEALS DOES NOT REMOVE TAX LIMITATIONS OF BONDS ISSUED UNDER SECTION 1259, G. C.

The decision in Howland v. The Village of Cuyahoga Falls (circuit court of appeals of the eighth district, October 13, 1914), to the effect that bonds issued under section 1259, G. C. (the Bense Act), are subject to the one per cent. limitation of section 3940, G. C. (the "Longworth Act"), does not apply to bonds issued under section 1259, G. C., for the enlargement or extension of waterworks when the income from the existing works is sufficient to pay the operating expenses of the enlarged works, interest charges and to pass an amount to the sinking fund sufficient to retire such bonds when they mature.

Nor does the other ground of the decision in said case, to the effect that the tax limitations must be taken into consideration in determining whether bonds may be issued under section 1259, G. C., apply to such an issue of bonds.

COLUMBUS, OHIO, April 21, 1915.

DR. E. F. MCCAMPBELL, *Secretary and Executive Officer State Board of Health, Columbus, Ohio.*

DEAR SIR:—In your letter of April 6th you quote from a letter addressed to you by Hon. John Sherman Taylor, city solicitor of Cambridge, Ohio, calling attention to the decisions of the common pleas court and court of appeals of Summit county in the case of Howland v. The Village of Cuyahoga Falls, and questioning the effect of the decision upon the power of the city to issue bonds under the Bense act for the purpose of installing a new water supply or purifying works in connection with an existing waterworks plant.

You request my opinion upon the question so suggested, coupling your request with the statement that the present waterworks may be made "self supporting."

The decision cited was an interpretation of section 1259 of the General Code in connection with sections 3939 to 3951, inclusive, of the General Code, the first section being a part of what is known as the "Bense act" and the second group of sections constituting what is known as the "Longworth act" in its present form. Section 1259, General Code, provides for the issuance of bonds by municipal corporations for the purpose of raising the necessary funds to comply with the orders of the state board of health relative to water purification or sewage disposal, and provides in part as follows:

> "Section 1259. * * * The bonds authorized to be issued for such purpose shall not exceed five per cent. of the total value of all property in any city or village, as listed and assessed for taxation, and may be in addition to the total bonded indebtedness otherwise permitted by law. The question of the issuance of such bonds shall not be required to be submitted to a vote."

The provisions of the Longworth act pertinent to the question decided by the court of appeals of the eighth circuit and that submitted by you are as follows:

> "Section 3939. When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two thirds of the members elected or appointed thereto, by ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, and at such rate

of interest, not exceeding six per cent. per annum, as said council may determine and in the manner provided by law, for any of the following specific purposes:

"2. For extending, enlarging, improving, repairing or securing a more complete enjoyment of a building or improvement authorized by this section, and for equipping and furnishing it.

"11. For erecting or purchasing waterworks for supplying water to the corporation and the inhabitants thereof.

"14. For constructing sewers, sewage disposal works, flushing tunnels, drains and ditches.

"Section 3940. Such bonds may be issued for any or all of such purposes, but the total indebtedness created in any one fiscal year, by the council of a municipal corporation, under the authority conferred in the preceding section, shall not exceed one per cent. of the total value of all property in such municipal corporation, as listed and assessed for taxation.

"Sec. 3941. The net indebtedness created or incurred by the council under the authority granted it in section one (1), (G. C., Section 3939), of this act, and in an act passed April 29, 1902, to amend sections 2835, 2836 and 2837 and to repeal section 2837a of the Revised Statutes (O. L., v. 95, p. 318), together with its subsequent amendments, shall never exceed four (4) per cent. of the total value of all property in such municipal corporation as listed and assessed for taxation.

"Sec. 3942. In addition to the authority granted in section one (1), (G. C., section 3939), of this act and supplementary thereto, the council of a municipal corporation, whenever it deems it necessary, may issue and sell bonds in such amounts, or denomination, and for such period of time and rate of interest not exceeding six per cent. per annum, as it may determine upon for any of the purposes set forth in said section one, (G. C., section 3939), upon obtaining the approval of the electors of the corporation at a general or special election in the following manner.

"Sec. 3948. The net indebtedness created or incurred by a municipal corporation under authority of sections one (G. C., section 3939), and four (G. C., section 3942), of this act and under the authority of an act passed April 29, 1902, to amend sections 2835, 2836 and 2837, and to repeal section 2837a of the Revised Statutes (O. L., v. 95, p. 318), (G. C., sections 3939 to 3947), (original numbering), together with its subsequent amendments, shall never exceed in total eight (8) per cent. of the total value of all property in such municipal corporation as listed and assessed for taxation.

"Sec. 3952. That from and after the passage of this act and until and including the 30th day of September, 1911, the limitations of four and eight per cent. prescribed in this act shall be applied to and based upon the total value of all property listed and assessed for taxation in such municipal corporation as determined by the duplicate for the year 1910. On and after the first day of October, 1911, the said four per cent. limitation shall be reduced to two and one-half per cent., and the said eight per cent. limitation shall be reduced to five per cent., and such reduced limitations shall be applied to and based upon the value of all the property listed and assessed for taxation in such municipal corporation as determined by the duplicate then or thereafter in force.

"Sec. 3949. The 'net indebtedness' prescribed in sections three and ten (G. C., sections 3941 and 3948), of this act shall be the difference between the par value of the outstanding and unpaid bonds and the amount held in

the sinking fund for their redemption. In ascertaining the limitations of one per cent., four per cent. and eight per cent. herein prescribed, the following bonds shall not be considered:

"f. Bonds issued for the purpose of purchasing, constructing, improving and extending waterworks when the income from such waterworks is sufficient to cover the cost of all operating expenses, interest charges and to pass a sufficient amount to a sinking fund to retire such bonds when they become due."

In Howland v. Cuyahoga Falls, supra, there was involved the question as to whether a particular prospective bond issue in the sum of one hundred thousand dollars for the purpose of constructing certain lines of trunk sewers and a sewage disposal plant to be used in connection therewith was lawful. The common pleas court, per Rogers, J., held upon the questions argued and presented:

"1. That the state board of health had no authority to order the village to construct the sewers in connection with the sewage disposal plant, but its authority extended only to the installation of the plant itself; so that bonds could not be issued under section 1259, General Code, and subject to its peculiar limitations, the proceeds of which were to be in part devoted to the construction of a system of sewers.

"2. That under the tax limitation laws of the state the village would be without power to levy the necessary taxes to meet the interest and sinking fund requirements of the proposed bond issue."

The court of appeals passed over the first question decided by the common pleas court, and planted its decision at least in part upon the proposition that the effect of section 1259, General Code, is not to remove as to bonds issued thereunder all the limitations of the Longworth act, but only those relative to the net indebtedness outstanding at any one time, that is, the limitations of section 3941 and 3948, General Code, as above quoted, respectively; so that the limitation of section 3940, relative to the amount of bonds that might be issued in any one year remains applicable to bond issues under section 1259. In reaching this conclusion the court gives to the phrase "in addition to the total bonded indebtedness otherwise permitted by law" a strict interpretation, emphasizing the word "total."

It appearing in the case before the court of appeals that the bonds proposed to be issued by the village of Cuyahoga Falls would cause the one per cent. limitation of the Longworth act to be exceeded, this of itself was considered to be a sufficient ground for enjoining their issuance.

But the court of appeals also held with the common pleas court that levies to retire bond issues under the Bense act would have to be made within the appropriate limitations of the Smith one per cent. law, so called, and that under the facts of the case it did not appear that the necessary interest and sinking fund levies could be made within the limitations. The court here based its decision in part upon Rabe v. Board of Education, 88 O. S., 403, giving to that decision what appeals to me as a rather strict interpretation. There is, however, no question that under the decision in Rabe v. Board of Education, supra, the tax limitations constitute, indirectly, debt limitations.

With the foregoing analysis of the decision in Howland v. Cuyahoga Falls in mind its application to the question presented by you may be considered. It is clear from paragraph "F" of section 3949, General Code, that under certain circumstances waterworks bonds are in a class by themselves for the purpose of the Longworth act. Just what the exact application of this provision may be I do not feel called upon to determine, as no facts are stated in your letter which call for a precise interpretation or the application thereof. I assume, however, that by the phrase "self-supporting,"

as applied to the present waterworks of the city of Cambridge, you mean that the water rents are such or will, prior to the issuance of the bonds, be made such as that the revenue resulting from the operation of the works is, or may be reasonably anticipated to be in the future, sufficient to cover the cost of all operating expenses on account of the improved and extended works, the interest charges on all outstanding bonds, including those proposed to be issued, and the creation of a sinking fund to retire the proposed bonds when they become due. If these conditions exist at the time the bonds are issued, then by the express provisions of section 3949, General Code, such bonds would not be considered in ascertaining the one per cent. limitation; that is, their issuance would not be subject to that limitation. That being the case, one ground of the decision in Howland v. Cuyahoga Falls would not apply to nor prevent the issuance of bonds for such purposes, even if the amount to be issued would exceed one per cent. of the duplicate of the city.

A more difficult question is presented with respect to the application of the other ground of the decision in Howland v. Cuyahoga Falls to a case of bonds issued for waterworks purposes under the circumstances stated by you. Such bonds are, of course, general tax duplicate bonds for the retirement of which under article XII, section 11 of the constitution, provision must be made at the time of issuance by the levy and collection of taxes. Yet under the implied authority of section 3949, General Code, and under the direct authority of section 3959, General Code, the interest and sinking fund charges of a waterworks bond issue may be met out of the surplus earnings of the waterworks, and thus not become a burden upon the general tax duplicate.

Said section 3959, General Code, is as follows:

> "Section 3959. After paying the expenses of conducting and managing the waterworks, any surplus therefrom may be applied to the repairs, enlargment or extension of the works or of the reservoirs, the payment of the interest of any loan made for their construction or for the creation of a sinking fund for the liquidation of the debt. The amount authorized to be levied and assessed for waterworks purposes shall be applied by the council to the creation of the sinking fund for the payment of the indebtedness incurred for the construction and extension of waterworks and for no other purpose whatever."

Upon careful consideration I reach the conclusion that waterworks are not within the doctrine of Rabe v. Board of Education and Howland v. Cuyahoga Falls, supra, when it can be anticipated at the time the bonds are issued that the net income from the waterworks, after paying operating expenses, will be sufficient to meet the interest and sinking fund requirements of the bonds. At the very least the surplus water rentals over operating expenses would obviate the necessity of making levies which might otherwise be made for extensions and betterments of the waterworks, and in any view of the case would, if sufficient to meet the interest and sinking fund requirements of the bond issue, have to be regarded as dispensing *pro tanto* with the necessity of levying taxes. Therefore, the limitations upon the taxing power would in no wise be involved in such a case. There is a direct relation between the ability of the municipality to levy under the tax limitations for the retirement of such bonds and the existence of a surplus from water rentals.

It is my opinion, therefore, that neither of the grounds upon which Howland v. Cuyahoga Falls, *supra*, was decided would apply to or present the issuance of bonds for the purpose of constructing improvements in connection with the waterworks of the city under the Bense act, when the income from the waterworks is sufficient to pay all operating expenses of the works and to pay interest charges and accumulate a sinking fund for the retirement of the bonds at maturity.

In answering your question I think it proper to refer to the provision of article XVII, section 12 of the constitution, which is as follows:

> "Section 12. Any municipality which acquires, constructs or extends any public utility and desires to raise money for such purposes may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such municipality but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure."

If action is taken under this provision, it is obvious that neither the debt limitations nor the tax limitations provided by general laws will in any way affect or impair the authority of the municipality to issue such mortgage bonds.

Respectfully,
EDWARD C. TURNER.
Attorney General.

267.

DISTRICT ASSESSOR—MERE APPOINTMENT OF DEPUTY ASSESSOR FROM ELIGIBLE LIST IS NOT COMPLETE APPOINTMENT SO AS TO ENTITLE PERSON TO PROTECTION OF CIVIL SERVICE LAW.

When a district assessor notifies one of two persons on the eligible list for appointment as deputy assessor of a meeting of deputy assessors, but does not otherwise indicate that he has appointed such person as a deputy assessor, and in fact no such appointment is recorded or certified, and where the person in question does not regard the notice as an appointment and does not accept it as such, no appointment has been made and the person in question is not entitled to the protection of the civil service law.

COLUMBUS, OHIO, April 21, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letters of April 16th and April 20th submitting for my opinion thereon the following facts:

> "On the morning of March 31, 1915, E. J. Carey, district assessor of Hardin county, was removed by the tax commission, and so notified by telegram. R. D. Turner was appointed his successor, but did not qualify and assume his office until Saturday, April 3rd. He was notified by Mr. Carey that there was a vacancy in the assessor's force for the city of Kenton, made some time previous by the resignation of C. J. Griffith. On Saturday, the second place in the city of Kenton was made vacant by the resignation of Ross W. Scott. There are but two assessors in the city of Kenton. A year ago, when the civil service examinations were held, but four candidates qualified for the two places, so on the resignation of Griffith and Scott, the eligible list consisted of two names. The civil service commission holds that where there are less than three names on the eligible list, the district assessor has

the right to disregard the eligible list entirely and make an outside appointment, subject to their approval. Finding no record of an appointment for a successor of either Mr. Griffith or Mr. Scott, Mr. Turner, the district assessor, appointed I. A. Wynn and D. W. Wagner to these assessorships, and applied to the civil service commission for their approval of the provisional appointments.

"In reply he received the following letter:

" 'MR. R. D. TURNER,
" 'Kenton, Ohio.
' 'DEAR SIR:—The two provisional nominations for deputy assessor in Kenton have not been approved by the commission.
"Our records show that Albert McFarland was duly appointed from an eligible list, and if he is willing to serve it will be necessary to give him the work. You should then indicate to this commission one of the two provisionals you desires us to act upon.
" 'Yours very truly,
[Signed.] " 'C. H. BRYSON,
" 'Acting Secretary.'

"Upon investigation and conference with the civil service commission, we find that the only written notification that Mr. McFarland had, consisted of a carbon copy of a circular letter reading as follows:

" 'DEAR SIR:—There will be a meeting of the deputy assessors, Saturday, April 3rd, at 1 p. m., to make preparation to commence the valuation of property on Monday, April 5th.
" 'It is important that you be here, and to get through with the work we want to commence promptly at 1 p. m.
" 'Very truly yours,
[Signed.] " 'C. J. CAREY,
" 'District Assessor.'

"Mr. Carey did not certify either to the county auditor or to the tax commission of Ohio, his appointment of Mr. McFarland as is required under section 33 of the Warnes law. No one would have known of the appointment had he not raised the question himself with the civil service commission, which held this afternoon that the receipt of this circular letter itself, constituted the appointment. Mr. McFarland did not furnish a bond, and he did not appear at the conference of district assessors called by Mr. Turner and advertised in the paper.
"Mr. Carey, before he left the office, made out a list of deputy assessors for his successor, Mr. Turner, Mr. McFarland's name did not appear on this list.
"On the evening of March 31, Mr. McFarland called Mr. Turner by telephone and asked him if he (McFarland) would be appointed as deputy assessor. He called Mr. Turner again on Friday afternoon, April 2nd. In neither conversation, according to Mr. Turner, did Mr. McFarland say anything about his alleged appointment. He never called at the office of the district assessor."

As you yourself suggest, the only question in the case appears to be as to whether or not Mr. McFarland was appointed by the outgoing district assessor. If he was

appointed then it may be assumed that he is entitled to the place unless removed by the incoming district assessor. If he was not appointed then it would appear that the provisional appointment for the place in question was regular and should be approved by the civil service commission. I have no hesitancy in holding that no valid appointment was made.

The following essential facts may be recapitulated from your very full statement:

> "1. The outgoing district assessor made no record of such an appointment.
>
> "2. No such appointment was certified, as required by section 33 of the Warnes law, to the county auditor or to the tax commission of Ohio.
>
> "3. No direct evidence of any kind exists showing that such an appointment was made. The only evidence of an intention to appoint is the sending out of a circular letter by the outgoing district assessor. That this was not treated as an appointment is clear from the fact that Mr. McFarland himself did not so regard it."

Even if there had been an appointment, so far as the outgoing district assessor could have made it such, the appointment could not have been complete unless accepted by Mr. McFarland. Mr. McFarland did not, of course, accept the appointment as such.

For the foreging reasons, I am of the opinion that no complete appointment has been made, and that within the reason and spirit of the civil service act Mr. McFarland did not at the time the provisional appointment was made hold a position in the classified service of the assessment district of Hardin county.

Respectfully,
EDWARD C. TURNER,
Attorney General.

268.

BONDS—INDUSTRIAL COMMISSION OF OHIO—LAKE COUNTY INTER-COUNTY HIGHWAY.

Bonds in amount of $68,000 *issued by Lake county for improvements of the inter-county highway held invalid and their purchase not recommended.*

COLUMBUS, OHIO, April 21, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of April 2, 1915, enclosing transcript of the proceedings and records of the county commissioners of Lake county, Ohio, relative to the issuance of bonds to the amount of $68,000.00 for the improvement of the Cleveland-Buffalo inter-county highway No. 2, together with a copy of the proposed form of bond, and requesting my opinion relative to the authority of your commission to purchase the same.

If the bonds in question are valid obligations of Lake county, the industrial commission is authorized to purchase the same under section 1465-58 of the General Code. Therefore, a determination of whether or not the bonds in question are valid obligations of Lake county will answer both of your questions.

The transcript discloses that said bonds have been issued under authority of section 1223 of the General Code for the purpose of securing money to pay the county's

share of improving said inter-county highway. The portion of such cost assumed by the county in the first instance was 50 per cent. of the entire estimated cost, and in addition, the entire cost of the necessary bridges and culverts. The portion of the road to be improved lies in Willoughby and Mentor townships, and the trustees of each of these townships by resolution adopted and certified to the county commissioners, have agreed to pay an amount equal to twenty-five per cent. of the entire cost of improving so much of the road as lies within their respective townships, which, in effect, relieves the county as such from paying one-half of the amount originally assumed by it, and to the same extent transfers the burden of such payment to said townships of Willoughby and Mentor.

According to the agreement contained in the original application of the county commissioners, and the subsequent shifting of a portion of the burden to Willoughby and Mentor townships, accomplished through resolutions of their respective trustees, one-half of the money necessary to pay interest and create a sinking fund to redeem said bonds when due must be raised by tax levy upon all the taxable property of the county, and the remaining half, divided in the proportions above stated, must be raised by a tax levy upon all the taxable property of Willoughby and Mentor townships.

Section 11 of article XII of the constitution of Ohio provides as follows:

> "No bonded indebtedness of the state, or any political subdivision thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

The resolution of the county commissioners of Lake county authorizing the issuance of said bonds contained the following provisions:

> "That for the providing an amount sufficient to pay the interest on said bonds and to provide a sinking fund for their final redemption at maturity, there shall be, and hereby is ordered levied upon all the taxable property of said county, in addition to all other taxes, the following direct annual tax, to wit:
>
> "In the year 1915, a tax sufficient to produce the sum of..... $1,700
> "In " " 1916, " " " " " " " 10,400
> "In " " 1917, " " " " " " " 10,050
> "In " " 1918, " " " " " " " 9,700
> "In " " 1919, " " " " " " " 9,350
> "In " " 1920, " " " " " " " 9,000
> "In " " 1921, " " " " " " " 9,650
> "In " " 1922, " " " " " " " 9,250
> "In " " 1923, " " " " " " " 8,850
> "In " " 1924, " " " " " " " 9,450
>
> "Said tax shall be and hereby is ordered certified, levied and extended upon the tax rolls and collected by the same officers, in the same manner and at the same time as the taxes for the general purposes, in each of the said years are certified, extended and collected; that all funds derived from said tax shall be placed in said sinking fund, which together with all interest collected on the same shall be irrevocably pledged to the payment of the principal of said bonds when and as the same shall fall due."

Apparently, the above is the only provision which has been made by the county

commissioners of Lake county for the payment of interest upon said bonds, and to create a sinking fund for their redemption as they become due. No provision has been made for levying a tax upon the townships of Willoughby and Mentor to secure funds to pay their proper proportion of the interest and the principal of these bonds. I am unable to understand how the county commissioners expect to collect from Willoughby and Mentor townships the respective amounts which they have agreed to pay. Neither am I able to understand by what authority a levy of taxes is authorized and directed against the taxable property of Lake county to pay the entire amount of the interest and principal of these bonds, when by specific agreement the county is under obligations to pay only one-half of the same.

I am, therefore, of the opinion that the county commissioners of Lake county, in authorizing the issuance of the bonds to the amount of $68,000.00 for the improvement of the Cleveland-Buffalo inter-county highway No. 2, have not complied with the requirements of the section of the Ohio constitution above quoted, and that the same should not be purchased by the industrial commission of Ohio.

In the event that the county commissioners of Lake county decide to correct their proceedings, and in anticipation of a future re-submission of the question of the validity of these bonds, I desire to call attention to certain omissions in the transcript of information necessary to enable me to intelligently advise your commission:

1. There is no affirmative showing that the state highway commission designated said road by name and number as an inter-county highway.

2. There is no showing of what portion of the total existing bonded indebtedness of Lake county has been issued for the improvement of the inter-county highways. (Section 1223 of the General Code.)

3. Resolution authorizing bond issue should provide for a levy on the duplicates of Willoughby and Mentor townships to pay their respective shares of the bonds issued.

4. Transcript fails to show the amount of the tax duplicate of Willoughby and Mentor townships; also fails to show whether the townships can raise funds for the obligation assumed and still keep within the tax limitation.

Transcript does not show the amount of the bonded indebtedness of the townships of Willoughby and Mentor.

Although there is no information to that effect in the submitted transcript, yet upon investigation at the office of the state highway commissioner, I find that there is only $16,000.00 in the inter-county highway fund available for use in Lake county. It is evident from the records that the state highway department intends to pay the remaining portion of the state's 50 per cent. of the cost of said road improvement from the main market road fund. The state highway department has advertised for and received bids for the proposed improvement in two parts—one contract covering the cost of grading, etc., and the other contract covering the cost of the concrete foundation and the surfacing.

Although the state highway commissioner is given wide latitude and authority in respect to the main market road fund under section 6859-5 of the General Code, yet it is extremely doubtful whether or not he is authorized to pool any portion of such fund with the inter-county highway fund and with funds of the several counties and townships.

A more serious question arises, however, relative to the right of the county commissioners to agree with the state highway commissioner to pay one-half of the cost of a road improvement, and to issue bonds upon the strength of such agreement, when, as a matter of fact, there is not sufficient money in the inter-county highway fund available to pay the portion of the cost of such improvement assumed by the state.

Some other method of procedure should be adopted and followed. If the road in question is, as I am informed, a main market road, the highway commissioner has undoubted authority to improve any part of the same out of the main market road

fund, and since the county commissioners are not limited by law to the payment of 50 per cent. of the cost of improving an inter-county highway, but may pay any portion thereof (Section 1207, General Code) in the event that there is not sufficient inter-county highway funds available to pay the state's full 50 per cent. I see no reason why the state highway commissioner may not, by separate and distinct contracts, improve a section of the road from the main market road fund and the remainder from funds supplied by the several townships, assessments upon abutting property and the inter-county highway funds. Such a method would keep the main market road fund and the inter-county highway fund separate, and remove any question as to the validity of the bonds issued by the county commissioners, which might arise from the method of pooling inter-county highway and the main market road funds.

I am herewith returning to you the transcript and bond form submitted with your enquiry.

Respectfully,
EDWARD C. TURNER,
Attorney General.

269.

MUNICIPAL COURT, CITY OF COLUMBUS—JUSTICE OF PEACE—TERM CANNOT BE EXTENDED AS MUNICIPAL JUDGE BY LEGISLATURE.

COLUMBUS, OHIO, April 21, 1915.

To the Judiciary Committee of the Ohio Senate, Columbus, Ohio, HON. OTTO E. VOLLENWEIDER, *Chairman.*

GENTLEMEN:—I am in receipt of your letter of April 20, 1915, in which you request my opinion as follows:

> "A question arises before our committee relative to the bill amending 'An act creating a municipal court for the city of Columbus.'
>
> "Mr. T. H. Hennessy was elected justice of the peace in the city of Columbus, for a period of two years beyond the time at which the municipal court begins, and the question is whether or not we can, under the present bill, extend the term of justice Hennessy for two years.
>
> "The law creates a court of larger jurisdiction and larger salaries, and abolishes the present justices of the peace and police courts. It was passed in 1913. The present bill is amendatory of that act.
>
> "Justice Hennessy has been before our committee, and is in favor of the municipal court, but the question of the extension of his term comes up at this time.
>
> "The committee will appreciate very much an early opinion from you as to the advisability of extending this term."

As recited in your letter, the act creating a municipal court for the city of Columbus (103 O. L., 292), sections 1558-46, et seq., of the General Code, as well as the present bill before your committee to amend said act, abolishes the offices of justice of the peace and police court in the city of Columbus, and creates a municipal court for said city, having larger jurisdiction than that exercised by said justice of the peace and police courts.

As I understand the question submitted, it involves the right of the legislature to

appoint Mr. T. H. Hennessy as one of the judges of the municipal court of Columbus for a period of two years, commencing with the installation of the court.

In answering your question, permit me to call your attention to section 27 of article II of the constitution of Ohio, which is as follows:

> "The election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this constitution, or the constitution of the United States, shall be made in such manner as may be directed by law; but no appointing power shall be exercised by the general assembly, except as prescribed in this constitution, and in the election of the United States senators; and in these cases the vote shall be taken 'viva voce.' "

A full and very apt discussion of the language used in the above quoted section of the constitution, which denies the appointing power to the general assembly, is found in the case of State ex rel. Attorney General v. Kennon, et al., 7 O. S., 546. The principle involved is stated at length and clearly explained in the syllabus as follows:

> "1. That the general assembly may by law direct the manner in which all offices existing or created by law or vacancies therein shall be filled by appointment, except in cases provided by the constitution.
>
> "2. Directing by law the manner in which an appointment shall be made, and making an appointment, are the exercises of two different and distinct powers; the one prescribing how an act shall be done, being legislative; and the other, doing the act, being administrative.
>
> "3. The constitutional provision which authorizes the general assembly to prescribe by law how an appointment shall be made, by express provision and condition withholds from the general assembly all appointing power.
>
> "4. Conceding that the general assembly may provide by law for the creation of an office in the form of a board clothed with the power of selecting, appointing and removing all officers and filling all vacancies not otherwise provided for by the constitution, in all offices; and conceding an unlimited power in the general assembly to pass laws providing for the creation of offices or boards in such cases, even permanent or for life (question which are not before us), yet the general assembly cannot exercise any appointing power to fill such boards or offices.
>
> "5. The exercise of the power of appointment and removal of state officers, and the filling of vacancies which may occure in state offices, is a high public function and trust, and not a private, or casual, or incidental agency; and the officers of the board so created by statute, to exercise these public functions, are vested with official state power, and hold and exercise a public franchise and office."

There is no analogy between the facts presented in your inquiry and the facts which were before the supreme court of Ohio in the case of State ex rel. v. Yeatman 89 O. S., 44. In that case the acts of the legislature, "Providing for enlarging and extending the jurisdiction of the police court of the city of Cincinnati, and changing the name of such court to the municipal court of Cincinnati" (103 O. L., 279); also a similar act relating to the city of Dayton (103 O. L., 385), were before the court upon the question of their validity. These acts did not abolish the existing police courts of Cincinnati and Dayton, nor did they create any new courts.

The situation presented by your letter and by the act creating the municipal court of Columbus presents an entirely different situation. By this act the offices of judge of the police court for Columbus and of justices of the peace for Montgomery township are abolished, and an entirely new court is created.

I am therefore of the opinion that the legislature is prohibited by section 27 of article II of the constitution of Ohio from appointing Mr. T. H. Hennessy, or any other person, as one of the judges of the municipal court of the city of Columbus.

Respectfully,
EDWARD C. TURNER,
Attorney General.

270.

UNIVERSITY OF CINCINNATI—TRUSTEES NOT REQUIRED TO PURCHASE SUPPLIES FROM PURCHASING DEPARTMENT ESTABLISHED UNDER SECTION 3626, G. C.

The trustees of the University of Cincinnati are not required to make purchases from purchasing department established under section 3626, G. C.

COLUMBUS, OHIO, April 21, 1915.

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

GENTLEMEN:—I am in receipt of your letter of March 2, 1915, requesting my opinion upon the following question:

> "The city of Cincinnati has a regularly established purchasing department, established under authority of section 3626, General Code, et seq.
>
> "Are the trustees of the University of Cincinnat, acting under the special laws creating said board of trustees, required to make purchases of supplies, etc., through said purchasing department (see section 3626), or may they act independently of said department?"

Section 3626, G. C., authorizes council of a city:

> "To establish and furnish the necessary equipment for a municipal department to be known as the department of purchase, construction and repair. Such department shall be under the management and control of the director of public service, who shall purchase all material, supplies, tools, machinery and equipment, together with all construction, alterations and repairs of every kind and thing in each of the departments of the municipality whether established by law or ordinance."

Such department is under the management of the director of public service, who is required to purchase the things therein enumerated "in each of the departments of the municipality whether established by law or ordinance." The term "departments" as therein used has a peculiar signification and does not mean each and every branch of government, as, for example, under the provisions of section 4323 there is established a department of public service; under the provisions of section 4367 a department of public safety; under the provisions of section 4205-1 a municipal pawn department. See also sections 3787 and 3796.

The laws relating to municipal universities are contained in sections 4001-4003, inclusive, and sections 7902-7922, inclusive. In none of said sections, however, is there any indication that the legislature intended that such a university should be considered within the restricted definition of "department" of a municipality. Consequently I

am of the opinion that the trustees of the University of Cincinnati are not required to make purchases of supplies, etc., through the purchasing department established under section 3626, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney General.

271.

STATE HIGHWAY COMMISSIONER—CONTRACT—FOR ROAD IMPROVEMENT IN CUYAHOGA COUNTY LEGALLY AWARDED.

Upon the facts as now submitted, a contract for a road improvement in Cuyahoga county was legally awarded by the state highway commissioner to the firm of Aikens & McCleary, and no legal ground exists for the cancellation of the same.

COLUMBUS, OHIO, April 22, 1915.

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

DEAR SIR:—Under date of March 30, 1915, your predecessor Hon. James R. Marker, addressed a communication to this department relative to a contract with the firm of Aikins & McCleary, the communication being received by me on April 2nd. In this communication it was stated that there was on file in the office of the state highway commissioner an opinion rendered January 6, 1915, by my predecessor, Hon. Timothy S. Hogan, relative to the Aikins & McCleary contract. It was further stated that this opinion was based upon a certain statement of facts incorporated in the formal request for the same, and that it now appears that a full and complete statement of facts was not submitted and that certain undisclosed facts existed which, had they been known at the time the opinion was rendered, might have had a bearing upon the decision of the attorney general. These additional facts are submitted with the communication of your predecessor in the form of correspondence and affidavits, and my opinion is requested as to the matter involved.

From an examination of the files of this office, it appears that the communication of my predecessor, under date of January 6, 1915, was not in the nature of a formal opinion, but was merely a letter addressed to the state highway commissioner, in response to a request as to how to proceed in the matter of the Aikins & McCleary contract. It also appears from the letter of my predecessor above referred to, that the facts on which the same was based were not embodied in any formal request for an opinion, but were gathered from the correspondence on file in the office of the state highway commissioner, and in an informal way by a representative of this department.

The only document on the files of this office which appears to relate to the Aikins & McCleary contract, other than the letter of my predecessor referred to above, is a letter from Mr. Marker, under date of December 4, 1914, addressed to this department, in which the following language was used:

> "The county surveyor of Cuyahoga county some months ago asked our advice as to what disposition should be made of a certain contract which had been awarded, under what seemed to be suspicious circumstances, to a former employee of the Cuyahoga county surveyor's office. This matter was turned over to Mr. P. J. Monahan, and he and Mr. H. J. Bradbury called upon the county surveyor at Cleveland in an attempt to adjust it. They are both familiar with all the facts, and should again confer with the Cuyahoga county officials without unnecessary delay."

The letter of my predecessor dated January 6, 1915, and referred to as an opinion in the communication of your predecessor, dated March 30, 1915, appears to have been an answer to the letter quoted above, and reads as follows:

In re—AIKINS & MCCLEARY CONTRACT.

"You have asked for advice as to how to proceed in the above entitled matter.

"The facts as taken from the correspondence and from personal investigation by your department, are that you appointed Mr. Frank Lander, the surveyor of Cuyahoga county, as resident engineer for that county, to make surveys of and to prepare land estimates and specifications for the improvement of the Richmond road, section No. 7, in said county.

"A Mr. McCleary, who was a deputy in the office of the county surveyor, was authorized by his chief to direct the work of surveying said road and of the making of plans, specifications and estimates for the construction thereof. Mr. McCleary certified to the highway commissioner the results of his alleged survey.

"After the time of making the survey, etc., and before the advertisement for bids and the letting of the contract for said improvement, Mr. McCleary retired from the county surveyor's office and formed a partnership with a Mr. Aikins under the firm name of Aikins & McCleary. This firm submitted a bid for the construction of said improvement, and its bid being the lowest, was accepted. A contract was duly entered into between you, representing the state, and the firm of Aikins & McCleary.

"After entering into the contract, but before any work was done thereunder, the alleged discovery was made that certain quantities named in the alleged estimates of Mr. McCleary were much in excess of the actual quantities to be moved. It is stated in the correspondence that no actual survey had been made for this improvement, from which the quantities could be accurately computed, because it was presumed that the work would be let on a unit price basis and that Mr. McCleary had knowledge that the quantities were excessive.

"My advice to you, based upon the above mentioned information, is to declare said alleged contract forfeited on the ground that the estimate certified to you by Mr. McCleary, upon which the contract was based, was grossly excessive, and furthermore that it is against public policy to permit Mr. McCleary to derive benefit from the knowledge he had of the facts surrounding this transaction. You should then have a proper estimate made, readvertise for bids, and award the contract to the lowest bidder."

Attached to the request for an opinion on the facts as they now appear are certain documents, which documents are as follows: First, a letter to Mr. Marker from Tolles, Hogsett, Ginn & Morley, attorneys of Cleveland, Ohio, representing Aikins & McCleary; Second, affidavit of J. M. McCleary, member of the firm of Aikins & McCleary; third, affidavit of S. H. Murdock, a former employ of the county surveyor's office of Cuyahoga county; fourth, letter from Tolles, Hogsett, Ginn & Morley to William A. Stinchcomb, resident engineer for Cuyahoga county; and fifth, a letter from Mr. Stinchcomb to Tolles, Hogsett, Ginn & Morley. I am left to gather from these exhibits the facts on which my opinion is now requested, and have therefore been forced to resort to the files in your office and to a report of a personal investigation of the matter made at Cleveland by a representative of this department, in an effort to secure all the facts before passing on the matter.

In this connection it should be stated that certain correspondence relating to the

Aikins & McCleary contract appears to be missing from the files of your office. The filing clerk states that this correspondence was taken in 1914 from the files in the office of the state highway commissioner by a representative of this department, who was engaged in investigating the matter, and that the correspondence in question was mislaid or lost and cannot now be found. The facts as they now appear are as folows:-

In September, 1913, Aikins & McCleary bid on the construction of an intercounty highway in Cuyahoga county. The bids were opened on October 1, 1913, and Aikins & McCleary were awarded the contract upon their bid of $65,981.00, the estimate for the work being $68,031.50. There were two bidders other than Aikins & McCleary and their bids were $67,600.00 and 67,800.00 respectively. A contract was duly entered into between Aikins & McCleary and the state highway commissioner acting on behalf of the state of Ohio, and work was started on the construction of the road. In the meantime, there had been a change in resident engineers on this road improvement. Mr. William A. Stinchcomb succeeded Mr. Frank R. Lander, and Mr. Stinchcomb called the attention of the highway department to certain alleged irregularities affecting the contract. The matter was referred to the then attorney general, Hon. Timothy S. Hogan, who advised that the alleged contract be declared forfeited, his decision being based on the supposed facts set forth in his letter of advice to the state highway commissioner under date of January 6, 1915, and quoted above. Aikins & McCleary had started work on the road on March 26, 1914, but on March 28, 1914, the state highway commissioner notified them not to do any more work on the road until the matters brought to the attention of the highway department by Mr. Stinchcomb had been adjusted. Aikins & McCleary complied with the terms of the notice given them by the state highway commissioner and have not done any further work on the road, but have always insisted that they had been legally awarded the contract and that they would insist upon being allowed to perform the same. It will be noted from the above that the charge that there was something irregular in the awarding of this contract was in the hands of the state highway commissioner as early as March 28, 1914, but that the letter of advice of my predecessor to the effect that the contract be declared forfeited or cancelled was not written until January 6, 1915.

It now develops that the assumed facts upon which the letter of advice of my predecessor was based were not correct, and that in some manner he had been misinformed as to the real facts of the case. The actual facts were that prior to September 1, 1913, J. M. McCleary was employed as a deputy in the office of the county surveyor of Cuyahoga county, Mr. Frank R. Lander. On September 1, 1913, upon the retirement of Mr. Lander from office of county surveyor, Mr. McCleary left the employ of that office and formed a partnership with one Aikins for the purpose of engaging in the contracting business. Mr. Lander had been appointed resident engineer on the road improvement in question on June 27, 1913. As such resident engineer in the month of August, 1913, he designated one S. H. Murdock, who had been employed as one of Mr. Lander's deputies in the county surveyor's office, to prepare an estimate for the road improvement in question. This duty was performed by Murdock and McCleary had nothing whatever to do with the preparation of this estimate, neither had he anything to do with the old survey on which this estimate was based. After McCleary left the office of the county surveyor on September 1, 1913, and formed his partnership with Aikins, the firm about September 15, 1913, bid on the road improvement in question and was awarded the contract. McCleary in his affidavit says that before bidding for the contract he made a personal investigation of the improvement in question, going over the road with the grading foreman employed by his firm, and afterward making a comparison between the estimate and the actual grading paid for on a similar section of this road, and that from this investigation he gathered the information on which he based his firm's bid. It appears as a matter of fact that the estimate made by Murdock was largely a guess, that he made little effort to get

exact results due to his understanding that the contract was to be let on a unit price basis rather than on lump sum bids, and due to the further fact that the state highway department insisted on the estimate being made in a very few days, the time not permitting a careful survey of the road. As a result, Murdock's estimate of the amount of excavation was considerably in excess of the amount that will actually be required in the performance of the contract.

Previous to this time it had been the custom of the highway department to let all Cuyahoga county contracts on a unit price basis, but this contract was advertised to be let on lump sum bids. As soon as the form of the advertisement came to the notice of Mr. Lander, he called the attention of the highway department to the fact that the grading estimate was probably excessive, inasmuch as the estimate was prepared on the theory that bids were to be taken on a unit price basis. The highway department, however, took no action on the information furnished by Mr. Lander, evidently relying upon the printed information furnished all bidders to the effect that the estimates were only approximate, although the result of calculation, and that the contractor must be responsible for his own data on which to base his bid. There is no evidence of fraud or of collusion between Murdock and McCleary, and no charge made by any person that any such fraud or collusion existed. It is not claimed by any one that the Aikins & McCleary bid is excessive, taking into account the work that will actually be required in the performance of the contract, and Mr. Stinchcomb, the present resident engineer, in his letter to Tolles, Hogsett, Ginn & Morley, has the following to say:

> "The present controversy results in no way because of a belief in the mind of the writer that the amount bid for the work to be done is unreasonable or excessive, and your statement that in comparison with similar work on the same road, it appears that the bid submitted by Aikins & McCleary is practically the same per mile as that for which the previous work was done, is correct."

Upon the above statement of facts the question presents itself as follows: Is a firm disqualified from bidding on a contract for a road improvement to be let by the state of Ohio upon the ground and for the reason that a member of the firm was in the employ of the county surveyor as a deputy at the time the estimate was prepared for the proposed state road improvement, the county surveyor and the resident engineer on the proposed state road improvement being the same person, the member of the firm in question not having anything to do with the preparation of the estimate or the survey on which the same was based, that work being done by another person under the direction of the resident engineer, it being a fact that the estimate was considerably in excess of the actual amount of grading required to be done in the performance of the contract, and the further fact existing that all bidders were required, in submitting their bids, to use a blank upon which was the printed information that the estimates were only approximate and that contractors must be responsible for their own data on which to base their bids.

I am of the opinion that this question must be answered in the negative, and that upon the facts above stated, the firm of Aikins & McCleary was not disqualified from bidding on the contract in question. The contract having been awarded to said firm, I am of the opinion that the facts stated above, standing alone, do not constitute a ground for cancelling the contract.

This opinion is based upon the assumption that the facts now presented to me and stated herein are true, and that they constitute all material facts in the case.

Respectfully,

EDWARD C. TURNER,

Attorney General.

272.

TOWNSHIP BONDS—ERROR IN PRINTING AS TO DATE OF MATURITY —TERMS OF RESOLUTION OF TOWNSHIP TRUSTEES WILL GOVERN IN SUCH CASES.

A typographical or clerical error in the printing of township's bond as to the date of maturity will be controlled by the terms of the resolution authorizing their issuance relative thereto and the bonds will mature according to the terms of the resolution.

COLUMBUS, OHIO, April 22, 1915.

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

GENTLEMEN:—I acknowledge receipt of your request under date of April 7, 1915, for an opinion as follows:

> "1. If a board of township trustees issue bonds in the sum of $20,000.00 for the improvement of roads in the township, the first bond to mature September, 1914, and it develops later that in printing the bonds a mistake was made and that they were all made to mature in 1920, and the bank holding same has agreed to accept payment as provided in the original resolution, may township trustees pay in addition to the interest accrued on the bonds up to the correct date of its maturity, an additional amount to cover the time from said date to the time of the compromise? In other words, can they legally pay interest in excess of the amount that would have been due had the bond been printed and delivered as provided for in the resolution authorizing the issue?
>
> "2. Inasmuch as the bonds delivered did not conform in date of maturity to the resolution authorizing same, can such bonds be legally paid at any time?"

It is assumed from your statement that every statutory requirement essential to the validity of the issue and sale of the bonds referred to was fully complied with up to the point of delivery of the bonds and that it was contemplated and provided throughout the proceedings for the issue and sale of said bonds that the same or a part thereof should fall due and be paid at intervals, the first installment to be paid September, 1914.

The power of trustees to issue and sell bonds is confined strictly within the statutory authority therefor and is dependent upon a strict conformity to the procedure therein prescribed. It is stated that the original resolution of the trustees provided that the first bond should become due in September, 1914, and from that it is assumed that the entire issue was to be paid at intervals definitely fixed in such resolution. This resolution was an essential prerequisite to the issuance of the bonds upon which the subsequent proceedings leading up to the sale of the same was based, and a matter of record, and fixed the limitations of the authority of the trustees beyond which they could create no legal liability of the township.

Of all the terms of this resolution and its consequent limitations and restrictions upon the power and authority of the trustees, the purchaser must be conclusively presumed to have had actual notice at the time of his acceptance of such bonds.

Section 2295-3, G. C., 103 O. L., 179, makes it the duty of the clerk or other officer having charge of the minutes of the trustees of the township to furnish to the successful bidder a true transcript of all resolutions, notices and other proceedings had with ref-

erence to the issuance of said bonds, etc. So that notwithstanding the recitals of the bonds, the purchaser had full knowledge of terms of the resolution and the extent of the authority of the trustees, and is bound thereby.

It then became the duty of the purchaser of such bonds to present them for payment when they were made by the terms of the resolution to become due, and upon failure so to do, the interest thereon would cease to run if there was then money in the treasury of the township sufficient in amount and applicable to the payment thereof. If such of these bonds as in fact by the terms of the resolution became due in September, 1914, were not then nor thereafter presented for payment, and if there was then money in the treasury of the township sufficient in amount and applicable to the payment thereof, no interest accruing subsequent thereto may lawfully be paid.

From this it also follows that the remainder of the bonds should be paid at the time fixed in the resolution for their maturity.

It is suggested further that with the consent of the purchasers of said bonds the date of the maturity should be corrected on the face thereof to correspond with the provisions of the resolution in that regard.

Respectfully,
EDWARD C. TURNER,
Attorney General.

273.

BONDS ISSUED PURSUANT TO VOTE OF PEOPLE—DESTRUCTION OF SCHOOL BUILDING BY FIRE OR OTHER CASUALTY—BY ORDER OF CHIEF INSPECTOR OF WORKSHOPS AND FACTORIES—LEVY NOT WITHIN FIVE MILL LIMITATION OR ANY LIMITATIONS OF SMITH ONE PER CENT. LAW—BOARD OF EDUCATION—AUTHORITY TO BORROW MONEY OR ISSUE BONDS UNDER SECTION 5656, G. C.—AUTHORITY OF BOARD OF EDUCATION TO EXERCISE LEVYING POWER.

A levy for the payment of principal and interest on bonds issued to erect or repair school buildings, rendered necessary as a compliance with the orders of the chief inspector of workshops and factories or by the destruction of school buildings by fire or other casualty, said bonds being issued pursuant to a vote of the people, is not within the five mill limitation or any of the other limitations of the Smith one per cent. law.

A board of education not having fully exercised the authority conferred by law to levy taxes for sinking fund and interest on bonds falling due, is not authorized to borrow money or issue bonds for the purpose of extending or refunding said indebtedness under the provisions of section 5656, G. C.

COLUMBUS, OHIO, April 22, 1915.

HON. J. H. MUSSER, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—Under date of March 17, 1915, you submitted to me for written opinion thereon, the following statement of facts and inquiries, to wit:

> "After May 31, 1911, the New Knoxville village school district voted a bond issue of $18, 500.00, under section 7625, G. C., it being necessary for the district to erect a new school house, for the reason that the use of the then existing school house had been prohibited, by an order of the chief inspector of workshops and factories.

"In July, 1914, the budget commissioners of Auglaize county fixed the following levy for New Knoxville village school district:

"Tuition	2.58 mills.
"Contingent	1.18 mills.
"Sinking, since May 31, 1911	1.24 mills.
"Total	5.00 mills.

"Their valuation is $774,740.00.

"The board of education must pay, each year, $750.00 of bonds, and about $800.00 interest, so that you can see, from the above levy for sinking fund, that the district will not have sufficient money with which to pay bond and interest this year.

"The budget commissioners were of the opinion, last July, that the levy for the sinking fund for this bond issue had to come within the five mill limitation, provided by section 5649-3a, G. C. It seems to me that this levy for sinking fund, under the provisions of section 7630-1, and section 5649-4, 103 Ohio Laws, 527, would not have to be included within the five mill limitation.

"Please advise me as to your ideas about the matter.

"If this levy for sinking fund could be made, in addition to the five mill limitation, what would you suggest as to the manner of taking care of their bonds and interest due this year, as they will not have sufficient money to do so. A part of their indebtedness is due in April. Do you think that this can be taken care of under section 5656, G. C.? The board desires to adjust this matter in some manner, and I wish you would give your opinion as to what would be best to do in the matter."

Section 7630-1, G. C., 103 O. L., 527, provides:

"If a school house is wholly or partly destroyed by fire or other casualty, or if the use of any school house for its intended purpose is prohibited by any order of the chief inspector of workshops and factories, and the board of education of the school district is without sufficient funds applicable to the purpose, with which to rebuild or repair such school house or to construct a new school house for the proper accommodation of the schools of the district, and it is not practicable to secure such funds under any of the six preceding sections because of the limits of taxation applicable to such school district, such board of education may, subject to the provisions of sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven, and upon the approval of the electors in the manner provided by sections seventy-six hundred and twenty-five and seventy-six hundred and twenty-six issue bonds for the amount required for such purpose. For the payment of the principal and interest on such bonds and on bonds heretofore issued for the purposes herein mentioned, and to provide a sinking fund for their final redemption at maturity, such board of education shall annually levy a tax as provided by law."

Section 5649-4, G. C., as amended, 103 O. L., 527, provides:

"For the emergencies mentioned in sections forty-four hundred and fifty, forty-four hundred and fifty-one, fifty-six hundred and twenty-nine, seventy-four hundred and nineteen, and 7630-1, of the General Code, the taxing authorities of any district may levy a tax sufficient to provide therefor irrespective of any of the limitations of this act."

Section 5649-4, supra, insofar as it relates to the provisions of section 7630-1,

authorizes a levy irrespective of any of the limitations of the Smith law, so-called, for the payment of principal and interest on bonds that may be issued or bonds *theretofore* issued, for the purpose of rebuilding or repairing a school building or constructiong a new school building in compliance with the orders of the chief inspector of workshops and factories or when the same is rendered necessary by reason of the destruction of a school building by fire or other casualty. From your statement of facts it appears that bonds aggregating $18,500.00 were issued in New Knoxville village district for the purpose of erecting a new school building for the district, rendered necessary by the orders of the chief inspector of workshops and factories in prohibiting the further use of the then-existing school building; and that the bonds were issued pursuant to the provisions of section 7625, G. C., which requires the submission of the proposal to issue the bonds to the electors and its approval by a majority vote.

Your inquiry relates to the application of the five mill limitation of section 5649-3a to the power of the board to levy a tax for the payment of interest on such bonds to and provide a sinking fund for their final redemption at maturity, under the facts as above stated. The five mill limitation is found in section 5649-3a, and that part of the section directly in point provides as follows:

> "* * * The aggregate of all taxes that may be levied by a county, for county purposes, on the taxable property in the county on the tax list, shall not exceed in any one year three mills. The aggregate of all taxes that may be levied by a municipal corporation on the taxable property in the corporation, for corporation purposes, on the tax list shall not exceed in any one year five mills. The aggregate of all taxes that may be levied by a township, for township purposes, on the taxable property in the township on the tax list, shall not exceed in any one year two mills. The local tax levy for all school purposes shall not exceed in any one year five mills on the dollar of valuation of taxable property in any school district. Such limits for county, township, municipal and school levies shall be exclusive of any special levy, provided for by a vote of the electors, special assessments, levies for road taxes that may be worked out by the taxpayers, and levies and assessments in special districts created for road or ditch improvements, over which the budget commissioners, shall have no control."

Your inquiry seems to be answered by the provisions of section 7630-1, G. C., and 5649-4, G. C., authorizing a levy outside all of the limitations of the law, for the payment of the principal and interest on the bonds, whether issued pursuant to section 7630-1 or theretofore issued, for the erection or repair of school buildings, rendered necessary in compliance with orders of the chief inspector of workshops and factories or where school buildings have been destroyed by fire or other casualty.

Your second inquiry relates to the power of the board to borrow money or issue bonds under the provisions of section 5656, G. C., which provides:

> "The trustees of a township, the board of education of a school district and the commissioners of a county, for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation, such township, district, or county, is unable to pay at maturity, may borrow money or issue the bonds thereof, so as to change, but not increase the indebtedness in the amounts, for the length of time and at the rate of interest that said trustees, board or commissioners deem proper, not to exceed the rate of six per cent. per annum, payable annually or semi-annually."

From the conclusions above announced, it is apparent that the inability of the board of education here in question to pay the bonded indebtedness and interest falling

due during the current year does not result directly from its limits of taxation, but rather from its failure to exercise its levying power to the extent conferred by law, and I am of the opinion that the plain language of section 5656, G. C., imposing the condition, viz.: inability to pay *by reason of its limits of taxation*, may not be disregarded, and that under the facts as above stated the board of education is not authorized to borrow money or issue bonds by the provision of the said section.

I do not find any statute making provision similar to that contained in section 5656, and applicable in its terms, to extension of time for payment of indebtedness which, from mere failure to levy as authorized by law, the taxing authority is unable to pay at maturity.

Section 5649-1, G. C., as amended, 104 O. L., 12, provides:

> "In any taxing district, the taxing authority shall, within the limitations now prescribed by law, levy a tax sufficient to provide for sinking fund and interest purposes for all bonds issued by any political subdivision, which tax shall be placed before and in preference to all other items, and for the full amount thereof."

In respect to the levy for retiring the bonds in question, the foregoing section does not have the force of imposing any different limitation on the rate than that prescribed in the sections above quoted, but is effective to impose the duty of placing such tax before and in preference to all other items and for the full amount thereof, and in any event the board of education should provide an adequate levy in the next annual budget to retire all outstanding bonds then due and unpaid together with the interest thereon.

It was the duty of the board to provide a levy sufficient to pay the interest on these outstanding bonds and to provide a sinking fund for their redemption at maturity, at the time of making the last annual levy, and the levy for this purpose does not come within any of the limitations of the law with respect to rates of taxation, and if necessary the board should have had recourse to the courts to carry into effect this requirement of the statutes.

Answering your question specifically, I am of the opinion:

First. That the levy for the interest and sinking fund purposes for the bonds mentioned in your statement of facts is not within the five mill limitation of section 5649-3a, nor is it within the ten mill limitation or the fifteen mill limitation of the Smith law.

Second. That the board of education is not authorized to borrow money or issue bonds to pay the bonded indebtedness falling due during the current year, under authority of section 5656, G. C., for the reason that the board has not exercised its powers to levy, as conferred by law, and is, therefore, not within the terms of section 5656, G. C., but must provide an amount sufficient in its next annual levy to pay both the bonds falling due this year and unpaid and those maturing during the ensuing year.

Respectfully,

EDWARD C. TURNER,

Attorney General.

274.

COUNTY BOARD OF EDUCATION—ELECTORS IN TERRITORY ATTACHED TO VILLAGE SCHOOL DISTRICT BY COUNTY BOARDS MAY VOTE ON ALL SCHOOL QUESTIONS AND OFFICES IN SUCH DISTRICT.

Electors residing in territory attached to a village school district for school purposes by the county board of education, may vote for school offices and on all questions in such village school district.

COLUMBUS, OHIO, April 23, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am directing to you an opinion upon a statement submitted to me by Hon. H. W. Woodruff, chief deputy supervisor of elections of Gallia county, which I consider of general public interest, as follows:

> "The school board of Vinton special school district have agreed upon a new high school building of the first grade, and have asked for a bond issue. The vote will be taken on it April 24th.
>
> "On March 5th, the school board advertised this bond issue in the local paper, and have continued it as the law prescribes.
>
> "On the 27th of March, the county school board met at the county superintendent's office and agreed by ballot to take in some additional territory into the Vinton special school district for the purpose of increasing the tax duplicate of said special district.
>
> "The parties so taken into the district were notified previous to this meeting so they might meet and state their objections to being set in if they had any. No objections were filed, so the board had a map drawn taking in some territory from Huntington township and a portion of Morgan township. The question now arising is this: Can the parties taken in vote on the bond issue next Saturday, April 24th? Will there be any difference between those of Huntington and those of Morgan township? The special district being in Huntington precinct, which was a part of Huntington township originally."

By virtue of section 4736, G. C. (104 O. L., 138), the county board of education is authorized to change the lines and territorial limits of school districts under its supervision, as follows:

> "The county board of education shall as soon as possible after organizing, make a survey of its district. The board shall arrange the schools according to topography and population, in order that they may be most easily accessible to pupils. To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and transfer territory from one rural or village school district to another. A map designating such changes shall be entered on the records of the board and a copy of the resolution and map shall be filed with the county auditor. In changing boundary lines, the board may proceed without regard to township lines and shall provide that adjoining rural districts are as nearly equal as possible in property valuation. In no case shall any rural district be created containing less than fifteen square miles. In changing boundary lines and other work of

a like nature, the county board shall ask the assistance of the county surveyor and the latter is hereby required to give the services of his office at the formal request of the county board."

It will be noted that the county board may make such changes without regard to township lines so that upon the action of the county board, in accordance with the provisions of the above section, the additional territory referred to in the above statement became a part of what is termed the Vinton school district, which I learn from the office of the superintendent of public instruction of the state, is a village school district for all school purposes, and the electors residing within such attached territory are therefore entitled to vote upon all school questions and for school officers of such village district.

Section 4711, G. C., provides as follows:

"Electors, residing in territory attached to a village district for school purposes, may vote for school officers and on all school questions at the proper voting place in the village to which the territory is attached. If the village is divided into precincts, the board of education of the village school district shall assign such attached territory to the adjoining precinct or precincts of the village, and have a map prepared showing such assignment, which map shall be made a part of the records of the board. Electors residing in such attached territory, may vote in the precinct to which they are assigned, but if no assignment of territory is made, they shall vote in the precinct nearest their residence. An elector residing in the village, but not in the village school district, shall not vote in such village school district."

The provisions of this section govern the conduct of school elections in such village school districts, and prescribe the rules for determining where such electors shall be allowed to vote upon school questions and for school officers.

It will be noted that the language of this section is substantially the same as that of section 4714, G. C., applicable to territory attached to township school districts for school purposes, and the last inquiry in the above statement is answered in opinion No. 104, under date of February 23, 1915, which holds, that unless there has been an assignment of territory made, the electors residing in the attached territory shall vote on school questions and for school officers in the precinct in which such elector resides.

It is suggested, that in this opinion, the validity of the bonds proposed to be issued is not under consideration, nor is the same here passed upon.

Respectfully,

EDWARD C. TURNER,

Attorney General.

275.

OFFICES INCOMPATIBLE—DISTRICT ASSESSOR OR DEPUTY DISTRICT ASSESSOR—CITY CIVIL SERVICE COMMISSION.

A district assessor or deputy district assessor may not be a member of a city civil service commission.

COLUMBUS, OHIO, April 23, 1915.

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

GENTLEMEN:—Deeming the same of importance and general public interest, I am directing to you an opinion upon a question submitted by Hon. Jonathan Taylor, city solicitor of the city of Akron, Ohio, which may be stated as follows:

> "May the district assessor, at the same time, serve as a member of a city civil service commission?"

This question involves a consideration of section 5617, G. C., as amended in 103 O. L., 796, as follows:

> "A district assessor, deputy assessor, member of a district board of complaints or any assistant, clerk or other employe of a district assessor or district board of complaints, shall not, during his term of office or period of service or employment, as fixed by law or prescribed by the tax commission of Ohio, hold any office of profit, except offices in the state militia and the office of notary public."

Section 486-19, G. C. (103 O. L., 708), provides for the appointment of a civil service commission in each city of the state, defines their duties and powers, prescribes the term of office and qualifications, and the first paragraph of said section concludes with the following provision:

> "The expense and salaries of any such municipal commission shall be determined by the council of the city and a sufficient sum of money shall be appropriated each year to carry out the provisions of this act in any such city."

From the unequivocal terms of section 5617, G. C., no district assessor, deputy assessor, member of a district board of complaints or any assistant, clerk or employe of such assessor or board may hold any office of profit, and it is provided that the city council shall determine the salaries of the members of city civil service commissions. The office of civil service commissioner of a city is, therefore, an office of profit within the terms of section 5617, G. C., and a district assessor, deputy assessor, member of a district board of complaints or any clerk, assistant or employe of such assessor or board may not hold the office of such commissioner.

The answer to the question here submitted must, therefore, in my opinion, be in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney General.

276.

COUNTY COMMISSIONERS—MAY ALLOW AGENT APPOINTED BY GOVERNOR EXPENSES INCURRED TO EXTRADITE PERSONS CHARGED WITH FELONIES WHO HAVE FLED FROM THIS STATE—MISDEMEANOR CHARGE—FELONY.

The county commissioners, under authority of section 2491, *G. C., may allow to an agent appointed by the governor, under section* 109, *G. C., his necessary expenses incurred in traveling to the governor's office at Columbus, to present the papers mentioned in sections* 110 *and* 111, *G. C.*

The fact that a person returned to Ohio upon requisition under a felony charge is thereafter prosecuted on a misdemeanor charge, the felony charge being ignored, will not preclude the commissioners from allowing the necessary expenses of the agent.

COLUMBUS, OHIO, April 23, 1915.

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

GENTLEMEN:—I have your communication of April 9, 1915, which communication reads as follows:

"We would respectfully request your written opinion upon the following questions:

"If a prosecuting attorney sends the sheriff, a constable, or a private individual with the necessary papers mentioned in sections 110 and 111 of the General Code, to the governor at Columbus, Ohio, for a requisition for the return of a person charged with a felony from another state, when does the officer, or person, so sent by the prosecuting attorney, become an agent of the state; at the time he leaves his county seat, or after the papers have been delivered to him by the governor?

"Section 2491, General Code, authorizes the county commissioners to pay the actual and necessary expenses of the agent designated in such requisition. The question is—If the person so designated does not become an agent of the state until after the governor has issued the requisition, how is he to be reimbursed for his expenses from the county that he started from to Columbus? If a sheriff, or constable, he does not really present any writs to the governor upon which mileage may be taxed under either section 2845 or 3347, G. C. Could this preliminary expense be paid by the prosecuting attorney out of his contingent fund, provided by section 3004, General Code?

"Can the county commissioners legally allow the necessary and actual expenses of an agent of the state who has brought back from another state, upon requisition, a person charged with a felony when, after said person is brought back, he is prosecuted on a misdemeanor charge, the felony charge under which he was extradited being ignored?"

Section 109, G. C., provides that on application the governor may appoint an agent to demand of the executive authority of another state or territory a person charged with felony who has fled from justice in this state. Sections 110 and 111, G. C., cited by you, provide that the application referred to in section 109, G. C., must be accompanied by sworn evidence of certain facts; a duly attested copy of an indictment or information, or a duly attested copy of a complaint, accompanied with an affidavit or affidavits to the facts constituting the offense charged, by persons having

actual knowledge thereof; a statement in writing from the prosecuting attorney of the proper county, which statement shall set forth certain facts, and such further evidence as the governor may require.

Section 2491, G. C., provides as follows:

> "When any person charged with a felony has fled to any other state, territory or country, and the governor has issued a requisition for such person, or has requested the president of the United States to issue extradition papers, the commissioners may pay from the county treasury to the agent designated in such requisition or request to execute them, all necessary expenses of pursuing and returning such person so charged, or so much thereof as to them seems just."

You now inquire when a person who is sent by the prosecuting attorney of a county to the governor at Columbus with the necessary papers mentioned in sections 110 and 111, G. C., and who is appointed under section 109, G. C., as agent to demand of the executive authority of another state or territory a person charged with felony who has fled from justice in this state, becomes the agent of the state, an answer to that question being necessary to a determination of the further question as to the right of the county commissioners to make reimbursement under section 2491, G. C., for the expenses incurred by such person in traveling to Columbus to present the papers mentioned in sections 110 and 111, G. C.

You will note that the authority given the county commissioners by section 2491, G. C., is very broad, they being authorized to pay *all* the necessary expenses of pursuing and returning the accused, or so much thereof as to them seems just. I am unable to say that the expense incurred by a person in carrying to the governor's office at Columbus the papers mentioned in sections 110 and 111, G. C., is not a necessary expense incident to the pursuit of the accused. On the other hand, it is often of vital importance that extradition papers be secured without any delay, and necessary that a messenger be used in transmitting to the office of the governor the papers required by the statutes. I am, therefore, of the opinion, from the language of the statute and the nature of the matter, that in case the person carrying to the office of the governor in Columbus the papers mentioned in sections 110 and 111, G. C., is designated as agent under section 109, G. C., then the expenses of such person while engaged in carrying said papers to the office of the governor may be allowed by the county commissioners under section 2491, G. C. Such expenses being covered by said section 2491, G. C., it follows that they should not be paid by the prosecuting attorney out of the allowance made to him by section 3004, G. C., for the reason that they are otherwise provided for by law.

Your next inquiry is as follows: Can the county commissioners legally allow the necessary and actual expenses of an agent of the state who has brought back from another state upon requisition a person charged with a felony, when after said person is brought back he is prosecuted on a misdemeanor charge, the felony charge under which he was extradited being ignored? In answering this question, it is necessary to look only to the provisions of section 2491, G. C., above quoted. Under that section it is only necessary in order that the county commissioners may allow the necessary expenses of the agent in pursuing and returning the accused, or so much of such expenses as to them seems just, that the accused should be charged with a felony, that he should have fled to some other state, territory or country, and that the governor should have issued a requisition for such person, or should have requested the president of the United States to issue the extradition papers. It will be seen that the right of the county commissioners to reimburse the agent for expenses incurred is in no way made dependent upon the subsequent bringing to trial of the accused upon the charge on which he was extradited, or indeed upon his subsequently being brought to trial upon any charge. I

am, therefore, of the opinion that under the facts related by you, the county commissioners have authority to allow the necessary expenses of the agent incurred in pursuing and returning the accused, or so much thereof as to them seems just.

Respectfully,
EDWARD C. TURNER,
Attorney General.

277.

COUNTY TUBERCULOSIS HOSPITAL — APPLICATION OF SECTION 3141 G. C., FOR MAINTAINING SUCH HOSPITAL—EXPENSES OF PATIENTS IN COUNTY WHERE THERE IS NO SUCH HOSPITAL—HOW PAID—POOR FUND—COUNTY INFIRMARY.

The provision of section 3141, *G. C., as amended in* 103 *O. L.,* 492, *authorizing an annual tax levy to provide a fund for maintaining a county tuberculosis hospital, does not apply to a county which does not maintain such a hospital, and, in such county, the county commissioners should make appropriation to meet the expense resulting from a contract made under authority of, and in compliance with, the requirements of section* 3143, *G. C., as amended in* 103 *O. L.,* 492, *out of the infirmary or poor fund of said county.*

COLUMBUS, OHIO, April 23, 1915.

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

GENTLEMEN:—In your letter of March 20, 1915, you request my opinion as follows:

> "When county commissioners make arrangements for the care and maintenance of tubercular patients under the provisions of section 3143, as amended 103, O. L., page 492, out of what fund shall appropriations be made to meet this expense—the county fund, or the infirmary or poor fund?"

Sections 3139 to 3143, both inclusive, of the General Code, as amended in 103 O. L., 492, provides as follows:

> "*Section* 3139. On and after January first, nineteen hundred and fourteen, no person suffering from pulmonary tuberculosis, commonly known as consumption, shall be kept in any county infirmary.
>
> "*Section* 3140. Whenever complaint is made to the state board of health that a person is being kept or maintained in any county infirmary in violation of section 3139 of this act, such state board of health may make arrangements for the maintenance of such person in some hospital or other institution in this state, devoted to the care and treatment of cases of tuberculosis, and the cost of removal to, and the cost of maintenance of, such person in such hospital or institution shall become a legal charge against, and be paid by the county in which such person has a legal residence. If such person is not a legal resident of this state, then such expense shall be paid by the county maintaining the infirmary from which removal is made.
>
> "*Section* 3141. In any county where a county hospital for tuberculosis has been erected, such county hospital for tuberculosis may be maintained by the county commissioners, and for the purpose of maintaining such hospital

the county commissioners shall annually levy a tax and set aside the sum necessary for such maintenance. Such sum shall not be used for any other purpose.

"*Section* 3142. An accurate account shall be kept of all moneys received from patients or from other sources, which shall be applied toward the payment of maintaining a tuberculosis hospital. The joint board of commissioners, as hereinafter provided for, may receive for the use of the hospital, in its name, gifts, legacies, devises, conveyances of real or personal property or money.

"*Section* 3143. Instead of joining in the erection of a district hospital for tuberculosis, as hereinafter provided for, the county commissioners may contract with the board of trustees, as hereinafter provided for, of a district hospital, the county commissioners of a county now maintaining a county hospital for tuberculosis, or with the proper officer of a municipality where such hospital has been constructed, for the care and treatment of the inmates of such infirmary or other residents of the county who are suffering from pulmonary tuberculosis. The commissioners of the county in which such patients reside shall pay to the board of trustees of the district hospital or into the proper fund of the county maintaining a hospital for tuberculosis, or into the proper fund of the city receiving such patients, the actual cost incurred in their care and treatment, and other necessaries, and they shall also pay for their transportation. Provided, that the county commissioners of any county may contract for the care and treatment of the inmates of the county infirmary or other residents of the county suffering from pulmonary tuberculosis with an association or corporation, incorporated under the laws of Ohio for the exclusive purpose of caring for and treating persons suffering from pulmonary tuberculosis; but no such contract shall be made until the institution has been inspected and approved by the state board of health, and such approval may be withdrawn and such contracts shall be cancelled if, in the judgment of the state board of health, the institution is not managed in a proper manner. Provided, however, that if such approval is withdrawn, the board of trustees of such institution may have the right of appeal to the governor and attorney general and their decision shall be final."

The provisions of sections 3139 and 3140 of the General Code, as amended, make it mandatory for the county commissioners to remove from the county infirmary all persons suffering from pulmonary tuberculosis and to provide for their care and treatment in a tuberculosis hospital.

In a county which has not erected a county tuberculosis hospital, and which does not join in the erection and maintenance of a district tuberculosis hospital, under authority of sections 3148, et seq., of the General Code, as amended in 103 O. L., 494, the county commissioners of such county may contract for the care and treatment of the inmates of the county infirmary or other residents of the county, who are suffering from pulmonary tuberculosis, in the manner provided in section 3143, G. C., as amended. In case such contract is made, the county commissioners of such county are required to pay the actual cost incurred in the care and treatment of such patients and for other necessaries furnished to them, and you inquire out of what fund said expense shall be paid.

Section 3143, G. C., prior to the above amendment, provided as follows:

"Instead of providing for the erection of a hospital for tuberculosis, the commissioners and infirmary directors may contract with the infirmary directors of a county or with the proper officer of a municipality, where such hospital has been constructed, for the care and treatment of the inmates of

such infirmary or other residents of the county who are suffering from pulmonary tuberculosis. The infirmary directors of the county in which such patients reside shall pay into the *poor fund* of the county or into the proper fund of the city receiving such patients, the actual cost incurred in their care and treatment, and other necessaries, and they shall also pay for their transportation."

It is evident, that prior to the establishment of a maintenance fund, under authority of section 3141, G. C., the expense of maintaining a county tuberculosis hospital was properly paid out of the county poor fund. It necessarily follows that, where a county did not maintain a tuberculosis hospital, and did not join in the establishment and maintenance of a district hospital, under authority of sections 3148, et seq., of the General Code, the expense incident to a compliance with the requirement of section 3143, G. C., was properly paid out of the county poor fund of such county.

Inasmuch as the provision of section 3141, G. C., as amended, authorizes an annual tax levy to provide a fund for maintaining a county tuberculosis hospital, does not apply to a county which does not maintain such a hospital, I am of the opinion that in such county, the county commissioners should make appropriation to meet the expense resulting from a contract made under authority of, and in compliance with, the requirements of section 3143, G. C., as amended, out of the infirmary or poor fund of said county.

Respectfully,
EDWARD C. TURNER,
Attorney General.

278.

OHIO SOLDIERS' AND SAILORS' ORPHANS' HOME—SUPERINTENDENT—APPOINTMENT—BOND.

The trustees of the Ohio Soldiers' and Sailors' Orphans' Home are authorized to appoint a superintendent for said home, require him to give a bond and fix his salary.

COLUMBUS, OHIO, April 23, 1915.

HON. JOSEPH O'NEALL, *Commissioner of Soldiers' Claims, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of April 14, 1915, in which you inquire as follows:

"Have the trustees of the Ohio Soldiers' and Sailors' Orphans' Home statutory authority to appoint a superintendent of said home, require him to give a bond and fix his salary?"

The board of trustees of the Ohio Soldiers' and Sailors' Orphans' Home is created by section 1931-1, G. C., 103 O. L., 159, and in that section is found the following provision:

"Such board shall govern, conduct and care for such home, the property thereof and the inmates therein as provided in the laws governing 'the Ohio board of administration,' so far as the provisions thereof are not inapplicable and are not inconsistent with the provisions of the laws governing such home."

The provisions of law governing the home are found in section 1931 to 1946-2, inclusive, of the General Code. These sections contain numerous references to a super-

intendent for the home, but no authority to employ a superintendent is specifically conferred by them. Section 1946, G. C., found in the chapter relating to the home, provides that the compensation of the officers and employees of the home shall be fixed by the board of trustees. The statutes relating specifically to the home are silent as to requiring bonds of the officers and employees of the home. From the above it will be seen that the sections of the General Code relating specifically to the home authorize the trustees of the home to fix the salary of the superintendent, but are absolutely silent as to any authority in the trustees or in any other officer or board to appoint a superintendent or to require the appointee to furnish bond for the faithful performance of his duties as superintendent.

In view of the above facts, reference must be had to the laws governing the Ohio board of administration, this reference being warranted by the provision of section 1931-1, G. C., 103 O. L., 159, above quoted, to the effect that the board of trustees of the home shall govern, conduct and care for the home as provided in the laws governing the Ohio board of administration, so far as the provisions thereof are not inapplicable and are not inconsistent with the provisions of the laws governing such home.

Section 1842, G. C., being one of the sections relating to the Ohio board of administration, provides in part as follows:

> "Each of said institutions shall be under the executive control and management of a superintendent or other chief officer designated by the title peculiar to the institution, subject to the rules and regulations of the board and the provisions of this act. Such chief officer shall be appointed by the board to serve for the term of four years, unless removed for want of moral character, incompetency, neglect of duty, or malfeasance, after opportunity to be heard."

Section 1855, G. C., being another of the sections relating to the Ohio board of administration, provides as follows:

> "The board shall require its secretary and fiscal supervisor, and each officer and employe of every institution under its control, who may be charged with custody or control of any money or property belonging to the state, or who is now required by law to give bond, to give a surety company bond, properly conditioned, in a sum to be fixed by the board, which when approved by the boards shall be filed in the office of the secretary of state. The cost of such bonds, when approved by the board, shall be paid from funds available for the board or the respective institutions."

Nothing in the above quoted provisions of sections 1842 or 1855 of the General Code is inapplicable to the Ohio Soldiers' and Sailors' Orphans' Home, and nothing therein is inconsistent with the provisions of the laws governing such home. I am therefore of the opinion that by virtue of sections 1931-1 and 1842 of the General Code, the trustees of the Ohio Soldiers' and Sailors' Orphans' Home are authorized and required to appoint a superintendent for such home to serve for the term of four years, unless removed for want of moral character, incompetency, neglect of duty, or malfeasance, after opportunity to be heard.

By virtue of sections 1931-1 and 1855 of the General Code, the trustees of said home must require the superintendent to give a surety company bond, properly conditioned in a sum to be fixed by the trustees. As already indicated, the trustees of said home are authorized and required by section 1946, G. C., to fix the compensation of the superintendent.

Respectfully,

EDWARD C. TURNER,

Attorney General.

279.

BOARD OF EDUCATION—BOND ISSUE UNDER AUTHORITY OF SECTION 7625, G. C.—WHEN UNDER SECTION 7629, G. C., ADDITIONAL SUM FOR SAME PURPOSE CANNOT BE PROVIDED.

Where a board of education of a school district submits the question of a bond issue to a vote of the electors of the district, under authority of, and in compliance with, the requirements of sections 7625, et seq., of the General Code, for any of the purposes mentioned therein, by submitting said bond issue for an amount of money which said board estimates will be sufficient for said purpose, said board exhausts its authority for this particular purpose and cannot provide an additional sum for the same purpose, under authority of section 7629, G. C.

COLUMBUS, OHIO, April 23, 1915.

HON. E. A. SCOTT, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—In your letter of March 27, 1915, you request my opinion as follows:

> "Kindly give me your opinion on the following:
>
> "Section 7629 of Code, provides that board of education can issue bonds without submitting same to electors when the aggregate does not go above the rate of two mills on taxable property The tax duplicate shows property to the amount of $738,000.00 in West Union special school district. Bond issue for repairing school building a few weeks past amounts to $4,200.00; vote on same by people. The old debt against school district for bond issue amounts to $2,800.00, making a total amount of $7,000.00. The last bond issue is for heating apparatus, and contracts are to be let Friday night. It will take $500.00 to complete contract, and can board of education issue $500.00 in bonds under the above section without vote on same?"

From your statement of facts, I understand that the board of education of West Union special district, acting under authority of section 7625, G. C., submitted to the electors of said district the question of issuing $4,200.00 of bonds for the purpose of installing heating plants in certain school buildings in said district; that a majority of the electors voting on said proposition voted in favor thereof, and that said bonds have been issued in conformity with the requirements of section 7625, et seq., of the General Code. The board of education having taken the necessary steps preliminary to the opening of bids and the awarding of the contracts, as are required by law, you now anticipate that the lowest bid submitted will be for a greater amount than the amount in the treasury of said board of education at its disposal for the above mentioned purpose, including the amount realized from the sale of bonds issued under authority of section 7625, et seq., of the General Code.

You assume that an additional sum of $500.00 will be needed by said board of education before it can let said contract, and you inquire whether said board can issue bonds in this amount without a vote of the electors of the district under authority of section 7629, G. C.

Before the board of education can exercise its authority under section 7625, et seq., of the General Code, it must determine first that for the proper accommodation of the schools of the district, it is necessary to make the proposed improvement; second, that the funds at its disposal or that can be raised under the provisions of section 7629 and section 7630, are not sufficient to accomplish the purpose and that a bond issue is necessary.

Section 7629, General Code, provides:

"The board of education of any school district may issue bonds to obtain or improve public school property, and in anticipation of income from taxes, for such purposes, levied or to be levied, from time to time, as occasion requires, may issue and sell bonds, under the restrictions and bearing a rate of interest specified in sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven. The board shall pay such bonds and the interest thereon when due, but provide that no greater amount of bonds be issued in any year than would equal the aggregate of a tax at the rate of two mills, for the year next preceding such issue. The order to issue bonds shall be made only at a regular meeting of the board, and by a vote of two-thirds of its full membership, taken by yeas and nays, and entered upon its journal."

The requirements that the board shall first determine that the funds that may be raised under the provision of section 7629, General Code, will not be sufficient to accomplish the purpose in question, does nor necessarily imply that the board shall first exhaust its power under said section and may only invoke the provisions of sections 7625, et seq., of the General Code, to provide the deficiency remairing. On the contrary, the requirements of section 7625, G. C., are satisfied when the board, in anticipating the probable cost of the contemplated improvement, finds and determines that the funds that may be raised under the limitations of section 7629, G. C., will be insufficient, and that a bond issue outside of such limitations will be necessary.

Having made this determination, and proceeded to the issue of bonds under the provisions of section 7625, et seq., of the General Code, with the approval of a vote of the electors, it now appears to the board of education that the amount of money in the school treasury available for the purpose of the proposed improvement, including the amount realized form the sale of the bonds, will be insufficient for said purpose. From the facts stated, it further appears that the additional sum of $500.00, which you estimate will be needed before the contract can be let for said purpose, can be produced by a bond issue within the two mill limitation upon the taxable property of this district, if the authority of section 7629, G. C., may be invoked.

Inasmuch as the board of education of the West Union special school district, before submitting the question of a bond issue, to a vote of the electors of said district, for the purpose hereinbefore mentioned, determined that the funds available for such purpose, or that might be raised under the provisions of sections 7629 to 7630, G. C., would not be sufficient for such purpose, and that a bond issue under the provisions of sections 7625, et seq., of the General Code, would be necessary, by submitting the question of a bond issue to the electors of said district, under authority of sections 7625, et seq., of the General Code, for an amount of money which said board estimated would be sufficient for said purpose, said board has exhausted its authority for this particular purpose, and I am of the opinion that said board cannot now provide an additional sum for this same purpose by a bond issue, under authority of section 7629, General Code.

The board of education can revise its plans and specifications for the purpose of reducing the estimated cost of the proposed improvement and again advertise for bids. In all probability the money in the treasury available for the purpose of making such improvement will then be sufficient.

Respectfully,
EDWARD C. TURNER,
Attorney General.

280.

SCHOOL AND MINISTERIAL LANDS—ORIGINAL SURVEYED TOWNSHIPS—LEASES OF SUCH LANDS—APPLICATION OF PRESENT LAW RESERVING OIL, GAS, COAL AND OTHER MINERALS, TO FORMER LEASES OF SUCH LANDS.

Section 3209-1, *G. C.* (105 *O. L.*), *applies to unsold portions of sections sixteen and twenty-nine, or other lands granted in lieu thereof, of original surveyed townships under lease.*

Section 3210, *G. C.* (105 *O. L.*), *applies to all unsold portions of section sixteen and twenty-nine, or other lands granted in lieu thereof, of original surveyed townships not under lease.*

Section 3210 (105 *O. L.*), *applies to surrender of all leases of sections sixteen and twenty-nine, or other lands granted in lieu thereof, of original surveyed townships entered into prior to legislation permitting surrender.*

As to whether section 3210 (105 *O. L.*), *applies to surrender of leases of sections sixteen and twenty-nine, or other lands granted in lieu thereof, of original surveyed townships entered into after legislation permitting surrender not answered because the right to surrender such lease would depend on the legislation existing at the time of entering into lease.*

COLUMBUS, OHIO, April 23, 1915.

HON. C. B. SMITH, *State Representative, Columbus, Ohio.*

DEAR SIR:—Under date of April 8th you submitted for my opinion the following:

"At the second extraordinary session held July 20, 1914, a law was passed relating to the school and ministerial lands, known as sections sixteen and twenty-nine of the original surveyed townships. This law provides in part that in all sales or leases of such lands by the state, all oil, gas, coal and other minerals shall be reserved to the state.

"During the first half of the nineteenth century, many of these lands were leased for a ninety-nine year term, renewable forever, and such lands are still held under the original tenure. The laws under which these leases were made were supposed to be valid enactments of the legislature. The law as passed July 20, 1914, without doubt, would apply to the sales or leases made subsequent to its passage, but the question is—does such law apply to the leases and sales made prior to the passage of such law. Many of the lessees of the school lands have failed to pay the annual rentals provided for in such leases, and they undoubtedly would be amenable to the law, but I would like to know whether any lessee who had paid his rentals to date, as per the original agreement, and in whose lease no reservation of any kind was made as to any mineral rights, possesses such rights, or whether the state of Ohio could read into his lease conditions and reservations which were not contemplated at the time such lease was made, or whether such application would not make the law retro-active and in abrogation of the right of contract. Persons holding the leases in good faith should be protected, and if the late law takes away this protection I shall introduce a bill amending the law so that it will not operate against lessees whose leases were made prior to its enactment. If it is your opinion that such a law is inoperative as to such persons, an amendment will be unnecessary.

"Enclosed I am sending you a copy of the act in question and should like very much to have your opinion as to the necessity of an amendment to accomplish my purpose."

Section 3210, G. C., as amended, 105 O. L., —, provides in part as follows:

> "Section sixteen and all lands instead thereof, granted for school purposes, may be sold, and such sales shall be according to the regulations hereinafter prescribed. * * * Provided, that such sales shall exclude all oil, gas, coal, or other minerals on or under such lands, and all deeds executed and delivered by the state shall expressly reserve to the state all gas, oil, coal, or other minerals, on or under such lands, with the right of entry in and upon said premises for the purpose of selling or leasing the same, or prospecting, developing or operating the same, and this provision shall affect and apply to pending actions."

Section 3222, as amended, 105 O. L., —, which relates to the surrender of leases of school lands and the purchase of the fee thereof, provides as follows:

> "Section 3222. On being satisfied of the truth of the facts set forth in such petition, the court shall appoint such appraisers who shall proceed under oath to make a just valuation of the premises in money without reference to the improvements made thereon under and by reason of such lease, or to any gas, oil, coal or other minerals that may be upon such lands, and shall return such valuation in writing to the court. If satisfied that the valuation is just, the court shall confirm it, and order it, with the petition and other proceedings therein to be recorded."

In your letter you state the question to be whether such law applies to leases and sales of school lands made prior to the passage of such law.

Section 3209-1, as amended, 105 O. L., —, authorizes the auditor of state to lease for oil, gas, coal or other minerals, any unsold portions of section sixteen and section twenty-nine, or other lands granted in lieu thereof, although the lands are already under lease under the statutes existing for many years in this state. However, the original leases that were made of both sections sixteen and twenty-nine were for the surface rights only. The state simply granted a lease to the original lessees for agricultural purposes and such other purposes as would be considered necessary to grant solely for surface rights. The state as the trustee did not grant any further rights in such leases than would have been granted by an ordinary property owner. Consequently the lessee of the surface has no right to any gas, oil or other minerals, nor the right to lease to another person for the purpose of taking out any oil, gas or other minerals.

Therefore, I am clearly of the opinion that section 3209-1, G. C., to which reference has hereinbefore been made, applies to the premises held under lease prior to July 20, 1914, and also that section 3210, G. C., applies to any sales that may be made of lands that were not under lease prior to July 20, 1914.

As to whether or not the provisions of said act would apply to lands sought to be surrendered by the original lessees is a question that can not be determined except on consideration of each and every lease entered into. As a general principle, however, I would state that prior to 1827 school lands were authorized to be leased for a term of ninety-nine years, renewable forever, at which time the state did not have any authority whatever to sell the lands but solely to lease the same; and prior to 1833 the ministerial lands were authorized to be leased for a period of ninety-nine years, renewable forever, but no authority was vested by the United States government in the state to sell said lands.

In 1826, or thereabouts, the United States government granted authority to the

state to sell or cause to be sold the school and ministerial lands, and to invest the proceeds thereof for the benefit of the schools and religion in lieu of the rentals that would have been obtained from the lands.

As to those leases that were entered into prior to the obtaining from the United States government of authority to sell the school and ministerial lands, it was not contained therein, nor became a part of the conditions of any of the leases, that the right of surrender was granted to the lessee. After that date it may be that certain of the leases for ninety-nine years, renewable forever, on both school and ministerial lands were entered into after the state had enacted legislation looking to the surrender of the leases.

As to those leases last mentioned I am of the opinion that the right of surrender would be considered as a part of the conditions of the lease, and that in consideration of the rentals to be paid and other covenants to be kept the right to surrender would be considered as a part of the contractual rights between the parties. However, as to those leases that were executed during the time that a right of surrender existed by statute, the statutes relative to such right of surrender as it then existed must be inquired into in order to determine whether or not there is an existing right of surrender. In the early statutes that were passed by the legislature immediately after authority was granted by congress of the United States to sell school and ministerial lands, the right of surrender was materially limited, especially as to time, some of the statutes only granting a right of surrender for a year subsequent to the enactment of such statute, and it was not until 1843 that a general right of surrender at any time was given by general statute. There are, however, innumerable special statutes which would always have to be examined into and considered relative to each and every lease the right to surrender which and to obtain from the state a title in fee simple, without reservation, is claimed by the lessee. No general rule, therefore, can ge given relative to those leases for ninety-nine years, renewable forever, entered into after the authority was granted by the United States to sell school and ministerial lands.

As to those leases which were executed prior to the enactment of legislation by the state permitting surrender, I am of the opinion that the right to surrender did not and could not become a part of the lease; and consequently the taking away of such right of surrender or the curtailment of the same could not be considered as in violation of any contract rights, and that, therefore, the provisions of section 3210, G. C., would apply to such leases. I do not, however, in any way pass upon the question as to whether or not the provisions of section 3210 would apply to those leases which were entered into after legislation by the state as to surrender.

Senate bill No. 3, passed at the second extraordinary session of the 80th general assembly, in which is found sections 3209-1, 3210 and 3222, G. C., hereinbefore commented upon and to be found in 105 O. L., page —, contained an emergency clause to the following effect:

> "Section 6. This act is hereby declared to be an emergency law necessary for the immediate preservation of the public safety. The necessity therefor lies in the fact that the state is now suffering, and is being threatened with, great financial loss, by reason of the waste and loss of valuable mineral resources now in existence on the lands described in the act, and which if immediately conserved will result in great material benefit to the state and its citizens."

The only laws that can be declared to be emergency laws under the provisions of article II, section 1d of the constitution are those "necessary for the immediate preservation of the public peace, health or safety." Section 6 of the act above quoted does not in any manner satisfy the above requirement of the constitution. The question as to whether or not a bill that has been passed as an emergency law, which does

not on its face show that it is properly an emergency measure, can be considered as an ordinary law passed by the legislature is indirectly involved in a case before the supreme court, and I do not in any way pass upon that question in this opinion, but simply call attention to the fact that, in my judgment, section 6, which undertakes to declare the law to be an emergency law for the immediate preservation of the public safety, and the necessities set forth in said section as the reasons for the passing of the bill, does not in any way satisfy the constitutional requirements as to emergency laws.

Respectfully,
EDWARD C. TURNER,
Attorney General.

281.

PROBATE JUDGE ACTING AS JUVENILE JUDGE—FEES AS CLERK OF SUCH COURT—HOW ASSESSED—PAID INTO PROBATE JUDGE'S FEE FUND.

The probate judge, exercising juvenile jurisdiction in proceedings against an adult for contributing to delinquency, is entitled by virtue of section 1651, *General Code, to receive as clerk of his own court the same costs as are taxed and paid to the clerk of courts in criminal cases, to be covered into probate judge's fee fund.*

COLUMBUS, OHIO, April 23, 1915.

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

GENTLEMEN:—Under date of March 1, 1915, you submitted for my opinion the following:

> "We would respectfully request your written opinion upon the following questions:
>
> "Section 1602, General Code, one of the fee sections of the probate judge, provides in part:
>
> "'* * * When acting as judge of the juvenile court, for each case filed against a delinquent, dependent, or neglected child, two dollars and fifty cents; for proceedings to take child from parent or other persons having control thereof, two dollars and fifty cents: * * *'
>
> *"Question:* What, if any, fees or costs can be taxed for clerical work or services rendered by a probate judge exercising the jurisdiction of a juvenile judge in a proceeding against an adult under the juvenile court laws?
>
> *"Question:* If any fees for the judge can be taxed against an adult defendant, and are paid, must they be accounted for to the probate judge's fee fund?
>
> *"Question:* In a case against an adult under the juvenile court laws, can the juvenile judge tax fees for himself under the provisions of section 1603, General Code? If this can be done, and the defendant proves insolvent, can same be paid to the judges out of the county treasury?"

By virtue of section 1584 the probate judge is made ex-officio the clerk of his own court. Section 1651, G. C., 103 O. L., 871, provides in part as follows:

> "Any person charged with violating any of the provisions of this chapter or being responsible for or with causing, aiding or contributing to the delin-

quency, dependency, or neglect of a child, or with acting in a way tending to cause delinquency in a child, arrested or cited to appear before such court, at any time before hearing, may demand a trial by jury, or the judge upon his own motion may call a jury. The statutes relating to the drawing and impaneling of jurors in criminal cases in the court of common pleas, other than in capital cases, shall apply to such jury trial. *The compensation of jurors and costs of the clerk and sheriff shall be taxed and paid as in criminal cases in the court of common pleas.*"

In answer to your first question, by virtue of section 1651, supra, the probate judge is entitled as clerk of his own court to receive the same costs as are taxed and paid in criminal cases in the court of common pleas.

Section 2977 provides in part:

"All the fees, costs, * * * collected or received by law as compensation for services by a * * * probate judge * * * shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county and accounted for and paid over as such as hereinafter provided."

In answer to your second question I am of the opinion that the provisions of section 2977 apply and that the fees so paid must be accounted for to the probate judge's fee fund.

Since the matter of the costs of the probate judge is determinable by section 1651, in a case against an adult under the juvenile court laws, such section prevails and it is not necessary to consider section 1603, which reads as follows:

"For other services for which compensation is not otherwise provided by law, the probate judge shall be allowed the same fees as are allowed the clerk of the court of common pleas for similar services."

The probate judge would be entitled, as clerk of his own court, on the insolvency of the defendant, to the same fees as the clerk of the common pleas court would be entitled to in criminal cases.

Respectfully,
EDWARD C. TURNER,
Attorney General.

282.

OFFICES COMPATIBLE—HUMANE OFFICER—PROBATE OFFICER OF JUVENILE COURT—QUESTION OF FACT—PHYSICALLY POSSIBLE TO PERFORM DUTIES OF BOTH OFFICES.

There is no statutory inhibition against the same person holding the position of humane officer and probation officer of the juvenile court. It is a question of fact to be determined in each instance whether it is physically possible for the same person to perform the duties of both offices.

COLUMBUS, OHIO, April 24, 1915.

HON. F. M. ACTON, *Probate Judge, Lancaster, Ohio.*

DEAR SIR:—I have your communication of April 16, 1915, which communication reads as follows:

"Kindly advise me whether in your opinion there could be legal objection to an officer being compensated as probation officer under section 1662, G. C., and also as humane officer under section 10072, G. C.

"By provision of section 10072 you will note that the city and county join in paying the humane officer, and under section 1662, the county alone compensates the probation officer. The question is, may a person be compensated by the county as humane officer and also as probation officer?

"If this can be done lawfully it will result in better service at less cost to the county."

In the absence of constitutional or statutory inhibition, the same person may hold two or more offices unless they are in law incompatible. I find no statutory provision that would prevent a person from holding the offices of probation officer and humane officer at the same time. It therefore becomes important to inquire whether or not these two offices are incompatible.

The compatibility of public offices is dependent upon the nature and character of the duties necessary to the proper exercise of the powers and functions of such offices. The law as laid down by the courts is aptly stated in the case of State ex rel. v. Gebert, 12 O. C. C., (n. s.) 274, as follows:

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

An examination of the statutes relating to the duties of probation officers and of humane officers, discloses that the duties of one of these offices do not conflict in any way with those of the other, and that one office is not in any way a check upon or subordinate to the other. The question of whether or not it would be physically possible or practicable for the same person to fully and efficiently discharge the duties of both offices at the same time, is not susceptible of a general answer applicable in all the counties of the state. I would have no hesitancy in saying that in the small counties of the state, it would be physically practicable for the same person to efficiently discharge the duties of both offices at the same time, and that in the very large counties of the state it would be impossible for one person so to do.

This question is one of fact to be determined by reference to the needs and requirements of each county. If, as a matter of fact, it is physically practicable in your county for the same person to fully and efficiently discharge the duties of both offices at the same time, then my answer to your question would be that no legal objection exists to the same person holding both offices at the same time. If, as a matter of fact, it is not physically practicable for the same person to efficiently discharge the duties of both positions at the same time, then under the rule set forth above, the two offices are to be considered incompatible and may not be held by one person at the same time.

Respectfully,

EDWARD C. TURNER,

Attorney General.

283.

BOARD OF EDUCATION—THREE METHODS PERMITTED BY LAW FOR *BOND ISSUE* TO REPAIR OR ERECT SCHOOL BUILDING IN COMPLIANCE WITH ORDERS OF CHIEF INSPECTOR OF WORKSHOPS AND FACTORIES OR WHEN RENDERED NECESSARY BY DESTRUCTION OF BUILDINGS BY FIRE OR OTHER CASUALTY—TAX LEVIES AND LIMITATIONS IN SUCH CASES.

For the purpose of repairing or erecting school buildings in compliance with orders of the chief inspector of workshops and factories, or when rendered necessary by destruction of buildings by fire or other casualty, a board of education may issue and sell bonds under the provisions of section 7629, G. C., without a vote of the electors; the tax levy therefor being within the five mill and ten mill limitations of the Smith law.

If the funds at its disposal, or that can be raised under section 7629, G. C., would not be sufficient, the board may submit the proposition to the electors in conformity with the provisions of section 7625, G. C., et seq.. the tax levy for such bonds and interest being outside the five mill and ten mill limitations, but within the fifteen mill limitation of the Smith law.

Upon determination that sufficient money cannot be raised within the limitations applicable to each of the foregoing methods, the board may submit the proposition to issue bonds pursuant to the provisions of sections 7630-1, G. C., and 5649-4, G. C., to which latter procedure none of the limitations on taxation is applicable.

COLUMBUS, OHIO, April 24, 1915.

HON. DONALD F. MELHORN, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—Under date of April 9th, you requested my written opinion upon the following inquiry, to wit:

> "On June 4th, 1914, the industrial commission of Ohio, through its department of inspection, issued an order requiring the board of education of the city school district of Kenton, Ohio, to make numerous improvements in the various school buildings in said city. These improvements are to be accomplished by changing doors and windows, reseating several rooms, placing chemical fire extinguishers, putting in furnace and fuel rooms, and installing sanitary toilets, etc. Said order is to be complied with by the first of September, 1915.
>
> "Said board of education now has a levy of four mills for all school purposes, and has no money on hand for the purposes aforesaid.
>
> "To comply with the above order would cost from $5,000 to $7,000.
>
> "What I would like to have your opinion on is this:
>
> "Has the board of education authority to issue and sell bonds for the purpose aforesaid, without submitting the question to a vote of the electors of said district?"

The changes and installations set out in your statement of facts as required by the orders of the department of inspection, constitute improvements of the public school property within the terms of section 7629, G. C., and I am of the opinion that the board of education may, subject to the provisions of said section, issue and sell bonds for the purpose of making such improvements.

Section 7629 provides:

> "The board of education of any school district may issue bonds to obtain or improve public school property, and in anticipation of income from taxes,

for such purposes, levied or to be levied, from time to time, as occasion requires, may issue and sell bonds, under the restrictions and bearing a rate of interest specified in section seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven. The board shall pay such bonds and the interest thereon when due, but provide that no greater amount of bonds be issued in any year than would equal the aggregate of a tax at the rate of two mills, for the year next preceding such issue. The order to issue bonds shall be made only at a regular meeting of the board and by a vote of two-thirds of its full membership, taken by yeas and nays, and entered upon its journal."

Section 11, article XII, of the constitution, as amended, 1912, provides that no bonded indebtedness of the state, or any political subdivision thereof, shall be incurred unless in the legislation under which such indebtedness is incurred, provision is made for leving and collecting annually by taxation, an amount sufficient to pay the interest on said bonds, and providing a sinking fund for their final redemption at maturity. The tax levy for the payment of interest and to provide a sinking fund for the retirement of the bonds at maturity under the foregoing section would have to be within the ten mill aggregate limitation provided by section 5649-2 of the Smith law, so-called, and within the five mill limitation for school purposes as provided in section 5649-3a of said law.

The statutes providing the limitation upon the tax that may be levied, furnish the basis also, for calculation of the bond issue that may be made in anticipation of the collection of such taxes. In this connection, your attention is directed to the case of Rabe et al. v. Board of Education of Canton School District, 88 O. S., 403.

If, however, the amount of money that can be raised under the provisions of section 7629, and within the limitations above referred to, will not be sufficient for the purpose in question, then, in order to raise the needed amount by bond issue, it will be necessary to submit the proposition to a vote of the electors.

Upon determining that the funds at its disposal, or that can be raised under the provisions of section 7629, et seq., are not sufficient, the board may avail itself of the provisions of section 7625, G. C., et seq., which require the submission of the question of issuing bonds to a vote of the people. Upon the approval of the proposition, submitted in conformity to the provisions of section 7625, the bonds may be issued as provided in the succeeding sections, and a tax may be levied for their retirement at maturity and for payment of interest thereon, outside the five mill limitation and the ten-mill aggregate limitation above referred to, but within the fifteen mill limitation prescribed in section 5649-5, et seq., G. C.; but it is provided in section 5649-4, that a tax may be levied outside of any of the limitations of the Smith law, so-called, for the purpose of erecting or repairing school buildings, when the same is rendered necessary as a compliance with the orders of the chief inspector of workshops and factories, or when school buildings have been destroyed by fire or other casualty, when the board of the district is without sufficient funds applicable to the purpose with which to rebuild or repair such school buildings, and it is not practicable to secure such funds under the provisions of sections 7625 to 7630, inclusive, General Code, as provided in section 7630-1, G. C.; the full text of said section being as follows:

"Section 7630-1 (103 O. L., 527). If a school house is wholly or partly destroyed by fire or other casualty, or if the use of any school house for its intended purpose is prohibited by any order of the chief inspector of workshops and factories, and the board of education of the school district is without sufficient funds applicable to the purpose, with which to rebuild or repair such school house or to construct a new school house for the proper accommodation of the schools of the district, and it is not practicable to secure such funds under any of the six preceding sections because of the limits of taxation ap-

plicable to such school district, such board of education may, subject to the provisions of sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven, and upon the approval of the electors in the manner provided by sections seventy-six hundred and twenty-five and seventy-six hundred and twenty-six, issue bonds for the amount required for such purpose for the payment of the principal and interest on such bonds and on bonds heretofore issued for the purposes herein mentioned, and to provide a sinking fund for their final redemption at maturity, such board of education shall annually levy a tax as provided by law."

Section 5649-4 (103 O. L., 527), provides:

"For the emergencies mentioned in sections forty-four hundred and fifty, forty-four hundred and fifty-one, fifty-six hundred and twenty-nine, seventy-four hundred and nineteen and 7630-1, of the General Code, the taxing authorities of any district may levy a tax sufficient to provide therefor irrespective of any of the limitations of this act."

Answering your question specifically, therefore, I am of the opinion that if sufficient funds can be provided within the limitations of section 7629 and the limitations of the Smith law, as above pointed out, such bond issue may be made without submitting the question to a vote of the electors, but if sufficient funds cannot be provided within such limitations, and upon a determination of that fact by the board, and if there are not sufficient funds in the treasury available for the purpose, the proposition to issue bonds may then be submitted to a vote of the electors as provided in section 7625; the tax levy for interest and sinking fund purposes for retirement of said bonds not being within the five mill limitation or the ten mill aggregate limitation of the Smith one per cent law, but within the fifteen mill limitation of said law.

If sufficient funds cannot be raised within the limitations of law applicable to each of the above named methods of procedure relative to bond issues, and upon a determination to that effect by the board, and if the school district is without sufficient funds applicable to the purpose, the board may proceed to submit to the electors the proposition of issuing bonds for the purpose of erecting or repairing school buildings as the case may be, in conformity to the provisions of section 7630-1, and the tax levy for payment of interest on such bonds and to provide a sinking fund for their retirement at maturity is not limited by the provisions of the Smith law.

Respectfully,

EDWARD C. TURNER,

Attorney General.

284.

CONSTRUCTION OF SECTION 3495, G. C.—EXPENSES OF BURIAL OF DEAD BODY PAID BY COUNTY COMMISSIONERS IRRESPECTIVE OF WHETHER OR NOT PERSON IN LIFE HAD LEGAL SETTLEMENT IN COUNTY OR STATE, OR WAS UNKNOWN.

The provisions of section 3495, G. C., that upon notice, the county commissioners "shall cause the body to be buried at the expense of the county" applies to the burial of the dead body of a person who in life had a legal settlement in the county as well as to the burial of the dead body of a person who in life did not have a legal settlement in the state, or whose legal settlement is unknown.

COLUMBUS, OHIO, April 24, 1915.

HON. FRANK B. GROVE, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—Under date of April 14, 1915, you wrote to this department as follows:

"Some difference of opinion has arisen as to the correct meaning and construction of section 3495, General Code, which said section reads as follows:

" 'When information is given to the trustees of a township or proper officer of a municipal corporation, that the dead body of a person, having a legal settlement in the county, or whose legal settlement is not in the state or is unknown, and not an inmate of a penal, reformatory, benevolent or charitable institution, has been found in such township or corporation, and is not claimed by any person for private interment at his own expense or delivered for the purpose of medical or surgical study or dissection in accordance with law, they shall cause it to be buried at the expense of the township or corporation, but, if such trustees or officer notify the infirmary directors (commissioners), such directors shall cause the body to be buried at the expense of the county.'

"On December 3, 1914, my predecessor in office, Mr. Pettay, acting under instructions from one of the state examiners, here at the time, sent the following to each of the various clerks in the county:

" 'Owing to recent court decisions with reference to burial of paupers, and owing to a change of the rule by the state bureau of accounting, the township trustees, on being notified of a deceased pauper in their township to be buried at public expense, may notify the county commissioners that such deceased pauper is not claimed for burial by any person for private interment at his own expense. And in such case the county commissioners shall bury such pauper at the expense of the county.'

"Since above has been sent out, each township has been demanding that all its indigent and pauper deceased be buried at the expense of the county, claiming that under above instructions all the indigent deceased and paupers which were formerly buried at the expense of the township, must now be buried at the expense of the county, if proper notice is given to the county commissioners.

"It does not appear to me that section 3495 is entitled to the broad construction contained in the letter sent out by Mr. Pettay, at the suggestion of said examiner. I am more inclined to the view that said section is intended to cover only those cases of persons found dead and whose bodies are unclaimed for interment, and that said section does not mean that all the indigents and paupers which were formerly buried at the expense of the township must now be buried at the expense of the county.

"Kindly inform me as to your construction of section 3495 in regard to

what cases it covers. Does it mean that, if notice is given to the county commissioners, they must bury at the expense of the county, every indigent person whose friends will not, or are unable to, bury the same?"

Section 3495 provides for the burial at public expense of the body of a person having a legal settlement in the county or whose legal settlement is not in the state or is unknown, provided such deceased person may not have been at the time of his death an inmate of a penal, reformatory, benevolent or charitable institution, and provided said body is not claimed by any person *for private interment at his own expense* or delivered to a medical college.

While I am not clear as to the exact question you desire answered, I assume that your question is:

Whether the county commissioners, on being duly notified, must bury the body of a person who in life had a legal settlement in the county and who was not an inmate of a penal, etc., institution, or only a person who in life did not have a legal settlement in the state or is unknown.

To my mind, the statute is clear that it is the duty of the county commissioners, they being the successors of the county infirmary directors, to cause to be buried, not only the body of a person who has a legal settlement in the county, but also the body of a person who did not have a legal settlement in the state or who is unknown.

Respectfully,

EDWARD C. TURNER,
Attorney General.

285.

EXHUMING DEAD BODY—EXPENSES PAID OUT OF PROSECUTING ATTORNEY'S CONTINGENT FUND—ANALYSIS OF STOMACH—EXPENSES MAY BE ALLOWED BY COUNTY COMMISSIONERS —EXPERT WITNESSES BEFORE CORONER ALLOWED ONLY PER DIEM MILEAGE—EXPERTS MAY IN CERTAIN CASES RENDER SERVICES AND BE ALLOWED COMPENSATION BY COUNTY COMMISSIONERS.

1. *The expense of exhuming a dead body for purpose of examination by a county coroner, or other physician or surgeon designated by him, can only be paid when such expense is authorized or ratified by the prosecuting attorney of the county, in which case it may be paid out of the contingent fund of the prosecuting attorney provided by section* 3004, *G. C.*

2. *The expense of an analysis of the contents of the stomach of a dead person may, when ordered by the county coroner or other proper officer, in conducting a post mortem examination, be allowed by the county commissioners in such an amount as they deem proper, (section* 2495, *G. C.).*

3. *Expert witnesses testifying before the coroner cannot be paid more than the usual per diem and mileage paid the other witnesses.*

4. *Expert witnesses may upon the certificate of the prosecuting attorney or his assistant, that the services of an expert or the testimony of expert witnesses were or will be necessary in the preliminary examination before an examining court, the grand jury investigation or the trial of a person accused of crime, be allowed such compensation as the county commissioners deem proper and the court approves.*

COLUMBUS, OHIO, April 24, 1915.

HON. FOREST G. LONG, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—Your two letters of March 25th and April 15, 1915, received, and are in part as follows:

> "The Logan county grand jury yesterday indicted Margaret Adelaide Bentz for murder in the first degree. She is charged with having poisoned a little babe (not her own). The county coroner was called in in this case and he had a chemical analysis made of some of the contents of the stomach, but he did not get a sufficient quantity for a proper test, and after the child was buried the body was exhumed and some parts taken and further analyzed, revealing that the child had died from morphine poisoning, supposedly at least.
>
> "Now, what I desire to know is, how and from what fund shall the cost of the post mortem in that case be paid? May that expense and the expense for the chemical analysis, which amounts to one hundred dollars, be paid under favor of section 2495 of the General Code? If not, who should pay it, and from what fund?
>
> "The analyst and the pathologist both live in Columbus and have asked in addition twenty-five dollars per day for each day that they are called to this county to testify. The twenty-five dollars each being in addition to their regular fees as ordinary witnesses. May these amounts be legally paid to them as expert witnesses, and if so, would you please indicate in what manner, and from what fund?
>
> "Referring to my letter to you of March 25th, and your letter to me of

the 27th, I wish to say that the body mentioned in said letter was exhumed upon the order of the county coroner for the purpose of making a post mortem examination."

For convenience in answering your questions, I have divided them into four parts as follows:

1. Can the expense of exhuming the body be paid, and if so from what fund?

From your letter it appears that this is an expense incurred solely on the order of the coroner and for the purpose only of conducting his inquest.

Section 2866, G. C., provides the fees which may be paid to the coroner and is as follows:

> "Coroners shall be allowed the following fees: For view of dead body, three dollars; for drawing all necessary writings, and return thereof, for every one hundred words, ten cents; for traveling, each mile, to the place of view, ten cents; when performing the duties of sheriff the same fees as are allowed to sheriffs for similar services."

No provision is here made for the payment of this expense, and there is no other authority for the payment of any fees or expenses incurred by, or on the order of the coroner.

I am, therefore, of the opinion that such expense, when incurred by or on the order of the coroner, cannot be paid from any public fund.

The facts stated by you do not call for an opinion as to whether such expense could be incurred at the direction of the prosecuting attorney and paid out of his contingent fund provided by section 3004, General Code. It is suggested that the prosecuting attorney may now, if he deems such expense a proper one in the furtherance of justice, ratify the act of the coroner and pay the same from said fund.

2. Can the cost of the analysis of the contents of the stomach be paid, and if so how?

Section 2495, General Code, provides as follows:

> "The county commissioners may allow a physician or surgeon making a post mortem examination at the instance of the coroner or other officer such compensation as they deem proper."

The making of the analysis being a necessary part of the post mortem examination and having been made at the instance of the coroner, such compensation therefor can be allowed by the commissioners as they deem proper.

3. Can the men who made the analysis and who appear before the coroner to testify as experts be paid more than other witnesses are paid?

The only authority for the payment of expert witnesses by the state in criminal cases is found in section 2494, General Code, as follows:

> "Upon the certificate of the prosecuting attorney or his assistant that the services of an expert or the testimony of expert witnesses in the examination or trial of a person accused of the commission of crime, or before the grand jury, were or will be necessary to the proper administration of justice, the county commissioners may allow and pay such expert such compensation as they deem just and proper and the court approves."

Prior to the enactment of this statute expert witnesses testifying on behalf of the state could not be paid more than the ordinary witness fees—Pengelly v. Ashland Co., 11 O. D., 620, decided in 1901, the first syllabus of which is as follows:

"Witness fees in criminal cases governed by section 1302, Rev. Stat.

"Authority for payment of claims out of the county treasury is statutory and the only fees which can be allowed witnesses, expert or non-expert, in criminal proceedings, are the per diem fees and mileage allowed by section 1302, Rev. Stat. Custom in such cases, of paying experts additional fees, does not make it lawful to do so."

Coming now to section 2494, enacted in 1902 (95 O. L., 282), it will be seen that expert witnesses can only be paid upon the certificate of the prosecuting attorney or his assistant, "that the services of an expert or the testimony of expert witnesses in the examination or trial of *a person accused of the commission of a crime*, or before the grand jury, were or will be necessary to the proper administration of justice."

The authority of the coroner to hold an inquest is found in section 2856, G. C., which is in part as follows:

"When informed that the body of a person whose death is supposed to have been caused by violence has been found within the county, the coroner shall appear forthwith at the place where the body is, issue subpoenas for such witnesses as he deems necessary, administer to them the usual oath, and proceed to inquire how the deceased came to his death, whether by violence from any other person or persons, by whom, whether as principals or accessories before or after the fact, and all circumstances relating thereto."

While the coroner has authority in conducting his inquest to inquire into the question of "how the deceased came to his death, whether by violence from any person or persons, *by whom*, whether as principals or accessories after the fact," yet when it is considered that the prosecuting attorney may act independent of the coroner in the prosecution of *any person charged* with the crime, and is provided by law with the machinery so to do—to wit: the examining court and the grand jury, it becomes clear that the use of the word "examination" in section 2494, above quoted, has reference to the preliminary hearing before an examining court, and does not include the coroner's inquest. The coroner's inquest is not for the purpose of examining or trying a person accused of a crime, but primarily for the purpose of determining whether or not there should be such an examination or trial.

I am, therefore, of the opinion that the men who made the analysis and who appeared and testified before the coroner cannot be paid more than the usual per diem and mileage allowed for ordinary witnesses.

In reaching this conclusion due regard has been given to the case of state ex rel. Brown, 62 O. S., 307, in which the court say:

"It is thus indicated that the inquest is intended to aid in the detection of crimes and in the punishment of those who perpetrate them."

This case is not regarded as having any bearing on this question because of the independent character of the coroner's inquest as distinguished from the authority and duty of the prosecuting attorney, and the clear intention that section 2494, above quoted, should apply only to the proceedings which the prosecuting attorney may institute and over which he has control.

It is further suggested that such witnesses who appear before the coroner to testify cannot be paid extra compensation by the prosecuting attorney out of his contingent fund provided by section 3004, General Code, because compensation for such witnesses is *otherwise provided by law*, to wit, per diem and mileage.

4. May the men who made the analysis be paid extra compensation for testifying before the examining court, the grand jury or at the trial of the case?

Under section 2494 above quoted it is clear that such witnesses upon the proper

certificate being made by the prosecuting attorney, as provided therein, may be allowed such compensation by the commissioners as they deem proper and the court approves.

In this connection, however, I call your attention to the case of state ex rel. v. Guilbert, 77 O. S., 333, in which it was held that such extra compensation so paid to expert witnesses could not be collected from the state by the county allowing and paying the same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

286.

WHERE WARRANT FOR TAXES MAILED VILLAGE BY COUNTY AUDITOR IS LOST IN MAILS—DUTY OF AUDITOR TO MAKE DUPLICATE WARRANT WHEN PROPER APPLICATION HAS BEEN MADE.

When a warrant for taxes due a village is mailed to the treasurer of the village by the county auditor and is lost in the mails, it is the duty of the auditor upon proper application therefor, to issue and deliver to such treasurer a duplicate warrant.

COLUMBUS, OHIO, April 24, 1915.

HON. ALDRICH B. UNDERWOOD, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—Under date of April 20, 1915, you request my written opinion upon the following statement of facts and inquiry, to wit:

"I am writing to you in regard to two warrants, issued on the treasury of Medina county, and lost in the mails.

"These warrants were issued on the 5th day of March, A. D., 1915, and were made payable to J. N. Leatherman, or order, said Leatherman being the treasurer of Wadsworth village, and said warrants being for the share of taxes, belonging to said village.

"These warrants bore the Nos. 4010 and 4043 respectively, and called for a total of $14,920.06. The mailing of these warrants was checked up by the auditor's working force, and has been proven beyond any doubt. The said J. N. Leatherman, treasurer of the village of Wadsworth, has never received same, and the presumption is that they have been lost, stolen, or have fallen into the hands of some other person.

"The village of Wadsworth is in immediate need of these funds to meet accruing bills, and to pay its bonded indebtedness. The city solicitor of Wadsworth visited Medina today, and has made it clear that something must be done, and be done at once.

"The solution which first suggests itself was for the county auditor to issue duplicate warrants. So far, we have been unable to find any law in the General Code of Ohio authorizing a county auditor to issue a duplicate warrant. In order to protect the county, all local banks have been notified not to cash the original warrants, and as much publicity as possible has been given the matter, as might prevent any person from presenting them for payment.

"A bond has been drawn up for said J. N. Leatherman to sign, to in-

demnify and save harmless the county of Medina. A copy of this bond is enclosed. Said H. N. Leatherman, as treasurer of the village, refuses to sign this bond."

Section 4298 of the General Code, authorizes the treasurer of a village to demand and receive all taxes and moneys due and payable to the village.

Section 4301, G. C., directs the county treasurer to pay to the treasurer of a municipal corporation the moneys due to such corporation arising from tax levies and assessments.

Section 2674 provides that no money shall be paid from the county treasury except upon the warrant of the county auditor, except moneys paid over to the state treasury, which shall be on the warrant of the state auditor.

Section 2602 provides:

"The auditor shall open an account with each township, city, village, and special school district in the county, in which, immediately after his semi-annual settlement with the treasurer in February and August of each year, he shall credit each with the net amount so collected for its use.

"On application of the township, city, village, or school treasurer, the auditor shall give him a warrant on the county treasurer for the amount then due to such treasurer, and charge him with the amount of the warrant, but the person so applying for such warrant shall deposit with the auditor a certificate from the clerk of the township, city, village, or district, stating that he is treasurer thereof, was duly elected or appointed, and that he has given bond according to law."

The statute contemplates an application by the treasurer of the village, in person, for the warrant for the proceeds of the tax levy for the village, and provides that upon the deposit with the auditor, by the person so applying, of a certificate from the clerk of the village that he is the duly qualified treasurer thereof and has given bond according to law, the auditor shall give him a warrant on the county treasurer for the amount then due to such village.

Any departure from the terms and spirit of the statute in effecting a delivery of the warrant is at the peril of the auditor, and any negligence occurring in the performance of the duty is chargeable against him.

It appears that the method of transmission of the warrant adopted by the auditor, viz.: The placing of it in the mails did not result in its delivery. The treasurer of the village, not having received it, is entitled upon application therefor, and the deposit of the certificate prescribed by the statute, to receive a warrant for the moneys due the village, and the only practicable means of discharging the auditor's obligation will be to issue and deliver a duplicate warrant for the amount so due.

There seems to be no express statutory authority for the issuance and delivery by the auditor of duplicate warrants, as such, but the obligation to issue and deliver a warrant is controlling, and we are not concerned with its character as "original" or "duplicate," but must leave it to the auditor to respond for his act in the unauthorized disposition of the additional warrant issued in this case.

The conclusion herein expressed is based on the presumption that the mailing of the warrant by the auditor was not authorized by the village treasurer.

By section 246, G. C., 104 O. L., 162, the state auditor is authorized to issue duplicate warrants in case of loss of the original, but this statute is not in terms applicable to the county auditors.

A bond issued on the part of the village treasurer, conditioned to save the county from liability to pay said original warrant on account of its endorsement by himself

or any one by him authorized, it seems to me would be very proper in this case, but the refusal or inability of the treasurer to execute such bond will not excuse the delivery of the warrant by the auditor.

However, any endorsement and negotiation of the original warrant by the village treasurer would be a violation of his official bond, while it is the general rule that a forged endorsement transfers no title.

I am, therefore, of the opinion, that if it appears that the original warrant has been lost, it is the duty of the county auditor to issue and deliver a duplicate warrant to the village treasurer, upon the proper application therefor.

Respectfully,
EDWARD C. TURNER.
Attorney General.

287.

VILLAGE SCHOOL DISTRICT—DISSOLUTION—TITLE TO SCHOOL PROPERTY THEN VESTS IN CONTIGUOUS RURAL SCHOOL DISTRICT TO WHICH VILLAGE DISTRICT IS JOINED—INDEBTEDNESS OF VILLAGE DISTRICT MUST BE PAID BY SUCH DISTRICT—RURAL SCHOOL DISTRICT HAS NO RIGHT TO ASSUME INDEBTEDNESS—VILLAGE BOARD OF EDUCATION MUST CONTINUE FOR PURPOSE OF LEVYING A TAX TO PAY INDEBTEDNESS.

Upon the dissolution of a village school district, the title to the school property of said district passes to and vests in the board of education of the contiguous rural school district to which such village school district is joined, but only the property within the limits of said village school district will be subject to a tax levy for the payment of any indebtedness incurred by the board of education of said village school district, and the board of education of said rural school district will have no authority in law to assume said indebtedness or to levy a tax to provide a fund for the payment thereof either upon the property within the limits of said village school district or upon the general duplicate of said rural school district.

If the levy for the payment of said indebtedness has not been made by said board of education of said village school district at the time of dissolution, said village school district as a separate taxing district, and its board of education as its taxing authority, must continue for the purpose only of levying a tax for the payment of such indebtedness until such time as said indebtedness will have been paid.

COLUMBUS, OHIO, April 26, 1915.

HON. F. C. GOODRICH, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 31st, which is as follows:

> "Under the recent law passed by the legislature, giving village districts of less than fifteen hundred population the right to dissolve and go back into the school district, West Milton, Ohio, is contemplating taking a vote to dissolve their special district, and become a part of Union township, Miami county.
>
> "Will you please advise me that if the vote to dissolve is successful, and this district becomes a part of the township district, does the school property at West Milton become the property of the township? If so, and there is a bonded indebtedness on the property now in the West Milton special district,

does this property have to be turned over to the township free of incumbrance, or will the whole township assume this indebtedness and pay it off from the taxes on the general duplicate of Union township?"

Section 4682-1, G. C., as found in 104 O. L., 133, provides:

"A village school district containing a population of less than fifteen hundred, may vote at any general or special election to dissolve and join any contiguous rural district. After approval by the county board, such proposition shall be submitted to the electors by the village board of education on the petition of one-fourth of the electors of such village school district or the village board may submit the proposition on its own motion, and the result shall be determined by a majority vote of such electors."

Section 4683, G. C., as amended, 104 O. L., 133, provides:

"When a village school district is dissolved, the territory formerly constituting such village district shall become a part of the contiguous rural district which it votes to join in accordance with section 4682-1, and all school property shall pass to and become vested in the board of education of such rural school district."

If a majority of the electors of West Milton village school district vote in favor of dissolving said district and joining it to the contiguous rural district of Union township, in accordance with the above provision of section 4682-1, General Code, said village of West Milton being located within said Union township, upon such dissolution, the title to the school property of said village school district will pass to and vest in the board of education of said Union township rural school district, under the above provision of section 4683, G. C.

In your letter you refer to West Milton village school district as "West Milton special district." Upon investigation I find that this district is known as West Milton village school district, and is in fact a village school district.

The statutes governing the dissolution of a village school district and the disposition of its bonded indebtedness are separate and distinct from the statutes governing the dissolution of a district formerly known as a special district, now known as a rural district under the provisions of section 4735, G. C., as amended in 104 O. L., 138, and the disposition of the indebtedness of such rural school district. The two classes must not be confused.

Section 4689, G. C., as amended in 104 O. L., 134, provides:

"The provisions of law relating to the power to settle claims, dispose of property or levy and collect taxes to pay existing obligations of a village that has surrendered its corporate powers, shall also apply to such village school district and the board of education thereof."

Section 3513, G. C., provides:

"Villages may surrender their corporate powers upon petition to council of at least forty per cent. of the electors thereof, to be determined by the number voting at the last municipal election, and an affirmative vote of a majority of such electors at a special election which shall be provided for by council, and conducted, canvassed, and the result certified and made known as regular municipal elections within the corporation. If the result of the election is in favor of such surrender, the clerk of the village shall certify the

result to the secretary of state and the recorder of the county, who shall record it in their respective offices, and thereupon the corporate powers of such village shall cease."

Section 3514, G. C., provides:

"Such surrender of corporate powers shall not affect vested rights or accrued liabilities of such village, or the power to settle claims, dispose of property, *or levy and collect taxes to pay existing obligations*, but after the presentation of such petition, council shall not create any new liability until the result of the election is declared, nor thereafter, if such result is in favor of the surrender of corporate powers. Due and unpaid taxes may thereafter be collected, and all moneys or property remaining after such surrender shall belong to the school district embracing such village."

Under the above provisions of the statutes it seems clear that the dissolution of West Milton village school district will not be complete until the payment of the indebtedness of said district is provided for. Inasmuch as the question of the dissolution of said village school district is to be submitted only to the electors of said district, and not to the electors of Union township rural school district, I do not think that the property in said township rural school district can be held liable for the payment of any indebtedness incurred by the board of education of such village school district.

Replying to your question, I am of the opinion that, upon the dissolution of West Milton village school district, the title to the school property of said district will pass to and vest in the board of education of Union township rural school district, but only the property within the limits of said village school district will be subject to a tax levy for the payment of any indebtedness incurred by the board of education of said village school district, and the board of education of Union township rural school district will have no authority in law to assume said indebtedness or to levy a tax to provide a fund for the payment thereof either upon the property within the limits of said village school district or upon the general duplicate of the Union township rural school district. If the levy for the payment of such indebtedness will not have been made by said board of education of said village school district at the time of dissolution, I am of the opinion that said village school district as a separate taxing district, and its board of education as its taxing authority, must continue for the purpose only of levying a tax for for the payment of such indebtedness until such time as said indebtedness will have been paid.

Respectfully,
EDWARD C. TURNER,
Attorney General

288.

COUNCIL OF MUNICIPAL CORPORATION—NOTES ISSUED IN ANTICIPATION OF SPECIAL ASSESSMENTS—HOLDER OF NOTES ENTITLED TO INTEREST AFTER MATURITY IF HE MAKES PROPER PRESENTMENT—WHAT CONSTITUTES PRESENTMENT OF NOTE.

The holder of a negotiable note issued by the council of a municipal corporation in anticipation of assessments, and made payable at the office of the sinking fund trustees, is entitled to interest thereon at the contractual rate after the maturity of the note if he makes proper presentment of the same at maturity and payment is refused by the sinking fund trustees, or if he fails to make proper presentment thereof but the sinking fund trustees did not have on hand or subject to their order at maturity sufficient funds to meet the note; but if such funds were on hand and proper presentment was not made, the holder is not entitled to past due interest and the payment of such interest to him is illegal.

In order to make proper presentment it is necessary ordinarily to exhibit the note at the place at which it is made payable, but under special circumstances this rule is relaxed.

Presentment of such a note at the office of the sinking fund trustees is legal, though the trustees themselves are not present and are represented only by their secretary, who is not authorized to determine whether or not a given obligation shall be paid.

COLUMBUS, OHIO, April 26, 1915.

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

GENTLEMEN:—I acknowledge receipt of your letter of April 19th, in which you call attention to the opinion of my predecessor under date of April 27, 1914, relative to the payment of interest on negotiable notes issued by a municipal corporation after the same are due, and state that the opinion in question applies to facts developed in an examintation under the direction of your department of the books and accounts of the sinking fund trustees in the city of Steubenville.

You advise that the examination to which you refer has thus far disclosed the total amount of past due interest paid out of the funds of the city during a given period of time, together with the amount paid under the administration of each particular board of sinking fund trustees, which, under the ordinances of the city, had been charged with the payment of such notes. You state, however, that your examiner has thus far not ascertained whether or not at the time of maturity of each certificate of indebtedness there were funds in the hands of the sinking fund trustees available for the payment of the particular obligation. To do so you say would entail a vast amount of work, due to the condition of the sinking fund accounts and the methods employed in collecting the special assessments, in anticipation of which the notes were issued.

You suggest the possibility of making and enforcing a finding against the holders of such certificates for the amount of past due interest received, on the ground that such holders did not legally present the certificates at maturity. In this connection you state that your examiner has allowed interest in all cases in which it appears on the face of the certificate by a proper endorsement that same was presented at maturity, or where the journal of the trustees of the sinking fund shows the fact of such presentation to the trustees.

You advise further that in numerous instances there is no record of such presentment being made, and describe in your letter and verbally two methods of what might be termed "informal presentment," viz.:

> "(1.) Verbal notice to the secretary of the sinking fund trustees, sometimes given by telephone, that the certificates were held by the holder, coupled with an inquiry as to whether or not they were to be paid.

"(2.) Actual presentment of the note at the office of the sinking fund trustees to their secretary."

You also advise that the sinking fund trustees had never, formally at least, authorized their secretary to act in such cases.

Upon these facts you raise two legal questions, and request my advice thereon for the guidance of the department, viz.:

"(1.) Is it necessary in order to establish the illegality of the payment of past due interest, when no proper presentment has been made (and assuming that the failure of the holder to make proper presentment would be material as affecting the legality of the payment of further interest), to show that the sinking fund trustees had at a given date of maturity money on hand sufficient to pay the note and available for its payment?

"(2.) Is presentment in either of the ways above described sufficient?"

Section 8175 of the General Code, being part of what is known as the "negotiable instruments law," provides in part as follows:

"Section 8175. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; yet if by its terms, the instrument is payable at a special place, and he is able and willing to pay it there at maturity, and has funds there available for that purpose, such ability and willingness are equivalent to a tender of payment on his part. * * *"

This provision is probably declaratory of the common law, but at all events it governs, in my opinion, as to the respective rights and liabilities of municipal corporations and those dealing with them in the issuance of what are termed "certificates of indebtedness" by section 3913, General Code, and "notes" by section 3915, General Code. They are negotiable instruments. There are with respect to their payment no peculiar statutory provisions which need be noted in connection with your first question. Therefore, it seems to me that the general rules of law, whether of statute or otherwise, apply.

This being the case, the answer to your first question is very clearly suggested by section 8175, supra. This section prescribes what shall be equivalent to a tender in case a negotiable instrument is made payable at a special place. By necessary inference no act or circumstance other than those prescribed in the section constitutes such a tender.

I am, therefore, of the opinion, that unless it should be established that the city at the date of maturity of a given note had funds at the office of the sinking fund trustees, i. e., subject to their order, available for the purpose of paying the note, the mere fact that the holder of the note did not properly present the same at maturity would not make the subsequent payment of past due interest illegal. I think that as to municipal corporations, section 8175, insofar as it provides that the maker must be "able and willing to pay it there at maturity," does not apply. The willingness of the municipality as such to pay the obligation at the time and place specified would, in my opinion be presumed if its officers were shown to have funds available for that purpose at such time and place.

I am, therefore, obliged to advise you, with considerable regret, that in order to determine the liability, if any, of the holders of the obligations to which you refer, who have received past due interest, it will be necessary further to examine the books and accounts of the sinking fund trustees in order to ascertain whether or not at the maturity of each note on which such past due interest was paid there was available and in the hands of the sinking fund trustees sufficient money to pay it.

In making this determination the general sinking fund balances may not be taken into account. As pointed out in the opinion of my predecessor, it is not the duty of the sinking fund trustees under the general laws of the state to administer the payment of notes and certificates of indebtedness as distinguished from bonds, but primarily at least such obligations are to be paid by the city treasurer. However, in the case with which you are dealing council of the municipality delegated to the trustees of the sinking fund the duty of caring for such certificates and notes, and caused to be placed on the face of each of them a recital to the effect that they were payable at the office of the sinking fund trustees.

This may be regarded, strictly speaking, as ultra vires legislation, but inasmuch as the rights of bona fide holders are involved I think the city as against third parties cannot claim anything on account of such irregularity. But while the city, having issued notes payable at the office of the sinking fund trustees, has hereby incurred the obligation of providing funds with which the sinking fund trustees may pay such obligations when due, it could not authorize the trustees to use the general sinking fund balances which are appropriated to other purposes by the self-executing provisions of the statute. The only revenues, therefore, available for the payment of such notes would be the proceeds of the special assessments or general levies anticipated by the notes themselves, together with such special tax levies as might be made for the purpose of supplying any deficiency in the special assessments, or otherwise providing, in whole or in part, for the payment of such notes. These funds would have to be kept separate from the general sinking fund balances and would have to be identified in each case before the conditions upon which the possible liability of the holders of the notes could be made to appear.

The first part of your second question is answered by section 8179, General Code, which provides as follows:

> "Section 8179. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it."

This section is declaratory of the common law. (See Daniel on Negotiable Instruments, section 654.)

While these principles apply primarily to presentment for the purpose of charging indorsers, yet in my opinion they apply also in all other cases where the question of presentment becomes material. The maker is entitled before being charged with further liability on a negotiable instrument to have the same personally presented to him at maturity, unless there is some good and sufficient reason for dispensing with such presentment, or unless same is waived by the maker. In the case you describe mere verbal notice to the clerk or secretary of the sinking fund trustees is not a sufficient presentment, nor is the verbal refusal of the secretary to pay the note the act of the city or of the trustees.

Therefore, I am of the opinion that in the first case described by you in stating your second question the holder of the note would be the recipient of an illegal payment if past due interest were subsequently paid to him, and if at the time of his verbal notice to the secretary of the sinking fund trustees the trustees actually had, subject to their order, funds of the municipality available for the payment of the note.

The second case described by you presents a more difficult question.

Sections 4509 and 4510, General Code, provide as follows:

> "Section 4509. The trustees of the sinking fund, immediately after their appointment and qualification, shall elect one of their number as president and another as vice-president, who, in the absence or disability of the president, shall perform his duties and exercise his powers, and such secretary,

clerks or employes as council may provide by an ordinance which shall fix their duties, bonds and compensation. Where no clerks or secretary is authorized, the auditor of the city or clerk of the village shall act as secretary of the board.

"Section 4510. The trustees of the sinking fund shall make their own rules, but their meetings shall be open to the public, and all questions relating to the purchase or sale of securities, payment of bonds, interest or judgments or involving the payment or appropriation of money shall be decided by a yea and nay vote with the name of each member voting recorded on the journal, and no question shall be decided unless approved by a majority of the whole board."

While, as hereinbefore stated, the duties of the sinking fund trustees primarily relate to the payment of bonds, yet when council by legislation such as has been described has imposed upon them the duty to administer the payment of certificates of indebtedness and notes, it is my opinion that such legislation is to be interpreted in the light of the above sections. That is to say, when the trustees are charged with the payment of notes they may not, in my judgment, act otherwise than in accordance with the rule provided in section 4510. At the very least the payment of notes and interest is a "question * * * involving the payment or appropriation of money," which under this section must be "decided by a yea and nay vote, with the name of each member voting recorded on the journal."

It is clear, therefore, that as a matter of municipal administration, the secretary of the sinking fund trustees has no authority to determine whether or not a given payment will be made.

Section 8177, General Code, provides in part that

"Presentment for payment, to be sufficient, must be made * * * to the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made."

While all persons are, of course, chargeable with notice of such statutes of the state as to which recitals on the face of a negotiable instrument call attention, yet the holder of such an instrument issued by a city in not to be put to any greater effort in preserving his rights than the holder of any other similar obligation. So if such holder makes proper presentment of the note in his possession at the place where it is made payable, viz., the office of the sinking fund trustees, and finds there the secretary of the board (as would be the case under normal circumstances, the trustees not ordinarily remaining at their office during business hours), and such presentment is during ordinary business hours, it is sufficient; and even though the secretary may not have power as an officer of the corporation to decide whether the note shall be then paid or not, such presentment is a sufficient demand upon the trustees to pay the note. If then the trustees at the first opportunity do not pay the note, the circumstances are the equivalent of a demand upon them and a refusal by them to pay.

Therefore, I am of the opinion that the presentment described by you in stating the second case in connection with your second question is legal, and if the sinking fund trustees do not forthwith pay the note so presented the city is liable for the interest thereon until the same is paid, regardless of whether or not there was sufficient money, subject to the order of the sinking fund trustees, available for the payment of the note at the time of presentment.

It occurs to me in connection with your questions, however, that the secretary of the sinking fund trustees was probably in possession of accurate knowledge as to the funds in the hands of the trustees; and if as a matter of fact the funds were at a given time insufficient to pay accruing obligations, and he so stated to the holder,

the fact that proper presentment was not made would be immaterial, for in that event the payment of the interest after the maturity of the note could not be regarded as illegal.

Respectfully,
EDWARD C. TURNER,
Attorney General.

289.

WORKMEN'S COMPENSATION ACT—AN EMPLOYE HAVING BUT ONE EYE AND LOSING THAT IN THE COURSE OF HIS EMPLOYMENT, IS TOTALLY AND PERMANENTLY DISABLED.

An employe, under sections 33 and 34 of the workmen's compensation act, having but one eye, and losing that in the course of his employment, is totally and permanently disabled.

COLUMBUS, OHIO, April 27, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter in which you advise that the industrial commission has held that where a person having lost the sight of one eye becomes an employe of one to whom the provisions of the workmen's compensation act applies, and loses the sight of the other eye as a result of an injury while in the course of his employment, that a case of permanent total disability is presented, and that said employe is entitled to the compensation provided for under section 34 of the said act. You ask my opinion as to the correctness of this ruling.

Section 34 of the workmen's compensation act (1465-81, G. C.), provides that in cases of permanent total disability the award shall be 66⅔ per cent. of the average weekly wage, and shall continue until the death of such person totally disabled, with a maximum of twelve dollars and a minimum of five dollars per week. This section makes the loss of both hands, or of both arms, or of both feet, or of both legs, or of both eyes, or any two thereof, prima facia evidence of permanent and total disability.

Section 33 (1465-80, G. C.), of the workmen's compensation act provides, in part, that for the loss of an eye, the compensation shall be 66⅔ per cent. of the average weekly wage for a period of one hundred weeks, with a maximum of twelve dollars and a minimum of five dollars per week. Section 33 also contains a provision that,

> "In case of an injury resulting in partial disability the employe shall receive sixty-six and two-thirds per cent. of the impairment of his earning capacity during the continuance thereof, not to exceed a maximum of twelve dollars per week, or a greater sum in the aggregate than thirty-seven hundred and fifty dollars."

From the various provisions contained in this section 33, it appears that for the loss of an eye 66⅔ per cent. of the average weekly wages shall be paid for one hundred weeks when such loss results in a partial disability. This can only mean that the employe had vision in both of his eyes at the time of the injury and is left with the vision of one eye. He is therefore not permanently and totally disabled. But section 34 provides compensation as heretofore set out when the injury received in the course of his employment results in permanent total disability.

Now, an employe at some prior time having lost one eye, and loses the second

or last eye as a result of an injury sustained in the course of his employment, is prima facia permanently and totally disabled just as fully as though he had lost the sight of both of his eyes at the time and under the circumstances he lost the second or last eye.

The supreme court of Wisconsin reached a similar conclusion in the case of Mellon Lumber Company v. Industrial Commission of Wisconsin, et al., 142 N. W., 187, 3 N. C. C. A., 649.

I am, therefore, of the opinion, that the language of these two sections fully sustains the ruling of the commission.

It is the well settled law that whoever takes a cripple into his employment takes him subject to his crippled condition; so the language of these two sections and the ruling of the commission in construing the same are in accordance with the general rule of law in the premises. The loss of the sight in both eyes constitutes a prima facia case of permanent total disability whether the unfortunate condition results from loss of both eyes or from the loss of the second or last eye.

The compensation authorized for the partial disability caused by the loss of one of two eyes is much less than the compensation authorized for total permanent disability caused by the loss of the second and last eye or both eyes. Therefore, the individual who has but one eye will be handicapped both in his application for and retaining of employment—when his employer is subject to the terms of this act. If the legislature did not have this contingency in mind while enacting these statutes, its attention should be called to it now.

Respectfully,
EDWARD C. TURNER,
Attorney General.

290.

BOARD OF EDUCATION OF SCHOOL DISTRICT MAY UPON ORDER OF COMMON PLEAS COURT, TRANSFER A SURPLUS IN ITS TUITION FUND TO ITS BUILDING FUND UNDER CERTAIN RESTRICTIONS.

If the board of education of a school district finds that there is a surplus in its tuition fund, resulting from the local tax levy for said fund, which will not be needed for any of the purposes of said fund, and that it is necessary to transfer said surplus to its building fund to be used in the construction of a school building which the board of education finds necessary for the proper accommodation of the pupils of its district, such board may, upon the order of the common pleas court, on an application duly made in compliance with the requirements of section 2296, et seq., G. C., transfer said surplus from said tuition fund to the building fund for the purpose above named.

COLUMBUS, OHIO, April 27, 1915.

HON. CARL SCHULER, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—In your letter of April 8th, you request my opinion as follows:

> "Can a school board, acting under section 2296, file a petition in the common pleas court, by virtue of that section, asking the court to transfer money in the tuition fund, to a building fund, the board having a large surplus in the tuition fund, and not having any in the building fund? Section 7603 providing that the tuition fund shall only be appropriated for the payment of superintendents and teachers, the latter section, or rather the portion referred to herein with reference to the tuition fund, having been passed by the legislators since the passage of section 2296. In case they could have this trans-

ferred, a new school house could be built without resorting to a bond issue, at the same time, they would have ample funds with which to pay superintendents and teachers for the ensuing year.

"It is my opinion, that they can file a petition asking for this transfer under section 2296, and those that follow, but having some doubts by reason of section 7603, there being no court decisions or opinions from attorney generals with reference to same, I submit this proposition."

Section 2296, G. C., as amended, 103 O. L., 522, provides:

"The county commissioners, township trustees, the board of education of a school district, or the council or other board having the legislative power of a municipality, may transfer public funds, except the proceeds or balances of special levies, loans or bond issues, under their supervision, from one fund to another, or to a new fund created under their respective supervision, in the manner hereafter provided, which shall be in addition to all other procedure now provided by law."

Under authority of this section, the board of education of a school district may, by order of court, on application duly made in compliance with the requirements of section 2297, et seq., of the General Code, transfer surplus money in any school fund, except the proceeds or balances of special levies, loans or bond issues, to another school fund which the board of education finds does not have sufficient money to its credit to pay valid existing obligations charged against said fund, or to meet additional expenditures which the board deems will be necessary for the proper accommodation of the schools of the district.

You call my attention to the provision of section 7603, G. C., which is as follows:

"The certificate of apportionment furnished by the county auditor to the treasurer and clerk of each school district must exhibit the amount of money received by each district from the state, the amount received from any special tax levy made for a particular purpose, and the amount received from local taxation of a general nature. The amount received from the state common school fund and the common school fund shall be designated the "tuition fund," and be appropriated only for the payment of superintendents and teachers. Funds received from special levies must be designated in accordance with the purpose for which the special levy was made, and be paid out only for such purpose, except, that, when a balance remains in such fund, after all expenses incident to the purpose for which it was raised have been paid, such balance will become a part of the contingent fund, and the board of education shall make such transfer by resolution. Funds received from the local levy for general purposes must be designated so as to correspond to the particular purpose for which the levy was made. Moneys coming from sources not enumerated herein shall be placed in the contingent fund.'

While this statue provides that the money received from the state common school fund and the common school fund shall be designated as the "tuition fund," and shall be appropriated only for the payment of superintendents and teachers, the term "tuition fund," as above used and limited to the money received from the state, may be only a part of the general statutory fund known as the tuition fund and for which the board of education may make a local tax levy in addition to the amount received from the state.

Before any money can be transferred under authority of section 2296, et seq., of the General Code, it must appear to the court that the amount of money which the

board of education asks to have transferred is not needed in the particular fund for any of the purposes for which such fund is by law established, and that such transfer is necessary.

In view of the provision of section 7603, G. C., above referred to, it seems clear that the authority of a board of education to transfer money from its tuition fund is limited to the surplus money in said fund resulting from the local tax levy for said fund.

In an unreported case in the common pleas court of Champaign county, where the board of educaton of a school district in said county made application to said court, under provision of section 2296, G. C., for an order authorizing a transfer from its tuition fund to its contngent fund, Judge E. P. Middleton, of said court, required said board of education to show that the surplus money in its tuition fund, which said board desired to transfer, resulted from the local tax levy for said tuition fund, and that no part of said surplus resulted from the money received by said district from the state.

Replying to your question, I am of the opinion that if the board of education, referred to in your letter, finds there is a surplus in its tuition fund, resulting from the local tax levy for said fund, which will not be needed for any of the purposes of said fund, and that it is necessary to transfer said surplus to its building fund to be used in the construction of a school building which the board finds necessary for the proper accommodation of the pupils of its district, such board may, upon the order of the common pleas court, on an application duly made in compliance with the requirements of section 2296, et seq., of the General Code, transfer said surplus from said tuition fund to the building fund for the purpose above mentioned.

Respectfully,
EDWARD C. TURNER,
Attorney General.

291.

APPROPRIATION BILL—AN AGGREGATE SUM AVAILABLE FOR PAYMENT OF SALARIES OF A DESIGNATED NUMBER OF CLERKS MAY BE EXPENDED ONLY FOR SUCH NUMBER, AND THE WHOLE SUM MAY NOT BE DIVIDED AMONG THE SALARIES OF A LESSER NUMBER OF CLERKS.

An item in an appropriation bill specifying an aggregate sum to be available for the payment of the salaries of a specific number of clerks may be expended only in the payment of the number of salaries designated; if fewer than the designated number of clerks are actually employed, the whole sum appropriated may not be divided among the salaries of such lesser number of clerks, but such salaries may not exceed in the aggregate such a sum as will leave in the appropriation a sufficient amount to pay a substantial salary for each of the remaining positions contemplated by the appropriation.

COLUMBUS, OHIO, April 27, 1915.

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

DEAR SIR:—I acknowledge receipt of your letter of April 22nd, requesting my opinion on the following questions:

> "The partial appropriation act provides as follows:
> "In relation to the department of industrial commission, under the subheading 'Investigation and Statistics,' on page 26 of the bill, the following appropriation was made, with the figures carried into the column headed 'Items':

" 'Two Statistical Clerks..... $900 00.'
" 'Fifteen Statistical Clerks..... 5,422 50.'

"Question 1. Are the words 'two' and 'fifteen' controlling, i. e., is the sum appropriated for the payment of such clerks to be used anong fifteen clerks in the second case and two clerks in the first case?

"Question 2. If the words 'two' and 'fifteen' are controlling, and if the commission employs two clerks at a total cost of $900.00, and ten clerks under the second item, may the commission pro-rate the whole appropriation of $5,422.50 among the ten?

"Question 3. If the commission employs under the second appropriation eighteen clerks, may it divide the entire appropriation among the eighteen?

"Question 4. If more or less than the number of clerks specified in the act are employed, and the board is required to pro-rate the appropriation on the basis of seventeen clerks receiving $6,322.50, then what rule shall be applied in determining whether the commission has properly calculated the sums. For instance, if only eight are employed, what proportion of the entire appropriation of $6,322.50 shall be permissibly used for salaries of the eight?"

I call attention at this point to an error in your statement, in that the figures to which you refer are not carried into the column headed, "Items," but in the column headed "Appropriations, February 16, 1915—June 30, 1915." That is, these are specific appropriations for personal service, and are not merely primary limitations upon the purpose for which a larger specific appropriation may be expended.

Answering your questions specifically, I am of the opinion:

(1). That the words "two" and "fifteen" are controlling, and that the sums appropriated are for the purpose of paying the salaries of two clerks, in the first case, and fifteen clerks, in the second case.

(2). Answering your second question, I am of the opinion that it is not lawful to expend the sum appropriated for salaries of fifteen statistical clerks in paying the salaries of ten such clerks; that is, to expend in this manner the entire sum so appropriated and divide it among ten clerks instead of fifteen clerks.

(3). I am further of the opinion that it is likewise not lawful to employ eighteen clerks and to divide an appropriation for fifteen clerks among such number of clerks in the payment of their salaries.

(4). In answer to your fourth question, I am of the opinion that the only rule which can be applied in determining whether the commission or department has properly calculated the division of a lump sum appropriation for the payment of the salaries of a specified number of clerks is as follows:

The division must be made in such manner as that a real and substantial salary will be assigned to each position for which the general assembly made an appropriation. What constitutes a real and substantial salary will necessarily vary with the grade of work to be performed and other like factors. It should not be difficult to determine in a given instance, however, whether, if the number of clerks for the salaries of which a lump sum appropriation has been made is not actually employed by the department, and the salaries of such clerks as are employed as fixed by the department do not exhaust the appropriation, the remainder, or what might be termed "the unused portion of the appropriations," represents a substantial and adequate aggregate compensation for the number of clerks which have not been employed.

Further than this, I feel that I cannot go as a matter of law, as I do not think that an appropriation of the kind specified by you is to be taken as indicating that the salaries of all the clerks to be employed and paid therefrom shall be equal.

The questions respecting the application of the state civil service law and the possibility of deductions in paying thereunder are not considered in this opinion, as no facts are stated upon which to base any consideration of such questions.

Respectfully,
EDWARD C. TURNER,
Attorney General.

292.

RURAL SCHOOL DISTRICT—SCHOOLS SHALL NOT BE SUSPENDED UNTIL AFTER SIXTY DAYS' NOTICE, EVEN THOUGH ATTENDANCE FOR PRECEDING YEAR WAS LESS THAN TWELVE.

The provision of section 7730, *G. C., as amended in* 104 *O. L.,* 139, *that no school of any rural district shall be suspended or abolished until after sixty days' notice has been given by the school board of such district, is mandatory, and no school is suspended until such notice is given even though the average daily attendance in such school for the preceding year was less than twelve.*

COLUMBUS, OHIO, April 27, 1915.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 16th, which is as follows:

> "Section 7730 of the General Code, as amended, 104 O. L., page 139, provides in part as follows:
>
> " 'When the average daily attendance of any school for the preceding year has been below twelve, such school shall be suspended * * *. No school of any rural district shall be suspended or abolished until after sixty days' notice has been given by the school board of such district. Such notice shall be posted in five conspicuous places within such village or rural school district.'
>
> "In the event that the average daily attendance of any school for the preceding year has been below twelve, and the board of education refuses or neglects to suspend such school, is such school suspended by the provision of this section, notwithstanding the board of education fails or neglects to suspend the same? Or must the sixty days' notice be given as provided in said section before such school can be suspended, even though the average daily attendance is less than twelve for the preceding year?"

The answer to your question is found in an opinion of my predecessor, Mr. Hogan, rendered to Hon. B. F. Enos, prosecuting attorney of Guernsey county, under date of August 10, 1914.

This opinion holds that the provision of section 7730, G. C., as amended in 104 O. L., 139, "no school of any rural district shall be suspended or abolished until after sixty days' notice has been given by the school board of such district," is mandatory and that no school is suspended until such notice is given even though the average daily attendance in such school for the preceding year was less than twelve.

I concur in this opinion and enclose copy of same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

293.

DISTRICT SUPERINTENDENTS—CANNOT REQUIRE TEACHERS TO ATTEND MEETINGS ON SATURDAY AFTERNOON—TEACHERS ARE ENTITLED TO REGULAR PAY AND MUST ATTEND MEETINGS HELD ON REGULAR SCHOOL DAYS—DISTRICT SO PAYING TEACHERS NOT INELIGIBLE TO STATE AID—DISTRICT SUPERINTENDENT WHO DRAWS PAY PARTLY AS TEACHER—BOARD SHOULD INCLUDE HIS SALARY WHEN ESTIMATING DEFICIT TO SEEK STATE AID.

District superintendents cannot require the teachers of their district to attend the meetings provided for in section 7706-1, *G. C.* (104 *O. L.*, 144), *on Saturday afternoons.*

If the board of education of a district authorizes the holding of these meetings on regular school days and during school hours, it is the duty of the teachers of said dis rict to attend such meetings, and said teachers are entitled to their regular pay for attending said meetings the same as if they had taught during the time used for such meetings.

Such district, by paying its teachers for attendance at meetings held on regular school days, does not, on this account, render itself ineligible to receive state aid, providing it complies with all the statutes governing state aid to weak school districts.

Where a district superintendent, employed under the provision of section 4740, *G. C., as amended in* 104 *O. L.*, 141, *gives one-half of his time to teaching, the proportionate amount paid him as a teacher, based upon the minimum salary of* $70.00 *per month, mentioned in item* 4 *of the schedule of salaries provided in section* 7595-1, *G. C.* (104 *O. L.*, 165), *should be included by the board of education of the district in which he teaches in estimating its deficiency for the purpose of making application for state aid, and the fact that said superintendent has been paid for teaching one-half his time, does not prevent said district from receiving state aid, providing said district has complied with all of the requirements of the statutes relating thereto.*

COLUMBUS, OHIO, April 27, 1915.

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

GENTLEMEN:—In your letter under date of February 27th, you request my opinion upon the following questions:

"1st. Have district superintendents a legal right to require teachers of their districts to attend the meetings provided for in section 7706-1, vol. 104 O. L., page 144, on Saturday afternoons, and would it be legal for boards of education to pay teachers for attending such meetings on Saturdays in addition to their regular salaries?

"2nd. Is it legal for district superintendents to hold these meeetings on regular school days, and if so, are the teachers entitled to their regular pay for such attendance the same as if they had taught?

"3rd. Would the district be eligible to receive state aid under section 7595, General Code, if it so paid its teachers?

"4th. If a teacher is employed one-half his time in supervision and one-half in teaching, can the amount paid him as teacher be included in the expense going to make up the deficiency on which is based application for state aid under section 7595, General Code? If not, would the fact that a teacher had been so paid for one-half his time, prevent the district from receiving state aid, provided it had complied with the other requirements of the weak school district sections?"

I call your attention to the following provisions of the statutes relating to the management and control of schools, the employment of teachers and district supervision:

Section 7690, G. C., provides in part:

"Each board of education shall have the management and control of all of the public schools of whatever name or character in the district. * * * Each board shall fix the salaries of all teachers, which may be increased, but not diminished during the term for which the appointment is made."

Section 7699, G. C., provides:

"Upon the appointment of any person to any position under the control of the board of education, the clerk promptly must notify such person verbally or in writing, of his appointment, the conditions thereof, and request and secure from him within a reasonable time to be determined by the board, his acceptance or rejection of such appointment. An acceptance of it within the time thus determined shall constitute a contract binding both parties thereto until such time as it may be dissolved, expires, or the appointee be dismissed for cause."

Section 7701, G. C., provides:

"Each board may dismiss any appointee or teacher for inefficiency, neglect of duty, immorality, or improper conduct. No teacher shall be dismissed by any board unless the charges are first reduced to writing and an opportunity be given for defense before the board, or a committee thereof, and a majority of the full membership of the board vote upon roll call in favor of such dismissal."

Section 7705, G. C., as amended, and section 7706, G. C., as amended, and supplemented by section 7706-1, G. C., as found in 104 O. L., 144, provides as follows:

"The board of education of each village, and rural school district shall employ the teachers of the public schools of the district, for a term not longer than three school years, to begin within four months of the date of appointment. The local board shall employ no teacher for any school unless such teacher is nominated therefor by the district superintendent of the supervision district in which such school is located except by a majority vote. In all high schools and consolidated schools one of the teachers shall be designated by the board as principal and shall be the administrative head of such school."

Section 7706:

"The district superintendent shall visit the schools under his charge, direct and assist teachers in the performance of their duties, classify and control the promotion of pupils, and shall spend not less than three-fourths of his working time in actual class-room supervision. He shall report to the county superintendent annually, and oftener if required, as to all matters under his supervision. He shall be the chief executive officer of all boards of education within his district and shall attend any and all meetings. He may take part in their deliberations, but shall not vote. Such time as is not spent in actual supervision shall be used for organization and administrative purposes and in

the instruction of teachers. At the request of the county board of education he shall teach in teachers' training courses which may be organized in the county school district."

Section 7706-1:

"The district superintendent shall, as often as advisable, assemble the teachers of his district for the purpose of conference on the course of study, discipline, school management and other school work and for the promotion of the general good of all the schools in the district. The county superintendent shall co-operate with the different district superintendents in holding such teachers' meetings and shall attend as many of them as his other duties will permit."

When a teacher is nominated by the district superintendent, and employed by the local board of education, under authority of section 7705, G. C., as amended in 104 O. L., 144, and enters into a contract with said local board of education, as required by section 7699, G. C., by accepting the appointment and entering into the contract, he agrees to comply with the rules and regulations of said board in so far as they are consistent with the statutes governing said board, and to perform his duties as a teacher according to the terms and conditions of said contract, and according to the requirements of the statutes governing his duties.

The district superintendent is employed by the boards of education of the district either under authority of section 4739, G. C., or section 4740, G. C., as such sections are amended in 104 O. L., pages 140 and 141.

Section 4739, G. C., as amended, provides:

"Each supervision district shall be under the direction of a district superintendent. Such district superintendent shall be elected by the presidents of the village and rural boards of education within such district, except that where such supervision district contains three or less rural or village school districts the boards of education of such school districts in joint session shall elect such superintendent. The district superintendent shall be employed upon the nomination of the county superintendent, but the board electing such district superintendent may by a majority vote elect a district superintendent not so nominated."

Section 4740, G. C., provides:

"In village or rural districts, or union of school districts for supervison purposes, which already employs a superintendent and which officially certifies by the clerk or clerks of the board of education, on or before July 20, 1914, that it will employ a superintendent who gives at least one-half of his time in supervision, shall, upon application to the county board of education, be continued as a separate supervision district so long as the superintendent receives a salary of at least one thousand dollars, and continues to give one-half of his time to supervision work. Such districts shall receive such portion of state aid for the payment of the salary of the district superintendent as is based on the ratio of the number of teachers employed to forty, multiplied by the fraction which represents that fraction of the regular school day which the superintendent gives to supervision. The county superintendent shall make no nomination of a district superintendent in such district until a vacancy in such superintendency occurs. After the first vacancy occurs in the superintendency of such a district, all appointments shall be made on the

nomination of the county superintendent in the manner provided in section 4739. A vacancy shall occur only when such superintendent resigns, dies or fails of re-election."

The district superintendent, in the performance of his duties shall, as often as is deemed advisable, assemble the teachers of the district for the purpose of conference in matters pertaining to the affairs of the district.

The question arises, can a board of education, either by an express provision in the contract of employment with a teacher or by implied authority under the statutes governing said employment, require said teacher to attend a teachers' meeting on Saturday afternoons?

Section 7689, General Code, provides:

"The school year shall begin on the first day of September of each year and close on the 31st day of August of the succeeding year. A school week shall consist of five days, and a school month of four school weeks."

It is clear, under the latter provision of this statute, that a board of education cannot compel a teacher to teach more than five days in any one week. The custom of keeping the schools in session the five working days of each week during the school term, exclusive of Saturday, is well established, and a teacher having taught the required time prescribed by the above provision of the statute, is not required by law, to render additional service outside of the five school days constituting the school week.

A teacher's attendance at a meeting called by the district superintendent within the limits of time above prescribed, is the performance of a duty incidental to his employment. It must therefore follow that if a teacher cannot be called to teach more than five days in any one week, he cannot be compelled to attend a teachers' meeting at a time other than for that which he is employed to render services.

The provision of section 5978, G. C., as amended in 103 O. L., 566, is an additional prohibition against the board of education compelling a teacher to teach or attend a teachers' meeting on Saturday afternnoon. This section, as amended, provides as follows:

"Every Saturday afternoon of each year shall be a half legal holiday *for all purposes*, beginning at twelve o'clock noon and ending at twelve o'clock midnight. Nothing however, in this section or any other, or any decision of any court shall in any manner affect the validity of or render void or voidable any check, bill of exchange, order, promissory note, due bill, mortgage or other writing obligatory made, signed, negotiated, transferred, assigned or paid by any person, persons, corporation or bank, upon said half holiday, or any other transaction had thereon."

I do not think a board of education can ignore the plain provisions of this statute. Even if the teachers of a supervision district would be willing to attend teachers' meetings on Saturday afternoons, no authority is conferred by statute upon boards of education to pay the teachers for attending such meetings, in addition to their regular salary.

Replying to your first question, I am of the opinion that district superintendents cannot require the teachers of their districts to attend the meetings provided for in section 7706-1, G. C. (104 O. L., 144), on Saturday afternoons.

If the boards of education of the district authorize the holding of these meetings on regular school days and during school hours, it is the duty of the teachers of the

district to attend such meetings, and, answering your second question, I am of the opinion that said teachers are entitled to their regular pay for attending said meetings the same as if they had taught during the time used for such meetings.

Your third question calls for a consideration of section 7595, G. C., as amended and supplemented by section 7591, G. C., 104 O. L., 165, section 7596, G. C., as amended in 103 O. L., 267, and section 7597, G. C., as amended in 104, O. L., 165, in addition to the provisions of the section of the statute hereinbefore set forth.

Section 7595, General Code, as amended, provides as follows:

> "No person shall be employed to teach in any public school in Ohio for less than forty dollars a month. When a school district has not sufficient money to pay its teachers, such salaries as are provided in section 7595-1, for eight months of the year, after the board of education of such district has made the maximum legal school levy, three-fourths of which shall be for the tuition fund, then such school district may receive from the state treasurer sufficient money to make up the deficiency."

Section 7595-1, G. C., provides:

> "Only such school districts shall be eligible to receive state aid which pay salaries as follows:
>
> "(1) Elementary teachers without previous teaching experience in the state and with no professional training, forty dollars per month.
>
> "(2) Elementary teachers having at least six weeks' professional training, forty-five dollars per month.
>
> "(3) Elementary teachers who have completed the full two years' course in any normal school, teachers' college, college or university approved by the superintendent of public instruction, fifty-five dollars per month.
>
> "(4) High school teachers, seventy dollars per month."

Section 7596, G. C., as amended, provides:

> "Whenever any board of education finds that it will have such a deficit for the current school year, such board shall on the first day of October, or any time prior to the first day of January of said year, make afidavit to the county auditor, who shall send a certified statement of the facts to the state auditor. The state auditor shall issue a voucher on the state treasurer in favor of the treasurer of such school district for the amount of such deficit in the tuition fund."

Section 7597, G. C., as amended, provides:

> "No district shall be entitled to state aid as provided in sections 7595, 7595-1 and 7596, unless the number of persons of school age in such district is at least twenty times the number of teachers employed therein, and the schools in such district are maintained at least eight months of the year."

The holding of teachers' meetings by the district superintendent, as required by the above provision of section 7706-1, is a part of the school work, and is vital to the welfare of the schools. It was certainly not the intent of the legislature, in making it mandatory on the district superintendent to hold these meetings to thereby disqualify weak districts from receiving state aid.

Replying to your third question, I am of the opinion that the district referred to

in your second question, by paying its teachers for attendance at meetings held on regular school days, does not on this account render itself ineligible to receive state aid, providing it complies with all the statutes governing state aid to weak school districts.

The duties of a superintendent employed under authority of the above provision of section 4740, G. C., who is not required to give more than one-half of his time to supervision work, differs from the duties of a superintendent employed under authority of section 4739 General Code, who is required by the provision of section 7706, G. C., to spend not less than three-fourths of his working time in actual class room supervision and the balance of his time for organization and administrative purposes, and in the instruction of teachers. The minimum salary of the district superintendent under each of the two sections above referred to, is the same. The apportionment of state aid for the payment of his salary varies according to the time given to supervision work and the number of teachers in the district.

Your fourth question applies only to the case of a superintendent employed under authority of section 4740, G. C., district supervision, whether under section 4739 or section 4740, G. C., is mandatory, and the question arises whether a district which contributes its proportionate part of the salary of the district superintendent, who gives one-half of his time to teaching in a school within said district, is, on this account, disqualified under the above provision of the statute relating to state aid.

The minimum salary of a district superintendent under section 4740, G. C., is one thousand dollars, and one-half of this amount, plus the proportionate amount paid for supervision, in addition to the amount received from the state, must be contributed by the district in which said superintendent teaches.

The district superintendent must have the qualifications of a high school teacher under the provisions of section 4744-3, G. C., as found in 104 O. L., 143.

For the time he teaches, his salary is more than $70.00 per month, the minimum for a high school teacher mentioned in item four of the schedule of salaries provided in section 7595-1, G. C., as amended in 104 O. L., 165. It does not follow, however, that the district which pays said superintendent for teaching one-half of his time, is on this account prevented from receiving state aid.

I call your attention to an opinion of my predecessor, Mr. Hogan, rendered to Hon. E. M. Fullington, auditor of state, under date of February 20, 1912, and found at page 98 of the annual report of the attorney general, for the year 1912.

In commenting on the provisions of section 7595, G. C., as in force at that time, Mr. Hogan said:

> "As I view the provisions of section 7595, General Code, it means simply if the school district does not receive into its tuition fund a sum which would be sufficient to pay its teachers forty dollars a month for eight months, such school district is entitled to receive enough money to make up the amount which would be necessary to pay its teachers such minimum salary. It does not mean, as it seems to me, that the board of education cannot pay other obligations which are placed either primarily or secondarily upon the tuition fund from such tuition fund, nor does it mean that it is restricted to the payment of the minimum salary to the various teachers of the school district, but merely that the state will only pay to such school district the difference between the total amount of the tuition fund received and the amount which would have been necessary to pay its teachers the minimum salary.
>
> "I am therefore, of the opinion, that a board of education may use the tuition fund for the payment of obligations in excess of forty dollars a month for teachers, but that in applying for state aid, such board of education shall

only be entitled to an amount which would equal a sum necessary to pay the requisite number of teachers a salary of forty dollars a month after deducting the total amount of the tuition fund actually received."

I concur in this opinion in so far as the same is applicable to the provisions of section 7595, G. C., as amended and supplemented by section 7595-1, G. C., 104 O. L., 165.

Replying to your fourth question, I am of the opinion that where a superintendent employed under the provisions of section 4740, G. C., gives one-half his time to teaching, the proportionate amount paid him as a teacher, based upon the minimum salary of $70.00 per month, should be included by the board of education of the district in which he teaches, in estimating its deficiency for the purpose of making application for state aid, and the fact that said superintendent has been paid for teaching one-half his time, would not prevent said district from receiving state aid providing said district has complied with the above requirements of the statutes relating thereto.

Respectfully,
EDWARD C. TURNER,
Attorney General.

294.

BOARD OF EDUCATION—HAS AUTHORITY TO ACQUIRE TITLE TO CHURCH PROPERTY FOR SCHOOL PURPOSES UNDER SECTION 7624, G. C., AS AMENDED, 103 O. L., 466.

If the board of education of a school district, by a proper resolution of record, determines that it is necessary to procure a tract of land on which a church parsonage is located for school purposes, and that it is unable to agree with the official or officials of the church organization holding the title to said property in trust for said organization, upon the sale and purchase thereof, said board of education, acting under authority of and in compliance with the requirements of section 7624, G. C., as amended in 103 O. L., 466, may acquire the title to said property in the manner provided by law for the appropriation of private property by municipal corporations.

COLUMBUS, OHIO, April 27, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a letter from Mr. C. L. Curl, treasurer of the village of North Lewisburg, Ohio, under date of April 7, 1915, requesting my opinion on a matter of public interest, and I am, therefore, addressing an opinion thereon to you.

The letter is as follows:

"We would be pleased to know if a church parsonage can be condemned and appraised and paid for to be used for school purposes."

Section 7624, General Code, as amended in 103 O. L., 466, provides:

"When it is necessary to procure or enlarge a school site or to purchase real estate to be used for agricultural purposes, athletic field or play ground for children, and the board of education and the owner of the property needed for such proposed are unable to agree upon the sale and purchase thereof, the board shall make an accurate plat and description of the parcel of land which it desires for such purposes, and file them with the probate judge, or

court of insolvency, of the proper county. Thereupon the same proceedings of appropriation shall be had which are provided for the appropriation of private property by municipal corporations."

The tract of land on which a church parsonage is located, being private property of a church organization, is subject to appropriation for public purposes the same as any other private property.

The case of School Board of the Village of New Berlin v. Peter et al., 9 Ohio, N. P. (n. s.), 232, relates to condemnation proceedings by a board of education, and the first branch of the syllabus is as follows:

"The probate court acquires jurisdiction in a condemnation proceeding brought by a school board by determining before the jury is summoned: First, that the school board has passed the necessary resolution; second, the inability of the board to agree with the owner on the question of price; third, the necessity for the appropriation for the purpose described in the petition; and fourth, that all parties having an interest in the property have been legally notified."

I am of the opinion that if the board of education of a school district, by a proper resolution of record, determines that it is necessary to procure a tract of land on which a church parsonage is located for school purposes, and that it is unable to agree with the official or officials of the church organization, holding the title to said property in trust for said organization, upon the sale and purchase thereof, said board of education, acting under the authority of, and in compliance with, the requirements of section 7624, G. C., as amended, may acquire the title to said property in the manner provided by law for the appropriation of private property by municipal corporations.

I am sending a copy of this opinion to Mr. Curl.

Respectfully,
EDWARD C. TURNER,
Attorney General.

295.

BUDGET COMMISSION—TIME OF CONVENING—SMITH ONE PER CENT. LAW RESPECTING TAX DUPLICATE ON THE BASIS OF WHICH ADJUSTMENTS SHALL BE MADE NOT AFFECTED BY DECISION IN STATE EX REL., POGUE v. GROOM—HOUSE BILL No. 342 WILL GOVERN IN THESE RESPECTS SHOULD IT BECOME A LAW.

The effect of the decision in State ex rel., Pogue v. Groom (September 15, 1914), considered and held that the provision in amended section 5649-3b (104 O. L., 233), respecting the time of the convening of the budget commission and that respecting the tax duplicate on the basis of which the adjustments shall be made therein, are not affected by said decision

If house bill No. 342, passed by the eighty-first general assembly becomes a law, it will govern these matters.

COLUMBUS, OHIO, April 27, 1915.

The Honorable Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of April 23, 1915, requests my opinion as follows:

"The supreme court, in the case of the State ex rel., Pogue v. Groom, on September 15, 1914, held that the act of April 16, 1913, amending section 5649-3b (103 O. L., 522), and the act of February 16, 1914, amending the same section (104 O. L., 233), are unconstitutional.

"Please render this department your opinion as to whether or not the valuations of 1915 are to be used this year for the purposes of said act or the valuations of last year."

The question which you ask is raised by the following legislative history:

"Section 5649-3b, as originally enacted, 102 O. L., 266: 'The county auditor, the mayor of the largest municipality in the county, as shown by the last federal census, and the prosecuting attorney shall constitute a board to be known as the budget commissioners, for the annual adjustment of the rates of taxation. The budget commissioners shall meet at the auditor's office in each county on the first Monday of June, annually, and complete their work on or before the first Monday in July next following.' "

The foregoing section is a part of the Smith one per cent. law which originally imposed certain rate and amount limitations upon the taxes which might be levied in any taxing district in the state. The application of the rate limitation, in particular, required the use of some tax duplicate of the given taxing district; for under other sections of the law the budget commissioners were to have submitted to them estimates of budgets of the various taxing districts levied within the county, and in order to enforce the limitations of the act it was necessary, so to speak, to translate amounts into rates by assuming or otherwise taking into consideration a given total tax duplicate for each taxing district.

Now in the original Smith law, in which the above quoted section appeared, there was no express provision as to what tax duplicate should be so employed, but inasmuch as the work of the budget commissioners was to be completed between June and July, and inasmuch as the duplicate for the year for which taxes were being levied was not, at that time under the then existing laws, made up; and inasmuch, further, as there was no express authority of statute to estimate the amount of the uncompleted duplicate, some doubt at least seems to have arisen as to whether the computations of the budget commission were to be made upon the basis of the duplicate upon which the levies were to be extended or upon the basis of the duplicate of the preceding year, the amount of which, at the time the budget commission was required to act, was definitely ascertainable. In the view I take of the case, it will not be necessary to express any definite conclusion as to what the meaning of the original Smith law, in this particular, was. It is sufficient to note that it was merely silent on this point.

Further history of the legislation is shown by the following amendments to section 5649-3b, cited by you. (As amended, 103 O. L., 552):

"The budget commission of each county shall consist of three members, the county auditor, the mayor of the largest municipality of the county as shown by the last federal census. In counties in which the amount of taxable property in the cities and villages thereof exceeds the amount of taxable property of territory outside of the cities and villages, the third member of such commission shall be the city solicitor of the largest municipality in the county as shown by the last federal census. In other counties the third member shall be president of the school board of the school district containing the largest municipality of the county as shown by the last federal census, if an elector, and if such president be not an elector then a member of such board who is an elector to be designated by the board.

"The amount of taxable property for purposes of this act shall be governed by the amount of tax duplicate of the preceding year. The budget commissioners shall meet at the auditor's office in each county on the first Monday in June, annually, and shall complete their work on or before the first Monday in July following."

As amended, 104 O. L., 237:

"The budget commission of each county shall consist of three members, the county auditor, the mayor of the largest municipality of the county as shown by the last federal census. In counties in which the amount of taxable property in the cities and villages thereof exceeds the amount of taxable property of territory outside of the cities and villages, the third member of such commission shall be the city solicitor of the largest municipality in the county as shown by the last federal census. In other counties the third member shall be president of the school board of the school district containing the largest municipality of the county as shown by the last federal census, if an elector; and if such president be not an elector then a member of such board who is an elector to be designated by the board.

"The amount of taxable property for purposes of this act shall be governed by the amount of the tax list of the current year as fixed by the district assessor and equalized by the tax commission of Ohio. The budget commissioners shall meet at the auditor's office in each county on the first Monday in August, annually, and shall complete their work on or before the third Monday in that month; provided, however, that for good cause the tax commission of Ohio may extend the time for completing the work. * * *"

I call attention to the following important facts respecting these two amendments:

The first amendment related to the personnel of the budget commission, and also to the basis of computation of the limitations, but it did not change the original law as to the date when the budget commission should convene and the time within which it should complete its work. The second amendment changed the law with reference to the basis of the computation of the limitation and also with reference to the date when the budget commission should convene and the time within which it should complete its work, but it did not change the law respecting the personnel of the budget commission.

In other words, for our present purposes there may be said to be three distinct provisions in section 5649-3b in its present form, at least, though only two of these provisions were in the original section. The three provisions of the section are that respecting the personnel of the budget commission, that respecting the basis of computation of the rate limitation and that respecting the time within which the budget commission should perform its work. The first amendment changed the law with reference to the first two of these three matters only, while the second amendment changed the law with respect to the second two of these matters only.

While analyzing these sections permit me to point out that there is no necessary, or even logical relation between the provision respecting the personnel of the budget commission and those respecting either of the other two matters; whereas there is a necessary and logical relation between the provision respecting the basis of the computation of the rate limitation and that respecting the time within which the budget commission shall complete its work, for I have pointed out the difficulty which arose under the original Smith law respecting the duplicate which was to be used in working out the rate limitation; this difficulty evidently led to the amendment of 1913, which

insofar as it related to this subject, clarified the law and removed the doubt; but it was at least illogical to impose a rate limitation upon a taxing district and then to provide that the duplicate used should be that of the preceding year. The legislature in 1914 evidently desired to do away with this inconsistency in the law, and being convinced that this could not be done without changing the date of the meeting of the budget commission solved the problem by postponing that date for a period of two months, and then providing that the budget commission should be governed by the tax duplicate of the current year, which could be ascertained under legislation that had, in the meantime, been enacted with sufficient definiteness by the first Monday in August.

There is still a little difficulty in the interpretation of these sections in that the use of the terms "preceding year" and "current year," as they appear in the respective amendments, is not exactly clear. I am of the opinion, however, that the phrase "the preceding year," as used in the amendment of 1913, means the year preceding the year for which taxes are to be levied; that is, the tax collection year which was actually the current year at the time the budget commission was then required to act, and for similar reasons I am of the opinion that the phrase "current year," as used in the amendment of 1914, means the year for which tax levies are to be determined by the budget commission. Indeed there is less difficulty in reaching this conclusion that there is in interpreting the legislation of 1913, because the current tax year ends at the time of the August settlement, whereas the period within which the budget commission is to complete its work under the law of 1914, begins shortly prior to that settlement and extends beyond it; so that if a strictly technical interpretation be given to the phrase "current year," as used in the act of 1914, such an interpretation would render the amendment meaningless.

Having arrived then at an understanding of what the legislature *intended* to do in so amending section 5649-3b in 1913 and 1914, we must now ascertain what, in the light of the decisions referred to by you, the legislature actually succeeded in doing.

The first two branches of the syllabus in State ex rel., Pogue v. Groom, are as follows:

> "The act of the general assembly passed February 16, 1914 (104 O. L., 237), amending section 5649-3b, General Code, as amended April 16, 1913 (103 O. L., 552), insofar as it purports to designate who shall constitute the county budget commission, is unconstitutional and void.
>
> "The act of the general assembly passed April 16, 1913 (103 O. L., 552), purporting to amend section 5649-3b, General Code, by designating who shall constitute the county budget commission, is to that extent unconstitutional and void, and the repealing clause of the act, insofar as it repeals that portion of section 5649-3b, is invalid."

A careful reading of the entire opinion bears out the reservations made in the syllabus, as above quoted, and makes it clear that the supreme court intended merely to hold that the provision which is common to both amendments, respecting the personnel of the budget commission, was unconstitutional, without holding the entire section, as amended in either year, to be affected thereby. It will not be necessary to quote from the opinion as it is not more definite than the syllabus in this particular. It seems very clear to me that the supreme court has been careful to limit the effect of its decision to the first paragraph of amended section 5649-3b, and to indicate, by the inferences which must necessarily be drawn from the language which is used in the syllabus, that the remainder of the section, as amended, is not affected thereby.

One very good reason for taking this view of the decision is that the court, by its judgment in this case and by its decision in the case of State ex rel., Durr v. Budget Commission of Hamilton county, decided, about the same time, necessarily held that

the unconstitutionality of the amended law did not affect the essential machinery of the Smith law, nor the remaining amendments affected by the Kilpatrick law of 1913. The court has clearly held in these decisions that the body of legislation consisting of the Smith law as amended by the Kilpatrick law, and as again amended in 1914, is not an entirety, but that the subject-matter of the personnel of the budget commission is severable from the remaining provisions of the act.

Of course an act is to be separated into its constituent parts for the purpose of measuring the effect of a judgment of partial unconstitutionality, not by any such artificial division as section numbers, but by subject-matters which constitute the only true and real divisions of the law. Therefore, a holding that a section is void, insofar as it relates to a given subject-matter, does not vitiate the entire section if there is in it some other subject-matter not necessarily related to the void portion.

I have already pointed out that the provision with respect to the time of the meeting of the budget commission, and the basis of applying the rate limitations, is, in no way, related to the provision respecting the personnel of the budget commission.

Another way of stating the same thing is to say that the legislature did not intend that it should be the budget commission, consisting of the county auditor, the mayor and the solicitor, or president of the school board, which should meet in August, and be governed by the amount on the tax list of the current year, and that commission only; but if it had been advised that it could not have constructed a budget commission having such a personnel, it would nevertheless have inserted in the law, for other sufficient reasons, the provision respecting the time of meeting and the basis of computation.

For all the foregoing reasons I am of the opinion that what you term the valuations of 1915, by which I assume that you mean the valuations now being made in the year 1915, and which will go on the duplicate upon which taxes are to be collected in December, 1915, and June, 1916, are to be used by the budget commission which is to convene in August, 1915, for the fixing of the tax rates; and that what you term the valuations of "last year," by which I suppose you mean the valuations which are to be found on the duplicate now in the possession of the treasurer for the collection of the second half of the taxes for the year 1914 in June 1915, are not to be so used.

In connection with your question I call your attention to the passage, by the present session of the legislature, of house bill No. 342, further amending section 5649-3b so as to obviate the constitutional infirmity pointed out by the court in the case above cited. This measure has not yet been signed by the governor, but if it is signed by the governor and becomes a law (and its effectiveness can hardly be postponed so as to keep it from going into operation this year), it will remove all doubt in the premises, for it provides that the budget commissioners shall meet on the first Monday in August annually, and shall complete their work on or before the third Monday in that month, unless for good cause the tax commission of Ohio shall extend the time for completing the work; and that the budget commissioners shall be governed, in their adjustments, by the amount of the taxable property as shown on the auditor's tax list for the current year, provided, that if the auditor's tax list has not been completed, the auditor shall estimate it as nearly as practicable, and the commissioners shall be governed by such estimate. As amended by house bill No. 342, the section is, it will be observed, absolutely clear.

Respectfully,
EDWARD C. TURNER,
Attorney General.

296.

PARTIAL APPROPRIATION BILL FOR 1915, HOUSE BILL No. 314—EFFECT ON ACT FOUND IN 104 O. L., 211, RESPECTING APPROPRIATIONS MADE IN 1914 AND 1915.

Section 6 of the partial appropriation bill for 1915, House Bill No. 314, practically, though not technically, repeals the appropriation accounts created by the act found in 104 O. L., 211 for purposes for which appropriations are made in the 1915 law; but has no effect whatever upon the other appropriation accounts in said act of 1914.

COLUMBUS, OHIO, April 27, 1915.

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

DEAR SIR:—I hasten to comply with your written request of April 22d for my advice upon the following question:

> "Does the enactment of house bill No. 314, to make appropriations for the current expenses of the state government and state institutions for the period beginning February 16, 1915, and ending June 30, 1915, repeal house bill No. 53 passed by the 80th general assembly, to make sundry appropriations?"

It is not difficult to answer your question categorically in the negative. That is, house bill No. 314, passed by the present session of the general assembly, does not expressly repeal all or any part of house bill No. 53, passed by the 80th general assembly at its first extraordinary session in 1914 (104 O. L., 211). The only express repeal in house bill No. 314, above referred to, is of the law approved February 17, 1914; that is, house bill No. 47, passed by the 80th general assembly at its first extraordinary session in 1914 (104 O. L., 64).

I apprehend from the manner in which your question is asked that you have in mind another legal question arising under section 6 of said house bill No. 314. This section provides in part as follows:

> "All liabilities incurred on or before June 30, 1915, shall be paid from appropriations herein provided in section 1. All balances in any appropriation account against which there is no liability on February 16, 1915, and any excess of such balances over liabilities, shall lapse into the fund from which the same were appropriated;"

The question which I apprehend has been raised in your department is as to the effect of this provision, respecting the lapsing of balances, upon balances remaining in appropriation accounts created by house bill No. 53 of 1914, which is not expressly repealed.

Said house bill No. 53 presents certain striking peculiarities. In the first place, section 1 of the act appropriates "the following sums, * * * to be available to pay the *liabilities* herein below specified." Then follows a list of miscellaneous appropriations, not departmental in character and obviously relating to liabilities incurred prior to the passage of said house bill No. 53, such as, for example, the refund of taxes, the payment of expenses incurred by a special commission, payment for services rendered to the state in different capacities, etc.

There are also in the bill certain departmental appropriations relating to liabilities theretofore incurred, other than those of a contractual nature, such as would be prohibited by the statute against the creation of deficiencies. Thus we find a number

of appropriations under the heading "Ohio National Guard," consisting, in a large measure at least, of the allowance of claims for damages against the State, and under the heading "Department of Public Works" we find a list of appropriations of a similar character.

In the second place, the bill carries a general clause to the following effect:

> "The moneys herein appropriated shall be paid upon the approval of a special auditing committee, consisting of the chairman of the senate finance committee, the chairman of the house finance committee and the auditor of state, and said auditing committee is hereby authorized and directed to make careful inquiry as to the validity of each and every claim herein made, and to pay only so much as may be found to be correct and just."

Of course this clause is appropriate only to the auditing of claims against the state and would hardly be appropriate in the case of disbursement of appropriations for the current expenses of state departments and institutions.

The difficulty which I imagine is presented arises, however, out of the fact that in the so-called "sundry bill" (house bill No. 53) the legislature of 1914 inserted a number of what might be termed "anticipatory appropriations," that is, appropriations intended to provide for expenses to be incurred in the future. Thus we find an appropriation for the expenses of legislative committees; one for the geological survey of Ohio; one for the rental of Longview hospital; one for conducting the summer term of the Ohio State University; an appropriation of $25,000 for installing, maintaining and exhibiting the live stock, agricultural products, resources and opportunities of this state at the Panama-Pacific International Exposition in the year 1915; and others of a different specific character, but of the same general class.

It is only by inference that it can be ascertained that there are two classes of appropriations in the law in question; for the law lacks any such clause as is ordinarily found in a general or partial appropriation law relative to the availability of the appropriation accounts for the payment of liabilities incurred prior to or subsequently to a given date.

The appropriations are made without limitation with respect to the liabilities to meet which they may be disbursed, as is the case in the ordinary form of current expense appropriation laws. Nevertheless, I think it is very clear that the legislature intended that the appropriations, some of which I have mentioned, should be disbursed in the ordinary manner and be subject to pay liabilities incurred in the activities of the departments and commissions to which they were made.

I am therefore of the opinion that the restrictive clause relative to the special auditing committee and its powers and duties, above quoted, does not apply to the disbursement of such appropriations, but only to the disbursement of appropriations made, as therein provided, for the payment of "claims."

The question which I have assumed to exist, then, is this:

> "Is the general language of section 6 of the act of 1915, to the effect that all balances in *'any* appropriation account against which there is no liability on February 16, 1915, and any excess of such balances over liabilities shall lapse into the fund from which the same were appropriated,' applicable to balances of the appropriation accounts created by said house bill No. 53 of 1914, and effect a lapse of any net balances therein?"

It is clear that the appropriation accounts in question, unless affected by house bill No. 314, passed by the present session of the general assembly, continue to be available for disbursement and to constitute authority for the incurring of liabilities, and will continue to be such, unless exhausted, until two years from the passage of house

bill No. 53, insofar as the same are for the current expenses of the state government or its institutions, or until two years from a date ninety days subsequent thereto, with respect to other appropriations of a continuing character. This is true because of the lack of any specific limitation on the life of the appropriation and under article II, section 22 of the constitution, which provides that "no appropriation shall be made for a longer period than two years," by force of which an appropriation made without limitation as to time is good for a period of two years unless sooner exhausted. Therefore, the question which you submit is directly raised.

The first sentence of section 6, above quoted, to the effect that all liabilities incurred on or before June 30, 1915, shall be paid from appropriations provided in section 1 thereof, is primarily a legislative declaration of policy as to the disbursement of the moneys appropriated by section 1. Of itself it is not sufficient, in my judgment, to cut off the right to disburse moneys appropriated by some other law, though of prior enactment, for purposes other than those covered by the 1915 law and to prohibit such appropriations from being used to pay liabilities incurred "on or before June 30, 1915." In fact, so far as this sentence is concerned, any practical application thereof would be impossible without reading into the sentence some beginning date, such as the date of the passage of the act or the date suggested by the succeeding sentence and the title of the bill, viz.: February 16, 1915.

The purpose of the act is, as indicated in the title and elsewhere, to provide appropriations for the current expenses of the state government and its institutions for the period beginning on February 16, 1915, and ending June 30, 1915. The bill was not passed until March 11, 1915, and though the law could have no effect until that date, when it did go into effect it governed through this sentence all expenditures within its purview, on account of liabilities incurred on and after February 16, 1915.

If limited to the period between February 16, 1915, and June 30, 1915, this sentence can be given a definite meaning. Taken in connection with the title of the bill and the specific appropriations made therein, I think it must be interpreted as follows:

> "The sums appropriated in section 1 of the partial bill of 1915 are to be the only sums available for the payment of liabilities therein authorized, incurred between February 16, 1915, and June 30, 1915. If there is a subsisting appropriation for such purposes and a balance therein, the right to expend that appropriation is suspended as to such liabilities incurred between these two dates."

There is nothing inconsistent in such an interpretation of house bill No. 314 with anything that is expressed in house bill No. 53, passed in 1914; for as already pointed out, the appropriations therein made are for no specific period of time and it is only by inference that they are held available for expenditure on account of liabilities incurred at any time within two years after they became effective. We have then the case of a specific provision operating as an exception to a general provision. The subsequent declaration of the legislature, to the effect that the appropriations made in 1915 should be the only appropriations available for the uses and purposes for which they are made on account of liabilities incurred within a given period of time, merely suspends the authority to incur liabilities against the preceding appropriations during that period.

The first sentence of section 6 of the 1915 partial law, then, does not have the effect of lapsing the continuing appropriations found in house bill No. 53, but as to appropriations therein for the purposes covered by the 1915 law does have the effect of suspending the authority to expend them or to incur liabilities against them until June 30, 1915, when, unless there is a similar clause in the appropriation bill which is to be passed to provide for the current expenses of the state on and after July 1, 1915, he authority to incur liabilities against such balances would be restored.

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The foregoing is a discussion of the first sentence of section 6 only. The effect of the first part of the second sentence in that section will now be considered.

The exact language of this portion of the section is as follows:

> "All balances in any appropriation account against which there is no liability on February 16, 1915, and any excess of such balances over liabilities, shall lapse into the fund from which the same were appropriated;"

In my opinion, this part of section 6 is controlled by the same legislative intention which is discerned in the first sentence of that section. That is to say, while the language is general, the intent of the whole bill is to legislate with respect to the governmental expenses for which appropriations are made in section 1 thereof.

Therefore, the words "any appropriation account," as used in the sentence now under examination, must be held to mean any appropriation account for a purpose for which an appropriation account is created by section 1 of house bill No. 314, passed in 1915. The effect of this sentence, then, is exerted only upon outstanding appropriation accounts, by whatever appropriation law they may have been created, for purposes for which appropriations are made in section 1 of the act. As to such appropriations the auditor of state should lapse the balances as therein provided for; but as to appropriations for other purposes than those covered by the 1915 bill the auditor of the state should not so act.

It follows that the second sentence of section 6 goes a step further than the first sentence thereof, and that while the first sentence standing by itself would have no effect other than to suspend appropriation accounts for purposes for which appropriations are made in section 1 of the 1915 law, the second sentence thereof has the effect of lapsing the net balances in such appropriation accounts.

In conclusion, then, it is my opinion that house bill No. 314, passed in 1915, has the substantial, though not technical, effect of repealing so much of house bill No. 53, passed by the 80th general assembly, as relates to the subjects for which appropriations are made in said house bill No. 314; but that as to those appropriations made in house bill No. 53 for purposes not covered by the 1915 law, the latter has no effect whatever.

Respectfully,
EDWARD C. TURNER,
Attorney General.

297.

CITY OF COLUMBUS—STREET PAVING AND SIDEWALK IMPROVEMENTS —APPROPRIATIONS IN 1914 NOT AFFECTED BY 1915 PARTIAL APPROPRIATION, HOUSE BILL No. 314.

The specific appropriations to the city of Columbus for the payment of the state's share of certain improvements in the law found in 104 *O. L.,* 211, *are not affected by the* 1915 *partial appropriation bill, house bill No.* 314.

COLUMBUS, OHIO, April 27, 1915.

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

DEAR SIR:—In an opinion of even date herewith I have advised generally as to the effect of house bill No. 314—the 1915 partial appropriation bill—upon the balances of appropriations made by house bill No. 53 (104 O. L., 211).

You advise me verbally that the particular appropriations in said house bill No. 53 about which you are concerned are the following:

"CITY OF COLUMBUS

"Repaving of High street from Broad to State in front of state ground	$5,000 00
"Paving Eleventh avenue along state fair grounds	9,500 00
"Cement walks on Eleventh avenue along state fair grounds	2,500 00"

The fact is that none of the improvements for which appropriations were thus made had been completed, or even begun, when house bill No. 53 was passed in 1914. According, these are not appropriations to pay liabilities or claims against the state such as are subject to the audit of the special committee provided by the bill; nor are they appropriations for the current expenses of the state government or institutions. In effect, these items of the bill amount to provisions that the state shall pay its proper proportion or share of the cost of making the improvements therein specified when ascertained. That is, the bill authorizes the city of Columbus to make the improvements on the faith of the state's appropriation.

The nature of these appropriations is best illustrated by calling attention to the fact that similar appropriations are made to the city of Columbus in house bill No. 314, recently passed by the present session. None of these appropriations, however, relates to the particular improvements covered by house bill No. 53.

It is apparent, therefore, that the subject-matter of these appropriations in house bill No. 53 is one not within the purview of the act of 1915. Therefore, nothing in that act, interpreted as I have stated in the main opinion to which this is supplementary, in any way affects the balances in these appropriation accounts.

Respectfully,
EDWARD C. TURNER,
Attorney General

298.

ELECTION BOARDS—CHIEF DEPUTIES AND CLERKS ELECTED IN AUGUST, 1914, HOLD OFFICE UNTIL ORGANIZATION OF SUCH BOARDS WITHIN FIFTEEN DAYS AFTER THE FIRST DAY OF MAY, 1916—APPOINTIVE OFFICES.

The chief deputies and clerks of boards of deputy state supervisors of elections chosen in August, 1914, will continue to hold such offices until the organization of such boards within fifteen days after the first day of May, 1916.

COLUMBUS, OHIO, April 27, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of April 19, 1915, submitting for my opinion the following:

> "Shall the chief deputy and clerk of the board of deputy state supervisors of elections, organized in the month of August, 1914, continue to be chief deputy and clerk of said board until the first day of May, 1916, or does their

term expire at the end of one year from the date of their selection, as provided by section 4811, General Code, and a new selection be made to end on the last day of April, 1916."

The sections of the statutes referred to by you and which are determinative of the question submitted, are as follows:

"*Section* 4804, *G. C.*, as amended, 103 O. L., 215:

" 'On or before the first Monday in August, 1913, the state supervisor of elections shall appoint for each such county, two members of the board of deputy state supervisors of elections, who shall each serve until the first day of May, 1916, and whose successors shall then be appointed and serve for a term of two years from and after such date. And on or before the first Monday in August, 1914, such state supervisors of elections shall appoint for each such county two members of the board of deputy state supervisors of elections who shall each serve until the first day of May in the year 1917, and whose successors shall then be appointed and serve for a term of two years from and after such date. One member so appointed shall be from the political party which cast the highest number of votes at the last preceding November election for governor, and the other member shall be appointed from the political party which cast the next highest number of votes for such officer at such election.'

"*Section* 4811, *G. C.*:

" 'Within fifteen days after such appointment in each year, the deputy state supervisors shall meet in the offices of the county commissioners and organize by selecting one of their number as chief deputy, who shall preside at all meetings and a resident elector of such county, other than a member of the board, as clerk, both of which officers shall continue in office for one year.' "

It is by reason of the provisions of section 4804, G. C., supra, eliminating the appointment of deputy state supervisors of elections in the year 1915, that your question arises. Prior to such amendment, there was appointed, on or before the first Monday of August, each year, two members of the board of deputy state supervisors of elections, thereby giving rise to an annual change in the personnel of the board, or at least made possible such change each year. It was manifestly in view of this state of the law that it was provided in section 4811, G. C., that within fifteen days after such appointments in each year, the deputy state supervisors of elections should meet and organize. That is, the manifest reason for the requirement that the board organize each year, was the then, at least possible change in its personnel each year, and hence the provision that such organization be made after such appointments.

It may be further observed, that the phrase "in each year" as found in section 4811, G. C., relates to the time of such appointments rather than to the time of organization of the board.

While it is provided that the chief deputy and clerk shall continue in office for one year, it is quite apparent that such term is fixed with particular reference to the appointments and organization required to be made in each year. Since no such appointments and organization may be made, the reason of that rule fails, and hence the rule in this case does not apply. The manifest purpose and intent of that provision is that such officers should continue in office until the next succeeding appointments and organization made thereafter. In short, the appointment of a new members of the board is the foundation for a re-organization of the board and a controlling factor.

For the above reasons, I am of the opinion that since no such appointments as are referred to in sections 4804 and 4811 are to be made in the year 1915, and consequently

the personnel of the board will remain unchanged until the first day of May, 1916, no organization of such board should be made or changed until after such appointments are made in that year.

Answering your question more specifically, the chief deputy and clerk of the boards of deputy state supervisors of elections will continue as such until such boards are organized within fifteen days after May 1, 1916.

Respectfully,
EDWARD C. TURNER,
Attorney General.

299.

AKRON ARMORY BOARD—ABSTRACT OF TITLE.

Abstract of title for armory, city of Akron, Summit county, approved.

COLUMBUS, OHIO, April 28, 1915.

HON. BYRON L. BARGAR, *Secretary, Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—I have your letter with which you transmit an abstract of title and copy of proposed deed for the Akron Armory site situated in the city of Akron, Summit county, Ohio, and asking me to advise the armory board whether or not the state will acquire a sufficiently good title under the proposed deed to this site to authorize it to accept the same for armory purposes.

In reply to your enquiry I beg to advise that I have examined the abstract end the proposed deed, and I find that the city of Akron is the owner of the premises described therein with power to convey the same in fee simple, and that the deed tendered by the city of Akron to the state is a deed in fee simple to the state of Ohio of the premises therein described, subject to the constitutionality of section 3631 of the General Code.

I return herewith the abstract of title and the deed referred to above.

Respectfully,
EDWARD C. TURNER,
Attorney General.

300.

BOXING EXHIBITION—PRIZE FIGHT—QUESTION OF FACT—A BOXING EXHIBITION BEFORE MEMBERS OF A FRATERNAL ORGANIZATION NOT A PUBLIC EXHIBITION—PRINCIPALS OF SUCH CONTEST WOULD BE CRIMINALLY LIABLE—MEMBERS OF CLUB EXEMPT FROM LIABILITY, CRIMINALLY.

The question of whether a so-called boxing exhibition is in fact a boxing exhibition, or whether it is a prize fight within the meaning of the statutes, is one of fact.

Where a fraternal organization entertains its members by giving boxing exhibitions, to which only members of the organization are admitted, such exhibitions cannot be classed as public.

If the organization is not such as to bring it within the exceptions created by section 12803, *G. C., then under section* 12802, *G. C., the principals in such boxing exhibitions would be criminally liable, but no criminal liability would attach to the members of the organization aiding, assisting or attending the boxing exhibitions.*

COLUMBUS, OHIO, April 29, 1915.

HON. CHARLES F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I have your communication of April 17, 1915, in which you inquire as follows:

> "I desire to know whether under any of the statutes now existing regarding prize fighting and public boxing exhibitions, it is unlawful for a fraternal organization to entertain the members of the organization by giving boxing exhibitions in their club rooms, charging an admission to the same?
>
> "Bear in mind that to this exhibition are admitted all members of the organization, without reference to the location of their lodge, and so far as I am aware, the principals in the boxing exhibition are hired for the occasion."

An answer to your inquiry involves in the first instance a determination of the question of whether the exhibitions to which you refer are prize fights, or whether they are sparring or boxing exhibitions within the meaning of the statutes. A determination of this question depends upon the particular facts of each case. For a particularly lucid and able discussion of this matter, I desire to cite you to the opinion of Judge Hollister in the case of State ex rel. Sheets v. Hobart, et al, 8 O. N. P., 246.

A prize fight is defined in the Century dictionary as a pugilistic encounter or boxing match for a prize or wager, and this definition was quoted with approval in the case of Seville v. State, 49 O. S., 117-131. It was also held in this case that it is not an essential ingredient of the crime of engaging in a prize fight in this state that it take place in public. If the contests to which you refer come within this classification, that is, if they are prize fights, then it may be stated without qualification that the principals would be criminally liable under section 12800, G. C., and all persons aiding, assisting or attending as backer, trainer, second, umpire, assistant or reporter, would be criminally liable under section 12801, G. C.

It was held in State v. Aston, 57 O. S., 672, 39 Weekly Law Bulletin, 117, that a sparring exhibition between two persons hired for the purpose at a definite compensation without intention to harm each other and without harming each other, is not a prize fight. If the contests to which you refer are of this class, as seems to be indicated by your letter, then they are governed by the provisions of sections 12802 and 12803 of the General Code.

Section 12802, G. C., reads as follows:

"Whoever agrees to fight and wilfully fights or boxes at fisticuffs or engages in a public sparring or boxing exhibition without gloves or with gloves, or aids, assists or attends such boxing exhibition or glove fight, or being an owner or lessee of grounds, or a lot, building, hall or structure, permits it to be used for such exhibition or purpose, shall be fined not more than two hundred and fifty dollars or imprisoned not more than three months, or both."

Section 12803, G. C., reads as follows:

"The next preceding section shall not apply to a public gynasium or athletic club, or any of the exercises therein, if written permission for the specific purpose has been obtained from the sheriff of the county, or, if the exercise or exhibitions are within the limits of a municipal corporation, from the mayor of such corporation."

Section 12802 divides itself into two parts and applies (1) to "whoever agrees to fight and wilfully fights or boxes at fisticuffs," and (2) to "whoever engages in a public sparring or boxing exhibition without gloves or with gloves, or aids, assists or attends such boxing exhibition or glove fight, or being an owner or lessee of grounds, or a lot, building, hall or structure, permits it to be used for such exhibition or purpose." Under the first part of this section it is unlawful to agree to fight and wilfully fight or box at fisticuffs, unless the act be brought within the exceptions created by section 12803, G. C., and, applying the reasoning of the court in the case of Seville v. State, supra, it would not be essential that the fighting or boxing take place in public. The second part of this section, and which more especially concerns your specific inquiry, makes it a criminal offense to aid, assist, or attend a *public* boxing exhibition or glove fight and further provides that it shall be unlawful for an owner or lessee to permit premises to be used for such purposes, except, of course, as is provided in section 12803, G. C. This part of the section applies only in case the boxing exhibition is public. The word "public" when used as an adjective, is defined in the Century dictionary as follows:

"Open to all the people, not limited or restricted to any particular class of the community."

It was held in the case of Commonwealth v. Mack, 187 Mass., 441, that where a statute specifies public boxing matches, or sparring exhibitions, it is necessary that the contest be one to which the public generally is admitted; that is, all persons must be admitted in the same way as to theaters and other public places of amusement, in order to bring the contest within the provisions of the statute. It appears from your inquiry that the exhibitions in question are open only to the members of a certain lodge or fraternal organization and hence they cannot be classed as public exhibitions, because not open to all persons on the same terms and indeed, not open at all to the general public.

I am therefore of the opinion, that if such exhibitions are not prize fights and are only boxing or sparring exhibitions, under the rule laid down by the supreme court of Ohio in the cases cited above, and if it be further assumed that such exhibitions do not come within the exceptions created by section 12803, G. C., then under the first part of section 12802, G. C., the principals in such boxing exhibitions would be criminally liable for the reason that it is not necessary, in order to make them liable, that the exhibitions be public; and under the last part of said section, the members of the fraternal organization aiding, assisting or attending such boxing exhibitions would not be criminally liable for the reason that under the terms of the section it is necessary that the exhibitions be public in order to make them liable.

Coming now to consider the exceptions created by section 12803, it need only be

observed that if the exhibitions in question are boxing exhibitions and not prize fights, and if the fraternal organization in question is in fact organized as a bona fide athletic club, and if the written permission provided for by this section has been duly obtained, then the entire transaction would be a lawful one and no criminal liability would attach even to the principals. If all of the above facts do not exist, then the section would have no application. As has been previously observed, the question of whether a given exhibition is a prize fight or whether it is a boxing exhibition, is one of fact, and is to be determined under the rules referred to herein by a reference to all the facts of the particular case.

Respectfully,
EDWARD C. TURNER,
Attorney General.

301.

DRY COMMODITIES—SALE IN OHIO—SECTION 6418-1, G. C., AS IT FORMERLY STOOD EFFECTIVE AFTER SUBSEQUENT AMENDMENT AND REPEAL DECLARED UNCONSTITUTIONAL—WEIGHTS AND MEASURES.

Section 6418-1, *G. C., repealed by act subsequently declared unconstitutional, revived and again effective.*

COLUMBUS, OHIO, April 29, 1915.

HON. S. W. BRATTON, *Director of the Bureau of Standards, Department of Commerce, Washington, D. C.*

DEAR SIR:—Permit me to acknowledge receipt of your favor of April 20th, which is as follows:

> "In a publication which will soon be issued by this bureau, the various states are classified by the method of selling dry commodities required by law. Section 6418-1 of the General Code of your state, as amended February 27, 1913, requires sales by weight of certain commodities in the absence of written agreement, and your state was originally so classified.
>
> "In case No. 14508, 'In the matter of the application of Henry Steube for a writ of habeaus Corpus,' the supreme court of Ohio has declared section 6418-1 of the General Code unconstitutional. We are in some doubt as to the present status of your law in relation to this matter, and would like your opinion on the following question.
>
> "Is section 6418-1, as it existed prior to the amendment of February 27, 1913, now the law in your state, or is section 6418-1 to be considered as rendered entirely null and void, and if so, does Ohio have any law whatever in relation to weights per bushel and the manner of sale of dry commodities?
>
> "We would appreciate a prompt reply very much in order that no mistake may occur in the proper classification of Ohio in our publication."

Answering your request for an opinion as to whether or not section 6418-1 of the General Code is to be regarded as in effect the same as prior to the opinion of the supreme court of Ohio in the matter of the application of Henry H. Steube for a writ of habeas corpus, I have to advise that the questions in that case arose through the enforcement of the amendment to section 6418-1, wherein the law was changed by

the insertion of the words "in writing" which qualified the form of agreement provided for in section 6418-1, and it was on the ground that the exaction of "an agreement *in writing* of the contracting parties" that the law as amended was declared unconstitutional, it being held by the court that the provision referred to above conflicted with the right to make contracts and constituted an invasion of property rights guaranteed by the constitution of the state of Ohio.

In the case of State ex rel. Wilmot et al. v. Buckley et al., 60 O. S., 273, the court, at page 296, said:

> "As this section 2926-b, as passed April 16, 1896, is unconstitutional and inoperative, the repealing section of the act is also inoperative."

It is a well recognized principle of law that where an act repealing another act and providing a substitute therefor is itself invalid, the repealing clause must also be held inoperative.

It is my opinion, therefore, that as the attempt to repeal section 6418-1 of the general code was made by an act subsequently declared to be unconstitutional, the said attempt to repeal was wholly ineffective and that section 6418-1 as it formerly stood is now the law in this state.

I trust that the above will supply the information you desire for the publication you contemplate issuing.

Respectfully,
EDWARD C. TURNER,
Attorney General.

302.

MUNICIPAL CORPORATION—MAY NOT EXACT EXCESSIVE LICENSE FEE FOR PEDDLERS—QUESTION OF FACT IN EACH CASE—MAY REGULATE AND LICENSE PEDDLERS—SECTION 3673, G. C., UNAFFECTED BY DECISION IN GREAT ATLANTIC AND PACIFIC TEA COMPANY V. THE VILLAGE OF TIPPECANOE, 85 O. S., 120.

That part of section 3673, *G. C., which authorizes a municipal corporation to license persons, who on the streets or traveling from place to place about such municipality, sell goods, wares or merchandise by retail, is unaffected by the decision in the Great Atlantic and Pacific Tea Co. v. The Village of Tippecanoe,* 85 *O. S.,* 120, *and in Wooster v. Evans, decided April* 27, 1915.

Authority to regulate and license peddlers is also found in section 3670, *G. C.*

Under authority of either of these sections, a municipal corporation may not exact an excessive license fee. What is an excessive license fee in a given case is ultimately a question of fact to be decided under principles discussed in the opinion.

COLUMBUS, OHIO, April 30, 1915.

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

GENTLEMEN:—You have returned to me opinion No. 232, given to you on April 12, 1915, with the statement that the same does not answer the question which you have in mind. In that opinion you were advised that under the decision in The Great Atlantic and Pacific Tea Co. v. The Village of Tippecanoe, 85 O. S., 120, section 3673, G. C., cannot be so interpreted as to authorize a municipal council to impose a license fee upon merchants who merely solicit orders and negotiate future sales at the resi-

dences of their customers. Your question as originally phrased, was by me interpreted as an inquiry respecting the validity of an ordinance imposing a license fee of ten dollars a day upon persons soliciting sales and delivering goods for a domestic corporation, going from door to door in a municipality, and it was supposed by me that the case was one within the rule of the decision cited.

You now state that you have in mind a case wherein the person subject to license does not solicit for the sales, but actually makes sales from a small stock of goods which he carries with him, in his house to house visit; that is to say, in case of successful solicitation on his part, he makes immediate delivery from said stock.

You also advise me that you are primarily interested in the amount of the license fee, and for this purpose desire me to assume a valid ordinance under section 3673, G. C., than to consider merely the size of the fee, viz., ten dollars a day for the business described.

I must say that it is now a matter of considerable doubt as to whether section 3673, G. C., is constitutional at all or not. On April 27, 1915, the supreme court of this state held, in the case of City of Wooster v. Evans, that on the principles of the decision in The Great Atlantic and Pacific Tea Co. v. Tippecanoe, section 3673, G. C., could not be so interpreted as to authorize the licensing of persons who temporarily open stores or places for the sale of goods, i. e., transient dealers.

Now it is obvious, that in deciding the two cases in question, the supreme court has held the statute (section 3673), unconstitutional, in part at least. For though the decision may be palliated by the statement that the section cannot be interpreted in a certain way, yet the fact is that it cannot be interpreted in any other way than the way in which the court holds it should not be.

Section 3673, G. C., provides as follows:

> "To license transient dealers, persons who temporarily open stores or places for the sale of goods, wares or merchandise, and each person who, on the streets. or traveling from place to place about the municipality, sells, bargains to sell, or solicits orders for goods, wares or merchandise by retail. The granting of such license shall be controlled by the provisions of the next preceding section."

This section authorizes the licensing of a person, who, traveling from place to place about such municipality, solicits orders for goods by retail. Yet in the Great Atlantic and Pacific Tea Company case the decision was that it could not be so interpreted as to authorize such a license. The section also plainly authorizes the licensing of transient dealers or persons who temporarily open stores or places for the sale of goods, wares or merchandise, but in Wooster v. Evans, supra, this was the exact business of the defendant in error, and it was held that the section could not be so interpreted as to authorize the municipality to license.

The court, however, has never held that the section is wholly unconstitutional. In all probability its several provisions are severable. We may say then, for the purpose of your question at least, that the following portion of the statute remains unaffected by the judicial decision:

> "To license * * * each person who, on the streets or traveling from place to place about such municipality, sells, * * * goods, wares or merchandise by retail."

Section 3673 also provides that "the granting of such license shall be controlled by the provisions of the next preceding section."

The next preceding section (3672) provides that the municipality "in granting such license, may exact and receive such sum of money as it may think reasonable,

but no municipal corporation may require of the owner of any product of his own raising, or the manufacturer of any article manufactured by him, license to vend or sell in any way, by himself or agent, any such article or product. Such council may confer upon, vest in and delegate to the mayor of the corporation authority to grant, issue and revoke licenses."

I assume from the form of your question that the case which you have in mind is not within the exception of this provision, and that in point of fact the agents of the corporation mentioned by you conduct their business substantially as peddlers do. If this is the case, there is special authority to license them in section 3670, G. C., which provides as follows:

> "To regulate and license * * * peddlers. In the granting of any license a municipal corporation may exact and receive such sums of money as the council shall deem proper and expedient."

I call your attention to the fact that this statute may be regarded as somewhat broader than section 3673 in that it authorizes regulation as well as license, while section 3673 authorizes license only. However, both are subject to the same principles.

The principles in point are as follows:

Under the power to license, or the power to regulate and license, a municipal corporation may not exact a license fee for the purpose of supplying general revenue; for this would constitute an attempted exercise of an entirely different power, viz.: the power of taxation, and municipalities do not possess the general taxing power, but only that which has been specifically delegated to them by the law, which in Ohio is power to levy taxes upon the property duplicate.

A municipality having the power to license or to regulate and license may not exact a license fee so high as to be prohibitive; for the power to license or to regulate does not imply the power to prohibit. All of the occupations mentioned in the license statutes are presumptively lawful, and the city will not be held to have the power to prevent their pursuit, the power extending merely to the imposition of such restraint thereon as may be exerted through regulation and license.

In determining what constitutes an exaction, palpably for the purpose of revenue, allowance must be made for the fact that the municipality is not limited in fixing the license fee merely to compensating itself for the actual expense for issuing the license, but it is permitted to take into account the expenses of enforcing its own ordinances, so that the fact that some revenue is produced in addition to the expense directly chargeable to the machinery of issuing the license does not, of itself, establish the excessiveness of the fee.

Where the power is not limited to the mere license, but extends to regulation as well, as under section 3670, G. C., and the occupation to be regulated, while lawful in itself, is subject to become by abuse a public nuisance (and it has been so held as to peddling), the license fee may be such as to exceed the total cost of all governmental expenses properly attributable to the licensed business, and thus to produce some incidental revenue if so fixed for the purpose merely of restricting the number of persons engaged in the occupation, or guaranteeing that they shall be persons of sufficient financial responsibility to pay the exaction; or especially where there are provisions for the revocation of licenses for misconduct, so as to impose, in this way, a sufficient restraint upon the licensed persons. But even in such cases the exaction must not be so high as to amount to prohibition, and the production of revenue must be merely incidental and not the purpose of the ordinance.

Subject to these primary rules, the determination of what amount may be excessive for a given occupation in a given municipal corporation, is really a question of fact. The presumption is, that a license fee exacted under favor of a constitutional statute is reasonable in amount, and the burden is upon the defendant in a prosecu-

tion to show that the amount of the fee is excessive. What may be a reasonable fee for one business would be an unreasonable fee for another business; and what might be a reasonable fee for a business in one municipality might be an unreasonable fee for the same business in another municipality.

For these reasons I hesitate to state that ten dollars a day is, as a matter of law, an excessive license fee under any and all conditions when exacted from those carrying on such a business as that described by you. I must say, however, that I have examined a number of decisions respecting the licensing of peddlers and itinerant traders, and find that in at least the very great majority of them ten dollars a day was held to be excessive. The amount does seem very high, and it is very likely true that it would exceed all reasonable expectations of profit which could be made by a person engaged in such business. If that is the case, it would be prohibitory in effect, and on that ground alone could not be sustained. Just whether or not the fee is prohibitory is a matter of fact, in the exact sense, and not a matter of law.

For your information I cite the following decisions:

Carrollton v. Bazzette, 159 Ill., 284.

(License fee of ten dollars a day upon peddlers and itinerant vendors held prohibitory, the court remarking that "the business of itinerant merchants would have to be much more remunerative than ordinary merchandising in small cities to survive under a burden of this character, amounting to more than $3,000 per annum.")

State ex rel. Clark v. New Brunswick, 43 N. J., 175.

(The question of unreasonableness and production of excessive revenue held to be one of fact upon which testimony may be offered; so that summary conviction without opportunity to attack the ordinance in this way may not be sustained.)

Van Hook v. Selma, 70 Ala., 361.

(This decision discusses at length the underlying principles surrounding the question of reasonableness of a license fee. The amount of the fee here was ten dollars—not ten dollars a day, but merely ten dollars for the granting of the license—; it seems from the opinion that the court below had given a charge to the jury upon these principles, from which I take it that the question was regarded as being one of fact.)

St. Paul v. Colter, 12 Minn., 41.
Chaddock v. Day, 75 Mich., 527.
Brooks v. Mangan, 86 Mich., 576.
(Ordinance exacting ten dollars for the first day and five dollars for each subsequent day held prohibitory.)

It so happens that there are no decisions in this state in which the reasonableness of the exact amount of the license fee mentioned by you has been considered. The principles which I have stated have, however, been established in the following cases:

Mays v. Cincinnati, 1 O. S., 268.
Cincinnati v. Buckingham, 10th Ohio, 257.
Baker v. Cincinnati, 11 O. S., 534.
Sipe v. Murphy, 49 O. S., 536.

I may add that the language which is found in both of the statutes which have been considered, proposing to delegate to the council of the municipality authority to

"exact and receive such sum of money as it may think reasonable" or "proper and expedient," does not alter the case. Council would, without such a provision, have primarily the discretionary power to fix the amount of the fee, and presumptively the fee fixed by it would be reasonable and just. But the reasonableness and justice of the fee is ultimately a question for the courts.

With the statement then that in most of the cases which I have examined, ten dollars a day, as applied to peddlers or itinerant vendors in small municipalities, is held to be excessive, and that such a holding would almost unquestionably be made upon the facts which may be assumed, if a case should arise upon the facts submitted by you I must nevertheless advice that strictly and technically the question is, in the last analysis, a question of fact.

Respectfully,
EDWARD C. TURNER,
Attorney General.

303.

PRIMARY ELECTIONS—NOMINATION OF CANDIDATES—TOWNSHIP OFFICES—MAY NOT BE HELD UNLESS PETITIONED FOR BY A MAJORITY OF ELECTORS OF SUCH TOWNSHIP.

Primary elections for the nomination of candidates for township offices may not be held in any township unless petitioned for by a majority of the electors of such township.

COLUMBUS, OHIO, April 30, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of April 21, 1915, as follows:

> "Section 7 of article V of the constitution of the state of Ohio is as follows:
>
> "'All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator; but direct primaries shall not be held for the nomination of township officers or for officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality.'
>
> "Section 4951 of the General Code, as amended, 103 O. L., 476, reads as follows:
>
> "'The provisions of this chapter shall not extend nor be applicable to the nomination of candidates for township offices or for the elective offices of any municipality which has less than two thousand population as ascertained at the federal census next preceding such nomination, unless the voters of such township shall so petition the board of deputy state supervisors of elections.'
>
> "QUESTION: Shall primary elections be held in township of a population of two thousand or more as ascertained by the last census, unless petitioned for by a majority of the voters of such township?"

The language of the above constitutional and statutory provisions is, it seems, quite clear and unequivocal. It will be observed that in the general constitutional

provision requiring that nomination shall be made at direct primaries or by petition no mention is made of township officers, while in the exception to this general provision township officers are specifically referred to. This would indicate a clear distinction between township officers and municipal officers, and that it was not intended that the phrase "municipal officers" as used in the general provision should be construed to include township officers as referred to in the exception. Indeed, it may well be argued that the primary purpose of the first phrase of the exception in reference to township officers was to clear up any possible ambiguity that might arise in the interpretation of the phrase "municipal officers," and to emphasize the intent that township officers were not subject to the preceding provisions except when within the subsequent terms of section 7 of article V of the constitution.

To my mind the phrase "of less than two thousand population" modifies only municipalities and does not relate to townships. It appears that if the intent of this provision had been to limit this exception as to township officers to those townships having a population of less than two thousand, and that the prepositional phrase "of less than two thousand" should relate to or modify townships, the word township would have been used as a noun rather than as an adjective, and that the phraseology in the first instance would have been officers of a township as distinguished from township officers, and the terms placed in similar relationship to those of the latter phrase.

In the absence of some manifest and controlling reason to the contrary the usual grammatical construction should prevail.

In answer to your question I am, therefore, of opinion that primary elections may not be held for the nomination of township officers unless petitioned for by a majority of the electors of such township.

Respectfully,
EDWARD C. TURNER,
Attorney General.

304.

AUDITOR OF STATE—REQUIRED TO ISSUE WARRANTS FOR COSTS OF CONVICTION AND TRANSPORTATION OF PERSON SENTENCED FOR FELONY—EXECUTION AND SUSPENSION OF SENTENCE.

The auditor of state is required to issue his warrant for the proper costs of conviction and transportation of a person sentenced for a felony to the penitentiary or the Ohio state reformatory upon the delivery of the person to the warden of the penitentiary or the superintendent of the reformatory, and a proper certification of such costs and transportation, notwithstanding that the execution of such sentence may be subsequently suspended by order of the court.

COLUMBUS, OHIO, April 30, 1915.

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

DEAR SIR:—I acknowledge receipt of your request for an opinion under date of April 13, 1915, as follows:

> "*FACTS:* Upon a verdict of guilty, the court of common pleas sentenced two men to the reformatory at Mansfield. Within the five days prescribed by law, but pending application for a suspension of sentence for the purpose of instituting proceedings in error, the sheriff, disregarding the request of counsel for the convicted men, transported the prisoners to the reforma-

tory, presented his cost bill to the warden upon surrendering the prisoners, had the cost bill approved by the warden and presented same to this department for payment. Meanwhile, and before payment of said cost bill, this department is advised that the court of appeals ordered a suspension of sentence, and that the two prisoners were ordered returned to the county jail pending the determination of the error proceedings which were instituted.

"*QUESTION:* Is the state liable for the costs of the conviction and transportation of these two men, and may the auditor of state at this time issue his warrant for the same, regardless of the determination of the courts upon the proceedings in error?"

Your inquiry involves a consideration of the statutes relative to the execution of sentence for felony. Section 13720, G. C., provides:

"A person sentenced to the penitentiary or Ohio state reformatory, unless the execution thereof is suspended, shall be conveyed to the penitentiary or Ohio state reformatory by the sheriff of the county in which the conviction was had, within five days after such sentence, and delivered into custody of the warden of the penitentiary, or superintendent of the Ohio state reformatory, with a copy of such sentence there to be kept until the term of his imprisonment expires, or he is pardoned. If the execution of such sentence is suspended, and the judgment be afterward affirmed, he shall be conveyed to the penitentiary or Ohio state reformatory within five days after the court directs the execution of sentence; provided, however, that the trial judge, or any judge of said court in said subdivision may, in his discretion, and for good cause shown, extend the time of such conveyance."

Section 13722, G. C., provides:

"Upon sentence of a person for a felony, the officers, claiming costs made in the prosecution, shall deliver to the clerk itemized bills thereof, who shall make and certify, under his hand and the seal of the court, a complete bill of the costs made in such prosecution, including the sum paid by the county commissioners for the arrest and return of the convict on the requisition of the governor, or on the request of the governor to the president of the United States. Such bill of costs shall be presented by such clerk to the prosecuting attorney, who shall examine each item therein charged, and certify to it if correct and legal."

It will be observed that the above section is applicable to all sentences for felony and not confined to sentences to the penitentiary alone. While it is true that at the time of the enactment of this section in its present form sentences to the penitentiary may have been the only sentences for felony authorized by law, such subsequent changes as have been made in that respect must be presumed to have been so made with full recognition of the provisions of this section, so that the above provisions, together with those of sections 13726 and 13727, G. C., infra, must be read with section 2131, G. C., as amended, 103 O. L., 885, as follows:

"The superintendent shall receive all male criminals between the ages of sixteen and thirty years sentenced to the reformatory, if they are not known to have been previously sentenced to a state prison. Male persons between the ages of sixteen and twenty-one years, convicted of felony, shall be sentenced to the reformatory instead of the penitentiary. Such persons between the ages of twenty-one and thirty years may be sentenced to the reformatory

if the court passing sentence deems them amenable to reformatory methods. No person convicted of murder in the first or second degree shall be sentenced or transferred to the reformatory."

Under section 13723, G. C., the clerk is required to issue forthwith to the sheriff executions against the property of the person so sentenced for the costs of the prosecution. Section 13724, G. C., provides that if the convict is sentenced to the penitentiary or death, and no property has been levied upon, the sheriff shall deliver such cost bill, with the convict, to the warden of the penitentiary.

Section 13726, G. C., provides:

"When the clerk certifies on the cost bill that execution was issued according to the provisions of this chapter, and returned by the sheriff 'no goods, chattels, lands or tenements, found whereon to levy,' the warden of the penitentiary shall allow so much of the cost bill and charges for transportation as is correct, and certify such allowance, which shall be paid by the state."

Section 13727, G. C., is as follows:

"Upon the return of the writ against the convict, if an amount of money has not been made sufficient for the payment of the costs of conviction, and no additional property is found whereon to levy, the clerk shall so certify to the auditor of state, under his seal, with the statement of the total amount of costs the amount made and the amount remaining unpaid. Such amount so unpaid as the auditor finds to be correct, shall be paid by the state, to the order of such clerk."

Considering together then the provisions of sections 13722, 13726, 13727, G. C., and 2131 and 2134, G. C., as amended, 103 O. L., 885, and which latter section provides relative to the duties of sheriffs, upon sentence to the reformatory, as follows:

"In transporting a prisoner to the reformatory, the sheriff shall perform like duties, have like powers and receive like compensation as provided by law for transporting prisoners to the penitentiary."

I am led to the opinion that it was the legislative purpose and intent, fairly deducible therefrom, that costs should be paid by the state in the same manner in cases of sentence to the reformatory as where sentence is to the penitentiary.

It will be observed that the sheriff is specifically required to convey every person sentenced thereto to the penitentiary or reformatory within five days after such sentence, unless the same be suspended or by order of court the time of such conveyance is extended. From this it is clearly mandatory that the convict be delivered by the sheriff within five days to that institution to which he has been sentenced, barring the above mentioned exceptions. One of those exceptions is in case of suspension of execution of sentence.

Express provision is made for securing a suspension of execution of sentence of a person convicted of an offense by the court of common pleas as follows:

"*Section* 13698: When a person has been convicted of an offense and gives notice to the court of his intention to file, or apply for leave to file, a petition in error, such court, on his application, may suspend execution of the sentence or judgment against him until the next term of the court, or for such period not beyond the session as will give him a reasonable time to apply for such leave."

A mere request of counsel, directed to the sheriff, is not in any way such a compliance with this requirement of the law as compels recognition by the sheriff.

Provisions for the suspension of execution of sentence in the court of appeals is found in section 13757, G. C., as amended, 103 O. L., 435, in the language following:

> "Upon filing such petition in error in the supreme court, the execution of sentence, in cases of felony, shall be thereby suspended, and in cases of misdemeanor, the court or judge, allowing the motion, shall order such suspension. Proceedings in error in other courts shall not suspend execution of sentence except in capital cases, where such suspension must be for good cause shown, on motion, and on notice to the prosecuting attorney of the proper county, ordered by a majority of the judges of the court of appeals of the county, and in other cases in such court, by one judge thereof, and in cases in the common pleas court by one of the judges of such court. * * *"

Thus ample provision is made for securing the suspension of execution of sentence of persons to the penitentiary or to the reformatory prior to their commitment thereto. If, however, a person so sentenced neglects or refrains from seeking suspension until after the expiration of the full time within which the sheriff is required to convey such person to the penitentiary or reformatory, it could not be maintained that a suspension then granted by the court would absolve the state from the payment of the costs.

From your statement it is assumed that all statutory requirements preliminary to the surrender of the convicts to the superintendent of the Mansfield reformatory, relative to the collection of costs, have been fully complied with, and to such assumed state of facts this opinion is confined.

Every step, then, having been taken which is necessary to bring the costs of prosecution of the two convicts within the provision of the statute, which requires that the same shall be paid by the state, does a subsequent suspension of execution of the sentence suspend the operation of or abrogate the authority to pay such costs from the state treasury? An immediate pardon, parole, escape or death of the prisoners would not be held to bar the payment of the costs, even though the warrant had not yet been issued by the auditor of state therefor. Indeed, the liberation of the prisoner in any other manner than that stated in your request, would not suspend the operation of the statutory requirement of the state to pay the costs. It seems clearly the legislative purpose and intent that when the convict has been delivered into the custody, control and jurisdiction of the warden of the penitentiary or superintendent of the reformatory, that the costs of prosecution and transportation of such convict shall be paid by the state. I am, therefore, of opinion, in answer to your question, that the state is liable for the costs under the facts stated, and that the auditor of state should issue his warrant therefor.

Respectfully,
EDWARD C. TURNER,
Attorney General.

305.

AGRICULTURAL EXPERIMENT STATION—GENERAL EXPERIMENT STATION WORK NOT PUBLIC WORK—EIGHT HOUR LAW.

General experiment station work is not public work within the meaning of sections 17-1 *and* 17-2, *G. C.,* 103 *O. L.,* 854, *or of section* 37 *of article* II *of the Ohio constitution.*

COLUMBUS, OHIO, April 30, 1915.

HON. CHARLES E. THORNE, *Director Ohio Agricultural Experiment Station, Wooster, Ohio.*
DEAR SIR:—I have your letter of April 20, 1915, requesting my opinion as follows:

"Your opinion is desired regarding the application of the eight hour law to the state, district and county experiment farms of Ohio.

"First: Is experiment work 'public work' in the meaning of the act in question?

"Second: If experiment station work is public work, would that portion of the station's work which has to do with live stock and field operations be regarded as 'extraordinary emergency' work?

"The daily feeding and care of live stock, including the milking of dairy cows, cannot be crowded into eight hours continuous work. If careful experiment work is to be carried on it is essential that the *same men* should feed, care for and make observations *throughout the day.* If this work cannot be conducted with absolute accuracy, there is no need for doing it at all. With the hundreds of animals under experiment, if their care at time of mating, parturition and during sickness was regarded as 'extraordinary emergencies' such occurences would be encountered daily.

"And the various experiments in the field with crops, fruits and fertilizers must be carried on with extraordinary care. In order to get reliable results under present conditions the station often has to ask its men to work over ten hours, which they are very willing to do upon receiving extra pay for the overtime. In comparative tests of oats, wheat, corn, etc., it is important to plant an entire series of plots in one day, for a rain over night might delay the planting of the balance of the test two weeks, thus ruining the test. The station has learned these things by unpleasant experiences.

"The station's field and live stock work cannot be carried on as it should be by hiring extra men, as might be done in ordinary farming. If the eight hour law is held to apply to this work it will seriously cripple it."

I assume that by the term "eight hour law" you refer to sections 17-1 and 17-2 of the General Code (103 O. L., 854), which are as follows:

"Section 17-1. Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise; and it shall be unlawful for any person, corporation or association, whose duty it shall be to employ or to direct and control the services of such workmen to require or permit any of them to labor more than eight hours in any calendar day or more than forty-eight hours in any week, except in cases of extraordinary emergency. This section shall not be construed to include policemen or firemen.

"Section 17-2 Any person who shall violate any of the provisions of this

act shall be deemed guilty of a misdemeanor and upon conviction be fined not to exceed five hundred dollars or be imprisoned not more than six months or both.

"This act shall be in force and applicable to all contracts let on and after July 1, 1915."

Section 37 of article II of the constitution of Ohio, under authority of which the above sections of the General Code were evidently enacted, is as follows:

"Except in cases of extraordinary emergencies, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract, or otherwise."

This constitutional provision was undoubtedly self-executing, and went into effect on January 1, 1913. It will be observed that the statutory enactment follows the language of the constitution and the only result accomplished by the general assembly was to add to an existing constitutional enactment the sanction of a penalty, and to specifically designate who should be subject to such penalty.

Although the general assembly might, under authority of section 34 of article II of the constitution, enact legislation "fixing and limiting the hours of labor" generally, yet in view of the fact that they have adopted the very language of section 37 of article II, above quoted, it must be assumed that the legislative intent was to provide an effective method of enforcing this constitutional declaration of the state's policy relative to labor employed by or under the state in the performance of a certain class of work.

The answer to your question depends necessarily upon the meaning and scope of the words, "public work carried on or aided by the state." The meaning of this language has been considered and construed by my predecessor, the Hon. Timothy S. Hogan, in two opinions -one of the date of March 11, 1914, addressed to Hon. R. H. Hughes, acting president of Miami University, and the other of date April 29, 1914, addressed to Hon. C. E. Van Dusen, city solicitor of Lorain, Ohio.

Without going into or repeating the process of reasoning and argument contained in these two opinions, suffice it to say that I agree with the conclusions reached by Attorney-General Hogan, and I am of the opinion that the language referred to in section 37 of article II of the constitution and in section 17-1 of the General Code, applies only to public work of a constructive, improvement or betterment character, and not to the general routine work performed under or in various departments of the state. As stated in the opinion of April 29, 1914, above referred to, there is a wide distinction between "workmen engaged in public work" and "workmen working for the public."

I am, therefore, of the opinion that general routine experiment station work does not come within the purview of sections 17-1 and 17-2 of the General Code.

If, however, any constructive work, such as erecting buildings, making roads, etc., which is outside of the general routine of what is commonly understood as experiment station work, and which requires the employment of labor in addition to the regular force of employes, should be undertaken by your department, the employment of labor thereon would be governed by the provisions of said sections of the General Code.

I am enclosing you copies of the two opinions referred to above, also a copy of an opinion dated April 15th, and addressed to the agricultural committee of the house of representatives.

Respectfully,

EDWARD C. TURNER,

Attorney General.

306.

INDUSTRIAL COMMISSION—AWARD PAID BY COMMISSION CANNOT BE RECOVERED IN ABSENCE OF FRAUD.

An award paid by the industrial commission, in the absence of fraud, on the part of the applicant, cannot be recovered by the commission.

COLUMBUS, OHIO, April 30, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You submit for my opinion thereon the following facts:

> "Mr. William Martin sustained injuries on the 23rd of March, 1914, which caused him to be disabled from said date until June 22, 1914, as a result of falling from a ladder attached to a water tank located near the residence on a farm near Canal Dover, and owned by Nina B. Martin, wife of said William Martin. On said 23rd day of March, 1914, said William Martin was and for some time prior thereto the general manager of The Consumers Brewing and Ice Company of Canal Dover, Ohio, at a salary of $125.00 per month. This company was owned and operated by Nina B. Martin. Said Nina B. Martin, as owner and operator of said brewing and ice company, under the name of The Consumers Brewing and Ice Company of Canal Dover, Ohio, at the times herein referred to, carried industrial insurance. As a result of said injury, William Martin made application to the industrial commission for an allowance of compensation as an employe of said The Consumers Brewing and Ice Company of Canal Dover, Ohio, claiming to have been injured within the course of his employment. On August 4, 1914, this claim was heard by the commission, and a compensation of $142.29 was allowed the applicant. On August 14, 1914, the claim was reheard, and medical expenses aggregating the sum of $173.46 were allowed and paid."

You ask me:

> "First. Was William Martin injured in the course of his employment?
>
> "Second. If the commission was in error as to William Martin's being injured in the course of his employment and unlawfully paid such sums of money, what authority, if any, has the commission to recover said sums so awarded and paid?"

As to your first question I may say that I have examined the record in this case, and I fail to find any evidence tending to show or prove that William Martin, at the time of his injury, out on the farm of his wife, was doing anything whatever that had any connection with, or in any way related to, his duties as general manager of The Consumers Brewing and Ice Company of Canal Dover, Ohio. Under the rule that the onus of proving that the accident arose out of or in the course of his employment rests upon the said William Martin, and the record disclosing no such evidence, it follows that the application of William Martin should have been denied.

In answer to your second enquiry, I beg to say that the commission is only authorized to make an award and pay the same after it finds that the injury was received in the course of his employment, not on purpose, and while the injured person is doing what a person may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time to do that thing. When the com-

mission has so found and paid the award as a result of such finding, the injured employe, or his representatives, receiving such award, in the absence of fraud, have a vested interest therein.

The legislature, in the enactment of the workmen's compensation law under consideration, did not anticipate that the commission would in any instance make an award and pay the same until after the applicant had satisfied the commission by competent evidence that the award should be made; hence the legislature did not attempt to confer upon the commission the power to recover such an award so made when once paid.

Applying this conclusion to the case of William Martin, he is under moral but not legal obligations to refund the money he has received as a result of his application aforesaid.

Respectfully,
EDWARD C. TURNER,
Attorney General.

307.

FEES OF SHERIFF AS MASTER COMMISSIONER ARE PAYABLE INTO FEE FUND—CONSTRUCTION OF SECTION 11692, G. C.—FEES ARE PERSONAL WHERE SHERIFF, UNDER SECTION 11927, G. C. IS APPOINTED AS SUITABLE PERSON TO MAKE SALE OF REAL ESTATE.

Fees paid to sheriff while making a sale as master commissioner are official and payable into the fee fund under section 11692, *G. C.*

When the suitable person appointed to make a sale of real estate under section 11927, *G. C., is the sheriff of the county, the fee received by such person is personal and not payable into the sheriff's fee fund.*

COLUMBUS, OHIO, April 30, 1915.

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

GENTLEMEN:—I have your letter of April 13, 1915, requesting my opinion upon the following questions:

> "Section 11692, General Code, provides that a sheriff may act as master commissioner. Is the allowance made to him by the court for acting as such payable to his fee fund, or is he entitled to keep this personally?
>
> "If a court appoints a person who is serving as sheriff under section 11927, General Code, to sell property in an action commenced under section 11925, General Code, is the compensation allowed to such person to be paid into his fee fund or is it his personal fee? Would this also apply to any of the salaried county officers should any of them be chosen by the court under section 11927, General Code?"

Under the provisions of section 11691 of the General Code, when there exists some special reason that the sale of real estate shall not be made by the sheriff of the county where the decree or order was made, the court shall make and issue an order to a master commissioner for the sale of such real estate.

Section 11692 of the General Code provides that, "a sheriff may act as a master

commissioner," and "on notice and for a reasonable compensation to be paid him by the master out of his fee, he shall attend and make the sale for the master, who, by reason of sickness, is unable to attend."

We have here the anomalous situation of the master commissioner's being appointed only when the sheriff, for some special reason deemed sufficient by the court, is disqualified to make the sale; and upon the master commissioner's being unable to attend by reason of sickness the statute directs said sheriff so disqualified in the first instance to attend and make the sale for the master. Such is the provision of the statute. The sheriff makes the sale as sheriff, hence the "reasonable compensation to be paid him" comes to him in his official capacity as a county officer.

Section 2977 of the General Code provides:

> "All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected, and shall be held as public moneys belonging to such county, and accounted for and paid over as such as hereinafter provided."

It therefore follows that this compensation so earned by the sheriff is payable into the sheriff's fee fund.

As to your second enquiry, section 11927 and other sections of the same chapter of the General Code, in *pari materia* therewith prescribe the method for the sale of entailed and other estates. If, upon the hearing provided for in said sections, the application of the petitioner is granted, "the court shall direct a sale to be made, the manner thereof, and appoint some suitable person or persons to make it."

Now, if under this authority the court appoints as such "suitable person or persons" the individual or individuals who are serving as sheriff or other county officers, the compensation allowed for the making of such sale will be payable to such person or persons as individuals and not in their official capacities. Therefore, such compensation is the property of the person or persons making the sale, and is not subject to be paid into the fee fund provided for in said section 2977 of the General Code.

Respectfully,

EDWARD C. TURNER,

Attorney General.

308.

ROADS AND HIGHWAYS—AUTHORITY TO BRING SUIT FOR DAMAGES —INJURIES—OBSTRUCTIONS ON NATIONAL ROAD LYING OUTSIDE OF MUNICIPALITIES—REMOVAL OF FENCES ON NATIONAL ROAD.

The authority to bring suits for damages for injuries to or obstructions of that part of the national road lying outside of municipalities, rests with the county commissioners of the county in which the injury occurs.

COLUMBUS, OHIO, April 30, 1915.

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

DEAR SIR:—I have your communication of April 20, 1915, which reads as follows:

> "Last year the state highway department undertook the task of rebuilding the National Road east of Columbus. The right of way is 80 feet wide,

and after a conference with the officials of your office it was decided to have all fences moved back and all obstructions removed to the full width in order to give the state an opportunity to beautify the road and make it a fitting part of the national highway known as 'The Old Trails Route.' "

"To this end buildings have been removed at various places and fences have been set back to the 80 foot width. But it now develops that a few property owners have refused to comply with the instructions given by the state and are setting their fences on the public highway as they previously existed.

"I feel that it is very desirable for us to preserve the full width, if possible, and would request a conference with you, or your representative, concerning the proper procedure to pursue."

I desire to call your attention to certain sections of the General Code applicable to the situation presented by you.

Under section 7524, G. C., that part of the National Road outside of municipalities, is placed in the care and control of the boards of county commissioners. The section reads as follows:

"Commissioners of counties, through which part of the National Road passes, shall take under their care and control in behalf of their respective counties, so much of the road as lies within the limits of their counties respectively, except such parts thereof as are by law under the control of cities or villages. The road shall be kept in such repair by each county, so taking possession thereof, as is contemplated by the acts of congress ceding to the state the jurisdiction and control of such portion of the national road as lies within the limits of this state. The commissioners shall be governed in all respects by the laws in force relating to such road, except as hereinafter provided."

By sections 2408 and 2424 of the General Code, suits growing out of injuries to or obstructions of state and county highways are to be brought by the county commissioners of the proper county. Section 2408, G. C., reads as follows:

"The board of county commissioners may sue and be sued, plead and be impleaded in any court of judicature, bring, maintain and defend all suits in law or in equity, involving an injury to any public, state or county road, bridge, ditch, drain or watercourse established by such board in its county, and for the prevention of injury thereto. The board shall be liable in its official capacity for damages received by reason of its negligence or carelessness in not keeping any such road or bridge in proper repair, and shall demand and receive, by suit or otherwise, any real estate or interest therein, legal or equitable, belonging to the county, or any money or other property due the county. The money so recovered shall be paid into the treasury of the county, and the board shall take the treasurer's receipt therefor and file it with the county auditor."

Section 2424, G. C., reads as follows:

"If a bridge or any state or county road, or any public building, the property of or under the control or supervision of a county, is injured or destroyed, or when any state or county road or public highway has been injured or impaired by placing or continuing thereon, without lawful, authority, any obstruction, or by the changing of the line, filling up or digging out of the bed thereof, or in any manner rendering it less convenient or useful than it had been previously, by a person or corporation, such person or corpora-

tion shall be subject to an action for damages. The board of commissioners of the proper county may sue for and recover of such person or corporation the damages which have accrued by reason thereof, or such as are necessary to remove the obstruction or repair the injury."

By section 2917 of the General Code, the prosecuting attorney is made the egal adviser of county commissioners and required to prosecute and defend all suits and actions to which county commissioners are parties. Under the above provisions of law, your proper course of procedure would be to take this matter up with the county commissioners of the proper county or counties. The commissioners will be authorized and required to take all steps necessary to fully protect the rights of the public, and their legal adviser in the matter will be the prosecuting attorney of their county.

I will be very glad at any time to co-operate with the proper local officials in order to secure the ends desired by you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

309.

COUNTY COMMISSIONERS—NO AUTHORITY TO LEVY A TAX UPON AN ADJOINING COUNTY FOR ROAD IMPROVEMENT OF LANDS LYING IN ONE MILE ASSESSMENT DISTRICT—COMMISSIONERS OF EACH COUNTY REQUIRED TO ACT JOINTLY WHEN ROAD LIES IN MORE THAN ONE COUNTY—ASSESSMENT APPORTIONED UPON SEPARATE COUNTIES BY COMMISSIONERS OF THEIR RESPECTIVE COUNTIES.

The commissioners of a county, acting under authority of section 6956-2 and related sections of the General Code, governing the improvement of a road, or part thereof, lying entirely within such county and having a terminus at the county line between such county and an adjoining county, have no authority to levy a tax upon the taxable property of said adjoining county, or to place an assessment against any lands in said adjoining county, to pay a proportionate part of the cost of improving said road, or part thereof. The owners of lands lying in said adjoining county, and within one mile from said terminus of said road, have no right to sign the petition for said improvement.

If the petition filed with the commissioners of a county describes a road, or part thereof, lying in more than one county, the commissioners of the several counties, in which such road, or part thereof is located, are required to act jointly on said petition in the manner provided by section 6956-3 *and other related sections of the General Code, governing the improvement of a road, or part thereof, lying in more than one county. The owners, residing in any of said counties, of lands lying within one mile from either side, end or terminus of said road, have the right to sign said petition, and the commissioners of said counties acting jointly under authority of section* 6956-11, *G. C., are required to apportion the cost and expense of such improvement in the manner provided by said section, and the commissioners of each county, separately, are required to assess the expense falling upon their respective counties, in the same manner and form as if the improvement were wholly within one county, in the proportion provided in section* 6956-10, *G. C.*

COLUMBUS, OHIO, April 30, 1915.

HON. T. B. JARVIS, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—I have your letter of April 16, 1915, which is as follows:

"Under the law as passed May 10, 1910, known as section 6956-2, which provides that when a majority of the owners of the real estate who reside within the county and who own lands lying within one mile in any direction from either side, end or terminus of the road or part thereof to be laid out, constructed or improved shall petition to the commissioners of any county in the state asking for the levying of a special tax for the construction, repair, improvement or alteration of the public road, or any part thereof upon the filing of the petition, etc.

"The question raised in my mind is as to whether lands lying immediately within one mile of the end of the road that begins on the county line and traverses the county should be taxed, which land lies in another county, although it may be owned by the man living within the county where the road is constructed, and further whether the land within a mile of the end of this road which lies in another county, can be assessed for the improvement as contemplated by the statute?

"We have a number of farmers who have petitioned for the improvement of a road under the one mile assessment plan as contemplated by the section referred to, but all of the petitioners live within Richland county, and the east end of the road ends at the Ashland and Richland county line. Should the farmers in Ashland county be expected to sign the petition, and if they do not sign the petition can they be assessed for a distance of one mile from the end of this road? The road in Ashland county is not improved and may not be improved for years to come. Should the improvement of the Richland county road extend over into Ashland county a few rods, would this not change the situation, if they cannot be compelled to pay an assessment under the other plans?

"You may have ruled upon this question before, but it has slipped my memory, or I have not seen it. Let me have your opinion as soon as possible."

From your statement of facts it appears that a number of persons residing in Richland county, and owning lands lying within one mile from either side, end or terminus of a road, lying entirely within said county and having its eastern terminus at the county line between Richland county and Ashland county, have petitioned the commissioners of Richland county to improve said road under authority of sections 6956-1 et seq., of the General Code, known as the Braun Law.

It is evident that a part of the lands lying within one mile from the eastern terminus of said road, lies in Ashland county.

You ask my opinion on the following questions:

"(1) Have the owners of said lands lying in Ashland county, a right to sign the petition for the improvement of the above described road?

"(2) If said owners do not have the right to sign said petition, can the commissioners of Richland county levy a tax on, or place an assessment against said lands, lying in Ashland county, to pay their proportionate part of the cost of said improvement?

"(3) If the petition filed with the commissioners of Richland county described a road or part therof lying in both Richland and Ashland counties, would the owners of lands lying in Ashland county and within one mile from either side, or from the eastern terminus of said road or part thereof, have the right to sign said petition for said improvement, and would said lands be subject to the tax and assessments for their proportionate part of the cost?"

Section 6956-2, G. C., provides as follows:

"When a majority of the owners of real estate who reside within the

county and who own lands lying and being within one mile in any direction from either side, end or terminus of the road or part thereof, to be laid out, constructed or improved shall present a petition to the commissioners of any county in the state asking for the laying out, construction, repair, improvement or alteration of any public road or part thereof, and upon the filing of a bond in such an amount and with such security as the county commissioners shall deem sufficient, conditioned for the payment of the cost and expense of the preliminary survey, the county commissioners shall go upon the line of said road or part thereof of such proposed road, and if in the opinion of the county commissioners it seems that the public utility and convenience require such road to be laid out, constructed, repaired, improved, altered, straightened, or widened as petitioned for, the commissioners shall determine the route and termini of such road, if the petition is for the laying out of a new road, the kind and extent of the improvement or repairs, and what alterations in the line or change of grade of said road, if any, should be made, and at the same time the commissioners shall appoint the county surveyor as engineer, to go upon the line of such road or proposed road, and make such surveys, plats, profiles, estimates and specifications as the commissioners shall order; provided that in locating such road and road improvements within the territorial limits of any municipality the county commissioners shall be confined to the platted streets of such municipality."

The provisions of this section apply to a road, or part thereof, lying entirely within one county.

The provisions of section 6956-3, G. C., apply to a road, or part thereof, lying in more than one county, and read as follows:

"When the road or any part thereof proposed to be laid out and constructed, repaired, improved, straightened, widened or altered is in more than one county, or along the county line between two or more counties in this state, and a majority of the owners of real estate who reside within the counties and who own lands lying and being within one mile in any direction from either side, end or terminus of such proposed road or road improvement shall present the petition and give the bond provided for in section two of this act to the commissioners of any such county the commissioners of the county to whom the said petition is first presented shall file a certified copy of such petition and bond with the commissioners of each of the counties in which the proposed road is to be laid out, constructed, repaired, improved, straightened, widened, or altered. The several boards of county commissioners of such county shall thereupon go upon the line of such proposed road or road improvement at a time to be agreed upon by the boards, and shall act jointly (in the same manner and form as though they were one and the same board) as provided in the preceding section. The counting of the signatures on the petition of residents of their respective counties may be done separately or jointly, at the will of the joint board, but a majority of all shall be sufficient for action thereof."

The provision of section 6956-10, G. C., governing the apportionment of costs, apply to a road, or part thereof, lying within one county. This section provides as follows:

"When the improvement is wholly within one county, the cost and expense of said improvement including all damages and compensation awarded, shall be apportioned by the commissioners as follows: Not less than thirty-

five per cent. (35%) nor more than fifty per cent. (50%) thereof shall be paid out of the proceeds of any levy or levies upon the grand duplicate of all the taxable property of the county, or out of any funds available therefor, as provided in section 6956-14 of this act; not less than twenty-five per cent. (25%) nor more than forty per cent. (40%) thereof shall be paid out of the proceeds of any levy or levies upon the grand duplicate of the county levied upon the taxable property of any township or townships in which said improvement may be situated in whole or in part, as provided in section 6956-14 of this act; and the balance, which shall not be less than twenty per cent. (20%) nor more than thirty-five per cent. (35%) thereof shall be assessed upon and collected from the owners of real estate lying and being within one mile from either side, end or terminus of the improvement and assessed according to benefits derived from the improvement as determined by the commissioners. Such assessment shall be in addition to all other assessments authorized by law notwithstanding any limitation upon the aggregate amount of assessments on such property."

Section 6956-11, G. C., governs the apportionment of cost when the road, or part thereof, is in more than one county, and provides as follows:

"When any part of the improvement is in more than one county or along the line between two or more counties, the cost and expense of the entire improvement including all damages and compensation awarded, shall be divided between the counties in which such improvement may be in the proportion the distance in such county bears to the whole distance improved, and the amount of expense so falling upon the several counties shall be assessed by the commissioners of said counties separately in the same manner and form as though the improvement was wholly in one and the same county, and in the proportion provided in the preceding section."

In view of the provisions of section 6956-3 and related sections of the General Code, which apply to the improvement of a road, or part thereof, lying in more than one county, I am of the opinion that the county commissioners of Richland county acting under authority of section 6956-2 and related sections of the General Code, which apply to the improvement of a road, or part thereof, lying entirely within one county, cannot, under authority of section 5966-10, G. C., levy a tax on or place an assessment against land in Ashland county for the improvement of a road, or part thereof, lying entirely in Richland county, and having its eastern terminus at the county line between Richland county and Ashland county.

The answer to your second question must, therefor, be in the negative.

Inasmuch as the lands in Ashland county are not subject to a tax or assessment for the improvement of said road, I am of the opinion that the owners of said land lying in Ashland county, have no right to sign the petition for said improvement.

The answer to your first question is, therefor, in the negative.

If the petition filed with the commissioners of Richland county, described a road, or part thereof, lying in both Richland and Ashland counties, the owners of lands lying in Ashland county and within one mile from either side or from the eastern terminus of said road, or part thereof, would have the right to sign said petition and the boards of commissioners of said counties could act jointly under authority of section 6956-3 and other related sections of the General Code, which apply to the improvement of a road, or part thereof, lying in more than one county. Said boards of county commissioners, acting jointly under authority of section 6956-11, G. C., could apportion the cost and expense of such improvement in the manner provided in said section, and the amount of expense

falling upon each county would be assessed by the board of county commissioners of each county, separately, in the same manner and form as if the improvement was wholly within one county, in the proportion provided in section 6956-10, G. C.

The answer to the third question is, therefore, in the affirmative.

The commissioners of Richland county have no authority to improve that part of the road lying in Ashland county, without the co-operation of the commissioners of Ashland county, as authorized and required by the provisions of section 6956-3 and other related sections governing the improvement of a road lying in more than one county, or to levy a tax on the taxable property of Ashland county or place an assessment against any lands in said county, without such co-operation.

The provisions of sections 6956-1 to 6956-15, both inclusive of the General Code, as applied to the laying out, construction, repair or improvement of a public road lying entirely in one county, and having a teminus at the county line between such county and the adjoining county, have not been passed upon by any of the courts of the state.

Respectfully,
EDWARD C. TURNER,
Attorney General.

310.

MEMBER OF THE LEGISLATURE—SHALL RECEIVE MILEAGE ONLY BY "THE MOST DIRECT ROUTE OF PUBLIC TRAVEL" TO AND FROM THE SEAT OF GOVERNMENT.

Section 50, G. C., will not allow a member of the legislature to receive mileage for travel to and from the seat of government to his place of residence by the most convenient route unless said route is also "the most direct route of public travel."

COLUMBUS, OHIO, April 30, 1915.

HON. M. P. TOTMAM, *Chairman Committee on Mileage, House of Representatives, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 28, 1915, requesting a ruling on the following:

> "Mr. Lovett, a member of the general assembly, of Adams county, travels to and from his home by the way of Cincinnati, it being the most convenient route and making good connections so can make the trip all in one day, the distance being one hundred and ninety-two miles, but the most direct route is by the way of Portsmouth, a distance of one hundred and forty miles, but he must stay over night in Portsmouth on account of not being able to make connections. How many miles is he entitled to draw mileage for, the 192 miles, the most convenient route, or the 140 miles, the most impractical route?"

Section 50 of the General Code provides in part as follows:

> "Each member shall receive two cents per mile each way for mileage once a week during the session from and to his place of residence, by the most direct route of public travel to and from the seat of government, to be paid at

the end of each regular or special session. If a member is absent without leave or is not excused on his return, there shall be deducted from his compensation the sum of ten dollars for each day's absence."

The law clearly states that mileage is to be computed "by the most direct route of public travel to and from the seat of government." This language is clear and unmistakable and means exactly what it says. Therefore, mileage should be allowed to Mr. Lovett for only 140 miles.

It is not the province of this department to do other than to apply the law as enacted by the legislature. If the legislature deems the above provision to be inequitable it is within its province to change the law.

Respectfully,
EDWARD C. TURNER,
Attorney General.

311.

TOWNSHIP TRUSTEES—HAVE NO AUTHORITY TO PAY RENT TO FAMILIES IN NEED OF SUPPORT—SECTION 3476 GENERAL CODE, CONSTRUED.

As a general rule, township trustees have no authority to pay rent under sections 3476 et seq., G. C., to families in need of support. They can only do so when, from extraordinary circumstances, such help is needed only temporarily.

COLUMBUS, OHIO, April 30, 1915.

HON. O. W. KENNEDY, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—Under date of March 11th, you inquire, whether under the provisions of section 3476, et seq., of the General Code, township trustees have authority to pay rent to families who are in need of support as provided in said sections.

Section 3476, G. C., makes it the duty, subject to certain conditions, provisions and limitations, of the trustees of each township, at the expense of such township, to afford public support or relief to all persons therein who are in condition requiring it.

Section 3486, G. C., provides for the annual report of the township clerk to the auditor, and requires said report to show "all expenditures in that behalf as follows: First, the aggregate of physicians' fees paid; second, the aggregate paid for supplies, food, clothing, etc.; third, aggregate of per diem and expenses of such trustees and municipal officers in connection with the poor laws."

Section 3486 shows from its provisions relative to the annual report that something further than supplies, food and clothing is contemplated to be within the power of the trustees to furnish. Rent has always been considered in law as one of the necessaries which come within the purview of the attachment laws of Ohio, and is classed in the same category with food and necessary clothing.

The relief which the township trustees are authorized to grant under the above sections is only what can be termed "temporary" relief; that is to say, in order to help those in need of support over a temporary emergency.

As a general rule, I would state that the township trustees are not authorized to pay rent for families who are in need of support; and the only exceptions thereto would be when under extraordinary circumstances such help is needed only temporarily.

If a family should be in need of other than temporary support, such family should be warranted by the township trustees over to the county infirmary to become county charges.

Respectfully,
EDWARD C. TURNER,
Attorney General.

312.

ABSTRACT OF TITLE—ARMORY—CITY OF DELAWARE, OHIO.

Abtract of title for armory at Delaware, Ohio, approved in part.

COLUMBUS, OHIO, May 1, 1915.

Ohio State Armory Board, COL. B. L. BARGAR, *Secretary, Columbus, Ohio.*

DEAR SIR:—I have received from adjutant general B. W. Hough, abstract of title and deed, executed April 2, 1915, in which there is conveyed to the state of Ohio, by The Delaware Ice and Coal Company, the following described premises:

> "Situated in the county of Delaware, in the state of Ohio, and in the city of Delaware, and bounded and described as follows:
>
> "1. Being in-lot number eighty-eight (88), as designated on the town plat of said town of Delaware, excepting therefrom, forty-three (43) feet from the east side thereof, being the same premises conveyed by H. E. Martin and wife, to E. A. Adams, by deed of date July 2, 1869.
>
> "2. Also, all that part of a fractional lot lying immediately south of in-lot No. 88, in the town of Delaware, county of Delaware, and state of Ohio, sold by Lucy Martin and her husband to E. A. Adams, not conveyed by quit-claim deed to one Calvin Welch, and being the same premises conveyed to E. H. Hyatt, by William Brown, sheriff of Delaware county, on the 4th day of January, A. D. 1873—being the same, more or less, but subject to all legal highways—being the same premises conveyed by E. H. Hyatt and wife, to Margaret A. Perry, March 16, 1878, and recorded in volume 71, page 363, Delaware county record of deeds."

The abstract of title to said premises was prepared by E. S. Mendenhall, abstracter, Delaware, Ohio, and from my examination of said abstract and the deed above referred to, I am of the opinion that the state of Ohio has a good and marketable title to the first tract above described.

As to the second tract, I do not believe that said abstract of title and the deed above referred to show a good and marketable title to the state of Ohio, for the reason that there is a defect in the title, as shown by said abstract at sections 41 and 43 thereof.

At section 41, there is shown a conveyance for this tract from George and Clara Bomford, by Milo D. Pettibone, their attorney, to Jacob Drake, which conveyance is recorded in volume 9, at page 148, of the Delaware county record of deeds. The abstract then fails to disclose any conveyance of said tract from said Jacob Drake or anyone claiming under him.

At section 43, Lucy M. Martin and husband convey said second tract by quit-claim deed to E. A. Adams, which conveyance is recorded in volume 60, page 557, of the deed records of Delaware county, Ohio.

While this property has been in the possession of Margaret A. Perry since 1878, as shown by the conveyance at section 46, of this abstract, yet I feel it proper that I should call attention to the defects hereinbefore set out.

I am informed by adjutant general Hough, that the proposed armory building will be located entirely upon the first tract above described.

Respectfully,
EDWARD C. TURNER,
Attorney General.

313.

ABSTRACT OF TITLE—BOWLING GREEN NORMAL SCHOOL.

Approval of abstract of title for Bowling Green normal school.

COLUMBUS, OHIO, May 1, 1915.

Board of Trustees of the Bowling Green Normal School, Bowling Green, Ohio.

GENTLEMEN:—At the request of Mr. J. E. Schatzel, secretary of the board of trustees of the Bowling Green normal school, I have carefully examined the various abstracts of title to the following described real estate, to wit:

> "The southeast corner of out-lot number ninety-seven (97) in the city of Bowling Green, Wood county, Ohio, as said lot is recorded on plat records in volume 7, page 5, recorder's office of Wood county, Ohio. The part of said lot hereby conveyed is bounded and described as follows:
>
> "Commencing at a point where the west line of Wayne street (formerly Cemetery street), intersects the curb line on the north line of Wooster street in the aforesaid city of Bowling Green; thence running west along said curb line fifty (50) feet; thence north parallel with the west line of said Wayne street two hundred (200) feet; thence east fifty (50) feet to the west line of said Wayne street; thence south along said west line of Wayne street to the curb line of Wooster street a distance of two hundred (200) feet to the place of beginning."

The first of said abstracts examined was made by The Wood County Abstract and Loan Company, under date of April 11, 1911; the second is a continuation of said first abstract and was made by Robert Dunn, abstracter, under date of June 14, 1911; and the third of said abstracts is a continuation of the second abstract, made by The Wood County Abstract and Loan Company, under date of April 28, 1915.

From my examination of said abstracts, I am of the opinion that on the 28th day of April, 1915, Frank L. Deffenbach was possessed of a good and marketable title to said premises, subject only to the following incumbrances:

> "1. The taxes for the last half of the year 1914, amounting to $19.38; and the taxes for the year 1915, the amount of which has not yet been ascertained.
>
> "2. The balance of the assessment for the improvement of Kelly road, as shown on the records in the office of the county auditor of Wood county, Ohio, amounting to fifty-nine cents (59c).
>
> "3. The balance of the assessment for sanitary sewer improvement, as shown by the records in the office of the city auditor of Bowling Green, Ohio, amounting to $16.47."

I have also examined the deed for said premises executed by Frank L. Deffenbach and Mina Deffenbach, his wife, to the state of Ohio, under date of April 9, 1915, and find same to be in proper form.

The various abstracts, together with the deed above mentioned, are herewith returned to you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

314.

PUBLIC WORKS—APPROVAL OF CERTAIN LEASES.

Approval of certain leases submitted to department of public works.

COLUMBUS, OHIO, May 1, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communications of April 28, 1915, transmitting to me for my examination the following leases:

	Valuation.
The Dayton Pure Milk & Butter Co., Dayton, Ohio	$3,666 00
Harvey Walker, Thornville, Ohio	250 00
John J. Brady, Akron, Ohio	1,000 00
Agricultural Commission of Ohio	4,000 00

I find that these leases have been executed according to law, and therefore return them to you with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

315.

PUBLIC WORKS—CERTAIN LEASES DISAPPROVED.

Leases to L. P. Schimke and The Odenweller Milling Company, as submitted for approval, are not in legal form.

COLUMBUS, OHIO, May 1, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication of April 28, 1915, transmitting to me for examination the following leases, to wit:

	Valuation.
L. P. Schimke	$2,250 00
Odenweller Milling Co	250 00

In reference to the lease executed to L. P. Schimke, I note that the same provides for an annual rental of $100.00 for the first five years, $125.00 for the second five years, and $150.00 for the third five years.

While not desiring to question or pass upon the wisdom of such an arrangement, I desire to call your attention to the provisions of section 13965, et seq., of the Appendix to the General Code of Ohio, relating to the leasing of canal lands; it being provided in these sections that before such lands may be leased, they must be valued at their true value in money, and that after being so valued, they may be leased for fifteen years at an annual rental of six per cent. per annum of said valuation. The statutes are silent as to any sliding scale of valuations upon which rental is to be based, and in the absence of statutory authority for the use of such a sliding scale of valuations, I am of the opinion that lands which are to be leased should first be valued at their true value in money at the present time, and that the annual rental should be six per cent. per annum of such valuation, and should be the same throughout the life of the lease.

In reference to the lease of the Odenweller Milling Co., permit me to call your attention to an opinion rendered by me to you on April 14, 1915, as to certain lease executed between you and the Dayton Pure Milk and Butter Company, in which the following language was used: "The lessee being a corporation, it follows that proper evidence that the directors of the corporation authorized the making of the lease, should also be required by you. The directors of the corporation, if they have not already done so, should adopt a resolution authorizing the making of the lease by the corporation, and instructing the president and secretary thereof to execute the same on behalf of the company. Triplicate copies of this resolution, properly certified, should be furnished, and one copy attached to each copy of the lease." In the lease in question, it does not even appear that Ed. C. Odenweller, who assumed to execute the same on behalf of the corporation, is an officer of the company.

In reference to both of the above mentioned leases, it should be stated that in the body of the lease, there is a reference to a plat which it is stated is attached to and made a part of the lease. An examination of the leases discloses that no plat has been attached, and this omission should be supplied.

For the above reasons, I am herewith returning these leases without my approval.

Respectfully,

EDWARD C. TURNER,

Attorney General.

316.

COUNTY BOARD OF EDUCATION—AUTHORITY TO TRANSFER PART OF RURAL SCHOOL DISTRICT TO A CONTIGUOUS VILLAGE SCHOOL DISTRICT—COUNTY BOARD CANNOT SUSPEND SCHOOL IN TERRITORY TRANSFERRED—VILLAGE BOARD MUST SUSPEND.

A county board of education, acting under authority of, and in compliance with, the provisions of section 4736, *G. C., as amended in* 104 *O. L.,* 138, *has authority to transfer a part of a rural school district to a contiguous village school district,but said county board of education has no authority in law to suspend any school in the territory so transferred. Said suspension can only be effected by proper action of the board of education of said village school district under authority of section* 7730, *G. C., as amended in* 104 *O. L.,* 139, *and in compliance with the requirements of said section.*

COLUMBUS, OHIO, May 1, 1915.

HON. CLARK GOOD, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—I am in receipt of your letter of April 19th, which is as follows:

"There is located in our county, on the township line, running north and south, between York and Jennings townships, the village of Venedocia. To the village, there was attached, prior to the 13th day of April, 1915, certain adjoining territory. This territory, together with the territory within the corporation limits, was known as 'The Venedocia Village School District,' since the new school code went into effect.

"The residents of the school district, as constituted prior to April 13, 1915, petitioned the county board of education to transfer certain territory from the York township rural district and from the Jennings township rural district to the Venedocia village school district. The territory located in York township, and lying north and west of the Venedocia village school district, comprised what was known as the Auglaize school district, and was a complete subdistrict of the York township rural school district. The territory in Jennings township consisted of territory lying north and east of the Venedocia village school district, and comprised what was known as the Horeb school district, and was a complete subdistrict of the Jennings township rural school district. The territory lying east and south of the Venedocia village school district comprised what was known as the Berry school district, and was a part of that complete subdistrict in the Jennings township rural school district.

"On the 13th day of April, 1915, on the request made in the petition of the residents of the Venedocia village school district, the county board of education, acting under authority claimed by section 4736 of the General Code of Ohio, passed February 5, 1914 (104 O. L., 138), made an order transferring the Auglaize school district in York township, from the York township rural school district to the Venedocia village school district; also, the Horeb school district in Jennings township, and the north part of the Berry school district in such township, to the Venedocia village school district.

"In each of these school districts, there is located a school house, and in each, the enrollment of pupils is such that a school must be maintained therein. In none of these school districts is there any present probability of the average daily attendance falling below such a number, that the board would be required to suspend this school, and transfer the pupils to other school or schools.

"In the order made by the county board of education, the territory transferred from the rural districts to the Venedocia village school district is described by sections and parts of sections. There is a good and sufficient school building in each one of these subdistricts which is located within the territory so ordered transferred. In that part of the territory, so ordered transferred, lying in Jennings township, there are fifty-four (54) voters, thirty-three (33) of whom protested against the territory in Jennings township being transferred by the county board, and all of the parties protesting are opposed to the centralization of their schools. The action taken by the county board of education works a centralization of the different subdistricts in the rural districts of York and Jennings townships, without the matter being submitted to the electors, as required under the law, provided for the centralization of schools.

"I would be pleased to have an opinion from you regarding the authority of the county board of education, under section 4736 of the General Code, or any other section therein, to make an order transferring territory in this manner, and thus arbitrarily centralize the schools in these various subdistricts, by attaching them to the Venedocia village school district."

From your statement of facts, it appears that, on April 13, 1915, the board of education of Van Wert county school district, acting under authority of section 4736, G. C., as amended in 104 O. L., 138, made an order transferring a part of York township rural school district, and certain parts of Jennings township rural school district, to Venedocia village school district, said rural school districts and said village school district all being within the Van Wert county school district, and the parts of said rural school districts, which the county board of education ordered transferred, being contiguous to said village school district.

While you state that the order of the county board of education was made on the petition of certain persons residing in the Venedocia village school district, permit me to say that the jurisdiction of the county board of education to act under authority of section 4736, G. C., as amended, is not dependent upon the filing of an application or petition signed by one or more persons residing in the district or districts which will be affected by such action.

Section 4736, G. C., as amended 104 O. L., 138, provides, in part, as follows:

"The county board of education shall, as soon as possible after organizing, make a survey of its district. The board shall arrange the schools according to the topography and population in order that they may be most easily accessible to pupils. To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and transfer territory from one rural or village school district to another. A map designating such changes shall be entered on the records of the board and a copy of the resolution and map shall be filed with the county auditor. In changing boundary lines the board may proceed without regard to township lines, and shall provide that adjoining rural districts are as nearly equal as possible in property valuation. In no case shall any rural district be created containing less than fifteen square miles. * * *."

It is clear that the county board of education, acting under authority of the above provision of section 4736, G. C., and in compliance with the requirements of said statute, had the right to make the order, above referred to, and the filing of the petition signed by certain persons residing in Venedocia village district was not material as affecting the jurisdiction of said county board of education to make said order.

The provisions of section 4736, G. C., as amended, must not be confused with the

procedure to dissolve an entire rural district and join it to a contiguous rural or village district, as provided in sections 4735-1 and 4735-2, G. C., 104 O. L., 138, which require the filing of a petition, signed by not less than one-fourth of the electors residing in such rural school districts, with the board of education of such district, and the submission of the question of dissolution and union with the contiguous rural or village school district to a vote of the electors.

Coming now to the effect of the order of the county board of education above referred to, upon the status of the rural schools which passed, under said order, from the township rural school districts into the Venedocia village school district, I call your attention to the provisions of section 7730, G. C., as amended in 104 O. L., 139, which are as follows:

> "The board of education of any rural or village school district may suspend any or all schools in such village or rural school district. Upon such suspension, the board in such village school district may provide, and in such rural school district shall provide, for the conveyance of the pupils attending such schools to a public school in the rural or village district, or to a public school in another district. When the average daily attendance of any school for the preceding year has been below twelve, such school shall be suspended and the pupils transferred to such other school or schools as the local board may direct. No school of any rural district shall be suspended or abolished until after sixty days' notice has been given by the school board of such district. Such notice shall be posted in five conspicuous places within such village or rural school district."

The board of education of Venedocia village district has the authority under the above provisions of section 7730, G. C., to suspend any or all of the schools, in the territory transferred to said village school district by order of the county board, by a proper resolution on its records and by giving the notice required by the latter provision of said section.

Upon such suspension, it would be the duty of said board of education of said village school district to transfer the pupils attending such school or schools so suspended, to such other school or schools in said district as said board might direct. It would be discretionary with said board to provide for the conveyance of said pupils to the school or schools in said district to which said pupils would be transferred, except in the case where a pupil were living more than two miles from the nearest school in said district, in which case it would be the duty of said board of education to provide transportation for such pupil to and from such school as required by section 7731, G. C., which provides:

> "No township school shall be centralized under the next preceding section by the board of education of the township until after sixty days' notice has been given by the board, such notices to be posted in a conspicuous place in each subdistrict of the township. When transportation of pupils is provided for, the conveyance must pass within at least the distance of one-half of a mile from the respective residences of all pupils, except when such residences are situated more than one-half of a mile from the public road. But transportation for pupils living less than one and one-half miles, by the most direct public highway, from the school house shall be optional with the board of education."

Replying to your question, I am of the opinion that the board of education of Van Wert county school district, acting under the provisions of section 4736, as amended, and in compliance with the requirements of said section, had the authority to make

the order, referred to in your inquiry, but said county board of education has no authority in law to suspend any school in the territory, transferred under said order, from the York township and Jennings township rural school districts to the Venedocia village school. Said suspension can only be effected by proper action of the board of education of said village school district under authority of section 7730, G. C., as amended, and in compliance with the requirements of said section.

Respectfully,
EDWARD C. TURNER,
Attorney General.

317.

COUNTY TREASURER—AUTHORITY FOR COLLECTING DELINQUENT PERSONAL TAXES—MUST DISTRAIN SUFFICIENT GOODS AND CHATTELS TO PAY TAXES AND ACCRUED COSTS.

Under the provisions of section 2658, G. C., it is the duty of the county treasurer, acting in person or through his deputy, to distrain sufficient goods and chattels belonging to a person charged with delinquent personal taxes, if such goods and chattels can be found in the county, to pay such taxes and accrued costs, and, upon such distraint being made, it is his duty to advertise and sell said goods and chattels, or so much thereof as will pay said taxes and costs in the manner provided in said section, provided said taxes and costs are not paid by the owner of said property before the day appointed for said sale. The county treasurer is neither required nor authorized by the provisions of section 2658, G. C., to resort to a justice's court for the purpose of collecting delinquent personal taxes.

COLUMBUS, OHIO, May 1, 1915.

HON. CARL H. CURTISS, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—I am in receipt of a letter from Mr. A. L. Kreinberg, treasurer of Portage county, asking to be advised as to the proper procedure under section 2658, General Code, for the collection of delinquent personal taxes.

As you are the legal adviser of Mr. Kreinberg as treasurer of said county, I am addressing my opinion, on the question asked by him, to you.

His letter is as follows:

> "As I do not fully understand the procedure under section 2658, General Code of Ohio, for the collection of delinquent personal property tax, I beg leave to ask your opinion in the matter as to whether the treasurer, deputy or his agent is to seize the goods or chattels and advertise etc., or does the treasurer leave the accounts with a justice of the peace for collection? Also, are there legal blanks on the market for use in making collections under this section of the law."

Section 2658, G. C., provides:

> "When taxes are past due and unpaid, the county treasurer may distrain sufficient goods and chattels belonging to the person charged with suc taxes, if found within the county, to pay the taxes so remaining due and th

costs that have accrued. He shall immediately advertise in three public places in the township where the property was taken, the time and place it will be sold. If the taxes and costs accrued thereon are not paid before the day appointed for such sale, which shall be not less than ten days after the taking of the property, the treasurer shall sell it at public vendue or so much thereof as will pay such taxes and the costs."

This section gives to the county treasurer plenary power for the purpose of collecting delinquent personal taxes. Its constitutionality has been upheld by the courts in numerous cases, among which is the case of Scottish Union & National Insurance Co. v. Bowland, treasurer et al., 196 U. S., 611. One branch of the syllabus relates to the provisions of section 2658, G. C., and is as follows:

"The collection by distraint of goods to satisfy taxes lawfully levied is one of the most ancient methods known to the law, and in this case the law of Ohio authorizing it does not violate the constitutional right of a foreign insurance company and deprive it of its property without due process of law."

Under the provisions of section 2658, G. C., the county treasurer has authority to take possession of sufficient goods and chattels belonging to the person charged with delinquent personal taxes, if such goods and chattels are found within the county to pay such taxes and accrued costs. When goods and chattels are distrained for this purpose it is the duty of the county treasurer to immediately advertise in three public places, in the township where the property was taken, the time when and the place where said property will be sold. If the taxes and accrued costs are not paid before the day appointed for the sale, which shall not be less than ten days after taking possession of the property, it is the duty of the treasurer to sell said property or so much thereof as will pay such taxes and accrued costs at public vendue.

It will be observed that in these proceedings by the county treasurer, under authority of section 2658, G. C., no resort to the court is necessary, and no greater power could be gained by litigation.

It was held in Myers v. Shiels, 8. O. F. D., 339, that the tax duplicate has the force of an execution.

The authority of the county treasurer, under the provisions of section 2658, G. C., is separate and distinct from that conferred upon him by the provision of section 2660, G. C., which applies to the case where he is unable to collect the taxes by distraint, and from the authority conferred by section 2665, G. C., which provides:

"If a person charged with a tax has not sufficient property which the treasurer can find to distrain to pay such tax, but has moneys or credits due, or coming due him from any person within the state, known to the treasurer, or if such taxpayer has removed from the state or county, and has property, moneys, or credits due, or coming due him in the state, known to the treasurer, in every such case the treasurer shall collect such tax and penalty by distress, attachment, or other process of law. He may make affidavit that the residence of such taxpayer is to him unknown, or that he is not a resident of the county where such property is found, or where such debtor resides, or that such taxpayer has no property in the county sufficient to distrain to pay such tax. Thereupon an attachment, with garnishee process, shall be issued, and such proceedings had, and such judgment rendered for taxes, penalty, and costs, as are lawful in other cases of attachments. If the treasurer serves upon any person indebted to such taxpayer a written notice stating the amount of delinquent tax and penalty due, such debtor may, after the

service of such notice, pay such tax and penalty to the treasurer, whose receipt therefor shall be a full discharge of so much of the indebtedness as equals the tax and penalty so paid."

I call your attention to the provision of section 5697, G. C., as I think Mr. Kreinberg has confused the provision of this section as well as the provision of section 2665, G. C., with the provision of section 2658, G. C.

Section 5697, G. C., provides:

"When personal taxes stand charged against a person, and are not paid within the time prescribed by law for the payment of such taxes, the treasurer of such county, in addition to any other remedy provided by law for the collection of personal taxes, shall enforce the collection thereof by a civil action in the name of such treasurer against such person for the recovery of such unpaid taxes. It shall be sufficient, having made proper parties to the suit, for the treasurer to allege in his bill of particulars or petition that the taxes stand charged upon the duplicate of the county against such person, that they are due and unpaid, and that such person is indebted in the amount appearing to be due on the duplicate, and the treasurer need not set forth any other or further special matter relating thereto. The tax duplicate shall be prima facie evidence on the trial of the action, of the amount and validity of the taxes appearing due and unpaid thereon, and of the nonpayment thereof, without setting forth in his petition any other or further special matter relating thereto."

This statute provides an additional method of collecting delinquent personal taxes and should not be confused with the authority of the county treasurer to distrain and sell goods and chattels for said purpose under authority of section 2658, G. C.

I am of the opinion, therefore, that under the provisions of section 2658, G. C., it is the duty of the county treasurer, acting in person or through his deputy, to distrain sufficient goods and chattels belonging to a person charged with delinquent personal taxes, if such goods and chattels can be found in the county, to pay such taxes and accrued costs, and, upon such distraint being made, it is his duty to advertise and sell said goods and chattels or so much thereof as will pay said taxes and costs in the manner provided in said section, provided said taxes and costs are not paid by the owner of said property before the day appointed for such sale. The county treasurer is neither required nor authorized by the provisions of section 2658, G. C., to resort to a justice's court for the purpose of collecting delinquent personal taxes.

I am sending a copy of this opinion to Mr. Kreinberg.

Respectfully,

EDWARD C. TURNER,

Attorney General.

318.

STATE INSPECTOR OF OILS—FEES—NO PAYMENT ALLOWED FOR INSPECTION OF OIL FOR TIME BETWEEN DECISION OF SUPREME COURT AND TAKING EFFECT OF NEW BILL PRESCRIBING NEW RATE OF FEES FOR INSPECTION—EFFECT OF HAVING PAID FEES.

The state inspector of oils and his deputies may not demand fees at the rate prescribed by senate bill No. 183, *passed April* 27, 1915, *after that bill goes into effect for the period intervening between March 4th, when the case of Castle v. Mason was decided by the supreme court, and the date of the signing of the bill; nor may the inspector or his deputy demand any inspection fees on account of inspections made prior to March* 4, 1915, *on account of which fees have not theretofore been paid.*

Such fees, if voluntarily paid, however, may be received by the inspector and paid into the state treasury.

COLUMBUS, OHIO, May 3, 1915.

HON. J. M. CARR, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter April 28, 1915, which is as follows:

> "By reason of the recent decision of the supreme court, touching the fee sections of the act under which the state oil department had been operating, we advised our deputy inspectors, who continued making inspections as heretofore, that in making their reports to the various companies and concerns for which inspection was made, that they should enter no rate nor fees charged for the time since the rendering of this decision by the supreme court until the date of the signing of the new act.
>
> "Beginning with this date, the bill being signed today by the governor, our deputy inspectors will enter into their statements the new rate of three cents and the aggregate amount of fees resulting therefrom. Some of the companies doing business in the state have inquired if they should not make payment for inspections made during the period of uncertainty, March and April, at a rate of three cents. I have answered such inquiry by saying that we would make no statement to them covering that period, no fee being in legal existence. Kindly advise me if my position has been well taken, as I am very desirous of passing through this fallow period with the utmost caution, and with due care as to the legality of our acts and statements.
>
> "There is, however, in a number of cases a delinquency on the part of companies for the February and prior inspections, the same not being due until the 10th or 15th of the subsequent month. I have in mind, in my communication to these companies, to call their attention to this delinquency, but not with the suggestion of making collection or any idea of rendering a statement, but leaving it wholly up to them as a matter of conscience or equity to remit any portion or all of their delinquency as they see fit."

You request my advice as to whether or not the course upon which you have determined is proper.

The bill referred to by you in the second paragraph of your letter is, I presume, senate bill No. 183, which provides an entirely new system of oil inspection and revises the schedule of fees chargeable against the owners of the inspected oil and other by-products of petroleum, so as to conform to the decision referred to by you. I ascertain upon inquiry, however, that this bill has not yet been signed by the governor. I take

it that you are otherwise advised of your error in stating that the bill was signed on April 28th, and that your statement as to what is to be done under the new law relates to the date when the law shall be actually signed by the governor.

I am of the opinion that the procedure as you have outlined it is, in all respects, proper. I would advise, however, that in communicating with the owners of oil, respecting the payment of fees on account of inspections heretofore made, you be careful to advise that they are under no legal obligation to pay the same so that your letters may not in any way be interpreted as demands.

Respectfully,
EDWARD C. TURNER,
Attorney General.

319.

JUVENILE COURT—NO AUTHORITY TO COMMIT YOUTH OVER EIGHTEEN YEARS OF AGE TO BOYS' INDUSTRIAL SCHOOL ALTHOUGH DELINQUENCY ATTACHED PRIOR TO ARRIVING AT AGE OF EIGHTEEN.

Juvenile court judge is without authority to commit youth over eighteen years of age to Boys' Industrial School, notwithstanding status of delinquency attached to youth prior to arriving at age of eighteen.

COLUMBUS, OHIO, May 3, 1915.

HON. ELWIN C. PECK, *Judge Juvenile Court, Williams County, Bryan, Ohio.*

MY DEAR JUDGE:—Permit me to acknowledge you request for an opinion, contained in your letter of April 27th, which is as follows:

> "As judge of the juvenile court of Williams county, Ohio, I would like your opinion at your earliest convenience in the following matter and upon the following facts:
>
> "I have a boy who, when he was fourteen years of age, was found to be delinquent and placed on probation and permitted to remain with his parents and report to the court or to the probation officer. He has very recently violated his probation and is now confined in the county jail awaiting the action of the authorities. He has just passed his eighteenth birthday. The superintendent of the Boys' Industrial School seems to be of the opinion that the school cannot receive him because he is now eighteen years of age.
>
> "I call your attention to sections 1643, 1652 and others of the General Code of Ohio. 1643 provides that a delinquent child becomes a ward of the court until he arrives at the age of twenty-one years, and that the power of the court shall continue until the child attains such age.
>
> "If the court cannot commit such child after it arrives at the age of eighteen years for the violation of its probation, then it would seem that the power of the juvenile court over such child after it becomes eighteen years of age was not very great, and of very little value. I would like your opinion as to whether or not the juvenile court has power to commit such child, under such circumstances, to any reformatory in the state of Ohio, and if so, what one?"

In answer to my letter addressed to you under date of April 29th, you advise me

that the youth referred to in your previous letter, which is quoted above, was placed in the jail by order of the juvenile court for violating his probation, and that the violation of the probation consisted in the committing of an offense against the laws of the state, viz.: Either petit larceny or grand larceny, and that if he may not at this time be committed to the Boys' Industrial School or some other reformatory, the offense which he recently committed will be considered by the grand jury of Williams county, which is about to convene.

Your attention is invited to the provisions of section 2084, of the General Code, as amended in 103 O. L., page 864, which is as follows:

> "Male youth, not over eighteen nor under ten years of age, may be committed to the Boys' Industrial School in the manner provided by law on conviction of an offense against the laws of the state."

So that, in an ordinary case, a boy over eighteen years of age would not be committed to the Boys' Industrial School by any court, and there would be no authority in the superintendent of the Boys' Industrial School to accept one over eighteen years of age as an inmate of the school.

You invite my attention to the provisions of section 1643 of the General Code, as amended on page 869, 103 O. L., which is as follows:

> "When a child under the age of eighteen years comes into the custody of the court under the provisions of this chapter, such child shall continue for all necessary purposes of discipline and protection, a ward of the court, until he or she attain the age of twenty-one years. The power of the court over such child shall continue until the child attains such age."

Section 1652 of the General Code, as amended on page 871, 103 O. L., is as follows:

> "In case of a delinquent child the judge may continue the hearing from time to time, and may commit the child to the care or custody of a probation officer, and may allow such child to remain at its own home, subject to the visitation of the probation officer or otherwise, as the court may direct, and subject to be returned to the judge for further or other proceedings whenever such action may appear to be necessary; or the judge may cause the child to be placed in a suitable family home, subject to the friendly supervision of a probation officer, and the further order of the judge, or he may authorize the child to be boarded in some suitable family home in case provision be made by voluntary contribution or otherwise for the payment of the board of such child, until suitable provision be made for it in a home without such payment; or the judge may commit such child, if a boy, to a training school for boys, or, if a girl, to an industrial school for girls, or commit the child to any institution within the county that may care for delinquent children, or be provided by a city or county suitable for the care of such children. In no case shall a child, committed to such institutions, be confined under such commitment after attaining the age of twenty-one years; or the judge may commit the child to the care and custody of an association that will receive it, embracing in its objects, the care of neglected or dependent children, if duly approved by the board of state charities, as provided by law. Where it appears at the hearing of a male delinquent child, that he is sixteen years of age, or over, and has committed a felony, the juvenile court may commit such child to the Ohio State Reformatory."

It appears from the statement of facts presented by you that when the case under

consideration was originally disposed of in your court, the youth was placed on probation, committed to the charge of his parents and directed to report to the probation officer. At that time the court might have, had it seen fit, committed the boy to the Boys' Industrial School, he being under the age of eighteen years, to wit: fourteen years. This was not done and the industrial school authorities, therefore, did not acquire jurisdiction over the boy such as would enable them at this time, notwithstanding his having passed the age of eighteen years, to receive him as an inmate of the school.

While under the provisions of section 1643 of the General Code, as amended, quoted above, the delinquent remains a ward of the court for all necessary purposes of discipline and protection until he or she attains the age of twenty-one years, the extent to which the juvenile court may exercise its powers of discipline and protection is necessarily limited by the existing laws, in the case under consideration, to the particular limitation against the comitment of a boy over the age of eighteen years to the Boys' Industrial School.

Under the provisions of section 1652 of the General Code, as amended, quoted above, the juvenile court is authorized to have returned to him a delinquent who has been placed on probation when it is made apparent to the court that further proceedings are necessary and until the time when the boy has reached the age of eighteen years the court would be authorized to commit him to the Boys' Industrial School. Failing to act before that time, however, the Boys' Industrial School would not be open to receive a boy over eighteen years of age, the only exception to this law being in the case of the retaking of a boy who, under the provisions of sections 2091 and 2092 of the General Code as amended on page 880, 103 O. L., has been paroled from the home and has violated the conditions of his parole.

The juvenile court law, having for its purpose the segregation of youth under the age of eighteen years who may be guilty of violation of the law, to a great extent relieves the youth from the ordinary forms of prosecution. However, there is no provision of the law to be found which will relieve one having the status of delinquency from answering for the violation of the law after the delinquent has reached the age of eighteen years.

It is my opinion, therefore, that if the delinquent who is now over eighteen years of age has violated a law, the jurisdiction to hear and determine his case would rest in some tribunal other than the juvenile court, notwithstanding that for such purposes the jurisdiction of the juvenile court attached to said delinquent and continues until he may have reached the age of twenty-one years and that there is no jurisdiction in the juvenile court to commit, in the case under consideration, for an offense committed by the boy, although possessing the status of delinquency, when said offense against the law was committed after the boy had reached the age of eighteen years.

I agree with you that the power of the juvenile court over a boy between the ages of eighteen and twenty-one years may be slight, however, it is to be exercised to the extent possible under the law and no further. It would hardly be contended that the purpose of the law would be carried out if boys ranging from the age of ten years and upwards, in care of the Boys' Industrial School and who have been disciplined there, should be thrown into contact with boys between the age of eighteen and twenty-one years who might be sent there on account of offenses committed by them after they had reached that age, and the provision of law limiting the entrance age to eighteen years is, in my opinion, a wise one.

Respectfully,
EDWARD C. TURNER,
Attorney General.

320.

DISTRICT TAX ASSESSOR—INCONSISTENCY AS TO DATE OF APPOINTMENT—DATE OF COMMISSION ITSELF GOVERNS AND FIXES DATE OF APPOINTMENT.

In case of inconsistency between the date of the commission of the district assessor, under the Warnes law, and the date thereof as shown on the record of appointments kept in the governor's office, the date of the commission itself governs and fixes the date of the appointment.

The date of an informal announcement by the governor respecting appointments and the date of the delivery of the commissions are both immaterial as affecting the date of appointment. Where a district assessor was appointed by the execution of a commission to him on December 1, 1913, and with actual notice thereof immediately thereafter entered upon the performance of his duties and within reasonable time gave bond, he is entitled to receive compensation from the date of the commission.

COLUMBUS, OHIO, May 3, 1915.

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

GENTLEMEN:—I am in receipt of a letter from Hon. Robert P. Duncan, prosecuting attorney of Franklin county, written at the request of Messrs. C. E. Ellis and John Pfeiffer, former district assessors for Franklin county, and requesting my opinion upon the question which my predecessor, Hon. Timothy S. Hogan, considered in his opinion to the bureau under date of December 21, 1914, or rather, to be more accurate, upon additional facts bearing upon the main question considered by Mr. Hogan.

The question passed upon by Mr. Hogan was as follows:

> "Could the district assessor be legally compensated in a sum equaling one-twelfth of his annual salary for the full month of December, 1913, if he was not officially appointed until the fifth day of that month, even though his bond as such had been approved before that date? In the event that he did not file his bond, and have same approved by the county auditor until some time after the 5th day of December, 1913, would he be only legally entitled to that portion of the month of December, 1913, as represents the number of days following the date of approval of his official bond by the county auditor?"

Mr. Hogan held that the term of a district assessor commences on the date of his appointment, and that his annual compensation should be computed from that date as the beginning of his official year regardless of the date of the filing and approval of his bond. Mr. Hogan also considered in his letter facts of which he was advised otherwise than by the bureau's letter requestion his opinion, namely, that the district assessors had been called upon to render some services prior to December 5, 1913. The facts respecting these services were also held to be immaterial as affecting the date of the commencement of the term.

With these conclusions I agree, with the qualification expressed in another opinion to your bureau that where a district assessor had rendered no services prior to the date of his appointment, nor subsequently thereto for a considerable period, such an assessor would be entitled to receive compensation only from the date on which he actually began his official services, but this qualification does not affect the principles underlying the conclusion expressed by Mr. Hogan; the official year in both cases was

the same, but in the second case the individual assessor did not enter upon his official services until after the commencement of his official term, and accordingly should not receive compensation for the intervening period of time.

The additional facts which are now submitted may be summarized as follows:

While the records of the governor's office show that the first district assessors under the Warnes law were appointed on December 5, 1913, and while you advise me that this was the date upon which the commissions of the several district assessors were delivered to them, yet the governor publicly announced his appointments on November 25, 1913, and signed the commissions of at least some of the district assessors, if not all of them, on December 1, 1913.

The persons raising the present question accept the principles of Mr. Hogan's opinion, to which I have expressed adherence, but insist that under the additional facts to which they call attention, their official terms commenced on December 1, 1913, and they having rendered official services continuously from that date to the time of their removal, they claim compensation from December 1, 1913.

Consideration of the question thus presented starts from the assumption that the date of appointment is the date of the commencement of the term. This is true, although section 138, G. C., provides as follows:

> "A judge of a court of record, state officer, county officer, militia officer and justice of the peace, shall be ineligible to perform any duty pertaining to his office, until he presents to the proper officer or authority a legal certificate of his election or appointment, and receives from the governor a commission to fill such office."

This section bears upon the eligibility of the person to discharge the duties of the office and not upon the commencement of the term of office. The Warnes law does not fix the commencement of the terms of office of district assessors, and it is well-settled that in the absence of such a provision, the term of office commences when the election or appointment is made, regardless of the date of the issuance of a commission, and regardless of the date of the performance of other qualifying acts on the part of the incumbent. Sawyer v. Pollner, 18 C. C., 304; Bushnell v. Koon, 8 C. C., n. s., 163, affirmed 71 O. S., 521, should be distinguished on this point because of the application of a statute especially applicable to justices of the peace, the holding being that by virtue of this statute the term of office of the justice began with the date of his commission, and not with the date of his election. But this case holds that the date upon which bond is given or the oath of office taken, does not determine the commencement of the term, though such date is subsequent to the date of the commission.

The general rule being, than, as stated, the inquiry must be as to when the appointment of the district assessors in 1913 was made. Two official writings exist as evidence of the date of such appointment, but they are not in mutual accord. The commissions are dated December 1st, and the governor's record of the commissions shows their issuance on December 5th.

Aside from the written records and documents, it appears that informal announcement of the governor's choices was made on November 25th, and that the commissions were delivered on December 5th.

Were, then, the appointments made on November 25th, when they were apparently determined upon by the governor in his own mind on December 1st, when he signed the commissions, or on December 5th, when he delivered the commissions, and made a permanent record in his office, showing their issuance?

We may put aside the date upon which the governor announced his appointments as immaterial, because until he had committed some official act he might have changed his mind as to any given appointment. The rule is that an appointment is made when

the executive or appointing authority has committed the official act which fixes his choice and places the matter beyond his recall save through the exercise of the power of removal.

In Marbury v. Madison, 1 Cranch, 135, it was held, in the language of chief justice Marshal, that:

> "The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. (This language being applicable to the case under consideration because the power of the governor to appoint and to commission is given in two separate sections of the statutes.) * * *.
>
> "This is an appointment made by the president, by and with the advice and consent of the senate, and is evidenced by no act but by the commission itself. In such case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment, though conclusive evidence of it.
>
> "But at what stage does it amount to this conclusive evidence?
>
> "The answer to this question seems an obvious one. The appointment being the sole act of the president, must be completely evidenced, when it is shown that he has done everything to be performed by him.
>
> "Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still it would be made when the last act to be done by the president was performed, or, at farthest, when the commission was complete.
>
> "The last act done by the president is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination; the time for deliberation has then passed; he has decided. * * * This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction."

In this case the secretary of state had refused to deliver to an appointee a commission that had been signed by the president. The court held that the delivery of the commission was a mere ministerial act, the performance of which could be compelled by mandamus, and as apparent from what has been quoted from the decision, that the signature of the president to the commission is conclusive evidence of the making of an appointment.

The keeping of a record of appointment is provided for by section 144 G. C., as follows:

> "The governor shall cause to be kept in his office the following records:
> * * * * * *
>
> "2. An appointment record in which shall be entered the name of each person appointed to an office by the governor * * * the office to which appointed, the date of the appointment, the date of the commission, and of the beginning and expiration of the term * * *."

A question arises as to whether or not, under this statute, the date of the commission is conclusive as to the date of appointment, upon the principles laid down in Marbury v. Madison, supra. It must be admitted, I think, that the official record which

the statute requires to be kept is evidence of the date of a given appointment. The statute was enacted for this purpose. Yet the record therein provided for is, at best, but secondary evidence, and an entry thereon does not constitute an appointment, but only a memorandum showing that an appointment has been made, and when it was made. I am of the opinion that where better evidence of a fact required to be recorded in the governor's office exists, it must be given controlling weight if inconsistent with the record. For example, the same secton provides for a record of restorations, in which is to be entered the "name of each convict to whom the governor has issued a certificate evidencing the restoration of the rights and privileges forfeited by his conviction, the date of the certificate, of what crime, in what county, and at what term of court he was convicted, and the term of his sentence." The date of the restoration of the convict to his rights and privileges might become material in a given case, and in that event it seems clear that the best evidence thereof would be the date of the certificate, as shown on the face of the certificate itself, and not the date of the certificate, as entered upon the record in the governor's office.

Similarly, in the case now under consideration, I am of the opinion that the date of the commission is better evidence of the date of appointment than the record of appointments required to be kept by the governor; for the one is really a written act showing an executive determination, while the other is merely a secondary record of that act showing that the determination has been made.

The date of the delivery of the commission being absolutely immaterial for the reason as decided in Marbury v. Madison, supra, that delivery is a mere ministerial act and no part of the act of appointment, I am of the opinion, for the reasons above stated, that the date of the commission of a district assessor, appointed in 1913, is conclusive as to the date of his appointment; and where, as in the specific case which I have been asked to consider, the appointee qualified immediately upon notice of his appointment and performed services from the date of his appointment, he is entitled to receive compensation for his entire official term, beginning on the first day thereof, which is the day of his appointment.

Respectfully,
EDWARD C. TURNER,
Attorney General.

321.

BOARD OF EDUCATION—CANNOT BE COMPELLED TO FURNISH SCHOOL BOOKS FREE OF CHARGE TO PUPILS OF PAROCHIAL SCHOOL—BOARD AUTHORIZED TO PURCHASE ONLY TEXT BOOKS ADOPTED BY BOARD.

The board of education of a school district cannot be compelled to furnish school books free of charge to pupils of a parochial school. Board authorized to purchase only text books adopted by board.

COLUMBUS, OHIO, May 3, 1915.

HON. GEORGE THORNBURG, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—In your letter of March 16th you requested my opinion, as follows:

"The board of education of Colerain township in Belmont county have asked me to secure an opinion from you on the following:

"They want to know whether a township school board are compelled

to furnish school books for parochial schools. In this county a number of foreign children attend the catholic schools and the priest demands books furnished to children whose parents are unable to pay for them.

"In some of these schools I am informed teachers are employed who do not hold a county teacher's certificate. If you answer that the board must furnish books for such schools, must the teacher in such schools hold a county certificate or its equivalent?"

Section 7739, G. C., provides:

"Each board of education *may* furnish, free of charge, school books, necessary to enable the parent or guardian, without expense therefor, to comply with the requirements of this chapter (relating to schools and attendance), to be paid for out of the contingent fund at its disposal. Such levy each year, in addition if necessary to that otherwise authorized, as may be necessary to furnish such school books free of charge to all the pupils attending the public schools, is hereby authorized. But pupils wholly or in part supplied with necessary school books shall be supplied only as other or new books are needed. All school books furnished as herein provided, shall be the property of the district, and loaned to the pupils on such terms and conditions as the board prescribes."

Section 7763, G. C., as amended, 104 O. L., 232, provides:

"Every parent, guardian or other person having charge of any child between the ages of eight and fifteen years of age, if a male, and sixteen years of age, if a female, must send such child to a public, private or parochial school, for the full time that the school attended is in session, which shall in no case be for less than twenty-eight weeks. Such attendance must begin within the first week of the school term, unless the child is excused therefrom by the superintendent of the public schools, or by the principal of the private or parochial school, upon satisfactory showing either that the bodily or mental condition of the child does not permit of its attendance at school, or that the child is being instructed at home by a person qualified, in the opinion of such superintendent or clerk, as the case may be, to teach the branches named in the next preceding section."

This statute, within the limits therein prescribed, makes school attendance compulsory.

Section 7739, G. C., was formerly known as section 4026 of the Revised Statutes, as found in Bates' Annotated Ohio Statutes in the chapter relating to "schools and attendance enforced" under the head of "compulsory education."

Section 7763, G. C., as found in the chapter relating to compulsory education, was formerly a part of section 4022-1 of the Revised Statutes, as found in Bates' Annotated Statutes in the same chapter, and under the same head as section 4026, R. S.

It seems clear that the chapter as above referred to in section 7739, G. C., means the chapter relating to schools and attendance taken in connection with the chapter relating to compulsory education.

You will observe that the furnishing of free school books under the above provision of section 7739, G. C., is optional with the board of education of a school district. The authority of the board of education, in levying a tax for this purpose, is

limited by the provision that such board is authorized to make an annual levy in addition to the levy otherwise authorized for contingent purposes "as may be necessary to furnish books free of charge to all the pupils *attending the public schools.*"

A parochial school is not a public school and is not subject to all the requirements of the statutes governing public schools. In the instance to which you call my attention, a teacher in a parochial school is not required to hold a teacher's certificate from the state board or county board of school examiners. The provisions of the statute governing the selection and use of text books for the public schools as found in section 7709, et seq., of the General Code, do not apply to the text books used in private or parochial schools.

Under the provisions of section 7644, G. C., it is made the duty of each board of education "to establish a sufficient number of elementary schools, and provide for the free education of the youth of school age under its control at such places as will be most convenient for the largest number thereof."

I am not unmindful of the provisions of section 7777, G. C., which are as follows:

> "When a truant officer is satisfied that a child, compelled to attend school by the provisions of this chapter, is unable to do so because absolutely required to work at home or elsewhere in order to support itself or help to support or care for others legally entitled to its services who are unable to support or care for themselves, such officer must report the case to the president of the board of education. Thereupon he shall furnish text books free of charge, and such other relief as may be necessary to enable the child to attend school for the time each year required by law. The expenses incident to furnishing books and relief must be paid from the contingent funds of the school district. Such child shall not be considered or declared a pauper by reason of the acceptance of the relief herein provided for. If the child, or its parent or guardian, refuses or neglects to take advantage of the provisions thus made for its instruction, it may be committed to a children's home or a juvenile reformatory, as provided for in the next three preceding sections."

While the provisions of this section make it the duty of the president of the board of education of a school district, under the conditions and within the limitations therein, prescribed, to furnish free text books and such other relief as is necessary to enable a child to attend school for the time each year required by law, it does not follow that the child must be furnished with the text books prescribed by the principal of a private or parochial school.

The limitations on the provisions of this statute must be determined in the light of the provisions of all the statutes relating to schools and attendance and to compulsory education.

The board of education of a school district, under authority of section 7739, G. C., *may* furnish text books, free of charge, to enable a parent or guardian to comply with the requirements of section 7763, G. C., as amended in 104 O. L., 232, and other sections of the General Code relating to compulsory school attendance, or, within the limitations prescribed by section 7777, G. C., it is the duty of the board of education to furnish a child text books, free of charge, and such other relief as may be necessary to enable such child to comply with said statutes.

The provision of section 7763, G. C., as amended, within the limitations therein prescribed, permits a parent or guardian to send a child to a private or parochial school, but in case such parent or guardian is not able or does not choose to do this, said provision compels the attendance of such child at a public school, and, for the purpose of making compliance with this mandatory provision possible, it is the duty of the board of education of a school district, within the limitations prescribed by section 7777, G. C., to furnish free text books to a child and such other relief as may be neces-

sary to enable said child to comply with said prevision, or said board of education, under authority of section 7739, G. C., *may* furnish free text books to a child to enable its parents or guardian to comply with said provision, or said board of education *may*, in its discretion, furnish text books, free of charge, to all the pupils attending the public school of the district.

Under section 7709 to 7720, G. C., boards of education may purchase such books only as are prescribed by "the state commissioner of common schools" (now the superintendent of public instruction). Free text books when furnished are only loaned and remain the property of the board of education.

Relying to your question I am of the opinion that the board of education of a school district cannot be compelled to furnish school books, free of charge, to pupils attending a parochial school within said district, nor is such board of education authorized to purchase any text books except those lawfully adopted by said board.

Respectfully,
EDWARD C. TURNER,
Attorney General.

322.

ELECTION—INITIATIVE AND REFERENDUM—MUNICIPAL CORPORATION—SUBMISSION OF TWELVE QUESTIONS ON BOND ISSUES MAY BE MADE UPON ONE BALLOT—QUESTIONS PROPOSED BY INITIATIVE PETITION UPON ONE BALLOT.

More than one question, which may be properly submitted to a vote of the people at the same election, may be placed on one ballot.

COLUMBUS, OHIO, May 3, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of April 16, 1915, submitting for an opinion upon the following:

> "There was filed April 10, 1915, by the clerk of the city council with this board, twelve separate resolutions, each resolution providing for the issue of bonds in certain amount for a certain municipal improvement. All to be voted on at a special election set for May 11, 1915. Shall these twelve resolutions be submitted separately on one ballot or shall they be submitted on twelve separate ballots?
>
> "The well water committee have filed three separate petitions. Shall these three propositions be submitted separately on one ballot or shall they be submitted on three separate ballots?

Each of the foregoing questions involve a construction of section 5020, G. C., which is as follows:

> "When the approval of a question, other than a constitutional amendment, is to be submitted to a vote, such question shall be printed on a separate ballot and deposited in a separate ballot box, to be presided over by the same judges and clerks of election."

By the act of May 2, 1902, (95 O. L., 352), it was provided that a question of the adoption of a constitutional amendment might, under the proper action of a party convention, be placed upon a party ticket on the ballot upon which was printed the

names of the candidates for office. It may be further noted that there was then no authority for placing upon the ballot containing the names of candidates for office, any other matter or question submitted to a vote of the people, and that the provisions of this act was in effect at the time of the passage of the act of April 23, 1904, (97 O. L., 241), in section 18, of which is found the following provision:

> "Whenever the approval of any question other than a constitutional amendment is to be submitted to a vote of the people, such questions shall be printed on a separate ballot and deposited in a separate ballot box to be presided over by the same judges and clerks."

Further examination of section 18 of this act will disclose that the two paragraphs thereof, preceding the provision above quoted, refer solely to the form and arrangement of the ballot with reference to the names of candidates for office and party tickets thereon. So that from the context of the whole section, when it is borne in mind that nothing other than the names of candidates and constitutional amendments might then be placed upon the ballot containing party tickets, it is fairly inferable that the meaning of the phrase "separate ballot" is a ballot separate from that on which appears such party tickets rather than a ballot separate from that on which any other question is presented.

This view is strengthened when it is observed that in the original enactment of section 5020, G. C. (97 O. L., 231), the plural form is used in the provision that "such questions shal be printed on a separate ballot" clearly indicating the intent of the legislature, not that each question should be upon a ballot separate from all other questions, but that all such questions be placed upon one ballot separate from that exclusively referred to in the preceding provision of that section.

Indeed, this seems clearly to have been the legislative intent in the original enactment, and so slight are the changes of the original provisions as carried into the General Code, it will not be presumed without some apparent reason therefor that any modification of the legal effect thereof was contemplated.

Your second question refers to two measures or resolutions and an ordinance proposed by initiative petition, and you inquire of all these may be submitted on one ballot.

If the subject-matter of such resolutions and ordinance be such as may be controlled by legislative action of the municipality, they are then within the provisions of article II, section 1f of the constitution, and section 4227-1, G. C. (104 O. L., 238), and may be proposed by initiative petition. The same reasons and therefore the same rule would then apply to these questions as to those referred to in your first inquiry.

To answer your questions more specifically, I am therefore of the opinion that the submission of the twelve questions of bond issue referred to in your first question, may be made upon one ballot, and that the three questions proposed by petition may be submitted upon one ballot.

If all these questions are to be submitted at the same election, there is little, if any, doubt that they may all be placed upon the same ballot, but since that might tend to result in a confusion of many electors, I advise that the measures and ordinance proposed by petition be placed upon one ballot, and that the twelve questions of bond issue be placed upon another.

The question of the validity of the bonds proposed to be issued is not submitted nor are facts sufficient for its determination stated, and is not, therefore, here considered.

Respectfully,
EDWARD C. TURNER,
Attorney General.

323.

REQUISITION—EXPENSES OF OFFICER RETURNING FROM ANOTHER STATE WITHOUT REQUISITION, A PERSON UNDER INDICTMENT —PAYABLE UNDER SECTION 3015, G. C.

The expenses of an officer in returning from another state, without requisition, a person under indictment, are payable under section 3015, *G. C., and not under section* 3004, *G. C.*

COLUMBUS, OHIO, May 4, 1915.

HON. CHARLES F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Under date of April 19th, you inquire as follows:

"Our grand jury recently indicted one Edward L. Conn for non-support of minor children. In the opinion of this office it was an aggravated case, and after much trouble, we located the defendant at Indiana Harbor, Indiana.

"At my request, the sheriff sent one of the deputies, Mr. Edward Bark, who, however, is not a salaried official, and Mr. Bark was able to induce Conn to return without the necessity of extradition papers, and I may add in this connection, that Mr. Bark has in many instances succeeded in inducing defendants to return without extradition papers, and we seldom secure them when he is the officer sent for the felon.

"Mr. Bark expended in railroad fare and necessary expenses of himself and the prisoner, approximately $50.00. I desire to know,

"*First*: Whether this is a proper charge to pay out of my fund provided by section 3004?

"*Second*: Whether this is one of the bills which may be allowed by the commissioners under section 2491?

"I would appreciate your opinion at your earliest convenience."

Section 2491, General Code, to which you refer, reads as follows:

"Section 2491. When any person charged with a felony has fled to any other state, territory or country, and the governor has issued a requisition for such person, or has requested the president of the United States to issue extradition papers, the commissioners may pay from the county treasury to the agent designated in such requisition or request to execute them, all necessary expenses of pursuing and returning such person so charged, or so much thereof as to them seems just."

It is my opinion that under said section, it is necessary that a requisition shall issue before the commissioners may pay anything thereunder.

The fund which section 3004, General Code, allows to the prosecuting attorney in furtherance of justice is "to provide for expenses which may be incurred by him in the performance of his official duties and in furtherance of justice, *not otherwise provided for.*"

Section 3015, General Code, provides as follows:

"Section 3015. The county commissioners may allow and pay the necessary expense incurred by an officer in the pursuit of a person charged with felony, who has fled the country."

The person sent, as stated by you in your inquiry, was a deputy sheriff—there-

fore, an officer, and I am of the opinion that section 3015, General Code, will cover the matter. Section 3004 will not, for the reason that under the provision of section 3015, the expenses are otherwise provided for.

Respectfully,
EDWARD C. TURNER,
Attorney General.

324.

BANK EXAMINER—CAN BE APPOINTED TO SERVE IN LIQUIDATION OF A BANK AT A DIFFERENT SALARY—CAN BE APPOINTED SPECIAL DEPUTY SUPERINTENDENT OF BANKS IN LIQUIDATION OF BANKS—DOES NOT NULLIFY APPOINTMENT AS BANK EXAMINER—COMMON PLEAS COURT'S FAILURE TO PAY SALARIES AND EXPENSES OF PERSONS EMPLOYED IN LIQUIDATION DOES NOT PERMIT THEM TO BE PAID FROM STATE TREASURY —LIQUIDATING AGENT REQUIRED TO OBTAIN ORDER OF COURT BEFORE HE SELLS REAL OR PERSONAL PROPERTY OR SELLS OR COMPOUNDS DOUBTFUL DEBTS.

1. *A bank examiner and office clerk appointed under section 712, G. C., salary fixed under section 713, G. C., can be appointed to serve in liquidation of a bank by superintendent of banks, at a different salary than received in position to which appointed under section 712, G. C.*

2. *A bank examiner appointed under section 712, G. C., salary fixed under section 713, G. C., can be appointed special deputy superintendent of banks in liquidation of a bank and receive a different salary than received as bank examiner.*

3. *If a bank examiner is appointed a special deputy superintendent, it does not necessarily nullify his appointment as bank examiner, but the action of the superintendent of banks in appointing a bank examiner as special deputy superintendent may be construed as granting a leave of absence to the person holding the position of bank examiner, from such position during the period he serves as special deputy superintendent.*

4. *If the common pleas court fails to allow salary and expenses of persons employed in the liquidation of a bank, the amount rejected may not be paid out of the state treasury, and the person receiving the same should res ore it to the state.*

5. *If a liquidating agent sells real or personal property, or sells or compounds doubtful debts without an order of the court first obtained, the act of so selling or compounding is a nullity.*

COLUMBUS, OHIO, May 4, 1915.

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

DEAR SIR:—Under recent date, you submitted several questions to me for opinion, which said questions I shall consider in the order in which they are propounded.

You first inquire:

> "May a bank examiner and an office clerk, appointed under the provisions of section 712, G. C., and his salary fixed under the provisions of section 713, G. C., be assigned to duty in a bank under process of liquidation, at a greater salary than that fixed under section 713, G. C?"

The provisions of law that govern the appointment of both a bank examiner and an office clerk are contained in section 712, G. C., referred to by you in your inquiry.

Section 712, G. C. (103 O. L., 384), provides in part as follows:

> "With the approval of the governor, the superintendent of banks may employ, from time to time, the necessary clerks, and examiners to assist in the discharge of the duties imposed upon him by law. * "

The salaries of such clerks and examiners are provided for in section 713, G. C. referred to by you in your inquiry.

Section 713, G. C., provides as follows:

> "The superintendent of banks shall fix the salaries of the deputies, assistants, clerks and examiners at such rates per annum as the governor approves. Upon vouchers approved by the superintendent of banks, such salaries shall be paid monthly by the teeasurer of state upon the warrant of the auditor of state."

The positions of both the bank examiners and the clerks are, in contemplation of law, continuous positions and not temporary positions. This is clearly deducible from the fact that the law uses the word "salaries;" that it refers to the fact that they are to be at such rates per annum as the governor approves, and the fact that they are to be paid monthly.

There is no doubt that the question of clerk in the department of the superintendent of banks is within the classified service of the state civil service; and also no doubt that bank examiners in the department of superintendent of banks are within the classified service of the state civil service, unless the civil service commission should determine that it is impracticable to determine their merit and fitness by competitive examination. On inquiry, I have ascertained that the state civil service commission has not so determined. We may, therefore, proceed on the basis that neither a bank examiner nor a clerk in the office of the superintendent of banks is in the unclassified service of the state civil service.

Section 742, G. C., provides that whenever it is provided that the superintendent of banks may take possession of the property and business of a banking corporation, doing business under the provisions of the banking laws of this state, to liquidate its affairs, the superintendent of banks shall take possession of and administer the assets of such bank as is provided in the subsequent sections.

Section 742-4, G. C., provides as follows:

> "The expenses incurred by the superintendent of banks in the liquidation of any bank in accordance with the provisions of this act, shall include the expenses of deputy or assistants, clerks and examiners employed in such liquidation, together with reasonable attorney fees for counsel employed by said superintendent of banks in the course of such liquidation. Such compensation of counsel, of deputies or assistants, clerks and examiners in the liquidation of any corporation, company, society or association, and all expenses of supervision and liquidation shall be fixed by the superintendent of banks, subject to the approval of the common pleas court of the county in which the office of such corporation, company, society or association was located, on notice to such corporation, company, society or association. The expense of such liquidation shall be paid out of the property of such corporation, company, society or association in the hands of said superintendent of banks, and such expenses shall be a valid charge against the property in the hands of said superintendent of banks and shall be paid first, in the order of priority."

From the above section it is to be seen, that while the superintendent of banks,

in the liquidation of a bank, may employ deputies or assistants, clerks and examiners, and pay their compensation, yet the fixing of such compensation by such superintendent is subject to the approval of the common pleas court of the county in which the office of the bank is located, and payable out of the property of such bank.

If the position held under appointment by the superintendent of banks in the liquidation of a bank is within the classified service of the civil service, then the superintendent of banks would not be authorized to appoint bank examiners and office clerks to positions in the liquidation of a bank, unless such person were transferred under the provisions of section 486-16, G. C. (103 O. L., 706), which provides in part as follows:

> "With the consent of the commission, a person holding an office or position in the classified service may be transferred to a similar office or position in another office, department or institution having the same pay and similar duties; but no transfer shall be so made from an office or position in one class to an office or position in another class, nor shall a person be transferred to an office or position for original entrance to which there is required by this act, or the rules adopted pursuant thereto, an examination involving essential tests or qualifications or carrying a salary different from or higher than those required for original entrance to an office or position held by such person. * * *"

which, as I understand in the given case, has not been done.

The question after all, to be determined is, as to whether or not a position held under the provisions of section 742-4, by appointment by the superintendent of banks, the compensation for which is to be fixed by him, subject to the approval of the common pleas court, can be considered as within the purview of the state civil service act.

It is true that section 486-1 defines "civil service" as follows:

> "The term 'civil service' includes all officers and positions of trust or employment * * * in the service of the state * * *."
> "The 'state service' shall include all offices in the service of state * *."

Said section 486-1 likewise defines the term "employe" as follows:

> "The term 'employe' * * * signifies any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer."

There is no doubt that a bank examiner or an office clerk who has been appointed to assist the superintendent of banks in the liquidation of a bank would come within the definition of the term "employe" as so generally defined in the above quotation. But the query arises as to whether or not the service of such persons would be considered as the "service of the state."

Section 486-21 provides in part as follows:

> "After the expiration of twelve months from the taking effect of this act (the civil service act), it shall be unlawful for the auditor of state * * * to draw, sign or issue, or authorize the drawing, signing or issuing of any warrant on the treasurer * * * of the state * * * to pay any salary or compensation to any officer, clerk, employe, or other person in the classified service unless * * * a payroll * * * containing the name of each person to be paid, shall bear the certificate of the state civil service commission * * *."

The foregoing provision of the civil service act is the principal provision of said act for the enforcement of the law.

Such provision likewise gives to the civil service commission the power to check up the various departments of the state in order to see whether or not the provisions of the civil service act are being carried out. The fact that the superintendent of banks is required to receive the approval of the common pleas court, and upon such approval may pay his appointees from the assets of the bank, does not in any way give a check to the civil service commission to see whether or not the civil service act of Ohio is being carried out in such liquidation.

In the case in question, the persons serving in the liquidation of a given bank do not look to the state for their compensation, since it is fixed by the superintendent of banks, subject to the approval of the common pleas court, and paid out of the assets of the bank. There is no state money paid to them for their services.

It therefore, seems to me, that the employes in the liquidating department of a bank, since they are paid from the assets of the bank itself, directly by the superintendent of banks, subject to the approval of the common pleas court, are not to be considered within the purview of the civil service act.

The only definition that I can find given to "civil service" is found in Hope et al. v. New Orleans et al., 106 La., 345, cited with approval in 7 cyc. 178, wherein the court says, at page 348:

> "*Civil Service*, in its enlarged sense, means all service rendered to and paid for by the state, the nation, or by political subdivisions thereof, other than that pertaining to naval and military affairs."

Section I, of chapter 648, of the laws of 1887, of the state of New York, gives a preference in employment to honorably discharged Union soldiers "in every public department, and upon all public works of the state of New York, and of the cities, towns and villages thereof."

In the case of People ex rel. Uhrie v. Gilroy, commissioner of public works of the city of New York, 60 Hun. 507, the facts are: That a certain Uhrie was an honorably discharged veteran of the war of the rebellion; on May 31, 1888, he receivd an appointment in writing from the commissioner of public works, as follows, viz.: "You are hereby appointed inspector *on the work* of laying mains of the Standard Gas Light Company, by whom you will be paid at the rate of $100.00 per month." On January 26, 1889, he was relieved from service by the following notice in writing: "You are hereby notified that your services as inspector on the work of the Standard Gas Light Company will not be required after this date."

The syllabus of the case is as follows:

> "Section 1, of chapter 464, of the laws of 1887, gives a preference in employment to honorably discharged union soldiers 'in every public department and upon all public works of the state of New York, and of the cities, towns and villages thereof.'
>
> "Such a soldier was by a written notice appointed by the acting commissioner of public works of the city of New York, inspector on the works of laying mains of the Standard Gas Light Company in said city, which notice stated that the appointee would be paid by said company. He was subsequently discharged. *Held*, that the appointee was not employed in the general service of the 'department of public works;' that his employment was limited to a particular purpose and to a special work; that the statute did not require, in such a case, that the appointee should receive continuous employment in the department after the special purpose for which he was employed had ended, and that the commissioner was not required to retain him."

While the above case is not exactly in point in the question under consideration, nevertheless the court holds that an appointment can be made by an official of the state for a particular purpose, the pay for which is to be made out of funds other than public funds, and that he will not in holding such a position be considered as within public employment.

In the same manner do I believe that the employes of the superintendent of banks, in the liquidation of a bank, although they are appointed by the superintendent of banks, a state officer, nevertheless, since their compensation is to be paid out of the assets of the bank, and that said compensation is subject to the approval of the common pleas court, are not within the purview of the civil service act.

In coming to the conclusion which I have just stated, I am not in the least unmindful of the opinion rendered by my predecessor, Hon. Timothy S. Hogan, to the state civil service commission, under date of December 22, 1914, wherein he held that persons employed in the liquidating department of the state banking department are subject to the provisions of the civil service act. I cannot, however, reach the same conclusions that he did.

Since the employes of the superintendent of banks in the liquidation of a given bank are not within the classified service of the state civil service, I am of the opinion that if the superintendent of banks appoints a bank examiner or an office clerk to serve him in the liquidation of a particular bank, he may do so, and, subject to the approval of the common pleas court, fix the compensation of said persons at a different rate than they were receiving as bank examiner or as office clerk in the department of the suprintendent of banks.

You next inquire:

> "(2) May an examiner who has been appointed and his salary fixed under section 712 and 713, G. C., be appointed a special deputy superintendent of banks and, if so, may he draw a greater salary than that fixed under section 713, G. C.?"

In my answer to your first question, I have advised you that, in my opinion, the employes of the superintendent of banks in the liquidation of a given bank are not within the purview of the state civil service act.

Even if they were within the purview of such act, nevertheless a special deputy superintendent of banks, appointed under the provisions of section 742-2, G. C., would not be within the classified service of the state civil service.

Section 742-2, G. C. (103 O. L., 530), provides in part as follows:

> "* * * The superintendent of banks may under his hand and official seal appoint one or more special deputy superintendents of banks as agent or agents, to assist him in the duty of liquidation and distribution, a certificate of appointment to be filed in the office of superintendent of banks and a certified copy in the office of the clerk of the county in which the office of such corporation, company, society or association was located. * * *"

Section 486-8, G. C. (being section 8 of the civil service act), 103 O. L., 701, divides the civil service of the state into unclassified and classified service. Under the division of unclassified service, subsection 8 thereof, provides as follows:

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

It has heretofore been determined that it is not necessary that a deputy act for the

principal in all matters, but that insofar as he does act, he shall act generally for his superior, and I am of the opinion that the special deputy superintendent of banks appointed under the provisions of section 742-2, G. C., is, in all respects, a deputy under the provisions of subsection 8 of division "a" of section 486-8, G. C., and, therefore, that a bank examiner may be appointed a special deputy superintendent of banks and receive a different salary than he received as bank examiner.

You next inquire:

> "(3) If an examiner is appointed as special deputy superintendent, does it nullify his appointment under section 712, G. C., or may he hold both titles at the same time—not drawing pay under both titles at the same time—but interchangeably as he may be employed in the different capacities?"

Under section 7 of the civil service act (section 486-7 of the General Code) the state civil service commission shall "prescribe, amend and enforce rules for carrying into effect section 10 of article XV of the constitution of Ohio, and the provisions of this act, and such rules shall have the force and effect of law."

Section 9 of the civil service act (section 486-9 of the General Code) requires the commission to put into effect rules for various subjects, among which is "lay-offs."

In pursuance of the authority granted by the above sections, the civil service commission adopted rules and regulations, and under regulation IV, section 7, provided relative to leave of absence. Said regulation is to the following effect:

> "(7) *Leave of Absence.* Leave of absence from duty shall in no case be granted to an officer or employe who has been in the service for less than three months immediately preceding his time of leave, except in case of sickness or disability, in which case application for extended leave shall be accompanied by such proof as the commission may require, and such leave shall be granted only upon the approval of the commission. Leave of absence shall not be extended unless application therefor be made prior to the expiration thereof, and no such leave, extension or continuation, whether continuous or not, shall exceed one year, except as herein provided.
>
> "The head of the department may, with the approval of the civil service commission, grant leave of absence from regular duty upon written application made to him by such subordinate officer or employe within his department. The application shall be reported immediately to the civil service commission, and the commission shall approve such leave for the following purposes and reasons, and not otherwise:
>
> " '(a) Where leave is requested to enable an officer or employe to take any elective or appointive position in the civil service exempted from the classified service by section 8 of the civil service act, the same may be granted for periods of one year, and during the actual service of such officer or employe in such position.'
>
> " '(b) Where leave of absence is requested because of disability or injury received in the performance of duty, and not due to the negligence of the officer or employe himself, the same being recommended by the head of the department.'
>
> " '(c) Where leave of absence is requested because of some special reason other than those above enumerated; and is recommended by the head of the department concerned; provided, that no such leave shall be granted for a period to exceed one year."

In view of such regulation, I am of the opinion that when the superintendent of

banks appointed a state bank examiner as a special deputy superintendent in charge of the liquidation of a particular bank, he must necessarily be presumed to have granted to such state bank examiner a leave of absence from his duties as bank examiner, and under paragraph "a" thereof, the right so to do is for periods of one year.

When the state civil service commission had presented to it a payroll containing the name of the person who was designated as bank examiner, and it appears that the period of time as shown by such payroll during which he served was not for the complete period of time covered by the payroll, and the civil service commission placed its certificate on such payroll, such act must be held to have been an approval by the civil service commission of the granting of the leave of absence by the superintendent of banks to the state bank examiner from regular duty as such state bank examiner.

I am, therefore, of the opinion that the appointment of an examiner as special-deputy superintendent in the liquidation of a particular bank does not nullify his appointment as bank examiner, but that his appointment as special deputy superintendent would, in effect, be the granting of a leave of absence to such bank examiner during the time he acted as such special deputy superintendent. However, the head of each department should always first obtain the approval of the state civil service commission on granting a leave of absence from regular duty to an employe in the classified service.

In your fourth question you inquire as follows:

> "(4) If the court fails to allow the salary and expense of an examiner or office clerk, assigned to duty in the liquidation of a bank, may the amount so rejected be paid out of the state treasury and, if not, who is liable for the amount?"

The answer to your fourth question has already been given you in another opinion. However, I would again state that the amount which the court has failed to allow, cannot be paid out of the state treasury, and the employe who has received such amount should be the primary party to restore the same to the state treasury.

You next inquire:

> "(5) If a liquidating agent sells real or personal property or sells or compounds doubtful debts without an order of the court, what finding should be made in the premises?"

Section 742-2 (103 O. L., 530) provides in part as follows:

> "* * * The superintendent of banks shall collect all debts due and claims belonging to it and upon the order of the common pleas court in and for the county in which the office of such corporation, company, society, or association was located may sell or compound all bad or doubtful debts, and on like order may sell all the real estate and personal property of such corporation, company, society or association, on such terms as the court shall direct; and the superintendent of banks, upon the terms of sale or compromise, directed by the court, shall execute and deliver to the purchaser of such real or personal property, such deeds or instrument as shall be necessary to evidence the passing of the title; * * *"

It would appear, therefore, that only upon the order of the common pleas court of the county in which the office of the bank is located, may the superintendent sell or compound bad or doubtful debts or sell any real estate or personal property. If

he attempts to sell any real or personal property, or compound doubtful debts without such an order, he is without authority so to do, and any sale so made by him would not, as I see it, pass title to the property in question.

The obtaining of the order of the common pleas court is jurisdictional as to his right to proceed to sell real or personal property, or sell or compound doubtful debts.

In your sixth question you inquire as follows:

> "(6) If the liquidating agent closes up the affairs of a bank without submitting the expense of said liquidation to the proper court for approval, what finding should be made in the premises?"

The answer to your sixth question has already been given you in another opinion.

You next inquire:

> "(7) If no record of the approval of the governor of appointments and salaries can be found in the office of the superintendent of banks, or in the executive office, what finding should be made in the premises?"

I have been informed that since you have submitted your request for an opinion on the above question the records have been found. Consequently, I do not answer such question.

Respectfully,
EDWARD C. TURNER,
Attorney General.

325.

GENERAL ASSEMBLY—MAY AFTER A LAW HAS BEEN SIGNED BY THE GOVERNOR AND DURING THE NINETY DAYS PERIOD OF SUSPENSION PROVIDED BY THE CONSTITUTION, BUT BEFORE A REFERENDUM HAS BEEN ORDERED THEREON, AMEND SUCH A LAW.

The general assembly may, after a law has been signed by the governor, and during the ninety days period of suspension provided by the constitution, but before a referendum has been ordered thereon, amend such a law.

COLUMBUS, OHIO, May 4, 1915.

HON. FRANK C. PARRETT, *Chairman Taxation Committee, House of Representatives, Columbus, Ohio.*

DEAR SIR:—You submitted to me a draft of a proposed bill to amend section 32 of what is known as the "Parrett-Whittemore bill," which has been passed by the general assembly and is now in the hands of the governor.

The only question which I have considered is as to whether or not, if the governor signs what may be termed the "main bill," the general assembly may, within the referendum period provided by the constitution, amend a section of that bill.

This interesting question invites extended discussion, but such discussion is prevented by the limitations of time and space.

Under the initiative and referendum provisions of the constitution, a measure that has passed both houses of the general assembly, and has been signed by the gover-

nor, is referred to as a "law," and its status by the express provisions of the constitution is, so to speak, one of suspended animation. It is a law, but it does not go into effect for a period of ninety days, nor thereafter, if a referendum is ordered, until the electors have approved it at a general election.

During the referendum period, and at least before the people have asserted their reserved right to order a referendum and thus become a part of the legislative machinery of the state, such a measure is a complete law—a legislative act in every sense of the word. Laws are often passed so as not to go into effect for a considerable period after the date of their passage, even when constitutional restrictions do not intervene; and in states where the initative and referendum does not prevail there are to be found constitutional provisions postponing the effectiveness of all ordinary laws to a date considerably subsequent to that of their passage. I do not find that the power of the legislature under either a voluntary or a compulsory suspension of this sort to amend or repeal a law in this condition has ever been questioned.

For the reason, then, that until a referendum has actually been ordered a law, the effectiveness of which is suspended by force of the constitution, is none the less a "law," I am of the opinion that until a referendum is ordered and after the law is approved by the governor it may be amended by the general assembly.

I may add that I have no criticism of the form of the bill which has been submitted to me.

Respectfully,
EDWARD C. TURNER,
Attorney General.

326.

CERTIFICATES OF INDEBTEDNESS—EFFECT OF REFUNDING THOSE ISSUED PRIOR TO TAKING EFFECT OF AMENDED HOUSE BILL No. 414 BY REMOVING TAX LIMITATIONS AS TO SUCH REFUNDING BONDS—EFFECT OF RE-ENACTMENT OF SECTION 5649-2, G. C.—EFFECT OF AMENDMENT ON TEN MILL LIMITATION.

Section 3941, *G. C., as amended by house bill No.* 414 *is ambiguous.*

A provision that bonds may be issued to refund certificates of indebtedness issued prior to the taking effect of the bill, and removing tax and debt limitations as to such refunding bonds, opens the door for a municipality during the referendum period to issue a large amount of such certificates of indebtedness, and thus to incur indebtedness without restraint.

The re-enactment of section 5649-2 *of the Smith law, imposing the ten mill limitation without excepting levies authorized to be made outside of such limitation by laws passed since June* 2, 1911, *and prior to the passage of the pending bill, would have the effect of bringing such levies within such limitation.*

The amendment of said section 5649-2, *made by the bill, has the effect of taking all interest and sinking fund levies outside of the ten mill limitation.*

COLUMBUS, OHIO, May 4, 1915.

HON. A. R. GARVER, *Chairman Senate Taxation Committee, Eighty-First General Assembly, Columbus, Ohio.*

DEAR SIR:—You have left with me for my inspection and opinion amended house bill No. 414.

In regard to the same I beg to submit the following:

The amendment to section 3941, General Code, is seemingly an effort to simplify the Longworth law by putting the two and one-half and five per cent. limitations in one section instead of in three, as they are in the law itself.

It is feared that confusion will result from the language of this section as proposed to be amended, taken in connection with the remainder of the act as it is to be amended. Formerly, there was a one per cent. limit applicable to the amount of bonds that might be issued in any one year, and a two and one-half per cent. limit on the total amount of bonds that might be outstanding at any one time, both without a vote of the people and a five per cent. limit on the amount that might be outstanding at any one time, including bonds issued by a vote of the people. Other amendments in this bill prohibit the issuance of any bonds without a vote of the people, with certain exceptions. Amended section 3941 does not make it clear whether the two and one-half per cent. limit is to apply to bonds issued by a vote of the people or not. Formerly, as already stated, this limitation did not apply to such bonds.

As a matter of interpretation, the intention of the draftsman of this section can be ascertained, because the two and one-half per cent. limitation is upon the indebtedness incurred *by the council,* while the five per cent. limitation is upon the indebtedness incurred *by a municipal corporation.* Possibly this distinction makes the section clear enough for practical purposes, but it occurred to me that it might be made a good deal clearer than it is.

The amendment to section 3942 radically changes the scope and effect of that section. Formerly, any bond issue could be submitted to a vote of the people, and any bond issue had to be submitted to a vote of the people when the one per cent. or two and one-half per cent. limitations were reached. Under the amendment, however, the rule is that all bond issues must be submitted to a vote of the people with certain exceptions therein provided for. This, it is believed, is a good move, as it wi l prevent the council of municipalities from putting over a big bond issue without a vote of the people. The limit is $75,000. The other exceptions are of bonds like the Bense act bonds, refunding bonds, mortgage bonds, special assessment bonds, emergency bonds, etc., that ought to be outside of these limitations.

The proviso, beginning at the bottom of page two of the bill, makes a hole in the Smith law, and the Longworth law too, in that it gives a municipality the power to refund certificates of indebtedness "issued prior to the taking effect of this act," without regard to any limitations, and without a vote of the people. This is vague, in that it does not on its face apply to bonds as well as certificates of indebtedness, and the question will be raised as to its application here. It is dangerous, in that it will permit a city between the date of the passage of the act and the time it takes effect, viz.: ninety days, to issue a large amount of certificates of indebtedness upon the amount of which there is no limitation, and then, by refunding, to get the levies outside the Smith law limitations and the bonds outside the Longworth law limitations. This proviso is probably intended for the benefit of the city of Cleveland, which has been issuing certificates of indebtedness until it is unable to provide for their payment under the Smith law. Some relief to Cleveland and other such cities may be necessary, but the date fixed should be in the past and not in the future, so as to prevent the cities from taking advantage in an unfair way of the referendum period.

The amendments to section 3949 are entirely proper. The first one, which affects paragraph "e," is restrictive. Paragraphs "g" and "h," which are new, are not open to criticism. The first of these obviates a decision of the court of appeals of the sixth district in the Cuyahoga Falls case, to which the attention of this department has already been called. The second one takes mortgage bonds out of the Longworth act, although as a matter of fact I do not think they could have been regarded as within the limitations of the Longworth act in any event. In this view of the case paragraph "h" is unnecessary, but harmless.

The re-enactment of section 5649-2, without change, other than that made at the end of it, would have the effect of bringing into the ten mill limitation quite a number of levies which were never intended to be within that limitation. I refer to levies provided for by laws passed since June 2, 1911, and prior to the passage of the bill now

under consideration, and which by those laws were expressly taken out of the ten mill limitation. Unless the legislature wants to bring these levies back into the ten mill limitation again, there should be some sort of a saving clause, or else the question will be raised as to whether or not this amendment of section 5649-2, being the last in point of time, will not be inconsistent with these intermediate laws.

A shining example of a law of this kind is the Hite road law, which, if section 5649-2 of this bill is enacted into a law, might very well be held to be brought within the ten mill limitation.

The amendment which is made to section 5649-2 knocks another hole in the Smith law, in that it takes all sinking fund and interest levies outside of the ten mill limitation, whereas under the original Smith law and its previous amendments only those levies which were necessary to provide for indebtedness incurred prior to June 2, 1911, or thereafter, by a vote of the people, were exempt from taxation.

We prepared for you, for use in your bill restoring the amount limitation of the Smith one per cent. law, a revised form of section 5649-2, which, with the amount limitations stricken therefrom, would be the proper solution of the difficulty of drafting that section so as to amend it in any material particular now without affecting the status of levies, authorized by what might be termed "intervening" legislation, and intended to be outside of the ten mill limitation.

Respectfully,
EDWARD C. TURNER,
Attorney General.

327.

EFFECT OF AMENDED SENATE BILL No. 220 UPON THE SMITH ONE PER CENT. TAX LIMITATIONS.

Where a section providing for a tax levy is so amended as to create new levying power, a provision therein that the levies therein provided for shall be "in addition to all other taxes authorized by law," probably has the effect of removing, as to such levies, all tax limitations created by previously enacted laws, although the language in question was in the original section which was passed before the law creating the general tax limitation became effective.

COLUMBUS, OHIO, May 4, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—You have asked me to examine amended senate bill No. 220, passed by both houses of the general assembly.

The general purpose of this bill is to grant authority to townships and municipal corporations to issue bonds for their respective shares of a joint improvement made under agreement with the county commissioners.

Under some of the laws affected by the bill there is no real necessity for such legislation, because such laws already provide for the issuance of bonds by the county commissioners to pay the total cost of the improvement, and the making of tax levies by the commissioners upon the property of the township or municipality to pay the share assumed by such township or municipality. There can be no vital objection, however, to the policy of having the borrowing power lodged where the levying power ought to be lodged, viz.: in the officers of the township or municipality.

You direct my attention particularly to the curative provision found in amended section 3295. The general assembly has special power to enact such legislation under

the constitution, and I can see but one objection to the form of this provision, namely: it assumes to validate all bonds issued for the purpose therein specified without reference to whether the provisions of law applicable generally to the issuance of bonds by township trustees have been complied with or not. Strictly speaking, it might be better to have the clause limited to the curing of such defects in the bonds of which it speaks as arise out of the fact that the township trustees lack general authority to issue such bonds. However, this is the effect that most likely will be given to the provision by the courts should any question arise, and as the bill has been passed, I do not feel that the objection is vital. At any rate, this provision is clearly severable from the remainder of the section in which it is found and from the remainder of the bill, so that if the curative provision should be held to be unconstitutional, the remaining provisions of the bill, should it become a law, would not be affected by such a holding.

You also direct my attention to the tax limitation provisions of the bill. You refer here to the provision of section 6912-1, as amended, to the effect that the levies therein authorized to be made shall be "in addition to all other taxes authorized by law."

The question as to whether or not this language, as it appears in the amended section, would have the effect of placing these levies outside of all the limitations of the Smith law is a close one. In a recent case (not yet in the official reports), it was held that when the legislature in 1913 passed the Kilpatrick act, amending section 5649-2 of the Smith law, and left a part of the section unchanged, the words denoting time in such unchanged portion continued to have the significance which they had in the original section; so that this part of the section still continues to refer to the date of the passage of the original Smith law instead of to the date of the passage or effectiveness of the Kilpatrick law.

I doubt seriously whether the principles underlying that decision could be applied so as to keep the levies authorized by amended section 6912-1 within the limitations of the Smith law. The cases are not parallel, for two reasons:

In the first place, the particular words interpreted in the case which I have described, related to time and fixed a specific date, whereas the phrase "authorized by law" does not necessarily refer to the law in existence at a given time.

In the second place, it cannot be said that the clause in which the language to be interpreted appears is the same in amended section 6912-1 as it was in the original section bearing that number.

As I have pointed out, the fact that a part of original section 5649-2 was unchanged by the Kilpatrick law was one of the grounds of the decision in the case which I have mentioned. Now, in the case of section 6912-1, as amended by the bill, the clause in question has been changed by inserting the words "and village council," that is, as to villages, an entirely new levying power has been created.

It is to be observed that there is no qualification of the phrase "in addition to all other taxes authorized by law." If there were any such qualifying phrase, as "for county, township or municipal purposes," or words of like import, the conclusion might be reached that the taxes therein authorized were to be merely in addition to the ordinary local taxes, but within the limitations upon the aggregate amount of all taxes; but in the absence of such qualifying language I incline strongly to the belief that the amendment can be given but one meaning, namely, that the two mill tax levy therein authorized is to be outside of all limitations.

In connection with this subject, I call attention to the views expressed by Governor Harmon in his message to the general assembly, vetoing certain provisions of the state highway law of 1911, the message being found in 102 Ohio laws, 349. It is true that the language which Governor Harmon found objectionable as violating the principles of the Smith Law was more explicit than the language which I have considered, but it seems clear to me that even if the clause, "notwithstanding any limitation upon the

aggregate amount of such levies now in force," had been eliminated from the sections to which Governor Harmon called attention, he would have found the same fault with them.

For the foregoing reasons I cannot say less of section 6912-1 than that it raises a very serious question relative to its effect upon the Smith law limitations.

Another objection to amend section 6912-1 lies in the fact that if, acting under its provisions, the county commissioners issue bonds to pay the entire estimated cost and expense of the improvement, then the levies to pay the respective shares of the township and village must be made, not by the commissioners who issued the bonds, but by the local taxing authorities of the township or village. In that event there would be no one tax duplicate pledged to the payment of the bonds and the interest thereon. Such a situation would raise a legal question under article XII, section 11 of the constitution, as amended, and a very practical question as to the marketability of the bonds.

Respectfully,
EDWARD C. TURNER,
Attorney General.

328.

HOUSE BILL No. 438—DOUBLE NEGATIVE IN SAME RENDERS BILL INOPERATIVE.

COLUMBUS, OHIO, May 4, 1915.

HON. FRANK B. WILLIS, *Governor, Columbus, Ohio.*

MY DEAR GOVERNOR: In re house bill No. 438, which you have submitted to me.

I am of the opinion that a portion of this bill is rendered inoperative by the use of a double negative in the third clause thereof.

I have called the attention of Senator Moore and Mr. Platt to the same and they have stated to me in a letter from Senator Moore that they believe the best course to be pursued is to have the bill vetoed and passed again with the necessary corrections. House bill No. 438 returned herewith.

Respectfully,
EDWARD C. TURNER,
Attorney General.

329.

CHILDREN'S HOME—COUNTY COMMISSIONERS HAVE NO AUTHORITY TO MAKE CONTRACT WITH TRUSTEES OF A CHILDREN'S HOME OF ANOTHER COUNTY WHERE NO HOME IS MAINTAINED IN A COUNTY, UNLESS SUCH HOME HAS CERTIFICATE FROM STATE BOARD OF CHARITIES—PAYMENTS UNDER SUCH ILLEGAL CONTRACTS MAY BE ENJOINED.

The commissioners of a county having no children's home, are not authorized to enter into a contract with the trustees of a children's home of another county, for the admission and care of children of their county who become proper subjects for admission to such a home, unless such children's home has received a certificate of qualification from the state board of charities as prescribed by law.

Such a contract with a home not having the required certificate being illegal, payments of money from the county treasurer pursuant thereto, may be enjoined, and it is the duty of the auditor upon notice of such facts to refuse to issue his warrant for such payments.

COLUMBUS, OHIO, May 4, 1915.

HON. H. H. SHIRER, *Secretary Board of State Charities, Columbus, Ohio.*

DEAR SIR:—Under date of April 9th, you submitted to me for written opinion thereon the following inquiry to wit:

> "Under the provisions of section 1352-1 of the General Code, as enacted April 28, 1915, the board of state charities has not deemed it proper to certify a certain county children's home as suitable in its management for the reception of dependent children. The trustees of this home, as well as the juvenile court in that county have been notified of the action of the board.
>
> "We are now advised that negotiations are under way between the county commissioners of an adjoining county in which there is no children's home to make a contract for the care of dependent children of the latter county in the home which we have not certified. I desire your advice on the following:
>
> "Can such a contract under the above circumstances be entered into legally?
>
> "If the contract is made, would the auditor of the second county have any legal right to pay the trustees of the uncertified home for the care of children under the terms of the contract?"

The sections of the statutes applicable to your inquiry are found in the chapters of the General Code entitled "Board of State Charities" sections 1349 et seq., and "Children's Homes" sections 3070 et seq., and the amendments thereto in the act of 1913, 103 O. L., 864.

The sections being somewhat lengthy, only the language most directly in point is quoted.

Section 3089, G. C., 103 O. L., page 890, provides in part:

> "The home shall be an asylum for children under the age of eighteen years, of sound mind and not morally vicious and free from infectious or contagious diseases, who have resided in the county not less than one year, and for such other children under such age from other counties in the state where there is no home, as the trustees of such home and the persons or authority having the custody and control of such children, by contract agree upon,

who are, in the opinion of the trustees, suitable children for admission by reason of orphanage, abandonment or neglect by parents, or inability of parents to provide for them. * * *"

Section 3090, G. C., 103 O. L., 890, provides in part:

"They shall be admitted by the superintendent on the order of the juvenile court or of a majority of such trustees. * * *"

Section 3092, G. C., 103 O. L., 891, provides in part:

"In any county where such home has not already been provided, the board of commissioners shall make temporary provisions for destitute children by transferring them to the nearest children's home where they can be received and kept at the expense of the county, or by leasing suitable premises for that purpose, which shall be furnished, provided and managed in all respects as provided by law for the support and management of children's homes * *"

Section 1352, G. C., 103 O. L., 865, provides in part:

"The board of state charities shall investigate by correspondence and inspection the system, condition and management of the public and private benevolent and correctional institu'ions of the state and county, and municipal jails, workhouses, infirmaries and children's homes, and all maternity hospitals or homes, lying-in hospitals, or places where women are received and cared for during parturition, as well as all institutions whether incorporated, private or otherwise which receive and care for children."

Section 1352-1, G. C., 103 O. L., 865, provides in part:

"Such board shall annually pass upon the fitness of every benevolent or correctional institution, corporation and association, public, semi-public or private as receives, or desires to receive and care for children, or places children in private homes. * * *"

"When the board is satisfied as to the care given such children, and that the requirements of the statutes covering the management of such institutions are being complied with, it shall issue to the association a certificate to that effect, which shall continue in force for one year, unless sooner revoked by the board. No child shall be committed by the juvenile court to an association or institution which has not such certificate unrevoked and received within fifteen months next preceding the commitment. A list of such certified institutions shall be sent by the board of state charities, at least annually, to all courts acting as juvenile courts and to all associations and institutions so approved. Any person who receives children or receives or solicits money on behalf of such an institution, corporation or association, not so certified, or whose certificate has been revoked, shall be guilty of a misdemeanor and fined not less than $5.00, nor more than $500.00"

The foregoing provisions of the statutes and others of similar import are in the interest of the proper care and guardianship of the children of the state who are subject to commitment or admission to children's homes or other institutions receiving or desiring to receive or care for children, and to this end, it is the manifest purpose of

the enactment to provide for the proper regulation and management of such institutions and to prohibit the commitment of children to institutions not meeting the requirements of the law and the approval of the state board of charities.

The statutes provide that when upon investigation the board is satisfied of the qualification of such institution adequately to care for such children as are or may be committed to it or received therein, and that the requirements of the statutes relating to such institutions have been complied with, the board shall issue to such institution a certificate to that effect, and that a list of such certified institutions shall be furnished by the board at least annually to all juvenile courts and to all approved institutions.

It is further provided no child shall be committed by the juvenile court to an institution not having such certificate unrevoked and received within fifteen months next preceding such commitment. It is made a misdemeanor for any person to receive a child or receive or solicit any money on behalf of an institution not so certified.

The placing of children in institutions not having the required certificate, and the payment of the cost of their maintenance out of the public funds by the officers of the county, would seem therefore to be in direct contravention of the purpose of the statutes.

From the foregoing and other similar provisions of the act relating to children's homes, I am of the opinion that there is no authority of law for the county commissioners of any county to enter into a contract with trustees of an institution to receive and care for children of its county that may be committed to a children's home, unless such institution meets the requirements of the statutes as to qualification and management, and has received a certificate to that effect from the board of state charities.

A contract with such an institution not so certified being illegal, the approval of payment of moneys under such contract from the county treasury by the county commissioners would not be conclusive on the auditor, and upon notice that the institution has not been approved, as provided by law, it would be his duty to refuse to issue a warrant for such payments, or the payment of money from the county treasury pursuant to such contract could be restrained by injunction.

Respectfully,

EDWARD C. TURNER,
Attorney General.

330.

HOSPITALS—AUTHORITY OF MUNICIPALITY TO CONTRACT FOR PROPER SUBJECTS OF ADMISSION—COUNCIL HAS RIGHT OF DISCRETION—OBLIGATION OF A HOSPITAL TO RECEIVE PERSONS AFFLICTED WITH CONTAGIOUS DISEASES—EYE DISEASES.

The statutes conferring authority upon the council of municipalities to maintain hospitals or contract for the care and treatment of inhabitants of the municipality who are proper subjects of admission to hospitals, vest a discretion in the council as to the extent and method of the exercise of such authority, which may not be controlled in the absence of gross abuse.

The arrangement by which inhabitants of a municipal corporation are received and cared for in hospitals not owned by the municipality, and in consideration of which, contributions are made by the municipality to such hospitals, is contractual, and the obligation of the hospital to receive persons afflicted with infectious or contagious diseases is dependent upon the terms of the contract.

COLUMBUS, OHIO, May 4, 1915.

HON. CHARLES F. F. CAMPBELL, *Executive Secretary, State Commission for the Blind, Columbus, Ohio.*

DEAR SIR:—Under date of April 9th, 1915, you requested my written opinion upon the following statement of facts and inquiry, to wit:

"Dr. Walter H. Snyder, of Toledo, a member of the commission for the blind, is very much concerned because the hospitals which are subsidized by the city of Toledo are refusing to admit babies having opthalmia neonatorum. I enclose a letter from him which will give you the facts in the case.

"Without immediate and constant treatment, an infant whose eyes are infected with this disease runs a very great risk of becoming blind, and when the home conditions are bad, practically the only way of saving the sight is to send the child to the hospital. It is well known that if a baby's eyes are once badly infected, it needs the constant attention of a night and day nurse for several days (and sometimes more) to get control of the situation, and hospitals naturally are not keen to take charity cases which involve so much trouble. From the point of view of the commission, however, the unnecessary loss of a pair of eyes means a future expense to the state of thousands of dollars, and if there is any way of bringing pressure to bear upon the hospitals, we should like to know it."

The letter of Dr. W. H. Snyder, enclosed, is in part as follows:

"A few weeks ago, our eye nurse in Toledo, had reported to her the case of a baby with inflammation of the eyes. The house was in such a condition that it was impossible to treat the baby at home, and the superintendent of the district nurse association referred the father to the police station for an order admitting her to one of the hospitals that are subsidized by the city. He was given an order on the Toledo Hospital, but on presenting himself with the child was refused admittance, the claim being made that the disease was a contagious one which they were not bound by the contract to accept. Later, through the kindness of the sisters of St. Vincent's, the child was taken there for a few days, and then sent to the county hospital. A few days after this, I made an appointment with the safety director, which appointment he did not

keep, but Idid see his secretary. I explained the situation to him, asking for some ruling on what we could do if a similar case came up. The answer was that nothing could be done, and that there was no arrangement by which these cases could be cared for.

"I wish you to make a formal inquiry of the attorney general as to whether we have power to compel municipalities to make some arrangement for caring for these children in case the parents are unable to meet the expenses."

Section 4021, G. C., authorizes the council of municipalities to levy and collect a tax, not to exceed one mill, and pay the proceeds of such tax to a private corporation or association which maintains and furnishes a free public hospital for the benefit of the inhabitants of the municipality, or free to those who are unable to pay.

Section 4022, G. C., provides:

"Such council may agree with a corporation or association organized in the municipality for charitable purposes, for the erection and management of a hospital for the sick and disabled, and a permanent interest therein to such extent and upon such terms and conditions as may be agreed upon between them. The council shall provide for the payment of the amount agreed upon for such interest, either in one payment or installments, or so much each year as the parties may stipulate."

The arrangement by which sick or disabled inhabitants of municipal corporations are received and cared for in institutions not owned by the municipality is contractual, and the scope and extent of the rights and privileges accruing are necessarily dependent upon the terms of the contract between the municipal authorities and the authorities of the hospital.

It would be competent for such authorities to contract for the admission and care of such inhabitants of the municipality as are proper objects of admission, under the rules and regulations of the hospital, and in which event, admission of persons contrary to the rules of the hospital could not be required or enforced.

The authorities of the municipality would be authorized to provide by contract for the care and treatment of persons afflicted with contagious diseases at a hospital adapted to their treatment, but it appears from the letter of Dr. Snyder, that the treatment of such patients was not included within the terms of the contract with the hospital referred to in your inquiry.

Section 4441, G. C., provides, in part:

"No person suffering from, who has been exposed to, or is liable to become ill of, small-pox or other contagious disease or infectious disease may be sent to or admitted into prison, jail, workhouse, infirmary, children's or orphans' home, state hospital or institution for the insane, epileptic, blind, feeble-minded or deaf and dumb or other state or county benevolent institution without first making known the facts concerning such illness or exposure to the superintendent, or other person in charge thereof. * * *"

If the terms of the contract with the hospital spoken of, as subsidized by the city of Toledo, do not provide for the admission and treatment in such hospital of persons affected with the character of disease or affliction mentioned in your inquiry, I am of the opinion that such hospitals are not under obligations to accept such persons under

their contract with the city, but the city may contract for the care and treatment of persons so affected, with any association or corporation having a hospital or other proper place for the isolation and treatment of such cases.

Section 4452, G. C., provides:

> "The council of a municipality may purchase land within or without its boundaries and erect thereon suitable hospital buildings for the isolation, care or treatment of persons suffering from dangerous contagious disease, and provide for the maintenance thereof. The plans and specifications for such buildings shall be approved by the board of health."

Among the enumeration of powers of municipal corporations, such corporations are authorized in section 3646 of the General Code,

> "To provide for the public health, to secure the inhabitants of the corporation from the evils of contagious, malignant or infectious diseases, and to purchase or lease property or buildings for pest houses and to erect, maintain and regulate pest houses, hospitals and infirmaries."

The statutes conferring authority upon the council of municipalities to maintain hospitals or contract for the care and treatment of inhabitants of the municipality who are proper subjects of admission to hospitals, vest a discretion in the council as to the extent and method of the exercise of such authority and, while this authority of council to make such provision is very ample, I am of the opinion that its exercise is not subject to control in the absence of gross abuse by the council.

Section 12787, G. C., provides:

> "Whoever, being a midwife, nurse or relative in charge of an infant less than ten days old, fails within six hours after the appearance thereof, to report in writing to the physician in attendance upon the family, or if there is no such physician, to a health officer of the city, village or township in which such infant is living, or, in case there be no such officer, to a practitioner of medicine legally qualified to practice, that such infant's eye is inflamed or swollen, or shows an unnatural discharge, if that be the fact, shall be fined not less than five dollars nor more than one hundred dollars or imprisoned not less than thirty days nor more than six months, or both."

Section 1367, G. C., provides:

> "The commission for the blind shall make inquiries concerning the cause of blindness to ascertain what portion of such cases are preventable, and cooperate with the state board of heath in the adoption and enforcement of proper preventive measures."

The powers conferred by the foregoing section, upon the commission for the blind, are largely advisory and regulatory.

Section 1237, G. C., provides, in part:

> "The state board of health shall have supervision of all matters relating to the preservation of the life and health of the people, and have supreme authority in matters of quarantine, which it may declare and enforce, when none

exists, and modify, relax or abolish, when it has been established. It may make special or standing orders or regulations for preventing the spread of contagious or infectious diseases, for governing the receipt and conveyance of remains of deceased persons, and for such other sanitary matters as it deems best to control by general rule. It may make and enforce orders in local matters when emergency exists, or when the local board of heath has neglected or refused to act with sufficient promptness or efficiency, or when such board has not been established as provided by law. In such cases, the necessary expense incurred shall be paid by the city, village or township for which the services are rendered."

By the foregoing and other sections of the statutes relating to the state board of health, the said board is given supervision of all matters relating to the preservation of the health of the people, and supreme authority in matters of quarantine; it is authorized to make inquiry as to the causes of disease and the methods for its prevention and suppression; it may make orders looking to the prevention and suppression of diseases, and local authorities are required to enforce the rules and regulations adopted by the board.

The powers conferred upon the state board of health seem to be largely regulatory, except in case of unusual prevalence of contagious disease or similar emergency, or when the local board fails to act, when such board is authorized to take steps for the restriction and suppression of diseases, and in which event the costs incurred are chargeable against the municipality. The authority of the board does not extend to the maintenance of hospitals, nor is the board empowered to direct or control he general policy of municipal authorities in the provision and maintenance of hospitals.

Under the chapter entitled "Poor," sections 3476, et seq., General Code, provision is made for extending aid and medical relief to needy persons whose condition requires it, and the expense thereof is chargeable against the township, municipality or county, as regulated by the provisions of the chapter.

While under all the foregoing sections it would seem that ample authority is provided for the maintenance of hospitals and regulation of matters affecting the public health, yet the administration of the provisions relating to public hospitals is a function of the council of the municipality.

I have to advise, therefore, that there is no authority to compel hospitals receiving contributions from the city of Toledo for caring for the city's sick and disabled inhabitants to receive persons for treatment contrary to the terms of the contract, nor to control the discretion of the council in the exercise of the authority conferred upon it to provide hospitals for the care and treatment of its inhabitants.

I would suggest that local medical organizations are usually active and effective agencies in the interest of the requisite hospital facilities for the proper care and treatment of those whose condition requires the accommodations of such institutions, and by calling to the attention of the organizations of the physicians of Toledo, the conditions of which you speak, a remedy may be greatly promoted.

Respectfully,

EDWARD C. TURNER,

Attorney General.

331.

AMENDED HOUSE BILL No. 453—EFFECT OF CERTAIN PROVISIONS RELATING TO SALE OF PUBLIC BONDS

Section 2294, *G. C., as amended by house bill No.* 453, *is broadened so as to govern the advertisement and sa'e of township bonds, if its provisions are consistent with amended senate bill No.* 220, *passed but not signed at this writing; but if said amended senate bill No.* 220 *does not become a law the section will be inconsistent with section* 3295, *G. C., and related statutes.*

Section 2295, *G. C., is so amended by the bill as to give to county commissioners, and other au'horities to which it relates, the right to sell at private sale bonds once advertised and not sold, at not less than par and accrued interest; and to require that premiums and accrued interest received from the sale of such bonds shal go to the sinking fund instead of the improvement fund.*

The bill amends sec'ion 3914, *G. C., by requiring hat municipal assessment bonds shall not be issued until the assessments are made. Such amendment is not made necessary by article* XII, *section* 11 *of the constitution, and is inconsistent with the policy of the state statutes relative to special assessments, with certain sections of which it would be in direct conflict.*

The bill so amends sections 4228 *and* 4229, *G. C., as, general y speaking, to clarify the language of these sections, though it leaves something to be desired in this respect, particu'arly in that section* 4229, *as amended by the bill, is inconsistent with section* 3924, *G. C.*

The bill amends section 7626, *G. C., so as to take from boards of education the power to dispense with advertising bonds for sale.*

The bill changes section 7627, *G. C., so as to permit bonds to be dated at a fixed ime and to bear interest from date, but balances this change by requiring that they be sold for not less than par and accrued interest.*

The bill provides for the making of deficiency tax levies in the case of municipal assessment bonds, and bonds issued in anticipation of the collection of special assessments or special taxes by county commissioners. As to the municipal assessment bonds there is no change in the substantive law. As to the county bonds the law is changed, and the effect of the new provision would be to remove all questions which might arise under article XII, *section* 11 *of the constitution, and to promote the marketability of such county bonds.*

COLUMBUS, OHIO, May 4, 1915.

HON A. R. GARVER, *Chairman Senate Taxation Committee, Eighty-First General Assembly, Co'umbus, Ohio.*

DEAR SIR:—You have asked me to examine amended house bill No. 453, Mr. Lustig.

This bill amends several sections of the General Code, all bearing upon the sale of public bonds. The amendments, however, are various in their nature, there being no one purpose discernible in all of them.

The amendments to section 2294 disclose the following changes:

> "The scope of the section is broadened so as to include bonds issued by township trustees."

General authority is conferred upon township trustees to issue bonds by section 3295, General Code, which is to be read in connection with sections 3939 et seq., of

the General Code, which latter sections are applicable primarily to municipal corporations. Section 3295, General Code, formerly made the provisions of this group of sections of the Municipal Code, familiarly known as the "Longworth law," generally applicable in the issuance and sale of township bonds However, this section has been amended at this session by amended senate bill No. 220, which has been passed but has not yet been signed by the governor. This bill, if it becomes a law, will strike out of original section 3295 the provision that the municipal statutes applicable "in the issue and sale of bonds for specific purposes" shall apply to the trustees of townships and will substitute the following sentence:

> "Such township bonds shall be advertised and sold in the manner provided by law."

This change in section 3295 makes it necessary to provide somewhere by law for the manner of selling township bonds. Therefore, it seems appropriate that section 2294, which is the general section relative to the sale of bonds other than municipal bonds, should be extended in the manner in which amended house bil No. 453 extends it. Should senate bill No. 220 not become a law, however this amendment would produce a conflict with original section 3295 and related sections.

The change in the language, descriptive of the publication to be made, tends to make the statute more specific, and is not open to criticism. The same may be said of other amendments in the section as it is printed in the bill.

In view of doubtful questions which frequently arise respecting the newspapers in which publications may be made, it might be advisable to specify the place of publication or printing of the newspaper in which the publication is to be made. However, it must be said that the bill makes no change in the present law in this particular.

Section 2295, General Code, is amended in two particulars—both of them important, viz.:

(1.) The section gives to county commissioners, boards of education, turnpike commissioners and township trustees the privilege of selling, at private sale, bonds once advertised and offered at public sale, if such private sale is made at not less than par and accrued interest. This provision is found in the statutes applicable to municipal corporations, and there seems to be no valid objection to giving the same privilege to the borrowing authorities to whom section 2295 applies. On the contrary, the provision will have the effect of dispensing with fruitless readvertisements involving expense in times when, like the present, it is difficult to dispose of bonds.

(2.) Present section 2295 provides that premiums received from the sale of county, school district and turnpike bonds, shall be credited to the improvement fund. This is wrong in principle, and is properly changed by the amendment so that such premiums are to go to the sinking fund for the retirement of the bonds. The old section made no specific disposition of the accrued interest. The amended section treats such accrued interest like the premiums, i. e., provides that it shal go into the sinking fund.

Amended section 2295 in this respect would be like the municipal law.

A vital and far reaching change is made by the bill in section 3914, by the addition of a sentence to the effect that assessment bonds shall not be issued by a municipal corporation until the assessments are levied.

I am told that this proposed change in the law is due to the feeling that article XII, section 11 of the constitution, as adopted in 1912, has the effect of requiring that all revenues to be available for the payment of the interest and principal of bonds shall be specifically provided for in the legislation under which the bonds are issued, and that in the case of bonds issued in anticipation of the collection of special assessments, the constitution, in effect, requires that the assessments be levied prior to the

issuance of the bonds. So, I understand that dealers in municipal bonds, acting under legal advice, are reluctant to purchase Ohio municipal bonds issued prior to the actual levying of the assessment.

In my opinion, the constitution does not have the above described effect. The requirement of article XII, section 11 of the constitution, in effect, is that in the legislation under which a bonded indebtedness is incurred or renewed, provision shall be made for levying and collecting annually *by taxation* an amount sufficient to pay the interest on the bonds, and to create a sinking fund for their retirement at maturity.

The levying of assessments on specially benefited property is sometimes spoken of as a species of taxation; yet I do not think that it is "taxation" within the meaning of the constitutional amendment. On the contrary, I think that the requirement of the constitution is that the coincidental revenue provision, of which it speaks, shall assert the taxing power in the pure sense; that is, that in the legislation under which the indebtedness is incurred, the exercise of the taxing power for the purpose of producing a *sufficient* amount to meet the interest and sinking fund requirements of the bond issue, shall be provided for. This conclusion is strengthened by consideration of the fact that the provision mentioned in the constitutional amendment is obviously not to be the levy itself, for the levy is to be made, as the section itself intimates, "annually." See on this point Link v. Karb, Mayor, 89 O. S. 326, wherein, in the language of the third branch of the syllabus, it is held:

> "This provision of the constitution does not require that at the time the issue of bonds is authorized there shall then be levied any specified amount or any specific rate, but it does require that provision shall then be made for an annual levy during the term of the bonds in an amount sufficient to pay the interest on the bonds proposed to be issued and to provide for their final redemption at maturity, which levy must be made annually in pursuance of the provisions of the original ordinance or resolution requiring the same. The amount necessary to be levied for the purpose specified is to be determined by the taxing officials at the time the levy is made."

Now the constitution does not mean, in my judgment, that when bonds have been issued the *entire* interest and sinking fund requirements thereof shall be annually met by general tax levies; the emphasis in the constitution is, I think, upon the word "sufficient," for the purpose of the provision is to insure that the tax duplicate of the borrowing district shall be behind all of its bonds in such a way as to guarantee (not necessarily completely furnish), the production of sufficient revenue to pay the interest thereon and retire them at maturity.

In this, the only practical view of the case as it seems to me, the constitution is fully satisfied when, in the legislation under which special assessment bonds are issued, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on the bonds, and to retire them through a sinking fund at maturity; and when in pursuance of the principles laid down in Link v. Karb, supra, the taxing authorities in a given year are proceeding to carry out the mandate of such a coincidental provision, they need not, in my judgment, levy the tax for the full amount of the interest and sinking fund requirements of the bond issue for that year, if there is (available for the payment of such interest, and the accumulation of such sinking fund in that year) revenue produced otherwise than by taxation, as by the assessments themselves; or, for example, by accumulations to the sinking fund through the contribution thereto of premiums, and accrued interest received from the sale of bonds. In other words, in the case of assessment bonds all that is required to comply with article XII, section 11, is a deficiency levy of general taxes. This, as to municipal corporations, is required by existing statutes relative to the maintenance of a sinking fund and the duties of the sinking fund trustees of municipal corporations.

This result is also promoted by section 3914-1, as framed in the bill now under examination. I believe this section to be wholly unnecessary, but it is at the most merely declaratory of the law in its present state.

I have gone into detail in discussing the *necessity* of the change in section 3914 which the bill makes, because if there is any such necessity for such a change as has been suggested and considered, the practical objections thereto would be overridden by such necessity. I may say in this connection that my predecessor, Hon. Timothy S. Hogan, expressed the same views which I have just stated in an opinion to the bureau of inspection and supervision of public offices.

Being certain then that there is no necessity for amending section 3914 in the manner in which the bill seeks to amend it, I pass to the question as to the policy of the amendment. On this point there are serious objections to the change. In the first place, the amended section would be inconsistent with at least three express provisions of the law relative to special assessments, which are left untouched by the bill. I refer to section 3817, General Code, which provides as follows:

> "Section 3817. When bonds are issued in anticipation of the collection of the assessment, the interest thereon shall be treated as part of the cost of the improvement for which assessment may be made. If such assessment or any installment thereof is not paid when due, it shall bear interest until the payment thereof, at the same rate as the bonds issued in anticipation of the collection thereof, and the county auditor shall annually place upon the tax duplicate the penalty and interest as therein provided."

to section 3896, General Code, which provides as follows:

> "Section 3896. The cost of any improvement contemplated in this chapter shall include the purchase money of real estate, or any interest therein, when acquired by purchase, or the value thereof as found by the jury, when appropriated, the costs and expenses of the proceeding, the damages assessed in favor of any owner of adjoining lands and interest thereon, the costs and expenses of the assessment, the expense of the preliminary and other surveys, and of printing, publishing the notices and ordinances required, including notice of assessment, and serving notices on property owners, the cost of construction, interest on bonds, where bonds have been issued in anticipation of the collection of assessments, and any other necessary expenditure."

and to section 3892, General Code, which provides in part as follows:

> "Section 3892. When any special assessment is made, has been confirmed by council, and bonds, notes or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, the clerk of the council, on or before the second Monday in September, each year, shall certify such assessment to the county auditor, stating the amounts and the time of payment. * * *"

All of these sections recognize the practice of issuing bonds before the assessments are made, and indeed this is the established practice arising from the very necessities of the case as I shall point out. Of course, it would be impossible to figure the interest on bonds as a part of the total cost of the improvement for which the assessment is to be made if the issuance of the bonds were postponed to the making

of the assessment. Often bonds are offered at one rate of interest, and because of the condition of the market for such investments fail to sell at that rate, requiring amendatory legislation fixing another and higher rate of interest.

But the most serious objection to the change lies in the fact that it is simply impossible to let a contract for an improvement until bonds are issued, as no municipal corporation can make improvements without borrowing money; and it is equally impossible to determine the total cost of an improvement until the work is completed and the contractor's estimates have been allowed; for frequently there are changes in the plans and specifications of an improvement during the progress of the work, the effect of which is either to increase or diminish the cost. Moreover, the engineer's estimate as to the cost of the improvement is often inaccurate, and is not borne out by the bids when they are actually received.

It has been held that the general law requiring the issuance of a certificate that money is in the treasury, and available for the purpose of a contract, does not apply as to the proceeds of special assessment bonds. So, it might be argued that there is no legal impediment in the way of letting a contract before the improvement fund has been provided, when that fund is to be provided by special assessments. But though there may be no legal impediment in the way of such a proceeding, it is very clear to me that there would be a very practical impediment in the way of it, as no contractor would be willing to bid on a public job unless he knew that the fund to pay for his work was in existence or in immediate prospect.

Summing up then, the practical objection to the change in section 3914 is that no assessment can be made until the total cost of the improvement is ascertained. This cannot be done until the work is completed. The work cannot be completed without the issuance of bonds. Therefore, the issuance of bonds should precede the making of the assessment.

It may be answered that municipalities may provide money for the progress of the work of an improvement by issuing notes under section 3915 of the General Code, and then subsequently taking up these notes and issuing bonds under section 3914; and that in this way the issuance of the bonds can be postponed to the making of the assessment. This would not be a sufficient answer to what has been said respecting the requirement that interest on *bonds* (not notes) shall be treated as a part of the total cost of the improvement for which assessments are to be made. But even if this were not so, the cities subject to the municipal code should not, in my judgment, be compelled to have recourse to such a procedure; for short time notes of the character which might be thus issued under section 3915 would bear a relatively high rate of interest as compared to bonds running for a longer period, and in a normal condition of the money market it would be a real hardship in many conceivable cases to have to resort to such an expedient.

For all the foregoing reasons I think there is strong objection to section 3914, at least without amending numerous other related sections of the General Code and making the process of assessment completely open.

Section 4228, as amended in the bill, embodies a distinct improvement on the language of the present Municipal Code sections relative to legal publications. There is some question, however, as to whether the purpose here would not be more completely subserved by amending other related sections, such as 4676 and 6255 of the General Code. A recent decision of the court of appeals of Muskingum county (later reversed by the supreme court) created a great deal of interest in this subject at the opening of the present session of the general assembly, and more than one bill was introduced with a view to clarifying these publication statutes. I refer your committee to house bill No. 336, Mr. Stevens, which deals with this subject in a comprehensive way. The committee may find some valuable suggestions therein along the lines just referred to.

The last sentence of amended section 4228, as printed in the bill, is quite necessary. Some provision of this sort must be made by the present session of the general assembly, as the lack of such a provision has created much confusion.

Of section 4229 it may be said generally that it is amended principally for the purpose of making it consistent with the changes in section 4228, and generally speaking, this purpose is well carried out. However, the section as it is now framed conflicts with section 3942, General Code, relative to the sale of bonds. This conflict was present in original section 4229, and is one of the things which the general assembly, now that it has the opportunity, should correct, either by making some exception to the general language of section 4229, or by amending section 3924. As the situation now stands section 3924 is the specific provision and is of later enactment than section 4229 (that is, both were enacted at the same time as sections of the General Code, but when recourse is had to the state of the pre-existing law it is discovered that the two provisions were enacted in the order named). In this state of affairs section 3924 would prevail over section 4229, but if section 4229 should now be amended, and thus become the law of later enactment, the question would be reopened as to which of the two sections should control. I take it that the whole purpose of the Lustig bill is to clarify the laws relative to the sale of bonds. In this respect its effect would be exerted in the other direction.

The change in section 7626 is a very salutary one. Under the original section bearing this number boards of education were seemingly given some power to dispense with competitive bidding in the sale of bonds. This is against sound public policy. The amendment has the effect of requiring advertisement, in that it provides that the bonds shall be "sold in the manner provided by law." The reference here is to section 2294 as amended in the bill itself. Perhaps it would be better to refer to the section by number.

Section 7627 is amended by the bill so as to conform to the practice and statutes relative to municipal corporations and to other bonds generally. The custom is to offer bonds for sale dated at a time fixed in the resolution or ordinance providing for their sale and bearing interest from that date, and then to require the bidder to pay the interest accrued on the bonds up to the day of delivery. This is what is known as the "accrued interest," and the practice in effect prevents the taxing district from paying interest on money which it has not yet received.

This same object was in the mind of the legislature in enacting original section 7627, and providing that the bonds should bear date of the day of sale and should not bear interest until the purchase money had been paid. Such a provision does not more effectively accomplish the desired result than the provision for sale at not less than par and accrued interest, and is much more awkward from the standpoint of practice.

Section 5630-1 is a very important provision of this bill. There are several kinds of road bonds issued in anticipation of contributions to a common improvement fund fixed in definite proportions from different sources, as a certain portion to be paid by the county, a certain portion to be paid by the township, and a certain portion to be paid by specially benefited property. The most prominent example is the state highway law, which provides for the issuance of bonds to pay the portion of the total cost and expense of an inter-county highway improvement not assumed by the state, which in a normal case are issued in anticipation of the collection of revenues for the creation of a fund, fifty per cent. whereof is to be paid by the county, thirty per cent. by the township and twenty per cent. by the property owners whose property is to be specially assessed. These proportions are fixed at the time the bonds are issued, and should there be any deficiency in the revenues it could only be met by drawing again upon the particular source which happened to be deficient. In other words, no general tax duplicate is behind such bonds. As a consequence thereof there is a serious question as to the status of such bonds under article XII, section 11 of the constitution, and the bonds themselves are not salable—not only on account of this

question, but also because one of the chief uses of bonds of this character is for hypothecation under the laws and regulations of the federal government and several states by banks, etc. Practically all these laws require general tax duplicate bonds, and Ohio bonds of the character just described fail to meet these requirements.

In effect, section 5630-1, as it appears in the bill, provides for a deficiency levy in the same manner that section 3914-1 provides for such a levy in the case of municipal assessment bonds. The difference between the two provisions, however, is that whereas the present law applicable to municipal corporations constitutes special assessment bonds general tax duplicate obligations, in the last analysis the same is not true of the present laws relative to county bonds of the above described character.

Respectfully,
EDWARD C. TURNER,
Attorney General.

332.

ROAD CONSTRUCTION—SECTION 196 OF AMENDED SENATE BILL NO. 125 IS CONSTITUTIONAL.

If it be the desire of the legislature to secure a uniform standard of road construction in the state, then the words "county highway superintendent" should be stricken from line 2255 of amended senate bill No. 125 and the words "state highway commissioner" should be substituted therefor.

COLUMBUS, OHIO, May 5, 1915.

HON. ANTHONY NIEDING, *Chairman Public Highways Committee, Ohio House of Representatives Columbus, Ohio.*

SIR:—Mr. Thacher, of your committee, has requested my opinion as to the constitutionality of section 196 of amended senate bill No. 125, and at his request I am directing the opinion to you.

The section in question reads as follows:

> "Nothing in this chapter shall be construed as prohibiting the county commissioners or township trustees from constructing, improving, maintaining or repairing any part of the inter-county highways within such county or township; provided, however, that the plans and specifications for the proposed improvement shall first be submitted to the chief highway engineer and shall receive his approval; and provided further, that whenever forty per cent. of the mileage of all the roads of any county are improved by the use of gravel, broken stone, slag, brick, cement and bituminous products or the aggregate of any of these, to a standard established by the county commissioners and approved by the county highway superintendent and the county commissioners appropriate an equal sum for the purpose of constructing, improving, maintaining or repairing all or any part of the inter-county highways within such county; then, on request of the county commissioners, the state highway commissioner shall order the apportionment or any appropriation by the state or of any funds available for the construction, improvement, maintenance or repair of inter-county highways, due or to become due and available for such county as state aid, paid into the treasury of said county. The state highway commissioner shall issue his voucher therefor upon the auditor of state against any such fund, and the auditor shall issue his

warrant therefor upon the state treasurer and deliver the same to the treasurer of such county. The sum realized therefrom shall be deposited to the credit of the road fund of said county together with the sum appropriated by such county to be used by the commissioners in the construction, improvement, maintenance or repair of such inter-county highways within the county, in accordance with the plans and specifications of the state highway engineer as herein provided."

It has been suggested that this section is unconstitutional, at least in part, for the reason that while the section is of general nature it does not have a uniform operation throughout the state. While there can be no doubt that the subject-matter of public roads is of a general nature, yet I am unable to say that the section in question is not of uniform operation throughout the state. The particular provision in the section which it has been suggested might be unconstitutional upon the ground above stated is that to the effect that whenever forty per cent. of the mileage of all the roads of any county are improved with certain materials and to a certain standard, then that county's apportionment of inter-county highway funds shall be paid to the county and expended by it instead of by the state highway commissioner, provided the county appropriates an equal sum for use on inter-county highways. The fact that under this section the inter-county highway funds apportioned to some counties may be expended by the county authorities, while in other counties these funds may be expended by the state highway commissioner does not prevent the section from having a uniform operation throughout the state. Any county in the state can qualify to receive and superintend the expenditure of its proportion of inter-county highway money by improving forty per cent. of the mileage of its roads with certain materials and to a certain standard, and by appropriating for use on inter-county highways a sum equal to the state's contribution. If a county does not elect to comply with these conditions or is unable so to do, this fact will not operate to decrease in any way the share of inter-county highway funds apportioned to and expended in that county. The only effect of the failure or inability of a county to meet the conditions in question will be that the county's proportion of inter-county highway funds will be expended by the state highway commissioner instead of by the local authorities. I am therefore of the opinion that the section in question is constitutional.

My opinion has been further requested as to whether or not this section will tend toward securing uniform standard of road construction in the state, and more particularly as to the effect in this direction of the provision found in lines 2254 and 2255, which is in substance that the standard to which forty per cent. of the roads of a county must be improved before the county authorities are to be entrusted with the expenditure of inter-county funds is to be established by the county commissioners and approved by the county highway superintendent. It would seem clear that the effect of this provision will be to destroy uniformity in the state, for under its terms each county in the state may establish a different standard. If uniformity is the thing desired by the legislature, then the standard fixed by the county commissioners should be made subject to the approval of the state highway commissioner instead of the county highway superintendent.

Respectfully,
EDWARD C. TURNER,
Attorney General.

333.

PUBLIC UTILITIES COMMISSION—EXPENSES OF EMPLOYE—TRAVELING TO AND FROM HIS HOME NOT CHARGEABLE TO STATE.

An employe of the public utilities commission stationed at Columbus may not charge or receive expenses incurred while traveling to and from his home.

COLUMBUS, OHIO, May 5, 1915.

The Public Utilities Commission, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication of May 1st, requesting my opinion upon the following matter:

> "Has an employe, whose work consists of office and field work, and whose office is located at Columbus but who has retained his residence at a point outside of Columbus, the right to charge, as a part of his expenses, money spent in going from Columbus to his home and returning therefrom?"

Section 494, G. C., establishes the office of the commission at the seat of government in the city of Columbus.

Section 499, G. C., provides as follows:

> "All expenses incurred by the commission pursuant to the provisions of this chapter, including the actual and necessary traveling and other expenses and disbursements of the commission, their officers and employes, incurred while on the business of the commission, shall be paid from funds appropriated for the use of the commission after being approved by the commission. An itemized statement of traveling expenses shall be sworn to by the person incurring same before payment is made."

Section 614-81, G. C., provides:

> "* * * The commissioners and their assistants, shall receive from the state their actual and necessary expenses while traveling on the business of the commission."

The official residence of the employe inquired about is at Columbus, and not where he resided at the time of his appointment or where he retains his residence after appointment. While all actual and necessary traveling expenses and other disbursements incurred while on the business of the commission is required to be paid by the state, it cannot be said that such employe is engaged in the business of the commission, or traveling in the discharge of his duties, when expending money for traveling from the established office of the commission in Columbus to his home and returning therefrom. The traveling expenses or other disbursements, authorized to be paid by the statute, must be some item of expense directly connected with or relating to the carrying on of the business of the commission in which the employe is engaged.

I am, therefore, of the opinion that the expenses referred to in your communication are not properly chargeable against the state.

Very truly yours,
EDWARD C. TURNER,
Attorney General.

334.

COMMON LAW—FIRE PREVENTION—AUTHORITY TO ESTABLISH INDIVIDUAL LIABILITY FOR DAMAGES RESULTING FROM FIRE CAUSED BY NEGLIGENCE.

At common law, one employing fire as his agency, or upon whose property a fire has been accidentally or without his fault started, who fails to exercise ordinary care under the circumstances to prevent its spread to neighboring property, or one who negligently or carelessly starts a fire, is liable in damages to another for injury to person or property, of which injury such fire or its spread is the proximate cause.

COLUMBUS, OHIO, May 5, 1915.

HON. E. R. DEFFENBAUGH, *State Fire Marshall, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a letter from the Cleveland Chamber of Commerce, requesting my opinion as follows:

> "The committee on public safety of this chamber, of which I am chairman, has been considering for sometime the question of the advisability of legislation which would aid in decreasing the annual loss of life and of property through fire in Ohio.
>
> "It is our belief that the first step toward this end lies in calling the attention of those through whose negligence fires result to their liability under the common law rather than in the placing of an additional law in our statute books.
>
> "On behalf of the committee on public safety of the Cleveland Chamber of Commerce, I respectfully request from you a statement on the form of a brief synopsis of the common law, which establishes individual liability for damages resulting from fire caused by negligence. I am informed that there have been several decisions in point, one of which is Adams v. Young, 44 O. S., 80.
>
> "You will appreciate that since in a large part the value of any law which, by establishing individual liability for damage resulting from fires caused by negligence, attempts to prevent our fire waste, would lie in its moral effect and that moral effect would be dependent upon the publicity given it, a concise statement of the liability existing under the common law, which statement can be printed upon such letter heads, notices, etc., will be of very great value.
>
> "It is our hope that this matter may receive your early attention."

In view of the present public interest and concern in the subject of fire prevention, and the important service in conserving life and property of Ohio citizens, which the Cleveland Chamber of Commerce is endeavoring to accomplish, I believe it my duty to lend all assistance possible.

In order, however, to keep within the rule of this department, restricting the furnishing of opinions and advice to such officers and departments of the state as are by law entitled to receive the same, I have addressed to you my reply to the question submitted, and I am sending a copy of the same to the Cleveland Chamber of Commerce.

There are court decisions without number, as well as comments of numerous text writers, in reference to the common law liability of individuals for damages resulting from fire by their negligence, I take it, however, from the letter of Mr. C. H. Patton, chairman of the committee on public safety, and from the conference with Mr. John P. Phillips, the assistant secretary of that organization, that the desire is to secure in as brief form as possible a statement of the law governing such liability, and I therefore submit the following rule, which I trust will answer its purposes, viz.: At com-

mon law, one employing fire as his agency, or upon whose property a fire has been accidentally or without his fault started, who fails to exercise ordinary care under the circumstances to prevent its spread to neighboring property, or one who negligently or carelessly starts a fire, is liable in damages to another for injury to person or property, of which injury such fire or its spread is the proximate cause.

Respectfully,
EDWARD C. TURNER,
Attorney General.

335,

WHERE SCHOOL DISTRICT RECEIVES MORE THAN AMOUNT TO WHICH IT IS ENTITLED FROM STATE AID FOR WEAK SCHOOL DISTRICT—AMOUNT MAY BE DEDUCTED FROM FUTURE STATE AID CONTRIBUTIONS.

If a school district receives more than it is legally entitled to from state aid for weak school district, an adjustment may subsequently be made by deducting from subsequent amounts to which it is entitled, the amount illegally receivd.

COLUMBUS, OHIO, May 6, 1915.

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

DEAR SIRS:—Under date of April 21, 1916, you replied to a letter addressed to you by this department, under date of April 16th, in which letter was submitted a letter received from Hon. Addison P. Minshall, prosecuting attorney, Chillicothe, Ohio, received under date of April 14th, relative to a certain finding for $197.14, made against the board of education of Harrison township, Ross county, being an amount held by your bureau to be in excess of the amount of state aid for weak school districts, to which said Harrson township school district was entitled. Your letter is to the following effect:

> "We are in receipt of a letter addressed to you from Hon. Addison P. Minshall, prosecuting attorney, Chillicothe, Ohio, in which he recommends that a finding of $197.14 against the board of education of Harrison township, Ross county, Ohio, for excess state aid, be cancelled, because the district is unable to pay the same.
>
> "In opinion No. 236, given by your department April 14, 1915, the auditor of state is instructed to correct errors in the payment of state aid, either by making a draft on the district or by withholding an amount necessary to correct the error in case too much money has been sent, or by paying an amount necessary to correct the error in case insufficient amount has been paid. This opinion, however, is a construction of section 7596, as amended 103 Ohio laws, page 277. The finding was made under the section before amended, hence it may not be considered as applying. We are assuming, however, that the correction may be made under this opinion, and if so, the finding could be cancelled at the time the amount is deducted from the next payment of state aid. We would be glad to have a ruling on this question."

You request an opinion as to whether or not, when a school district entitled to state aid has received an amount in excess of that to which it is entitled, the auditor of state can correct the matter by withholding from future state aid the amount so paid in excess.

Under the law relative to state aid for weak school districts, provision is made

for the amount to which each school district may be entitled, as ascertainable by the provisions of such law and it is contemplated that such a school district shall not receive more than that to which the law entitles it. Having received more, it is to that extent unjustly enriched, and in order to correct the error in the payment of such state aid, I am of the opinion that the auditor of state should withhold from future state aid given to such school district an amount equal to the amount which the said school district has received unlawfully, and that the principles set forth in opinion No. 236, given to your department April 14, 1915, would be applicable, as above set forth, to section 7596, G. C., prior to the amendment found in 103 O. L., page 277.

Respectfully,
EDWARD C. TURNER,
Attorney General.

336.

BOARD OF EDUCATION—COUNTY SCHOOL DISTRICT—CANNOT EMPLOY ATTORNEY OTHER THAN PROSECUTING ATTORNEY.

The board of education of a county school district has no authority in law to employ counsel other than prosecuting attorney of the county.

COLUMBUS, OHIO, May 6, 1915.

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

GENTLEMEN:—In your letter of March 20th, you request my opinion upon the following questions:

> "Is the county board of education, as created under the provisions of section 4729, vol. 104, O. L., page 136, a school board within the meaning of the provisions of section 2918, General Code, and has it the same power to employ counsel when necessary?"

Section 4679, General Code, as amended in 104 O. L., 133, provides:

> "The school districts of the state shall be styled, respectively, city school districts, village districts, rural districts and county districts."

Section 4728, General Code, as amended 104 O. L., 136, provides in part:

> "Each county school district shall be under the supervision and control of a county board of education composed of five members."

Section 4729, G. C., as amended in 104 O. L., 136, provides for the election and term of office of the members of such board.

The principal function of the county board of education, as above created, is to re-district and supervise the schools of the county district.

Section 4761, G. C., provides, in part, as follows:

> "Except in city school districts, the prosecuting attorney of the county shall be the legal adviser of all boards of education of the county in which he is serving. He shall prosecute all actions against a member or officer of a board

of education for malfeasance or misfeasance in office, and he shall be the legal counsel of such boards or the officers thereof in all civil actions, brought by or against them, and shall conduct such actions in his official capacity. When such civil action is between two or more boards of education in the same county, the prosecuting attorney shall not be required to act for either of them. * * *"

While I am of the opinion that, within the limitations of the above provisions of section 4761, G. C., the prosecuting attorney of the county may act as the legal adviser of the county board of education in the case of an action between the county board and the local board of education of a school district within the county district, the prosecuting attorney cannot represent both boards, and is not required to represent either of said boards. If, in such case, the prosecuting attorney declines to represent either of said boards, or, if he chooses to represent the local board, the question arises may the county board employ counsel other than the prosecuting attorney, to represent it under authority of section 2918, G. C., which provides, in part, as follows:

"Nothing in the preceding two sections shall prevent a school board from employing counsel to represent, it but such counsel, when so employed, shall be paid by such school board from the school fund."

Section 2916, G. C., relates to certain powers and duties of the prosecuting attorney, and section 2917, G. C., provides that the prosecuting attorney shall be the legal adviser of county and township officers, and that no county officer may employ other counsel or attorney except as provided in section 2412, G. C.

Section 1, of article X, of the constitution, provides:

"The general assembly shall provide, by law, for the election of such county and township officers as may be necessary."

The members of the county board of education are not county officers, and the said board is not a county board within the meaning of the provisions of section 2917 G. C., as limited by the above provision of the constitution, and this section has, therefore, no application to a county board of education.

Under the above provision of section 2918, G. C., payment for services rendered to the board of education of a school district by counsel other than the prosecuting attorney must be made from the "school fund" of such district.

The contract of employment would not be within the exceptions to the requirements of section 5660, G. C., provided in section 5661, G. C., and it would, therefore, be necessary that a certificate of available funds be filed with said contract by the clerk of said board.

The authority of the local board, in the case above referred to, to employ counsel other than the prosecuting attorney to represent it, provided it has sufficient funds in its treasury available for such purpose, is clear, but the county school district has no school fund within the meaning of section 2918, G. C., out of which counsel, other than the prosecuting attorney, might be paid by the county board of education for services rendered to said board, and there is no authority in law to create such fund.

I am of the opinion, therefore, that the county board of education may not employ counsel other than the prosecuting attorney of the county.

Respectfully,
EDWARD C. TURNER,
Attorney General.

337.

COUNTY AUDITOR'S OFFICE—DEPUTIES AND CLERKS WHO OFFER TO PERFORM THE SERVICE OF PREPARING TAX LIST AND DUPLICATE FOR DISTRICT ASSESSOR MAY DO SO UNDER CERTAIN CONDITIONS—EFFECT ON TAX LIST—RIGHTS OF ASSISTANTS IN DISTRICT ASSESSOR'S OFFICE—DEPUTIES IN AUDITOR'S OFFICE MAY CONTINUE TO RECEIVE REGULAR SALARIES AS SUCH DEPUTIES—NO COMPENSATION FOR PREPARING TAX LIST.

If the deputies and clerks in the office of a county auditor, who, though regularly and continuously employed as such, have at a certain time of the year a relatively great amount of spare time, and offer to perform the service of preparing the tax list and the duplicate and triplicate copies thereof for the district assessor; and the district assessor, willing to avail himself of such offer, desires to dispense with the services of assistants, clerks and other employes in his office and in the classified civil service, who would otherwise do such work; with respect to such arrangement, it is held:

(1) *That if carried into effect it would not affect the validity of the tax list or that of the duplicate and triplicate thereof, if kept in the proper offices and properly certified to by the district assessor.*

(2) *That the assistants, clerks and employes of the district assessor whose positions are in the classified civil service have no rights under the Warnes Law or the civil sevice law, which would prevent the district assessor from dispensing with their services in order to carry out the arrangement.*

(3) *That the deputies and clerks in the office of the county auditor may continue to receive their regular compensation as such for the time within which they are employed under such an arrangement, if the discharge of their duties as deputies and clerks of the auditor is not in any way interfered with and if they receive no compensation for working on the tax lists.*

COLUMBUS, OHIO, May 6, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of May 3d, enclosing copies of communications addressed to the commission by the district assessors for Hamilton county and the auditor of Hamilton county, respectively.

The letters referred to disclose the following facts:

The auditor of Hamilton county has a certain number of deputies and clerks, for the annual salaries of whom allowance has heretofore been made by the commissioners of that county. In order to secure competent men it is necessary that these deputies and clerks be continuously employed, although the need of their services is acute only at certain periods of the year. During the spring and summer months they are not very busy.

The district assessors for Hamilton county last year employed a considerable force of clerks and assistants in the preparation of the tax list, the auditor's duplicate and the treasurer's triplicate, and these men so employed, being under civil service, are now available for service in this capacity, although they are not at present working.

The clerks and assistants last year employed by the district assessors were inexperienced. They consumed several months in doing the work allotted to them, whereas the same work had been done by the auditor's force under the prior law in the same number of weeks. They committed numerous errors entailing an inordinate number of corrections in the auditor's office.

For the protection of his own office and in the interest of what is deemed to be public economy, the auditor suggests that the books in question be prepared by the deputies and clerks in his office under the direction of the district assessors, such depu-

ties and clerks to perform such work without neglecting the regular work of the auditor's office and without additional compensation; and that the services of the clerks and assistants in the office of the district assessors, who were employed last year for this purpose, be dispensed with. The suggestion is made upon the understanding that the district assessors are to have control of the making of the lists and that when they are prepared the original list is to be retained in their office, and they are to certify the other lists as having been prepared by them in accordance with law.

The district assessors acquiesce and join in the suggestion of the county auditor.

You advise that the plan above outlined has been submitted to the state civil service commission, which, however, declines to make any official ruling in the premises, but joins with the tax commission in requesting my opinion upon the legal questions involved. As they present themselves to you, these questions are as follows:

> "(1) Would a tax list and its duplicates so prepared be valid, if certified to as their own by the district assessors?
>
> "(2) Would the assistants and clerks of the district assessors, who are under civil service, have any rights under the Warnes law and the civil service law which would prevent this work from being taken from them and performed in accordance with the above described plan?"

To these two questions which you submit, I may add another which has arisen in my own mind, namely:

> "(3) Assuming that no objection is made by the deputies and clerks in the auditor's office and that the work is performed by them voluntarily, would it be lawful for them to receive their compensation as auditor's deputies and clerks from the fee fund of the auditor's office in full for the period of time during which they are partially engaged in performing such services?"

In the consideration of your first question the following statutory provisions may be considered:

Section 5585, General Code, (Section 7 of the Warnes law, 103 O. L., 786):

> "On or before the first Monday of July, annually, the district assessor shall compile and make up * * * lists * * *. Such lists shall be prepared in triplicate. On or before the first Monday in September in each year the district assessor shall correct such lists in accordance with the additions and deductions ordered by the tax commission of Ohio and by the board of complaints and shall certify and deliver two copies thereof to the county auditor. The copies delivered to the county auditor shall constitute the auditor's tax list and treasurer's duplicate of real and personal property for the current year. * * *"

Section 5581, General Code, (Section 3 of the Warnes law):

> "Each district assessor shall appoint such number of deputy assessors, assistants, experts, clerks and employes as may, from time to time, be prescribed for his district by the tax commission of Ohio. Such deputy assessors, assistants, experts, clerks and employes shall hold their respective offices and employments for such times as may be prescribed by the tax commission."

Nowhere in the Warnes law or elsewhere is there any provision specifying the duties of the assistants, clerks and other employes of the district assessor. The law does attach specific duties to the position of deputy assessor; but I take it that none

of the former employes of the district assessors' office concerned in the question now presented are deputy assessors. Moreover, the statutes describing the duties of the deputy assessors do not relate to the preparation of the tax lists.

Inasmuch, then, as the law requires the *district assessors* to make up the tax list and certify to the copies thereof, and inasmuch as the duties of the assistants, clerks and other employes of the district assessor are not fixed by law, two conclusions are at once established:

> "(1) The assistant assessors, clerks and employes are not required to be employed in the preparation of the tax lists.
>
> "(2) If a district assessor, or the members of a board of district assessors, should personally do the work involved in the preparation of tax lists, which is merely clerical in its nature, and should certify to the copies, there would be no question as to the validity of the list and the certified copies thereof."

Now if no law requires that any public employe shall actually do the clerical work of preparing the tax list and duplicates, and inasmuch as the responsibility for the preparation thereof rests upon the district assessor, who discharges his duty in the premises when he, so to speak, produces the required list, it follows, I think, that the district assessor is at liberty to have the clerical work done in any way he sees fit, so long as he does not thereby incur any liability payable from the public treasury. That is to say, if the district assessor chose to dispense with the services of any and all publicly employed clerks and to employ clerks and assistants privately, paying them from his own individual fund, he might use such private employes in the preparation of the tax list and duplicates; and if when such privately employed assistants or clerks had completed their work it was then certified to by the district assessor in his official capacity as the tax list and the duplicate copies thereof prepared by him, no question could be made as to its validity. In the hands of the auditor and the treasurer respectively, the copies of such tax list so certified would have complete virtue in law for all purposes.

The case is not altered by the fact present in the question asked by you, that the clerical work is to be done by other employes of the public acting as volunteers. All that is required to make the tax list and duplicate valid is the certificate of the district assessor, which has the force and effect in law to adopt such lists and duplicates as the work of the district assessor in his official capacity.

I answer your first question, then, in the affirmative.

The answer to your second question is at least partially suggested by what I have already said respecting the duties of the assistants, clerks and other employes. These are not prescribed by law. So, aside from the civil service law at least, such assistants, clerks and other employes have no right whatever to consider the clerical work in the preparation of the tax list and duplicate as in any sense belonging to them.

The civil service law (103 O. L., 698) gives to the state civil service commission with respect to the county service authority to put into effect rules for the classification of offices, positions and employments (section 486-9—section 9 of the act), and to ascertain the duties imposed by law *and practice* upon each employe in the classified service, and to establish grades of service based upon similarity of duties and salaries (section 486-18—section 18 of the act).

Without discussing the effect of these provisions of the civil service law in detail it is sufficient to state that no inference can be drawn therefrom, to the effect that there is any authority in the civil service commission to prescribe the duties of a given position. The investigations, classifications and rules of the commission are to be made solely for the purpose of enabling it to conduct examinations—in other words, to enforce the substantive provision of the civil service law. So that where the general

law by necessary inference gives to the head of a department power to prescribe the duties attaching to a given position, such a result is not affected by any provision in the civil service law.

Of course, the abuse by the head of a department of a power of this character for the purpose of evading the civil service law or violating its spirit is guarded against by other provisions of the civil service law (see section 22 and section 26 of the civil service law); but in the case submitted to me through the commission the facts are such as completely to negative any idea of possible abuse of the civil service law.

I am confident that the civil service law could not be given the effect of requiring the head of a department to find work for an employe in civil service whom he considered to be unnecessary. So, to refer again to an illustration once used in this opinion, if an incoming district assessor should find in his office an employe who had been used by his predecessor in the preparation of the tax lists; and if such district assessor would be willing to do this work with his own hands, and should feel that on that account the services of such a clerk would be unnecessary, the civil service law would not prevent the district assessor from doing the work and dispensing with the services of the employe.

Section 17 of the civil service law (section 486-17, General Code) relates to reductions, suspensions and removals, and provides as follows:

> "No person shall be discharged from the classified service, reduced in pay or position, laid off, suspended or otherwise discriminated against by the appointing officer for religious or political reasons. In all cases of discharge, lay off, reduction or suspension of a subordinate, whether appointed for a definite term or otherwise, the appointing officer shall furnish the subordinate discharged, laid off, reduced, or suspended with a copy of the order of discharge, lay off, reduction, or suspension, and his reasons for the same, and give such subordinate a reasonable time in which to make and file an explanation. Such order together with the explanation, if any, of the subordinate shall be filed with the commission.
>
> "Nothing in this act shall limit the power of an officer to suspend without pay, for purposes of discipline, a subordinate for a reasonable period, not exceeding thirty days; provided, however, that successive suspensions shall not be allowed."

For reasons which I have already suggested, I am of the opinion that the fact that the services for which a clerk, assistant or employe had been originally brought into the civil service were unnecessary, and indeed the mere fact that the head of the department might deem such services unnecessary, would be a sufficient reason for discharge or lay off under the above section.

For all the above reasons I answer your second question in the negative.

The third question, which is one I have myself suggested, is answered in the specific case submitted by the statement that the proposed arrangement does not contravene the county officers' salary law. It is perhaps true as a general rule that a deputy or other employe of a county officer, the compensation of whom is payable from the fee fund of the office under allowance made at the beginning of the official year by the county commissioners, is employed solely for doing work pertaining to that office, and may not lawfully be paid out of such fund for doing work of any other kind; but this rule cannot be carried so far as to prevent such an assistant or deputy from doing outside work and continuing to receive his compensation, if the doing of such work in nowise interferes with the performance of the services for which he is being paid out of the public treasury.

The arrangement upon which I have expressed my opinion, as I understand it, is that the auditor's deputies and clerks are not, on account of the preparation of the

tax list and duplicates for the district assessors, to absent themselves from their post of duty at the auditor's office during business hours; nor are they to do the clerical work for the district assessors to the exclusion of such work in the auditor's office as may fall to their lot at this season of the year. They are merely to work on the books for the district assessors when they are not busy with the affairs of the auditor's office.

The auditor's deputies and clerks are not to receive any compensation attributable to the performance of the services in question. In fact, technically, they will perform such services voluntarily and without compensation therefor.

Therefore, I am of the opinion, as heretofore stated, that it would be lawful under the county officers' salary law for the deputies and clerks in the auditor's office voluntarily to do the work contemplated by the above described arrangement, and that the doing of such work would not in any way affect their right to receive the compensation prescribed for them under the salary law.

The questions which I have considered are the only ones which have occurred to me.

I am, therefore, of the opinion that the arrangement as above outlined may lawfully be made and carried into effect.

Respectfully,
EDWARD C. TURNER,
Attorney General.

338.

COUNTY COMMISSIONERS—NOT AUTHORIZED TO BORROW MONEY UNDER SECTION 5656, G. C., TO MAKE UP A DEFICIENCY IN THE CHILDREN'S HOME FUND FOR CURRENT HALF YEAR—APPROPRIATION FOR SUCCEEDING HALF YEAR REQUIRED AND EXPENDITURES MUST BE WITHIN SUCH APPROPRIATION.

The provisions of section 5656, *G. C., do not authorize the commissioners of a county to borrow money to make up a deficiency in the children's home fund for the current half year.*

While section 3104, *G. C., as amended in* 103 *O. L.,* 893, *requires the trustees of a county children's home to file an annual report of the conditions of the home, and, at the same time, a carefully prepared estimate, in writing, for the wants of the home for the succeeding year, it is still the duty of the county commissioners of such county, at the beginning of each fiscal half year, to make an appropriation from the children's home fund, and the expenditures for said home for the succeeding six months must be kept within said appropriation as required by sections* 5649-3d *and* 3106, *G C.*

COLUMBUS, OHIO, May 6, 1915.

HON. ROBERT C. PATTERSON, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR —I am in receipt of your letter of April 28, 1915, which is as follows:

"The trustees of the county children's home are in need of additional funds to maintain the institution. The condition is due to the fact that the amount allowed by the budget commission for the support of the institution in each of the years 1913 and 1914, was insufficient for that purpose, owing to an abnormal number of children having to be admitted and cared for in each of the years, and the budget was fixed on the old attendance.

"The trustees and county commissioners have not followed the requirements of the statutes (General Code, 3104 to 3106), in filing a report and es-

timate, and making an appropriation within which amount the expenses must be kept; but the semi-annual distribution of taxes has been placed to the credit of a children's home fund, out of which warrants were paid on the trustees' order. In meeting the increased cost of maintenance, the trustees have anticipated future semi-annual distributions, until now their fund will soon be exhausted.

"Under these conditions, can the county commissioners borrow money by authority of General Code 5656 to meet the cost of supporting the children's home as the indebtedness accrues, so as to change the form, but not increase the amount?

"In the opinion of the attorney general, dated March 8, 1913, it was held that General Code section 5649-3d limits only the expenditure of *current revenue, and* does not restrain the expenditure of *borrowed money.* This opinion further holds, that under General Code section 2434, money may be borrowed for the support of the poor and expended regardless of section 5649-3d. While I find no similar section authorizing the borrowing of money for the support of children's homes, General Code section 3078 imposes a duty on the commissioners to 'provide means by taxation' for the support of such homes; and if, from unforeseen conditions, the amount provided by taxation is not sufficient, it seems to me that the provisions of section 5656 should be available.

"The amendment of section 3104 (103 O. L., 864-893), substitutes an annual for a quarterly report by the trustees. As there is no longer a quarterly report upon which to base an appropriation under section 3105, are the commissioners to make a semi-annual appropriation under 5649-3d?"

While you state that the trustees of the Montgomery County Children's Home did not comply with the provisions of section 3104, G. C., as in force prior to its amendment, 103 O. L., 893, requiring said trustees to file with the commissioners of said county a quarterly report of the condition of said home, and a carefully prepared estimate, in writing, of the wants of the home for the succeeding quarter, specifying, separately, the amounts required for each of the purposes therein enumerated, and that said commissioners, at their regular quarterly meetings, at which such reports and estimates were presented to them, did not make quarterly appropriations for the maintenance of said home as required by the provision of section 3105, G. C., in view of the fact that the semi-annual distributions of taxes levied by the commissioners of said county, for the maintenance of said home, were placed to the credit of the children's home fund, and that said commissioners made the proper semi-annual appropriations out of said fund for such maintenance, as required by section 5649-3d, G. C., I do not think that the failure of said officials to comply with the requirements of section 3104, as in force prior to said amendment, and section 3105, G. C., is material as affecting the answer to your first question.

Section 3104, G. C., as amended, now provides:

"The board of trustees shall report annually to the commissioners of the county the condition of the home, and make out and deliver to the commissioners a carefully prepared estimate, in writing, of the wants of the home for the succeeding year. Said estimate shall specify, separately, the amount required for each of the following purposes, to wit: First, maintenance. Second, repairs. Third, special improvements."

While this section, as amended, requires the trustees of the children's home to file an annual report of the condition of the home and, at the same time, a carefully pre-

pared estimate, in writing, for the wants of the home for the succeeding year, I am of the opinion, in answer to your second question, that it is still the duty of the county commissioners to make semi-annual appropriations from the children's home fund and that the expenditures for said home for the succeeding six months must be kept within said appropriation as required by section 3549-3d, which provides:

> "At the beginning of each fiscal half year, the various boards mentioned in section 5649-3a of this act, shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury, from the collection of taxes, and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget, nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

The same limitation is placed upon the trustees of the home by the provision of section 3106, G. C., which is as follows:

> "The trustees shall contract no debts and make no purchases in excess of the amount so appropriated."

You state that the trustees of the children's home, in meeting the increased cost of maintenance of said home, have anticipated future semi-annual distributions of taxes, with the result that their allowance for the six months commencing March 1, 1915, is almost exhausted, and in view of this fact, you inquire whether the county commissioners can borrow money under authority of section 5656, G. C., to meet the cost of maintaining said home "as the indebtedness accrues" during the remainder of the current half year.

The contracting of any indebtedness by the trustees of said home, in the absence of an appropriation by the county commissioners, of sufficient money for such purpose, would be a plain violation of the provisions of section 3106, G. C.

I understand, however, that the county commissioners, in making semi-annual appropriations from the children's home fund, have anticipated future semi-annual tax distributions in contravention of the provision of section 5649-3d, G. C., and that the trustees of the home have not violated the provisions of section 3106, G. C., by contracting indebtedness beyond the semi-annual appropriations made by said commissioners.

The county commissioners had no authority in law to appropriate any of the money realized from the collection of taxes for the first half of the year 1914, levied for the maintenence of the children's home, to be used by the trustees of the home for the payment of any indebtedness incurred prior to March 1, 1915. In so doing they violated the plain provision of section 5649-3d, G. C.

I appreciate the embarrassing situation confronting the county commissioners, but, from your statement of facts, it is evident that this situation arises on account of the failure of the commissioners to properly estimate the needs of the children's home for the years 1913 and 1914, and their consequent failure to make a sufficient levy as authorized and required by section 3078, G. C., for the maintenance of said home for said years, and not on account of the inability of the commissioners to make a levy sufficient for such maintenance, because of the limitations of the statutes governing tax levies. You call attention to an opinion of my predecessor, Mr. Hogan, rendered to Hon. Eli H. Speidel, prosecuting attorney of Clermont county, under date of March 8, 1913, with special reference to the following:

"The Smith one percent. law, section 5649-3d, provides that, all expenditures for a given period of time shall be made from and within the appropriations required by the section.

"I have in other opinions held that this section imposes an absolute limitation upon the amount which may be expended by the county commissioners for any purpose other than one for which money may be borrowed. That is to say, it has been, and still is my opinion, that if the county commissioners are authorized to borrow money for a particular purpose, they may, through the exercise of the borrowing power, expend more money in a given half yearly period than is permitted to be expended by section 5649-3d. Stating it still in another way, section 5649-3d limits the power of the commissioners to expend current revenues only and does not restrain the expenditure of borrowed money."

The question asked by Mr. Speidel was as follows:

"May the county commissioners borrow money for the purpose of supporting the county infirmary when the funds raised by taxation for that purpose are exhausted?"

Mr. Hogan held that, so far as the Smith one per cent. law is concerned, money borrowed under section 2434, for the relief or support of the poor, may be expended, without reference to any appropriation made by the county commissioners, and that the commissioners of Clermont county were therefore authorized to meet the indebtedness incurred for the support of the poor by borrowing money and issuing bonds under said section.

There is nothing in this opinion that leads me to conclude, in view of your statement of facts, that the commissioners of Montgomery county can borrow money under section 5656, G. C., to make up a deficiency in the children's home maintenance fund for the current half year. On the contrary, it seems to me, said opinion warrants the opposite conclusion in view of the fact that there is no statutory provision expressly authorizing county commissioners to issue bonds and to levy a tax to pay the interest on said bonds and provide a sinking fund for their retirement at maturity, for the purpose of providing a fund for the maintenance of the children's home, in addition to the fund realized from the semi-annual distribution of the annual tax levy for such maintenance.

Answering your first question, I am of the opinion that the commissioners of Montgomery county cannot borrow money under authority of section 5656, G. C., to make up a deficiency in the children's home maintenance fund for the current half year.

The unfortunate situation confronting said board of county commissioners is due not to a lack of lawful authority on the part of said board to provide sufficient funds to maintain the children's home of said county, but to the failure of said board to comply with the requirements of section 5649-3d of the General Code, above quoted, and to fully exercise the authority conferred upon it for said purpose by the provision of section 3078, G. C.

I might suggest that, if there is a surplus in any other county fund, except the proceeds or balances of special levies, loans or bond issues, not needed for the purposes of such fund, the county commissioners may, on an order of the common pleas court, upon application made under authority of section 2296, G. C., as amended in 103 O. L., 522, and in compliance with the requirements of sections 2297, et seq., of the General Code, transfer such surplus to the children's home fund, but the money realized from such transfer would not be available for appropriation until September 1, 1915, for the reason that on March 1, 1915, the county commissioners, in compliance

with the provisions of section 5649-3d, G. C., made an appropriation for the maintenance of the children's home "from the moneys known to be in the treasury from the collection of taxes" levied for such purpose, and from "all other sources of revenue" applicable to said purpose, and said section requires that "all expenditures within the following six months shall be made from and within such appropriations and balances thereof."

Respectfully,
EDWARD C. TURNER,
Attorney General.

339.

MEMBER OF BOARD OF TOWNSHIP TRUSTEES—REMOVAL FROM TOWNSHIP IS NOT ABANDONMENT OF OFFICE—TEMPORARY AND PERMANENT REMOVAL DISTINGUISHED—WHAT IS ABANDONMENT OF OFFICE—REMEDY.

A temporary removal by a public officer for a limited time from a district represented and with no intention to abandon or surrender the office or to cease to perform its duties will not be deemed an abandonment of an office.

A permanent removal by a public officer from the district represented, will at once, ipso facto, vacate the office.

A refusal or neglect to exercise the functions of an office for so long a period as to reasonably warrant the presumption that an officer does not desire or intend to perform the duties of an office at all, will be held to amount to an abandonment, but it is ordinarily held that such an abandonment does not, of itself, create a complete vacancy and that a judicial determination of the fact is necessary to render it conclusive.

Sections 10-1 *to* 10-4, *inclusive, of the G. C., furnish an appropriate remedy where a public officer is guilty of gross neglect of duty.*

COLUMBUS, OHIO, May 6, 1915.

HON. OTHO M. KENNEDY, *Prosecuting Attorney, Bucyrus, Ohio.*

SIR:—I have your communication of March 1, 1915, inquiring as to whether or not a certain Mr. Stuckey is still a member of the board of township trustees of Lykens township, Crawford county, in view of certain facts set forth in your communication: and also your letter of April 29, 1915, transmitting to me additional information necessary in the preparation of an opinion covering this matter. From these two communications the following state of facts appears to exist:

About April 1, 1914, Mr. Stuckey, who was then a member of the board of trustees of Lykens township, left the township and went to the city of Bucyrus. His family continued to reside in Lykens township until some time between the 15th and the 22nd of September, 1914, when the family also moved to Bucyrus. Since the first day of April, 1914, the board of trustees of Lykens township has held twenty-five official meetings. Mr. Stuckey has attended fifteen of these meetings, and has been absent ten times. Beginning on June 13th, he was absent from three consecutive meetings, and again, beginning on August 1st, he was absent from three consecutive meetings. Since October 3rd, twelve meetings have been held and Mr. Stuckey has only been absent twice during that period. It also appears that on some of the occasions when Mr. Stuckey was present, he would only remain a short time and would leave before the business of the board had been completed. Mr. Stuckey still claims

his residence in Lykens township, and voted there at the election in November, 1914. You inquire as to whether or not, under the above state of facts, Mr. Stuckey still holds the position of township trustee or whether a vacancy has been created.

If a vacancy exists in the office of township trustee, due to the facts above set forth, it is to be attributed to one of two causes, to wit: (1) Removal from the township; (2) Abandonment of the office.

A mere temporary removal for a limited time, from the district represented, and with no intention to abandon or surrender the office, or to cease to perform its duties, will not be deemed an abandonment of an office. Mechem's Public Offices and Officers, section 438.

Temporary absence from the district represented, for the purpose of engaging in business for a limited time, will not amount to an abandonment of an office. Curry v. Stewart, 8 Bush (Ky.), 560.

The above cited case is also authority for the proposition that a permanent removal by an officer from the district represented will at once, ipso facto, vacate the office.

It is impossible to determine from your statement of facts, whether Mr. Stuckey has temporarily removed from the township for the purpose of engaging in business for a limited time, or whether he has permanently removed from the township. I assume, however, from the fact that he voted at the November, 1914, election, that his removal from the township is only temporary, and for the purpose of engaging in business, or for some similar purpose, and if that be the fact, then such removal would not vacate the office. If, on the other hand, it appears from the actual facts, and from Mr. Stuckey's statement of intentions together that his removal from the township is permanent, then that fact would result in rendering the office vacant.

I am of the opinion that so far as Mr. Stuckey's absence from meetings, and failure to remain in other cases until the close of the meetings are concerned, they do not in themselves, constitute an abandonment of the office. A refusal, or neglect to exercise the functions of an office for so long a period, as to reasonably warrant the presumption that an officer does not desire or intend to perform the duties of the office at all, will be held to amount to an abandonment. Mechem's Public Offices and Officers, section 435.

The facts in the case now under consideration do not bring it within the above statement of the law. Even where the refusal or neglect to exercise the functions of the office is for so long a period as to warrant the presumption that the officer does not desire or intend to perform the duties of the office at all, it is ordinarily held that such an abandonment does not of itself create a complete vacancy, but that a judicial determination of the fact is necessary to render it conclusive. Van Orsdall v. Hazard, 3 Hill (N. Y.), 243.

Answering your question specifically, and basing my answer upon the assumption that Mr. Stuckey's absence from the township is only temporary, and for some specific purpose, such for instance, as engaging in business for a limited time, it is my opinion that under the facts stated by you, a vacancy has not been created in the office in question.

Your inquiry is directed solely to the proposition of whether or not the facts related by you and set forth in this opinion, are such as to automatically create a vacancy in the office of township trustee, and the opinion is therefore limited to an answer of your specific question.

The legislature of 1913, in pursuance of the mandate of section 38 of article II of the constitution of Ohio, adopted September 3, 1912, passed an act to provide for the removal of certain officers for misconduct in office. This act is found in 103 O. L., 851, the section numbers being 10-1 to 10-4, inclusive. It is provided in section 1 of the act, being section 10-1 of the General Code, that any person holding office in this state or in any municipality, county or subdivision thereof, coming within the official

classification in section 38 of article 2 of the constitution, who is guilty of certain acts specified in the section, shall upon complaint and hearing, have judgment of forfeiture of said office entered against him. Among the grounds upon which such judgment of forfeiture may be based, are refusal or wilful neglect to perform any official duty, gross neglect of duty and nonfeasance. Other sections of this act relate to the courts having jurisdiction in this matter and to the procedure necessary to secure the removal of a public officer.

The language "who refuses or wilfully neglects * * * to perform any official duty now or hereafter, imposed upon him by law" and "who is guilty of gross neglect of duty * * * or nonfeasance," has not received such a judicial interpretation as to make it possible to determine just what acts on the part of a public officer, or what failure upon his part to act, come within the terms of this statute. In the absence of a judicial definition or interpretation, for instance, of the term "gross neglect of duty," it is impossible to assert with confidence, just what failure to act will constitute gross neglect of duty on the part of a public official within the meaning of the terms as used in this section. The character or nature of the duties to be performed by a board and any excuse which a member of a board might have to offer for his failure to attend all the meetings of a board, might well be considered by the court in determining whether or not his official conduct had been such as to make him guilty of gross neglect of duty.

Many surrounding facts would have a bearing upon the determination of this question, and some of these facts in the particular case are not covered by your letters or within my knowledge, and while not holding that absence on the part of a township trustee from ten out of twenty-five meetings held by the board of trustees during a given period, and failure to remain during the entire session of the board on many of the fifteen occasions when the trustee was present, would, as a matter of law, constitute gross neglect of duty within the meaning of this statute, yet I am of the opinion that in the absence of any proper or valid excuse for such conduct, and especially if it be made to appear that important matters were before the board of trustees for consideration, and that the public business might suffer by reason of the failure of all the members of the board to attend the meetings, it would then be true that such conduct would constitute gross neglect of duty and that the offending official would be liable to have judgment of forfeiture pronounced against him in a proceeding instituted and carried forward under the provisions of the act referred to above.

Respectfully,

EDWARD C. TURNER,
Attorney General.

340.

TORRENS LAND ACT—REGISTRATION OF TITLE—FEES OF COUNTY RECORDER FOR RECORDING DOCUMENTS—FEES PAID ON PRESENTATION OF DOCUMENTS—COMPLETE RECORD OF EVERY CASE SHOULD BE SENT BY CLERK OF COURT TO COUNTY RECORDER.

In land registration, fees of recorder not specially provided for shall be charged as for services in similar cases authorized by law, section 8572-112, G. C. Fees due recorder to be paid on presentation of documents for filing or recording, section 2778, G. C. Clerk of court should demand from applicant necessary fees to cover all disbursements for filing and recording of various documents. Memorandum of disposition of every case should be sent by the clerk to the recorder, section 8572-12, G. C. All surveys ordered by court under section 8572-19, G. C., to be recorded under section 8572-29, G. C.

COLUMBUS, OHIO, May 7, 1915.

HON. ROBERT C. PATTERSON, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—I have before me your letter of April 3, 1915, in which you ask for an opinion relative to certain questions arising under the operation of the land registration act, which is as follows:

"The county recorder has asked me some questions relating to the fees of his office under the registration of land title act, 103 O. L., 914, and as the questions relate to a subject that should be of uniform operation through the state, I am writing to you for your opinion in regard to them.

"1. Section 7 of this act requires the clerk of the court to file in the recorder's office a memorandum stating that the application for registration has been filed, and 'such memorandum shall be recorded and indexed by the county recorder.' The act contains no specific fee for the recorder for this recording and indexing, and we have advised the recorder that he is entitled under the provisions of the act at the bottom of page 958

" 'For filing, recording and indexing any papers or instruments other than those above provided, for any certified copy of record or of any instrument on file in his office, the same fees as may be allowed by law for like services."

to charge the same fees as he would for indexing and recording deeds and mortgages, but the recorder is in doubt as to whether he can demand this fee at the time the instrument is presented for record, under General Code, section 2778. The recorder contends that the bureau of inspection requires him to charge himself with all fees that are entered on his books, and that if they are not paid at the time the instrument is presented he will get in trouble with the next inspector. On page 959 of the land registration act, the following provision is made:

" 'Costs as herein provided may in any case be taxed, and by the court

ordered to be paid by the parties in such manner as to it may seem just and reasonable.'

"It seems to me that unless the provisions of section 2778, requiring the fees to be paid at the time of the presentation of the instrument to be recorded are mandatory, that the costs of this filing and recording could be carried along and paid in the costs of the case; although undoubtedly it would be much better for the recorder's accounts to have it paid at the time of presentation.

"2. The same question arises under section 12, which provides:

" 'As soon as an application is disposed of the clerk shall make a memorandum stating the disposition of the case, and shall send the same to the recorder of deeds of the county, who shall record and index it with the records of deeds.'

"Mr. Jones, in a recent article on this act published in the law bulletin, and which has since been sent out by him in pamphlet form, states that this memorandum is required only in case where the court refuses to register the title. But I am unable to see any ground for such a construction from the language of the statute, and it seems to me that it would be a good thing for the memorandum to be sent down in every case, because it finally closes the record of the old system for keeping the records; and a certified copy of the decree sent down under the seal of the court, as provided in section 23 of the act, begins the new system.

"I would therefore like your opinion in addition to the question as to whether or not the recorder may demand the fee for recording and filing this instrument at the time of its presentation. Also as to whether or not this memorandum is to be sent down in all cases or only in cases where the proceeding in court is dropped.

"3. Section 29 of the act requires the recorder to keep books to be known as 'records of surveys of registered lands,' and I understand the surveys to be kept in this are those ordered by the court under section 19 of the act. The act provides that a plat shall be filed with the application in the common pleas court, and section 22 requires that the decree

'shall contain an accurate description and plat of each separate parcel of the land as finally determined and adopted by the court.'

"As this plat which is required to be in the decree must be entered upon the certificate of registration sent to the recorder, and then also placed upon the owner's duplicate certificate, the provision for recording the surveys ordered by the court seems useless; but for recording such surveys is the recorder entitled to the fees under section 2779 of the General Code?"

Answering your first question, as to the authority of the recorder to charge fees for the recording and indexing of the memorandum noting that application for registration has been filed, which memorandum is to be filed with the recorder by the clerk

of the court, I have to advise that the fee to be charged in this case is governed by the provisions of section 8572-112 of the General Code, to be found on page 958, 103 O. L. the part particularly referred to being as follows:

> "For filing, recording and indexing any papers or instruments other than those above provided, for any certified copy of record or of any instrument on file in his office, the same fees as may be allowed by law for like services,"

resort being had to the above in view of the fact that no special provision is made for fee for the recorder in connection with the recording and indexing of the memorandum provided for in section 8572-7 of the act.

With reference to your inquiry as to the authority of the recorder to perform the above services without receiving the fees at the time the instrument is filed for record, I have to advise that it is provided in section 8572-112, G. C., among other things:

> "For certifying pending suits, judgments, liens, attachments, executions or levies, the officers certifying the same to the recorder shall receive a fee of twenty-five cents, to be paid by the party interested, and taxed in the costs of the case."

Section 2778 of the General Code, after enumerating the fees to be charged for certain services, provides as follows:

> "The fees in this section provided shall be paid upon the presentation of the respective instruments for record (or) upon the application for any certified copy of the record."

The word "or" in parentheses in the above quotation does not appear in section 2778 as printed in the General Code, but was a part of the act as passed in 102 O. L., at page 290.

Under the provisions of section 2778 of the General Code, quoted above, it is clearly made the duty of the recorder to collect the necessary fees upon the presentation of the various records for filing, recording, and so forth, and there is no provision in law authorizing the recorder to disregard the provisions of section 2778, nor in fact is there any necessity growing out of the operation of the land registration act for the disregard of said section.

At the time the original application is filed, the clerk of the court should demand, in addition to the three dollars to be paid to him in full of all clerk's fees, as charges in such proceeding on behalf of the applicant as necessary to cover any disbursements which he will be obliged to make in filing papers with the recorder on behalf of the applicant. I might say that this course has been followed by some of the clerks with whom I have consulted in reference to the matter. For instance, the clerk, at the time of the filing of the application, knows that it will be necessary to file with the recorder the memorandum provided for in section 8572-7 of the General Code, also the memorandum concerning the disposition of the case, provided for in section 8572-12 of the General Code.

Referring to your second question, I have to advise that, from a careful reading of the act referred to, I have been unable to find a basis for the statement that the clerk in certain cases may dispense with the memorandum which under the provisions of section 8572-12, G. C., he is to file with the recorder showing what disposition is made of the case.

Section 8572-12, G. C., which is to be found on page 920 of 103 O. L., is as follows:

> "After the filing of an application and before registration, the land therein described may be dealt with, and instruments relating thereto may be recorded and indexed, in the same manner as if no such application had been filed. As soon as an application is disposed of the clerk shall make a memorandum stating the disposition of the case, and shall send the same to the recorder of deeds of the county, who shall record and index it with the record of deeds."

I would advise, in view of the provisions of the section quoted above, that the memorandum referred to therein is to be sent to the recorder in all cases, and that the fees to be paid to the recorder should be paid on presentation of the memorandum from the sum to be procured from the applicant, as before stated.

Coming to your third question, which refers to the fees to be charged for the recording of such surveys as the court may direct to be made in connection with any land title registration case, I have to advise that, while, as you state, there may be a duplication of the surveys on file in the recorder's office, by reason of the fact that the decree of the court shall contain an accurate description and plat of each separate parcel of land as finally determined and adopted by the court, and that under the provisions of section 8572-29 of the General Code, a copy of the survey shall be filed in the "records of surveys of registered land," yet the provision of section 8572-29 of the General Code, is plain, and the record therein provided should be made in every case where the survey is ordered.

You understand, of course, that this does not apply to every application for the registration of land title, but only in such cases when it is made necessary "for the purpose of determining the boundaries and a more accurate and definite description of the land," as provided for in section 8572.

As there is no express provision in the act for the fees to be charged for recording of the surveys, resort must be had to section 8572-112, G. C., quoted above, where authority is given to charge the same fees as may be allowed by law for like services; and as the survey referred to is in reality a plat, the provision for the payment of fees for the recording of the same is to be found in section 2779 of the General Code, which is as follows:

> "For recording assignment * * * any plat not exceeding six lines, one dollar; and for each additional line, ten cents."

Upon ascertaining from the recorder as to the fees to be charged for the recording of the survey, the clerk should call upon the applicant to provide such recording fees so that section 2778 of the General Code may be complied with when the survey is presented to the recorder for filing and recording.

It is my opinion, therefore, that under the provisions of the act "to provide for

the settlement, registration, transfer and assurance of land titles, and to simplify and facilitate transactions in real estate," to be found in 103 O. L., pages 914 to 960, inclusive, that the recorder, in the absence of express provisions for fees for services, may charge the same fees as provided by law for like services, and inasmuch as under section 2778 G. C., to which no exception has been made in the above entitled act, the recorder is compelled to demand his fees for filing and recording, such fees should be procured by the clerk from the applicant, to be paid to the recorder on the presentation of the various documents offered for filing and recording; that it is the duty of the clerk in every case, as soon as an application is disposed of, to make and send to the recorder a memorandum stating the disposition of the case, in order that said memorandum may be recorded and indexed with the record of deeds.

Respectfully,
EDWARD C. TURNER,
Attorney General.

341.

APPROVAL OF LEASE FOR CERTAIN CANAL LANDS—CITY OF MASSILLON TO L. P. SCHIMKE.

COLUMBUS, OHIO, May 8, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication of May 6, 1915, transmitting to me for my examination a lease to L. P. Schimke, of certain canal land in the city of Massillon, Ohio, valued at $1,666.66.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

342.

DISAPPROVAL OF FINAL RESOLUTIONS FOR CERTAIN ROAD IMPROVEMENTS.

Final resolutions on the following roads, as submitted for approval by the state highway department, are defective:

(1) *Cleveland-Buffalo, Lake county, petition* 852.
(2) *Paulding-Woodburn, Paulding county, petition* 1404.
(3) *Mansfield-Galion, Richland county, petition* 1138.
(4) *Mansfield-Shelby road, Richland county, petition* 823.
(5) *Akron-Cuyahoga, Summit county, petition* 1367.
(6) *Lancaster-New Lexington, Perry county, petition* 894.

COLUMBUS, OHIO, May 8, 1915.

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

DEAR SIR:—I acknowledge the receipt of your communication of May 3, 1915, transmitting to me for my consideration the six final resolutions referred to below. I have examined these resolutions and find them defective for the reasons set forth below, and am therefore returning the same to you without my approval.

(1) Cleveland-Buffalo, Lake county, petition 852;

It appears from an examination of this resolution, including the certificate of the chief clerk of the state highway department, that all the proceedings had by the county commissioners of Lake county have been taken under the inter-county highway law, being sections 1178 to 1231 inclusive, of the General Code of Ohio, but that the money which is to be used in paying the state's proportion of the cost and expense of the improvement is to be taken from the main market road fund. I find no provision of law authorizing county commissioners to engage in a scheme of co-operative road improvement with the state highway commissioner, when the state's proportion of the cost and expense is to be paid from the main market fund. The only statutory authority for co-operation between the state and its several counties, contemplates the expenditures by the state of inter-county highway funds.

(2) Paulding-Woodburn road, Paulding county, petition 1404;

The chief clerk of the state highway department has certified upon this resolution, under date of May 3, 1915, that there has been appropriated from the highway fund of the state highway department the sum of $14,000 to the credit of Paulding county. The improvement in question is an inter-county highway improvement, and under the terms of the current appropriation bill under which your department is now operating, there could not, on the third day of May, 1915, be a sum available for an inter-county highway improvement in any county of the state in excess of $8,874.73. The current appropriation bill carries in effect an appropriation of $8,874.73 for inter-county highway work in each of the 88 counties of the state and by the terms of the bill all balances remaining in the inter-county highway fund on the 12th day of March, 1915, were lapsed so that, as above stated, there could only be in the inter-county highway fund to the credit of Paulding county, on the third day of May, 1915, $8,874.73, assuming that no contingent liabilities had been contracted against the same from the 12th day of March to the third day of May, 1915. Under the circumstances I deem it proper to call your attention to these facts and to go back of the certificate of the chief clerk of the highway department and withhold my approval from this resolution.

(3) Mansfield-Galion road, Richland county, petition 1138;

It appears from the certificate of the chief clerk of the highway department

that the state's proportion of the cost and expense of this work is to be paid from the maintenance and repair fund. I am assuming, therefore, that the contemplated work is in the nature of a repair. I make this assumption for the reason that the maintenance and repair fund, as indicated by its name, can be used only for repair, maintenance, protection, policing and patroling of public highways. It further appears from the face of the resolution that the road to be improved is less than one mile in length and it does not appear that the proposed improvement is an extension of or connected with a permanently improved road, street or highway of approved construction. As before observed, the only indication on the resolution that the improvement contemplated is in the nature of a repair, is found in the certificate of the clerk to the effect that the state's proportion of the cost is to be paid from the maintenance and repair fund. Before approving this resolution, I would therefore thank you to endorse thereon, or attach thereto, a certificate to the effect that the proposed work consists of the repair of an existing highway.

While it will not affect the question of the approval of this resolution, for the reason that the matter will go to the rights of the township and county rather than to the rights of the state highway department, I deem it proper to refer to what seems to be a copy of a resolution adopted March 10, 1915, by the trustees of Madison township, Richland county, a copy of this resolution of the township trustees being attached to the final resolution now under consideration. In this resolution of the trustees they agree to pay "the township's share of the cost of said improvement." Under section 1225 of the General Code, the township's share may be nothing or it may be any amount less than the entire cost of the repair. A determination, therefore, on the part of the trustees of Madison township to pay "the township's share," does not mean anything, or at least is too indefinite to fix the rights between county commissioners and the trustees, for the reason that the law does not fix the township's share of a repair proposition or indeed require them to pay any part of the cost.

(4) Mansfield-Shelby road, Richland county, petition 823;

There is an error in the last paragraph of the resolution. The amount appropriated by the county commissioners, as written in the resolution is "twenty-five thousand, six hundred and 00/100 dollars" where as the amount appropriated by the commissioners, as set forth in figures, is "$20,000.00."

It appears by the certificate of the chief clerk of the state highway department endorsed on this resolution, that there has been appropriated from the highway fund of the state highway department the sum of $15,600.00 to the credit of Richland county. In this connection I desire to refer you to my previous statements in this communication, relative to the resolution in the case of the Paulding-Woodburn road in Paulding county, merely observing that on May 3, 1915, the date of the chief clerk's certificate, there could not have been in the inter-county highway fund to the credit of Richland county, more than $8,874.73.

(5) Akron-Cuyahoga road, Summit county, petition 1367;

It appears that the proceedings had by the county commissioners of Summit county, were under the sections of the Code relating to inter-county highways, whereas the certificate of the chief clerk of your department shows that the state's proportion of the cost and expense is to be paid from the main market road fund. In this connection I refer you to the statements heretofore made in this communication, relative to the resolution as to the Cleveland-Buffalo road.

It also appears on the face of this resolution that the proposed improvement is less than one mile in length and there is nothing on the face of the resolution to show that the improvement is an extension of, or connected with a permanently improved road, street or highway of approved construction. Either of the objections above suggested would be fatal to the validity of this resolution.

(6) Lancaster-New Lexington road, Perry county, petition 894;

The description in this resolution should be corrected to read 1.44 mills instead of 144 mills. In the last paragraph of the resolution and the second line thereof, the word "of" should be stricken out and the words "less than" should be substituted therefor. I suggest that the resolution be returned to the commissioners of Perry county with instructions to make the necessary corrections and then readopt the resolution.

Respectfully,
EDWARD C. TURNER,
Attorney General.

343.

SENATE BILL NO. 187—LIMITATIONS OF SMITH ONE PER CENT. LAW FOR TAX LEVIES DISREGARDED IN PROPOSED BILL.

COLUMBUS, OHIO, May 8, 1915.

HONORABLE FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination amended senate bill No. 187, and have requested my opinion upon the following specific question in connection therewith:

> "Is the levy of taxes, provided in section 3 of the bill, subject to any of the limitations of the Smith one per cent. law, so called?"

The language of section 3, in this particular, is as follows:

> "The resolution authorizing and directing the execution and delivery of said bonds shall provide for levying and collecting annually, by taxation on the taxable property in the county, of an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity, which may be assessed, levied and collected without regard to any limitation or restriction contained in any other law, or laws, upon the amount of taxes which may be assessed, levied and collected."

This language unquestionably has the effect of taking the levies, therein provided for, outside of all the limitations of the Smith law. That is to say, the levy is outside of the fifteen mill limitation as well as of the other limitations of said law. In short, there would be no limitation or restriction whatever upon the taxes which might be levied under this language.

Respectfully,
EDWARD C. TURNER,
Attorney General.

344.

MAYOR OF MUNICIPALITY—JUSTICE OF PEACE—MAY NOT REMIT A PART OF FINE OR PART OF COST WHEN ONCE ASSESSED FOR VIOLATION OF STATUTES—FINES AND COSTS OR FINES ONLY MAY BE SUSPENDED.

Mayors of municipalities and justices of the peace may not remit a part of fine or part of cost when once assessed for violation of statutes. They may suspend both fines and costs or fines only.

COLUMBUS, OHIO, May 8, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—On March 30, 1915, you asked me if mayors of municipalities or justices of the peace have the power to remit fines in cases brought for violation of the statutes. On April 10, 1915, I answered this enquiry, holding that there is no authority for a mayor to remit any fine due to the state of Ohio, subject to the question of the authority of a mayor to revise or modify his judgment in any such cases by proper proceedings for such purposes. I also referred to the opinion of Attorney General Wade H. Ellis on the same question, given on October 24, 1907. You now supplement the question so answered by submitting for my opinion thereon the following facts.

> "1. In some actions the statutory fine has been assessed, together with costs. The magistrate, or mayor, has then *remitted* the whole fine, or all but one dollar, which is less than the minimum fine, collecting the costs. Is this remitting of the fine legal?
>
> "2. In other actions, the statutory fines have been assessed, and the magistrate, or mayor, has then *suspended* the fine, or fines and costs, and no collection of either has been made. Is this permissible?
>
> "3. In still other cases the magistrate, or mayor, has assessed a fine and costs, and has *suspended* all of the fine but one dollar, which is less than the minimum fine, and has collected the one dollar and costs. Please advise if this is in accordance with law."

Answering your first enquiry, I beg to advise that the magistrate or mayor may suspend sentence upon the payment of costs, but in no case can he remit a fine due to the state of Ohio. Neither can the magistrate, or mayor, impose or collect a fine less in amount than the minimum fine fixed by the statutes. The magistrate or mayor has no authority to disregard the express provisions of the statutes as to the amount of the fines he shall impose.

As to your second enquiry, I know of no provision of law that would prevent the magistrate or mayor from assessing a fine and costs and then proceeding to suspend both the fine and costs, or fine only. However, such a course is inconsistent with the proper administration of the law and the maintenance of respect therefor. To exempt one found guilty of violating a statute from paying the costs incurred in his prosecution is not conducive to the preservation of the public peace and welfare and, unless in an exceptional case, is not to be approved.

Your third enquiry involves the same principle as your first. The magistrate or mayor must either suspend the entire amount of the fine, or collect the full

amount thereof as imposed under the letter of the statute under which the prosecution has been brought. It is the duty of the magistrate or mayor to administer the law as he finds it and not to make unauthorized substitution therefor.

Respectfully,
EDWARD C. TURNER,
Attorney General.

345.

REPORT ON FOLLOWING CLAIMS TO FINANCE COMMITTEE OF HOUSE OF REPRESENTATIVES: WALTER WOHLWEND; CITY OF ST. MARYS; CITY OF CHILLICOTHE; DEFIANCE UTILITIES CO.; D. K. WATSON; W. F. GATES AND SUE NOON; THE VAN CAMP PACKING CO.; WEBB C. BALL CO.; T. J. McKIM; CUYAHOGA COUNTY; OHIO LIGHT & POWER CO., NEWARK; CLERK OF COURT OF ASHLAND COUNTY; FRANK YOUNG; RIGHTMIRE AND NIXON, MT. VERNON; JOHN ALBURN.

COLUMBUS, OHIO, May 11, 1915.

HON. FRANK H. REIGHARD, *Chairman Finance Committee, House of Representatives, Columbus, Ohio.*

DEAR SIR:—You have asked me to report to you upon the following claims which have been presented as claims against the state to the finance committee of the house of representatives. The claims are as follows:

Walter Wohlwend, City of St. Marys, City of Chillicothe, Defiance Utilities Co., D. K. Watson, W. F. Gates and Sue Noon, The Van Camp Packing Co., Webb C. Ball Co., T. J. McKim, Cuyahoga County, Ohio Light and Power Co., Newark; Clerk of Court of Ashland County, Frank Young, Rightmire and Nixon, Mt. Vernon, John Alburn.

As to the claim of Walter Wohlwend, I am unable to advise specifically. The papers submitted to me do not show the foundation of this claim. The claimant asserts that he has been damaged by the failure of water power at a certain grist mill on the Ohio canal. Whether or not he is entitled to water power, as a matter of right under a contract with the state; whether or not the failure of the water power was due to any neglect on the part of the state in the maintenance of its public works, and all similar facts are not shown.

It seems clear to me, however, that in any view of the case this claimant should not be allowed, as damages, the cost of supplying other power for the operation of his mill.

I am unable to make any recommendation whatever in this case.

As to the claim of the city of St. Marys, I beg to advise that this is a sewer assessment against lands of the state. While the superintendent of public works should be consulted as to the location of these lands and the benefits to be derived from them by the improvement, I have no hesitancy in advising that if his statements show that the lands have been properly assessed the claim should be allowed.

The claim of the city of Chillicothe is similar to that of the city of St. Marys except that in this case the assessments are for street paving. It appears that the canal property belonging to the state and located in the city of Chillicothe has been abandoned for canal purposes and that the lands in question abut directly upon the improvement. Should the state sell these lands, as it undoubtedly will

ultimately do, the value of the improvement would certainly affect the selling price of the land. The state should, in good conscience, pay these assessments. In my opinion the certificates and plat attached to the papers making this claim are sufficient on their face to show that the claim is a proper one.

The claim of The Defiance Utilities Company is for refund of corporation taxes paid to the state. It appears that the taxes charged and collected from this company were correct in accordance with the report which the company made, but that one of the company's officers made a mistake in the report, which cost this company the sum of $65.00. If this mistake had been discovered within the specified time it could have been corrected by application to the tax commission, as was the case in the matter of The Van Camp Packing Company which will be hereinafter referred to. The state is under no obligation to pay such a claim as this because of the failure of the corporation to act within the time specified in the statute. However, if the circumstances warrant, as for example if the mistake was not discovered in time to make application to the commission, then there would be no impropriety in making an allowance on the theory that the state has collected more taxes than the corporation ought to have paid and is hence under a moral obligation to make the refunder. Primarily, the corporation should seek restitution from its officer whose carelessness gave rise to the over-payment.

The claim of W. F. Gates arises out of a deposit which he was required to make by the Perry county liquor licensing board to cover the cost of a transcript of the proceedings in the hearing of his rejection of an application for a license. The law requires such deposits to be made and to be transmitted to the state board, and requires the state board to pay all moneys received by it daily into the state treasury to the credit of the state liquor license fund. It is the opinion of this department that the last described requirement does not make it necessary to pay moneys of this sort into the treasury, but this was evidently done in the case of this claim. The claimant is now entitled to a refunder not, however, in the full amount of the deposit made by him, but in the amount of the deposit less the cost and expense of preparing the record of testimony and proceedings. Evidently the next claim, that of Sue Noon, represents the cost of preparing such record. Accordingly the applicant, W. F. Gates, has a valid claim in the amount of $79.60 against the state, and the applicant, Sue Noon, if she has not been paid for her services, has a proper claim of $20.40 against the state. The money for the payment of both of these claims, however, should be appropriated from the state liquor license fund and not from the general revenue fund.

The claim of the Van Camp Packing Company is for franchise taxes paid on December 1, 1914, in accordance with the determination of the tax commission, which was subsequently corrected on January 25, 1915. These proceedings are regular, and the company is entitled to a refunder, upon a showing that it actually paid $470.39, in the amount of the difference between said sum and $381.37, which is the amount due under the corrected certification. In my opinion the papers submitted constitute a sufficient showing for an appropriation, but the special auditing committee, which the legislature will doubtless create for the purpose of auditing these claims, should require the state treasurer's receipt showing the payment of $470.39.

The papers submitted to me in the matter of the claim of Webb C. Ball Company do not show sufficient facts upon which to base an appropriation. It appears that this company paid franchise taxes in the amount of $406.50 in the year 1914, and subsequently in 1915 the same company paid $820.00 in settlement of the claims of the state for franchise taxes for the years 1911-1914 inclusive. The records of this department show that there was a confusion of names, and the exact amount which is to be refunded to the Webb C. Ball Company, if any, is uncertain.

At this stage of the proceedings it would be proper, in my judgment, to make an appropriation in the sum of $406.50 to the Webb C. Ball Company and direct the special auditing committee to allow so much thereof as may be recommended by the attorney general and tax commission upon more complete investigation. Otherwise, we would be unable to advise the making of any appropriation.

In the matter of the claim of T. J. McKim it appears that the state highway department has already made a settlement with the claimant and has paid him the sum of $3,455.00 in full of all claims. The issue in this case appears to be one of fact. I am unable to advise, as a matter of law, upon such meager details as have been furnished to me and without consulting the state highway department, that this claim should be paid. The ground of the claim is that the claimant, a contractor, was damaged in a certain amount by the failure of the state to furnish common labor, for the work contracted for, in accordance with the terms of the contract, and that he was accordingly damaged. This matter should be taken up with the state highway department and acted upon in accordance with its recommendation.

The claim of Cuyahoga county is for moneys paid upon forfeited recognizances, no part of which should go to the state treasury. The claim amounts to $1,033.83, and is due to Cuyahoga county from the state.

In this connection, however, I advise the committee that the state has a claim against Cuyahoga county in excess of $17,000.00 for the cost and expense of maintaining patients committed from that county to the institution for feeble-minded. Other counties in the state have paid similar claims, and this department is now seeking to enforce the collection of this claim against Cuyahoga county. So long as Cuyahoga county refuses to pay its obligation to the state it does not seem appropriate that the state should pay its obligation to Cuyahoga county.

The claim of the Ohio Light and Power Company of Newark, Ohio, arises by virtue of the shutting off of the water in the Ohio canal through the sale of a part of the canal located in the city of Newark. The claimant had paid water power rental in advance and is accordingly entitled to a rebate in the sum claimed, which has been approved by the department of public works.

The claim of the clerk of courts of Ashland county is founded upon the provisions of section 5144, G. C., which authorizes the court of appeals, in determining a case of contest of the election of a common pleas judge, to adjudge a part of the cost against the state treasury. The court of appeals, in the trial of the election contest case of Frey v. Graven, ordered that the clerk of courts and the clerk of the board of elections be allowed each the sum of $10.00 for expenses of transferring papers and dockets and election papers. I do not find any authority of law for the allowance of such items as costs in a case of this character. Nevertheless, the court of appeals has made the allowance, and the same is reasonable in amount. I am unable to recommend an appropriation for this claim, yet I cannot advise against the same in the face of the decree of the court.

The claims of Frank Young and Rightmire and Nixon, of Mt. Vernon, arise out of the sale of diseased hogs from the state farm at Mt. Vernon. There is no question, upon the affidavits submitted, but that the representative of the state is responsible for the damage suffered by Mr. Young, and for the damages suffered by those to whom Messrs. Rightmire and Nixon sold some of these animals. The latter named gentlemen have been held by the court primarily responsible for the damages on account of such sales. I observe that the board of administration recommends these appropriations and I concur in the recommendation.

The claim of D. K. Watson for counsel fees for services rendered in the case of State v. Fenn is one concerning which I am unable to make any recommendation to the committee. The records of this department disclose that General

Watson, after the rendition of these services, was paid the sum of $3,300.00, but unfortunately there is no showing as to the services covered by this payment. The amount of the fee is reasonable considering the nature of the services rendered, the only question in my mind being as to whether or not the compensation which General Watson has already received includes these services. Inasmuch as the former allowance was made by the general assembly in 1911 it is suggested that there may be on file the papers of the finance committee of that year and statements which will make this matter clear.

The claim of John A. Alburn is for services rendered under the direction of this department in the administration of Honorable Timothy S. Hogan as attorney general. The records of this department show that these services were rendered and that Mr. Alburn has never been paid for them. It is suggested, however, that General Hogan can be of more assistance to the committee, in regard to this matter, than I can.

Respectfully,
EDWARD C. TURNER,
Attorney General.

346.

COLLATERAL LOAN COMPANIES—NOT AUTHORIZED TO REDUCE CAPITAL STOCK—EACH SHARE OF STOCK REQUIRED TO BE OF FACE VALUE OF FIFTY DOLLARS.

A collateral loan company, organized under sections 9857, 9858, *et seq., G. C., is not authorized to reduce the amount of its capital stock, by reason of the fact that each share of stock is required by law to be of the face value of fifty dollars.*

COLUMBUS, OHIO, May 11, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of May 3, 1915, in which you request my opinion, as follows:

> "This department is in receipt of certificate of reduction of capital stock of The Toledo Savings & Collateral Loan Company, attempting to reduce its capital stock from $400,000.00 to $10,000.00, by reducing the par value of each share from $50.00 per share as required by section 9858 to $1.25 per share. We are transmitting the same and request your opinion upon the following questions in reference thereto:
>
> "(A) May a collateral loan company reduce the authorized amount of its capital stock?
>
> "(B) May a collateral loan company reduce its authorized capital stock to an amount less than $20,000.00?
>
> "(C) May a collateral loan company reduce the par value of its shares to less than $50.00 per share?
>
> "Said certificate of reduction, and fee of $5.00 was received from H. E. French, 606 Summit St., Toledo, Ohio.
>
> "We are temporarily holding said check awaiting your opinion."

The Toledo Savings & Collateral Loan Company is a corporation organized under section 9857, et seq., General Code, which are as follows:

"Sec. 9857. Corporations may be organized for the purpose of making loans on pledges of goods and chattels and upon mortgage thereof; but they shall not receive money on deposit, engage in banking, nor make loans upon security other than herein is provided. The names of such corporations shall begin with the word 'The' and end with the words 'Collateral Loan Company.'

"Sec. 9858. The capital stock of such company shall not exceed five hundred thousand dollars in shares of fifty dollars each. When twenty thousand dollars have been duly subscribed and one-fourth of it actually paid in, the subscribers thereto may organize and transact business."

The above sections of the General Code, together with other following sections of the same act, were designed to authorize the organization and to regulate the business of collateral loan companies.

Under the terms of section 9858 supra such corporations must have a capital stock of at least twenty thousand dollars, divided into shares of fifty dollars each.

Section 8700 of the General Code, relative to the reduction of the capital stock of corporations, provides as follows:

"With the written consent of the persons in whose names a majority of shares of the capital stock thereof stands on its books, the board of directors of such a corporation may reduce the amount of its capital stock and the nominal value of all the shares thereof, and issue certificates therefor. The rights of creditors shall not be affected thereby; and a certificate of such action shall be filed with the secretary of state."

The above section of the General Code was apparently intended to apply to corporations organized under general laws, which are not limited as to the amount of their capital stock or as to the amount or value of each share.

A collateral loan company, by virtue of the section of the General Code under which it is organized, must have a capital stock of at least twenty thousand dollars and each share of its stock must have a face value of fifty dollars. I am unable to understand, therefore, how such a corporation can reduce its capital stock under the provisions of section 8700 of the General Code and still maintain its shares at fifty dollars face value.

In answer to your first question, I am of the opinion, therefore, that a collateral loan company can not reduce the authorized amount of its capital stock.

A negative answer to your second and third questions follows of necessity from my answer to your first question.

I herewith return to you the certificate of reduction of capital stock of The Toledo Savings & Collateral Loan Company.

Respectfully,
EDWARD C. TURNER,
Attorney General.

347.

INDETERMINATE SENTENCE LAW—NO AUTHORITY TO SENTENCE FOR CRIME COMMITTED PRIOR TO PASSAGE OF ACT—ERRONEOUS SENTENCE—HOW TO PREVENT ITS EXECUTION—ELIGIBLE FOR SUSPENDED SENTENCE UNDER SUCH SENTENCE—JURISDICTION OF COURT TO SENTENCE PRISONER IN ABANDONMENT CASES CONTINUES UNTIL MINOR REACHES AGE OF SIXTEEN YEARS.

There is no authority in law to sentence under indeterminate sentence act for crime committed prior to the passage of the act.

Erroneous sentence to the penitentiary should be executed through proceedings in error—habeas corpus will not lie.

Imprisonment in penitentiary under erroneous sentence does not render prisoner ineligible for suspended sentence imposed subsequent thereto.

Jurisdiction of court to sentence prisoner in abandonment cases continues until minor reaches age of sixteen years.

COLUMBUS, OHIO, May 11, 1915.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I have before me your letter of April 1, 1915, in which you ask for an opinion, the same being as follows:

"The board of administration is today in receipt of a letter from P. E. Thomas, warden of the Ohio penitentiary, which reads as follows:

"'Attached please find papers in the case of Estel Judd, serial No. 43133, received November 20, 1914, from Clermont county for the crime of abandoning a legitimate child.

"'This man was sentenced in February, 1912, and the sentence was suspended, but he was not put on probation, hence was not certified to the Ohio penitentiary. He failed to keep his promise with the court regarding the payment of $2.00 or $2.50 per week and was arrested, brought into court and was sentenced to the Ohio penitentiary, either under the old indictment, or the old sentence was put into execution, probably the latter. The sentence appears to be for the unexpired time of the maximum sentence from the date of the sentence, which would cause his release to be effective February 20, 1915.

"'It appears to me from previous cases that when a suspended or probationed sentence is given or allowed for time served upon the same, that the prisoner being committed to the Ohio penitentiary, either by order of the court or the Ohio board of administration, puts the original sentence into execution.

"'Hence I wish to know the status of this man's case: Whether he is to be released immediately or held on the original sentence, the same beginning November 20, 1914.'

"In view of the facts as stated in the warden's letter, the board re-

quests your opinion as to whether Estel Judd, serial 43133, now confined in the Ohio penitentiary, should be released immediately or held on the original sentence beginning November 20, 1914."

With your letter you enclose a transcript of the docket and journal entry in the case of the State of Ohio v. Estel Judd, No. 4097 in the court of common pleas of Clermont county, Ohio; also a letter from Honorable Eli H. Speidel, addressed to Mr. Judd, at Columbus, Ohio, advising Mr. Judd that the sentence received by him in the above styled case should have expired February 20th, last. Mr. Speidel's letter was dated March 27, 1915.

A reading of your letter and an examination of the transcript and journal entry at once suggests the thought that there was a misunderstanding as to just what had transpired in the case under consideration, your letter indicating that the defendant had been sentenced in February, 1912, and that the sentence was suspended. In view of past experience with a number of cases similar to this one, I felt uncertain as to what actually occurred, and I addressed a letter to Honorable Eli H. Speidel, prosecuting attorney of Clermont county, under date of April 2, asking for full information relative to the matter. Under date of May 1, Mr. Speidel advises me as follows:

"Batavia, Ohio, May 1, 1915.

"Dear Sir:—I have your communication of April 29th, concerning the sentence of Estel Judd, an inmate of the Ohio penitentiary, who was committed thereto from this county for the crime of failing to provide for his minor child.

"I was under the impression that I had answered your letter of April 2nd, but I presume that the matter was overlooked, and consequently will endeavor herein to give you the information desired.

"Estel Judd was indicted by the Clermont county grand jury, on October 18, 1911, and on February 19, 1912, was arraigned on said indictment and entered a plea of guilty. The entry on the plea being the following form:

Court of Common Pleas,
"Clermont county, Ohio.

"State of Ohio, Plaintiff,
v.
"Estel Judd, Defendant.

No. 4097.
ENTRY ON PLEA OF GUILTY.

"This day came D. W. Murphy, prosecuting attorney on behalf of the state of Ohio, the defendant Estel Judd being into court in the custody of the sheriff, and his counsel, N. G. Cover, also coming, and thereupon said defendant, Estel Judd, was arraigned upon said indictment, the same being distinctly read to him, and was required to plead thereto, and for his plea thereto saith he is guilty, and he stands charged therein.

"And thereupon the defendant Estel Judd, agreeing in open court that he would pay the sum of $2.00 per week, commencing Saturday 24, 1912, and a like sum thereafter to Edward Tilton, as trustee, of Moscow, Ohio, for the support, care and maintenance of his minor child, Ethel Judd. And that he would within thirty days pay the costs in this case taxed at $----------.

"Said payment of $2.00 per week is to be made until the said Ethel Judd arrives at the age of sixteen years.

"Thereupon the court does suspend sentence herein upon said Estel Judd, upon the condition that he will fulfill the conditions and terms of said agreement above named in open court, otherwise said defendant, Estel Judd, is to be brought before this court as provided by statute for sentence.

"The defendant is hereby ordered released from jail.

"Judd having failed thereafter to comply with the order of the court as to the payment of the $2.00 per week, a capias was issued on September 14, 1914, for his arrest, and he was thereafter apprehended by the sheriff in Cincinnati, Ohio, and was brought before the court on November 13, 1914, for sentence, when the following order was made by the court:

" 'This day came Eli H. Speidel, prosecuting attorney, on behalf of the state of Ohio, the said defendant, Estel Judd being brought into court in the custody of the sheriff. And it being made to appear to the court that heretofore, to wit: On the 20th day of February, 1912, the said Estel Judd was arraigned upon the indictment, and for plea thereto said he was guilty as he stands charged therein.

" 'And it being made to further appear to the court that sentence on the said defendant was suspended upon the condition that the said Estel Judd pay the sum of $2.00 per week, commencing on Saturday, February 24, 1912, and a like sum on each Saturday thereafter for the support, care and maintenance of his minor child, Ethel Judd, until his said minor child should arrive at the age of sixteen years, said money to be paid to Edward Tilton, of Moscow, Ohio, as trustee for said child, and it being made further to appear to the court that the said Estel Judd has violated the terms of said probation, and has at no time paid any sum whatever to the said Edward Tilton, as such trustee for the support of said child, and the said Estel Judd being now brought before this court for sentence, as provided by statute, and it appearing that said defendant has been a fugitive from justice, and offering no good reason or excuse for his failure to pay said sum per week, it is ordered that the said defendant, Estel Judd, be imprisoned and confined in the penitentiary of the state, at Columbus, O., and kept at hard labor for an indeterminate period, but for a period of time not later than February 20, 1915, which is the maximum time for which he would have been sentenced for the crime charged in said indictment, and that he pay the costs of this prosecution, for which execution is awarded.'

"You will ascertain from the foregoing proceedings that Judd committed the crime prior to the enactment of the indeterminate prison sentence law, and had he been sentenced at the time he was arraigned, he would necessarily have been sentenced for a fixed period not to exceed three years.

"I am sure that Judge D. in sentencing Judd looked upon the matter as one of doubt as to whether or not he could be sentenced for an indeterminate sentence, as it might be claimed that the indeterminate law could not be retro-active in its effect, and that the crime having been committed prior to its enaction he only could be sentenced for a fixed period, or for a time not later than the expiration of the maximum time for which he might have been sentenced at the time of his original arraignment.

"However, whatever view the board of administration or yourself may take of the matter, it seems to me that a spirit of fairness towards this prisoner would require that he be confined no longer than the time indicated

by the trial court, and if this could not be done, then a pardon ought to be issued. I do not say this in the sense that Judd by his actions is deserving of any great help or sympathy, but I know it was the intent and purpose of the court in sentencing Judd that he should be imprisoned for a period of time not later than February 20, 1915.

"If there is any further or additional information I can give you, kindly advise me."

A reading of Mr. Speidel's letter quoted above shows that Warden Thomas was under a misunderstanding as to the proceedings had in the Judd case at the time the plea of guilty was entered, the case having been disposed of under the provision of section 13010 of the General Code, which authorized the judge to defer sentence and release the defendant under bond conditioned upon the payment of the sum of two dollars per week to Edward Tilton, as trustee, for the care and maintenance of his minor child, Ethel Judd, commencing Saturday, February 24, 1912, and to continue until said Ethel Judd arrived at the age of sixteen years. The defendant Judd defaulted in his payments, and under the provisions of section 13015 a capias was issued on February 14, 1914, for his arrest and upon his apprehension by the sheriff at Cincinnati, Ohio, he was brought before the court on November 14, 1914, for sentence as provided in section 13015 of the General Code, which is as follows:

"Upon the failure of such father or mother * * * to comply with any order and undertaking provided for in this subdivision of this chapter, he or she may be arrested by the sheriff or other officer, on a warrant issued on the precipe of the prosecuting attorney, and brought before the court for sentence. Thereupon the court may pass sentence, or for good cause shown, may modify the order at to the time and amount of payments, or take a new undertaking and further suspend sentence as may be for the best interests of the child. * * *"

From a reading of the order made by the court on November 13, 1914, it will be noted that the defendant was sentenced "to be imprisoned and confined in the penitentiary of the state, at Columbus, Ohio, and kept at hard labor for an indeterminate period, but for a period of time not later than February 20, 1915, which is the maximum time for which he would have been sentenced for the crime charged in said indictment, and that he pay the costs of this prosecution, for which execution is awarded."

The question arises as to what was the effect of the sentence imposed by the court and when would it expire.

The crime for which Judd was convicted occurred prior to May 29, 1913, when the new indeterminate sentence law (to be found in 103 Ohio Laws, page 29) went into effect; and in view of that fact the court would have no power or authority to sentence under the law passed subsequent to the commission of the crime, and, in fact in this case, subsequent to the conviction of the defendant, but would be obliged to look for his authority to sentence to a law in effect at the time the the crime was committed. The authority which might have been invoked at that time was to be found in section 13009 of the General Code, which is as follows:

"Whoever, being the father of a legitimate child under sixteen years of age, * * * and leaves with intent to abandon such child, shall be

imprisoned in a jail or workhouse at hard labor not less than six months nor more than one year, or in the penitentiary not less than one year nor more than three years."

The judge in passing sentence in this case probably had in mind the provisions of section 13714 of the General Code, which is as follows:

"Upon such revocation and termination, the court or magistrate may pronounce judgment at any time after such suspension within the longest period for which the defendant might have been sentenced, whereupon the judgment shall be in full force and effect, and the person shall be delivered over to the proper officer to serve his sentence."

The section quoted above, however, would apply only in cases where a sentence had been previously imposed and execution of the same suspended under the provisions of sections 13706, et seq., of the General Code. However, as no sentence had been previously imposed, and the only authority under which the sentence could have been imposed in this case resided in section 13009 of the General Code, above quoted, the sentence which was imposed and which was "for an intederminate period" being without authority of law was erroneous, and had steps been taken to correct the same the error would, in all probability, have been corrected at that time.

The supreme court of the state in case No. 39, volume 91, No. 14687, In re Harry Allen, not yet reported, speaking through Newman, J., says:

"The trial court in the instant case had jurisdiction of the person of the petitioner. It had jurisdiction to try him for the offense charged and to sentence him to a term in the penitentiary under section 12672. Instead there was an indeterminate sentence imposed of which the petitioner complains. If this was erroneous, the error committed by the court related to the sentence and punishment only and was not a jurisdictional one. The court merely entered and enforced a wrong judgment. Admitting then, for the purpose of this case, that there was no authority to impose the sentence, either by reason of the repeal of the indeterminate sentence law or its unconstitutionality, the punishment inflicted was erroneous and voidable, but not void. The sentence and punishment could have been corrected in a proceeding in error challenging the judgment of the court. The petitioner had ample opportunity to avail himself of the objections as to the sentence which he attempts to make here. A habeas corpus proceeding cannot perform the functions of a writ of error."

When this case was originally considered by the court, sentence was deferred on an order of the court conditioned upon the payment by the defendant of two dollars per week for the support, care and maintenance of his minor child, Ethel Judd, until the said minor child should arrive at the age of sixteen years. Section 13015, of the General Code, which is quoted above would empower the court to pass sentence on the defendant at any time before the child arrived at the age of sixteen years after the defendant had been arrested and brought before the court for a failure to comply with the order previously made, hence the defendant would be under the jurisdiction of the court for the purpose of sentence or modification

of the order until Ethel Judd, the minor child, became sixteen years of age. The court in passing an erroneous sentence did not thereby lose jurisdiction over the defendant.

It is my opinion, therefore, that the sentence under which Estel Judd is confined in the penitentiary is erroneous, having been imposed without warrant of law, and that the matter should be taken up with the prosecuting attorney of Clermont county without delay to the end that the rights of the prisoner may be protected, at least to the extent of his having the benefit of the minimum penalty provided in section 13009 of the General Code, namely, one year in case of a sentence to the penitentiary, and that the judge, having retained his jurisdiction over the prisoner under the provisions of section 13015 of the General Code, may resentence him in accordance with the terms of section 13009 of the General Code, quoted above.

In case the judge should be inclined to suspend any sentence he may impose, and the prisoner is not otherwise ineligible to receive a suspended sentence under the provisions of section 13706 of the General Code, the fact of his having been confined in the penitentiary under the erroneous sentence hereinbefore referred to should not operate of itself against him.

This case, which is an unusual one, presents a question the practical solution of which rests between your board, the prosecuting attorney and the judge of the court, who imposed the sentence.

The papers submitted by you, together with jacket No. 43133, containing papers submitted by the warden of the Ohio penitentiary, are returned herewith.

Respectfully,
EDWARD C. TURNER,
Attorney General.

(Enclosures)

P. S. The above opinion was prepared upon the assumption that the minor child referred to was a legitimate child, that assumption being borne out by all of the papers presented. However, from the prosecuting attorney's statement and a statement made by the bertillion officer of the penitentiary, it is gathered that the child is an illegitimate child, and the latter being the case, section 13008 of the General Code should be substituted where reference is made to section 13009 of the General Code in the opinion.

348.

TRADING STAMPS—NOT SECURITIES WITHIN MEANING OF "BLUE SKY" LAW.

Trading stamps, coupons or stamps, commonly known as "trading stamps" are not securities within the meaning of the "Blue Sky" law.

COLUMBUS, OHIO, May 11, 1915.

HONORABLE HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of April 30th, 1915, requesting my opinion as follows:

> "This department is informed that there are several companies, some of them organized under the laws of Ohio, and some of them organized under the laws of other states, offering for sale in Ohio 'trading stamps.'
>
> "As yet the department has no full information in regard to any particular company. It may be stated, however, generally, that the companies sell to merchants coupons or trading stamps, which the merchants give out to their customers as premiums or rebates when cash purchases are made aggregating certain amounts. The stamps or coupons are redeemable in merchandise or railroad trips, or some other thing of value, when presented at the place designated as the office of the trading stamp company.
>
> "Are coupons or stamps sold to merchants under such circumstances 'securities' within the meaning of the Ohio blue sky law?"

Section 6373-1 of the General Code, prescribing who must be licensed under the blue sky law, is as follows:

> "Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed 'securities') evidencing title to or interest in property, issued or executed by any private or quasi-public corporation, co-partnership or association (except corporations not for profit), or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided."

If trading stamps come within the meaning and scope of the term "securities" as used in the section above quoted, it must be by virtue of the language: "instruments evidencing title to or interest in property."

A determination of the nature and legal effect of a trading stamp cannot be arrived at merely by an examination of the stamp itself, or of the contract entered into by the issuer of the stamp and the merchant who places it in circulation, but it must be considered in view of the provisions of section 6386 to section 6389, both inclusive, of the General Code. In these sections the general assembly has practically defined and established, at least so far as the Ohio law is concerned, the legal status of trading stamps. They have also very effectively safeguarded the public from abuse and fraud resulting from the use of trading stamps; and it may be further added that there was and is no real necessity or reason why the subject of trading stamps should have been further regulated and restricted by the provisions of the blue sky law.

Without quoting the sections from 6386 to 6389, both inclusive, it is sufficient to say that in substance they provide that trading stamps shall in all cases be redeemable in money when presented in amounts aggregating five cents or more, and that each stamp issued must have written or printed thereon its redeemable value in money of the United States.

Section 13399 of the General Code prescribes a penalty for the violation of any of the provisions of sections 6386 to 6389, above referred to. The legal effect of these last mentioned sections of the General Code is, in my opinion, to make trading stamps simply evidences of indebtedness, payable upon demand either in money or in merchandise at the option of the holder. This can by no interpretation, as I view it, be taken as "evidencing title to or interest in property." No property of any kind is hypothecated for security, nor has the holder thereof any claim upon any specific property. True, he may, if he so elects, demand merchandise for their redemption, but he has no right of any kind, by virtue of his ownership of stamps, in any specifically described or segregated property.

I am therefore of the opinion that coupons or stamps commonly known as "trading stamps" are not such securities within the meaning of the blue sky law as makes necessary the securing of a license by the trading stamp company selling them or by the merchant distributing them.

Respectfully,
EDWARD C. TURNER,
Attorney General.

349.

BONDS AUTHORIZED TO BE ISSUED BY TOWNSHIP TRUSTEES OF MONROE TOWNSHIP, MIAMI COUNTY, OHIO, DISAPPROVED—INDUSTRIAL COMMISSION ADVISED NOT TO PURCHASE.

Bonds to the amount of $50,000, *authorized to be purchased by the township trustees of Monroe township, Miami county, Ohio, and purchased by the industrial commission of Ohio, subject to the approval of the attorney general, are held invalid and the industrial commission advised not to purchase same.*

COLUMBUS, OHIO, May 11, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of April 26, 1915, enclosing a certified copy of a resolution adopted by the Industrial Commission of Ohio on April 26, 1915, purchasing bonds from the township trustees of Monroe township, Miami county, Ohio, in the sum of fifty thousand dollars ($50,000.00), subject to securing from the attorney general a certificate approving the validity of said bond issue.

Under date of April 29, 1915, I received a transcript of the proceedings of the trustees of Monroe township, Miami county, Ohio, relative to the issuance of said bonds, and under date of May 7, 1915, I received additional information relative to said proceedings, from the attorneys for said township trustees and from S. O. Mitchell, clerk of said township.

I have made a careful examination of this transcript, together with the supplemental information referred to, and herewith submit my opinion relative to the validity of the bond issue.

The transcript recites that on October 11, 1913, the trustees of Monroe township at regular session adopted a resolution directing that the question of building a town hall be submitted to a vote of the electors of said township at the coming November election; at the same meeting of said board of trustees another resolution was adopted by the trustees directing that there be submitted to a vote of the electors of said township "at the same time the question of the erection of a town hall is submitted" the question of whether or not said bonds should be issued to run for a period of twenty-five years.

Under authority of the two resolutions above referred to the clerk of said Monroe township posted, as required by law, the following notice of the holding of said election:

"Notice is hereby given to the electors of Monroe township, Miami county, Ohio that an election will be held at the regular voting places in each precinct in said township on

Tuesday, November 4, 1913,

for the purpose of determining as to whether or not the trustees of said township shall erect a town hall in said township as provided for by sections 3395 to 3398 of the General Code of Ohio; the estimate cost of said building is fifty thousand ($50,000.00) dollars.

"Notice is further given that at the same time and at the same election vote will be taken by the electors of the township to determine the length of time bonds shall run that are issued to pay for the above hall in anticipation of taxes afterwards to be levied. The time proposed for said bonds to run is twenty-five years.

"At the aforesaid election those desiring to vote in favor of the erection of a town hall shall place upon their ballot 'town hall' yes, and those opposed 'town hall' no.

"Those favoring a bond issue for a period of twenty-five years shall place on their ballot 'bond issue twenty-five years' yes, those opposed to this time shall place on their ballot 'bond issue twenty-five years' no.

"The above notice is given by virtue of a resolution of the board of trustees of Monroe township duly passed at a regular meeting on October 11, 1913.

"S. O. MITTCHELL, Clerk.

"Tippecanoe City, Ohio."

Section 3395, 3396 and 3397 of the General Code, relative to the construction of town halls by township trustees, are as follows:

"Sec. 3395. If in a township, it is desired to build, remove, improve or enlarge a town hall, at a greater cost than is otherwise authorized by law, the trustees may submit the question to the electors of the township, and shall cause the clerk to give notice thereof and of the estimated cost, by written notices, posted in not less than three public places within the township, at least ten days before election.

"Sec. 3396. At such election the electors in favor of such hall, removal, improvement or enlargement shall place on their ballots 'town hall' yes, and those opposed 'town hall' no. If a majority of all the ballots cast at the election are in the affirmative, the trustees shall levy the necessary tax, but not in any year to exceed four mills on the dollar valuation. Such tax shall not be levied under such vote for more than seven years. In

anticipation of the collection of taxes, the trustees may borrow money and issue bonds for the whole or any part therefor, bearing interest not to exceed seven per cent., payable annually.

"Sec. 3397. After such affirmative vote, the trustees may make all needful contracts for the purchase of a cite, and the erection, or the improvement or enlargement of a town hall. They shall have control of any town hall belonging to the township, and from time to time, may lease so much thereof as may not be needed for township purposes, by the year or for shorter periods, to private persons, or for lectures or exhibitions, in all cases having the rent paid in advance or fully secured. The rents received may be used for the repair or improvement of the hall so far as needed, and the balance for general township purposes."

It will be observed that the question of whether or not a town hall should be constructed and the question of the length of time for which said bonds should run were submitted at the same election. The electors were informed of the holding of an election upon both questions by the same posted notice and apparently, from the form of the posted notice, both questions were submitted upon the same ballot.

I find no authority in the statutes for the submitting to the electors as to the length of time for which bonds shall run. In fact, in view of the provisions of section 3396, G. C., above quoted, I doubt very much whether the bonds in question could be issued to run longer than a period of seven years.

It is claimed that the submission to the electors of the length of time said bonds should run, being unauthorized, is mere surplusage and should not be considered in passing upon the validity of the proceedings of the trustees or of the election. I am unable to agree with this position, because the electors who voted upon the question of whether or not a town hall should be constructed were undoubtedly misled into believing that the bonds issued to secure money to pay for said hall were to run for twenty-five years and that, therefore, the burden of taxes to redeem the bonds when due would be distributed over a period of twenty-five years. It is not unreasonable to suppose, therefore, that many of the voters who sanctioned the proposed erection of a town hall did so with the express understanding and representation to them that the raising of the funds to construct said building would be distributed over a period of twenty-five years and I question, therefore, very seriously the validity of the election.

Assuming, however, that the election was valid, I note the following defects in the proceedings of the trustees, which to my mind render the bonds invalid:

1. Section 3396, G. C., provides that "in anticipation of the collection of taxes, the trustees may borrow money and issue bonds for the whole or any part thereof, bearing interest not to exceed seven per cent., payable annually." The resolution authorizing the issuance of bonds contains no recital that a tax levy has been made or that the bonds are issued in anticipation of the collection of any tax, and I am informed by the attorneys representing the township trustees, in their letter setting forth additional information, that no tax levy has as yet been made. Under the language of the statute above quoted the authority of the township trustees to issue bonds is dependent upon a tax levy having first been made, and I am of the opinion that the levying of such tax is a jurisdictional fact, which must exist before the township trustees can by resolution authorize the issuance of bonds.

In this connection I desire to call attention to section 11, article 12, of the constitution of Ohio, which is as follows:

"Section 11. No bonded indebtedness of the state, or any political

subdivision thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption."

This provision of the constitution has apparently been ignored by the township trustees and no provision has been made in the legislation of the trustees authorizing the issuance of said bonds for levying and collecting any tax or otherwise providing for the payment of interest and redemption of the principal of said bonds at maturity.

I am therefore of the opinion that the proceedings of the township trustees relative to the issuance of said bonds are defective and that said bonds are invalid and I advise the commission to refuse to accept the same.

Since the township trustees will doubtless desire to take the necessary steps to correct their proceedings and in anticipation of a re-submission to me of the question of the validity of said bonds, I deem it my duty to advise that they start entirely new proceedings.

Respectfully,
EDWARD C. TURNER,
Attorney General.

350.

JOINT COUNTY DITCHES—LEGISLATURE HAS PROVIDED TWO DISTINCT METHODS OF PROCEDURE FOR SUCH IMPROVEMENT—SECTIONS 6536 TO 6563, G. C., PROVIDE ONE METHOD AND SECTIONS 6563-1 to 6563-48, G. C., THE OTHER.

Sections 6536 *to* 6563, *inclusive, G. C., relative to county ditches, were not repealed by implication by the enactment of sections* 6563-1 *to* 6563-48, *inclusive, G. C.,* 102 *O. L.,* 575.

COLUMBUS, OHIO, May 11, 1915.

HON. ARCHER L. PHELPS, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I have your communications of April 24 and May 5, 1915, relating to the subject of joint county ditches and the straightening of natural water courses in two or more counties. You state that there has been filed with the commissioners of Trumbull county and the commissioners of Ashtabula county, a petition signed by thirteen property owners, praying for the deepening, widening, straightening and changing of Grand river through the northerly part of Trumbull county and the southerly part of Ashtabula county, and that the petitions so presented have been submitted to the prosecuting attorney of each county, respectively, for an opinion upon the validity of the petitions. You then call attention to the present state of the law relating to improvements of this class.

The subject of joint county ditches and the improvement of water courses in two or more counties is provided for in sections 6536 to 6563-48, inclusive, of

the General Code. As the law stood prior to May 31, 1911, sections 6536 to 6563 inclusive, contained all of the law on this subject. On May 31, 1911, the legislature enacted sections 6563-1 to 6563-48 of the General Code, which sections afford an independent and complete procedure, covering substantially the same ground covered by sections 6536 to 6563, inclusive, but the steps to be taken under each procedure differ sufficiently to make it necessary to follow one procedure or the other exclusively. This enactment is found in 102 O. L., 575.

On May 31, 1911, the same day that the legislature enacted sections 6563-1 to 6563-48, it also amended sections 6536, 6540, 6541, 6548, 6553, 6556 and 6557. Section O. L., 313. On April 12, 1913, the legislature recognized the continued existence of sections 6536 to 6563 inclusive, by amending twelve of these sections in important particulars. See 103 O. L., 836. The same session of the legislature also recognized the existence of sections 6563-1 to 6563-48 inclusive, by amending two of these sections. See 103 O. L., 465.

After pointing out the above situation you inquire as to whether these two separate procedures, one covered by sections 6536 to 6563 inclusive, and the other by sections 6563-1 to 6563-48 inclusive, are in full force and effect, or whether the enactment of sections 6563-1 to 6563-48 inclusive, repealed sections 6536 to 6563 inclusive.

The theory that there was an implied repeal in the case now under consideration, finds some support in the case of Goff v. Gates, 87 O. S., 142. It was decided in that case that an act entitled "an act to provide for the laying out, construction, repair or improvement of any public road or any part thereof, and for the straightening, widening or altering and draining of the same by the county commissioners" passed by the legislature May 10, 1910, and being sections 6956-1 to 6956-15 inclusive, of the General Code, repealed by implication sections 6926 to 6956 inclusive, of the General Code, which sections provided a method of improving and grading public roads by county commissioners. Much of the reasoning of the court in the case of Goff v. Gates might be applied to the situation now under consideration, but in the last analysis the decision of the court in that case is grounded upon the elementary principle of giving effect to the intent of the legislature, it being held that in enacting sections 6956-1 to 6956-15 inclusive, the legislature must have intended to repeal sections 6926 to 6956 inclusive, and that the failure to make an express repeal was a mere oversight.

This reasoning cannot be applied to the matter now under consideration, and indeed the facts point in the opposite direction. It could hardly be said that in enacting sections 6563-1 to 6563-48 inclusive, the legislature intended to repeal sections 6536 to 6563 inclusive, when on the same day the legislature proceeded to amend sections 6536, 6540, 6541, 6548, 6553, 6556 and 6557. In other words, the rule announced in Goff v. Gates cannot be carried to the point where it will result in defeating the manifest intention of the legislature. That the legislature intended to leave sections 6536 to 6563 inclusive, in full force and effect and did not intend to repeal these sections in enacting sections 6563-1 to 6563-48 inclusive, is strongly indicated by the fact that on the same day that the legislature enacted the new sections, it amended certain of the old. A subsequent legislature placed this construction on the law by proceeding to amend certain of the old sections and certain of the new sections, thus recognizing the existence of both schemes of improvement.

It is elementary that repeals by implication are never favored, and that if any reasonable construction may be given to previously existing statutes, so that both may stand, it must be given. With this principle in mind, and having in view, also, the history of the legislation as set forth above, I am of the opinion that sections 6536 to 6563 inclusive of the General Code, have not been repealed by implication

and that two separate procedures for the construction of joint county ditches are available, one covered by sections 6536 to 6563 inclusive, of the General Code, and the other by sections 6563-1 to 6563-48 inclusive, of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

351.

COUNTY OFFICERS—LIABILITY FOR EXCEEDING CLERK HIRE ALLOWANCE—LIABILITY OF COUNTY AUDITOR—OF COUNTY TREASURER.

When amount allowed by county commissioners for clerk hire to county officer is exceeded, both county auditor and county officer whose allowance is exceeded are liable.

When total aggregate allowable under section 2980-1, *G. C., is exceeded, county treasurer is likewise liable.*

Since liability sounds in tort, it is joint and degrees of liability cannot be determined.

COLUMBUS, OHIO, May 11, 1915.

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

GENTLEMEN:—Under date of April 17th you submitted for my opinion the following inquiry:

> "On December 10, 1912, Hon. Timothy S. Hogan, attorney general, rendered to this department a lengthy opinion in regard to findings which should be made against county auditors and other officers for payment of clerk hire in excess of the amount allowed by county commissioners. This opinion appears in full at page 200 of Vol. 1 of the Annual Report of the Attorney General for 1913. This opinion intimates that under certain circumstances, joint findings should be made, but in order that our examiners may understand the matter fully, we would respectfully request you to distinguish more definitely the degree of liability as presented by the various phases of this opinion.
>
> "We make this request for the reason that we find that it is rather awkward in a report to make joint findings unless it is possible to show the amount that should be charged to each officer."

The opinion to which you refer in your inquiry has attached thereto the following synopsis:

> "It is the official duty of the county auditor to know the manner of drawing, and the statutory restrictions relating to vouchers for payment of county expenses. Furthermore, in the case of the allowance of clerk hire in the office of county officers, the auditor has notice of the proceedings of the commissioners when he serves as their clerk, under the provisions of section 2566, General Code; if he does not serve as their clerk, he has notice of their proceedings by virtue of section 2407, General

Code, which provides that the record book of the county commissioners' work shall be kept in the auditor's office. The county auditor, therefore, is charged with actual or constructive notice of the allowance made by the county commissioners, for clerk hire in excess of which no payment can be made, by virtue of sections 2980 and 2981, General Code.

"When a county auditor, therefore, allows a voucher for the payment of clerk hire, in excess of the county commissioners' allowance, he is liable for such payment.

"By virtue of section 2981, General Code, the various officers are required to limit the salaries of their clerks to the aggregate amount allowed by the commissioners. If such officer, therefore, employs help and certifies to the county auditor, compensation in excess of the aggregate amount allowed his office by the commissioners, he violates his official duty and is liable to the county for such excess payment. The county treasurer is not given any official or formal notice of the action of the county commissioners in fixing such an allowance, nor has he in his possession any records of such proceedings. He is not, therefore, liable for over-paying the annual allowance made by the county commissioners for such clerk hire.

"Under section 2980-1, General Code, however, the aggregate sum, fixed by the county commissioners to be expended in any one year for compensation of any assistants or any employes shall not exceed a certain percentage of the fees, costs and allowances, etc. When in making their allowances, therefore, the county commissioners violate this statute, they and all other county officers are charged with knowledge of this limitation and are liable for payment made in contravention thereto, the county treasurer as well as the others.

Deputies and clerks are not required to take notice of these statutory limitations and they have the right to presume that the officers will perform their duties as prescribed by statute. They are not liable, therefore, for excess amounts paid to them when they have received money in good faith for services performed."

From the foregoing synopsis it appears that the county auditor in issuing a warrant for compensation in excess of the aggregate amount allowed to a certain office by the commissioners violates his official duty; that the officer employing the clerk and permitting the clerk to continue after the amount allowed to his office for clerk hire has been expended has likewise violated his official duty; also that the county treasurer, if he honors a warrant which calls for clerk hire above the total aggregate allowable to such office under the provisions of section 2980-1, is likewise guilty of a violation of his official duty.

The above violations sound in tort, and I am unable to say that any one of the officers liable in a given case should be considered as more liable than the other, and am therefore unable to distinguish more definitely the degree of liability as presented by the various phases of the opinion referred to.

Respectfully,

EDWARD C. TURNER,

Attorney General.

352.

STATE HIGHWAY COMMISSION—CAN ONLY LET CONTRACT FOR MAIN MARKET ROAD WHEN HIGHWAY HAS BEEN LEGALLY DESIGNATED AS SUCH—MAIN MARKET ROAD NO. 13, ERIE COUNTY—CHANGE IN ROUTE SHOULD BE MADE BY STATE HIGHWAY COMMISSIONER—THIS PARTICULAR CASE DISTINGUISHED.

Contracts involving the expenditure of main market road funds can only be let by the state highway commissioner where the highway to be improved has been legally designated as a main market road.

In the improvement of Main Market Road No. 13, Erie county, the state highway commissioner attempted to let a contract for the improvement of a section of said road, the highway to be improvd also including a section of proposed highway that has not been legally designated as a main market road. The contractor has incurred a considerable expense in the matter. Under the facts of the particular case, a proper procedure for the state highway commissioner to follow would be to legally designate as a main market road the section of highway not previously so designated, and enter into a new and valid contract with the original contractor at the price bid in the first instance.

COLUMBUS, OHIO, May 12, 1915.

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

DEAR SIR:—I have your communication of May 7, 1915, relating to the present situation with reference to the improvement of a portion of main market road No. 13, situated in Erie county. You call my attention to the original designation of inter-county highway No. 3, as main market road No. 13, the original designation of main market road No. 13 being as follows:

> "Beginning at the junction of inter-county highways Nos. 3 and 31 in Cuyahoga county, and following what is known as inter-county highway No. 3 to the junction of inter-county highways Nos. 3 and 294 in Erie county."

You further direct my attention to the fact that in projecting the survey for the improvement of section "L" of said main market road No. 13, said section "L" lying within Erie county, the state highway commissioner attempted to change the location of a part of said section of said main market road and his action, purporting to make this change, was approved by the governor.

On April 6, 1915, this department rendered an opinion to Hon. James F. Flynn, Jr., prosecuting attorney of Erie county, the opinion dealing with the attempted change in the location of said main market road. In the opinion in question it was pointed out that when the state highway commissioner contemplated the improvement of this highway, and when said improvement was projected, a sentiment arose in favor of establishing a new road and of changing the route of the main market road so that said main market road would run over the new route, the reason for this suggested change being that the new road would avoid a dangerous railroad crossing and would be more direct. For the purpose of establishing this new road, the commissioners began proceedings under section 6860, et seq., of the General Code, but before these proceedings had been completed, and before the new road had been in fact established, the state highway commissioner, assuming to act under section 1184-4, G. C., 103 O. L., 451, made an order

changing the route of the Cleveland-Sandusky inter-county highway No. 3, and main market road No. 13, and attempted to change the route from the existing highway and established the said road over the projecting new road which the commissioners of Erie county were seeking to establish in the proceedings above referred to, and this attempted action of the state highway commissioner was approved by the governor.

It was held in the opinion above referred to that the state highway commissioner was without authority to make this change and that he had no authority to re-locate any inter-county highway or main market road in any location other than along the line of an existing public highway of the state. In other words, the holding was to the effect that in selecting additional routes and in changing to a more practicable location, the state highway commissioner acts under the same limitation that applied in the original designation of inter-county highways and he must designate the additional route or the altered route so that the same will follow the line of an existing public highway, and he has no authority to change a route and establish the same across privately owned lands. The conclusion expressed was that the act of the highway commissioner, in attempting to change the route was, therefore, without legal effect and the legal location of the inter-county highway and main market road in question was still along the old route.

You call my attention to the opinion above referred to and further state that a contract has already been let by the state highway commissioner to the Fred R. Jones Company, of Cleveland, for the improvement of said section of main market road, the contract price being $70,107.52.

The contract entered into as above stated, with the Fred R. Jones Company, covers the new section of highway which, as above stated, has never been legally designated by the state highway commissioner as a main market road. Since the opinion to Prosecuting Attorney Flynn, above referred to, was rendered, the proceedings for the establishment of a road under sections 6860, et seq., of the General Code, have been carried to a conclusion by the county commissioners, and such proposed new road is now a public highway. It was not, however, a public highway at the time the contract was let to the Fred R. Jones Company, and has never been legally designated as a main market road. The effect of the facts above stated is that when the state highway commissioner entered into the contract in question with the Fred R. Jones Company, he was entering into a contract involving the expenditure of main market road money upon a section of road and proposed road, part of which was not at that time a public highway and, what is more important to the present inquiry, part of which had never been legally designated as a main market road or even as an inter-county highway. You now inquire as to the effect of this action and as to the proper procedure to pursue in the premises.

Under the provisions of section 6859-3 of the General Code, main market road money can only be used in the construction, improvement, maintenance and repair of such roads as have been legally designated as main market roads. I am therefore of opinion that there was no authority for the making of the contract with the Fred R. Jones Company for the reason that the contract was one involving the expenditure of main market road funds and at the time it was entered into, a part of the highway covered by the improvement was not a main market road.

This conclusion to which I have been forced, results in a most awkward and embarrassing situation and it remains to consider whether a course of procedure can be worked out that will protect the rights of all parties concerned.

The infirmity in the original proceedings and the lack of authority on the part of the highway commissioner to enter into the contract in question, could not have been easily ascertained by the Fred R. Jones Company at the time it entered

into the contract in question. The company has apparently acted in the best of faith, and I am informed that the company has shipped its equipment to Erie county, perfected its organization for the construction of the road in question, started the work of grading and already incurred a large expense in the matter, but that so far the company has not been paid anything on account of the work done. If the company should be deprived of all rights in the premises, a very considerable financial loss will result to it, which loss ordinary prudence on the part of the company probably would not have prevented. It may be observed in the first place that the new road must be legally designated as a main market road before a valid contract can be entered into with the Fred R. Jones Company. The only course which is open and which will result in at least a substantial compliance with the law and at the same time will not result in the taking of what appeals to me as an unconscionable advantage of the company, would be for the state highway commissioner to now take the action which was formerly attempted, but which, for the reasons heretofore pointed out, was a nullity, and now make the change in the route of the inter-county highway and main market road which was previously attempted. If this change in the route of the main market road in question appeals to you as a wise and proper one, I suggest that you make the change in question and submit your action in the premises to the governor for his approval. If he approves of the change in route, the result will be the establishing of an inter-county highway and main market road over the new road recently established by the county commissioners of Erie county, under section 6860 et seq., of the General Code. The situation will then be that all of the highway covered by the proposed improvement will have been legally designated as a main market road and the commissioner will have before him the original bids filed by the Fred R. Jones Company and other bidders for the construction of this improvement. I assume that the contract was originally attempted to be awarded to the Fred R. Jones Company for the reason that that company was the lowest bidder for the work in question.

After taking the action above suggested and legally designating the new highway established by the commissioners as a main market road, and securing the approval of the governor to such action, it is my opinion that it would be proper, in view of the peculiar facts and circumstances of this particular case, to then regard the bid of the Fred R. Jones Company as still subsisting and upon said bid to award the contract for the construction of the road improvement in question to said company, and to enter into a written contract with the company in question for the performance of the work, for the amount of its original bid. This course of action on your part will not do any violence to the statute requiring the letting of these contracts on competitive bids and will be at least a substantial compliance with the law limiting the expenditure of main market road funds to the improvement of highways that have been legally designated as main market roads. In other words, such a course of procedure will protect the rights of the public and at the same time will protect the equities of the company which has proceeded under the original void contract and which has incurred a considerable expense in the matter.

I desire to expressly limit the force and effect of this opinion to the particular facts of this case and do not desire to be taken as holding generally that the state highway commissioner may advertise for and receive bids in advance of the time when he is authorized by law to let a contract for a specific highway improvement.

Respectfully,
EDWARD C. TURNER,
Attorney General.

353.

A CORPORATION MANUFACTURING PRODUCTS IN OHIO AND SHIPPING SAME TO AGENTS TO BE SOLD UPON COMMISSION, MUST RETURN FOR TAXATION THE STOCK OF GOODS IN EACH TAXING DISTRICT WHEREIN HELD ON AVERAGE BASIS AS MANUFACTURER'S STOCK OF FINISHED PRODUCT—RETURN MADE BY PRINCIPAL OFFICER OF CORPORATION.

A corporation manufacturing a product in Ohio and shipping quantities of the same to local agents to be sold by them upon commission must return for taxation each stock of goods so held by such agent, in the taxing district wherein the same is so held, on the average basis as manufacturer's stock of finished products. The return must be made by the president, secretary or principal accounting officer of the corporation, and not by the local agent.

COLUMBUS, OHIO, May 12, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of May 3rd, you requested my opinion as follows:

> "An incorporated company in this state, manufacturing fertilizers, has a business practice of shipping large quantities of its product over the state to farmers and others, to be sold by them upon commission. Admitting that these shipments are not included by the manufacturing company in its annual tax return of the average manufactured products on hand, by whom and in whose name should stocks of scattered merchandise so held as above, be listed, and who is liable for the tax thereon? If they are to be listed in the name of the manufacturing company should they be listed under the item of 'merchandise' or 'manufacturer's stock' and where?
>
> "If these stocks of merchandise so held are to be returned by the persons having them under control, should the amount returned be the value of the amount on hand on listing day, or the average amount in possession and control during the past year?
>
> "If the manufacturing company includes this merchandise in its tax return of the average amount of manufactured goods on hand, will that exempt such property from taxation in the taxing district in which it was found on listing day, or in a taxing district in which there had been a large average quantity on hand during the past year; in other words, what is the situs of such property for taxation?"

The questions which you submit involve a consideration of the following provisions of the taxation laws of the state:

> "Sec. 5370. Each person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned, or otherwise controlled by him, as agent or attorney, or on account of any other person or persons, company or corporation, and all moneys deposited subject to his order, check, or draft; all credits due or owing from any person or persons, body corporate or politic, whether in or out of such county; and all money loaned on pledge or mortgage of real estate, although a deed or other instrument may have

been given for it, if between the parties, it is considered as security merely. The property of a ward shall be listed by his guardian, of a minor child, idiot, or lunatic having no guardian, by his father, if living, if not, by his mother, if living, and if neither father nor mother is living, by the person having such property in charge; of a person for whose benefit property is held in trust, by the trustees; of an estate of a deceased person, by his executor or administrator; of corporations whose assets are in the hands of receivers, by such receivers, of a company, firm, or corporation, by the president or principal accounting officer, partner or agent thereof; and all surplus or undivided profits held by a society for savings or bank having no capital stock, by the president or principal accounting officer.

"Sec. 5371. A person required to list property, on behalf of others, shall list it in the township, city or village in which he would be required to list it if such property were his own. He shall list it separately from his own, specifying in each case the name of the person, estate, company, or corporation, to whom it belongs. Merchants' and manufacturers' stock, and personal property upon farms shall be listed in the township, city or village in which it is situated. All other personal property, moneys, credits and investments, except as otherwise specially provided, shall be listed in the township, city or village in which the person to be charged with taxes thereon resides at the time of the listing thereof, if such person resides within the county where the property is listed, and if not, then in the township, city or village where the property is when listed.

"Sec. 5372. Personal property of every description, moneys and credits, investments in bonds, stocks, joint stock companies, or otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April, in each year. * * *

"Sec. 5375. A person required to list property, upon receiving a blank for that purpose from the assessor, or, within five days thereafter shall make out and deliver, annually, to the assessor, a statement, verified by his oath, of all the personal property, moneys, credits, investments in bonds, stocks, joint stock companies, annuities, or otherwise, in his possession, or under his control, on the day preceding the second Monday of April of that year, which he is required to list for taxation, either as owner or holder thereof, or as parent, husband, guardian, trustee, executor, administrator, receiver, accounting officer, partner, agent, factor, or otherwise.

"Sec. 5381. A person who owns or has in possession or subject to his control personal property within this state, with authority to sell it, which has been purchased either in or out of this state, with a view to being sold at an advanced price or profit, or which has been consigned to him from a place out of this state for the purpose of being sold at a place within this state, is a merchant.

"Sec. 5382. When a person is required by this chapter to make out and deliver to the assessor a statement of his other personal property, he shall state the value of such property appertaining to his business as a merchant. In estimating the value thereof, he shall take as the criterion the average value of such property, as provided in the next preceding section, which he has had from time to time in his possession or under his control during the year next previous to the time of making such statement, if he has been engaged in business so long, and if not, then during such time as he has been so engaged. Such average shall be ascertained by taking the amount in value on hand, as nearly as possible, in each

month of the next preceding year in which he has been engaged in business, adding together such amounts and dividing the aggregate amount thereof by the number of months that he has been in business during such year.

"Sec. 5383. A consignee shall not be required to list for taxation the value of property, the product of this state, which has been consigned to him, for sale or otherwise, from a place within this state, nor the value of property consigned to him from another place for the sole purpose of being stored or forwarded, if in either case, he has no interest in such property, or any profit to be derived from its sale. A person engaged in selling property on commission and who does not retain control of such property longer than forty-eight hours is not a merchant within the meaning of the next two preceding sections.

"Sec. 5385. A person who purchases, receives or holds personal property of any description, for the purpose of adding to the value thereof by manufacturing, refining, rectifying, or by the combination of different materials with a view of making a gain or profit by so doing, is a manufacturer, and, when he is required to make and deliver to the assessor a statement of the amount of his other personal property subject to taxation, he shall include therein the average value estimated, as hereafter provided, of all articles purchased, received or otherwise held for the purpose of being used, in whole or in part, in manufacturing, combining, rectifying or refining, and of all articles which were at any time by him manufactured or changed in any way, either by combination or rectifying, or refining or adding thereto which, from time to time, he has had on hand during the year next previous to the first day of April annually, if he has been engaged in such manufacturing business so long, and if not, then during the time he has been so engaged.

"Sec. 5386. Such average value shall be ascertained by taking the value of all property subject to be listed on the average basis, owned by such manufacturer, on the last business day of each month the manufacturer was engaged in business during the year, adding such monthly values together and dividing the result by the number of months the manufacturer was engaged in such business during the year. Such result shall be the average value to be listed. A manufacturer shall also list at their fair cash value, all engines and machinery of every description used, or designed to be used, in refining or manufacturing, except such fixtures as are considered a part of any parcel or parcels of real property, and all tools and implements of every kind used, or designed to be used, for such purpose, owned or used by such manufacturer.

"Sec. 5404. The president, secretary and principal accounting officer of every incorporated company, except banking or other corporations whose taxation is specifically provided for, for whatever purpose they may have been created, whether incorporated by a law of this state or not, shall list for taxation, verified by the oath of the person so listing, all the personal property thereof, and all real estate necessary to the daily operations of the company, moneys and credits of such company or corporation within the state, at the true value in money.

"Sec. 5405. Return shall be made to the several auditors of the respective counties where such property is situated, together with a statement of the amount thereof which is situated in each township, village, city or taxing district therein. Upon receiving such returns, the auditor shall ascertain and determine the value of the property of such companies, and deduct from the aggregate sum so found of each, the value as assessed for taxation of any real estate included in the return. The value of

the property of each of such companies, after so deducting the value of all the real estate included in the return, shall be apportioned by the auditor to such cities, villages, townships, or taxing districts, pro rata, in proportion to the value of the real estate and fixed property included in the return, in each of such cities, villages, townships, or taxing districts. The auditor shall place such apportioned valuation on the tax duplicate and taxes shall be levied and collected thereon at the same rate and in the same manner that taxes are levied and collected on other personal property in such township, village, city or taxing district."

The duty of the agent to list property of the kind described by you will first be considered; and in such consideration the fact that the manufacturer is a corporation will, for the time being, be eliminated from consideration.

Section 5370, General Code, makes complete provision as to who shall list personal property for taxation. This fact is not altered by section 5375, which, though it mentions "agent, factor or otherwise," has no force and effect of its own, because primarily it fixes the date as of which the ownership, possession or control of property for purposes of taxation shall be determined, and its exact provision is that each person shall list the property *"which he is required to list for taxation"* in any of the capacities mentioned, with reference to the date therein named (which date, of course, has been changed by subsequent legislation not affecting the other substantive provisions of the section). In other words, one must look to some section other than section 5375 to determine what property a person "is required to list for taxation." One other such provision is, as already stated, section 5370. This section requires each person of normal status to list the personal property of which he is the owner; but when it comes to prescribe what shall be listed as agent or attorney or on account of any other person or persons, etc., its scope is limited to "moneys in his possession" and "moneys invested, loaned, or otherwise controlled by him," etc. That is to say, the first or general clause of section 5370 standing by itself does not require a person to list personal property other than moneys controlled by or in the possession of the listing person for or on behalf of another person.

This general rule is enlarged as to particular classes of persons acting in a representative capacity by the second sentence of the section, which provides for the listing of the property of a ward, a minor child, idiot, lunatic, cestui que trust, the estate of a deceased person, corporations whose assets are in the hands of receivers, and companies, firms or partnerships. But the property of a mere individual of normal status in the hands of an agent is by this section not required to be listed by the agent, except as to moneys.

Still ignoring for the purpose of clearness the fact that the principal in the case submitted is a corporation, we may consider the application of the statutes relative to merchants and manufacturers thereto.

I call attention, first, to the fact that section 5381, which defines a "merchant," is divisible into two parts as follows:

"(1) A person who owns or has in possession or subject to his control personal property within this state, with authority to sell it, which has been *purchased* either in or out of this state, with a view to being sold at an advanced price or profit, is a merchant.

"(2) A person who owns or has in possession or subject to his control personal property within this state, with authority to sell it, which has been consigned to him from a place out of this state for the purpose of being sold at a place within this state, is a merchant."

To the case submitted by you the conditions of the first part of the above definition are not satisfied, because the property has not been purchased with a view to being sold at an advanced price or profit. In fact, the property has not been in the exact sense "purchased" at all; it has been manufactured with a view to being sold at the manufacturer's price.

The conditions of the second half of the definition are not satisfied by the facts stated by you, because the goods were consigned to the agent from a place within this state and not from a place out of this state.

In short, the case which you submit is one case which is not embraced within the definition of a "merchant" by section 5381, General Code.

An incongruity is presented by section 5383, General Code, which, insofar as applicable here provides that a consignee shall not be required to list for taxation the value of property, the product of this state, which has been consigned to him, for sale or otherwise, from a place within this state, if he has no interest in such property or any profit to be derived from its sale. The natural inference is that if a consignee has an interest in such property, or a profit to be derived from its sale (which is the case, of course, where the sale is to be on a commission) he is to be required to list the value of the property for taxation, even though it is the product of this state and has been consigned to him from a place within this state. But, as we have seen, no statute requires a consignee to list, either as a merchant and on the average basis or otherwise, property which has been consigned to him for sale on commission from a place within this state unless he is the owner of such property. A mere negative inference like that to be drawn from section 5382, General Code, is not sufficient upon which to base a positive duty to list property for taxation, with the attendant penalties for the failure to discharge such duty.

Still disregarding, then, the fact that the principal in the case submitted is a corporation, I express the opinion that it is not the duty of the commission agent to list the property described by you as merchandise in his possession.

I think that upon a casual inspection of sections 5385 and 5386, General Code, it will be apparent that there is nothing in these sections relative to manufacturers which has the effect of imposing the duty to list the goods described by you for taxation upon the agent.

Still having regard to the duty of the individual agents of the corporation mentioned by you in the premises, let us now consider the effect of the fact that the principal is a corporation.

Sections 5404 and 5405, supra, require corporations to make return of all property of the corporation situated in each county in the state to the auditors of the several counties where the same is situated. This return is required by section 5404 of the General Code, to be made by the "president, secretary and principal accounting officer of the company." This provision is in apparent conflict with section 5370, which provides that the personal property of a "company, firm or corporation" shall be listed by "the president or principal accounting officer, partner or agent thereof." This conflict has existed in the law since the general taxation act of 1859, section 4 whereof (the predecessor of section 5370, General Code) provided that the property of "every company, firm, body politic or corporate" should be listed "by the president or principal accounting officer, partner or agent thereof," and section 16 whereof (the predecessor of present section 5404, General Code) provided that the "president, secretary or principal accounting officer" of certain enumerated corporations should list the property of such corporation.

I am of the opinion that insofar as there may be said to be a conflict between these two provisions, the specific one relative to corporations, viz.: section 5404,

must control. I am inclined to the belief that there is no conflict at all between the two provisions, and that the words "or agents" in section 5370 refer to partnerships and unincorporated associations and not to corporations.

For the foregoing reasons, then, it is apparent that the fact that the principal in the case submitted by you is a corporation does not affect the duty of its several agents in the premises.

Sections 5371 and 5372, General Code, clearly provide as to the name in which property shall be listed, the provision being that property shall be listed in all cases in the name of the person, etc., to whom it belongs. In the case stated by you the property is not owned by the agents, but by the corporation, and it not being even the duty of agents to list the property, it follows clearly that it should be listed in the name of the corporation.

The conclusions thus far reached furnish answers to some of your questions, as follows:

> "The goods in question should be listed by the corporation through its president, secretary or principal accounting officer.
>
> "The goods in question should be listed in the name of the corporation to which they belong.
>
> "The corporation is liable for the personal taxes thereon."

The question embraced in the second paragraph of your letter, which assumes that the goods are to be listed by the agents having them under control, does not require any answer.

These questions being eliminated and it being clear from what has preceded that the corporation must list the goods and pay the taxes on them, there remain for consideration the following questions:

> "(1) Should the goods in question be listed on the average basis as merchandise; or
>
> "(2) Should they be listed by the corporation on the average basis as manufacturer's stock of finished product?
>
> "(3) What is the situs of such property for taxation?"

For reasons which have been suggested, I think, in discussing the statutes relative to the listing of merchandise on the average basis, it is clear that the answer to the first question must be in the negative. The corporation mentioned by you does not satisfy the definition of a "merchant," nor indeed does it come as near to satisfying such definition as do its agents.

On the other hand, the company, I assume, satisfies the definition of a "manufacturer" in section 5385, General Code, and it is therefore the duty of the company to return such "articles which were at any time * * * manufactured or changed in any way, which from time to time, he (it) has had on hand during the year next previous to the first day of April annually" at the average value thereof ascertained in the manner described in section 5386, General Code.

Here, however, two questions present themselves, as follows:

> "Are goods which a manufacturer has taken from his factory and placed in the hands of an agent for sale on commission to be considered as 'on hand' within the meaning of section 5385; and
>
> "If such goods are to be regarded as 'on hand,' at what place for the purpose of this section and section 5371, which provides that manufacturers' stock shall be listed in the township, city or village in which

it is situated, shall the stock be regarded as 'on hand'—at the factory or at the residence or place of business of the agent; in other words, are such small stocks to be regarded as a part of the factory stock of finished products or as separate and distinct small stocks?"

Of these two questions the second is, of course, dependent upon the first, for if it be held that when a manufacturer places goods in the hands of his agent for sale they thereby cease to be "on hand" for all purposes, the conclusion would necessarily follow that such goods are not subject to be listed on the average basis, but merely at the value thereof as ascertained as of the date on which personal property is required to be listed for taxation.

I find that a closely related question was considered by my predecessor, Honorable Timothy S. Hogan, in an opinion to the commission under date of August 25, 1912. The question which Mr. Hogan considered as submitted by the commission was as to whether or not a stock of goods constituting manufacturer's finished product stored in warehouse in a county other than that in which the manufacturing corporation's plant is located, should be regarded as located in such other county and as manufacturer's stock therein.

Mr. Hogan found himself confronted, as I am, with the decision in Bridge Co. v. Yost, 22 C. C. 376, wherein it was held that a corporation engaged in Ohio in the business of manufacturing bridge materials and erecting bridges should list for taxation in the county in which its factory was located and as a part of its manufactured articles on hand materials shipped from its factory to a place in another county in the state for the purpose of being put together in the form of a bridge.

This decision Mr. Hogan very properly limited to the facts of the particular case, it appearing not only that there were numerous distinctions between the decided case and the case which he was considering, but also because the court in Bridge Co. v. Yost, supra, had seemingly overlooked such material provisions of the statute as section 5371 and section 5405.

Mr. Hogan's conclusion may be quoted from his opinion, as follows:

"I am of the opinion that the act of a corporation in separating from its stock at the manufactory, articles of its finished product and sending them to a warehouse maintained by it in another county, causes the goods so separated to cease to be 'on hand' within the meaning of section 5385, General Code, as part of the stock which a corporation must list in the county where the manufactory is located."

With this conclusion I agree, upon the grounds stated in Mr. Hogan's opinion, and I advise the commission on the facts submitted in your letter of May 3rd, that when goods have been shipped by a manufacturing corporation to agents for the purpose of sale on commission, they cease to be "on hand" at the factory, and from the time of their separation from the factory stock their value is to be disregarded in arriving at the average value of the goods there on hand for the purposes of the statute.

But it was apparent to Mr. Hogan, as it is to me, that this holding did not furnish a complete answer to the question which he was considering. As he saw it, there still remained another question which he stated and analyzed as follows:

"I come now to the consideration of the question as to the manner of listing the stock at the warehouse in the other county. Three views might be taken of this question:

"1. That it must be listed as any other tangible personal property, by setting forth the value of the goods on hand on the day preceding the second Monday of April;

"2. That it must be listed as merchant's stock;

"3. That it must be listed as a separate manufacturer's stock."

In answering this question Mr. Hogan referred to a previous opinion to the commission under date of September 13, 1911, in which he had considered the case of Bridge Co. v. Yost, supra, as applied particularly to the question as to the listing of manufacturer's finished product sent from an Ohio manufactory to another state for the purpose of sale. Upon authorities therein cited he reached the conclusion that

"a stock of goods maintained in a warehouse in the manner suggested in your question should not be listed as ordinary tangible property, but should be listed upon the average basis either as merchants' or manufacturers' stock of finished product."

Thereupon Mr. Hogan eliminated from consideration the view that such a stock could be treated as "merchant's stock" for reasons similar to those which I have already expressed.

Referring to section 5385, General Code, applicable to the return of a manufacturer, he concludes as follows:

"Taken in connection with the provision of section 5371 which I have already quoted, this statute furnishes to me, the proper guide for the listing and valuation of the warehouse stock described in your letter. To be sure, there is a slight inconsistency arising out of the failure of the statute specifically to provide for separating a stock of finished products into more than one part. That it was the intention of the legislature that this should be done, however, seems to me to be reasonably clear from section 5371, supra, and I cannot reach the conclusion that the general assembly intended to give such an artificial situs to a manufacturer's stock of finished products as to preclude him from keeping two separate stocks of said products in two different places. For the reasons already suggested the case of Bridge Co. v. Yost, supra, cannot be relied upon in support of any such construction of the law. The construction suggested is consistent with reason and justice and, in my opinion, ought to prevail.

"This construction is also consistent with the provisions of sections 5404 and 5405, General Code, pertaining to corporate returns, and permits corporations to return their property consisting of manufactured products in the counties wherein it is actually situated in accordance therewith.

"I am, therefore, of the opinion that when a manufacturing company whose factory is located in one county maintains in a warehouse, or otherwise, situate in another county, a stock of its manufactured products, such stock should be listed in such other county as a separate stock and manufactured products and valued on the average basis. No 'double taxation' results from adherence to this principle. The moment an article leaves the factory it must be charged off from the stock of finished products there maintained and credited to the stock of manufactured articles maintained at the warehouse in the other county. No single article need be included in the monthly averages of both stocks for any one month."

The only difference between the case submitted to Mr. Hogan and that now

presented by you is that in the former case there was a considerable and substantial stock of goods maintained at a particular place and controlled directly by the corporation itself, whereas in your case the stocks of goods are small in amount and value and are scattered promiscuously throughout the state in the hands of persons who are not in the full sense agents of the corporation, but who are merely its agents to sell on commission.

I am of the opinion, however, that the distinction does not produce a difference in result. I agree with Mr. Hogan's conclusion and advise that the principles which he lays down apply to the case which you present. In other words, having regard to the controlling purpose of section 5371, General Code, which provides that manufacturer's stock shall be listed in the taxing district in which it is situated, and being of the opinion that section 5383 is subject to a construction which permits of a division of a manufacturer's stock of finished products, where the manufacturer has actually divided his stock for the purpose of custody and sale, I reach the conclusion that where a manufacturer in Ohio consigns to an agent in Ohio a relatively small amount of his products for sale on commission by the agent, such goods cease to be on hand as a part of the main stock of manufactured products, but are on hand from that time forward as a part of a separate stock of manufactured products maintained at the place of business of the agent, and that they should, therefore, be listed on the average basis in the taxing district in which the agent's place of business is located.

Of course, sections 5404 and 5405, General Code, taken in connection with section 5371, and particularly the last clause thereof, would have the effect of fixing the situs of property of the kind mentioned by you in the taxing district in which it is located—at least in all counties other than the county in which the principal place of business of the corporation is situated; and this consideration would leave only the question as to whether the goods should be listed on the average basis or at the value thereof on hand on tax listing day for final determination.

For the reasons above stated, however, I am of the opinion that the goods retain their character as manufacturer's stock of finished products, subject to be valued on the average basis, after they are placed in the hands of agents for sale on commission; but that each separate small stock is to be considered as a distinct manufacturer's stock for the purpose of computing the average amount on hand at the factory and in the hands of agents, respectively. So that when a given article leaves the factory it ceases to be "on hand" there and becomes "on hand" as a part of a stock in the hands of the agent for the purpose of computing the average amount. That is to say, under these circumstances, the particular goods are to be charged off the account of goods on hand at the factory and credited to the account of goods on hand in the possession of the agent.

Further answering your questions specifically, then, I am of the opinion that the goods in question should be listed under the item of "manufacturer's stock" by the corporation in the taxing district in which the small stock maintained in the possession of the agent is located, and that the value of such goods so located and listed should be ascertained on the average basis.

Any other conclusion would require a rule defining a manufacturer's stock in terms of mere quantity. The statutes permit of no such distinction, and I accordingly reach the conclusion that the mere size of a manufacturer's stock of finished products is no criterion by which to determine whether or not the value thereof is to be ascertained on the average basis.

It follows also that the mere fact that the manufacturing company may have included the merchandise in question in its return of the average amount of the manufactured goods on hand in the taxing district in which its plant is located will

not exempt such goods as may have been actually on hand in a small stock in another taxing district from taxation in that district. The manufacturer has simply made an excessive and erroneous return in the district in which the factory is located. The other taxing districts concerned are, under favor of section 5371, General Code, entitled in law to the benefit of the taxes upon such property as should be returned therein.

Respectfully,
EDWARD C. TURNER,
Attorney General.

354.

TOWNSHIP TRUSTEES—NO AUTHORITY TO EXPEND MONEY FOR ADDITION TO TOWNSHIP HALL IN ORDER TO PROVIDE PLACE FOR TEMPORARY DETENTION OF PERSONS ACCUSED OF CRIME.

Township trustees may not lawfully expend township moneys in the enlargement of a township hall in order to provide a place for the temporary detention of persons accused of crime.

COLUMBUS, OHIO, May 12, 1915.

HON. EARL K. SOLETHER, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—Your letter of May 7, 1915, receipt of which is acknowledged, is as follows:

> "We have in this county, Ross township, which lies in the northern part of the county and on the outskirts of the city of Toledo. In this township is located the immense concern of the Ford Plate Glass Company and the unincorporated village of Rossford, whose population is about 2,000.
>
> "The township trustees have a town hall at this place and on account of the numerous criminal cases occurring in this section of the township, they desire to enlarge the town hall so as to include a jail, or rather, two cells for the temporary confinement of criminals. The estimated cost of this enlargement of the town hall will be about $200.00.
>
> "I have been unable to find any express statute allowing such expenditure other than by implication in section 3397 of the General Code, and I wish you would advise me as to whether this improvement would be legal under this section."

Your question is answered by the general statement that the maintenance of a jail or of a place for temporary detention of persons accused of crime is not a township function. The law makes no provision for the discharge of any such function by any township officer. That is, no township officer is designated as the jailer, nor is there any procedure for receiving and discharging prisoners confined in any such township institution. In short, the statutes relative to the townships expressly provide for various township institutions such as township halls, libraries, memorial buildings, hospitals, parks, street lights and cemeteries, and make no mention whatever of township jails or prisons. In the scheme of things in this state the purpose of maintaining a jail is either a county or municipal one, and it would not be lawful to levy taxes on the taxable property of a township for such a purpose.

Section 13507, G. C., provides as follows:

> "If it is necessary, for just cause, to adjourn the examination of the accused, the magistrate may order such adjournment and commit him to the jail of the county, until such cause of delay is removed, but the entire time of such confinement in jail shall not exceed four days. The officer having custody of such person, by the written order of the magistrate may detain him in custody in a secure and convenient place other than the jail, to be designated by such magistrate in his order, not exceeding four days. The officer in whose custody any person is detained shall provide for the sustenance of such prisoner while in custody."

It will be seen that the place for the temporary detention of persons accused of crime and brought before a justice of the peace is the county jail. The authority of the justice of the peace or other magistrate, to give a written order to the officer having custody of the person charged with crime to detain him in custody in a "secure and convenient place," is not in my opinion sufficient authority for the township to levy taxes to furnish such a place and thus, in effect, to provide a township jail. It is the duty of the constable or other officer having the custody of the person to provide the place and also to provide for the sustenance of the prisoner while in custody, and neither of these obligations can be assumed by the township and thus shifted to the taxpayers thereof.

Of course, the township hall may be enlarged under the statute which you cite, but to provide ostensibly under these sections for the real purpose of constructing a place for the detention of persons accused of crime would be violative of the law.

I think I should state also that although section 3295, G. C., gives to township trustees the authority to issue bonds for the specific purpose for which municipalities may issue bonds, and although municipal corporations, under section 3939, G. C., may issue bonds "for erecting workhouses, prisons and police stations," yet it is apparent that these provisions do not have the effect of authorizing the improvement which you mention. It is not every purpose, mentioned in section 3939, for which by virtue of section 3295 township trustees may issue bonds, but only such purposes as constitute township purposes. The maintenance of a jail is not a township enterprise any more than the maintenance of a fire department or free public baths or municipal lodging houses or gas works or other public utilities are township enterprises.

For all the above reasons I am of the opinion that the proposed expenditure may not lawfully be made.

Respectfully,
EDWARD C. TURNER,
Attorney General.

355.

ARTICLES OF INCORPORATION—CORPORATION NOT FOR PROFIT—FEE FOR FILING BASED UPON CAPITAL STOCK WHEN SUCH CORPORATION HAS CAPITAL STOCK.

The fee for filing articles of incorporation of a corporation not for profit and having a capital stock is based upon the amount of such capital stock and is not to be less than ten dollars in any case.

COLUMBUS, OHIO, May 12, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have requested me to advise you as to the fee for filing the articles of incorporation of a corporation not for profit having a capital stock; the question being as to whether or not such a corporation should pay a filing fee of $2.00 or one based upon the amount of its capital stock, with a minimum of $10.00.

I quote the material provisions of section 176 of the General Code, which is the only section that need be considered in answering your question.

> "Sec. 176. The secretary of state shall charge and collect the following fees for official services:
>
> "1. For filing articles of incorporation whose capital stock is ten thousand dollars or under, ten dollars; of a corporation whose capital stock is over ten thousand dollars, one-tenth of one per cent. upon the authorized capital stock of such corporation.
>
> "4. For filing articles of incorporation of a mutual life insurance corporation having no capital stock, or of other mutual corporations not organized strictly for benevolent or charitable purposes and having no capital stock, twenty-five dollars, except as hereinafter provided.
>
> "5. For filing articles of incorporation formed for religious, benevolent or literary purposes; or of corporations not organized for profit and not mutual in their character, or of religious or secret societies; or societies or associations composed exclusively of any class of mechanics, express, telegraph, railroad or other employes, and formed exclusively for the mutual protection and relief of members thereof and their families, two dollars. * * *"

It is apparent at a glance that these provisions, considered together, are ambiguous on their face, so far as furnishing an answer to the question you ask is concerned. A corporation of the class described by you is one of those referred to in paragraph five as "corporations not organized for profit and not mutual in their character." If paragraph five is to be regarded as special and exclusive provision for this class of corporations, whether having a capital stock or not, then it is in apparent conflict with paragraph one of the same section. On the other hand, the use of the language "except as hereinafter provided" in paragraph four tends to support the conclusion that entire paragraph five is in the nature of an exception to paragraph four, which relates primarily to corporations having no capital stock.

In this state of the statute law the ambiguity may be resolved upon familiar principles by recourse to the pre-existing statute, which in this case was section

148a of the Revised Statutes; for the only changes which have been made in the statute were made in process of codification, the law not having been amended since 1910.

I find that paragraph five of section 148a was as follows:

> "5. For filing the articles of incorporation of corporations formed for religious, benevolent or literary purposes; or of such corporations as are not organized for profit, *have no capital stock,* and are not mutual in their character; or of religious or secret societies, or of societies or associations composed exclusively of any class of mechanics, express, telegraph, railroad or other employes, formed for the mutual protection and relief of the members thereof and their families exclusively, two dollars."

The words "have no capital stock" were dropped in process of codification, either through error (there are other probably accidental omissions in the section, as, for example, in paragraph one thereof) or in the belief that paragraph one provided fully and exclusively for the fee for filing articles of incorporation of companies having a capital stock.

It is my opinion that present section 176 is to be given the same substantial meaning as section 148a, Revised Statutes, and that, therefore, the fee for filing articles of incorporation of a company organized not for profit, but having a capital stock, is governed by paragraph one of said section 176, and it is based upon the authorized capital stock of the company, not to be less than ten dollars in any case.

I herewith return the proposed articles of incorporation of the D. K. E. Chapter House Company, with check, revenue stamps and letter attached thereto.

Respectfully,
EDWARD C. TURNER,
Attorney General.

356.

EFFECT OF AMENDED SENATE BILL NO. 45—WHERE CITIES HAVE A CERTAIN MINIMUM POPULATION THERE SHALL BE TWO EXECUTIVE OFFICERS "CONTROLLER OF FINANCE" AND "CITY TREASURER"—IN CERTAIN OTHER CITIES ONLY ONE SUCH OFFICER IS PROVIDED TO DISCHARGE DUTIES OF BOTH OF SUCH OFFICERS.

The general assembly is without power to provide for cities having a population of three hundred thousand or over, excepting those which have or may have adopted charters for their own government, a framework of government different from that applicable to all cities.

COLUMBUS, OHIO, May 12, 1915.

HON. HARRY L. FEDERMAN, *Chairman Cities Committee, House of Representatives, Columbus, Ohio.*

DEAR SIR:—You have submitted to me for my examination amended senate bill No. 45 and certain proposed amendments thereto, the effect of which amend-

ments is such as to provide that in municipal corporations having a certain minimum population there shall be two executive officers, designated, respectively, as the "controller of finance" and the "city treasurer"; whereas in all other cities by the provisions of the main bill one officer, to be known as the "controller of finance," is to discharge the functions of both such officers.

You request my opinion as to the constitutionality of this classification.

Since the well known decisions in State ex rel. Kniseley v. Jones, 66 O. S., 453, and State ex rel. v. Beacon, 66 O. S., 491, the question as to the power of the legislature to classify cities for the purpose of legislation respecting the form of municipal government has been, in a way, an open one. In these cases the supreme court wiped out, so to speak, all the mass of laws, nominally general and uniform, but substantially special and local, which had grown up under previous decisions of the court.

The ground of the decision in 1902, to be precise, was that the classifications that had theretofore existed were unreasonable and were such, in the language of the second branch of the syllabus in State ex rel v. Jones as to "evince the legislative intention that municipalities having substantially the same conditions and characteristics shall not enter and remain in the same class." But the court did not go so far in these cases as to hold that the legislature was without power to classify municipal corporations otherwise than in the manner in which they were then classified by the constitution, viz: into cities and incorporated villages, as is shown by the fifth branch of the syllabus which is as follows:

> 5. Whether the provisions of the 6th section, of article 13, ordaining that: 'The general assembly shall provide for the organization of cities, and incorporated villages, by general laws,' is an exclusive classification of municipalities into cities and villages, we do not determine."

See also on this point Gentsch v. State, 71 O. S., 151.

In the case last cited there is language, both in the syllabus and in the opinion, which asserts positively the right of the legislature under the constitution as it existed prior to 1913 to classify cities upon a general and reasonable basis for the purpose of providing by law for the organization thereof. However, this portion of the syllabus and opinion was concurred in by but three of the six judges then constituting the court. Two of the remaining judges did not sit and the third, Judge Shauck, did not concur in this portion of the decision, but placed his concurrence in the judgment upon other grounds stated in the syllabus and in the opinion, viz.: that the legislation complained of in the case and held constitutional by the decision related to the holding of elections, and was a part of the general election laws, and was not limited in its scope to municipal elections as such; therefore, the statute was not one for the organization of cities and villages, but was one respecting the conduct of elections.

It will be seen, therefore, that prior to November 15, 1912, the law respecting such a question as is raised by your inquiry was in a state of uncertainty.

In my opinion, however, the present constitutional provisions with respect to the organization and government of municipal corporations are substantially different from those in effect when the decisions cited were rendered. The former provisions were article 13, sections 1 and 6, which have never been expressly repealed. Section 6 of article 13 has, however, been supplanted by present article 18.

Such former provisions are as follows:

> *Article* 13, *section* 1: "The general assembly shall pass no special act conferring corporate powers."

Article 13, *section* 6: "The general assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power."

Article 18, sections 1 and 2, in force since November 15, 1912, are as follows:

"Section 1. Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law."

"Section 2. General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law."

A comparison of the new constitutional provisions with the old ones will show that the following changes have been made:

1. The language "municipal corporations are *hereby* classified into cities and villages," which is found in article 18, section 1, was lacking in the former constitution, save by implication. The express provision that municipal corporations "are hereby" classified into cities and villages gives rise to the inference that this is the only classification of municipal corporations that may be made—that is, that the classification shall be constitutional and that the legislature shall have no power to make further classifications.

2. The old constitution provided that the general assembly should provide by general laws for the "organization" of cities and incorporated villages; whereas section 2 of article 18 provides that general laws shall be passed to provide for the "incorporation and government" of cities and villages. If there is a difference in the effect of these two provisions it would lie in the fact that the laws for the *government* of cities must be general as well as the laws for the mere incorporation of such municipalities.

3. The provision in section 2 for the passage of additional laws for the government of municipalities adopting the same and the provision of section 7 of article 18, not above quoted, that any municipality may frame and adopt a charter for its own government, point the way by which a municipality may avoid the effect of the general and uniform laws passed for the government of all cities. A strong inference is thereby raised that the same result can not be attained even to the extent suggested by the amendments pending before your committee in any other way.

Aside from the change in the language of the constitution and the doubt arising under the language of the constitutional provisions formerly in force, the amendments submitted by you to me raise another question, in that their effect is to make special provision for the city of Cincinnati, and that city alone. This is because there are but two cities in the state having a population of over three hundred thousand, and one of these cities, Cleveland, is governed by a self-adopted charter. While, technically, the statute so long as it is in force will apply to any city which may attain a population of over three hundred thousand and be

governed by the general laws; yet looking through the form to the substance of the legislation in the manner in which the supreme court in 1902 viewed the conditions then confronting it, one can not escape the conclusion that the intention of the amendments is to make one provision for Cincinnati and another provision for all the other cities in the state. On the principles laid down in the case of State ex rel Kniseley v. Jones, supra, such legislation would have been invalid even under the former constitution.

Although the question is not free from doubt, I advise your committee that if the bill which has been submitted to me should pass and be approved with the amendments which I have considered, it would probably be held unconstitutional.

Respectfully,
EDWARD C. TURNER,
Attorney General.

357.

AMENDED ORDER, STATE BOARD OF HEALTH—APPROVAL—SEWERAGE AND SEWAGE PLANT, VILLAGE OF CHARDON, OHIO.

Amended order of state board of health approved for sewerage and sewage treatment plant, village of Chardon, Ohio.

COLUMBUS, OHIO, May 13, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Enclosed you will find an amended order of the state board of health relating to the sewerage and sewage treatment plant for the village of Chardon, said order to become effective when you have approved the same.

I have conferred with the state board of health and with the city solicitor of Chardon relative to this matter, and upon being satisfied as to conditions it is my opinion that the order should be approved and I have approved the same under the provisions of section 1254 of the General Code, and the same is now transmitted for your approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

358.

STATE HIGHWAY COMMISSIONER—CONTRACTOR'S RIGHT TO COMPEL AWARDING OF CONTRACT, LIMITED—REQUIREMENTS MAY BE WAIVED BY COMMISSIONER IN AWARDING A CONTRACT.

A contractor cannot compel the state highway commissioner to award a contract to him unless the contractor has complied with all reasonable requirements of the highway commissioner as to the form of bids; but the highway commissioner may waive his own requirements and award a contract even though the proposal may not comply with all the regulations of the highway department where such a waiver will not work any prejudice to the rights of the public.

COLUMBUS, OHIO, May 13, 1915.

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

DEAR SIR:—I have two communications from you under date of May 3, 1915, transmitting to me for my examination the bids of certain contractors for inter-county highway work.

On the Wauseon-Morenci road in Fulton county, H. G. Zeller was the lowest bidder, but in filling out a blank form which bidders are required to use, he failed to write in words the amount of his bid, merely using figures, and these figures are written in pencil instead of ink.

On the Van Wert-Ottawa road, in Putnam county, bidders were required to submit their bids in two items, one item covering excavation and foundation course and the other item covering the top course and the finishing of bermes, ditches and slopes. Barnes & Almendinger were the lowest bidders. The estimated cost of item No. 1 was $7,062,88, and the estimated cost of item No. 2, was $7,386.56. In filling out their proposal for the work, Barnes & Almendinger failed to divide the amount bid between items No. 1 and No. 2, and bid $13,500 on item No. 1 and left blank the appropriate space for filling in the amount of their bid as to item 2.

The sections of the General Code relating to the letting of contracts for inter-county highway improvements contain no refernce to the form in which bids shall be received, and it is broadly provided in section 1202, G. C., that *"the bids received for an improvement shall be filed and opened at the time stated in the notice and shall conform to such other regulations as the state highway commissioner may direct."* This provision places it within the power of the state highway commissioner to make any reasonable regulations as to the form in which bids shall be received.

I learn by inquiry that certain regulations have been adopted by your department, and among these regulations are provisions to the effect that contractors in bidding upon inter-county highway improvements must use a blank form of proposal prescribed by the highway department; that the highway commissioner may, when in his judgment it is proper, require separate bids on separate items; and that the amount of a contractor's bid must be written out in the bid in words and also set forth in figures, and that this must be done in ink. The requirement that ink must be used is printed upon the blank form of proposal furnished by the highway department. I am unable to say that any of these requirements are unreasonable or that under the provision of section 1202, G. C., above quoted, the highway commissioner is without authority to make any of the regulations in question.

It remains to examine into the effect of the failure of the contractors in question, H. G. Zeller and Barnes and Almendinger, to comply with certain require-

ments of the highway department relating to the form of bids, the particular defects in their bids being set forth above. While a contracttor could not *compel* the state highway commissioner to award a contract to him unless the contractor had complied with all reasonable requirements of the state highway commissioner as to the form of bids, yet I am not prepared to say that the commissioner could not, if he deemed it proper, award a contract to a bidder who had failed to comply with certain requirements of the department relating to the form of his proposal. The requirements are imposed by a rule of the department and not by a legislative enactment, and I am of the opinion that in *proper cases* the commissioner may waive his own requirements and award a contract even though the proposal may not comply with all the regulations of the highway department.

The question of whether or not a particular case is a proper one for the exercise of this discretion and for the waiving of any requirements by the commissioner, depends upon whether or not such a waiver will work any prejudice to the rights of the public.

As to the requirements now under consideration, it is apparent that the requirement that the amount of a bid must be set forth in both words and figures and that this must be done in ink has for its purpose the elimination of any possibility of subsequent alteration or of misunderstanding as to the amount of a bid. If, therefore, you are able to determine with certainty the amount of the bid of H. G. Zeller, and if no question of subsequent alteration enters into the matter, then it is within your discretion to waive your requirements as to this matter and award the contract to Mr. Zeller. The same general rule would apply to the bid of Barnes and Almendinger, and if the division of the amount of the bid between the separate items be not important to your department or material to the proper handling of the work, then it is within your power to waive your requirement in this particular and award the contract to Barnes and Almendinger.

Respectfully,
EDWARD C. TURNER,
Attorney General.

359.

STATE BOARD OF HEALTH—APPROVAL OF AMENDED ORDER RELATIVE TO SEWAGE WORKS FOR CITY OF AKRON.

Amended order of state board of health for sewage treatment works, city of Akron, Ohio, is regular and subject to approval.

COLUMBUS, OHIO, May 13, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Enclosed herewith please find amended order of the state board of health relative to sewage treatment works for the city of Akron. I have examined the order, which is issued under section 1251 of the General Code of Ohio, find the same regular, and it is my opinion that it should be approved Having approved the same under the provisions of section 1254 of the General Code, I am transmiting the order to you for your approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

360.

STATE BOARD OF HEALTH—NO AUTHORITY TO EMPLOY PUBLIC NURSES

The state board of health has no authority under existing laws for appropriation of funds to pay compensation and expenses of public nurse; nor is the state board of health authorized by law to employ public nurses.

COLUMBUS, OHIO, May 13, 1915.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for an opinion dated April 30, 1915, which is as follows:

> "During the past two or three years in a number of cities in Ohio, the board of health has appointed 'public health nurses.' The question has been raised as to whether or not the board of health has the authority to employ a public health nurse and whether council has the authority to appropriate to the board of health the funds to pay the compensation and expenses of the nurse. I shall be very glad to have your opinion as to whether or not the board of health may legally employ a public health nurse.
>
> "In explanation, I enclose a statement by Mr. Bauman relative to his opinion of the state law as it relates to this subject."

With your letter you enclose a communication from Mr. James E. Bauman, assistant secretary of your board, in which he contends that there is ample authority under existing statutes to authorize council to make an appropriation to the board of health for the employment of a public health nurse. Mr. Bauman quotes a number of statutes under which the board of health operates, but notwithstanding all of his statements he is frank to admit that if the authority to employ a public nurse exists at all it is by inference.

I have read the letter of Mr. Bauman very thoroughly and while he presents the question in an attractive manner, I do not find from the authorities he quotes nor from any of the laws in existence, authority for the board of health to employ a public nurse. Particular stress is laid on the authority contained in section 4411 of the General Code, which is as follows:

> "The board may also appoint as many persons for sanitary duty as in its opinion the public health and sanitary condition of the corporation require, and such persons shall have general police powers, and be known as the sanitary police, but the council may determine the maximum number of employes so to be appointed,"

and which is supplemented in 103 O. L., at page 436, as follows:

> "The board shall determine the duties and fix the salaries of its employes; but no member of the board of health shall be appointed as health officer or ward physician."

The sections quoted above provide for the employment of persons to be known as "sanitary police" who shall have and exercise general police powers, and it is argued that because of the development of certain disease and the progress made

in the determination as to cause and prevention of disease, that a broad interpretation would be given to the sections quoted above for the purpose of meeting the various situations which exist and which come under the control of the state board of health.

I am unable to place a public nurse in the class as comprehended by section 4411 of the General Code. The legislation had under consideration the question of the necessity of a nurse to be employed by the board of health, and in section 4436 of the General Code, provided as follows:

> "When a house or other place is quarantined on account of contagious diseases, the board of health having jurisdiction shall provide for all persons confined in such house or place, food, fuel and all other necessities of life, including medical attendance, medicine and nurses, when necessary. The expenses so incurred, except those for disinfection, quarantine, or other measures strictly for the protection of the public, when properly certified by the president and clerk of the board of health, or health officer where there is no board of health, shall be paid by the person or persons quarintined, when able to make such payment, and when not by the municipality in which quarantined."

The section quoted above contains the only authority which addresses itself to the employment of a nurse, and this is limited to special cases. It would appear, therefore, that if there be the need for a public nurse that is to be gathered from the very able argument of Mr. Bauman, the question is one which should be addressed to the legislature rather than to this office, as I am of the opinion that there is no authority on the part of council to appropriate to the board of health the funds necessary to pay the compensation and expenses of a public nurse, nor is there authority on the part of the board of health to employ such nurse, except that contained in section 4436 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

361.

COUNTY BOARDS OF SCHOOL EXAMINERS—NOT REQUIRED TO PUBLISH NOTICE FOR EXAMINATION OF APPLICANTS FOR COUNTY TEACHERS' CERTIFICATES.

Under the provisions of section 7817, G. C., as amended, 104 O. L., 103 county boards of school examiners are no longer required or authorized to publish notice of the time and place of holding public meetings for the examination of applicants for county teachers' certificates.

COLUMBUS, OHIO, May 13, 1915.

HON. LEVI B. MOORE, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I have your letter of May 4th, which is as follows:

> "Section 7817 of the General Code (104 O. L., page 103) fixes the

dates for the examination of applicants for county teachers' certificates, but I can find no authority for having these dates published in the county newspapers or for paying the same if they are published.

"I have some bills of that character before me awaiting your opinion as to the legality of the same."

Section 7817, G. C., prior to its amendment in 104 O. L. 103, provided as follows:

"Each board (the county board of school examiners) shall hold public meetings for the examination of applicants for county teachers' certificates on the first Saturday of every month of the year, unless Saturday falls on a legal holiday, in which case, it must be held on the succeeding Saturday, at such place or places within the county as, in the opinion of the board, best will accommodate the greatest number of applicants. Notice thereof shall be published in two weekly newspapers of different politics printed in the county, if two papers thus are published, if not, then a publication in one only is required. In no case shall the board hold any private examination or antedate any certificate."

Section 7835, G. C., prior to its amendment in 104 O. L., 107, provides:

"Such board may contract for the use of suitable rooms in which to conduct examinations, for the printing of examination questions, may procure fuel and light, and employ janitors, to take charge of the rooms and keep them in order. Expenses so incurred, together with the cost of advertising notice of their meeting as required by law, shall be paid out of the county treasury on orders of the county auditor, who shall issue them upon the certificate of the president of the board, countersigned by the clerk."

Section 7817, G. C., as amended in 104 O. L., 103, provides:

"Each board shall hold public meetings for the examination of applicants for county teachers' certificates on the first Saturday of September, October, January, March, April, May and the last Friday of June and August of each year, unless any such day falls on a legal holiday, in which case, it shall be held on the corresponding day of the succeeding week, at such place within the county as, in the opinion of the board, best will accommodate the greatest number of applicants. In no case shall the board hold any private examination or antedate any certificate."

Section 7835, G. C., as amended in 104 O. L., 107, provides:

"Such board may contract for the use of suitable rooms in which to conduct examinations, may procure fuel and light, and employ janitors to take charge of the rooms and keep them in order. Expenses so incurred shall be paid out of the county treasury on orders of the county auditor, who shall issue them upon the certificate of the president of the board, countersigned by the clerk."

It will be observed that, in amending section 7817, G. C., the legislature omitted the provision requiring the publication of notice of the time and place of holding

examinations of applicants for county teachers' certificates, and that section 7835, G. C., was amended by omitting from the provision authorizing the payment of expenses incurred in holding such examinations the words "together with the cost of advertising notice of their meeting as required by law."

It was clearly the intent of the legislature, in so amending section 7817, G. C., and in amending section 7835, G. C., to conform to section 7817, as amended, to do away with the publication of notice of holding said examinations as originally provided in section 7817, G. C., and to eliminate the expense incident thereto.

The act of the general assembly amending these sections became effective May 19, 1914.

Replying to your question, I am of the opinion that any publication of notice for the aforesaid purpose made on or after said date were without authority in law, and any bills for expense so incurred are not valid claims against this county.

Respectfully,
EDWARD C. TURNER,
Attorney General.

362.

INSURANCE—INTER-INSURANCE EXCHANGE IS ENGAGED IN BUSINESS OF INSURANCE—PENALTY FOR ATTORNEY IN FACT AND POLICY HOLDERS—LIABILITY OF EXCHANGE FOR EXERCISING FRANCHISE OF WRITING INSURANCE.

The attorney in fact for the Merchants' and Manufacturers' Inter-Insurance Exchange is an insurance agent under the provisions of section 644, G. C., and unless licensed is liable to the penalty prescribed in section 672, G. C.

The contracts entered into by the members of the Merchants' and Manufacturers' Inter-Insurance Exchange are contracts of insurance and the association being unauthorized by the superintendent of insurance to engage in the insurance business, the policy holders therein are liable to the tax of five per cent. under section 644-1, G. C.

The Merchants' and Manufacturers' Inter-Insurance Exchange, each of the members thereof, and the attorney in fact are unlawfully engaged in the business of writing insurance contrary to the provisions of section 665, G. C., and subject to the penalty of section 672, G. C., and may also be ousted from exercising the franchise of writing insurance by proceeding in quo warranto.

COLUMBUS, MAY 13, 1915.

HON. FRANK TAGGART, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I have your letter of April 20, 1915, requesting my opinion as follows:

> "I am enclosing herewith circular of the Merchants' and Manufacturers' Inter-Insurance Exchange, also blank power of attorney for one L.L.L., two original policies issued by this association to residents of the state of Ohio, three photographs of policies issued to residents of Galveston, Texas, receipt of money by L.L.L., and letter of Mr. L. to Mr. J. H., Cincinnati.
>
> "These exhibits show the plan that is being adopted by a class of individuals who are very industriously engaged in making insurance in this state.

"They are not authorized to do business within the state,—indeed it is doubtful if they can be so authorized. The so-called attorneys in fact solicit this class of business without being licensed as agents, and have no other authority save the signed power of attorney.

"What I am desirous of knowing is: First. As to the liability of the alleged attorney in fact under sections 644 and 672 of the General Code of Ohio. Second. I am desirous of knowing whether or not this is insurance, and, if authorized insurance, the liability of the alleged insured to pay the tax of five per cent. under section 644-1 and section 664-3.

"It is the contention of the people who are engaged in this business that section 664-3 relieves them from responsibility, but you will notice that these associations do not confine themselves to residents of this state, in fact, these people have gone over the entire state, and have included not only residents of the state, but citizens and residents of other states.

"I beg, also, to call your attention to section 665 of the General Code.

"It is very desirable that this question be settled, as this department is constantly called on to correct associations of this character who are transacting business in all parts of the state. If they are not authorized to write insurance, proceedings should be commenced to stop this business, and the taxes provided for in section 664-1 should be collected, and the persons making this insurance under the guise of acting as attorney in fact should be published. This department will co-operate with you in any way in arriving at the correct conclusion, and if violation of the law exists, will be pleased to assist your department in bringing offenders to task."

The circular of information of the Merchants' and Manufacturers' Inter-Insurance Exchange submitted with your letter contains the following paragraph indicating the method or plan of insurance:

"Each inter-insurer makes a deposit equal in amount to what he would pay as premium to stock companies for the same amount of protection for a like period of time. His proportion of payments for losses and expenses is to be paid from his deposit. At the end of twelve months one-half of the amount remaining of his deposits, after the payment of losses and expenses, is used to create a 'reserve fund.' The other half is returned to him in cash. When the amount to his credit in the reserve fund aggregates twice the amount of his annual deposit, and as long as his reserve fund is sustained at that figure, he shall have returned to him in cash, at the end of each succeeding year, all other savings."

The application for insurance signed by the insured is as follows:

"APPLICATION FOR INTER-INSURANCE

"To L.L.L., Attorney-in-Fact,

"c/o Merchants' and Manufacturers' Inter-Insurance Exchange,

"Cincinnati, Ohio.

"The undersigned, desiring protection against direct loss or damage by fire for one year, from the_____day of_____, 191__, to the_____day of_____, 191__, for an amount of _____dollars, hereby contracts to interchange indemnity with other contractors, subject to all the conditions set forth in the power of attorney given him to L.L.L., and agrees to make a deposit of _____dollars in cash.

"The property to be protected is located at----------
Description to follow.
"----------Signed
"Date----------"

The following is the form of power of attorney which is printed on the back of the application above quoted, and is also signed by such applicant and referred to in the explanation:

"WHEREAS, There has been established at the office of L.L.L., in Cincinnati, Ohio, a bureau where merchants and manufacturers may interchange insurance for the protection of their respective properties and or interests, such bureau being called 'Merchants and Manufacturers' Inter-Insurance Exchange.'

"NOW, THEREFORE, The undersigned, each severally for himself and not jointly, does hereby appoint L.L.L. our attorney for us and in our name, place and stead:

"To interchange indemnity against loss by fire with other signers of this or like contracts; to accept and make binding upon us, applications for such indemnity insurance; to subscribe with our name, or in his name as attorney-in-fact, issue, change, modify, re-insure, or cancel contracts therefor, containing such terms, clauses, conditions, warranties and agreements as he may deem best; to demand, receive, collect and receipt for all deposits, or sums paid in accordance with the terms of such contracts; to perform or waive all agreements or stipulations of any such contracts; to adjust and settle all losses; to give, receive or waive any notice or proofs of loss; to appear for us in any suits, actions or proceedings and bring, defend, prosecute, compromise, settle or adjust the same; and, in general, no matter whether specifically authorized herein or not, to do or perform every act that we, ourselves, could do in relation to the making, performance, compromise, settlement or adjustment of any contract of indemnity hereby authorized.

"As the purpose of this power of attorney is only to enable us, through our attorney, to exchange indemnity with other contractors, the exercise of the powers hereby granted shall be strictly confined to such purpose and be subject to the following limitations, viz.:

"First. Our liability, above the amount of our annual deposit and our surplus, shall be limited to ($150.00) one hundred and fifty dollars.

"Second. Our attorney shall not have power to bind us for the obligation of any other contractor, but he shall bind us separately and for ourselves alone.

"Third. Our attorney shall only bind us upon the same terms and conditions that he shall bind other parties signatory to this or like contracts.

"In order that the acts hereby authorized may be properly carried on, the same shall be conducted subject to the following regulations, viz.:

First. An advisory committee, composed of the signers of this or like contracts, shall be selected annually for a term expiring during the first week in January of each year, and in annually choosing successors, our attorney is authorized to ask all contractors to name in writing those parties whom they desire to serve as such committee. All moneys that may come into the hands of our attorney shall be deposited in banks or invested in securities subject to the approval of such committee, and all disbursements shall be by check, signed by said attorney, and our attorney is hereby

authorized and instructed to pay out of our funds in his possession our proportion of any losses or other liability as adjusted or compromised and in case at any time the balance standing to our credit shall be insufficient to meet our proportion of any loss or losses or other liability, we hereby agree to remit on demand and we authorize said attorney to draw on us at sight for the necessary amount. If the liability of any member of said committee as an indemnitor shall be terminated for any reason, or if his power of attorney be revoked or cancelled, he shall cease to be a member of the committee and the attorney and the remaining members shall fill the vacancy. Said committee shall serve until their successors are chosen. The powers herein conferred upon said attorney may, at any time, be deputized by him to any other person he may select, subject to the written approval of the majority of said committee.

"Second. Said attorney shall keep separate account of all moneys due us, which shall be at all times open to our inspection. As compensation to the attorney (and in consideration of the guarantee of the solvency of the contractors) said attorney may deduct from any money of ours that may come into his hands, twenty-five per cent. thereof; in consideration whereof, he shall defray all expenses incident to the business hereby authorized, except legal expenses, taxes, or expenses of the advisory committee, of which we shall bear our pro rata share. Said attorney may transfer the office to any other place or places in the United States.

"Third. The signers hereof shall have no joint funds, capital, or stock, nor shall business be conducted by them jointly, nor shall they have any power to bind each other, but each shall act separately and not for any others.

"Fourth. There shall be set aside one-half of our savings as a surplus or reserve fund until such surplus or reserve fund shall equal twice the amount of our last annual deposit, and all other savings shall be returned to us annually in cash.

"Fifth. This power of attorney is strictly limited to the use and purpose herein expressed and to no other purpose, and may be terminated at any time by the undersigned or by the attorney, by either giving to the other ten days' notice in writing, and thereupon our attorney shall within thirty days completely liquidate our account and return to us any net surplus and reserve, provided, however, that there shall be at that time no outstanding unadjusted losses on which we are liable nor adjusted losses on which our liability is unliquidated.

"IN WITNESS WHEREOF, We have hereunto set our hands and seals the_____day of_____, 191__.

Witness_____ Seal.

_____ Seal."

The form of the policy of insurance submitted contains the following provisions:

"Each contractor contracting herein exclusively for such contractor alone, and each represented under separate power of attorney by L.L.L., of Cincinnati, Ohio, called herein the attorney, and it being understood that wherever in this contract the word 'contractors' occurs, it means, and shall be taken and construed to mean, each of the contractors individually, as if a separate contract were issued for each contractor, and as the consideration for and as a part of this contract that each of the con-

tractors has entered into an agreement with each of the other contractors to exchange indemnity on the property of each other to the several amounts respectively authorized by and upon the terms and conditions expressed in said agreement, which is hereby made a part of this contract, it being thereby provided that no contractor shall in any event be made jointly liable with the others or with any one or any of the others or otherwise than severally."

A condition of said policy form printed in heavy type on the back thereof is as follows:

"In the event of litigation herein, to avoid a multiplicity of suits, no suit or other proceeding at law or in equity shall, in any event, be begun or maintained for the recovery of any claim upon, under or by virtue of this contract against more than one of the contractors at any time, nor in any court other than the highest court of original jurisdiction; nor unless the attorney in fact named herein shall have theretofore been given thirty days' notice in writing of the intention to bring suit under this contract; and, it is agreed between the insured and each of the contractors that a final decision in such suit, or other proceedings, shall be taken to be decisive of the similar claim, so far as the same may subsist, against each of the other contractors, absolutely fixing his liability in the premises; each of the contractors, in consideration of the entire stipulation, so far as he individually is or may be concerned, expressly agrees to accept and abide by the result of such final decision in the same manner and to the same effect as if he had been sole defendant in a similar suit or proceeding as to the similar claim against him, so far as the same may subsist, save and accept, however, as to the matter of costs and disbursements; the attorney being authorized as to each contractor, to receive and admit service of process in, and defend, compromise or settle any suit or other proceeding begun or maintained as aforesaid."

Sections 644 and 672 of the General Code referred to in your first question are as follows:

"Section 644. No person, company or corporation, in this state, shall procure, receive or forward applications for insurance in any company or companies not organized under the laws of this state, or in any manner aid in the transaction of the business of insurance with any such company, unless duly authorized by such company and unless duly licensed by the superintendent of insurance.

"Section 672. Whoever violates any provision herein relating to the superintendent of insurance or any provision of an insurance law of this state, for the violation of which no penalty is elsewhere provided, shall be fined not more than one thousand dollars or imprisoned not more than six months, or both."

The answer to your first question depends upon the meaning and scope of the words "company or companies not organized under the laws of this state" as used in section 644 supra. The attorney in fact is clearly an agent procuring and receiving applications for insurance, but do the several individuals who have appointed him as their attorney in fact constitute or come within the meaning of the word "company" as used in the said section?

Section 670, of the General Code, provides:

> "The provisions herein relating to the superintendent of insurance shall apply to all persons, companies and associations, whether incorporated or not, engaged in the business of insurance."

The substance of the language of this last section was a part of section 289 of the Revised Statutes of Ohio as enacted in 99 O. L., 131, which was by the codifying commission separated into four sections of the General Code, viz.: Sections 665, 666, 669 and 670. The language of section 289 of the Revised Statutes, which section was contained in chapter 8, title 3, was in part as follows:

> "The provisions of this chapter shall apply to individuals and parties, and to all companies and associations, whether incorporated or not, now or hereafter engaged in the business of insurance; * * *"

Section 644 of the General Code, above quoted, was section 283 of the Revised Statutes, and also a part of chapter 8, title 3. The word "company" in section 644 must therefore be construed in the light of the qualifying language in section 670 of the General Code. It should also be borne in mind that the General Assembly in the enactment of section 644 and other sections relative to the powers and duties of the superintendent of insurance had in mind and were attempting to restrict and regulate the business of insurance generally, and one cannot escape the conclusion that in enacting this particular section (Sec. 644) the legislative intent was to make sure of the authority and definitely locate and establish the responsibility for the actions and representations of insurance agents representing insurers not incorporated under the laws of Ohio, and that its provisions apply to agents of any foreign corporation or of any individual or unincorporated association of individuals residing in or out of the state; or in other words, that it required the licensing of all agents of any and all insurers, except agents of corporations organized under the laws of Ohio to conduct the business of insurance.

In the case of State v. Stone, 118 Mo., 388 (25 L. R. A., 243), the court say:

> "The word 'company' sometimes includes individuals as well as corporations so that as used in the Revised Statutes of Missouri of 1889 (Sec. 5910), providing that no company shall transact insurance business in this state without a certificate, the word 'company' will be held as including both company and association of individuals."

The facts in the above case were very similar to the facts in the case of State v. Ackerman, 51 O. S., 163, except that in the Missouri case the question was raised in a criminal prosecution upon an affidavit charging Stone with writing insurance without a license, while in the Ackerman case the question arose in a quo warranto proceeding.

> "The word 'company' may be construed to include all corporations, companies, firms or indiyiduals in statutes passed for the promotion of the public good, such as the enforcement of the collection of revenues, regulation of the exercise of public franchises, and in other similar matters. (Efland et al. v. Southern Railway Company, 146 N. C., 135, 59 S. E., 355.)"

Replying to your first question, I am of the opinion that the agents of all insurers, except of corporations organized under the laws of Ohio, are required

by virtue of section 644 of the General Code, to secure a license from the superintendent of insurance, and that under the facts submitted, the attorney in fact for the Merchants' and Manufacturers' Inter-Insurance Exchange is soliciting and procuring insurance without a license, contrary to section 644 of the General Code, and is subject to the penalty prescribed in section 672 of the General Code.

Although I have given you a categorical answer, yet I do not hesitate to say that the question asked is not easy of determination, that strong reasons and authorities of considerable weight can be produced leading to a contrary conclusion. All laws which make the doing of an act a criminal offense are by the courts construed strictly and in favor of the accused. Therefore, in view of the language used in section 644 of the General Code, it is very difficult to predict with certainty what construction will be given it by a court. I therefore advise, as more certain of accomplishing the purpose desired, a resort to the remedies hereinafter suggested in reply to your second question and to the other questions which have arisen in my own mind while engaged in solving the problem submitted.

Considering your second question, I quote sections 664-1, 664-2 and 664-3, as follows:

> "Sec. 664-1. That all persons, companies, associations or corporations residing or doing business in this state that enter into any agreements with any insurance company, association, individual, firm, underwriter or Lloyd, not authorized to do business in this state, whereby said person, company, association or corporation shall enter into contracts of insurance covering risks within this state, with said unauthorized association, individual, firm, underwriter, or Lloyd, for which there is a premium charged or collected, the said person, company, association or corporation so insured shall, annually on the first day of July or within ten days thereafter return to the superintendent of insurance of this state, a statement under oath of all actual cost of indemnity and gross premiums paid or payable for the twelve months preceding on policies or contracts of insurance taken by said person, company, association or corporation and shall at the same time pay to said superintendent of insurance a tax of five per centum of the actual cost of indemnity paid or payable to any such association, firm or individual, or a tax of five per centum of the gross premiums paid or payable to any such insurance company, underwriter or Lloyd. All taxes collected under the provisions of this section by the superintendent of insurance shall be paid by him, upon the warrant of the state auditor, into the general revenue fund of the state.
>
> "Sec. 664-2. Any person, company, association or corporation failing or refusing to make the report required in section 1 of this act and to furnish all the data and information that may be required by the superintendent of insurance to determine the amount due, shall be deemed guilty of a misdemeanor and upon conviction, be fined not less than one hundred dollars, nor more than five hundred dollars for each offense.
>
> "Sec. 664-3. No provision of this act shall be construed as extending to private citizens, firms or corporations, residents of this state, who seek to provide indemnity among themselves from fire, loss or other casualty, by exchange of private contracts for protection only and not for profit. Nor shall any provision of this act be construed as extending to fraternal beneficiary associations or members thereof."

In this connection it may be well to state that the constitutionality of the above section of the General Code has been questioned by reason of the fact that the

so-called "tax" therein imposed is laid upon the insured rather than upon the insurer. The question has never been presented to the courts for determination, and the presumption must be in favor of the constitutionality of the law. The tax imposed is in the nature of a privilege tax or penalty assessed apparently to discourage the doing of the thing which is taxed or penalized. Assuming therefore that the tax imposed by sections 664-1 and 664-2, G. C., is a valid exercise of the legislative power, the class of agreements or contracts entered into by the several members of the Merchants' and Manufacturers' Inter-Insurance Exchange clearly constitute insurance within the definition of section 664-1 above quoted, and since neither the Inter-Insurance Exchange as an association or company nor the several individual members of the "Exchange" who have executed the power of attorney, are authorized by the superintendent of insurance to do an insurance business in Ohio, the insured are under the necessity of paying five per cent. tax provided for in section 664-1 of the General Code, unless they come within that excepted class described in section 664-3 of the General Code, quoted above.

The facts submitted in your letter and the exhibits reveal that the Inter-Insurance Exchange is not composed exclusively of members who are "residents of Ohio," but that its membership includes residents of other states.

I am therefore of the opinion that the five per cent. tax provided for in section 664-1 of the General Code, may be collected from all corporations, associations or individuals in Ohio carrying insurance policies in such Inter-Insurance Exchange, and that in default of making report and paying said tax as required in said section 664-1 they may be subjected to the penalty prescribed in section 664-2, and in addition thereto, the five per cent. tax may be collected from them by civil action.

Although you submit no direct questions relative thereto, you call my attention to section 665 of the General Code, which is as follows:

> "No company, corporation or association, whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with."

Under the facts stated, the Merchants' and Manufacturers' Inter-Insurance Exchange is engaged in writing insurance in violation of the provisions of the last section, and is subject to the penalty prescribed in section 672 of the General Code. The attorney in fact is also, to say the least, directly aiding in the making of contracts substantially amounting to insurance with an association not authorized by the laws of Ohio and is therefore subject to a like penalty. A careful study of the power of attorney, the application for insurance and the policy form reveal also that each member of the Inter-Insurance Exchange is individually engaged in writing insurance contrary to the provisions of section 665 of the General Code, and liable to the penalty prescribed in section 672 of the General Code. Even though the members of the Inter-Insurance Exchange were limited strictly to "residents of Ohio" and thereby escape the tax prescribed in section 664-1 of the General Code, yet they would still be engaged in the business of writing insurance under the definition of section 665 of the General Code, and in order to conduct such business legally they must be authorized by the superintendent of insurance and otherwise conform to Ohio laws relative to the character of insurance written by them.

An examination of the entire plan of business of the Inter-Insurance Exchange,

in connection with the decision of the supreme court of Ohio in the case of Ackerman v. State, 51 O. S., 163, leads directly to the conclusion that its plan of operation is very similar to the plan there under consideration of the court, and that the Inter-Insurance Exchange is an association of companies incorporated and unincorporated, and of individuals who are attempting to exercise the franchise of writing insurance without authorization from the state.

The plan of the Inter-Insurance Exchange is in many particulars so clearly identical with that described and considered in the Ackerman case that a natural inference arises that both plans had their origin in a common source, and I am of the opinion that under the ruling in the Ackerman case the members of the Inter-Insurance Exchange may by proceedings in quo warranto be ousted from transacting the business of insurance in Ohio.

It is brought to my attention from the facts presented that many Ohio corporations are subscribing to or becoming parties to inter-insurance or reciprocal insurance, and the question arises, have Ohio corporations, other than such as are organized to conduct an insurance business, authority under their charters to subscribe to or enter into a contract whereby they insure other corporations, associations or individuals. The answer is clearly "no." Corporations are limited to those express purposes for which organized, together with those impliedly necessary to carry out or accomplish the express purpose. It follows therefore that such corporations are exceeding their corporate authority and doing an *ultra vires* act, and in addition to the penalty imposed by law for the violation of the provisions of section 665 of the General Code, they may by suit in quo warranto, be ousted from entering into contracts of insurance.

Respectfully,
EDWARD C. TURNER,
Attorney General.

363.

SUPERINTENDENTS OF IMPROVED ROADS—WHEN APPOINTED UNDER SECTION 6997, G. C., MAY NOT BE PAID EXPENSES INCURRED FOR CAR FARE, LIVERY HIRE AND HOTEL IN ADDITION TO PER DIEM FIXED BY SAID SECTION.

"Superintendents of improved roads" appointed under section 6997, G. C., may not be paid expenses incurred for car fare, livery hire and hotel in addition to per diem fixed by said section.

COLUMBUS, OHIO, May 13, 1915.

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

GENTLEMEN:—Under date of April 28, 1915, you submitted for my opinion the following question:

> "Can bills for car fare, livery hire and hotel expenses incurred by 'superintendents of improved roads,' appointed under section 6997, G. C., be legally paid from township funds in addition to the $4.00 per diem provided for in the section?"

Section 6997, G. C., provides:

> "Before entering upon the improvement of a road under the provisions of this subdivision of this chapter, the trustees of such township shall employ a competent engineer, who shall be known as 'superintendent of the improved roads,' and who shall be paid not more than four dollars per day for the time actually employed, out of the funds raised for the improvement of roads and streets."

Nowhere in the statutes relative to an improvement of a road, under the provisions of the particular subdivision of the chapter, is there any provision for the payment to superintendents of improved roads of any expenses incurred by them, nor anything further by way of compensation. The superintendent employed under the provisions of section 6997, G. C., is supposed to present himself for work at the proper place and work on a per diem basis. Bills for car fare, livery hire and hotel expense are, under the opinion of the supreme court in the case of Richardson v. State ex rel, 66 O. L., 108, of a personal character. Such expenses are not to be compensated for unless there is clear provision of statute authorizing the same. Not finding any provison so authorizing them I am of the opinion that bills for car fare, livery hire and hotel expenses, incurred by superintendents of improved roads appointed under section 6997, G. C., cannot be legally paid from township funds in addition to the compensation provided in said section.

Respectfully,
EDWARD C. TURNER,
Attorney General.

364.

APPOINTMENT TO FILL VACANCY IN OFFICE OF JUDGE OF COURT OF COMMON PLEAS OF FIRST SUBDIVISION OF NINTH JUDICIAL DISTRICT—LENGTH OF SERVICE—HOW APPOINTMENT SHOULD BE MADE

An appointment to fill a vacancy in the office of judge of the court of common pleas of the first subdivision of the ninth judicial district should be made to the office of "judge of the court of common pleas of the first subdivision of the ninth judicial district" for the period beginning with the date of the appointment and ending with the election and qualification of the appointee's successor.

COLUMBUS, OHIO, May 13, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—Your letter of May 10, 1915, receipt of which is acknowledged, requests my opinion as follows:

> "Hon. John H. Fimple, judge of the court of common pleas of the first subdivision of the ninth judicial district, composed of Carroll, Stark and Columbiana counties, has tendered his resignation to take effect as of date May 15, 1915. I am, therefore, called upon to make an appointment, and in filling such vacancy in this office, I desire to be advised, under the provisions of section 1532 of the General Code, as amended Ohio Laws, page 243, 1914, the term for which such appointment should be made and

whether or not the appointment should be made 'has been duly appointed to the office of judge of the court of common pleas in Carroll county,' or 'has been duly appointed to the office of judge of the court of common pleas of the first subdivision of the ninth judicial district."

I find upon investigation that Judge Fimple's term began January 1, 1911. Accordingly the position held by him was that described by you, viz.: "judge of the court of common pleas of the first subdivision of the ninth judicial district."

Upon the principles worked out in an opinion to the bureau of inspection and supervision of public offices, which is too lengthy to be quoted herein, I advise that the appointment which you must make to fill the vacancy created by Judge Fimple's resignation is to the same office. That is, judge of the court of common pleas of the first subdivision of the ninth judicial district. The appointment should be made for the period beginning with the date of the appointment and extending until the election and qualification of his successor. (Article IV, section 13 of the constitution.)

At the regular election for common pleas judges in the year 1916, there will be two positions to be filled, first: that of judge of the court of common pleas in Carroll county for the short term beginning with the qualification of the person elected and ending December 31, 1916, and second: the office of judge of the court of common pleas in Carroll county for the regular term beginning January 1, 1917, and ending December 31, 1922. The last statement results from the provision of section 1532, G. C., as amended 104 O. L., 243, to which you refer. The other statements in this opinion are based upon the schedule to amended article IV, section 3 of the constitution which provides that:

"Each county shall continue as a part of its existing common pleas district and subdivision thereof until one resident judge of the court of common pleas is *elected and qualified therein.*"

This provision controls to the exclusion of the third sentence of amended section 1532 insofar as that sentence is subject to such an interpretation as would constitute each common pleas judge a county judge "after the year 1914."

Respectfully,

EDWARD C. TURNER,

Attorney General.

365.

APPROPRIATION TO SATISFY CLAIMS OF OWNERS OF ANIMALS DESTROYED BY AGRICULTURAL COMMISSION DOES NOT BECOME EFFECTIVE UNTIL AFTER NINETY DAYS AFTER FILING OF LAW IN SECRETARY OF STATE'S OFFICE—SUBJECT TO REFERENDUM—LEGISLATURE WITHOUT AUTHORITY TO MAKE SUCH LAW AN EMERGENCY MEASURE.

An appropriation made to satisfy claims of the owners of animals destroyed by the agricultural commission in the eradication of contagious diseases among animals is not exempt from the referendum and does not become effective until after ninety days after the law making it is filed with the governor in the office of the secretary of state.

The general assembly is without power to make such an appropriation immediately effective by declaring it to be an emergency law.

COLUMBUS, OHIO, May 13, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—I have your letter of May 12, 1915, which is as follows:

> "I very respectfully request an opinion from you as to whether appropriations recently made by the general assembly for payment of claims of those whose animals were destroyed in the attempt to eradicate the hoof and mouth disease can be made available before the expiration of 90 days. As you realize many of these people are in sore straits and are very desirous of receiving the money appropriated at as early a date as possible. If this appropriation were construed to be an appropriation for current expenses it of course would be immediately available. Shall be glad to have your opinion upon this matter and also as to whether such appropriation should be provided for in an emergency measure under the terms of the state constitution."

The constitution of the state, article 2, section 1d provides:

> "Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect. Such emergency laws upon a yea and nay vote must receive the vote of two-thirds of all the members elected to each branch of the general assembly, and the reasons for such necessity shall be set forth in one section of the law, which section shall be passed only upon a yea and nay vote, upon a separate roll call thereon. The laws mentioned in this section shall not be subject to the referendum. (Adopted Sept. 3, 1912.)"

The statutes involved are as follows: being sections 36 to 38 inclusive of the act establishing the agricultural commission of Ohio, 103 O. L., 304-312, therein designated as sections 1114-1116, G. C. It appears that no appropriation was made, prior to the slaughter of the animals in question, for the uses and purposes of the agricultural commission in paying for slaughtered animals, but that the claims of the respective owners were presented to the general assembly for special allowance as claims against the state.

Although these claims constituted liabilities of the state in the sense that the

subject-matter thereof was authorized by pre-existing law, yet in my opinion their satisfaction does not constitute a "current expense of the state government," within the meaning of the above quoted provision of the constitution. The term "current expenses" as therein used in my opinion means and refers to such expenditures as would ordinarily have to be made in order to discharge the functions of government. I think the intention of the framers of the constitutional amendment, and of the people in adopting it was that what might be termed anticipatory appropriations intended to provide funds in advance for conducting the normal operations of the different departments of the state government should be exempt from a referendum. I do not think it was the intention that appropriations to discharge liabilities lawfully incurred by a state department, but not within the normal or ordinary course of business of the department, the appropriations being made after incurring the liability, should be exempt from the referendum. In other words the current expenses of the state government are those expenses for which appropriations are made in advance, subject to qualifications which need not be discussed here. But an appropriation to discharge a liability, though lawfully incurred by a state department, is not one for a "current expense" if no appropriation was made in advance for such purpose and if the liability is one not ordinarily or customarily incurred by the department in the regular course of its business.

These statutes cited clearly evince the legislative intention that the agricultural commission shall not, itself, make the expenditure. It has authority to create claims, but the statute requires that the claims shall be made the subject of special appropriations. The statute, therefore, shows on its face that the payment of such claims is not a current expense of that branch of the state government entrusted to the administration of the agricultural commission. That is, expenditures of this class are not, under the statute, to be made from time to time by the agricultural commission, but are to be provided for by the general assembly at the biennial appropriation periods. Therefore, from another point of view expenses of this character are not "current." I, therefore, advise that the appropriations recently made by the general assembly for the payment of claims of those whose animals were destroyed by the agricultural commission, under the circumstances mentioned by you, will not become effective until the expiration of ninety days after the law making them was filed by the governor in the office of the secretary of state.

I am further of the opinion that a law of this character cannot be made an emergency measure. The straits of those, the payment of whose claims is thus deferred, in nowise affect the public peace, health or safety, and any formal declaration to the effect that the public peace, health or safety required the immediate effectiveness of an appropriation law of this kind, if inserted in such law for the purpose of exempting it from the referendum and putting it into immediate effect, would in my opinion be a mere nullity.

Respectfully,

EDWARD C. TURNER,

Attorney General.

366.

FAIR GROUNDS OWNED BY COUNTY AGRICULTURAL SOCIETY—AN ACT AUTHORIZING COUNTY COMMISSIONERS TO LEVY A TAX AND ISSUE BONDS FOR IMPROVING SUCH GROUNDS, PROBABLY CONSTITUTIONAL.

In view of legislative and judicial history, the courts would probably hold an act authorizing county commissioners to levy a tax and to issue bonds for the purpose of improving fair grounds owned by a county agricultural society, to be constitutional.

COLUMBUS, OHIO, May 14, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—You have requested me to advise you as to the constitutionality of house bill No. 471, passed May 5, 1915, enacting section 9887-1 of the General Code, as follows:

> "Section 9887-1. In counties wherein there is a county agricultural society which has purchased a site whereon to hold fairs, or if the title to such grounds is vested in fee in the county, but the society has the control and management of the lands and buildings, if they think it for the interest of the county and society, the county commissioners may levy a tax upon all the taxable property of the county for the purpose of improving such grounds not to exceed one-tenth of one mill in any one year and not for a period of more than ten years; and in anticipation of the collection of this tax the commissioners may issue and sell the bonds of the county, bearing interest not to exceed six per cent. per annum payable annually."

This provision is similar in import and substantial effect, so far as your question is concerned, to sections 9887 and 9888 to 9892, inclusive, of the General Code. Both of these existing statutes authorize the payment from public funds to aid in the improvement of real estate used by a county agricultural society as a site whereon to hold fairs.

Sections 9880 and 9894, General Code, provide for public aid from the county treasury to an agricultural society for the purpose of encouraging agricultural fairs. The constitutionality of these provisions was upheld in Commissioners of Lawrence County v. Brown, 1 N. P. (n. s.) 357. The ground of the decision is that article VIII, section 4 of the constitution, prohibiting the loaning of the public credit to or in aid of any individual, company, corporation or association, does not apply to corporations formed for public purposes and not for profit, such as agricultural societies. (See also Zanesville v. Crossland, 8 C. C. 652.)

There might be said to be a distinction between the granting of public aid to an agricultural society for the purpose of encouraging the holding of fairs and for the purpose of paying for improvements on real estate, on the ground that though the corporation is not for profit, yet upon its dissolution the members would be entitled to its real estate; so that eventually the public aid might be diverted to private use. This contingency, however, is safeguarded in the related statutes. Section 9885, General Code, provides that when the county commissioners have paid money to aid in the purchase of a site, no mortgage shall be given by the agricultural society thereon without the consent of the commissioners; while section 9898, General Code, provides:

"When a society is dissolved or ceases to exist, in a county where payments have been made for real estate, or improvements thereon, or for the liquidation of indebtedness, for the use of such society, all such real estate and improvements shall vest in fee simple in the county by which the payments were made."

It is necessary only to add that county agricultural societies have no authority to declare dividends or otherwise to distribute profits among their members. So that even if such a society should not be dissolved, and its lands should be leased for private purposes, no benefit could thereby accrue to any individual.

The provisions of article VIII, section 4 of the constitution create some doubt in my mind, but in view of the decisions which I have cited and in view, too, of the fact that statutes of substantially the same character have supposedly been in force in this state for more than half a century and proceedings have been had thereunder without question, I am of the opinion that should section 9887-1 of the General Code, if enacted into law by the approval of house bill No. 471, be questioned in the courts its constitutionality would probably be sustained.

Respectfully,
EDWARD C. TURNER,
Attorney General.

367.

PROVISIONS OF SUBSTITUTE SENATE BILL NO. 264 MAY EXCEED THE TAX LIMITATION OF THE SMITH LAW ONE-HALF MILL.

Under the provisions of substitute senate bill No. 264, now pending before the general assembly, the tax limitations of the Smith law, sections 5649-1 *to* 5649-5b, *G. C., as amended* 103, 104, *Q. L. may be exceeded one-half mill.*

COLUMBUS, OHIO, May 14, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—You have requested my opinion as to whether the right to levy taxes as provided by substitute senate bill No. 264, now pending in the general assembly, is limited by the provisions of the Smith law, as found in sections 5649-1 to 5649-5b, General Code, (as amended in 103 and 104 O. L.).

This bill provides for the construction, maintenance and operation of a rapid transit and boulevard and parkway system by a municipality, acting through a board of rapid transit commissioners to be appointed as provided therein.

The funds to pay the cost of construction of such system are to be raised by taxation or by the issuance and sale of bonds of the municipality. Fifty per cent. of the cost of the boulevard and parkway may be assessed against abutting and benefited property, and bonds may be issued in anticipation of the collection of such special assessments.

Under the provisions of sections 7 and 8 of the bill, bonds may be issued for the construction of such system up to one hundred and fifty thousand dollars without a vote of the people, and with a vote of the people up to not to exceed "two per cent. of the total value of all property in such municipal corporation as listed and assessed for taxation."

Section 11 of the bill contains the provisions for the raising of money to pay the interest on said bonds and to redeem the same (except special assessment bonds) and is as follows:

"Section 11. All rentals, payments and fees of every description and all other income, earnings or revenues, received from all persons, firms and corporations for the use of said depot terminals and railways, shall be kept in a separate and distinct fund, and after paying the expenses of the municipal corporation for the maintenance, conducting and managing said depots, terminals, and railways, including the setting aside of a reasonable sum annually for depreciation to be applied to the repair or replacement of any portion of said work, from the remainder of said receipts there shall annually be paid into the sinking fund of the city such sum or sums as are necessary for the payment of accruing interest on the bonds, if any, issued and outstanding for the construction of such rapid transit system, and for providing a sinking fund for the redemption thereof at maturity, and to the extent that such remainder shall not be sufficient for the said payment of the interest on said bonds and for the bonds issued during construction and for the accumulation of a sinking fund sufficient for payment thereof at maturity, the municipal corporation shall annually levy a tax sufficient for such purposes, and said taxes for bonds issued by vote of the people shall not be subject to any of the limitations provided by law for maximum tax rates on property in the municipal corporation, except the combined maximum rate, fixed in section 5649-5b of the General Code, *and in addition thereto, one-half mill for the purposes herein authorized may be levied to the extent herein described in addition to all other tax levies provided by law.*

"The surplus in any year above said expenses, depreciation charges, interest and sinking fund charges, shall up to the amount necessary to equal said deficiencies of previous years, be paid into the sinking fund of said city until the amounts paid into the sinking fund from the said revenues shall equal the total accrued interest and sinking fund charges on said bonds, and any amounts thus paid in on account of such past deficiencies may be applied to interest or sinking fund charges on any indebtedness of said city. Any surplus above said expenses, depreciation charges, current interest and sinking fund charges and reimbursement of past deficiencies of interest and sinking fund charges, may be used for the reconstruction of, improvement of, additions to, or extensions of such depots, terminals and railway equipment."

Under the bill as submitted to me the tax limitations of the Smith law may be exceeded one-half mill either for the direct tax levy provided under section 7 of the bill, or for interest and sinking fund levies on bonds issued by a vote of the people. Hon. Walter M. Schoenle, city solicitor of Cincinnati, who happened to be here on another matter, explained that it was not the intention of those who were asking for the bill to place any levy outside of the Smith law except a levy of one-half mill for interest and sinking fund purposes on bonds issued by a vote of the people. He has informed me that an amendment will be offered from the floor of the house striking the commas out of line 191 and striking from line 192 the words "for the purposes herein authorized" and striking out the remainder of the sentence after the word "levied," which will make that part of the section read "and said taxes for bonds issued by vote of the people shall not be subject to any of the limitations provided by law

for maximum tax rates on property in the municipal corporation, except the combined maximum rate fixed in section 5649-5b of the General Code and in addition thereto, one-half mill may be levied."

If this is done then in my opinion no levy may be made in excess of the Smith law limitations except one-half mill for the purpose of interest and sinking fund for bonds issued under a vote of the people.

Your attention is called to the fact that under the provisions of section 11 above quoted, all earnings of such rapid transit system, over and above cost of maintenance, conducting and managing the same, are to be applied to the payment of interest on, and redemption of said bonds, and that taxes can be levied only when such surplus earnings are not sufficient for such purpose, and that any such taxes so levied and applied are to be returned to the sinking fund of the city out of any future surplus earnings of the rapid transit system, in which event such funds to be returned may be used to pay any indebtedness of the city.

This opinion is limited to the question of the application of the Smith law limitations, and no consideration has been given to any of the other provisions of the bill.

Respectfully,
EDWARD C. TURNER,
Attorney General.

368.

MEMBERS OF DISTRICT BOARD OF COMPLAINTS—FORM OF BOND TO BE GIVEN.

Form of bond prescribed, to be given by members of district board of complaints.

COLUMBUS, OHIO, May 14, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—For the bond to be given by members of the district board of complaints I hereby prescribe the attached form.

Respectfully,
EDWARD C. TURNER,
Attorney General.

BOND OF MEMBER OF DISTRICT BOARD OF COMPLAINTS.

KNOW ALL MEN BY THESE PRESENTS, That we, _____

_____

as principal, and _____

as suret_____, are held and firmly bound unto the state of Ohio in the penal sum of two thousand dollars ($2,000.00) for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally and firmly by these presents.

THE CONDITION of the above obligation is such that, whereas, the said__

_____

has been appointed as a member of the district board of complaints in and for the

assessment district of_____county, Ohio, for the term of _____year_____, commencing on the_____day of _____A. D. 191____.

NOW THEREFORE, if the said_____ shall faithfully perform the duties of the said office, as provided by law, or by the orders, rules and regulations of the tax commission of Ohio, during his said term of office, and shall not, while acting within the scope of his official duties, or under color of his official authority, be guilty of any neglect, default, fraud or unlawful act causing damage to any person, then, these presents shall be void; otherwise to be and remain in full force and effect in law.

IN WITNESS WHEREOF we have hereunto set our hands and seals this _____day of_____A. D. 191____.

_____

_____

_____

_____

I hereby certify that the form of the above bond is that prescribed by me.

_____

Attorney General of Ohio.

The execution of the above bond is hereby approved this_____ day of _____A. D. 191____.

_____, Prosecuting Attorney.

_____County, Ohio.

369.

PROPOSED SUBSTITUTE SENATE BILL NO. 187, PROVIDING FOR ISSUE OF BONDS IN AID OF CONSTRUCTING INTERSTATE CANALS CONNECTING LAKE ERIE AND HEAD WATER OF THE OHIO RIVER, UNCONSTITUTIONAL.

COLUMBUS, OHIO, May 14, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—You have submitted to me a proposed bill designed as a substitute for senate bill No. 187, recently vetoed by you, with a request for my opinion as to its constitutionality. The bill, like its predecessor, is entitled as follows:

> "A bill to authorize counties of this state to issue bonds in aid of the construction, by adjoining states, of interstate canals, partly within this state, connecting Lake Erie with navigable waters wholly or partly within such adjoining states; providing for the submission of the question of issuing such bonds to the electors of any county pursuant to the order of the court of common pleas made upon a petition of qualified voters who are freeholders; and requiring county commissioners to issue said bonds if a majority of the electors voting on the question vote in favor of such issuance, and repealing section 2503-1 of the General Code, as amended May 3, 1913 (Vol. 103, Ohio Laws, 473), and repealing sections 2503-2 and 2503-3 of the General Code."

Section 1 of the bill is in the abstract as follows:

> "Whenever by any present or future law, or laws, of any state of the

United States adjoining this state, a commission or board of such adjoining state shall be authorized to construct, maintain and operate an interstate canal or waterway by a route partly within this state and partly within such adjoining state, connecting Lake Erie with any navigable waters wholly or partly within such adjoining state, * * * which law, or laws, shall provide for such construction by such voluntary contributions or appropriations in money, or bonds * * * in pursuance of the authority of any present or future laws, by the United States, certain of the several states thereof, and various counties, cities, towns, municipalities, or other political subdivisions of said states * * * for the collection of tolls and charges on such canal or waterway, * * * and for the distribution of any surplus revenues of such canal or waterway * * * among such contributors * * * pro rata * * *, thereupon it shall be lawful for any county in this state to issue bonds in aid of the construction of such canal or waterway as hereinafter provided."

Section 2 of the bill provides that at least one member of the commission or board of such adjoining state shall be a citizen and resident of the state of Ohio, and such canal or waterway shall be and remain exclusively a public enterprise under public management, control and operation, and free from any private management or interest whatsoever.

Section 3 provides in the abstract for the filing, with the clerk of the court of common pleas, "of any county of this state" of certified copies of the laws of such other state and of a petition signed by at least one hundred qualified electors, freeholders of the county, stating that in the judgment of the petitioners "such county, by reason of its location or commercial or industrial interests, will be benefiited by the construction of the canal or waterway authorized by such law, or laws, and that it is desirable that bonds of the county should be issued in aid thereof," and praying the court to order an election on the question of issuing bonds in aid of the canal, in such amount, etc., as may be stated in the petition. It is further provided that the court shall consider whether or not the petition is in proper form and if it is shall order it to be filed with the clerk and fix the date of hearing. The hearing is to be upon the form of the petition, merely, it being expressly provided that the court "shall not be required to inquire into the matters set forth upon the judgment of the petitioners as to the benefits to the county resulting from the construction of such canal or waterway, and the desirability of the issue of bonds, which matters shall be deemed to depend upon the result of the election prayed for." If the court finds that the petition is in form regular, it shall order the election. The section then provides for the machinery of holding the election, and that "if it shall appear * * * that at least a majority of all the votes cast for and against the proposed bond issue are in favor of said issue, the county commissioners *shall* issue the bonds so authorized, as hereinafter provided." It is also provided in said section that the "power hereby conferred shall not be deemed to be exhausted by a single submission to a vote and a favorable vote thereat."

Section 4 provides for the issuance of the bonds so required to be issued, and the making of tax levies for the payment of the same which are to be "within any limitation prescribed by law."

The foregoing constitute, in the abstract, all the provisions of the bill. There is no provision in the bill directly authorizing any other state to construct any public work in the state of Ohio, or granting to the officers of any such other state the privilege of the exercise of the power of eminent domain for such purpose, nor providing in any way for the acquisition of the necessary right of

way in Ohio for the construction of such a canal as is mentioned in section 1. There are general provisions of the Ohio law relative to the organization and powers of ship canal companies. (Sections 9199-9228, inclusive, of the General Code.) One of the sections of this statute (section 9228), provides as follows:

> "Sec. 9228: Any company created under the laws of another state, or of the United States, for the purpose of constructing, maintaining and operating a ship-canal partly in such other state and partly in this state, with any kind of motive power, may exercise and enjoy herein all its powers, privileges, faculties, and franchises for the purposes of such canal and its business, not inconsistent with the laws of this state. Such companies shall be entitled to the rights or privileges granted, and subject to the requirements or restrictions imposed by law on ship canal companies organized under the laws of Ohio."

It is clear, however, that "a commission or board of such adjoining state," within the meaning of section 1 of the bill, would not be a "company created under the laws of another state, within the meaning of section 9228, G. C. Therefore, although foreign ship-canal companies have, by reason of the provisions of the sections referred to in section 9228 and of that section itself, the authority to "lay out, construct, maintain and operate with any kind of motive power a ship-canal" (section 9199), with power "by purchase, appropriation or otherwise" to "acquire lands necessary for making, preserving, maintaining, operating or using its canals" (section 9203), these powers would not be possessed by a department or agency of another state. Hence, in the absence of any authority in the bill for such agency of another state to acquire a right of way for a canal in Ohio, or even to operate a canal in this state, such authority does not exist.

If the issuance of bonds and the levying of taxes by counties in this state were made dependent, by the bill, upon the actual construction of a canal in this state, then because of the deficiency pointed out, the bill, if attempted to be enacted at all, would be merely *inoperative.* As a matter of fact, however, that is not the case. It is sufficient, under sections 1 and 3 of the bill, that the construction of the canal be *authorized* by any law or laws *"of any state of the United States adjoining this state."* When such laws have been passed and without any work being done or any route located except as to the general indication, in the laws, of the termini, the issuance of the bonds of any county may be compelled in the manner provided in the bill. This fact of itself constitutes a very serious objection to the bill, at least as to its policy, and it also necessitates the consideration of other questions presented by the bill. The first of said questions is as to whether or not the contribution by a county to an enterprise of this sort conflicts with article 8, section 6 of the constitution, which in part provides as follows:

> "No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation or association."

For reasons which have already been stated I am of the opinion that a commission or board of an adjoining state could not be regarded as a "joint stock company, corporation or association," within the meaning of this section. The provisions of section 2 of the proposed bill, above referred to, would have the

effect of a contractual obligation, in the event that money were actually contributed by any Ohio county to such an enterprise, and would in my opinion effectually preclude the canal from ever passing under the control and management of private interests.

A much more serious and fundamental question, however, has suggested itself to me. It will be observed that the bill authorizes one hundred electors of any county in the state to petition for an election and to submit to the qualified electors of the county the question of issuing bonds in aid of such canal, and provides that the result of the election shall conclusively determine that such county, by reason of its location or commercial or industrial interests, will be benefited by the construction of the canal; and that such result shall have the effect not merely of *authorizing* but of *requiring* the commissioners of the county to issue bonds in the amount voted upon and for the period of time specified in the petition.

Several reasons occur to me for holding such a scheme of legislation unconstitutional. In the first place, under the constitution of Ohio, as interpreted by our supreme court in Wasson v. Commissioners, 49 O. S., 822, and Hubbard v. Fitzsimmons, 57 O. S., 436, a question as to whether or not a given locality will be specially benefited by a public improvement cannot be conclusively foreclosed by political action, but is one the determination of which rests with the courts. The opposite theory is one which obtains in the state of Pennsylvania, and indeed formerly obtained in the state of Ohio, and possibly still does obtain in this state as to municipal corporation. (See Goddin v. Crump, 8 Leigh (Va.), 120. Sharpless v. Phila., 21 Pa. St., 147. Railroad Co. v. Commissioners, 1 O. S., 77-98. Walker v. Cincinnati, 21 O. S., 14-44.)

Counties, however, are not municipal corporations. They are "local subdivisions of a state, created by the sovereign power of the state, of its own soverign will, without the particular solicitation, consent or concurrent action of the people who inhabit them." "Whereas, a municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice." (Commissioners v. Mighels, 7 O. S., 110-119.)

The case last cited holds that the county commissioners, as a board, have some of the attributes of a corporation and constitute a public quasi corporation, but the people of the county, as a whole, do not constitute a body corporate, in the sense in which the people of a city or other municipal corporation may be said to constitute a body corporate. Hence, a county has no corporate functions or interests such as a municipal corporation is said to have, as distinguished from its governmental interests.

There will be found, in the above decision in Railroad Co. v. Commissioners, supra, language of a contrary import; but it must be borne in mind that the case itself arose under the constitution of 1802 and not under the constitution of 1851, and that after all the application of the doctrine now under discussion that was made in that decision was as follows:

> "The state had unlimited power to construct improvements of this character; and the selection of means and agencies to be employed for the purpose, was left exclusively to the general assembly. Counties and private corporations might lawfully be employed as such means and agencies, and invested with such powers as were necessary to accomplish the object."

So that it will be seen that Ranney J., conceived of the county, under the

constitution of 1802, as a mere instrument or agency of the state for the execution of its policies.

In effect the present bill constitutes an attempt to impose the will of the state upon the county, for when the election has been held, upon the petition, the duty of the commissioners, under the bill, to issue the bonds, becomes mandatory. So that if we assume that the county is merely chosen as an instrument by which to carry out the state policy, and is not invested with corporate power or functions, we must inquire whether or not the county is an appropriate instrument, under the present constitution, for the discharge of a state function of this character.

Article 8, section 12 of the constitution, as amended September 3, 1912, provides as follows:

> "So long as this state shall have public works which require superintendence, a superintendent of public works shall be appointed by the governor for the term of one year, with the powers and duties now exercised by the board of public works until otherwise provided by law, and with such other powers as may be provided by law."

The statutes prescribing the powers and duties of the board of public works, and those of the superintendent of public works, as the successor of that board, show what is the well known fact, viz.: that the phrase "public works," as herein used, means and refers almost, if not quite exclusively, to canals. In other words, under the constitution and statutes of this state, aside from sections 2503-1 to 2503-3 inclusive, of the General Code, which the bill repeals and for which it is a substitute, the public canals of the stae constitute the public works of the state, and the same are to be superintended by the superintendent of public works.

Thus it is provided in section 412, G. C., as amended 103 O. L., 120, that:

> "The superintendent of public works shall have the care and control of the public works of the state and shall protect, maintain and keep them in repair. The superintendent shall have the power to remove obstructions therein or thereto and shall make such alterations or changes thereof, and shall construct such feeders, dikes, reservoirs, dams, locks or other works, devices, or improvements as he may deem proper in the discharge of his duties. Subject to the approval of the governor, the superintendent of public works may purchase on behalf of the state such real or personal property, rights or privileges as it may be necessary, in his judgement, to acquire in the maintenance of the public works or their improvement subject to the approval of the governor."

And in section 415, as amended by the same act, that:

> "The superintendent of public works of Ohio shall have supervision of the public works of the state and shall make such rules and regulations for the improvement, maintenance and operation of the public works as shall be necessary to the proper conduct of the department.'

It follows, from these constitutional and statutory provisions, that the subject-matter of public canals, especially inter-county and interstate canals connecting the waters of Lake Erie with other navigable waters, is one of state-wide interest and concern. A public work of this sort is not a local improvement in any sense of the word, and if counties are to be employed in the aid of such an undertaking, such employment must be, as heretofore stated, either upon the theory that such subdivisions constitute municipal corporations so that they may, in their corporate (not governmental) capacity maintain public works of their own, as held in

Walker v. Cincinnati, supra, or because they are employed as means and agencies for the purpose of constructing improvements pertaining to the state, as such, as stated in Railroad Company v. Commissioners, supra. I think it is clear that Ohio counties have no corporate functions, so that the case of Walker v. Cincinnati, whatever be its present authority, could not be applied to counties. But I think, too, that where the purpose is admittedly a state-wide one, that is one the benefits of which are not peculiar to a county as a subdivision or locality but may spread throughout the state or throughout a large number of counties, and which is of a character similar to activities recognized by the constitution and laws of the state as pertaining to the state, as such, the county may not, on the theory of supposed local and special benefits, in addition to the general benefits, be specially burdened therefor. This was the holding in Wasson v. Commissioners and Hubbard v. Fitzsimmons, supra. In the first of these cases the supreme court of this state held unconstitutional a law authorizing the commissioners of any county, upon a vote of the people, to donate money by the issuance of bonds and the levying of taxes for the purpose of aiding in the construction of the proposed Ohio agricultural experiment station and securing its location in such county. The court was cited, by the attorney general seeking to sustain the act, to all the decisions which I have mentioned, but held that under the constitution of 1851, and especially article 12, section 2 thereof, the substance of which is still in force, it was not competent for the legislature to authorize a county to levy taxes for a purpose state-wide in its character, even though a peculiar local benefit would accrue to the people of the county through the accomplishment of the purpose. The court in its opinion per Spear J. sharply distinguished general taxes from assessments on specially benefited property. If property is, in fact, specially benefited (which must be determined by judicial and not political decisions), then special taxes known as assessments may properly be imposed upon such property for the making of the improvement. But if the power exercised is the power of taxation, and the purpose for which the tax is levied is one that pertains to a district other than the one taxed, as well as to the district taxed, there may be no discrimination against the particular district with respect to the rate or amount of the tax, even though such district may be said to enjoy special benefits by reason of the improvement. The doctrine that the question of benefits and the scope of the purpose could be conclusively determined by such political action as submission to a vote of the people, was distinguished in the following language:

> "A question of constitutional power can not satisfactorily be solved by asking the advice of persons claimed to be specially interested. If it can be maintained that the general assembly may authorize Wayne county to assume this burden, it may, with still less doubt, require it to be done. That this station, if established, would prove of some slight local benefit to the people living immediately near it, and, in a lesser degree, to others within the county residing farther away, we need not stop to deny. It is enough for us to know that the principal object intended and authorized was a state institution, to be located, constructed, controlled and managed wholly by the state for the common good of the persons interested throughout the entire state, and that whatever benefit might accrue of a local character, would be merely incidental."

In Hubbard v. Fitzsimmons, supra, the same principle was applied. The nature of this case is sufficiently disclosed by the following quotation:

> "It remains to inquire whether the purpose to be accomplished by the taxation in question is local to Cuyahoga county or general to the state.

That it is for the purchase of a site and the erection thereon of an armory for the use of the national guard, the active militia of the state, is averred in the petition, admitted in the answer, and required by the act. The character of the guard and the purposes of its organization are not to be determined from evidence upon issues joined in the pleadings, but as matters of law from the constitutional and statutory provisions by which it is created and controlled.

"It is ordained in section 10, article 3 of the constitution, that the governor shall be commander-in-chief of the military and naval forces of the state. The ninth article of the constitution is devoted to the subject of the militia of the state, and the fifth section of that article imposes upon the general assembly the definite duty that it 'shall provide, by law, for the protection and safekeeping of the public arms.'

"Title 15 of the Revised Statutes, provides for the enrollment, organization, government, equipment and pay of the guard and the care of the public arms. The guard may be ordered into active service by the commander-in-chief, it is subject to his orders, and it is provided that 'the adjutant general shall, subject to the order of the governor, have control of all public arms, ammunition, accoutrements, etc., belonging to the state.' The character of the militia as a state organization is thus definitely fixed. It is not at all affected by the fact that it may sometimes be called upon to aid the civil authorities in the preservation of public order. That duty is as clearly due to the civil authorities of Lorain county as to those of Cuyahoga. It is equally due from the entire guard to the proper civil officers of every county and municipality of the state. That some incidental benefit would result to Cuyahoga county from the erection of a public building in its chief city is doubtless true. But any view which would recognize such incidental benefit as a proper basis for a local imposition, would equally justify a tax on the property of Franklin county for the erection of a state building for the use of this court.

"Nor is this question in any way affected by the fact that the legal title to the armory is in Cuyahoga county. The character of the imposition is determined by the fact that the armory is to be used for the accomplishment of duties which the constitution charges upon the general assembly and officers of the state."

The only distinction which can be made between these decisions and the case presented by the bill which you have submitted to me lies in the fact that in the cases cited the purposes for which the local tax was authorized were required by the state law to be administered by the state officers for the benefit of the people of the whole state; whereas under the bill no officer of the state is to have anything whatever to do with the proposed canal, although all other public works of the same character are to be administered by state officers. I do not think that this distinction creates a difference in the application of the true principle, which may be stated thus:

A county has no proprietary or corporate functions whatever; it may levy taxes only for governmental purposes; the nature of the purpose, as to whether it is local, pertaining to the people of a county, or state-wide, pertaining to the people of the whole state, is to be determined by the character of the enterprise contemplated, and cannot be conclusively determined by the general assembly itself or by any body of electors to whom it may seek to delegate such determination.

Measured by this principle, the constitutionality of the bill is, at the very least, extremely doubtful. The vice which inheres in the bill permeates the entire

scheme which it seeks to legalize, as may be inferred from the statement that if the views above expressed are correct, no inter-county canal, intended for purposes of navigation, can be built at public expense save by the state itself.

Of course, if a county could not be authorized to build, maintain and operate a canal in conjunction with other counties for such a purpose, it follows that a county may not be authorized to contribute to the construction, maintenance or operation of such a canal.

In fact, the same objection would be to section 2503-1 to 2503-3 inclusive, of the G. C., as they would stand if the bill which you have handed to me should not become a law.

In addition to these objections I beg leave to point out that the bonds which may, and indeed must be issued under the bill, if a favorable vote is had in any county of the state, are to be provided for by taxation, within the limitations of the law, and yet there is no limit upon the amount of such bonds nor the number of years over which they may be spread. It is true that the section relative to the issuance of bonds provides that the same shall be issued "within any limitations prescribed by law," and that the term of the bonds shall not "exceed thirty years from the date." But inasmuch as there are no limitations upon the amount of the bonds which may be issued, for such purpose, by the county commissioners, the first of these limitations is of no avail; while the second of them operates in the wrong direction; for if the bonds should be issued at the outset of the proceedings, under the proposed scheme, it would certainly be some time before the canal would be in operation. Meanwhile the interest and sinking fund levies, on account of the bonds, would have to be made as provided in article 12, section 11 of the constitution. That is, levies would have to be made within the limitations of the law, and there being no practical limit on the amount of the bonds, and it being permissible to issue them for a relatively short period of time, the annual tax burden so created might very seriously impair the current revenues of any county issuing such bonds.

A great deal of light is shed upon the provisions of this bill by examination of the laws of Pennsylvania for 1911, page 55, and the laws of Pennsylvania for 1913, page 652, both of which acts evidently relate to the same scheme. The language of the bill, like that of section 2503-1 et seq., G. C., is taken almost verbatim from this Pennsylvania legislation. I have pointed out that the constitution of Pennsylvania is not like that of Ohio, and what may be done by the legislature of Pennsylvania is no criterion of what may be done by the legislature of Ohio.

Finally, article 1, section 10, of the constitution of the United States, provides in part as follows:

> "No state shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.'

The bill does not make the consent of congress a condition precedent to the issuance of such bonds which, if they have any force and effect at all, must be regarded as in the nature of contractual stipulations intended to be parts of a covenant between the issuing county and the "adjoining state." In short then the bill amounts to an attempt to authorize a county, for the purpose of aiding in the construction of a canal by another state, to enter into an agreement or compact with such other state.

In the preceding portions of this opinion I have pointed out that counties, not

being municipal corporations, may be authorized to act only as agencies of the state. An agent may not be granted authority which his principal does not possess. The state would have no authority, by virtue of the above quoted provision of the federal constitution, to enter into a compact with an adjoining state save with the consent of congress. Therefore, the state may not authorize any of its counties to enter into such a compact without its consent. This infirmity, it should be remarked, is present in present section 2503-1 to 2503-3 inclusive, of the General Code.

For the foregoing reasons I advise that in my opinion the bill which you have submitted to me should it be enacted in the form in which you have submitted it to me, would probably be held unconstitutional.

Respectfully,
EDWARD C. TURNER,
Attorney General.

370.

GENERAL ASSEMBLY—CAN LEGISLATE TO PREVENT THE PRACTICE OF DENTISTS USING FICTITIOUS NAMES—MAY REGULATE UNDER POLICE POWER.

It is not unconstitutional for the legislature to prevent the practice of dentistry under fictitious names, nor to regulate the same under the police power.

COLUMBUS, OHIO, May 15, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—I have your letter of the 12th, as follows:

> "I very respectfully request an opinion from your office as to the constitutionality of amended senate bill No. 84, relative to the practice of dentistry. I direct your attention especially to the provision prohibiting the practice of dentistry under a firm name and to the section which gives the board power to revoke a certificate without hearing. I desire to know whether these provisions are in compliance with the constitution of the state of Ohio."

Answering your inquiry first as to the section which gives the board power to revoke a certificate without hearing, I beg to advise that in my opinion sections 1325, 1326 and 1327 of the General Code, contained in the bill, do not authorize the revocation of a certificate without a hearing, but on the contrary section 1326 specifically provides that,

> "No action to revoke or suspend a license shall be taken until the accused has been furnished a statement of the charges against him and notice of the time and place of hearing thereof. The accused may be present at the hearing in person, by counsel, or both. * * *"

Then follows provisions for the record of the hearing, with the right to review

the order of revocation upon appeal in the common pleas court, and the judgment of the common pleas court may be reviewed on proceedings in error in the court of appeals. I do not find that the bill is faulty in this regard.

Answering your second inquiry relative to prohibiting the practice of dentistry under a firm name, I beg to say that I find that the section of the bill relating thereto is section 1329-1, which is as follows:

> "It shall be unlawful for any person or persons to practice or offer to practice dentistry or dental surgery, under the name of any company, association, or corporation, and any person or persons practicing or offering to practice dentistry or dental surgery shall do so under his name only; any person convicted of a violation of the provisions of this section shall be fined for the first offense not less than one hundred dollars, nor more than two hundred dollars, and upon a second conviction therefor, his license may be suspended or revoked, as provided in section 1325 of this act."

The right of the state to regulate the practice of a profession, including dentistry, is not subject to question.

> "Where the successful prosecution of a calling requires a certain amount of technical knowledge and professional skill, and the lack of them in the practioner will result in material damage to the one who employs him, it is a legitimate exercise of 'police power' to prohibit any one from engaging in the calling who has not previously been examined by the lawfully constituted authority and received a certificate in testimony of his qualification to practice the profession.
>
> "The right of the state to exercise this control over skilled trades and the learned professions, with a single exception in respect to teachers and expounders of religion, has never been questioned."
>
> (Tiedman's State and Federal Control of Persons and Property, p. 241.)
> (France v. State, 57 O. S., 1; Ohio v. Gardner, 58 O. S., 599.)
> (Ohio v. Marble, 72 O. S., 21.)

The diploma or license granted by the state permitting a successful applicant therefor to practice dentistry in Ohio is individual and is not a grant of such license to form a company for the purpose of merging the individuality of the holder in a company, association or corporation. The criminal prosecution for violation of any statute regulating the practice of dentistry in Ohio is personal. It has long since been the law of this state that corporations may not be formed for professional business, section 8623 of the General Code providing that,

> "Except for carrying on professional business, a corporation may be formed for any purpose for which natural persons lawfully may associate themselves."

The constitutionality of this statute was sustained by our supreme court in the case of State ex rel. The Physicians Defense Company v. Laylin, Secretary of State, 73 O. S., page 90.

The object of the legislation evidenced in the bill under consideration is for the preservation of the life, health and comfort of the people.

I have examined with care the many authorities urged by Messrs. Miller and Foster, attorneys at law, as against the constitutionality of this act in the respects

concerning which you inquire, but I do not find them sufficiently in point to be controlling. Omitting a review of other authorities which I have examined as bearing on the question which you present, I do not feel warranted in saying that amended senate bill No. 84 is unconstitutional on either of the grounds inquired about or for any other reason.

Respectfully,
EDWARD C. TURNER,
Attorney General.

371.

INDUSTRIAL COMMISSION—APPROVAL OF PURCHASE OF BONDS OF DEER CREEK TOWNSHIP RURAL SCHOOL DISTRICT OF PICKAWAY COUNTY, OHIO.

Approval of bonds in the amount of $20,000 purchased by the industrial commission of Ohio from the board of education of Deer Creek township rural school district, Pickaway county, Ohio.

COLUMBUS, OHIO, May 15, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of May 5, 1915, containing certified copy of the resolution of the industrial commission of Ohio to purchase bonds of rural school district of Deer Creek township, Pickaway county, Ohio, in the amount of $20,000.00, and requesting my opinion relative to the validity of the said bonds and proceedings by virtue of which they were issued.

Under date of April 23, 1915, I received through the Honorable Meeker Terwilliger, prosecuting attorney of Pickaway county, a transcript of the proceedings of the board of education of Deer Creek township rural school district, and under date of April 29th, other amendatory and supplementary information was certified to me by Mr. W. T. Ulm, clerk of the said board of education.

I have carefully examined the proceedings of said board of education relative to the issuance of said bonds and find them regular and in conformity with the statutes. I have also examined the bonds in question, which are in the office of the treasurer of state, and I find them proper in form.

I am, therefore, of the opinion that the bonds in question are legal and valid obligations of Deer Creek township rural school district of Pickaway county, Ohio, and approve the purchase of same by the industrial commission.

Respectfully,
EDWARD C. TURNER,
Attorney General.

372.

DEPUTY INSPECTOR OF WORKSHOPS AND FACTORIES—ACTUAL TRAVELING EXPENSES ALLOWED—INDUSTRIAL COMMISSION MAY DESIGNATE OFFICE OR STATION FROM WHICH EXPENSES MAY BE ALLOWED.

Deputy inspectors of workshops and factories are permitted actual expenses while traveling on the business of the industrial commission. The commission may designate the office or station from which expenses may be allowed.

COLUMBUS, OHIO, May 15, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of May 6, 1915, you submitted for my opinion thereon the following facts and inquiry:

> "A deputy inspector in the department of workshops, factories and public buildings lives at Gahanna (Franklin county); his district is Franklin and Pickaway counties, he spends 75 per cent. or more of his time in the city of Columbus; he travels between Gahanna and Columbus daily on the street railway line and obtains his noon day meal in Columbus. He is charging to the state the amount of his daily railway fare between Gahanna and Columbus and the costs of his noon day lunch.
>
> "Are these proper subjects for charges for which the state should pay?"

Under section 985 of the General Code a deputy or district inspector of workshops and factories "must devote his whole time and attention to the duties of his office."

Under favor of section 2250 of the General Code a district inspector of workshops and factories receives an annual salary of twelve hundred dollars per annum.

By the provisions of section 7871-7 of the General Code a deputy "shall be entitled to receive from the state the necessary and actual expenses while traveling on business of the commission either within or without the state of Ohio."

Under the language of this last section, to wit: "actual expenses while traveling on business of the commission" your question is one rather of fact than of law.

The law requires this inspector to travel over the counties of Franklin and Pickaway in the performance of his duties. He resides within the district at Gahanna. He has no fixed office or headquarters by virtue of law, and the commission has not assigned him any office or station to which he must report for service without expense to the state and from which he would be entitled to his expenses while traveling on business of the commission in the discharge of his official duties. It is within the power of the industrial commission to designate some place within his district other than his place of residence which shall be his official headquarters or station and the point from which his expenses, as provided by law, may be allowed.

In the absence of such a provision on the part of the commission, I am of the opinion that this inspector is entitled to his daily railway fare between Gahanna and Columbus, and the cost of his noon day luncheon, if the expense occasioned thereby is incurred while in the discharge of his official duties.

Respectfully,

EDWARD C. TURNER,

Attorney General.

373.

SHERIFF—HUMANE OFFICER—AGAINST PUBLIC POLICY FOR A PERSON ACTING AS SHERIFF TO BE APPOINTED AS HUMANE OFFICER.

It is against public policy for a person acting as sheriff to be appointed as humane officer.

COLUMBUS, OHIO, May 15, 1915.

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

GENTLEMEN:—Under date of March 10th, you submitted for my opinion the following question:

> "May a sheriff be appointed as humane officer and draw an additional compensation for his services as such? If not, what findings should our examiners make in cases of this kind?"

The duties of the humane agent, commonly known as "humane officer," are found in the chapter relating to "humane society," being sections 10062 to 10084, inclusive, also section 13491 of the General Code.

There are various duties placed upon the humane officer which are also placed upon the sheriff of the county. There are, however, other duties placed upon the humane officer which cannot be performed by the sheriff of the county, as for instance, under section 10081 the humane officer, if he deems it for the best interest of a child, because of cruelty inflicted upon it, or of its surroundings, may remove it from the possession and control of the parents or persons having charge thereof summarily. Such a right is in no way granted by statute to the sheriff of the county.

There are also various duties that may be performed by the sheriff that cannot be performed by a humane officer.

There is no statutory inhibition against a sheriff acting as humane officer, nor against a humane officer acting as sheriff; nor am I able to find that the one office is in any way a check upon the other.

However, under the provisions of section 2833, G. C., the sheriff is required to "preserve the public peace." In view of the fact that the sheriff is made the conservator of the public peace of his county, he should be accessible both day and night and be at all times subject to call.

The law making it the duty of the sheriff to preserve the public peace and, therefore, be at all times subject to call differentiates said officer from the other county officers, and being so subject I am of the opinion that it is against public policy that he should hold any other public office which would interfere with his duties as sheriff, as above indicated.

Under the provisions of the statutes governing humane societies it is provided that the compensation for the humane agent shall be fixed, so far as the county is concerned, by the county commissioners at a monthly salary of not less than twenty-five dollars. Since the sheriff has certain duties to perform which are likewise placed upon the humane agent, it could be well said that in a given case he was receiving double compensation for the services performed and this, I believe, is against public policy.

I am, therefore, of the opinion that it is against public policy for a sheriff to be appointed as humane officer.

Since there is no statutory inhibition, and since one office is not in any way a check upon the other, I would not advise the making of any finding against a

person who has been occupying the two offices simultaneously; but would suggest that your bureau notify those persons who are occupying the two offices simultaneously that either the one or the other should be given up.

Respectfully,
EDWARD C. TURNER,
Attorney General.

374.

UNDER SECTION 6254, G. C., EACH ADVERTISEMENT IS TO BE MEASURED BY THE "EM QUAD" OF TYPE USED.

COLUMBUS, OHIO, May 15, 1915.

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

GENTLEMEN:—Under date of February 4th you submitted to this department for opinion the following inquiry:

> "May a newspaper, which publishes an advertisement in eight-point type, payable from public funds, be entitled to the same amount as if such publication had been made in six-point type? For instance, if an advertisement is set in compact form, six-point type, by one newspaper, would another newspaper, which set the same advertisement in eight-point type, be legally entitled to the same amount?"

Section 6254 of the General Code provides:

> "A square shall be a space occupied by two hundred and forty ems of the type used in printing such advertisements. Legal advertising shall be set up in compact form, without unnecessary spaces, blanks or head lines, and printed in type not smaller than nonpareil."

An "em" is defined by the Standard Dictionary as follows:

> "(2) Print—the square of the body of any size of type, used as a unit of measurement in computing the cost of composition."

"Em" as defined by Webster's Dictionary means:

> "(Print) The portion of a line formerly occupied by the letter "m," when a square, used as a unit for measuring printed matter."

An "em" defined in a work called "Proof Reading and Punctuation" by Adele Millicent Smith, as follows:

> "Em—the square of the body of a type. The amount of matter composed is estimated by ems."

The New English Dictionary defines "em" as follows:

> "In printing the square, formerly of the type 'm' used in typography as the unit for measuring and estimating the amount of printed matter in a line, page, etc."

In "The Americana" in an article on "Printing" the writer states what constitutes a font of type, and after giving a list of one hundred and twenty-nine characters, further states:

> "Besides this, there are required for filling the blanks between words, at the end of lines, etc., four sizes of spaces and four of quadrats. (The former and the smallest of the latter being subdivisions of the em (m) or square of the size of the type, one equal to it and the other two multiples of it) making altogether 137 sorts."

In the New International Encyclopedia under the heading "Printing," it is stated as follows:

> "The printer's unit of measurement by which the compositor is paid is the em in America and the en in Great Britain. The em is the square of the body of the type selected; the number of ems that fill a line multiplied by the number of lines in a page gives the total number of ems of the type in the page."

In a book entitled "The Practice of Typography" by Theodore Low Devinne at page 113, it is stated:

> "An em of any type is the square body of that type. As it is impracticable to count all of the bits of metal in a page the em is made a unit of superficial measure. The space that can be covered by one thousand em quadrats is reckoned as one thousand ems."

From the above it can readily be seen that the em referred to in section 6254 is what is familiarly known by the printers as the "em quad," which, of course, is the square of the body of the type.

A "square" is defined by the Standard Dictionary as follows:

> "'Square'—a given space in the column of newspapers or the like, considered as a unit of measurement for advertisements and ranging in depth from column width down to an inch; now mostly superseded by the inch or line as a unit."

Webster's Dictionary defines "square:"

> "(print)—a certain number of lines forming a portion of a column nearly square; used chiefly in reckoning the prices of advertisements in newspapers."

However, section 6254 itself defines what the square shall be in that it states that it shall be a space occupied by 240 ems.

With the above definitions in mind it can be readily seen that the unit of measurement of advertisements under section 6254 is the em of the type used in printing the advertisement in question, and has been so held by this department in an opinion to your department under date of January 19, 1915.

Whether or not there are more or less squares by the use of eight-point type setting up a given advertisement than in the use of six-point type, I am unable to say. However, in an opinion by my predecessor, Hon. Timothy S. Hogan, found in the attorney general's report for 1913, page 225, rendered February 11, 1913, to your department, he states:

"I am informed by practical printers that a given advertisement when printed in eight-point type will not contain as many ems as if the same were printed in six-point type."

If the information obtained by Mr. Hogan was correct, the newspaper which publishes an advertisement in eight-point type would not be entitled to the same amount as if such publication had been made in six-point type, for the reason that the "em quad" of the type used in printing the advertisement is the basis of measurement.

Since each advertisement is to be measured by the em quad of the type used, the basis of payment of such advertisement is solely the amount of space occupied by the advertisement as measured by the particular em quad.

I have read the communication addressed to your department by the secretary of the Marion Tribune Publishing Co. My conclusion, however, is based upon the clear provisions of section 6254, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

375.

COUNTY SCHOOL DISTRICT—BOARD OF EDUCATION HAS IMPLIED AUTHORITY TO REIMBURSE COUNTY SURVEYOR FOR ACTUAL EXPENSES—PAYMENT FROM COUNTY BOARD OF EDUCATION FUND.

Under the provisions of section 4736, G. C., as amended in 104 O. L., 138, the board of education of a county school district has implied authority to reimburse the county surveyor for his actual and necessary expenses incurred by him in rendering service to said board of education as required by said section.

Claims for such expenses may be paid out of the county board of education fund on the order of the county board of education and the warrant of the county auditor.

COLUMBUS, OHIO, May 15, 1915.

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

GENTLEMEN:—I am in receipt of a letter from Mr. Archie G. Holland, surveyor of Clermont county, under date of May 3, 1915, in which he refers to opinion 147 of this department, rendered to your bureau on March 18, 1915.

Mr. Holland's inquiry raises the question of the authority of the board of education of a county school district to reimburse the county surveyor for his actual and necessary expenses incurred in rendering service to said board, as required by the provision of section 4736, G. C., as amended in 104 O. L., 138. As this question is one of general interest throughout the state, I am addressing my opinion to you.

Mr. Holland's letter is as follows:

"I am writing you in regard to the surveys of schools where they are centralized. I received a letter from you stating that my services were to be given free of all compensation. I am out $23.00 now four days and three dollars expenses which I had to pay out of my own pocket.

There is talk of centralization almost all over the county. This work has to come at a time of the year when I have work almost every day, and if I have to keep on at it and work for nothing and pay my own expenses, it looks like I might as well quit. I don't mind doing a little work without compensation, but it looks to me like this is asking too much. The law says the county surveyor is to receive $5.00 per day for every day he works, and also his legitimate expenses. In the report of the state examiners they say I have only been charging about half what the former surveyors charged. I am also keeping a record; while I have had a good deal of trouble with it and it is in a poor form up to the first of the year, I think it is better than none, and I am getting it in pretty good shape this year. There has been no record kept by the county surveyor for many years.

"Please write and let me know if there is not some way I can get paid for the school work."

The opinion of this department above referred to does not pass upon the question of the authority of the county board of education to reimburse the county surveyor for his actual and necessary expenses incurred by him in rendering the services required by section 4736, G. C., as amended.

This section makes it the duty of the county surveyor to render services to the county board of education upon request being made by said board, and while said section does not expressly authorize said county board of education to reimburse the county surveyor for his actual and necessary expenses incurred in the performance of such duty, I am of the opinion that the authority of said board to require such performance, carries with it the implied authority to make such reimbursement. To hold to the contrary would, in effect, render this provision of the statute inoperative.

I am of the opinion, therefore, that claims for such expenses may be paid out of the county board of education fund on the order of the county board of education and the warrant of the county auditor.

Respectfully,
EDWARD C. TURNER,
Attorney General.

376.

INJURIES SUSTAINED IN MILITARY SERVICE—CLAIMS MAY BE MADE AND PROVIDED FOR UNDER ARTICLE 2, SECTION 29 OF THE CONSTITUTION.

Claims for injuries sustained in the course of military service may be made and provided for under article 2, section 29, of the constitution.

COLUMBUS, OHIO, May 15, 1915.

HON. FRANK H. REIGHARD, *Chairman of the Finance Committee, House of Representatives, Columbus, Ohio.*

DEAR SIR:—This office is in receipt of the papers referred to you by the adjutant general relative to the claim of Mr. Floyd L. Reed, who is a member of Company B, Second Infantry, Ohio National Guards, and whose claim is put in language as follows:

"I am a member of Company B, 2nd Inf., O. N. G. I joined that organization May 31, 1913, and have been connected with it ever since.

"When I joined Company B, I was in good health and perfectly sound. Our company was ordered to Fort Benjamin Harrison, Indiana, July 13, 1914, for the purpose of being trained in military tactics. At the time of our arrival at Fort Benjamin Harrison I was as sound physically as the day I joined the Second Ohio Infantry.

"On Friday, July 17, 1914, we were ordered to prepare for a hike. On that day we marched a few miles out on the government reservation connected with Fort Benjamin Harrison and went into camp. That night I was on guard duty and was sick all night. The next morning about six o'clock we broke camp, marched about two miles where we had a sham battle. During the sham battle we rushed back and forth from one place to another. During this time I must have hurt myself. Immediately following this I was overcome by a severe pain in the lower right hand side of my abdomen. (The place where I afterward discovered I had been ruptured.) I fell out and was picked up later and taken to camp. When I got into camp I was sent to the hospital. An investigation of the hospital record will show that I was in the sick report from that time until we broke camp to go home, Monday, July 20, 1914.

"That night when I arrived at my home in Paulding I noticed a swelling where I had had such severe pains. The next day I called my home doctor, Dr. D. F. Russell, of Paulding, Ohio. Dr. Russell examined me thoroughly. He said that I had a hernia (rupture). He asked me what I had been doing and I told him, explaining all the circumstances and so forth. Dr. Russell said that I had undoubtedly contracted my hernia while on the hike Friday or in the sham battle on Saturday.

"Dr. Russell advised an operation. I at once began preparations to go to the hospital. On the third day of August, 1914, Dr. Russell and my father, C. O. Reed, took me to the Hope hospital, Ft. Wayne, Indiana. On that day I was operated upon for hernia and appendicitis by Dr. McOscar, who was assisted by Dr. Russel, of Paulding. Doctors McOscar and Russell operated on me for appendicitis because they said it was necessary on account of the operation for hernia, since I had chronic appendicitis, and if I had not been operated on for appendicitis at that time I might have had to undergo an operation for the same before I recovered from my operation for hernia. They said that would have proven fatal, so therefore my double operation was made necessary because of injuries I contracted while doing military duty for the state of Ohio.

"The cost of my operation was $200.00, and this added to the hospital fees and other necessary incidentals would make the total cost about $250.00.

"I did not recover from my operation in time to take up my work as a teacher in the Paulding township schools. When I recovered enough to take up my work all the schools were taken, and I could not get other employment that I was able to do.

"Thus, due to my operation, which was made necessary because of injuries incurred while doing military duty for the state of Ohio, I was not able to take up my work as teacher, thus losing me about $500.00 upon which I was totally dependent. This added to the cost of my operation would make a total loss of $750.00.

"There is a provision in the laws of the state of Ohio whereby a person disabled while doing military duty for the state of Ohio may be compensated for his doctor bill and other losses incurred.

"I would like to have a bill put before the legislature providing that the State of Ohio pay me, Floyd L. Reed, $750.00 to cover losses sustained by me and caused from disability contracted while doing military duty for the state of Ohio.

"I can furnish proof of the truth of my statements. I will have affidavits made out by parties who know the circumstances and facts of the case, and send them to you at once. I thank you for anything you may do for me. I assure you that I am wholly dependent on this, and hope that you can do something for me. * * *"

With the claim is forwarded various affidavits in support of the same, together with hospital receipts, doctors' receipts, etc., for medical service.

The case presented is one the merits of which cannot be determined in this office, as it is a matter simply of policy to be determined by the legislature after having investigated the facts and satisfying itself as to the justices and the merits of the claim. If the legislature, after such investigation, should be satisfied that the claim is a just one, it is my opinion that it has authority to act only under the provisions of article 2, section 29 of the constitution of the state of Ohio, which is as follows:

"No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor shall any money be paid, on any claim, the subject-matter which shall not have been provided for by pre-existing law, *unless such* compensation, or *claim be allowed by two-thirds of the members elected to each branch of the general assembly.*"

Respectfully,
EDWARD C. TURNER,
Attorney General.

377.

MISDEMEANORS—COUNSEL—COMPENSATION FOR DEFENSE OF INDIGENT PERSONS—NOT PAYABLE FROM COUNTY TREASURY.

Payment of compensation to counsel assigned by the court for the defense of indigent persons charged with misdemeanors may not be made from the county treasury.

COLUMBUS, OHIO, May 15, 1915.

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

GENTLEMEN:—I acknowledge receipt of yours under date of May 8, 1915, as follows:

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

"Section 13618, General Code, provides for the payment from the county treasury to an attorney, or attorneys, appointed to defend an indigent prisoner in felony cases. Examiners of this department have found in some counties where attorneys are paid for defending prisoners

indicted under a misdemeanor charge. Can such payments be legally made? If not should our examiners make findings for recovery against attorneys so paid?"

Section 13616, G. C., provides for the service of a copy of indictment for felony upon the accused within three days after the filing thereof and a delivery of such copy in other cases upon request therefor. Section 13617 provides that after such copy has been served or opportunity had for receiving it, if the accused is without and unable to employ counsel, the court shall assign him counsel not exceeding two. The only provision for payment of compensation of counsel so assigned, is found in section 13615, G. C., referred to by you and which reads as follows:

> "Counsel so assigned in a case of felony shall be paid for their services by the county, and may receive therefor, in a case of murder in the first or second degree, such compensation as the court approves; in a case of manslaughter, not exceeding one hundred dollars, and, in other cases of felony, not exceeding fifty dollars. The auditor of such county shall not draw an order on the treasurer for the payment of such counsel until the account for such services has been presented to and allowed by the commissioners thereof."

The terms of this statute specifically limit such payment of compensation of counsel to felony cases and to such amounts as are allowed by the county commissioners after the approval thereof by the court, and only such compensation as is authorized by statute may be lawfully made. The answer to your first question must therefore be in the negative.

As to the finding which should be made in such case, it may be said that both the commissioners and the auditor were quite probably misled by the action of the court in approving the claim, and while the payment of the same should have been enjoined by the prosecuting attorney, this, however, would not validate the payment of compensation in such case in the face of the absence of statutory authority therefor.

Answering this question specifically, I am of the opinion that a finding should be made against attorneys who have received payment for defense of indigent persons charged with misdemeanors under assignment of the court from the county treasury.

Respectfully,
EDWARD C. TURNER,
Attorney General.

378.

CONSTRUCTION OF A CONTRACT BETWEEN A GAS PRODUCING COMPANY AND A LOCAL DISTRIBUTING COMPANY—WHAT GROSS RECEIPTS OF DISTRIBUTING COMPANY ARE FOR PURPOSE OF EXCISE TAXATION—TAXES AND TAXATION.

A contract between a gas producing company and a local gas distributing company provides that the former shall furnish to the latter sufficient supply of gas, in consideration of which the former shall be entitled to a certain percentage of the gross collections of the latter. There is no means of measuring the amount of gas delivered by the one company to the other. The books of the distributing company and its mains and system are to be subject to inspection by the producing company. In spite of a recital in the contract that the gas upon entering the mains and distributing system of the distributing company shall be the property of that company, it is held that the case is governed by State v. Coshocton Gas Co., 12 *N. P., n. s.,* 570, *affirmed by the supreme court without report, and that the gross receipts of the distributing company for the purpose of excise taxation consist merely of the percentage of gross collections which under the contract it is permitted to retain for its own use, the remainder being receipts of the producing company and the enterprise, in law, being a joint one.*

COLUMBUS, OHIO, May 15, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have submitted for my examination an original and supplemental contract between the Springfield Gas Company and the Ohio Fuel Supply Company, and have requested my opinion as to whether or not the same are so similar to that involved in State v. Coshocton Gas Company as to make the decision therein controlling with respect to the amount of excise taxes collectible from the two above named companies.

The original contract in question was entered into in December, 1906. After reciting that the Springfield Gas Company is engaged in the business of selling and supplying natural gas in the city of Springfield, and that the Ohio Fuel Supply Company is a producer of gas and has a surplus supply over its present needs out of which it can supply the requirements of the Springfield company, the contract provides that the Ohio company shall deliver a supply of natural gas to the Springfield company and that the Springfield company shall furnish the right of way to enable the Ohio company to connect with its lines and install the proper connections and regulating devices; and that after May 14, 1909, the Springfield company shall pay seventy per cent. of the proceeds of its sales of gas to the Ohio company, provided that "in no instance or event, nor under any circumstances whatsoever, shall there be paid by the Springfield company to the said the Ohio company a less sum than nineteen (19) cents for each and every thousand cubic feet of natural gas *supplied and delivered* by the said Springfield company under these presents, subsequent to May 14, 1909."

The supplemental contract, which was made in the light of a change in the ordinance of the city of Springfield fixing the rates of the Springfield company, has the effect of avoiding this proviso of the original contract, though incorporating all the other provisions thereof; so that under the said supplemental contract the Springfield company is to sell its gas at thirty cents per thousand cubic feet, that being the price fixed by the ordinance, except as to certain public

buildings in which the rate is to be fifteen cents per thousand cubic feet, and in both cases the Ohio company is to have seventy per cent. of the gross proceeds of sales.

The original contract further provides the conditions under which the Springfield company should furnish gas to its consumers. Meters are to be installed and meter readings made monthly, and a statement of such readings is to be rendered to the Ohio company. The books of the Springfield company are to be open to the inspection of the Ohio company. The mains and system of the Springfield company are by the contract required to be kept in good condition so as to avoid leakage and waste, and the Ohio company is given for its own protection the right of inspection of the entire system of the Springfield company. It is expressly recited in the fifth article of the original contract that

> "Upon delivery of gas hereunder to the Springfield company it shall be the sole property of said company, and the Ohio company shall not thereafter be responsible for or on account of anything which may be done, happen or arise with reference to such gas, save so far as it shall be due to the acts of the Ohio company or its employes, and the Springfield company agrees to indemnify and save harmless the Ohio company from all claims, suits and damages on account of any conduct, act or thing which may be done, happen or arise with reference to such delivered gas, save as aforesaid."

In spite of this provision, however, there is no means under the contract of measuring the exact amount of gas which is actually delivered by one company to the other, the measurement for the purpose of compensation being made at the meters of the consumers. So that if any gas should be lost or wasted after passing into the lines of the Springfield company, the loss would fall in reality upon the Ohio company. Whatever be then the technical title of the Springfield company in the gas in its mains under the fifth article of the original contract, the substantial relation of the parties to the gas while in the mains in the proprietary sense cannot be altered by this recital, so long as there is no means of ascertaining how much gas has passed from the lines of one company to the lines of the other company.

There are other provisions in the contract for the protection of the respective parties, which in the aggregate, so to speak, have the effect of making the business in a sense a joint enterprise.

In State v. Coshocton Gas Co., 12 N. P. (N. S.), 570, subsequently affirmed by the supreme court, the court had before it a contract very much like the one now under consideration. In fact, I can find but one real difference between the two contracts as the Springfield contract is modified by the supplemental agreement, and that lies in the language of the fifth article of the original contract above quoted. It is true that Judge Rogers, in deciding the Coshocton Gas Company case, placed some stress upon the fact that the general property in the gas furnished by one company to the other in that case after it passed into the mains of the distributing company still belonged to the producing company. But even at that it was conceded by Judge Rogers that the distributing company had a special property in such gas. The fact that there was no means of measuring the amount of gas which was actually furnished by one company to the other is common in both cases, and this, I take it, is the determining factor. For, it was under circumstances of this sort that Judge Rogers used the following language:

> "The contract was more in the nature of one between factor and

principal, governed, however, by a special agreement. Defendant undertook to dispose of the Buckeye company's gas for a compensation measured by a per cent. of gross receipts, and to pay the residue to the Buckeye company. On disposition of the product by defendant, and receipt of the proceeds, the relation of debtor and creditor did not arise; rather, defendant's relation to the fund was that of trustee to its principal, unless the latter saw fit to waive that relation.

"The object of the contract as contemplated by the parties was, by one performing certain parts and the other performing others under the contract, to produce a certain common fund for the benefit of both which was to belong to each in certain proportions. Neither at any time was entitled to the whole fund as a right of property, but each was entitled to a proportionate share as belonging to it. While the defendant in the conduct of the business under the contract received the gross sum, it did not all belong to defendant. The property right in seventy per cent. or eighty per cent. thereof, depending upon the circumstances, belonged to the Buckeye company, and was its gross receipts, and defendant held the same as agent for its principal.

"I am clearly of the opinion that the contract between the two companies did not contemplate a sale of gas to the defendant. If it did not, no general property right in or to the gas is vested in the defendant. It was a special right only. The defendant not having a general property right in the gas did not acquire a general property right in the proceeds of their combined enterprise, but only had a property right in the proportion of the proceeds to which, under the contract, it was entitled."

Thereupon, Judge Rogers reached the conclusion that the gross receipts of the distributing company for purpose of excise taxation consisted only of the thirty per cent. of the entire collections which it might retain for itself, the other seventy per cent. thereof being receipts of the producing company.

While, therefore, I can see a distinction between the two cases, I am of the opinion that should litigation arise respecting the effect of the contract which you have submitted to me, the same would be governed by the decision in State v. Coshocton Gas Company, supra.

Respectfully,
EDWARD C. TURNER,
Attorney General.

379.

TAXATION OF RAW MATERIAL OF A FOREIGN CORPORATION UPON WHICH AN OHIO CORPORATION PERFORMS WORK—FOREIGN CORPORATION LIABLE FOR SUCH TAXES—AN OHIO MANUFACTURER IS REQUIRED TO LIST ON AVERAGE BASIS OF SUCH PROPERTY OWNED BY HIM—FOREIGN CORPORATION SHOULD LIST AMOUNT ON HAND ON LISTING DATE IN TAXING DISTRICT IN WHICH PROPERTY IS SITUATED.

If an Ohio corporation performs work upon material furnished by a non-resident foreign corporation for compensation, at no time being the owner either of the raw material so worked upon or the finished product, with reference to the taxation of such property:

(1) *It is taxable under section* 5404, *G. C., in the name of the foreign corporation; and the Ohio corporation is not required to list the property as a part of its manufacturer's stock nor to pay taxes on it.*

(2) *An Ohio manufacturer is required to list on the average basis such property only as is owned by him.*

(3) *There being no provision for listing property of the kind described on the average basis, it should be listed by the foreign corporation in the taxing district in which it is situated at the amount thereof on hand on the listing date.*

COLUMBUS, OHIO, May 17, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of May 7th, requesting my opinion as follows:

"A foreign corporation which has not qualified to do business in the state of Ohio, contracts with an Ohio corporation to do certain labor upon material furnished by the foreign corporation. The Ohio corporation at no time becomes the owner of the raw material or finished product, and simply receives a profit for the labor performed in transforming the raw material into a finished product.

"Query 1. Is this personal property taxable under section 5404 in the name of the foreign corporation?

"Query 2. Is the property taxable to the Ohio corporation?

"Query 3. Section 5385 provides that the manufacturing company shall include the average value estimated, as hereinafter provided, of all articles purchased, received or otherwise held for the purpose of being used in whole or in part, etc., and of all articles which were at any time by him manufactured or changed in any way, either by combining, etc. section 5386 which provides the method of arriving at the average value, provides in part that the value shall be ascertained by taking the value of all property subject to be listed, on the average basis, *owned by such manufacturer* on the last business day.

"The last section seems to limit section 5385, and it becomes a question whether all property held for the purpose of rectifying, changing, etc., should be listed in arriving at the average value, or only such property as is owned by such manufacturer.

"Query 4. Under the conditions stated in the first query, if you reach

the conclusion that the property is taxable in the name of the foreign corporation, should the average value be used in computing the taxable property, or just the amount of property on hand on listing date?"

Sections 5385 and 5386, General Code, are as follows:

"Section 5385. A person who purchases, *receives or holds* personal property, of any description, for the purpose of adding to the value thereof by manufacturing, refining, rectifying, or by the combination of different materials with a view of making a gain or profit by so doing, as (is) a manufacturer, and, when he is required to make and deliver to the assessor a statement of the amount of his other personal property subject to taxation, he shall include therein the average value estimated, as hereafter provided, of all articles purchased, *received or otherwise held* for the purpose of being used, in whole or in part, in manufacturing, combining, rectifying or refining, and of all articles which were at any time by him manufactured or changed in any way, either by combination or rectifying, or refining or adding thereto which, from time to time, he has had on hand during the year next previous to the first day of April annually, if he has been engaged in such manufacturing business so long, and if not, then during the time he has been so engaged.

"Section 5386. Such average value shall be ascertained by taking the value of all property subject to be listed on the average basis, *owned by* such manufacturer, on the last business day of each month the manufacturer was engaged in business during the year, adding such monthly values together and dividing the result by the number of months the manufacturer was engaged in such business during the year. Such result shall be the average value to be listed. A manufacturer shall also list at their fair cash value, all engines and machinery of every description used, or designed to be used, in refining or manufacturing, except such fixtures as are considered a part of any parcel or parcels of real property, and all tools and implements of every kind used, or designed to be used, for such purpose, owned or used by such manufacturer."

Primarily these sections are intended to provide a special method of listing and valuing manufacturers' stocks of materials and finished products. That is, the controlling idea of the sections relates to the manner of listing goods of a certain character, and not to the person who shall list them and the name in which they shall be listed.

The general policy of the state with respect to these matters is embodied in sections 5371 and 5372 of the General Code, the purport of which is that personal property shall be listed in the name of the owner thereof, even though required to be listed by some other person in a representative capacity.

Other statutes might be cited showing the policy of the state in this respect, but it is sufficient for the present purpose to state that inasmuch as sections 5385 and 5386 of the General Code do not primarily relate to or govern the matter of the name in which manufacturer's stock shall be listed, or the person liable for taxes thereon, they are not to be so interpreted as to establish a rule with respect to these matters inconsistent with the general policy of the state.

These two sections must be read together, as they relate to the same matter, and indeed were in substance both embraced in one section of the Revised Statutes.

So reading them, I reach the conclusion that the only property which an Ohio manufacturer is required to list on the average basis as therein provided is that which he owns.

The conclusion which I have reached is founded upon the conviction that the statutes are not ambiguous on their face, and that the meaning of the term "owned by such manufacturer" is unmistakable. Indeed, I am not so sure that this provision effects any real or substantial limitation of the language which is found in section 5385; for therein a manufacturer is defined as "a person who purchases, receives or holds personal property, of any description, *for the purpose of adding to the value thereof,* by manufacturing, etc., * * * *with a view of making a gain or profit by so doing.*"

This language might be interpreted fairly as making the definition of a "manufacturer" dependent upon the purpose of making a gain or profit through adding to the value of property. That is to say, that the gain or profit must accrue through the addition to the value of the property. This is consistent with the primary rule as to the words "gain" and "profit." When one performs services for another and receives mere compensation therefor, such compensation is not "gain" or "profit" in the exact sense at least. So it might be held that the performance of services in working upon materials in such a manner as, in the ordinary sense of the word, would constitute manufacturing, does not constitute "manufacturing" as the term is used in section 5385 when the person performing the work is to be paid for it, and does not do the work with a view to deriving a gain or profit from any increase in the value of the property worked upon.

This view of the case makes the statute harmonious and intelligible and avoids any conflict between section 5385 and section 5386; but if there is a conflict between sections 5385 and 5386, resulting in a latent ambiguity, the legislative history of the statute shows clearly what the intention of the general assembly was.

Section 2742, R. S., as it appeared in the Revised Statutes of 1880, was as follows:

> "Section 2742. Every person who shall purchase, receive or hold personal property of any description, for the purpose of adding to the value thereof by any process of manufacturing, refining, rectifying, or by the combination of different materials, with a view of making a gain or profit by so doing, shall be held to be a manufacturer and he shall, when he is required to make and deliver to the assessor a statement of the amount of his other personal property subject to taxation, also include in his statement the average value estimated, *as provided herein with reference to merchants,* of all articles purchased, received, or otherwise held for the purpose of being used, in whole or in part, in any process or operation of manufacturing, combining, rectifying or refining, which, from time to time, he shall have had on hand during the year next previous to the time of making such statement, if so long he shall have been engaged in such manufacturing business, and if not, then during the time he shall have been so engaged. Every such manufacturer shall also list at their fair cash value all articles on hand at the time when by law he is required to make his list, which had been by him manufactured, or changed in any way, either by combination, or rectifying, or refining, or adding thereto, one year or more previous thereto, and also the value of all engines and machinery of every description used or designed to be used in any process of refining or manufacturing (except such fixtures as shall have been con-

sidered a part of any parcel or parcels of real property), including all tools and implements of every kind used or designed to be used for the aforesaid purpose, owned or used by such manufacturer."

I call attention to two facts respecting this provision:

"(1) That the average value was to be estimated in the manner in which that of merchants' stocks was to be arrived at.

"(2) That the words 'owned by such manufacturer' were not in the section."

The statute with reference to merchant's stock clearly requires the merchant to list property of which he may not be the owner. So that if your question had been asked under original section 2742, R. S., a different answer might have been given.

Section 2742, R. S., was amended in 88, O. L., 341, so as to read as follows:

"Section 2742. Every person who shall purchase, receive or hold personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, refining, rectifying, or by the combination of different materials with a view of making a gain or profit by so doing, shall be held to be a manufacturer, and he shall, when he is required to make and deliver to the assessor a statement of the amount of his other personal property subject to taxation, also include in his statement the average value estimated, as provided herein, of all articles purchased, received or otherwise held for the purpose of being used, in whole or in part, in any process or operation of manufacturing, combining, rectifying or refining, and, also, of all articles which were at any time by him manufactured or changed in any way, either by combination or rectifying, or refining or adding thereto, which, from time to time, he shall have had on hand during the year next previous to the first day of April annually, if so long he shall have been engaged in such manufacturing business, and if not, then during the time he shall have been so engaged. The said average value shall be ascertained by taking the value of all said property subject to be listed on the average basis, owned by such manufacturers, on the last business day of each month the manufacturer was engaged in business during the year, adding such monthly values together and dividing the result by the number of months the manufacturer was engaged in such business during the year and the result shall be the average value to be listed. Every such manufacturer shall also list at their fair cash value, all engines and machinery of every description used, or designed to be used, in any process of refining or manufacturing (except such fixtures as shall have been considered a part of any parcel or parcels of real property), including all tools and implements of every kind used, or designed to be used, for the aforesaid purpose, owned or used by such manufacturer."

It will be observed that by this amendment the legislature of 1891 did away with the use of the method applicable to ascertaining the average value of merchant's stock in measuring the average value of manufacturer's stock, and provided a new and distinct method of arriving at the average value of manufacturer's stock, both of materials and finished products. At the same time the words "owned by such manufacturers" were inserted in the statute.

The purpose of the legislature in making these amendments is clear and

unmistakable. So that even if present sections 5385 and 5386 of the General Code be regarded as ambiguous, this ambiguity is resolved and the interpretation which I have given to them is fully justified by their legislative history.

Inasmuch as the scope of the sections is thus limited, and as they do not provide any machinery for listing on the average basis materials belonging to a non-resident, but held in Ohio for the purpose of manufacture, it follows that such materials are to be listed as ordinary property on hand on the listing date, and not on the average basis.

The owner of the property in the case submitted by you being a foreign corporation, the manner of its return is regulated by sections 5404 and 5405 of the General Code, which need not be fully quoted. These sections provide in effect that corporate property shall be returned in the counties in which it is situated, by the president, secretary and principal accounting officer of the company, and in the taxing districts in which it is situated. These sections, however, do not furnish the rule for determining where property is situated, and to determine this question recourse must be had to section 5371, General Code, which provides in part as follows:

> "Section 5371. * * * Merchants' and manufacturers' stock, and personal property upon farms shall be listed in the township, city or village in which it is situated. All other personal property, moneys, credits, and investments, except as otherwise specially provided, shall be listed in the township, city, or village in which the person to be charged with taxes thereon resides at the time of the listing thereof, if such person resides within the county where the property is listed, and if not, then in the township, city, or village where the property is when listed."

The property in question not being, technically, "manufacturer's stock," its situs is not governed by the first sentence of the above quotation, but by the latter part of the second sentence thereof. Inasmuch as the foreign corporation in question does not "reside within the county where the property is listed," the property should be listed in the "township, city or village where the property is when listed." In other words, the situs of the property in the case stated by you is in the taxing district in which it is held for purpose of manufacture, just as it would be if it could be regarded as manufacturer's stock.

Of course, under section 5328 of the General Code, the property, being tangible, is taxable in Ohio although belonging to a non-resident corporation.

I answer your questions, then, specifically as follows:

> "(1) The personal property in question is taxable under section 5404 in the name of the foreign corporation.
>
> "(2) The property is not taxable to the Ohio corporation.
>
> "(3) An Ohio manufacturer is not required to list all property held for the purpose of manufacture on the average basis, but only such property so held as is owned by him.
>
> "(4) The property in question should be listed at the amount thereof on hand in the taxing district where it is situated on the tax listing day, and not on the average basis."

Respectfully,

EDWARD C. TURNER,

Attorney General.

380.

NOMINATING PETITIONS FOR CANDIDATES FOR CHARTER COMMISSIONERS ARE REQUIRED TO BE FILED WITH DEPUTY STATE SUPERVISORS AND INSPECTORS OF ELECTION, ONLY THIRTY DAYS PRIOR TO DATE OF PRIMARY ELECTIONS.

Nominating petitions for candidates for commissioners of the city of Dayton, Ohio, are required to be filed with the deputy state supervisors and inspectors of elections of Montgomery county only thirty days prior to the date of holding primary elections for the nomination of candidates for that office.

COLUMBUS, OHIO, May 17, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of May 12, 1915, as follows:

> "We herewith submit a letter from the board of deputy state supervisors of elections for Montgomery county, in which they request your opinion upon the following question:
>
> "'When must petitions for candidates for commissioner of the city of Dayton, Ohio, be filed with the board of deputy state supervisors and inspectors of elections for Montgomery county, Ohio?'"
>
> "We also enclose a copy of the proposed charter from the city of Dayton. Will you kindly give us your opinion upon the aforesaid question?"

The question submitted arises from the inconsistency of the provisions of the charter of the city of Dayton, Ohio, and section 4969, G. C., as amended, 103 O. L., 482.

Sub-division D of section 7 of the charter of Dayton, Ohio, provides.

> "All nominating papers comprising a petition shall be assembled and filed with the election authorities, as one instrument, at least thirty (30) days prior to the date of holding the primary election with respect to which such petition is filed * * *"

Section 4969, G. C., 103 O. L., 482, provides in part as follows:

> "All nominations for offices or places on the primary ballot other than those heretofore provided for shall be by nomination papers which shall be filed with the board of deputy state supervisors at least sixty days before the day of holding the primary election."

Your question then is whether the charter or the statute will control?

Section 3 of article 18, of the constitution, provides that municipalities shall have authority to exercise all powers of local self-government, and under the provisions of section 8 of the same article, cities and villages are empowered to adopt charters for their local government entirely independent from the general laws of the state applicable to cities and villages which have not so adopted charters.

The commissioners referred to in your question are members of the governing body provided for in the charter adopted for the government of the city of Dayton,

provision for the nomination and election of which is set forth therein. These officers are purely local in their every character and function and their nomination and election are within the exercise of the powers of local self-government authorized by the constitution of the state, pursuant to which the charter of the city of Dayton was adopted and by reason of which the people of such city were empowered to create such officers and provide for their nomination and election independent of the general provisions of the statutes of the state relative to the government of municipal corporations.

The people of the city of Dayton, having seen fit to incorporate into the basic law of their local government a provision as to the time for filing nomination papers of candidates for the officers of such municipality referred to by you and the nomination and election of such officers being, as above stated, an exercise of the powers of local self-government, the charter provision will govern irrespective of the statutory provisions relative to primary elections applicable to municipalities which are not under such charter government.

The statutory provision not being applicable to the nomination of candidates for commissioners in the city of Dayton, the amendment of the statute subsequent to the adoption of the municipal charter becomes immaterial.

Answering your question specifically, I am of the opinion that nominating petitions for candidates for commissioners of the city of Dayton are required to be filed with the deputy state supervisors and inspectors of elections of Montgomery county only thirty days prior to the date of holding the primary election.

The foregoing opinion is based solely upon the decision of the supreme court of this state in the case of Fitzgerald et al. vs. The City of Cleveland, 88 O. S., 338.

Respectfully,
EDWARD C. TURNER,
Attorney General.

381.

INTERURBAN RAILROAD—HAS NO AUTHORITY TO CONDEMN LAND HELD BY A BOARD OF EDUCATION FOR SCHOOL PURPOSES.

A traction company, owning or operating an interurban railroad, has no authority in law to condemn, for railroad purposes, a part of a tract of land the title to which is held by the board of education of a school district in trust for public school purposes.

COLUMBUS, OHIO, May 17, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—In your letter of April 21st you request my opinion as follows:

> "The Sciotoville (Scioto county) board of education, is having a controversy with the Ohio Valley Traction Company. The traction company has surveyed a contemplated traction line which passes through one side and corner of the school property of the Sciotoville village school district.
>
> "The questions we desire to ask are:
>
> "First: In your opinion is it possible for the traction company to condemn and purchase this school property from the board of education against the will of the board of education?
>
> Second: If the answer to the first question is in the affirmative would

the board of education have grounds for a damage suit against the traction company in addition to the amount received in the purchase of the land?"

The provisions of sections 8759 et seq., of the General Code, conferring special powers upon a company, owning or operating a railroad, to acquire a right of way by agreement or by appropriation over public or private lands, are separate and distinct from the provisions of the statutes governing the operation of a street or interurban railway, as found in sections 9100 et seq., of the General Code.

In the case of Traction Co. v. Traction Co., 47, W. L. Bulletin 854, the court held:

> "A corporation which is described in its charter as a 'Traction Company' organized for the purpose of operating a 'traction railway,' and which is shown by such charter and by other evidence to be an interurban railway, is a street railway within the provisions of section 2780, 17 R. S., defining street railways."

In the case of Railway v. Traction Co., 4 C. C. (n. s.) 329, it was held that steam railroads and electric railways are classified and recognized as separate and distinct from each other by the statutes of Ohio, and statutes regulating the former are inapplicable to the latter unless an intention to the contrary clearly appears.

In the case of Railway v. Lohe, 68 O. S., 101, the court held that suburban and interurban railroads are street railroads within the meaning of the laws on street railroads.

The Ohio Valley Traction Company cannot, therefore, be considered a railroad within the meaning of the provisions of sections 8759 et seq., of the GeneralCode, and if said company has the authority to appropriate a part of the school property owned by the board of education of Sciotoville village school district such authority must be found in the provisions of sections 9100 et seq., of the General Code, under the chapter relating to street and interurban railways.

Section 9100, G. C., provides:

> "Street railways, with single or double tracks, side-tracks, and turn-outs, may be constructed or extended within or without, or partly within and partly without, any municipal corporation. Offices, depots and other necessary buildings therefor, also may be constructed."

Section 9101, G. C., provides:

> "The right to construct or extend such railway within or beyond the limits of a municipal corporation, may be granted only by its council, by ordinance; the right to construct such railway without the limits of a municipal corporation may be granted only by the county commissioners, by an order entered on their journal."

Section 9108, G. C., provides:

> "When the council or commissioners make such grant, the company or person to whom it is made may appropriate property necessary therefor, if the owner fails expressly to waive his claim to damages by reason of the construction and operation of the railway."

It will be observed that the provision "may appropriate property necessary therefor" is, by its terms, general in application.

The authority of said company to appropriate private property within said village for is corporate purposes, is clear under the provisions of section 9115, G. C., providing said company has secured a franchise from the council of said village.

Section 9115, G. C., provides:

> "When it is deemed necessary by a majority of the directors of a domestic or foreign corporation owning or operating a street railway in a municipality to appropriate private property therein, in order to avoid dangerous or difficult curves or grades, or unsafe or unsubstantial grounds or foundations or to extend or shorten its railway line, or to provide land on which to extend its power plant, such corporation may appropriate so much private property as is necessary for the extension of such power plant, or the construction, operation and maintenance of the tracks, poles, supports, wires, cables and necessary appliances of such railway other than power houses, machine shops, stations or substations in the manner and subject to the provisions of law for the appropriation of private property by corporations."

In the case of Railway v. Stoneware Co., 51 W. L. Bulletin, 421, the first branch of the syllabus provides:

> "An interurban electric railway company seeking a right of way through a municipality for the construction of its line is subject to the laws of the state respecting street railroads and not those respecting steam railroads, and may not appropriate private property for its purposes without first obtaining a franchise from the municipal council and complying with all the conditions providing for the regulation of street railroads."

However, the school land in question is not private property within the meaning of the provisions of section 9115, G. C., and even if we assume that the provisions of section 9108, G. C., apply to public, as well as to private, property, the question arises, may the Ohio Valley Traction Company, under the provisions of said statute, appropriate a part of the school ground, the title to which is held by the board of education of Sciotoville village district for public school purposes.

It is evident that if said traction company should secure a right of way over that part of the school ground described in your letter, and shown on the blue print attached thereto, it would prohibit the use of said part of said school ground for public school purposes, and would interfere with the use of the remainder of said ground for said purposes.

In the case of Board of Education, etc., v. Edson et al., 18 O. S., 221, the court held that a dedication for school purposes is for a specific use and confers no power of alienation so as to extinguish the use.

I quote the following from the opinion of the court in the case of Cincinnati International Railroad Co. v. Murray et al., 1 O. N. P. (n. s.), 301:

> "It is claimed that the St. Patrick's school property on Third street, in which a Catholic school is conducted, and which is open to all children, is property that is already applied to public use, and that the appropriation now sought for railroad purposes would destroy that use, and hence cannot be made. While it is true that this is a use of a public character, and in the highest degree commendable, yet the ownership is private, and the

> general public have no right to command or demand its continuance. Randolph in his work on Eminent Domain, section 56, says: 'An essential feature of a public use is that the public may enjoy its benefits, and, if it be an undertaking for the performance of services, command the services.'"

It may be clearly inferred from the above opinion that if the ownership of the school property which the plaintiff sought to appropriate had been public so that the general public would have had the right to demand the continuance of its use for public school purposes, the court would have denied the right of the plaintiff to appropriate said property for railroad purposes.

Inasmuch as the statute does not by express terms, nor by necessary implication, confer the power on the Ohio Valley Traction Company to condemn the school land in question, the general rule applicable to your first question is stated in 15 Cyc., at page 614, as follows:

> "Where property has been legally condemned or acquired by purchase for a public use, and has been or is about to be appropriated for such use, it cannot be taken for another public use which will totally destroy or materially impair or interfere with the former use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication."

The title to the land which the Ohio Valley Traction Company desires to appropriate is held by the board of education of Sciotoville village school district in trust for public school purposes, and its use by said traction company for railroad purposes would destroy its use for public school purposes.

I am of the opinion, therefore, in answer to your first question that said traction company cannot appropriate said land for railroad purposes.

This answer to your first question disposes of your second question.

Respectfully,
EDWARD C. TURNER,
Attorney General.

382.

ROADS AND HIGHWAYS—HIGHWAY COMMISSIONER WITHOUT AUTHORITY TO EXPEND FROM STATE FUNDS MORE THAN ONE-HALF OF COST FOR AN INTER-COUNTY HIGHWAY IMPROVEMENT—APPLICATION OF THIS GENERAL LAW TO CONTRACT FOR IMPROVEMENT OF WALHONDING-NEW GUILFORD INTER-COUNTY HIGHWAY.

The state highway commissioner has no authority to expend from state funds more than one-half of the cost of an inter-county highway improvement.

A contract for the improvement of the Walhonding-New Guilford inter-county highway in Coshocton county was forfeited and the balance of the funds appropriated by the county commissioners and set aside by the highway commissioner for the improvement in question, has been expended in an effort to complete the road by force account. The road is not yet completed. The only procedure open to the highway commissioner, under existing statutes, is to secure from the county commissioners an appropriation of one-half of the amount necessary to complete the work in question.

COLUMBUS, OHIO, May 17, 1915.

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

DEAR SIR:—I have your communication of May 5, 1915, transmitting to me the correspondence and papers from your files, relating to the Walhonding-New Guilford inter-county highway improvement, with a request that I advise you how to proceed in the premises. From the mass of correspondence and other papers submitted to me, I gather the following facts:

On the 7th day of December, 1910, the county commissioners of Coshocton county made an application to the state highway commissioner for state aid in the construction of the highway in question, said highway being about two and one-half miles in length. This action on the part of the commissioners was had under the authority of old section 1185 of the General Code, 99 O. L., 309. On the 26th day of December, 1910, the township trustees of Perry township, by resolution, agreed to pay from the township funds twenty-five per cent. of the cost and expense of so much of the improvement as was situated in Perry township, and on the 4th day of February, 1911, similar action was taken by the trustees of New Castle township. On the 26th day of January, 1911, state highway commissioner, James C. Wonders, acting under authority of old section 1189 of the General Code, 101 O. L., 285, made a finding to the effect that the road in question was of sufficient public importance to come within the purpose of the state highway act, and thereupon approved the application of the county commissioners of Coshocton county for state aid in the construction of said road. Following this action on the part of the state highway commissioner, it appears that several different sets of plans, specifications and estimates for the improvement of the road in question, were prepared by the state highway commissioner and approved by the county commissioners of Coshocton county, but it was finally determined in 1912 to improve the road in question by constructing the highway of bituminous macadam and the cost of this improvement was estimated by the state highway commissioner at $16,694.70. On the 2nd day of April, 1912, the county commissioners of Coshocton county adopted what is known as a "final resolution" with reference to the improvement of this road, and in this resolution the county commissioners determined that the highway should be constructed and that the work should be done under the supervision of the state highway commissioner.

In this resolution the plans, specifications and estimates prepared by the state highway commissioner were approved and adopted by the county commissioners who appropriated $8,347.35 to meet the county's share of the improvement, that amount being one-half of the total estimated cost and expense of construction. Bids for the construction of the improvement were called for by the state highway commissioner by advertisement properly made, and on the first day of June, 1912, a contract for the construction of the road was let to one Charles Bird, of Springfield, Ohio, his bid being $16,170.00. Bird entered into a written contract and furnished the bond required by law, and began work on the improvement. Under the terms of Bird's contract, he was to complete the construction of the highway in question by September 1, 1912, but this time was extended by the state highway commissioner until June 1, 1913. When that time arrived, Bird had still failed to complete the contract and the state highway commissioner undertook to complete the work by force account. In the meantime, on the 22nd day of April, 1913, the county commissioners of Coshocton county had made a supplemental appropriation for use in constructing this road, the amount of the same being $325.00. It will thus be seen that the total appropriation made by the county for the purpose of constructing the road in question, was $8,672.35, and the state highway commissioner set aside an equal amount of money for the same purpose, making the total amount available $17,344.70. It appears from the records of your department, that while Bird was engaged under his contract in attempting to build this road, he was paid the sum of $3,874.80, leaving in the fund available for the completion of the road, the sum of $13,469.90. Since Bird's contract was declared forfeited by the state highway commissioner, and since the commissioner began his attempt to complete the road by force account, the entire amount of money left in the fund set aside for the completion of this road, has been expended, but the road has not yet been completed. After expending all of the money in the fund and after incurring additional obligations to the amount of about $2,000.00, the state highway commissioner estimated that a sum not less than $5,904.04 would still be required to complete the road and at the request of the state highway commissioner suit was brought by the attorney general against Bird and his sureties, Pat Caffrey and J. S. Wagner, for the sum of $7,904.00, being the amount of obligations incurred by the highway commissioner over and above funds available, plus the estimated expense still required to complete the work. This suit was brought in the common pleas court of Clark county on January 9, 1915, and the defendants interposed a demurrer to the petition, which demurrer was argued and decided after I assumed office. The condition of Bird's bond was that, if awarded the contract, he would well, truly and faithfully comply with and perform each and all of the terms, covenants and conditions of the same on his part to be kept and performed, according to the tenor thereof, and that he would perform the work embraced therein upon the terms proposed and within the time prescribed and in accordance with the plans and specifications furnished therefor, and that he would pay all direct or indirect damages suffered or claimed during the construction of the road improvement, by reason of the construction thereof. It was held by the common pleas court of Clark county that the suit above referred to had been prematurely brought and that Bird and his bondsmen could not be required under the terms of the bond, to pay any money until the state highway commissioner had completed the road and ascertained the exact cost of construction or at least until the latter condition had been complied with by the commissioner. The court after observing that the state was not obliged to undertake to complete the work by force account, but might have re-let the work to some responsible contractor, and have at once sued upon the bond after letting the contract, held that if the highway commissioner did elect to complete the work by force account, then the commissioner must fully complete the work before

bringing suit upon the bond, for the reason that the exact liability of the bondsmen must be determined before suit could properly be brought.

Another element entering into the case is the fact that the county auditor of Coshocton county has refused to pay the final estimate on this road for the reason that the road has not been completed and that in fact a great deal of work remains to be done upon it. The situation is a most unfortunate one, and while it may be truthfully observed that the state of Ohio is under a moral obligation to complete this road without cost to the county, over and above the $8,672.35, appropriated by the county commissioners for that purpose, I am unable to see how your department can meet this moral obligation under existing statutes.

Under the provisions of section 1206, G. C., as it stood at the time this improvement was projected, being 99, O. L., 314, and under the provisions of section 1207, G. C., as it now stands, your department is not authorized under any circumstances or conditions to expend from the inter-county highway fund more than fifty per cent. of the cost of an inter-county highway improvement. I am informed that the Walhonding-New Guilford road is not a main market road and therefore you would have no authority to take over the improvement and complete the same with funds appropriated for the construction of main market roads. The work never having been completed, it is apparent that it would be beyond your authority to regard this proposition as one of maintenance or repair and pay the further cost of completing the improvement from the maintenance and repair fund. The only procedure open to you under existing statutes, is to place all of the facts before the county commissioners of Coshocton county and secure from them a further appropriation of one-half of the amount necessary to pay outstanding obligations and complete the work in question.

I learn from your department that the estimated amount of $5,900.00 needed to complete the work and for which suit was brought against Bird and his bondsmen, will in all probability be insufficient and that it would not be surprising if as much as $10,000.00 should be required to complete the road. Should the county commissioners of Coshocton county see fit to enter into an arrangement of the nature above suggested and make an additional appropriation of one-half the amount needed to complete the road, and should said road be completed in pursuance of such arrangement, and suit be thereafter brought and recovery had from Bird and his bondsmen, then the amount of the recovery would be not only the expenditure of the state, but also the expenditure of the county over and above the contract price of $16,170.00.

I am aware that this construction of the law works a hardship on Coshocton county, which had a right to assume that the original estimate was substantially correct and that the funds of the county would be handled by the state highway department in the economical manner. The only other alternative I have to suggest, however, is such legislative action as might meet this and similar situations, if such there be. I note that house bill No. 54, being "An act to make appropriations to pay unauthorized deficiencies and liabilities existing prior to February 15, 1914," found in 104, O. L., 221, carries the following item:

> "For payment of obligations for labor and material incurred by the state highway commissioner in the construction by force account of the Chester state aid road. Petition No. 647, Meigs county, Ohio_____$4,600.16."

and also the following item:

> "For payment of obligations for labor and material incurred by the state highway commissioner in the construction by force account of the Chesterhill state road, petition No. 359, Morgan county, Ohio____$8,382.29."

I am informed by the representatives of your department and learn from an examination of your records, that the two appropriations above referred to were made to care for situations like the one now presented by the Walhonding-New Guilford inter-county highway improvement. It would, therefore, seem that the construction herein placed upon the law is that which has been followed in the past and that the previous interpretation of the law has been that the state highway commissioner could not, in any instance, even for the purpose of meeting a moral obligation of the state, pay more than one-half of the cost of an inter-county highway improvement.

It is respectfully suggested that the facts relating to this matter, as set forth herein, are such as to warrant a careful investigation on your part for the purpose of determining why this road is so far from completion, in view of the fact that a sum in excess of the original estimate has already been expended.

The correspondence and papers submitted to me are returned herewith.

Respectfully,
EDWARD C. TURNER,
Attorney General.

383.

HOUSE BILL NO. 482 UNCONSTITUTIONAL—INJURED CONVICT NOT ENTITLED TO AWARD FROM STATE INSURANCE FUND.

The general assembly may not direct the state industrial commission as the state liability board of awards to pay out of the state insurance fund compensation to a particular convict injured in the course of working for the state, the general provisions of the workmen's compensation act not applying to such convicts and the state insurance fund not having been collected or created for such purposes.

COLUMBUS, OHIO, May 18, 1915.

HON. FRANK M. REIGHARD, *Chairman Finance Committee, House of Representatives, Columbus, Ohio.*

DEAR SIR:—Your committee, through Mr. Morris, has submitted to me house bill No. 482—Mr. Bryson, with a request for advice as to its validity.

The bill in full is as follows:

> "A BILL to award relief to the estate of Jeff Goings, of Greene county, who died from injuries received in the employ of the state while a convict in the Ohio penitentiary.
>
> "Be it enacted by the general assembly of the state of Ohio:
>
> "Section 1. That the industrial commission of Ohio is hereby authorized and directed to pay to the probate court of Greene county, to the credit of the estate of Jeff Goings, late a convict, who was injured while in the discharge of his regular employment at the Ohio penitentiary, and who was afterward pardoned while still severely injured, and died shortly after from his wounds, the sum of five hundred and twenty-five dollars $525.00) with which to pay the funeral expenses, medical expenses, and other charges incurred by or for said Jeff Goings after his pardon from the penitentiary; said payment to be made by said industrial commission of Ohio from the state insurance fund."

The state insurance fund is provided for by the act found in 103 O. L., 72,

which was passed under the special authority granted to the general assembly by article 2, section 35, of the constitution, as adopted September 3, 1912. The constitutional provision in full is as follows:

> "For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational diseases, occasioned in the course of such workmen's employment, aws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom, and taking away any or all rights of action or defenses from employes and employers; but no right of action shall be taken away from any employe when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employes. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto."

The act provides generally for a state fund out of which compensation is to be paid to two classes of employes described in section 14 thereof (section 1465-61, of the General Code), as follows:

> "Sec. 1465-61. (Section 14.) The terms 'employe,' 'workman' and 'operative' as used in this act, shall be construed to mean:
>
> "(1) Every person in the services of the state, or of any county, city, township, incorporated village or school district therein, including regular members of lawfully constituted police and fire departments of cities and villages, under any appointment or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, township, incorporated village or school district therein. Provided that nothing in this act shall apply to policemen or firemen in cities where policemen's and firemen's pension funds are now or hereafter may be established and maintained by municipal authority under existing laws.
>
> "(2) Every person in the service of any person, firm or private corporation, including any public service corporation employing five or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are elgally permitted to work for hire under the laws of the state, but not including any person whose employment is but casual, or not in the usual course of trade, business, profession or occupation of his employer."

Sections 17 and 18 of the act provide for contributions to the fund for the purpose of providing compensation to the first class of employes defined in section 14, as follows.

> "Sec. 1465-64. (Section 17.) In the month of January, in the years 1914 and 1915, the auditor of state shall draw his warrant on the treasurer of state, in favor of said treasurer as custodian of the state insurance fund, and for deposit to the credit of said fund, for a sum equal to one per centum of the amount of money expended by the state during

the last preceding fiscal year, for the service of persons described in subdivision one of section 14 hereof, which said sums are hereby appropriated and made available for such payments; and thereafter in the month of January of each year, such sums of money shall in like manner be paid into the state insurance fund as may be provided by law; and it shall be duty of the state liability board of awards to communicate to the general assembly on the first day of each regular session thereof, an estimate of the aggregate amount of money necessary to be contributed by the state during the two years next ensuing as its proper portion of the state insurance fund.

"Sec. 1465-65. (Section 18.) In the month of December of each year, the auditor of state shall prepare a list for each county of the state, showing the amount of money expended by each township, city, village, school district or other taxing district therein for the service of persons described in subdivision one of section 14 hereof, during the fiscal year last preceding the time of preparing such lists; and shall file a copy of each such list with the auditor of the county for which such list was made, and copies of all such lists with the treasurer of state. Such lists shall also show the amount of money due from the county itself, and from each city, township, village, school district and other taxing district thereof, as its proper contribution to the state insurance fund, and the aggregate sum due from the county and such taxing districts located therein."

These sections were amended 105 O. L., ____, in respects immaterial in the present connection.

I take it from the mere fact that such a bill as is now before me has been offered it is assumed that a convict is not an "employe," "workman" or "operative" within the meaning of the first paragraph of section 14 of the workmen's compensation act, as above quoted. This assumption is, of course, correct. A convict, while he is required to labor for the state, does not work under "any appointment or contract of hire, express or implied, oral or written." His service is involuntary and compulsory. Moreover, I am of the opinion that a convict is not a "workman" nor the state in its relation to such convict an "employer" within the meaning of article 2, section 35, of the constitution.

It follows that the state insurance fund, which is created under general laws for certain specific purposes, may not under those laws be lawfully paid out to furnish compensation to a convict.

I find two objections, which I think are insurmountable, to legislation of the character embodied in the proposed bill. They are as follows:

"(1) The state insurance fund is a trust fund created for a specific purpose and administered by a definite trustee, the 'board' referred to in the constitution and the 'state liability board of awards' referred to in the act. The legislature is in no sense the custodian or trustee of this fund. It has no control over the fund itself. It may by proper legislation prescribe the duties of the board, but, in my opinion, such legislation may not require or authorize the board to disburse the fund for any purpose other than those for which it was created.

"(2) Whatever legislative control the general assembly may have over the state liability board of awards in the disbursement of the state insurance fund, such control must be exerted by general laws. To provide that the state insurance fund may be paid out for the benefit of a class generally would be one thing; but to require that a specific sum be paid

out of the state insurance fund for the benefit of a particular person is quite another thing. The subject-matter is of a general nature, and article 2, section 26, of the constitution, requires that laws pertaining to such subject-matter 'shall have a uniform operation throughout the state'."

To illustrate more perfectly, it might be competent for the general assembly to provide compensation out of the state insurance fund for a new class of workmen, but in such event the law would have to operate prospectively and provide the fund in the first instance; and under no circumstances would it be competent for the general assembly to provide retrospectively for compensation out of the state insurance fund to a particular person.

For all of the above reasons, I am of the opinion that house bill No. 482 is unconstitutional, and if passed and approved would be void.

Respectfully,
EDWARD C. TURNER,
Attorney General.

384.

PROSECUTING ATTORNEY—BEFORE ENTITLED TO A WARRANT FOR EXPENSE ALLOWANCE IN AN AMOUNT NOT TO EXCEED ONE-HALF OF HIS OFFICIAL SALARY, HE MUST GIVE BOND UNDER PROVISIONS OF SECTION 3004, G. C., IN ADDITION TO HIS OFFICIAL BOND.

Before the prosecuting attorney of a county is entitled to a warrant from the county auditor for an expense allowance of an amount not to exceed one-half of his official salary, as authorized by the provision of section 3004, *G. C., he must give the bond required by said section in addition to the official bond given by him as required by the provision of section* 2911, *G. C.*

COLUMBUS, OHIO, May 18, 1915.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—In your letter of May 4th you request my opinion as follows:

"I write to inquire whether or not it is necessary for a prosecuting attorney, who has given a bond in the sum of $1,500, as provided in section 2911, and whose salary is less than $1,500 per year, to give an additional bond before drawing the expense allowance provided in section 3004 of the General Code."

Section 2911, General Code, provides:

"Before entering upon the discharge of his duties, the prosecuting attorney shall give bond to the state in a sum not less than one thousand dollars, to be fixed by the court of common pleas or the probate court, with sureties to be approved by either of such courts, conditioned that he will faithfully discharge all the duties enjoined upon him by law, and pay over, according to law, all moneys by him received in his official

capacity. Such bond, with the approval of such court of the amount thereof and sureties thereon, and his oath of office indorsed thereon, shall be deposited with the county treasurer."

The minimum amount of the bond which is required to be given by the prosecuting attorney under this statute is one thousand dollars ($1,000.00), and the amount of said bond is not determined by the amount of the salary of said officer. The fact that your salary is less than the amount of bond fixed by the court, under the provision of said section, would not, therefore, be material, in determining the answer to your question.

Section 3004, G. C., provides:

"There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county.

"Provided that nothing shall be paid under this section until the prosecuting attorney shall have given bond to the state in a sum not less than his official salary to be fixed by the court of common pleas or probate court with sureties to be approved by either of said courts, conditioned that he will faithfully discharge all the duties enjoined upon him, by law, and pay over, according to law, all moneys by him, received in his official capacity. Such bond with the approval of such court of the amount thereof and sureties thereon and his oath of office inclosed therein shall be deposited with the county treasurer.

"The prosecuting attorney shall annually before the first Monday of January, file with the county auditor an itemized statement, duly verified by him, as to the manner in which fund has been expended during the current year, and shall if any part of such fund remains in his hands unexpended, forthwith pay the same into the county treasury. Provided, that as to the year 1911, such fund shall be proportioned to the part of the year remaining after this act shall have become a law."

While the conditions of the bond which a prosecuting attorney is required to give under the provision of section 2911, G. C., are the same as those of the bond required by the provision of section 3004, G. C., it will be observed that the amount of the bond required by the provision of section 3004, G. C., must be not less than the amount of the salary of said officer, and the primary purpose of requiring the bond under section 3004, G. C., as shown by the latter provision of said section, is to hold said officer accountable for the proper use of the allowance made to him under authority of said section.

The general purpose of the bond required by section 2911, G. C., is to secure the faithful performance of the official duties of the prosecuting attorney.

In the case of State ex rel. v. Slough, 12 O. C. C., 105, it was held that the omission from the official bond of the prosecuting attorney of the condition pro-

vided in section 2911, G. C., that he shall "pay over according to law moneys by him received in his official capacity" is not a fatal or serious defect, but is cured by the provision of section 6 of the General Code.

Section 6, General Code, provides:

> "A bond payable to the state of Ohio, or other payee as may be directed by law, reciting the election or appointment of a person to an office or public trust under or in pursuance of the constitution or laws, and conditioned for the faithful performance, by such person, of the duties of the office or trust, shall be sufficient, notwithstanding any special provision made by law for the condition of such bond."

Replying to your question, I am of the opinion that before the prosecuting attorney of a county is entitled to a warrant from the county auditor for an expense allowance of an amount not to exceed one-half of his official salary as authorized by the provision of section 3004, G. C., he must give the bond required by said section in addition to the official bond given by him as required by the provision of section 2911, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

385.

AN AGRICULTURAL SOCIETY, WHICH LEASES ITS FAIR GROUND TO A CITY FOR PARK PURPOSES CAN RECEIVE AID FROM COUNTY TREASURY, WHERE IT USES ITS GROUNDS FOR FAIR PURPOSES.

An agricultural society which leases its fair grounds to a city for park purposes as provided in sections 4082-1 *et seq., G. C., retaining, however, the right to use the grounds for fair purposes, is not thereby precluded from receiving aid from the county treasury under section* 9894, *G. C.*

COLUMBUS, OHIO, May 18, 1915.

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

GENTLEMEN:—Your letter of May 13th requests my opinion as follows:

> "The agricultural society of Muskingum county, Ohio, own their own grounds, but on April 1, 1914, leased them to the city of Zanesville for park purposes under authority of section 4082-1 and 4082-2, General Code, for a period of forty years, retaining the privilege of the use of the grounds one week in each year for fair purposes, with the right to assemble material and prepare for said fair one week prior to the holding thereof.
>
> *"Question:* Does the Muskingum County Agricultural Society by reason of said lease forfeit their right to the maximum of $1,500.00 under authority of section 9894, General Code?"

The sections authorizing the leasing of the property of an agricultural society for park purposes are as follows:

"Sec. 4082-1. Any real estate controlled and managed by any agricultural society organized under the laws of Ohio, pertaining to agricultural societies, whether owned by it or by any county, or jointly by it and any county and which is situated within, adjacent to or near any municipal corporation and used as a site for fairs, may be jointly used as such site for fairs and also as a public park of such municipal corporation, although the title thereto shall remain in such agricultural society or county, or both such agricultural society and such county as the case may be.

"Sec. 4082-2. The duration of such joint use and all the terms and conditions thereof shall be such as may be agreed upon between such municipal corporation and such agricultural society or if such county has any interest in such real estate then such agreement shall be made between such municipal corporation on the one hand and such agricultural society and such county acting through its board of county commissioners.

"Sec. 4082-3. Such municipal corporation shall have the same authority and power to improve, equip and maintain such real estate as a public park and to do all things necessary for its use and enjoyment as such public park which it has under the laws of Ohio as to parks owned by it in fee."

The section authorizing and directing the county commissioners to grant public aid to agricultural societies for the purpose of encouraging agricultural fairs is as follows:

"Sec. 9894. When a county or a county agricultural society, owns or holds under a lease, real estate used as a site whereon to hold fairs, *and the county agricultural society therein has the control and management of such lands and buildings,* for the purpose of encouraging agricultural fairs, the county commissioners shall on the request of the agricultural society annually levy taxes of not exceeding a tenth of one mill upon all taxable property of the county, but in no event to exceed the sum of one thousand five hundred dollars, which sum shall be paid by the treasurer of the county to the treasurer of the agricultural society, upon an order from the county auditor duly issued therefor. Such commissioners shall pay out of the treasury any sum from money in the general fund not otherwise appropriated, in anticipation of such levy."

The only legal question which I discern is as to whether or not, under the circumstances mentioned by you, it may be said that the agricultural society "has the control and management of such lands and buildings."

The society owns the lands and buildings, and under its lease reserves to itself sufficient control and management thereof to enable it to hold agricultural fairs. This being the case, I am of the opinion that the making of the lease, which is authorized by law, under the terms and conditions described by you would not forfeit the right of the agricultural society to such public aid as it is entitled to under section 9894, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

386.

COUNTY COMMISSIONERS—BOND ISSUE FOR ROAD IMPROVEMENT WHERE PART OF ROAD LIES IN TOWNSHIP IN WHICH IS AN INCORPORATED VILLAGE—BEFORE MAKING LEVY, OTHER LEVIES SHOULD BE TAKEN INTO CONSIDERATION—DETERMINATION SHOULD BE THAT LEVY IS IN TEN MILL LIMITATION AND WILL NOT PROHIBIT OTHER LEVIES.

Before the commissioners of a county proceed to issue bonds and let the contract for the improvement of a road, under authority of sections 6926 *to* 6956, *G. C., inclusive, as amended in* 103 *O. L.,* 198-204, *a part of which lies in a certain township in said county in which is located an incorporated village, it is the duty of the said commissioners to take into consideration the levies that must necessarily be made on the taxable property within said village for the year* 1915 *and thereafter for municipal purposes, and for the purposes other than interest and sinking fund, for which the various taxing authorities may levy taxes on said property.*

If said commissioners find that the levy for the proposed improvement can be made on the taxable property within said village, within the ten mill limitation, and that said levy will not prohibit the levies in said taxing districts for the other purposes above mentioned, said commissioners, having granted the petition for said improvement, may proceed with its construction, and for the purpose of providing for the payment of the cost and expense apportioned to said township in the manner provided by section 6931, *G. C., as amended in* 103 *O. L.,* 199, *said commissioners may levy a tax within the limitations provided in section* 6945, *G. C., as amended, upon the taxable property of said township, including the taxable property within said village.*

COLUMBUS, OHIO, May 18, 1915.

HON. MILTON HAINES, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR:—I have your letter of April 21st, which is as follows:

"In compliance with your request as given to Mr. Beightler and myself, I shall try and give you the facts in the road case as I understand them.

"The road in question was granted by the county commissioners and is to be built under the provisions of a bill passed April 8, 1915, and known as house bill No. 544, and found in Vol. 103, Laws of Ohio, 1913, page 198.

"Section 6928 provides 'that a portion of the cost and expenses thereof which shall not be less than one-half nor more than two-thirds (one-half in this case) shall be paid out of the proceeds of any levy or levies upon the grand duplicate of the county against the taxable property of any township or townships in which such road may be in whole or in part, as authorized hereinafter. They shall also order the balance of said cost and expense be assessed upon and collected from the owners of said real estate benefited thereby and in proportion to the benefit to be derived therefrom by said real estate as determined by said commissioners.'

"Section 6945 says (in part): 'Such levies shall be in addition to all other levies authorized by law for township purposes, but SUBJECT TO THE MAXIMUM LIMITATION UPON THE AGGREGATE AMOUNT of all levies now in force.'

"The road in mind lies partly in Claibourne township, Union county,

Ohio, in which the village of Richwood (incorporated) is situated. The total rate for this village is 16.40 mills including the county emergency (flood) levy of 1.10 mills.

"The opinion desired is whether the commissioners have the power to proceed with the building of the road; and levy against the village of Richwood its proportionate share of the cost and expense of building said road with the tax rate of the village being 16.40 mills."

In response to my request for additional information relative to the tax levies for all purposes in the village of Richwood for the year 1914, I have your letter of May 6th in which you set forth the purposes for which the various taxing authorities made a levy on the taxable property within the corporate limits of said village, for the year 1914, and the rate for each purpose.

From your statement of facts it appears that the commissioners of Union county have granted a petition for the improvement of a certain road in said county, under authority of sections 6926 to 6956, inclusive, General Code, as said sections are amended in 103 O. L., 198-204, section 6956 being supplemented by section 6956-a, General Code. It further appears that a part of said road lies in Claibourne township within said county; that the village of Richwood is located within said township and that the aggregate rate of taxes for all purposes on the taxable property within said village for the year 1914 was 16.40 mills.

An examination of your enclosed statement of levies made by the several taxing authorities on the taxable property of said village for the year 1914, shows that the aggregate levy of 16.40 mills for all purposes, allowed by the county budget commissioners, was the maximum levy allowed by law. The levy of 1.10 mills by the commissioners of said county for flood emergency and the levy of 3.10 mills by the state for state highway improvement, were the only levies that were not subject to the fifteen mill limitation provided by section 5649-5b, G. C., as amended, 103 O. L., 57.

It is evident that the levy for the proposed improvement must come within said fifteen mill limitation and, inasmuch as the cost and expense of said improvement will be incurred without a vote of the people, said levy must come within the ten mill limitation provided by section 5649-2, G. C., as amended in 103 O. L., 552.

Section 6928, G. C., as amended 103 O. L., 199, provides:

"The county commissioners shall order that a portion of the cost, and expenses thereof, which shall not be less than one-half, nor more than two-thirds of the total, shall be paid out of the proceeds of any levy or levies upon the grand duplicate of the county against the taxable property of any township or townships in which such road may be in whole or in part, as authorized hereinafter. They shall also order that the balance of said cost and expense be assessed upon and collected from the owners of said real estate, and from the real estate benefited thereby in proportion to the benefit to be derived therefrom by said real estate as determined by said commissioners."

I understand that the county commissioners acting under authority of this section provided by resolution that one-half of the cost and expense of making said improvement shall be paid out of the proceeds of any levy or levies upon the grand duplicate of the county against the taxable property of the townships in which said road is located, and that the balance of said cost and expense shall

be assessed upon, and collected from the owners of the real estate situated within one mile of either side of said road, according to the benefits to be derived therefrom by said real estate as determined by said commissioners.

Section 6945, G. C., as amended in 103 O. L., 202, provides:

> "For the purpose of providing by general taxation a fund out of which not less than one-half nor more than two-thirds of the costs and expenses of all improvements made under the provisions of this subdivision of this chapter can be paid, the commissioners are authorized to levy upon the taxable property of any township or townships within the county in which such improved road is to be or has been constructed, not exceeding three mills in any one year upon each dollar of the valuation of the taxable property in such township or townships. Such levies shall be in addition to all other levies authorized by law for township purposes, but subject to the maximum limitation upon the aggregate amount of all levies now in force."

The levy for this improvement, together with other levies for interest and sinking fund purposes, will have to be placed on the duplicate before and in preference to all other items and for the full amount thereof, as required by the provision of section 5649-1, G. C., as amended, 104 O. L., 12, which provides:

> "In any taxing district, the taxing authority shall, within the limitations now prescribed by law, levy a tax sufficient to provide for sinking fund and interest purposes for all bonds issued by any political sub-division, which tax shall be placed before and in preference to all other items, and for the full amount thereof."

In the case of Rabe et al. v. Board of Education, 88 O. S., 403, the fourth branch of the syllabus provides:

> "In determining the amount of income from taxes levied or to be levied that may be anticipated by an issue of bonds by any taxing authority, the calculation must be based on the same proportion of the total maximum levy in any one taxing district as the proportion of the maximum levy it is authorized to certify to the budget commissioners is to the total maximum levies that all the taxing authorities within that taxing district are authorized to certify."

At page 422 the court in its opinion said:

> "It would seem to be not only proper but necessary to take into account the future demands upon the school funds for school purposes in connection with the probable increase of the tax duplicate in determining just what income may be anticipated by the issue of bonds for the purchase of school property without detriment to the future imperative needs of the schools of that school district. This, of course, is a question for the determination of the board of education in the first instance, and a court of equity would not for this reason interfere to restrain the issue of these bonds, except for an abuse of discretion, and if the judgment of the board of education is acquiesced in by the tax payers of that school district and the bonds have been issued in good faith, it would then be too late to challenge its decision in this particular.
>
> "At this time, under the amendment to the constitution (section 11,

article 12) which provides that no bonded indebtedness of the state or any political subdivision thereof shall be incurred or renewed, unless in the legislation under which such indebtedness is incurred or renewed provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds and provide for a sinking fund for their final redemption at maturity, it is of the utmost importance that at the time of the incurring of such indebtedness the other needs of the political subdivision proposing to issue the bonds should be taken into account, for this levy must continue during the term of the bonds in an amount sufficient to pay the interest and provide a sinking fund for their final redemption, even though the amount should exhaust the entire income available from taxation and without regard to the current expenses. In other words, under this provision of the constitution, the payment of interest and the retirement of bonds are to be provided for first, and the current expenses become a secondary consideration."

While it is presumed that the county commissioners at the time they granted the petition for said improvement had in mind the effect of a levy for said improvement on the taxable property of Claibourne township, including the taxable property of the village of Richwood, as limiting levies of the said taxing district for other purposes, I think that, inasmuch as the bonds for said improvement have not been issued and the contract has not been let, it is still the duty of said county commissioners, before proceeding with said improvement, to take into consideration the levies that must necessarily be made on the taxable property within said village for the year 1915 and thereafter, for municipal purposes and for the purposes other than interest and sinking fund, for which the various taxing authorities may levy taxes on said property.

If the county commissioners find that the levy for the proposed improvement can be made on the taxable property within said village, within the ten mill limitation, and that said levy will not conflict with the rule laid down by the supreme court in the case of Rabe et al. v. Board of Education, supra, I am of the opinion that said county commissioners, having granted the petition for said improvement, may proceed with its construction and, for the purpose of providing for the payment of one-half of the cost and expense apportioned to Claibourne township, in the manner provided by section 6931, G. C., as amended in 103, O. L., 199, said county commissioners may levy a tax within the limitations provided in section 6945, G. C., as amended, upon the taxable property of said township, including the taxable property within said village of Richwood.

Respectfully,
EDWARD C. TURNER,
Attorney General.

387.

HOUSE BILL NO. 160—VOLUNTEER FIREMEN'S PENSION FUND.

COLUMBUS, OHIO, May 18, 1915.

HON. HARRY L. FEDERMAN, *Chairman Cities' Committee, Columbus, Ohio.*

DEAR SIR:—In compliance with your request of May 18, 1915, I have exam-

ined house bill No. 160 in connection with Mr. Heinselman's request for an opinion "as to whether or not the firemen who served as minute men could participate in the pension provided for in this bill."

Section 1 of the bill provides a board of trustees for "the establishment and maintenance of a volunteer firemen's pension fund." This board is to consist of the ex-volunteer firemen of the municipality creating the fund.

Section 2 provides for the holding of an election by "the volunteer firemen's association."

Section 9 provides for the distribution of the fund, and curiously enough contains no positive provision on this subject, the language being that:

> "The board of trustees shall make all rules and regulations for the distribution of the fund, as to whom, including members or their widows, any portion of it shall be paid, and the amount thereof; provided, that no ex-volunteer fireman shall be eligible to receive a pension from such fund * * * unless he has served as a volunteer fireman for a period of at least five (5) years."

I assume that by the phrase "minute men" you mean volunteer firemen; that is, members of a volunteer association formed for the purpose of putting out fires and subject to the call of authorities of the municipality. Many such associations formerly existed and still exist in cities and villages where no regular fire department is maintained. I interpret your question, then, as inquiring as to whether a present member of a regular fire department, who formerly served as a member of a volunteer fire department, could participate in the pension provided for in the bill in its present form.

The bill clearly seeks to create a pension fund for ex-volunteer firemen who have served as such for a period of five years. This is a statement of the purpose of the bill; I express no opinion as to its constitutionality. There is no exception in the bill as to persons who have been volunteer firemen, but are now members of the regular fire department and actual or potential beneficiaries in the firemen's pension fund provided for by sections 4600-4615, inclusive, General Code.

Section 4613, G. C., provides as follows:

> "All persons drawing pensions or entitled to them from existing fireman's pension fund shall be and remain beneficiaries in pension funds created under this chapter in the same municipality where they are beneficiaries in such existing funds, and shall receive such amounts and be subject to the rules and regulations adopted by the board of trustees."

The phrase "existing fireman's pension fund," as used in this section, means in my opinion pension funds existing at the time of the passage thereof. Moreover it refers to a fireman's pension fund which is to be distingushed from a volunteer fireman's pension fund, such as is provided by section 160, G. C.

See also section 4614 wherein it is required that all funds belonging to "an existing fireman's pension fund in the municipality" be transferred to the board for the administration of the fireman's pension fund provided for by the related statutes. These sections then have no bearing upon the question. Except as might otherwise be provided by the rules which may be made by the board of trustees of the fireman's pension fund, under section 4612, and by the trustees of the volunteer fireman's pension fund, under section 9 of the bill, it would be possible for an individual to receive the benefits of both pension funds if he had served

five years as a volunteer fireman and was, at the time, acting as a regular fireman.

I think I should point out that the emergency section of the bill, which is section 11 thereof, is not sufficient. I do not think that a bill of this kind can be made an emergency at all; but certainly there is no such statement of an emergency in section 11 as is required by the constitution. The presence of this section, in my opinion, endangers the whole bill.

Respectfully,
EDWARD C. TURNER,
Attorney General.

388.

TREASURERS AND SURETIES OF A COUNTY, TOWNSHIP, CITY, VILLAGE OR SCHOOL DISTRICT MAY BE RELEASED FOR LOSS OF PUBLIC FUNDS, WITHOUT SUBMITTING THE QUESTION OF RELEASE TO VOTE OF THE PEOPLE—CERTAIN RESTRICTIONS.

COLUMBUS, OHIO, May 19, 1915.

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

GENTLEMEN:—On May 12, 1915, you submitted for my opinion thereon the following enquiry:

> "Can treasurers and sureties be legally released under sections 2303 to 2311, General Code, without submitting the question of release to a vote of the people?"

The seeming ambiguity contained in these sections of the General Code makes necessary a recourse to the Laws of Ohio, or year books containing the legislative enactments before the codification thereof. These sections 2303 to 2311, inclusive, of the General Code, were first enacted by the general assembly March 28, 1906, (98 O. L., 120). The act contains four sections. On March 9, 1908, the legislature amended section 1 of this act by inserting in the fourth line thereof the words: *"have heretofore been or hereafter may be caused by fire."*

With the aid of the separate enactments the interpretation of the codified form of the law becomes easier, and we find that the treasurers and the sureties may be released and discharged from liability to or demand of the county, township, city, village, or school district for the loss of public funds under the following conditions:

First. If the board of county commissioners, township trustees, city or village council, or board of education shall find that the treasurer was entrusted by law with the care of such public money, and that the loss thereof was not occasioned by his fault or negligence, and an entry of such finding shall be made upon the record book of the proceedings of such council or board. (Section 2304, of the General Code.) This finding is only a conditional release. Such council or board after "having first made and caused to be entered the finding of no fault or negligence as above provided, *may*, and they are hereby authorized, at the next ensuing general election to be held in such county, city, village, township or school district, respectively, to submit to the qualified electors of said county, city, village,

township or school district interested the question of discharging such treasurer and sureties upon his official bond from liability on account of such loss of funds." Section 2307,of the General Code. (99 O. L., 388, section 1.)

Second. It is provided in said section 1 of the original act (section 2308 of the General Code), "If twenty-five per cent. of the qualified electors of such county, township, city, village or school district petition the council or board thereof for the privilege of determining by ballot whether such treasurer and the sureties on his official bond shall be released and discharged, such council or board shall submit the question to the qualified electors of the county, township, city, village or school district as herein provided."

Third. A further provision is contained in said section 1 of the original act (section 2305 of the General Code) that, "a taxpayer of the county, township, municipality or school district, affected may within five days after any finding or release or discharge provided for in this act is made, take an appeal therefrom to the common pleas court of the county and until such appeal is finally determined such finding and other proceedings shall not affect such release and discharge."

It therefore appears that the finding of such council or board, that the loss of the public funds entrusted to such treasurer was not occasioned by the treasurer's fault or negligence by a proper entry of such finding, is final and conclusive only, (1) when the question made by such finding is not referred to the electors of such political subdivision by the board or council; (2) when twenty-five per cent. of the qualified electors of such political subdivision do not petition such council or board for the privilege of determining by ballot whether such treasurer and the surety on his official bond shall be released and discharged; and (3) when no taxpayer of such political subdivision appeals from such finding to the common pleas court of the county. When the finding of such council or board is reviewed in any one of the three ways specified, the release of the treasurer and surety is dependent upon the result thereof; when not so reviewed such finding is a final release of the treasurer and his surety.

Respectfully,
EDWARD C. TURNER,
Attorney General.

389.

COMMON PLEAS JUDGE—TERM OF OFFICE WHEN ELECTED IN 1904—LEGISLATURE LATER CHANGES TERM OF OFFICE—EFFECT OF SAME.

The term of office of a common pleas judge elected in 1904 *for a five year term, commencing in* 1905 *and otherwise expiring in* 1910, *was by the act found in* 98 *O. L.,* 119, *extended to January* 1, 1911; *so that a judge elected to succeed such a judge in November,* 1910, *should have taken office under such election on January* 1, 1911, *for a term of six years beginning on that date and his official salary and expense allowances should be computed on the basis of an official year co-incidental with the calendar year.*

COLUMBUS, OHIO, May 19, 1915.

HON. A. G. REYNOLDS, *Common Pleas Judge, Painesville, Ohio.*

DEAR SIR:—On April 29th you requested my opinion with respect to the merits of a question that has arisen between the auditor of state and yourself with

regard to your allowance for expenses. It appears from the correspondence submitted by you that there is in reality but a single question involved in the matter, which may be stated as follows:

> "When does the official year of the position which you hold, which may be described as that of the additional judge in the third subdivision of the ninth judicial district, begin?"

This question in turn, of course, hinges upon the date on which your official term began.

You state in a second letter under date of May 15th, just received, that you first assumed office on January 9, 1909, under an appointment to succeed Judge Metcalfe, who resigned on that date to accept appointment as circuit judge to fill a vacancy. You were then elected to fill out the unexpired term and for the regular term succeeding, and are now serving the latter term.

I assume, therefore, that in entering upon your present term of service you were, so to speak, your own successor.

You state further that despite the somewhat ambiguous provisions of the act creating the judgeship which you hold (72 O. L., 192) to which I called attention in my letter of April 30th, requesting additional information, the occupants of this position have always commenced their respective terms on the 9th of February; that being in office in January, 1911, under the appointment and the (assumed) election to fill out the vacancy created by Judge Metcalfe's resignation, you received a commission for the regular term to which you had been elected, on the 16th day of the month, reciting that your term of office thereunder was for six years from the 9th of February, 1911, and that you qualified by taking oath and filing bond with reference to the 9th of February, 1911, and upon the assumption that that was the day on which you should have begun your regular term.

Your statement of facts makes the solution of the question which you present rather clear to me, and eliminates any necessity of going back to the law of 1872 or considering whether or not under that law the official term of the additional judge therein provided for should have commenced on the 9th day of February. It may be assumed for present purposes that the practice which you say had obtained during the existence of this judgeship was correct.

You say in your letter that Judge Metcalfe was your predecessor and that you were appointed to serve out his term. The question as to the commencement of your own regular elective term, then, is dependent upon the question as to the duration of the term which Judge Metcalfe would have served had he remained in office and which you were appointed to fill out.

I find upon examination of the election statistics in the office of the secretary of state that Judge Metcalfe was elected in 1904, just as I had assumed in my letter to you. He took office, therefore, in 1905, and had not the constitutional amendment adopted in that year and the legislation enacted in pursuance thereof intervened, Judge Metcalfe would have completed his term of office on or about February 9, 1910. However, it became necessary to extend this term of office in order to comply with the intent of section 17 of the constitution, and this was effected by the act found in 98 O. L., 119, to which I called your attention in my letter. Section 2 of the that law, which was fully quoted in the letter referred to, provides, you will observe, that the existing term of office of any additional judge which would otherwise expire *in any even numbered year* shall be extended to the first day of January of the odd numbered year next succeeding.

By virtue of this provision Judge Metcalfe, had he remained in office, would have received an extension not of one full year, but for the period of time intervening between February 9, 1910, and January 1, 1911. You, being his successor

and filling out his term, were entitled to the benefit of the same provision. It follows very clearly, therefore, that your official term should have commenced and did commence on January 1, 1911. The commission which was issued to you was simply erroneous. You are, of course, familiar with the rule that a commission can not alter the law, and that any recitals therein which are inconsistent with the provisions of a statute or of the constitution are simply void.

I imagine that the question has not been raised before because you happened to be, as I have phrased it, your own successor. Therefore, the actual date when you ceased to serve under one appointment or election and commenced to serve under the other may not have been of any practical importance at the time.

As pointed out also in my letter of April 30th, the general assembly in 1914 was of the opinion that your term would end on December 31, 1916, and provided for the election of your successor for the term to commence on January 1, 1917 (104 O. L., 245).

I am satisfied, therefore, that your official term is coincidental with the calendar year and that your salary and expenses should be paid accordingly. The fact that for several years you have drawn monthly and quarterly salaries according to a year commencing on the 9th of February is not material, and merely serves to illustrate how easy it is for all concerned to fall into an error which becomes embarrassing to rectify when occasion requires.

I am sending a copy of this opinion to the auditor of state.

I take this occasion to thank you for supplying me with a full statement of the facts.

Respectfully,
EDWARD C. TURNER,
Attorney General.

390.

AMENDED HOUSE BILL NO. 414—EFFECT UPON TAX AND DEBT LIMITATIONS.

COLUMBUS, OHIO, May 19, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio.*

DEAR SIR:—You have left for my examination amended house bill No. 414, requesting my advice as to its effect upon the tax and debt limitations.

I enclose herewith copy of an opinion which I prepared for Hon. A. R. Garver, chairman of the senate taxation committee with respect to this bill.

I find upon comparison that the bill which you handed to me is the same as that with respect to which I advised Senator Garver. For the sake of accuracy, however, I wish to make two corrections in the former opinion.

At page 3 thereof, I stated that the proviso in section 3942, General Code, is vague, in that it is perhaps doubtful as to whether thereunder bonds may not be issued to refund other bonds issued prior to the taking effect of the bill, as well as certificates of indebtedness so issued. A closer examination of the bill convinces me that there is no doubt about the application of the bill in this respect, and that it is only certificates of indebtedness issued under section 3913 of the General Code, in anticipation of the collection of general revenue fund by a

municipal corporation, which may be thus refunded. I desire, however, to reiterate and reaffirm my observation with respect to the dangerous character of this provision in its present form.

The other correction which I wish to make is with respect to a statement made on page 4 of my previous opinion, wherein, in speaking of the amendment to paragraph "e" of section 3949, I characterize that amendment as "restrictive." I should say that in addition to the restrictive amendment in said section there is also a reference therein to bonds issued to refund certificates of indebtedness under section 3942, as amended by the bill, such bonds being taken by force of section 3949 out of the debt limitation. However, if the proviso in section 3942 were changed so as to obviate the danger to which attention is called in the opinion to Senator Garver, there would be no objection to this amendment in section 3949, which indeed would be necessary in order to make it consistent with the other section.

I think I should also observe with respect to the bill that section 3942 as amended has the effect not only of requiring all bond issues to be submitted to the people, with the exception of those specifically exempted from such requirement, but also all issues of notes. The bill itself also brings certificates of indebtedness within this requirement, but the amendments which you have submitted to me eliminate such certificates of indebtedness therefrom.

Coming now to the consideration of the amendments to the bill, as attached to the copy thereof which you have handed to me, I call attention to the fact that my criticism of the proviso of section 3942 is obviated by the amendment in line 42, which strikes out the words "taking effect" and inserts in lieu thereof the word "passage." If the bill has been so amended and passes in this form, what I said in my opinion to Senator Garver respecting the danger of the proviso as originally drafted would not be applicable to it. Instead of the proviso having the effect described, its effect would be as follows:

The section would substantially take out of the Smith law limitation levies for bonds issued for the purpose of taking up and funding certificates of indebtedness issued in anticipation of the general revenue fund by municipal corporations prior to the passage of the act. This would allow municipalities to take care of their present floating debts outside of all the limitations. The proviso would still make a breach in the Smith law, but the breach would be, so to speak, temporary and there would be no possibility of future action during the ninety-day referendum period such as was pointed out in my opinion to Senator Garver.

By striking out the words "five per cent." in line 47, the amendments keep such bonds within one of the limitations of the Longworth law as amended.

The amendment in line 86 makes section 5649-2 clearer than it otherwise would have been, but does not, in my judgment, alter its substantial effect as commented upon in my opinion to Senator Garver. In spite of the express reference in the amendment to the levy authorized in section 6859-1 of the General Code (the Hite state road levy), there would still be grave doubt as to whether or not this levy under the amended section would be within the ten mill limitation; while as to other special levies—flood emergency levies and certain road levies under laws passed since June 2, 1911, and originally intended to be outside the ten mill limitation, the section as amended would bring them all within that limitation.

An amendment of very great importance is that of Senator Pink in line 79. This amendment is designed to obviate the criticism of section 5649-2, as made in my opinion to Senator Garver. I fear that it goes too far in the accomplishment of this purpose. I very much prefer the form of the amendment which is referred to in my opinion to Senator Garver, and which may be phrased substantially as follows:

"except as otherwise specifically provided by any law passed subsequent to June 2, 1911, and prior to the taking effect of this act, authorizing any levy to be made outside of the limitations of this section."

While I do not undertake to say in absolute conviction that Senator Pink's amendment of this section would have the effect of taking out of the ten mill limitation of the Smith law all levies for specific purposes subject to a special limitation authorized by laws passed prior to June 2, 1911, and especially such levies authorized by such laws as under the terms of such laws (of which there were many) could be made "in addition to all other taxes," yet I should fear this result, which virtually put an end to the ten mill limitation of the Smith law and make the fifteen mill limitation thereof very difficult to administer. I am sure that this result is not desired by any one, and as a means of avoiding any danger of such result, rather than because of any clear opinion that such a result would follow from Senator Pink's amendment, I recomment that, if it is not too late, the other form of an exception, along the line above indicated, be adopted.

There are several other amendments which substantially affect the bill, but do not bear in any way upon the questions which you ask concerning its effect.

I might say too, that the general assembly should not amend section 5649-2 without also amending section 5649-3a. The supreme court, in the somewhat celebrated case of State ex rel. v. Sanzenbacher, 84, O. S., unreported, held that under the original Smith law the interest and sinking fund levies which were outside of the ten mill limitation were likewise outside of the interior limitations, on levies for municipal, county, township and school district purposes provided for by said section 5649-3a, although the last named section is silent with respect to any such exemption. Whether the supreme court reached this conclusion because of any supposed and necessary relation between the two limitations or not, cannot be stated, as the reasons upon which the conclusion was based have not been disclosed. However, it has become the settled understanding to regard any levies outside the ten mill limitation as likewise outside the five, three or two mill limitations. This understanding ought to rest upon a more substantial foundation than the decision in the Sanzenbacher case, and in order for legislation to be exact enough to avoid vexatious litigation, the full content of the law ought to be expressed on its face in unmistakable terms. Therefore, I suggest that if it is not too late, section 5649-3a be amended in the bill so as that the limitations therein provided for shall be subject to the same exceptions as the limitations provided for in amended section 5649-2.

I have treated the bill and the amendments separately because I was not advised as to whether the amendments had been agreed to by either branch of the general assembly.

Owing to the very limited time that I have been given to go over this bill, it has been impossible to do so with that care and detail which I prefer to give to opinions, but I am advised that you want this at once. The foregoing opinion is not to be taken as any recommendation of the policy of enacting such legislation.

Respectfully,

EDWARD C. TURNER,

Attorney General.

391.

HOUSE OF REPRESENTATIVES, FINANCE COMMITTEE—CLAIM OF P. B. JOHNSTON, FORMER EXAMINER OF BUREAU OF BUILDING AND LOAN ASSOCIATIONS FOR EXPENSES, HELD PROPER.

COLUMBUS, OHIO, May 19, 1915.

HON. FRANK H. REIGHARD, *Chairman Finance Committee, House of Representatives, Columbus, Ohio.*

DEAR SIR:—The finance committe of the house of representatives, through Mr. Wydman, has requested my advice respecting the claim of P. B. Johnston, a former examiner of the bureau of building and loan associations for expenses for hotel and meals incurred in the city of Columbus while engaged in examining building and loan associations in that city, under direction of the head of the department of which he was a member.

The correspondence attached to the itemized statement of expenses shows that the head of the department of building and loan associations considered that the case was covered by the opinion of my predecessor, Mr. Hogan, to Honorable E. M. Fullington, given on May 6, 1911. That opinion holds that the official residence of examiners in the department of building and loan associations is not necessarily the city of Columbus; that in the appointment of examiners in this department it is within the province of the head thereof to designate the headquarters or official residence of such examiners, from which they shall be allowed traveling expenses; that appropriations were properly made by the general assembly from time to time for traveling expenses of such examiners; and that in the absence of such a designation of headquarters or official residence by the head of the department, an examiner's headquarters, from which he would be entitled to charge and receive necessary traveling expenses incurred in the performance of his duties under the orders of his superior, would be his domicile.

I concur in Mr. Hogan's opinion, which is substantially, though not perhaps exactly, identical with my own opinion respecting the place from which expenses may be charged by a district inspector of workshops and factories, given within the past few days to the industrial commission of Ohio. In fact the only difference between the two cases is that the examiners of the bureau of building and loan associations have no specific districts, but perform their services in such territory as may be assigned to them by the head of the department; whereas the inspectors of workshops and factories are appointed for particular districts. This difference in the facts of the two cases does not alter the legal principles involved.

The general rule is that a field man or traveling inspector or examiner is not presumed, as a matter of law, to have his official residence at the office of the department which he represents. His headquarters, if not otherwise designated by the department, are at the place where he resides.

I note that the claim is an old one, and that Mr. Hogan advised the finance committee of the 80th general assembly to make an appropriation for it. Why this was not done I am, of course, unable to state. It does not appear that the claim was disallowed originally or by the 80th general assembly because of the appropriation for traveling expenses having been exceeded, but rather because of a former holding that such expenses could not be paid. That being the case and the claim being as proper now as it was in 1913, I see no legal objection to its allowance and the making of an appropriation to pay it.

Respectfully,

EDWARD C. TURNER,

Attorney General.

392.

LAND REGISTRATION ACT—FEES TO BE CHARGED BY CLERK OF COMMON PLEAS COURT—LIMITED TO THREE DOLLARS—PAID BY APPLICANT FOR EACH ENTRY OF APPEARANCE—CLERK NOT OBLIGED TO MAKE FINAL RECORD IN ORDINARY CASES.

In the land registration act, the fee to be charged by the clerk of the court is to be limited to three dollars, to be paid by the applicant, and three dollars for each entry of appearance either for joint or several defendants. Clerk not obliged to make final record in ordinary cases.

COLUMBUS, OHIO, May 19, 1915.

HON. ELI H. SPEIDEL, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your letter of May 12, 1915, which is as follows:

> "The clerk of the court of common pleas of this county has requested me to write you and ask whether or not you have ever rendered an opinion construing section 112 of the land registration act, found on page 957 of volume 103 of the Ohio Laws.
>
> "This section provides that the applicant shall pay to the clerk the sum of $3.00 which shall be in full of all clerk's fees and charges in such proceedings.
>
> "The clerk informs me that there are three cases pending at this time, and if the work required of the clerk, including the record and a certified copy of the record for the county recorder, was to be judged by the legal costs thereof in other cases, it would be at least $30.00 in each case.
>
> "If you have rendered an opinion construing this particular section of this law, I would be glad to have you furnish me a copy, and if you have not, will you kindly advise me whether or not, in your judgment, the sum of $3.00 is the maximum sum that may be charged by the clerk, however voluminous the record may be, or how much work the clerk must perform in any such case?"

Replying to your letter I beg to call your attention to the first two paragraphs of section 112 of the land registration act, (section 8572-112 of the General Code) to be found on page 957 of 193, Ohio Laws, and which are as follows:

> "Sec. 112. On the filing of an application for registration the applicant shall pay to the clerk of the court *the sum of three dollars, which shall be* in full of all clerk's fees and charges in such proceeding on behalf of the applicant. Any defendants, except a guardian ad litem, on entering his appearance by filing a pleading of any kind shall pay to the clerk of the court the sum of three dollars, which shall be in full of all clerk's fees in behalf of such defendant.
>
> "When any number of defendants enter their appearance as aforesaid at the same time, and in one pleading, but one fee shall be paid. Every publication in a newspaper required by this act shall be paid for by the party on whose application the order of publication is made, in addition to the

fees above prescribed. The party at whose request or on whose behalf any notice is issued shall pay for the service of the same except when sent by mail by the clerk of the court or recorder."

Enclosed you will find a copy of opinion No. 1298, rendered by my predecessor, Honorable Timothy S. Hogan, under date of December 14, 1914, from which I quote as follows:

"While in ordinary cases the court is to enter upon his journal the entire decree of registration, nevertheless, I think that it is competent to waive the making of final record in cases where there is no special reason for so doing, and this should be done under the order of the court, by authority of section 11605 of the General Code. The real requirements of the law will be met by the clerk's entering the orders and decrees of the court on the minutes of the journal and carefully collecting and binding all the papers together and transmitting them to the recorder's office where they will be permanently filed. If this course is adopted the decree settling title and also the decree of registration will be of record in the minutes of the courts; and the certified copy of the decree of registration, which under the law becomes the first certificate of title, will be of record in the recorder's office. The clerk must furnish the recorder with a certified copy of the entry. This is manifest from the provisions of section 23 of the land registration act, 103 O. L., 914, et seq."

I concur in the opinion referred to.

The provisions of section 8572-112 of the General Code, quoted above, are clear, and it is my opinion that the clerk's fee on filing an application under the above entitled act is limited to three dollars, and in addition thereto each defendant who separately enters his appearance is obliged to pay a fee of three dollars, and in cases where several defendants join in entering their appearance the fee is to be limited to three dollars.

Much has been said about the economical administration of this law, and notwithstanding the alleged hardship on the clerk to which you refer in your letter, no fee can be charged and collected, save those authorized by law.

Respectfully,
EDWARD C. TURNER,
Attorney General.

393.

OHIO BOARD OF ADMINISTRATION—PAROLE OFFICER—CHILD LABOR LAW—BOYS UNDER SIXTEEN YEARS OF AGE ARE NOT PERMITTED TO WORK AT PLACES OF AMUSEMENT AFTER 6:00 P. M.

COLUMBUS, OHIO, May 19, 1915.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—A communication has just been received from Mr. D. D. Weaver, parole officer for the Boys' Industrial School, Lancaster, Ohio, the same having been written from Lima, Ohio, under date of May 17, 1915, and which is as follows:

"The commission has notified the Unique theatre at Fostoria, to discharge Wilbur Hahn, age 15, on account of the school law.

"This boy was working three nights a week of three hours each and never exceeded 10 hours per week.

"He is one of my boys and needs the money that he receives at this work. Will you kindly inform me if this boy has the right to work the above number of hours per week from 7 to 10 P. M.?

Under enquiry made of the Industrial Commission I find that under date of May 13, 1915, an order was issued to William Sipe, of the Unique theatre, Fostoria, Ohio, as follows:

"Boys under sixteen years of age must not be employed after six P. M. Order to be complied with at once."

The order in this case was issued under the provisions of section 12996, of the General Code, as amended on page 908 of 103 O. L., and which is as follows:

"No boy under the age of sixteen and no girl under the age of eighteen years shall be employed, permitted or suffered to work in, about or in connection with any establishment or occupation named in section 12993 (1) for more than six days in any one week, (2) nor more than forty-eight hours in any week, (3) nor more than eight hours in any one day, (4) or before the hour of seven o'clock in the morning, or after the hour of six o'clock in the evening. The presence of such child in any establishment during working hours shall be prima facia evidence of his employment therein. No boy under the age of eighteen years or girl under the age of twenty-one years shall be employed, permitted or suffered to work in, about or in connection with any establishment or occupation named in section 12993 (1) for more than six days in any one week, (2) nor more than fifty-four hours in any week, (3) nor more than ten hours in any one day, (4) or before the hour of six o'clock in the morning or after the hour of ten o'clock in the evening. In estimating such periods, the time spent at different employments or under different employers shall be considered as a whole and not separately."

Section 12993, of the General Code (page 907 of 103 O. L.), provides, among other things, as follows:

"No male child under fifteen years or female child under sixteen years of age shall be employed, permitted or suffered to work in, about or in connection with any mill * * * place of amusement * * * or in the construction or repair of buildings, or in the distribution, transmission or sale of merchandise, nor any boy under fifteen or female under twenty-one years in the transmission of messages. * * *"

It is my opinion therefore that the commission has full authority to issue the order under the section quoted above, as there is no provision of law under which the youth referred to in Mr. Weaver's letter may be exempted from the provisions of the law.

A copy of this opinion has been forwarded to the superintendent of the Boys' Industrial School at Lancaster for the information of Mr. Weaver and the other parole officers.

Respectfully,
EDWARD C. TURNER,
Attorney General.

394.

APPROVAL OF DOCUMENTS DESIGNED TO CHANGE ROUTE OF INTER-COUNTY HIGHWAY NO. 3 AND MAIN MARKET ROAD NO. 13—ROADS AND HIGHWAYS—ERIE COUNTY.

Documents designed to change to a more practicable location the route of inter-county highway No. 3 and main market road No. 13, as submitted by the state highway commissioner, are in proper form.

COLUMBUS, OHIO, May 20, 1915.

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

DEAR SIR:—I have your communication of May 18, 1915, which reads as follows:

> "I hand you herewith papers addressed to Hon. Frank B. Willis, governor of Ohio, and intended to designate a section of road in Erie county as inter-county highway No. 3, and main market route No. 13. This is a matter concerning which your office furnished this department with an opinion, as of May 12, 1915, in which you state that it was lawful for the highway commissioner to make such designation.
>
> "Will you kindly give these papers your examination and advise me if they are drawn in proper form?"

The two documents attached to your communication are addressed to Hon. Frank B. Willis, governor of Ohio, and are designed to be signed by you as state highway commissioner. Both documents are drawn in duplicate and the plan is that after the same are signed by you and approved by the governor, the original of each document is to be returned to your office and filed therein, and the duplicate is to be filed in the office of the governor.

There appears from the documents in question and also from the attached map, that it is your desire to change to a more practicable location a part of inter-county highway No. 3 and main market route No. 13, the portion of highway to be affected being located in Erie county, just outside the corporate limits of the city of Sandusky.

The document prepared by you and relating to the inter-county highway, is as follows:

> "Subject to your approval, I hereby change to a more practicable location the route of the Cleveland-Sandusky inter-county highway No. 3, in the following particular, to wit:
>
> "Beginning at the east terminus of the said Cleveland-Sandusky inter-county highway No. 3, thence in a general westerly direction along said highway as originally designated in Cuyahoga, Lorain and Erie counties, to an angle on the north-east side of the right-of-way of the Lake Shore and Michigan Southern Railroad, at a railroad crossing in the north-western part of Huron township, Erie county; thence, deviating from the original designated route of said highway and following a public road along the north-east side of said right-of-way, through Huron and Perkins townships, to where the said public road intersects the south corporation line of the city of Sandusky.

"Said change is made in order to avoid a dangerous railroad crossing and secure a more direct route, and the location of the same is indicated in green on the attached map of Erie county."

The document which you have prepared and which relates to the main market road, is as follows:

"Subject to your approval, I hereby change to a more practicable location the route of the Cleveland-Sandusky main market route No. 13, in the following particular, to wit:

"Beginning at the east terminus of the Cleveland-Sandusky inter-county highway No. 3, thence in a general westerly direction along said highway as originally designated in Cuyahoga, Lorain and Erie counties, to an angle on the north-east side of right-of-way of the Lake Shore and Michigan Southern Railroad, at a railroad crossing in the north-western part of Huron township, Erie county; thence, deviating from the original designated route of said highway and following the new routing of the same, which is located on a public road on the north-east side of said right-of-way, through Huron and Perkins townships, to where said public road intersects the south corporation line of the city of Sandusky.

"Said change is made in order to avoid a dangerous railroad crossing and secure a more direct route, and the location of the same is indicated in green on the attached map of Erie county."

It is my opinion that the form in which you have drawn these documents is a proper one and that when they have been executed by you and when your action has been approved by the governor, the documents in question will have the effect indicated above and desired by you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

395.

FOREIGN INSURANCE COMPANIES—DOING SOLELY REINSURANCE BUSINESS NOT LIABLE FOR FIRE MARSHAL TAX—LIABLE WHEN CONTRACT OF REINSURANCE IS ENTERED INTO IN OHIO.

Foreign fire insurance companies doing solely a reinsurance business covering risks in this state are not liable for the fire marshal tax, unless the contract of reinsurance is entered into in Ohio, which is a question of fact to be determined by the particular company and the superintendent of insurance.

COLUMBUS, OHIO, May 20, 1915.

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

DEAR SIR:—Your department has certified to this department various claims, which had theretofore been certified to you by the superintendent of insurance, for what is familiarly known as the "fire marshal tax" on foreign insurance companies, which insurance companies, we understand, have been duly licensed to do business in Ohio—either a direct insurance business or a reinsurance business.

We notified the companies against whom the said claims were charged of the

fact that the fire marshal tax had not been paid and demanded payment thereof. Several of the insurance companies so notified answered our letters, stating that they did solely a reinsurance business and, therefore, did not believe that they were within the provisions of section 841 of the General Code, which provides for the fire marshal tax.

"Reinsurance" is defined in May on Insurance, volume 1, section 11:

> *Reinsurance defined*: "It is a contract of indemnity to the reinsured, whatever be the subject-matter, and binds the reinsurer to pay to the reinsured the loss sustained in respect to the subject insured, to the extent for which he is reinsured, and not necessarily differing in form from an original insurance."

May on insurance, volume 1, section 12:

> "'The original contract,' says Emerigon, 'subsists precisely as it was made, without renewal or alteration. The reinsurance is absolutely foreign to the first insured, with whom the reinsurer contracts no sort of obligation. The risks which the insurer has assumed constitute between him and the reinsurer the subject-matter of the contract of reinsurance, which is a new contract, totally distinct from the first. It cannot, therefore, in the strict sense, be made with the party first insured, for this would be a simple rescission of the contract; nor does the latter by it acquire any rights against the reinsurer, in case of the insolvency of the reinsured, or any claim upon the money to be paid to the latter. If the insurer be not liable, he cannot recover of the reinsurer, for the reason that the insurer has no insurable interest, and can suffer no loss, where there is no liability.'"

On page 21 of volume 1, May on insurance, in a note under section 12, foregoing cited, the author suggests that the word "reinsurance" is "sometimes used to denote a contract by which an old company sells out to a new one, or becomes consolidated with it, so that the new company becomes liable directly to the insured. And it is always competent for the reinsuring company to agree to be directly liable."

In the discussion which is hereinafter set out I wish to be distinctly understood as not referring to the so-called reinsurance which is mentioned by Mr. May in the note as foregoing, but simply confine myself to a reinsurance which is, in the language of Mr. May, "a contract of indemnity to the reinsured."

Section 665, of the General Code, provides as follows:

> "Sec. 665. No company, corporation, or association, whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with."

Section 664-1, of the General Code, provides as follows:

> "Sec. 664-1. That all persons, companies, associations or corporations residing or doing business in this state that enter into any agreements with any insurance company, association, individual, firm, underwriter or

Lloyd, not authorized to do business in this state, whereby said person, company, association or corporation shall enter into contracts of insurance covering risks within this state, with said unauthorized association, individual, firm, underwriter, or Lloyd, for which there is a premium charged or collected, the said person, company, association or corporation so insured shall, annually on the first day of July or within ten days thereafter return to the superintendent of insurance of this state, a statement under oath of all actual cost of indemnity and gross premiums paid or payable for the twelve months preceding on policies or contracts of insurance taken by the said person, company, association or corporation and shall at the same time pay to said superintendent of insurance a tax of five per centum of the actual cost of indemnity paid or payable to any such association, firm, or individual, or a tax of five per centum of the gross premiums paid or payable to any such insurance company, underwriter or Lloyd. All taxes collected under the provisions of this section by the superintendent of insurance shall be paid by him, upon the warrant of the state auditor, into the general revenue fund of the state."

Section 9555, of the General Code, provides as follows:

"Sec. 9555. A fire * * * insurance company organized or existing under and by virtue of the laws of this state, by and with the approval of the superintendent of insurance, may reinsure all risks undertaken by it in any company authorized by law to transact a similar class of insurance business in this state. Nothing herein shall prevent such a company from reinsuring any risks or fractional parts thereof not situated in this state in any company or companies duly licensed by such superintendent or like authority, of the state in which such risks may be located, to transact the business of insurance in that state."

It is because of the above sections of the General Code, I take it, that the various foreign insurance companies which do solely a reinsurance business take out licenses authorizing them to do a reinsurance business in this state.

Should a foreign insurance company undertake to do an insurance or a reinsurance business covering risks in this state without being licensed so to do, the person from whom they obtain the business would be liable under section 664-1, of the General Code, foregoing set out, but that in no way determines the liability of such an insurance company to pay under the provisions of section 841, General Code, the so-called "fire marshal tax."

Section 841, of the General Code, provides in part as follows:

"Sec. 841. For the purpose of maintaining the department of state fire marshal and the payment of the expenses incident thereto, each fire insurance company doing business in this state shall pay to the superintendent of insurance in the month of November each year, in addition to the taxes required by law to be paid by it, one-half of one per cent. on the gross premium receipts of such company on all business transacted by it in Ohio during the year next preceding, as shown by its annual statement under oath to the insurance department. * * *"

In an opinion rendered by my predecessor, Hon. Timothy S. Hogan, to the superintendent of insurance under date of December 10, 1914, he held that the fire marshal tax provided for by section 841, G. C., was to be computed upon the gross premium receipts of fire insurance companies without deduction of return premiums

and considerations received for reinsurance, and I am informed that the fire insurance companies have acquiesced in the ruling given in said opinion. In said opinion, however, Mr. Hogan did not decide the proposition whether or not a foreign fire insurance company should be taxed upon the premiums received by it for reinsurance.

In the course of the opinion he states as follows:

> "The contention that premiums received by reinsuring companies are not subject to the tax (fire marshal tax), I think, is disposed of by what I have already said. The statute makes no allowance for deductions of this kind. The proposition that reinsuring companies should not be taxed upon such premiums, because the contracts are almost entirely made outside of this state and do not constitute business transacted in Ohio, can not be considered in this opinion. If the business is not transacted in Ohio, then the tax could not attach; but whether the business is transacted in Ohio is a question between the companies and the insurance department, and would depend, of course, upon the facts in each particular case."

I concur in what Mr. Hogan stated in that portion of his opinion foregoing quoted.

The question of whether or not under the provisions of section 841, G. C., a foreign insurance company is "doing business" in Ohio when it reinsures risks covered by other insurance companies in Ohio, and whether or not the premiums received by such reinsuring company would be considered as being received on business transacted by it in Ohio is primarily a question of fact which should be determined between the insurance company and the insurance department.

I venture it as a proper construction of law to say that if a foreign insurance company reinsures its risks in another foreign insurance company, the business of reinsuring would not be considered as business transacted in Ohio, since the contract of reinsurance would have been made entirely outside of the territorial limits of Ohio; that if a domestic insurance company reinsures its risks in a foreign insurance company, it would be a question of fact as to where the contract of reinsurance was entered into; but the fact that the foreign insurance company was licensed to do a reinsurance business in Ohio would place the burden upon said foreign insurance company to show that the business of reinsurance so entered into was so entered into outside of the limits of Ohio.

There has been another objection raised to the placing of the fire marshal tax upon reinsurance companies, on the ground that it is double taxation. With this I can not agree. The insurance company which takes risks is charged for doing business in Ohio, and the extent of its tax is fixed by the gross premiums received by it. The reinsurance company is also taxed for its privilege of doing business in Ohio, and its tax is fixed by the amount of gross premiums received by it. It is not the premiums that are taxed, but the premiums are simply taken as a basis for computing the amount of the tax to be charged for the doing of the business. This I do not believe can in any way be considered as double taxation.

In view of what has been said heretofore I shall not take any further action on the claims that have been certified to me against foreign reinsurance companies until the liability as set forth under this opinion is determined by the insurance department.

In conclusion permit me to inform you that section 841, of the General Code, has been amended at the present session of the legislature so as to read as follows:

> "Sec. 841. For the purpose of maintaining the department of state fire marshal and the payment of expenses incident thereto, each fire insur-

ance company doing business in this state shall pay to the superintendent of insurance in the month of November each year, in addition to the taxes required by law to be paid by it, one-half of one per cent on the gross amount of premiums received by it from policies covering risks within this state during the preceding calendar year, after deducting return premiums and considerations received for reinsurance as shown by the next preceding annual statement, verified under oath as required under the provisions of section 9590, of the General Code. The superintendent of insurance shall pay the money so received into the state treasury to the credit of a special fund for the maintenance of the office of the state fire marshal. If any portion of such special fund remains unexpended at the end of the year, for which it was required to be paid, and the state fire marshal so certifies, it shall be transferred to the general revenue fund of the state.

"Upon failure or refusal to pay the tax, the superintendent of insurance may revoke or refuse to renew the license of said fire insurance company, and shall certify the fact of such failure or refusal to pay said tax to the attorney general, who shall thereupon begin an action against the company in the court of common pleas of the proper county, to recover the amount of the tax. If such company ceases to do business in this state, it shall thereupon make report to the superintendent of insurance and shall forthwith pay to the superintendent of insurance all taxes due and to become due from it."

Said amendment will not, however, be effective until August 9, 1915.

It is to be noted that under section 841, as above amended, a deduction is to be made of the considerations "received for reinsurance as shown by the next preceding annual statement."

Respectfully,
EDWARD C. TURNER,
Attorney General.

396.

TUBERCULOSIS HOSPITAL—NO LIMITATION ON COUNTY COMMISSIONERS AS TO TIME CONTRACT MAY RUN—CONTRACTS, HOWEVER, ARE SUBJECT TO CANCELLATION IF STATE BOARD OF HEALTH WITHDRAWS ITS APPROVAL.

County commissioners are not limited as to time in making contracts for care, treatment, etc., in a tuberculosis hospital of persons suffering from pulmonary tuberculosis, but all such contracts are subject to cancellation if approval of institution or association be withdrawn by the state board of health.

COLUMBUS, OHIO, May 21, 1915.

HON. G. O. MCGONAGLE, *Prosecuting Attorney, McConnelsville, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your favor of May 18th, which is as follows:

"Under section 3143 of the General Code, as amended O. L., volume 103, page 492-3, may the county commissioners legally and properly contract for the care, treatment, etc., of the inmates of the county infirmary or other residents of the county suffering from pulmonary tuberculosis

with an association or corporation incorporated under the laws of Ohio for the exclusive purpose of caring for and treating persons suffering from pulmonary tuberculosis, for a period of ten years?"

Section 3143 of the General Code, as amended in 103 Ohio Laws, page 492, is as follows:

"Instead of joining in the erection of a district hospital for tuberculosis, as hereinafter provided for, the county commissioners may contract with the board of trustees, as hereinafter provided for, of a district hospital, the county commissioners of a county now maintaining a county hospital for tuberculosis or with the proper officer of a municipality where such hospital has been constructed, for the care and treatment of the inmates of such infirmary or other residents of the county who are suffering from pulmonary tuberculosis. The commissioners of the county in which such patients reside shall pay to the board of trustees of the district hospital or into the proper fund of the county maintaining a hospital for tuberculosis, or into the proper fund of the city receiving such patients, the actual cost incurred in their care and treatment, and other necessaries, and they shall also pay for their transportation. Provided, that the county commissioners of any county may contract for the care and treatment of the inmates of the county infirmary or other residents of the county suffering from pulmonary tuberculosis with an association or corporation incorporated under the laws of Ohio for the exclusive purpose of caring for and treating persons suffering from pulmonary tubercolosis; but no such contract shall be made until the institution has been inspected and approved by the state board of health, and such approval may be withdrawn and such contracts shall be cancelled if, in the judgment of the state board of health, the institution is not managed in a proper manner. Provided, however, that if such approval is withdrawn, the board of trustees of such institution may have the right of appeal to the governor and attorney general and their decision shall be final."

The question propounded by you, as I understand it, is whether or not a contract may be made by your county commissioners with an association or corporation incorporated under the laws of Ohio for the exclusive purpose of caring for and treating persons suffering from pulmonary tuberculosis *for a period of ten years.*

Upon an examination of the statutes it will be found that there are certain preliminary conditions which must be met before it is possible to enter into a contract under the section, namely, that the institution must be inspected and approved by the state board of health, and it is also provided that if the institution is not managed in a proper manner the approval of the state board of health may be withdrawn and as a result thereof any contract entered into with the institution shall be cancelled.

Hence it is my opinion that while there is no limitation as to the time for which a contract under the section quoted above may be made to run, yet all contracts made under the section are subject to termination at anytime when the state board of health shall withdraw its approval of the institution on account of improper management and when such finding is approved by the governor and the attorney general.

Respectfully,
EDWARD C. TURNER,
Attorney General.

397.

HOUSE BILLS NO. 160 AND NO. 362 DISCUSSED—MEANING OF PHRASE "EX-PART PAY FIREMEN" AND "EX-VOLUNTEER FIREMEN."

Whether "ex-part pay firemen" are included within the scope of the phrase "ex-volunteer firemen" depends upon the definition of both terms. The first term is unknown in the law; but the second term means and embraces all persons enrolling themselves as members of fire companies or fire departments, but not under any contract of employment binding them to render particular services, though they may be entitled to specific compensation for specific services, if rendered.

COLUMBUS, OHIO, May 21, 1915.

HON. HARRY L. FEDERMAN, *Chairman Cities Committee, House of Representatives, Columbus, Ohio.*

DEAR SIR:—You have asked me to examine house bills Nos. 160 and 362, and to advise whether the subject-matter of house bill No. 362 is provided for in house bill No. 160.

Upon examination of the two measures I find that, with but one exception which I shall refer to, the first five sections of the two bills are substantially identical in phraseology and effect. House bill No. 160 contains ten sections and, in my judgment, sections 6 to 10, inclusive, thereof are necessary in order to make the bill workable; so that if house bill No. 362 relates to a subject-matter different than that to which house bill No. 160 relates, some such provisions as are found in sections 6 to 10, inclusive, of house bill No. 160 should be incorporated in the other bill.

The one respect in which sections 1 to 5, inclusive, of the two bills are not identical is that house bill No. 160 provides for a pension fund for "ex-volunteer firemen;" while house bill No. 362 provides for the creation (though not the disbursement) of such a fund for "ex-part pay firemen." Your question then resolves itself into an inquiry whether or not the term "ex-volunteer firemen" includes "ex-part pay firemen."

The statutes of this state do not recognize "part pay firemen." Two classes of firemen are provided for by the General Code, as it exists at present, viz.: regular firemen and volunteer firemen.

A fireman entering the employ of a city or village and receiving a regular compensation, but giving only a part of his time, would, in my opinion, not be a "volunteer fireman." On the contrary, he would probably be a regular fireman and subject to the benefits of the regular firemen's pension fund, unless the rules of the trustees of the particular fund would exclude him from its benefits. So that if such persons are meant by the use of the term "part pay firemen," my answer is that house bill No. 160 does not include the subject-matter of house bill No. 362.

If, on the contrary, a "part pay fireman," within the contemplation of house bill No. 362, is one who enlists in a volunteer hose or fire company, but receives from the public treasury a certain specific compensation for attending fires, a different question is presented. Such a person would not be a regular employe of the city, nor in any sense a member of its regular fire department. Some doubt as to whether or not he would be, in the exact sense, a volunteer fireman may be said to exist. (See Continental Hose Co. v. Fargo, 114 N. W., 834.)

All depends upon what is meant by the term "volunteer firemen," and particularly upon whether the definition of that term is predicated upon an obligation to attend all fires, or upon the receipt of compensation for attending any fires.

That is to say, if a person is a volunteer, who is not obliged to attend fires under any regular contract of employment, but who is nevertheless entitled to certain compensation if he does attend a fire, then one result follows: but if a person is not to be regarded as a volunteer fireman unless he serves without promise of compensation of any kind, another result follows.

There are no decisions in this state upon the subject, though the term "volunteer firemen" has been in the statutes for many years. My information and understanding is, however, that persons enrolling or enlisting as firemen and training themselves as such upon the understanding that should they attend fires they would be entitled to a certain sum for each fire attended, and perhaps to some other stipulated sum for each fire drill attended, constitute "volunteer firemen" where there is no contract of employment in the sense that the city or village is entitled to demand and receive the services of the firemen in any given case.

Upon this understanding I advise that a "volunteer fireman" is one who is not obliged by a contract of employment to be at the service of the city or village unless definitely excused therefrom, but who may nevertheless be a member of the fire establishment or department of the city or village, and as such entitled to certain specific fees or compensation for services actually rendered. If this is also the definition of the "part pay firemen" mentioned in house bill No. 362, I would be of the opinion that house bill No. 160 does provide for pensions for this class of ex-firemen.

I cannot answer your question more specifically than I have, because I do not know just what is meant by "part pay firemen." The term is unknown in the law, though it may have a meaning understood in the service.

I am unable to go further than to say that if the term "part pay firemen" means firemen who serve under a regular contract of employment, subjecting them to call at any time by the fire department authorities of the city or village, the substance of house bill No. 362 is not covered by house bill No. 160; but if the term applies only to firemen serving as volunteers but subject to compensation for services rendered, then house bill No. 160 does cover the same subject-matter as is covered by house bill No. 362.

This opinion is not to be construed as a recommendation one way or the other as to the policy of the proposed legislation.

Respectfully,
EDWARD C. TURNER.
Attorney General.

398.

THE TIDE-WATER PIPE COMPANY — CRUDE PETROLEUM — OPERATION OF A PIPE LINE FOR TRANSPORTING CRUDE PETROLEUM THROUGH OHIO FROM ANOTHER STATE—WHEN SUCH OPERATION IS A "PUBLIC UTILITY."

The Tide-Water Pipe Company, a limited partnership organized under the laws of Pennsylvania for the purpose, among other things, of operating a pipe line for the transportation of crude petroleum, and actually operating such a pipe line in interstate commerce through the state of Ohio, though not voluntarily holding itself out as a common carrier, and though not exacting any charge for transportation as such, and though becoming the purchaser of all petroleum which passes through its lines, and though purchasing largely from a single producer and selling and delivering entirely to a single refiner, is a pipe line company and a "public utility" within the meaning of section 5415 *and* 5416, *G. C.*

COLUMBUS, OHIO, May 21, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—On May 11th, you transmitted to this office the affidavit of W. S. Benson, vice-president of The Tide-Water Pipe Company, Limited, and requested my opinion as to whether or not the company, doing business as described in said affidavit, is a "public utility" within the meaning of the Ohio statute and as such is required to make report of its property for valuation to the tax commission.

The affidavit embodies a statement of the following material facts:

The company, which is a limited partnership organized under the laws of Pennsylvania, owns and operates a pipe line running from Illinois through Indiana, Ohio, Pennsylvania, New Jersey and New York to the seaboard. This pipe line is used by the company to transport crude petroleum from producing fields variously located outside of the state of Ohio to the refinery at the seaboard. In the entire history of its business operations, however, the company has never made a transportation charge, but at all times has purchased the oil in the producing field and sold it to a single refiner at the other terminus of the line.

The refiner referred to is The Tide-Water Oil Company of New Jersey. This company owns practically all the stock of The Tide-Water Pipe Company and practically all the stock of a corporation known as "The Associated Producers Company," which last named company produces crude petroleum by boring and operating wells in the producing fields.

The three companies are thus closely allied and affiliated, and their method of doing business is described, in the words of affiant, as follows:

> "That the output of oil from the wells of the Associated Producers Company is formally sold to The Tide-Water Pipe Company, Limited, at the mouth of the wells in Illinois, and transported by the pipe company as its property to New York harbor and there sold to The Tide-Water Oil Company. The Associated Producers Company also owns a large acreage of oil and gas leases in the McKean county oil fields of Pennsylvania, through which the line of the pipe company runs; that there the production from the wells of the Associated Producers Company is likewise sold formally to The Tide-Water Pipe Company and transported to New York harbor and sold to the Tide-Water Oil Company for use in its said refinery. That the production of oil by the Associated Producers Company

is not sufficient to meet the daily wants of the oil company at New York harbor, and The Tide-Water Pipe Company, Limited, supplements such production by buying from other producers in Illinois, Indiana and Pennsylvania additional quantities of oil sufficient to meet the daily requirements of the refinery. This oil so purchased in Illinois and Indiana is purchased in the name of The Tide-Water Pipe Company, Limited, paid for by that company, owned by that company, transported by that company through its line to New York harbor and there sold to the oil company."

It is further stated in the affidavit as follows:

"That The Tide-Water Pipe Company, Limited, does not take into its line in the state of Ohio any oil whatsoever, neither does it make any deliveries of oil in the state of Ohio; all of the oil which it transports through its line in Ohio being produced in the states west thereof. That The Tide-Water Pipe Company, Limited, does not in any way serve the public in the state of Ohio—all of the oil so transported by it through Ohio being its own oil, purchased by it as stated above and transported by it through its own pipe line as the owner of such oil to New York harbor and there sold to the oil company. That the transportation of oil through Ohio is only incidental to the production and refining thereof, and is a step to bring the oil in its crude state as produced from the wells to the refinery at New York harbor for refining into burning oil and its by-products. That the pipe company does not as a matter of fact operate as a common carrier in the state of Ohio; that all of the oil which it transports is, as stated above, its own property and transported and intended to be transported to the refinery at New York harbor for use therein.

"That it is absolutely necessary for the refinery to have a surplus of oil in tanks; that it cannot in good business practice rely upon its daily purchases or the production of its underlying corporations with which to meet the daily demands of its refinery at the harbor, and therefore The Tide-Water Pipe Company, Limited, for the protection of the refinery, buys and stores large quantities of crude oil so that the oil refinery may have at all times a quantity upon which it may draw for a regular and fixed daily consumption. That this oil so purchased and held is stored in iron tanks in the state of Illinois and in the state of New Jersey, waiting a market therefor as the demands of the oil refinery may create.

"That the purchase of oil from producers other than the Associated Producers Company is not only for the purpose, as stated above, of meeting the daily demands of the oil refinery, but also to have sufficient oil to fill its pipe line system and keep the same in good working order."

My predecessor, Mr. Hogan, in an opinion to the commission under date of May 20, 1913, dealt with the following facts:

"The Tide-Water Company, Limited, is a limited partnership organized under the laws of Pennsylvania. The partnership is authorized by its partnership articles to transport and refine petroleum as well as to buy and sell this commodity. It owns and operates a pipe line through Ohio extending from a point in Illinois to a point in Pennsylvania and has other lines in the states of Pennsylvania, New York and New Jersey. A lengthy statement of facts is made from which, however, it is difficult to determine whether or not the company is actually engaged in the business of refining

oil. The statement is made that 'we buy in Illinois, we transport it to Rixford (Ill.) * * * at Rixford it is transported by the main line to Bayonne (N. J.) * * *. Our income is derived from the sale of the oil at the seaboard *to our own refinery.* * * * We have no transportation charge for the oil coming in from any of these branches or any over the main line.'"

The only material difference between the facts as they were before my predecessor and those embodied in the affidavit which has been submitted to me lies in the fact, as now stated, that what appears to be the bulk of the purchases made by the pipe line company in the producing field, and constituting what might be called its "regular purchasing business," is made from the allied Associated Producers Company.

It now appears, therefore, that, except insofar as it is necessary in order to supply the refinery and to maintain at the refinery a surplus of crude petroleum to purchase oil from what might be termed "private producers," the main business of the three allied companies is conducted as follows:

The Producers Company drives and operates the wells and runs its oil into the lines of the pipe company, which "formally" pays for it. The pipe company, having thus "formally" bought the crude oil, transports the same to the refinery where it is sold to the oil company.

If these companies are as closely allied as one is led to believe from the statements in the affidavit, it is very clear, as therein stated, that "the transportation of oil through Ohio is only incidental to the production and refining thereof, and is a step to bring the oil in its crude state as produced from the wells to the refinery at New York harbor." In this connection, however, I feel constrained to observe that this statement might be made of the business of transporting crude petroleum through pipe lines as a whole.

Mr. Hogan, in his opinion to which I have referred (found in the report of the attorney general for the year 1913, at page 666) held upon the facts submitted to him that The Tide-Water Pipe Company was a public utility and a pipe line company under the tax commission act of 1911. Without repeating all of his reasons, I may say that, generally, I concur with him. There are, however, additional reasons, one of which at least could not be asserted by Mr. Hogan at the time his opinion was prepared, which, in my judgment, support the conclusion reached.

The statutes involved are sections 5415 and 5416, General Code, which provide in part as follows:

"Sec. 5415. The term 'public utility' as used in this act means and embraces each corporation, company, firm, individual and association, their lessees, trustees, or receivers elected or appointed by any authority whatsoever, and herein referred to as express company, telephone company, telegraph company, sleeping car company, freight line company, equipment company, electric light company, gas company, natural gas company, pipe line company, waterworks company, messenger company, signal company, messenger or signal company, union depot company, water transportation company, heating company, cooling company, street railroad company, railway company, suburban railroad company, and interurban railroad company, and such term 'public utility' shall include any plant or property owned or operated, or both, by any such companies, corporations, firms, individuals or associations.

"Sec. 5416. That any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated: * * *.

"When engaged in the business of transporting natural gas or oil through pipes or tubing, either wholly or partially within this state, is a pipe line company."

The Tide-Water Pipe Company from the facts above stated is clearly in the business of transporting oil through pipes or tubing in the state of Ohio, and, being such, it is a "public utility" as that term is used in section 5415, and the property which it operates in Ohio is also a "public utility" within the second meaning of that term as therein defined. This conclusion is not altered by the fact that the company buys "formally" at the producing field and sells at the refinery; nor by the fact that the purchases are from a limited group of producers and the sales to a single refinery. This is true for the reasons pointed out by Mr. Hogan in his opinion, which may be summarized by stating that the business of the company is essentially that of transportation, these features of the business being incidental to its transportation activities rather than paramount to them, and the fact that section 5416 does not, in words at least, require that a company in order to satisfy its definition of a pipe line company hold itself out to the public as a common carrier.

I am satisfied, however, that The Tide-Water Pipe Company, under the facts stated in the affidavit, is a "public utility" in every sense of the word; so that even if it be assumed that the business must be a quasi public business, as distinguished from a private business, and that this qualification is to be read into the definition found in section 5416, the business of the company would still constitute it a "public utility" within such a restricted definition of that term.

Much might be said respecting the reasons which may exist so as to charge a business with a public interest and make it a "public utility." The general statement may be made that professed willingness to serve all who may apply is not criterion of a public service business; and that there are some enterprises which can be conducted only subject to public regulation and control and to the right of the public to demand the service, whether the proprietor of the enterprise is willing or not. A very full discussion of these principles will be found in Wyman on Public Service Corporations.

The reason why it is unnecessary to go into such matters in detail exists in the decision of the supreme court of the United States, in the case of United States v. Ohio Oil Co., known as the "Pipe Line Cases," 234 U. S., 548. This, a very recent case, decided since Mr. Hogan's opinion was given to the commission, involved the interpretation and constitutionality of an act of congress amending the act to regulate commerce by the addition of a proviso as follows:

"The provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water, and * * * gas * * * who shall be considered and held to be common carriers, within the meaning and purpose of this act."

The Tide-Water Pipe Company was the defendant in error in one of the cases taken to the supreme court, and insofar as the decision is applicable to the question now under consideration, the status of that company may be regarded as *res adjudicata*.

The ultimate question considered by the supreme court of the United States was

as to whether or not the act of congress above quoted had the effect of depriving the pipe line companies of their private property by devoting it to a public use without due process of law, it being agreed by the court, and especially pointed out by the chief justice, who concurred in a separate opinion, that to make a purely private enterprise by legislative fiat subject to public use as a common carrier would be subversive of the fifth amendment to the federal constitution. On this point the majority of the court, through Mr. Justice Holmes, used the following language:

> "The control of congress over commerce among the states cannot be made a means of exercising powers not intrusted to it by the constitution, but it may require those who are common carriers in substance to become so in form. So far as the statute contemplates future pipe lines and prescribes the conditions upon which they may be established there can be no doubt that it is valid. So the objection is narrowed to the fact that it applies to lines already engaged in transportation. But, as we already have intimated, those lines that we are considering are common carriers now in everything but form. They carry everybody's oil to a market, although they compel outsiders to sell it before taking it into their pipes. The answer to their objection is not that they may give up the business, but that, as applied to them, the statute practically means no more than they must give up requiring a sale to themselves before carrying the oil that they now receive. The whole case is that the appellees, if they carry, must do it in a way that they do not like. There is no taking and it does not become necessary to consider how far congress could subject them to pecuniary loss without compensation in order to accomplish the end in view. Hoke v. United States, 227 U. S. 308, 323, 57 L. Ed. 523, 527, 43 L. R. A. (N. S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Lottery Case (Champion v. Ames) 188 U. S. 321, 357, 47 L. Ed. 492, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561."

The chief justice, especially concurring and treating of the case of Uncle Sam Oil Company, which had been held by the majority of the court to be not subject to the provisions of the act for reasons growing out of the interpretation thereof, stated that he was unable to agree that the act on its face did not apply to that company, and then went on to use the following language:

> "But despite this I think the company is not embraced by the statute because it would be impossible to make the statute applicable to it without violating the due process clause of the 5th amendment, since to apply it would necessarily amount to a taking of the property of the company without compensation. It is shown beyond question that the company buys no oil, and by the methods which have been mentioned simply carries its own product to its own refinery; in other words, it is engaged in a purely private business. Under these conditions in my opinion there is no power under the constitution without the exercise of the right of eminent domain to convert without its consent the private business of the company into a public one.
>
> "Of course this view has no application to the other companies which the court holds are subject to the act, because as pointed out, the principal ones were chartered as common carriers, and they all, either directly or as a necessary result of their association, were engaged in buying oil and

> shipping it through their pipes; in other words, were doing in reality a common carrier business, disguised, it may be, in form, but not changed in substance."

Mr. Justice McKenna, who dissented, based his entire opinion upon the opposite view of the same fundamental question.

It would seem, therefore, that the supreme court of the United States has held, as to The Tide-Water Pipe Company, that it is a "common carrier in substance," so that it may be compelled to become a common carrier "in form."

In reaching this conclusion the court considered, as the statement of facts and the briefs abundantly show, the fact that the company made no transportation charge as such and did not hold itself out as a common carrier, but purchased oil at one end of its line and sold it at the other. It also considered the close relation of The Tide-Water Pipe Company to The Tide-Water Oil Company and other affiliated companies—in fact all the facts which are before me in the affidavit of Mr. Benson.

I think there can be no question that a "common carrier in substance" is a "public utility" within any meaning that may be given to that term; and especially that a pipe line company which is so conducting its business as to be a "common carrier in substance" satisfies the broad definition of such a company in section 5416 of the General Code.

Another reason suggests itself to me in this connection:

Sections 10128 to 10134, inclusive, of the General Code of Ohio, provide that pipe line companies, among other companies therein named, may appropriate private property and, with the consent of the proper authorities, use public highways and lands for the purpose of laying pipes. While these sections have not been judicially interpreted in this particular, it seems that they may apply as well to companies organized under the laws of another state for the proper purpose as to domestic corporations—at least the regulatory provisions of the statute apply to all companies—and I am satisfied that a limited partnership or association organized under the laws of Pennsylvania is a "company" within the meaning of such regulatory provisions of the statute.

Section 10132 of the General Code provides specifically as follows:

> "Sec. 10132. Such company or companies, for the purpose of transporting natural gas, oils, water and electricity shall be a common carrier, and subject to all the duties and liabilities of such carriers under the laws of this state."

This statute is of purport similar to that of the federal statute recently passed upon by the supreme court of the United States. It may be true that The Tide-Water Pipe Company has never availed itself of the privilege of exercising the right of eminent domain. As much is to be inferred from the language of Mr. Justice McKenna in his dissenting opinion, at page 570, and from the abstract of the brief of counsel for The Tide-Water Pipe Company in the case above cited. But this would be immaterial if it were a fact, as it is if the Ohio statute is decided to be held applicable to foreign companies of the character of The Tide-Water Pipe Company, that that company could at any time exercise special rights and privileges afforded by the Ohio law. The Ohio statutes do not extend the right of eminent domain to such pipe line companies as hold themselves out to be common carriers, but the privilege is extended to all companies which are organized for the purpose of transporting petroleum; then, following a policy similar to

that of the federal statutes, the statute makes all such companies common carriers. In other words, mere organization for the purpose of transporting oil is sufficient to vest the right in the company and impose upon it the obligation, the very purpose itself being, for reasons pointed out in the opinion of the supreme court of the United States, a quasi public one, without regard to the intent of the organizers of the company.

For these additional reasons, then, I concur in my predecessor's conclusion, and I am of the opinion that none of the special facts stated in the affidavit are sufficient to divest The Tide-Water Pipe Company of the character of a "public utility" within the meaning of the statutes which I have quoted.

Another question which asserts itself grows out of the close affiliations of the three companies above named, from which it follows that The Tide-Water Pipe Company may be regarded merely as an adjunct of The Tide-Water Oil Company. I do not find this fact to be material. In the very nature of the case the pipe line can not serve many refineries, and I imagine that in most instances business convenience and physical necessity dictate that practically the entire carrying capacity of a certain pipe line may be absorbed by a single refinery, or a small group of refineries. This very fact constitutes an additional reason for discounting the importance of considering whether or not a given company is actually holding itself out as a common carrier; for, being a carrier from one point to another, it could serve in that capacity only such producers as might conveniently run oil into its pipes and only such refiners as might be located conveniently to the termini thereof and these, especially the latter, being necessarily few in number, the natural tendency would in the business of any pipe line company be at all times toward taking on the character of a purely private enterprise at both ends of the line.

Nor would the fact that The Tide-Water Oil Company controls practically all of the stock of The Tide-Water Pipe Company and the Associated Producers Company be material.

While the substance and not the form must govern the application of rules of law, it must not be forgotten that neither the Associated Producers Company nor The Tide-Water Oil Company has any standing in Ohio under statutes above cited as a pipe line company. The promoters and individual owners of all three companies have thus separated their interests, and the separation is more than formal. They must have had some purpose in separately organizing The Tide-Water Pipe Company, and it is not difficult to conjecture what that purpose was. Undoubtedly they contemplated the exercise of the right of eminent domain should occasion require, whether such right has ever been exercised in any state or not. Moreover, some business at least is done with private individuals, from whom oil is purchased in the producing field; so that it is clear that the entire business activities of the three companies are not confined to their mutual dealings.

In this connection the case of State v. Factory Power Company, 16 N. P. (N. S.) 545, must be distinguished. The commission is familiar with the facts in that case. It is sufficient to state of them that they constitute a peculiar case, and that no general rule whatever is to be drawn from the decision. Certainly the decision could upon no theory be applied to the present case because The Tide-Water Pipe Company deals, as above stated, not only with the Associated Producers Company and The Tide-Water Oil Company, but also with individual producers from whom it purchases oil in the field.

I may add that whatever so-called mercantile activities the company may be said to have, these are shown by the affidavit to be subordinate in every respect to the discharge of the function of transportation.

It is my opinion, therefore, that The Tide-Water Pipe Company, Ltd., is a "public utility" within the meaning of the taxation laws of Ohio. Being engaged

in Ohio solely in transporting interstate commerce, it is not, of course, subject to excise taxation nor to taxation on its franchise, even if under its peculiar form of organization it would be otherwise subject to the latter. It is, however, in my opinion subject to the requirement that it report its property holdings to the tax commission for assessment by the commission on the unit basis in accordance with the provisions of section 5424, of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

399.

COUNCIL OF CITY OR VILLAGE—HAS POWER TO LIMIT WEIGHT OF HEAVY TRAFFIC OVER CERTAIN STREETS, PROVIDING THERE ARE OTHER WAYS TO MAKE SUCH TRAFFIC REASONABLY CONVENIENT.

When from the nature of the improvement of a certain streets of a city or village, or for other reasonable cause, it becomes expedient or would promote the safety or convenience of public travel as a whole, the council may provide for the exclusion of heavy traffic over such streets, provided there remain other ways open to such traffic reasonably sufficient and convenient for its use.

COLUMBUS, OHIO, May 22, 1915.

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

GENTLEMEN:—Under date of April 29, 1915, you requested my written opinion, as follows:

> "We would respectfully request your written opinion upon the following question:
> "Has council of a village (or city) the power to limit the weight of vehicle traffic passing over certain streets, or parts thereof? Certain villages desire to keep the enormously heavy trucks off of certain streets, and desire to know whether the power and authority is vested in council to control same."

Section 3616, G. C., provides:

> "All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

Among the enumeration of powers of municipal corporations, section 3632, G. C., provides:

> "To regulate the use of carts, drays, wagons, hackney coaches, omni-

buses, automobiles, and every description of carriages kept for hire or livery stable purposes; to license and regulate the use of the streets by persons who use vehicles, or solicit or transact business thereon; to prevent and punish fast driving or riding of animals, or fast driving or propelling of vehicles through the public highways; to regulate the transportation of articles through such highways and to prevent injury to such highways from overloaded vehicles, and to regulate the speed of interurban, traction and street railway cars within the corporation.

Section 3635, G. C., provides:

"To prescribe the width of the tires of wagons, carts, drays and other vehicles used in the transportation of persons from one part of the corporation to another, or in the transportation of coal, wood, stone, lumber, iron or other articles in the corporation, and establish stands for hackney coaches, cabs or omnibuses, enforce the observance and use thereof, and fix the rates and prices for the transportation of persons and property in such coaches or other vehicles from one part of the corporation to another."

The municipality in which a public way is located has been vested by the legislature with the supervision and control of such ways for public use, and is charged with the responsibility of keeping them in repair and reasonably suitable and sufficient for use by the public for purposes of travel.

It is within the authority of the council of a municipality to provide such reasonable regulations on the use of improved streets as are necessary to preserve the improvements and prevent their destruction by the conveyance thereon of over-loaded vehicles, or those which from the mode of their use are destructive of such improvements.

An apt statement of this principle is found in the case of Commonwealth v. Mulhall, 162 Mass, 496, where the court said:

"An ordinance of the city of Boston which provides 'no person shall carry or cause to be carried, in a vehicle in any street, a load the weight whereof exceeds three tons, unless such load consists of an article which cannot be divided,' is reasonable, constitutional and valid.

"We cannot say that the mayor and aldermen were in error in deciding that the use of heavily loaded vehicles is a matter affecting the public in the use of streets, which may be regulated under the statute, nor can we say that the ordinance is anything more than a regulation upon the necessity of which their judgement is final."

In the exercise of this power the council may classify the streets of a city or village with reference to the character of construction or material used, or having regard to the safety and convenience of public traffic, and may prescribe regulations or restrictions on the use of the streets for particular kinds of traffic, based upon said classification.

Travelers are entitled to a reasonably safe, convenient and practicable opportunity for travel and passage over the public ways, but when the use of certain streets for heavy traffic is inconsistent with their safe and convenient use for the purpose of other classes of traffic, or is more than ordinarily destructive of the character of the improvement thereon, while other ways suitable to the uses of

such heavy traffic afford a reasonably convenient and sufficient opportunity for its passage, a regulation restricting such heavy traffic to the ways suitable to its use, tends to conserve the right of all and preserve the public improvements, and is the proper exercise of the authority granted to the municipality.

While I do not find that the exact question which you present has been passed upon by the courts of this state, yet an examination of the authorities of other states indicates that reasonable regulations of the use of streets by municipalities has generally been upheld by the courts.

In the case of State of Maine v. John Boardman, reported in 46 L. R., 750, the court said:

> "An ordinance restricting heavily loaded vehicles to a specified portion of the street is not reasonable, unless that portion is reasonably suited to the purpose, and cannot be enforced when that part of the street is absolutely impassable. * * *
>
> "Such a by-law does not deprive a person of any right; it simply regulates the exercise of it, and it can be readily seen that such a regulation may afford to all travelers much better opportunities for travel than they could otherwise enjoy.
>
> "In Com. v. Stodder, 48 Amer. Dec., 679, the court say: 'We cannot doubt that a by-law, reasonably regulating the use of the public streets of a city as to carriages of an unusually large size, or as to those which from the mode of using them would greatly incommode, if not endanger, those having occasion to use such public streets, would be valid and legal; and that such regulations might prescribe certain streets as route of travel for such vehicles and provide for their exclusion from certain other streets.'"

In the case of Cicero Lumber Co. v. Town of Cicero, 176 Ill., page 9, the court said:

> "Limiting the use of a street to a pleasure drive-way under authority of a general act of the legislature, is not a violation by the municiaplity of the trust upon which it holds such street for the public, as the legislature has full control of public streets, subject only to the constitutional restrictions and the private rights of property owners.
>
> "The property rights of parties in public streets, which the legislature must respect, are ordinarily such rights and easements as they have by virtue of their being owners of abutting property, and do not include the right to use every kind of vehicle thereon."

In People v. Wilson, 16 N. Y., Supp. 583, in discussing a similar question, the court said:

> "An ordinance of the city of Kingston prohibits any person from drawing or transporting a load or burden weighing from two and one-half to five tons over any macadamized, paved or top-dressed street of the city, in any vehicle having a tire less than four inches wide on its wheels. The

power to make such an ordinance is not expressly conferred. The specific grant of powers for the making, grading and repairing streets, and for their care and superintendence, coupled with the power to make such ordinance for the purpose of executing such powers, vests in the common council the power to make such ordinances as shall be reasonable for the purpose. It is reasonable to protect paved streets from being crushed and ruined by loads of enormous weight, borne upon vehicles with wheels of narrow tires, which cut through the pavement, when a broader tire will bear the load without causing such injury. It is reasonable that the carrier of heavy loads should so exercise his own rights as not injuriously to affect those of others.

"Such an ordinance was upheld in People v. James, 16 Hun., 426, and we concur in the views there expressed upon the subject."

I am of the opinion that an ordinance which imposes restrictions upon the use of certain streets for purposes of heavy traffic, when from the nature of the improvement of such street, or the consequences of their use for such traffic, grounds exist for its application to such streets which do not exist as to other streets of the corporation of a different construction, capacity or location, is not, by reason of such limited application, void as discriminatory or unreasonable.

I advise, therefore, that when from the nature of the improvement of certain streets of a city or village, or for other reasonable cause, it becomes expedient, or would tend to promote the safety, or convenience of public travel as a whole, the council may provide by ordinance for the exclusion of heavy traffic from such streets, provided there remain other ways open to such traffic reasonably sufficient and convenient for its use.

Respectfully,
EDWARD C. TURNER,
Attorney General.

400.

SIGNATURES UPON A REFERENDUM PETITION OF A MUNICIPAL CORPORATION MAY NOT BE WITHDRAWN THEREFROM NOR ADDITIONAL SIGNATURES THERETO FILED AFTER SUCH PETITION HAS BEEN CERTIFIED TO DEPUTY STATE SUPERVISORS OF ELECTIONS —SIGNATURES CANNOT BE WITHDRAWN NOR ADDITIONAL SIGNATURES BE ADDED AFTER EXPIRATION OF THIRTY DAYS SUBSEQUENT TO FILING.

Signatures upon a petition for the referendum of a municipal ordinance or measure may not be withdrawn therefrom nor additional signatures thereto filed after such petition has been certified to the deputy state supervisors of elections nor after the expiration of thirty days subsequent to the filing of such ordinance or measure with the mayor of the city or to the passage thereof by the village council.

COLUMBUS, OHIO, May 22, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of May 3, 1915, as follows:

> "Under section 4227 of the General Code of Ohio, when an ordinance has been passed by the council of a city for a bond issue and the electors have filed a referendum petition with the city auditor, asking for a referendum vote on said ordinance, can some of the petitioners who have signed the referendum petition have their names stricken from said petition?
>
> "If, in your opinion, such petitioners can legally withdraw their signatures to said petition so as to reduce the number of signatures remaining on the petition to less than the requisite number required to make the petition legal, can a sufficient number of new petitioners be filed with the city auditor to make the petition sufficient to require an election on the aforesaid question?"

Your question refers only to referendum petitions, and to that this opinion is confined.

Section 4227-2, as amended in 104 O. L., 239, applies more particularly to the questions above submitted than does section 4227.

Section 4227-2, 104 O. L., 239, provides as follows:

> "Any ordinance, or other measure passed by the council of any municipal corporation shall be subject to the referendum except as hereinafter provided. No ordinance or other measure shall go into effect until thirty days after it shall have been filed with the mayor of a city or passed by the council in a village, except as hereinafter provided.
>
> "When a petition signed by ten per cent. of the electors of any municipal corporation shall have been filed with the city auditor or village clerk in such municipal corporation, within thirty days after any ordinance or other measure shall have been filed with the mayor, or passed by the council of a village, ordering that such ordinance or measure be submitted to the electors of such municipal corporation for their approval or rejection, such city auditor or village clerk shall, after ten days, cer-

tify the petition to the board of deputy supervisors of elections of the county wherein such municipality is situated and said board shall cause to be submitted to the electors of such municipal corporation for their approval or rejection, such ordinance or measure at the next succeeding regular or general election, in any year, occurring subsequent to forty days after the filing of such petition.

"No such ordinance or measure shall go into effect until approved by the majority of those voting upon the same. Nothing in this act shall prevent a municipality after the passage of any ordinance, or other measure, from proceeding at once, to give any notice, or make any publication, required by such ordinance or other measure."

From the above statutory provisions it will be readily observed that the petition therein referred to in no case has any operative force until either the period of ten days since the filing of the same has elapsed, or the period of thirty days after the ordinance shall have been filed with the mayor of a city, or have been passed by a council of a village, has elapsed.

If a petition containing the requisite number of valid signatures remains on file with the auditor of a city or clerk of a village, for the period of ten days prior to the expiration of the thirty-day period subsequent to the passage or filing of such ordinance, it then, upon the certification to the proper election officers, has the operative force and effect of conferring upon such election officer authority for holding an election at which the question of approval or rejection of such ordinance or measure is submitted to a vote of the electors of a municipality.

The legal force of such petition has then become operative and affected a public right; that is to say, has created, under the law, right in the public to have the question so submitted to a vote and set in operation the machinery provided therefor. If, on the other hand, a petition fulfilling all the requirements of the law is on file with the proper officer at the expiration of the thirty days after the ordinance shall have been filed with the mayor of a city or has been passed by the council of a village, its legal force becomes operative and suspends the going into effect of the ordinance or other measure until the same shall have been approved by a majority of those voting thereon, thereby affecting the public interest giving rise to the public right to have such measure or ordinance submitted to a vote.

Attention is called to an opinion rendered by my predecessor, Hon. Timothy S. Hogan, upon the question submitted by you, rendered to Hon. William A. Hunt, solicitor of Salineville, Ohio, under date of April 19, 1913, found on page 1632 of the report of the attorney general for the year 1913, which holds:

"It is well settled that names may be withdrawn from a petition at any time before jurisdiction is acquired thereover by the board or officer entitled to exercise the same.

"When a petition for the referendum on a municipal ordinance, therefore, has been filed with the clerk of the village, the names may be withdrawn therefrom at any time prior to the certification of such petition to the board of elections by said clerk."

This opinion is based upon the decisions of the courts of this state, as follows:

Hayes vs. Jones, 27 O. S., 218;
Duttin vs. Village, 42 O. S., 215;
Cole vs. City of Columbus, 2 N. P. (n. s.) 563;

Haynes vs. Hillsboro, 3 N. P. (n. s.) 17;
Borwood vs. Board of Elections, 13 C. C. (n. s.) 465;

and is supported by the case of

State ex rel. Moore vs. City of Seattle, 109 Pac. Rep. 309.

It is equally well settled by the above cases that after an authority conferred by such petition is once exercised or such petition operates to effect a public right or interest, names may not be withdrawn therefrom.

I am, therefore, of opinion that names may not be withdrawn from a petition for the referendum of a municipal ordinance after the certification thereof within the thirty day period for the reason that by such certification the authority by the petition conferred has been exercised and given rise to the public right to have such ordinance submitted to a vote of the people, nor may names be withdrawn from such referendum petition after the expiration of the thirty day period notwithstanding that it has not been so certified for the reason that the petition has then operated to suspend the taking effect of the ordinance, thereby effecting a public right and may not thereafter be revoked or modified.

In other words, persons who have signed such referendum petition may withdraw their names therefrom only prior to the certification of the petition and prior to the expiration of the thirty day period, and that no withdrawal may be made after either the certification or the lapse of the thirty day period.

As to your second question, it is held in State ex rel. vs. Graves, 90 O. S., 311, O. L. B., March 22, 1915, in effect that the withdrawal of names would not invalidate the signatures not so withdrawn.

It will be remembered that petitions may be presented in separate parts so long as each part is in compliance with all the requirements relative thereto. So that after the withdrawal of names from a valid petition, additional parts of such petition, if in all respects in compliance with the requirements of the law, might be filed within the thirty day period. If after the filing of such additional parts within the thirty day period, there is then on file with the clerk or auditor, in regular form a sufficient number of valid signatures, including those found on the part or parts of such petition theretofore filed and excluding signatures theretofore withdrawn, a court would look to the substance rather than the form, in my opinion, and in view that the intent and purpose of the law under such circumstances would be fully met, would hold such petition to be sufficient and valid. That is to say, there would then be that expression of a desire of electors for holding the proposed election, which in contemplation of the statutory provisions is necessary to confer upon the election officers authority for conducting such election when properly certified to them, and it would then be the duty of such auditor or clerk, upon the expiration of ten days from the filing of such additional parts as to bring the sum total of valid signatures within the requirement of the law, to certify the same to the proper election officers, and if such petition were on file with such officer at the expiration of the thirty day period, it would then operate to suspend the going into effect of such ordinance or measure.

I am of the opinion, in answer to your second question, that additional signatures may not be filed after the withdrawal of signatures from the original petition, except within the thirty day period after the filing of such ordinance with the mayor or its passage by the village council and prior to the certification of such petition by the city auditor or village clerk.

Respectfully,
EDWARD C. TURNER,
Attorney General.

401.

STATE DENTAL BOARD—MEMBERS SHOULD BE PAID COMPENSATION ONLY FOR DAYS ON WHICH BOARD IS ACTUALLY IN SESSION FOR OFFICIAL BUSINESS.

Members of the state dental board may be paid compensation only for the days on which such board is actually in session for the transaction of the business and performance of the official duties of such board.

COLUMBUS, OHIO, May 22, 1915.

The Ohio State Dental Board, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of yours under date of May 20, 1915, as follows:

> "The state dental board has asked me to send you this communication. The board up until the time ex-Attorney General Hogan went into office, received pay for one day when they were traveling. Dr. Smith, of Marietta, is compelled to always lose two days' time when the board is in session, and it is quite frequent that the board has a one day session, and according to the ex-attorney general's ruling, he can draw compensation for but one day, when it used to be that he was allowed for two days. It looks like an injustice to ask the members to lose three days' time from their office for one day's pay. You will find ex-Attorney General Denman ruled that the board should be allowed one day for traveling. Kindly give us your opinion as soon as possible on the matter."

I am unable to find any reported opinion of my predecessor, Hon. U. G. Denman, upon the question submitted by you.

In an opinion of my predecessor, Hon. Timothy S. Hogan, rendered to Hon. E. M. Fullington, auditor of state, under date of September 5, 1912, and found at page 124 of the report of the attorney general for that year, it is held:

> "Under section 1317 G. C., the members of the state dental board are entitled to ten dollars for 'each day actually employed in the discharge of his official duties and his necessary expenses incurred,' and no additional payment can be allowed for the days required to come to and return from the place where the meetings of the board are held."

Section 1317 G. C., provides for the compensation of members of the state dental board as follows:

> "Each member of the state dental board shall receive ten dollars for each day actually employed in the discharge of his official duties, and his necessary expenses incurred. The secretary shall receive an annual salary to be fixed by the board, and his necessary expenses incurred in the discharge of his official duties. The compensation and expenses of the secretary and members and the expenses of the board, shall be paid from moneys received under this chapter, upon approval of the president and secretary."

It will be observed that the legislature has carefully restricted the compensa-

tion of members of the state dental board to $10.00 for each day "actually employed in the discharge of his official duties."

An examination of the statutes will fail to disclose any official duty imposed upon the individual members of the board, but on the contrary it clearly appears that every duty provided by law must be discharged by the entire board, so that no member of the state dental board may be engaged in the discharge of his official duties except during the time the board is actually in session.

I am, therefore, constrained to concur in the opinion of my predecessor, and therefore hold that members of the state dental board may not receive compensation for the time consumed in going to and from the place or places at which sessions of the board are held.

Respectfully,
EDWARD C. TURNER,
Attorney General.

402.

ARTICLES OF INCORPORATION—INSURANCE COMPANY WHICH SEEKS TO COMBINE OBJECTS THAT MAY NOT BE PURSUED BY A SINGLE CORPORATION SUCH AS INSURANCE AGAINST LOSS BY FIRE AND AGAINST LOSS BY THEFT OF AUTOMOBILES—SUCH INCORPORATION DISAPPROVED.

An insurance company seeking incorporation under paragraph two of section 9510, G. C., may not have authority to insure against loss or damage by fire as such nor against loss or damage by theft of automobiles.

COLUMBUS, OHIO, May 22, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return herewith the proposed articles of incorporation of the Automobile Owners' Mutual Liability and Casualty Company, without my approval endorsed thereon, for the following reason:

The purpose clause of the articles of incorporation is as follows:

> "Third. Said corporation is formed for the purpose of insuring owners of automobiles against automobile liability, automobile property damage, automobile collision, automobile theft, and damage to assured's automobile by fire.
>
> "Guaranteeing the fidelity of persons holding places of public or private trust who may be required to, or do, in their trust capacity, receive, hold, control, disburse public or private monies or property.
>
> "Also for the purpose of making all other insurance authorized under sections 9510, pgh. 2, 9511, and 9568 of chapter I, subdivision II, division III, title IX of the General Code of Ohio, 1910, and also of purchasing, leasing, holding and disposing of all property, personal and real, which shall be necessary or convenient; and the doing of all those things necessary or incidental to the prosecution of the business of such company and authorized under the laws of the state of Ohio."

The second clause of section 9510 of the General Code is as follows:

"(2) Make insurance on the health of individuals and against personal injury, disablement or death, resulting from traveling or general accidents by land and water; make insurance against loss or damage resulting from accident to property from cause *other than fire or lightning;* guarantee the fidelity of persons holding places of public or private trust, who are required to, or, in their trust capacity do receive, hold, control, disburse public or private moneys or property; guarantee the performance of contracts other than insurance policies, and execute and guarantee bonds and undertakings required, or permitted in all actions or proceedings, or by law allowed; make insurance to indemnify employers against loss or damage for personal injury or death resulting from accidents to employes or persons other than employes and to indemnify persons and corporations other than employers against loss or damage for personal injury or death resulting from accidents to other persons or corporations. * * *"

Section 9511 of the General Code provides as follows:

"Sec. 9511. No company shall be organized to issue policies of insurance for more than one of the above four mentioned purposes, and no company organized for either one of such purposes shall issue policies of insurance of any other. But companies organized under subdivision two of the preceding section, which do the business of guaranteeing the fidelity of persons, holding places of public or private trust, who are required to or in their trust capacity do receive, hold, control, disburse public or private property, and guaranteeing the performance of contracts other than insurance policies, and executing and guaranteeing bonds and undertakings required or permitted in actions, proceedings or by law allowed, may indemnify bank depositors against loss by reason of bank suspension and failure."

The rule of the first sentence of section 9511 is further relaxed by the specific provision of section 9556 of the General Code, as follows:

"Sec. 9556. All companies organized or admitted for the purpose of insuring against loss or damage by fire, may insure against loss or damage by water, caused by the breakage or leakage of sprinklers, pumps, tanks, water pipes and fixtures connected therewith, and by lightning, explosions from gas, dynamite, gunpowder and other like explosions, and tornadoes and may also insure against loss by the theft of automobiles and accessories, and against damage thereto from this cause."

The purpose of insuring against loss or damage by fire is that contemplated by the first clause of section 9510 of the General Code.

From the express provisions of these sections it follows that under the second clause of section 9510, General Code, property may not be insured against loss or damage by fire, nor against loss by theft.

In short, the purpose clause of the enclosed articles of incorporation attempts to combine objects that may not be pursued by a single corporation organized under the laws of Ohio.

A fire insurance company may insure against loss or damage to automobiles

by fire, water, lightning, certain explosions and tornadoes and by theft of automobiles and accessories; but such a company may not guarantee the fidelity of persons holding places of public or private trust or indemnify persons other than employers against loss or damage for personal injury or death resulting to other persons. Conversely, a company having the power to insure against loss or damage resulting from accident to property, to guarantee the fidelity of persons holding places of public or private trust and to indemnify persons other than employers against loss or damage for personal injury, etc., may not insure against damage by fire as such, nor against loss or damage by theft.

For the foregoing reasons, I am unable to approve the articles of incorporation of the Automobile Owners' Mutual Liability and Casualty Company.

I return herewith the check of the Lake Shore Banking and Trust Company in the amount of $50.00, payable to your order.

Respectfully,
EDWARD C. TURNER,
Attorney General.

403.

STATE HIGHWAY COMMISSION — WITHOUT AUTHORITY TO SELL BROKEN AND WORN OUT TOOLS AND EQUIPMENT OF THE DEPARTMENT.

There is no authorization in the statutes for the sale by the state highway commissioner of broken and worn out tools and equipment belonging to the highway department. Such tools and equipment should be stored until such time as the legislature authorizes the sale of the same.

COLUMBUS, OHIO, May 22, 1915.

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

DEAR SIR:—I have your communication of May 8, 1915, which reads as follows:

> "We have a number of requests from our superintendents and foremen asking for authority to dispose of broken and worn out tools and equipment which have accumulated with the different outfits. The moving of some of this useless equipment has become quite a burden to the different construction gangs.
>
> "While this equipment is of no use to the state, we believe that some amount can be realized from its sale.
>
> "We are advised of no law permitting the department to sell or dispose of this equipment in any way.
>
> "In view of this situation, will you be kind enough to advise us just what action can be taken by the department for the disposition of these broken and worn out tools, etc."

I find no authorization in the statutes for the sale by the state highway commissioner of broken and worn out tools and equipment belonging to the highway

department. The only suggestion, therefore, that I can make in the matter is that such tools and equipment be stored until such time as the legislature authorizes the sale of the same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

404.

ASSESSMENTS—COSTS AND EXPENSE OF IMPROVING A HIGHWAY WHERE RAILROAD COMPANY OWNS A STRIP OF LAND WHICH ABUTS ON AN INTER-COUNTY HIGHWAY—HOW ASSESSMENTS SHOULD BE MADE WHEN FEE TO SAID LAND IS AND IS NOT IN SAID RAILROAD COMPANY.

If a railroad company owns in fee a strip of land over which its railroad is operated and which abuts on an inter-county highway which is being improved, both the said strip of land and the land lying immediately back of said strip, may be assessed for part of the cost and expense of said improvement, under authority of section 1209, *G. C., and in the manner provided by section* 1208, *G. C., as amended,* 103 *O. L.,* 456.

If the fee to said land is not in said railroad company, said strip of land should be assessed according to the benefits accruing to the owner thereof, the same as any other land abutting on said improvement, and the land lying immediately back of said strip is not subject to an assessment for said improvement.

COLUMBUS, OHIO, May 24, 1915.

HON. T. B. JARVIS, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—I have your letter of May 7, 1915, which is, in part, as follows:

> "Referring to section 1208, 1913 Year Book, 103 Ohio Laws, at page 457, this part of the section bothers me:
>
> " 'Township trustees shall apportion the amount to be paid by the owners of the abutting property according to the benefits accruing to the owners of land so located.'
>
> "In our county of Richland we have a road running parallel with the Erie R. R. for a distance of nearly a half mile. The south line of the roadway is the north line of the right-of-way of said railroad company. According to this section only the owners of abutting property can be taxed. And part of this distance there is a piece about 4 rods wide probably 40 rods long belonging to the railroad company that is farmed or merely leased to some of their employes; the balance there is no farm land. The question arises, can the railroad company be assessed anything under this section for the payment of the new pike being built, or can we go across the railroad and assess those whose lands abut on the other side of the railroad track?
>
> "Second. There is one piece of land abutting on this property 20 rods wide at the point of abutment in the shape of a triangle, which contains about 150 acres. There is another piece 80 rods wide which contains about 30 acres. Should the assessment be made according to the rod frontage or the actual benefits taking into consideration the shape of the

land? My judgment is it should be actual benefits regardless of the number of rod frontage. What is your judgment? Would like to know as soon as convenient to your department."

Section 1208, General Code, as amended 103 O. L. 456, relates to the apportionment of a part of the cost and expense of improving an inter-county highway, and provides as follows:

"Except as otherwise provided, one-fourth of the cost and expense of such improvement, except the cost and expense of bridges and culverts, shall be apportioned to the township or townships in which such road is located. Of the amount so apportioned, three-fifths shall be a charge upon the whole township or townships and two-fifths shall be a charge upon the property abutting on the improvement. The township trustees shall apportion the amount to be paid by the owners of the abutting property according to the benefits accruing to the owners of land so located. At least ten days' notice of the time and place of making such apportionment shall be given to the person affected thereby, and an opportunity given them to be heard in the manner provided by law for the assessment of the cost and expense of establishing township ditches. If the improvement lies in two or more townships, the amount to be paid by each shall be apportioned according to the number of lineal feet of the improvement lying in each township."

Section 1209, General Code, provides:

"If a railway corporation owns in fee a strip of land by the side of the highway to be improved on which it operates a steam or electric railroad, the land lying immediately back of such strip shall be regarded and treated as abutting upon such highway for all purposes of abutting ownership, and both such strip and the land lying immediately back thereof shall be assessed as provided in the preceding section."

The answer to your first question depends on the ownership of the strip of land over which the Erie railroad is operated and which abuts on the highway now being improved. If the railroad company owns in fee the said strip of land, then, under the provision of section 1209, G. C., both the said strip of land and the land south of and abutting on said strip, should be assessed for a part of the cost and expense of said improvement in the manner provided by section 1208, G. C., as amended. If, on the other hand, the fee to said strip of land is not owned by said railroad company, the provisions of section 1209, G. C., are not applicable to your question, and said strip of land should be assessed according to the benefits accruing to the owner thereof the same as any other land abutting on said improvement, and the land south of and abutting on said strip of land would not be subject to an assessment for said improvement.

Assuming that the fee to the strip of land over which said Erie railroad is operated is in the railroad company owning said railroad, I am of the opinion, in answer to your second question, that under the provision of section 1208, G. C., as amended, the tracts of land, described in your letter and abutting on said strip of land, should be assessed for a part of the cost and expense of said improvement according to the benefits accruing to the owners of said lands and not according to foot frontage.

Respectfully,
EDWARD C. TURNER,
Attorney General.

405.

MAPS OF ELECTION PRECINCTS FURNISHED ONLY IN REGISTRATION CITIES—COST PAID FROM CITY TREASURY.

Maps of election precincts may be furnished and provided only in registration cities and the cost and necessary expense thereof is required to be paid from the treasury of such city upon vouchers of the board of deputy state supervisors of elections or the board of deputy state supervisors and inspectors of elections certified by its chief deputy and clerk on the warrant of the city auditor.

COLUMBUS, OHIO, May 24, 1915.

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

GENTLEMEN:—I acknowledge receipt of yours under date of May 14, 1915, as follows:

> "We would respectfully request your written opinion upon the following questions:
>
> "Are boards of deputy state supervisors of elections authorized to have maps made at the expense of the county?
>
> "Is the mention of maps as made in sections 4876 and 4878, General Code, only authorized to be used in registration cities, or are these sections broad enough to cover this question as to counties generally?"

The sections of the statutes referred to by you are as follows:

> "Section 4876. Subject to the control of the board, the clerk shall keep a full and true record of the proceedings of the board, file and preserve in its office all orders, rules and regulations pertaining to the administration of registration and elections, prepare and furnish, under the orders of the board, the registers, lists, books, maps, forms, oaths, certificates, instructions and blanks for the use and guidance of registrars, judges and clerks of elections and the board of canvassers; provide for timely furnishing of such officers therewith, and with the necessary supplies provided for them; to receive and keep close custody of the registrars and copies returned to such office, as herein provided, of records, papers and certificates of every kind relating to the office or administration of the board. He shall have the care of the ballot boxes while deposited at the office of the board, and perform such other or further duties pertaining to such office and affairs as are prescribed by the board.
>
> "Section 4878. The board of deputy state supervisors shall divide, define and proclaim the election precincts of such city and fix the boundaries thereof in the manner provided by law, and provide for furnishing to each registrar of electors and judges of elections a map and pertinent description of such divisions and boundaries and of changes which, from time to time, are made by them."

It will be observed that sections 4876, G. C., and 4878, G. C., were enacted in their present form prior to the codification of the statutory law of the state, April 23, 1904, 97 O. L., 193-194, in which act was first created in every county which contained a city wherein general registration of electors was required, a

board of deputy state supervisors and inspectors of elections, and conferred upon the same the powers theretofore exercised by the boards of deputy state supervisors of elections and city boards of elections in such counties; then follows in the same section the provisions now found in section 4876, G. C. In the succeeding section of the same act is found the provisions now incorporated in section 4878, G. C., stated thus:

> "They shall divide, define and proclaim the election precincts of such city, authorized in section two thousand nine hundred and twenty-six, and the boundaries thereof, and provide for furnishing to each registrar of electors and judges of elections a map and pertinent description of such divisions and boundaries, and of any changes which from time to time are made by them."

Section 2926, as above mentioned, referred only to cities in which registration was required. From the above it appears quite clear that the authority and requirement for maps is limited to registration cities. It will be noted that under section 4876, G. C., the clerk of the board is required to "prepare and furnish, under the orders of such board, all the registers, lists, books, maps, forms," etc., while under section 4878, G. C., the board is required to "provide for furnishing to each registrar of electors and judges of elections a map and pertinent description of such divisions and boundaries and of changes which, from time to time, are made by them."

Although the clerk is required to "prepare and furnish" under the orders of the board, registers, books and lists, it is not believed that this may reasonably be construed to mean that the clerk should actually make such books and registers, nor can it be maintained that the phrase "prepare and furnish" would have a different application to maps than to books and registers in the light of the provisions of section 4878, G. C., which require the board to "provide for furnishing" such maps.

The provisions of section 2926-d of the act of April 23, 1904, supra, were incorporated in section 4946, G. C., and were amended in 103 O. L., 545, to read as follows:

> "The additional compensation of members of the board of deputy state supervisors and of its clerk in such city hereinbefore specified, the lawful compensation of all registrars of electors in such city, the necessary cost of the registers, books, blanks, forms, stationery and supplies provided by the board for the purposes herein authorized, including poll books for special elections, and the cost of the rent, furnishing and supplies for rooms hired by the board for its offices and as places for registration of electors and the holding of elections in such city shall be paid by such city from its general fund. Such expenses shall be paid by the treasurer of such city upon vouchers of the boards, certified by its chief deputy and clerk, and the warrant of the city auditor. Each such voucher shall specify the actual services rendered, the items of supplies furnished and the price or rates charged in detail."

While the term "maps" is not found in this section, its provisions as to registers, books, blanks, forms and other supplies preclude any idea that under section 4876, G. C., the clerk is required to prepare and furnish these articles and supplies without expense to the board. From the above it quite clearly follows, therefore, that the making of necessary and proper maps in registration cities is

a proper item of expense to be incurred by the board to be paid either under authority of section 4821 or 5052, G. C., or under section 4946, G. C., above quoted.

Section 4821, G. C., provides that all necessary expenses of the board of deputy state supervisors shall be paid from the county treasury as other county expenses and section 5052, G. C., provides as follows:

> "All expenses of printing and distributing ballots, cards of explanation to officers of the election and voters, blanks, and other proper and necessary expenses of any general or special election, including compensation of precinct election officers, shall be paid from the county treasury, as other county expenses."

We have seen, however, that these maps are authorized and required only in registration cities and for use in the first instance or primarily in the registration of electors in the precincts thereof. The expense of such maps are then more properly incident to registration of electors than to the general supervision of elections or to the furnishing of ballots and supplies for general election purposes.

To answer your questions specifically, I am, therefore, of opinion that the board of deputy state supervisors of elections or deputy state supervisors and inspectors of elections, are authorized to furnish maps only in registration cities and that the expense thereby incurred should be paid from the city treasury in accordance with the provisions of section 4946, G. C., above quoted.

Respectfully,
EDWARD C. TURNER,
Attorney General.

406.

"URGENT NECESSITY"—CONSTRUCTION OF ITS MEANING IN SECTION 7623, G. C.—FAILURE OF BOARD OF EDUCATION TO COMPLY WITH REQUIREMENTS OF THIS SECTION RENDERS CONTRACT FOR CONSTRUCTION OF A SCHOOL BUILDING VOID.

If the facts in the particular case do not justify a finding of "urgent necessity" by the board of education of a school district within the meaning of section 7623, G. C., a failure on the part of said board to comply with the requirements of said section renders the contract for the construction or repair of a school building void.

COLUMBUS, OHIO, May 25, 1915.

HON. A. M. HENDERSON, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—I have your letter of May 11, 1915, which is as follows:

> "The board of education of Coitsville township, Mahoning county, has requested me to write you stating the following facts and submitting the following inquiry:
>
> "Along in the early spring of this year, the board advertised for bids for the furnishing of labor and material and construction of a school house in Coitsville township. A number of bids were submitted and the board attempted to take action upon the bids and passed a resolution to

let the contract to one they deemed to be the lowest and best bidder, but upon examination of the various bids I find that the bid of the bidder to whom the contract was attempted by the board to be let was not either in form or in substance a proper and legal bid. The certified checks deposited with the various bids having been returned, and it being necessary to readvertise for bids, causing a delay of at least thirty days, I have been requested to write you for advice as to whether or not this contract could be let as being one of 'urgent necessity' in view of the fact that if it is necessary to readvertise and secure further bidding, the building cannot be constructed in time for occupancy at the beginning of the September term of this year. The schools of this township are very much overcrowded and there is considerable doubt as to just what disposition to make of the students if the school house in question cannot be completed by the middle of September or the beginning of the fall term.

"My opinion in the matter is that this is not a case of 'urgent necessity' particularly in view of the action already taken in reference to the contract, but I am writing you for this opinion at the request of the board."

Section 7623, G. C., provides in part as follows:

"When a board of education determines to build, repair, enlarge or furnish a school house or school houses, or make any improvement or repair provided for in this chapter, the cost of which will exceed in city districts, fifteen hundred dollars, and in other districts five hundred dollars, except in cases of urgent necessity, or for the security and protection of school property, it must proceed as follows:

"1. For the period of four weeks, the board shall advertise for bids in some newspaper of general circulation in the district and two such papers, if there are so many. If no newspaper has a general circulation therein, then by posting such advertisement in three public places therein. Such advertisement shall be entered in full by the clerk, on the record of the proceedings of the board," etc.

You inquire whether, in view of the facts stated in your letter, you have a case of "urgent necessity" within the meaning of the above provision of the statute.

In the case of Mueller vs. Board of Education, 11 N. P. (n. s.) 113, the court in its opinion said:

"Urgent necessity is a very strong expression. It means more than convenience and more than ordinary necessity. It is something that requires immediate action. Something that cannot wait. When pleaded as an excuse for failure to comply with any statutory requirement it must be decided by the circumstances of the particular case in which it arises. An illustration of a case which might arise under the statute referred to would be where there is but a single school building of which a number of pupils would be prevented from occupancy for a considerable time, and left without any chance for instruction pending the construction or repair of such building."

While there is no general rule by which the term "urgent necessity" or the term "for the security and protection of school property" as used in the above

section, may be defined, and while each case must be determined upon its own facts and conditions, nevertheless, if the facts do not justify a finding of "urgent necessity" or that the "security and protection of school property" is at stake, a failure on the part of a board of education to comply with the requirements of said section would render the contract for the construction or repair of a school building, void.

From your statement of facts it is evident that at the time the board of education of Coitsville township rural school district by resolution determined that for the proper accommodation of the pupils of said district a new building should be constructed, the requirement of the statute that the board advertise for bids for a period of four weeks, could not have been dispensed with on the ground that the letting of the contract was a case of urgent necessity within the meaning of said statute.

In compliance with said requirement of the statute, the said board of education advertised for bids for the construction of said school building, several bids were received and the board attempted to award the contract to the lowest responsible bidder. It now appears that the bid accepted by said board and upon which it attempted to award said contract, is illegal and, the certified checks deposited with the various bids having been returned to the bidder, it now becomes necessary to readvertise for bids, causing a delay of at least thirty days, unless the requirement of the statute may now be waived on the ground that the letting of said contract is now a case of "urgent necessity" within the meaning of the saving provision of said statute.

While you state that if it is necessary to readvertise for bids the said building cannot be constructed in time for occupancy beginning with the fall term, that the schools of said township are overcrowded and that there is considerable doubt as to what disposition to make of the pupils, if the said school building is not completed by said time, it does not appear that any of said pupils of said district will be prevented from attending school because of the failure to complete said building by said time. On the contrary, I understand that said pupils will have practically the same accommodations at the beginning of said term as was had during the previous year and, while the schools of the district may be crowded and the pupils may be inconvenienced for a short time, it will be the duty of the board of education to make such arrangements for the reasonable accommodation of said pupils as will be possible under the circumstances, until such time as the new building will be ready for use.

I am of the opinion, therefore, in answer to your question, that the circumstances mentioned in your letter do not constitute a case of "urgent necessity" within the meaning of section 7623, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney General.

407.

SUPERINTENDENT OF PUBLIC WORKS—HAS AUTHORITY TO RENEW WATER LEASES—CONDITIONS IN LEASES ALONG MIAMI AND ERIE CANAL LEASED TO CITY OF CINCINNATI.

The superintendent of public works has authority to renew water leases on that part of the Miami and Erie canal leased to the city of Cincinnati under an act found in 102 *O. L.,* 168, *being sections* 14188-1 *to* 14188-8 *of the appendix to the General Code. It must be expressly provided in such leases that the same are made subject to the right of the city of Cincinnati to at any time and without previous notice begin the work of improving the leased property, and that at such time as the city has completed the outlet referred to in the first paragraph of section 2 of the act, or at such time as it becomes necessary for the city in the construction of such outlet to shut off the water in the canal, and without any notice, such leases shall terminate, and that the lessees shall not have any right against the city of Cincinnati to have said city construct a conduit to supply water to them, or any right to receive water from such a conduit when constructed.*

COLUMBUS, OHIO, May 25, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of April 21, 1915, relating to the renewal of contracts for the use of water from that part of the Miami and Erie canal leased to the city of Cincinnati.

In this communication you call my attention to a letter addressed by you to my predecessor, Hon. Timothy S. Hogan, on November 10, 1913, in which letter you called his attention to an act of the general assembly, passed May 15, 1911, and found in 102 O. L., 168, the act providing for leasing a part of the Miami and Erie canal to the city of Cincinnati as a public street or boulevard, and for sewerage and subway purposes. You especially directed attention in that letter to the second paragraph of section 2 of the act in question, which paragraph reads as follows:

> "And such permission shall be granted upon the further condition that said city shall adopt and construct appropriate works for the purpose of supplying water to the lessee users of said water along that portion of the canal to be abandoned, in order to and for the purpose of enabling the state fully to carry out and discharge the obligations now resting upon it by virtue of certain contracts now subsisting and in force between it and said lessee water users, during the remainder of the terms of said contracts, in the same quantity and under the same conditions and at the same rate of rental provided for in said contracts, and provided further that during the period of construction of a street or subway or of appropriate works for the purpose of supplying water to the lessee users of said water, as herein provided said city of Cincinnati shall cause no cessation or diminution of the supply of water to the said lessee water users to which they are entitled under their respective contracts or leases with the state of Ohio except in so far as such cessation or diminution of such supply of water may be absolutely necessary."

In your letter to Attorney General Hogan you further stated that the department of public works was placed in the position of supplying water which was being used by parties who had no longer a contract for the same and that it

would be a hardship to the said concerns to cut off their supply of water and that it appeared unnecessary so to do since enough water was being carried down the canal to supply them. You further stated in your letter that it seemed clear to you that the city of Cincinnati had no rights or interests in the disposal of the water, since one of the conditions of the lease was that the city should build suitable works for the conveying of the water for the purpose of its use and to enable the state wholly to discharge its obligations; that the city of Cincinnati had thus far done nothing toward carrying out these conditions, and that the state had maintained the banks on that section of the canal and repaired them at various times and was still maintaining said canal at considerable expense. You concluded your letter by observing that the auditor of the state of Ohio required contracts as the basis for collection for water rentals, that several contracts had expired and that the parties still wanted to use the water, and you then inquired as to the right of your department to make provisional contracts which might run for so long a time as the city of Cincinnati did not fulfill the conditions of its contract with the state of Ohio, these contracts to be provisional in a sense that at any time the city of Cincinnati fully complied with all the terms and conditions of the act, the said contracts should cease.

In your communication to me you further call my attention to the fact that on April 27, 1914, my predecessor, in response to your communication to him above referred to, rendered an opinion upon the matter in question, holding, in brief, that the superintendent of public works might renew leases for the use of surplus water along the part of the canal leased to the city of Cincinnati, subject to termination when the city constructed the works provided for in section 2 of the act, authorizing the making of the lease (102 O. L., 168), such leases to be entered into for definite terms, subject to termination as above stated.

You then state that after receipt of this opinion, you began the work of renewing contracts to water users, when the city of Cincinnati, through its legal department, raised objections and that as a result of these objections, you have only made oral agreements which run from month to month, and the water users are paying for the services at the same rate as that stated in the written agreements entered into with the board of public works, which written agreements have now expired. Attached to your communication are two letters directed to you by Hon. Walter M. Schoenle, city solicitor of Cincinnati, which you state you are forwarding to me for the purpose of giving me an idea of the city's contention in this matter. You now request my opinion on the proposition and with it a general statement of your duties and obligations in the matter.

An answer to your question involves a consideration of several of the provisions of the act referred to, 102 O. L., 168, being sections 14188-1 to 14188-8 of the Appendix to the General Code of Ohio. The first section of the act provides that permission shall be given to the city of Cincinnati, in the manner provided in the act, to enter upon, improve and occupy forever, as a public street or boulevard, and for sewerage, conduit and, if desired, for subway purposes, all that part of the Miami and Erie canal from a point 300 feet north of Mitchell avenue to the east side of Broadway, *but such permission shall be granted subject to all outstanding rights or claims, if any, with which it may conflict.* The first paragraph of section 2 of the act provides for the construction by the city of an outlet for the discharge of the water of the canal, so as not to obstruct the flow of water through the remaining part of the canal. The second paragraph of section 2 of the act has been quoted in full above and is the section which more particularly concerns the present inquiry. Subsequent sections of the act provide for the appointment of arbitrators to ascertain and fix the *actual value* of the property in question, and the annual rental to be paid by the city to the state is to be determined by calculating four per cent. of the value so fixed. Upon approval by

the city council of Cincinnati, of the valuation, and upon the governor being satisfied that the interests of the state are fully protected, and that the valuation placed upon the property is adequate, which fact shall be endorsed upon the lease by the governor, the governor is authorized to execute and deliver a lease to the city, the same to be for ninety-nine years, renewable forever.

The act contains a number of other provisions, with which we are not now concerned, but is silent as to certain important matters, leaving to construction to determine the rights of the parties to the lease. It may be observed in the first instance, that all the right, title and interest of the state passes under this lease, with the exception of the water in the canal. As to this water, the surplus part thereof is to be cared for by a suitable and sufficient work to be constructed by the city, which work will be used to convey this water by a route other and different from that which it now follows. As to water needed to supply lessees under contracts in force at the time the law was passed and still effective at the time the lease was executed, it is provided that the city shall adopt and construct appropriate works for the purpose of supplying water to these lessees of the state. It would seem clear that since the property leased was to be valued at its actual value, and since the rental to be paid by the city was to be calculated upon the full actual value, that the primary purpose of the second paragraph of section 2 of the act was not to provide for a continuous, permanent and additional income to the state, over and above the rental to be paid by the city, but that the purpose of this provision was to enable the state to deal honorably and fairly with its then lessees, by carrying out the contracts under which it had already bound itself to furnish certain quantities of water to them, and that the income to be derived by the state was only incidental, resulting from the desire and purpose of the state to keep faith with its lessee water users. This is apparent from the language used in the paragraph in question, to which language reference is hereby made, and it is also apparent that this construction was put upon the act by the then attorney general, who was directed by the act to prepare the lease and who, in dealing with this feature of the matter in the lease, used the following language:

> "The party of the second part shall adopt and construct such appropriate works for the supplying of water to lessee users of said water along that portion of the canal hereinbefore described as shall be necessary in order to and for the purpose of enabling the state fully to carry out and discharge the obligations which rested upon the state on May 15, 1911, and are still resting on it, by virtue of certain contracts which subsisted on May 15, 1911, and which are now subsisting and in force between it and said lessee water users, during the remainder of the terms of said contracts, in the same quantity and under the same conditions and at the same rate of rental provided for in said contracts, and provided further that during the period of construction of a street or subway or of appropriate works for the purpose of supplying water to the lessee users of said water, as herein provided, said party of the second part shall cause no cessation of diminution of the supply of water to the said lessee water users to which they are entitled under their respective contracts or leases with the state of Ohio, except in so far as such cessation or diminution of such supply of water may be absolutely necessary."

Nothing is said in the act as to the time within which, after the execution of the lease, the city must construct the improvements contemplated, and the act is also silent as to the subject matter of your inquiry, and upon the further questions of whether the city or the state is entitled to receive the water rentals from

the time of the execution of the lease to the time of the construction of the works referred to in paragraph 2 of section 2 of the act, as well as to whether the state or the city shall receive the water rentals after the construction of the works provided for in said paragraph. As a matter of fact, the property in question was appraised at $800,000.00, which appraisal was approved by the city council of Cincinnati and a lease was executed by the governor of Ohio on the 29th day of August, 1912, since which time the city of Cincinnati has been paying rental on said property at the rate of $32,000 per year, but so far the city has not undertaken to make any improvement on the property in question and the state is still in possession of the property and is charged with the care of the canal and its banks, and has been collecting the water rentals. I understand that the city of Cincinnati now has in contemplation a scheme of legislation, looking toward the improvement of this property. I also understand that when the city does take possession of the property in question and when it does begin work upon the scheme of improvement provided for by the act, then as a matter of fact and for obvious reasons the first thing that the city will have to do will be to construct the "suitable and sufficient works for a convenient outlet" referred to in the first paragraph of section 2 of the act in question. Not until this outlet is completed can the water of the canal or any part thereof be diverted from the present channel.

Having reference to the language used in paragraph 2 of section 2 of the act, to the effect that the city is to construct a conduit to supply lessee users of water *"in order to and for the purpose of enabling the state fully to carry out and discharge the obligations now resting upon it by virtue of certain contracts now subsisting and in force between it and said lessee water users, during the remainder of the term of said contracts"* and keeping in mind the fact that since the execution of the lease on August 29, 1912, the state has been receiving a rental calculated upon the full value of the property, it is my opinion that the superintendent of public works has no right to renew leases or to make any new leases of water from the leased portion of the canal, which leases would extend beyond the time when the city constructs the outlet provided for by the first paragraph of section 2 of the act in question. To hold otherwise would be to charge the city with the construction of a conduit for supplying water users other than those contemplated by the act. In any renewals of water leases which renewals are made from the time of the execution of the lease to the city until the time when the city elects to actually begin work upon its scheme of improvement, the superintendent of public works should be very careful to provide that these leases must terminate whenever the city has constructed the outlet referred to above, or whenever it is necessary for the city in the construction of said outlet, to shut off the water in the canal.

It must also be taken into consideration that until such time as the city elects to proceed under the lease and improve the property leased, in the manner specified in the act, the state of Ohio is charged with the custody and care of that part of the canal leased. If for no other reason, this is true by reason of the fact that the state has no other channel through which to conduct the water of the canal which water belongs to the state and is not leased to the city and no other way of serving its lessee water users than by causing the water to flow through the present channel. Being charged with this expense, it is not only fair that any revenue derived from water rentals should go to the state of Ohio, but also equally fair that the state should utilize to the fullest possible extent any surplus water in this part of the canal, and that until such time as the city elects to construct an outlet for the water of the canal, the superintendent of public works has the right to renew expiring leases, the renewal leases to be subject to termination not when the city has completed all the works provided for

in the act, but at any time when the city has completed the outlet provided for by the first paragraph of section 2 of the act, or when it becomes necessary for the city in the construction of such outlet, to shut off the water in the canal.

In the making of these leases, in order to avoid any future misunderstanding and possible litigation between the state, the city and the lessee water users, it should be expressly provided and stipulated that such leases are made subject to the right of the city of Cincinnati to, at any time, without previous notice, begin work upon the improvements in question, and that at such time as the city has completed the outlet referred to in the first paragraph of section 2 of the act, thereby making it possible to divert the water of the canal from the present channel, or at such time as it becomes necessary for the city in the construction of such outlet, to shut off the water in the canal, and without any notice, such leases shall terminate and that all rights of the lessees to receive water from the canal shall then cease and that such renewal leases shall not confer upon the lessees any right against the city of Cincinnati to have said city construct the conduit for the purpose of supplying water to said lessees, or any right in said lessees to receive water from such conduit when constructed. If desired by you, I will be glad to prepare a form of lease that will fully protect the rights of all parties concerned. This method of renewing leases will afford an income to the state so long as it is charged with the custody and care of this part of the canal, and at the same time will afford full protection to the rights of the city whenever it begins the actual work of improving the leased property.

Respectfully,
EDWARD C. TURNER,
Attorney General.

408.

AMENDED SENATE BILL NO. 125—AMENDMENT TO SECTION 226 AS SUBMITTED CONFERS AUTHORITY UPON HIGHWAY DEPARTMENT TO SELL OR EXCHANGE OLD AND BROKEN TOOLS AND EQUIPMENT.

An amendment to section 226 of amended senate bill No. 125 as submitted by the state highway commissioner, if enacted into law, will confer authority upon the state highway commissioner to sell or exchange tools and equipment that have become broken, worn or otherwise unfit for the use of the highway department.

COLUMBUS, OHIO, May 26, 1915.

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

DEAR SIR:—I have your communication of May 25, 1915, which reads as follows:

> "I have your opinion stating that under the provisions of the Hite law, the state highway commissioner is not authorized to sell broken and worn out tools and equipment belonging to the state highway department.
>
> "As indicated in my letter to you of May 8th, this is a matter of importance to the department as the care of useless equipment is quite a burden, and it will not be practicable to store the same for various reasons, and I have thought it of sufficient importance to suggest to the conference committee having in charge the new highway code, the advisa-

bility of inserting a provision authorizing the sale or exchange, when necessary, of such equipment, by inserting after section 226 of the Cass bill, the following language:

" 'The state highway commissioner may sell tools and equipment of any kind purchased for the use of the state highway department, which tools and equipment have become broken, worn, or otherwise unfit for the use of the department, the sums realized from the sales thereof to be turned into the state treasury to the credit of the state highway improvement fund. He may exchange such broken, worn, or otherwise unfit tools and equipment for such other tools and equipment as the interests of the highway department require, for the use of said department. He shall make an annual report of such sales or exchanges to the governor, stating the articles sold or exchanged, and the prices fixed therefor.'

"However, before submitting this to the conference committee, I wish to secure your opinion as to whether or not the language used is apt and whether it will accomplish the desired purpose.

"I understand the legislature is to meet again on Wednesday of this week, and will, therefore, appreciate it if you will give this matter your preferred attention, furnishing me with your opinion Wednesday, if possible."

I have examined the proposed addition to or amendment of section 226 of amended senate bill No. 125, and it is my opinion that if the language suggested by you be added to said section and the same enacted in the law, the result will be to confer upon the state highway commissioner authority to sell or exchange tools and equipment that have become broken, worn and otherwise unfit for the use of the highway department. As I understand the situation, that is the purpose which you desire to accomplish in suggesting this amendment to the proposed highway code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

409.

KENT STATE NORMAL SCHOOL—APPROVAL OF CONTRACT FOR POWER HOUSE.

The contract for the power house at the Kent State Normal School, including coal bins and tunnel connections, as a part of the heating plant and equipment, awarded to Robert H. Evans and Company, is regularly and legally executed and thereby approved.

COLUMBUS, OHIO, May 26, 1915

PROF. JOHN E. MCGILVREY, *President of Kent State Normal School, Kent, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your favor of May 24th, relative to the letting of contract for the power house, including coal bins and tunnel connections, which is as follows:

"In connection with the letting of the contract for the power house

including coal bins and tunnel connections as a part of the heating plant and equipment provided for in the short appropriation bill, you will please find the following enclosures:

"1. Contract with R. H. Evans and Company, including bond;

"2. Proposals of E. H. Walker, Canton, Ohio; Cleveland Fireproof Construction Company, Cleveland, Ohio; R. H. Evans & Company, Columbus, Ohio;

"3. Affidavits of Cleveland Leader, Cleveland, Ohio; Cincinnati Times-Star, Cincinnati, Ohio; Toledo News-Bee, Toledo, Ohio; Columbus Dispatch, Columbus, Ohio; Kent Courier, Kent, Ohio;

"4. Resolution from the minutes of the board of trustees.

"Work on this power plant should begin at the earliest possible date since the use of our building next winter is conditioned upon its completion this summer. We shall appreciate it much if you will pass upon the legal questions involved promptly and communicate with us at the earliest possible date."

Together with your letter and the enclosures mentioned therein you forwarded a copy of the resolution from the minutes of the board of trustees of the meeting under date of May 22, 1915, which is as follows:

"Moved by Mr. Doyle, seconded by Mr. McDowell, that as R. H. Evans and Company is the lowest and best bidder in their proposal for the construction of the power house and tunnel connections to be erected at the Kent state normal school, the board of trustees of the Kent state normal school hereby award to R. H. Evans and Company the contract for the construction of said building on their bid of $59,869.00."

You also enclose a copy of the contract signed by Robert H. Evans and Company, contractors, by Robert H. Evans, and the board of trustees: Edwin F. Moulton, president; John A. McDowell, secretary, and Peter W. Doyle.

The contract referred to, in article 1, provides as follows:

"Article 1. The contractor under the direction and to the satisfaction of the board of trustees, their superintendent, and George F. Hammond, architect, acting for the purpose of this contract as agent of said owner, shall and will provide all material and perform all work mentioned in the specifications or shown on the drawings as prepared by said architect, for the construction and completion of the power house, including coal bins and tunnel connections, for the Kent state normal school; the stacks to be 125 feet high; common brick to be substituted for glazed brick except in engine room; outside, brick substituted for all stone except sills and coping; mechanical department finished as one room; cement substituted for composition floor; all retaining walls to be omitted.

"These drawings and specifications are identified by the file in the office of the auditor of state."

It is further provided in article 6 that the contractor is to complete all the work contemplated by this contract by October 1, 1915, and,

"Upon failure to have all work fully completed by the date above mentioned the contractor shall forfeit and pay or cause to be paid to the owner, the sum of fifteen ($15) dollars per day for each and every day

thereafter the said work remains in an unfinished condition, for and as liquidated damages, and to be deducted from any payments due or to become due to said contractor."

Article 9 of the contract provides as follows:

"It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and material shall be the sum of fifty-nine thousand eight hundred and sixty-nine dollars ($59,869.00) subject to eliminations or additions as provided for in the proposal subject to additions and deductions as hereinbefore provided, and that such sum shall be paid in current funds by the owner to the contractor in installments as follows:

"Upon estimates issued by the architect about once a month as long as the work progresses. Said estimates to call for payments in accordance with the state law governing public buildings, provided, however, that nothing in this contract shall be construed to create an obligation or incur a liability against the state in excess of the appropriation made for the power house, coal bins and tunnel connections being a part of the heating plant and equipment for the Kent state normal school during the year of 1915, payments shall be made on all suitable materials furnished and delivered at the building site less fifty per cent.; provided, always, that all material delivered on the grounds and on which estimates have been based, is to become the property of the state and shall not be removed from the premises; the said fifty per cent. to be reserved until said material is in place in the building; and also payments on the material and work in place less five per cent. to be retained until the building shall have been completed and accepted by the party of the second part. The final payment shall be made within thirty days after the fulfillment of this contract. All payments shall be made upon written certificates of the architect to the effect that such payments are due.

"If at any time there should be any evidence of any lien or claim for which, if established, the owner of the said premises might become liable and which is chargeable to the contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due, an amount sufficient to completely indemnify him against such claim or lien. Should there prove to be any such claim after all the payments are made, the contractor shall refund to the owner all monies that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the contractor's default."

An examination of the proposals submitted discloses the fact that the total bid of the Robert H. Evans & Company amounts to $71,953.00, with an addition of $700.00 for an alternate bid, and a deduction amounting to $12,784.00 for an alternate bid such as has been specified in the contract, leaving the net bid amounting to $59,869.00, the amount specified in the contract. The bid of E. H. Walker, of Canton, Ohio, after making the additions and deductions on account of alternate bids, amounts to $64,490.00; while the bid of the Cleveland Fireproof Construction Company, after making the deductions on account of alternate bids, amounts to $77,647.00.

I find that the plans and specifications have been deposited with the auditor of state, that the notice of the time when, and the place where, sealed proposals would be received has been carefully carried out, and that the contract is in reg-

ular and proper form, and accompanied by a bond of the American Surety Company of New York in the sum of forty thousand dollars duly executed and attached to the contract.

It is my opinion, therefore, that inasmuch as the legal requirements have been met as to the advertising and the letting of the contract, and that the Robert H. Evans Company is the lowest and best bidder in their proposal, and that the bid of that company has been accepted by the board of trustees of the Kent state normal school and the contract awarded to it, the same should be and has been approved by the undersigned.

I return herewith the copies of contract and bond, together with the proposals submitted and the affidavits showing publication in the various newspapers referred to in your letter.

In view of the urgency stated in your letter, I am sending this approval at once rather than to retain it until I secure for my files a copy of the contract, and it is sent you with the understanding that immediately upon receipt of this letter you will forward to me a duplicate copy of the contract for the files of this office.

Respectfully,
EDWARD C. TURNER,
Attorney General.

410.

AMENDED HOUSE BILL NO. 414—LIMITATIONS UPON CITIES AND VILLAGES INCURRING INDEBTEDNESS—LIMITATIONS UPON LEVYING OF TAXES BY TAXING DISTRICTS GENERALLY FOR CURRENT EXPENSES.

COLUMBUS, OHIO, May 26, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—You have handed to me amended house bill No. 414—Mr. Jackson, with notes showing the insertion of numerous amendments which have not yet been printed but which have been incorporated in the bill. You ask me to advise you generally as to the effect of the bill.

I have previously prepared two opinions relative to this bill in different stages of its consideration by the general assembly, one to Hon. A. R. Garver, chairman of the senate taxation committee, and one to yourself; but as the bill has been substantially changed since these opinions were prepared, I deem it proper, in the interest of clearness, to disregard both of these opinions and to take up the various features of the bill anew in this opinion.

The bill affects two main subjects, viz.: The limitations upon the incurring of indebtedness by municipal corporations and the limitations upon the levying of taxes by taxing districts generally for current expenses. While these two subjects are practically related to each other, it will be convenient, I think, to observe the distinction between them, and to state that the amendments of sections 3941, 3942 and 3949 of the General Code in the bill do not in any way, as at present found in the bill, *directly* affect the tax limitations; whereas the amendment of section 5649-2, as at present found in the bill, does not in any way *directly* affect the debt limitations.

In order to express clearly the full effect of each class of proposed amendments it is advisable, I think, to make a general statement as to the state of the

law now in force; then by comparing therewith the state of the law as it would be if the bill should be enacted in the form in which it has been presented to me, the exact purport and effect of the bill can be apprehended.

First, with respect to the debt limitations: The present sections of the General Code, which go by the name of the "Longworth act" (although as a matter of fact the original Longworth act of 1902 was repealed in 1911 and an entirely new law was then substituted therefor) are sections 3939 to 3954-1 of the General Code. Without quoting these sections as they are found in the General Code, I may say that for the purpose of the comparison which is to be made they may be said to have the following effect:

The group of related sections, which for convenience will be hereinafter designated as the present "Longworth law," begin by authorizing the council of a municipal corporation, by a two-thirds vote, to issue and sell bonds for certain specific purposes which are enumerated. This authority, however, is coupled with a restriction upon the total indebtedness which may be thus created in any one fiscal year, the limitation being one per cent. of the tax duplicate of the municipality. There is also a further restriction upon the net indebtedness which may be incurred by the council under the authority of the present Longworth act and the original Longworth act, which at present is two and one-half per cent. of the tax duplicate of the municipality. In other words, under the present law, the council of a municipal corporation without the authority of the electors may, by a two-thirds vote, incur bonded indebtedness for any of the purposes mentioned in the act, provided that there is not thereby incurred in any one year an aggregate indebtedness exceeding one per cent. of the tax duplicate of the municipality; and provided further that the incurring of a particular indebtedness will not so increase the net indebtedness of the municipality as to cause the latter to exceed two and one-half per cent. of such tax duplicate.

In order to understand fully the scope and effect of the present one per cent. and two and one-half per cent. limitations, however, certain qualifications must be made. The one per cent. limitation, as stated, applies to the total indebtedness; the two and one-half per cent. limitation applies only to the "net indebtedness." The "net indebtedness" as distinguished from the "total indebtedness" is defined as being the difference between the par value of outstanding and unpaid bonds and the amount held in the sinking fund for their redemption.

Again, the present law excepts certain bonds from computation or consideration in ascertaining and applying both these limitations; such bonds being those issued prior to April 29, 1902, or to refund bonds so issued; bonds issued in anticipation of the collection of special assessments; for the payment of obligations arising through emergencies caused by epidemics, floods, etc.; bonds issued to meet deficiencies in the revenues; under authority of a vote of the people as provided in section 3931 of the General Code; and bonds issued for the purpose of purchasing, constructing, improving and extending waterworks when the income from such waterworks is sufficient to cover the cost of all operating expenses, interest charges and to pass a sufficient amount to a sinking fund to retire such bonds when they become due.

Summing up, then, as to the power of council without a vote of the people to incur bonded indebtedness under the present Longworth act, the following further statement of the effect of such law in this particular may be made:

Council without a vote of the people may issue bonds to refund bonds representing indebtedness created or incurred prior to April 29, 1902, subject to no limitation whatever. Likewise subject to no limitation upon bonded indebtedness, such council without such vote may issue bonds in anticipation of the collection

of special assessments, for the payment of obligations arising through emergencies caused by epidemics, floods, etc., and for the purpose of purchasing, constructing, improving and extending waterworks when the income from such waterworks is sufficient to cover the cost of all operating expenses, interest charges and to pass a sufficient amount to a sinking fund to retire them when they become due.

Council may also without a vote of the people issue bonds for any of the other purposes specified in the law in an aggregate amount, for all purposes, not exceeding one per cent. of the tax duplicate in any one year; provided that in the issuance of any bonds without a vote of the people the council does not cause the net indebtedness, representing the difference between the amount of the bonds outstanding at the particular time and the amount held in the sinking fund for their redemption, to exceed two and one-half per cent.; except that in ascertaining the amount of the net indebtedness outstanding, bonds which were issued prior to April 29, 1902, or to refund bonds so issued, or bonds issued in anticipation of the collection of special assessments, for the payment of obligations arising through emergencies, those issued to meet deficiencies in the revenues as provided in section 3931 of the General Code, and those issued for the purpose of purchasing, constructing, improving and extending waterworks when the income from such waterworks satisfies the requirements above expressed, are not to be counted.

With the above exceptions, however, all bonds issued by the council under the authority of the present Longworth act and its predecessor, the original Longworth act, outstanding at any one time, or, to be more exact, the difference between the total par value of such outstanding bonds and the amount held in the sinking fund for their redemption at such time, enter into and are to be counted in ascertaining such two and one-half per cent. limitation.

But under the present law the council has independent power to submit any bond issue, large or small, and whether otherwise required by the operation of the debt limitations to do so or not, to a vote of the electors. There is no limitation upon the amount of bonded indebtedness that may be incurred by a vote of the electors in any one year as such, the only limitation upon the incurring of bonded indebtedness by a vote of the electors is that in no event may the net indebtedness incurred by the municipality, that is, either by the council itself or by the vote of the electors, exceed five per cent. of the tax duplicate thereof. This limitation of five per cent. on the net indebtedness which may be created by a vote of the electors is arrived at, that is to say, by counting bonds outstanding at any one time, whether issued by the council itself or by the vote of the electors. Otherwise, it is defined like and subject to the same exceptions as the net indebtedness limitation of two and one-half per cent. applicable to the issuance of bonds by the council without a vote of the people. For a full definition of the scope and effect of the five per cent. limitation I refer you to the description which I have given of the two and one-half per cent. limitation, which applies as well to the five per cent. limitation, except that bonds issued by a vote of the people are not counted in ascertaining the two and one-half per cent. limitation, but are counted in ascertaining the five per cent. limitation.

Recapitulating then, the present Longworth act authorizes the council of a municipal corporation without a vote of the people to incur bonded indebtedness in any amount, for any purpose, subject only to the restriction that the total amount for all purposes incurred in any one year without a vote of the people must not exceed one per cent. of the tax duplicate, and the net amount of indebtedness which may be outstanding at one time by the act of the council without a

vote of the people may not exceed two and one-half per cent. of the tax duplicate, such limitations of one per cent. and two and one-half per cent. being defined in the manner above described. With the vote of the people, however, a municipality may incur an indebtedness of any amount in any year, for any and all purposes, subject only to the restriction that the net indebtedness of the municipality created under the act, whether by vote of the people or without a vote of the people, may not at any time exceed five per cent. of the tax duplicate of the municipality, such five per cent. limitation being defined in the manner above described.

The foregoing are the limitations of the present Longworth act, so called. It would not be accurate, however, to suppose that bonds may be issued by municipal corporations only under the Longworth act. That law is intended primarily to limit the power of a municipality to incur general tax duplicate obligations. It is not even certain that its limitations do apply to all such bonds, though this may be assumed for present purposes. But the Longworth act does not in any way limit the independent authority of a municipal corporation to incur indebtedness under article XVIII, sections 10 and 12 of the constitution, which authorize the issuance of mortgage bonds constituting a lien against specific property, and not being a liability of the municipality as such in the sense that its general tax duplicate is pledged for the payment thereof.

One other matter should be mentioned in connection with the state of the existing law: The two and one-half per cent. and five per cent. limitations, above referred to, were originally four per cent. and eight per cent., respectively. When the Smith one per cent. law was passed and in anticipation of large increases in tax valuations through the instrumentality of that law and the 1910 quadrennial appraisement of real estate, it was deemed advisable to reduce these limitations to two and one-half per cent. and five per cent., respectively. This was done by providing in sections 3941 and 3946 of the General Code for limitations of four per cent. and eight per cent., respectively, and then providing in sections 3952 and 3954-1 for a reduction of these limitations on and after the first day of October, 1911, to two and one-half per cent. and five per cent., respectively.

This last statement brings me directly to the first change which amended house bill No. 414 makes in the existing law. This is effected by repealing sections 3948, 3952 and 3954-1 of the General Code, and putting the two and one-half per cent. and five per cent. limitations in amended section 3941. That is to say, the amendments of section 3941 in the bill do not effect in reality any substantial change in the law, but are merely made in the interest of clearness of expression and constitute rather codification than amendment in the exact sense.

In this connection, however, I point out that the words "except as may be otherwise specifically provided by law," which, I observe, have been added at the end of amended section 3941, are not in the present law. I do not believe that this phrase is necessary. Whether or not it weakens the section, I have been unable to determine in the limited time which has been given for the consideration of the bill. In my judgment, however, this language, inasmuch as it creates a doubt as to the interpretation of a provision that otherwise would be clear, ought not to be incorporated in the section.

But if section 3941 as amended in the bill is in substance merely a codification of the present law, other provisions of the bill constitute radical changes. The first important thing that should be mentioned is disclosed by the repealing clause, section 3 of the bill, which repeals section 3940 of the General Code. The effect of this repeal is to abolish the one per cent. limitation on the amount of bonds which may be issued by the council in any one year without a vote of the people. By referring to my discussion of the state of the existing law you will observe

the effect of such a change. However, the change is not as far reaching in this particular as would otherwise be the case because of the provisions of amended section 3942 as carried in the bill.

Under section 3942 as amended in the bill, instead of council being authorized to incur bonded indebtedness for any particular purpose without limitation, except with respect to the aggregate amount incurred in any one year or the net amount outstanding at any one time, the rule is reversed and council is *prohibited* from incurring any bonded indebtedness, except as therein provided, without a vote of the people. In other words, the first great difference between the present Longworth law and the law as it would be if house bill No. 414 as amended should pass and become effective lies in the fact that under the former the submission of a bond issue to a vote of the people is, in a sense, the exception, while under the latter it is in the same sense the rule; under the former it is optional for council to submit a given bond issue to a vote of the electors, the only compulsion to do so resulting from the operation of certain limitations upon the aggregate amount of indebtedness which the council may incur, while under the latter submission to a vote of the people is *compulsory* as to all issues except those specifically mentioned in the section.

Before analyzing section 3942 as amended by the bill, then, it may be stated that its effect will make it more difficult for a municipal corporation to issue bonds, in that in a greater number of cases than under the present law submission to a popular vote will be required. I should state here, of course, that under other sections of the Longworth law which are not amended by the bill, two-thirds of the electors voting at the election upon the question of issuing bonds must vote in favor thereof in order to authorize their issuance.

The purposes for which indebtedness may be incurred by the council without a vote of the people are as follows:

> "(a) For the payment of obligations arising from emergencies resulting from epidemics or floods or other forces of nature.
>
> "(b) In anticipation of the collection of special assessments and for the purpose of paying the municipality's part of the cost and expense of improvements for which special assessments are levied; and for water-works improvements or extensions.
>
> "(c) To refund or extend the time of payment of bonds issued prior to January 1, 1913.
>
> "(d) To purify the sewage and the public water supply in obedience to orders of the state board of health issued prior to the passage of the act."

This provision as it now appears in the bill is inconsistent with the Bense act, which provides that when the state board of health requires a municipal corporation to purify its sewage or public water supply, council shall provide the necessary funds and in so doing may issue bonds up to five per cent. of the tax duplicate without submitting the question to any vote. The effect of adding the language "issued prior to the passage of this act" to paragraph "d" of section 3942, as amended, is to make it possible for one-third of the electors of a city or village to veto the orders of the state board of health.

> "(e) Mortgage bonds secured only upon the property and revenues of a public utility."

If this provision had been left out altogether it might, and I think would,

follow, nevertheless, that the act would not apply to the issuance of such mortgage bonds in such a way as to require their submission to a vote of the people. However, it is proper to make some such exception for the sake of clearness. The language of paragraph "e" of section 3942, as amended, leaves much to be desired. It is evidently designed to make it clear that mortgage bonds are not to be subject to a vote of the people. If that is its intent its scope is too narrow in the following particulars:

(1) Mortgage bonds secured upon the property and revenues of a public utility are not the only kind of mortgage bonds which may be issued by a municipality under the home rule amendment. Section 10 of article XVIII authorizes a municipality appropriating or otherwise acquiring property for public use to acquire in furtherance of such public use an excess over that actually to be occupied by the improvement and to sell such excess with such restrictions as shall be appropriate to preserve the improvement made. In furtherance of such a purpose the section provides that

> "Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law."

It will be observed that this class of mortgage bonds is not mentioned in paragraph "e" of section 3942 as amended.

(2) Public utility mortgage bonds are provided for by section 12 of article XVIII, which provides that the same shall be secured not only upon the property and revenues of the utility, but also "a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure." It is expressly provided in section 12 that public utility mortgage bonds may be issued beyond the general limit of bonded indebtedness prescribed by law.

Now, paragraph "e" of section 3942 as amended by house bill No. 414 is not a limit on bonded indebtedness; so that the self-executing provisions of the constitution removing debt limitations does not have the effect of making said paragraph "e" unconstitutional. That is to say, in spite of the language of sections 10 and 12 of article XVIII it would be competent for the general assembly to provide as to non-charter cities that mortgage bonds could be issued only upon a vote of the people, because sections 10 and 12 of article XVIII of the constitution do not prescribe what authority shall issue such mortgage bonds on behalf of the municipal corporation.

Therefore, even though it might be contended with some show of reason that paragraph "e" of section 3942 as amended is wholly unnecessary in the Longworth act, which is designed principally to limit general tax duplicate obligations, and would probably be construed as not applicable to the issuance of mortgage bonds, yet if any mention is to be made therein of mortgage bonds the language of the section should be consistent with the constitution. That is, if *any* mortgage bonds are to be made specifically exempt from the requirement of submission to popular vote, *all* mortgage bonds which a municipality may issue under the constitution should be made exempt.

"(f) In addition to the foregoing specific kinds of bonds, the is-

suance of which need not be authorized by a vote of the people, it is provided that for any of the purposes mentioned in sections 3939 and 3939-1 of the General Code bonds may be issued without a vote of the people, in an amount not exceeding one-twentieth of one per cent. of the tax duplicate in any one year, and not exceeding $75,000 in any one year, ' as may be otherwise specifically provided by law, for the purposes in each subdivision as numbered in sections 3939 and 3939-1 of the General Code.' ''

The apparent purpose here is to authorize an exception to the general rule that all bonds must be submitted to a vote of the electors, by permitting an aggregate indebtedness of one-twentieth of one per cent. to be incurred without a vote in any one year, subject to the proviso that not to exceed $75,000 for any one of the purposes mentioned in the Longworth act may be issued without a vote of the people in any one year. If this is the case, the intention is very awkwardly expressed. The language which I have quoted from paragraph ''f'' of section 3942, as amended, is almost meaningless. For example, the phrase ''as may be otherwise specifically provided by law'' certainly adds nothing to the section and tends merely to inject confusion. The phrase ''for the purposes in each subdivision as numbered in sections 3939 and 3939-1 of the General Code'' is evidently intended to convey the meaning that not more than $75,000 of indebtedness may be created under any one of the paragraphs of either of the two sections referred to in any one year. This would probably be the meaning which would be given to it by the courts. I am satisfied, however, that this phrase could be made clearer.

Though there are other provisions in section 3942 as amended by the bill which require attention and comment, it will be helpful to summarize at this point for purpose of comparison with the existing law. The amended section has the effect, as stated, of requiring all bond issues to be submitted to a vote of the people with certain exceptions. The rule then is that whenever council of a municipal corporation desires to issue bonds for any purpose whatever, except for the payment of emergency obligations, in anticipation of the collection of special assessments or for the municipality's part of the cost of improvements for which special assessments are levied, for waterworks improvements or extensions, to refund or extend the time of payment of bonds issued prior to January 1, 1913, for Bense act bonds ordered prior to the passage of the act, or mortgage bonds secured only upon the property and revenues of a public utility, and when the amount of such bonds, together with the amount of those theretofore issued in the given calendar year will exceed one-twentieth of one per cent. of the tax duplicate, or together with the bonds theretofore issued in the same year under the same paragraph of sections 3939 and 3939-1 will exceed $75,000, it *must* submit the proposition to the electors, who must approve it by a two-thirds vote.

This provision is a substitute for the one per cent. limitation of the present Longworth law, which the bill repeals. That is to say, all bonds mentioned in the subordinate paragraphs of section 3942 in the bill as exceptions to the general rule requiring submission to the electors may be issued with reference only to the two and one-half per cent. limitation; so that there is no limitation upon the amount of bonds to pay the municipality's part of the cost and expense of improvements for which special assessments are levied, bonds for the payment of obligations arising from emergencies resulting from epidemics or floods or other forces of nature, bonds issued for waterworks improvements or extensions, bonds to refund or extend the time of payment of bonds issued prior to January 1, 1913,

bonds issued under Bense act orders made prior to the passage of the act and mortgage bonds secured only upon the property and revenues of a public utility which may be issued in any one year.

The two and one-half per cent. limitation, however, except as modified by amended section 3949, which will hereinafter be considered, continues to have the same effect which it always had. In other words, the requirement of section 3942, as amended, with reference to the submission to a vote of the people is independent of the present limitation of two and one-half per cent. So that it would be possible under the bill for the council of a municipal corporation to be required practically to submit a bond issue to a vote of the people because of the operation of the two and one-half per cent. limitation of the law, without regard to the exemptions in the subordinate paragraphs of section 3942, as amended by the bill; although the converse of this proposition is not true, in that the requirement of section 3942 that all bond issues, except those specifically enumerated, shall be submitted to a vote, is in no wise dependent upon the operation of the two and one-half per cent. limitation. So that in a given case submission to a vote would be required by section 3942 even though the general debt limitations would be in no wise endangered by the proposed issue.

I think I should point out that the bond issues specifically excepted from the rule requiring submission to the electors are, broadly speaking, those which are current as distinguished from those which involve embarking upon a substantially new enterprise. Moreover, the amount limitations of paragraph "f" of the section are so low as to preclude any substantial new enterprise from being undertaken without a vote. In this connection, I point out that under the existing law and constitution no new enterprise, great or small, could be foisted upon the people of a municipality by the council thereof without the consent of the former. The referendum powers reserved to the people prevent this. The difference, however, between the referendum and the limitations of the Longworth act is that the former requires the affirmative vote of a majority merely of the electors voting on the proposition in order to support an affirmative action; whereas the latter requires the concurrence of two-thirds of those voting on the proposition in order to support such action.

In this respect, too, a very nice question is raised as to the interpretation of the Longworth act as it would be amended by house bill No. 414 in connection with the initiative provided for by general statute and expressly reserved by article II, section 1-f of the constitution.

This question is too complicated to discuss fully here. I point out the difficulties that might arise by instancing a possible case: Let me suppose that citizens desiring an improvement involving the issuance of bonds circulate initiative petitions for the issuance of bonds and secure the holding of a special election, at which a majority of the votes cast on the proposition are in favor of it, though fewer than two-thirds of the electors so voting concur. That is, suppose the assumed facts to exist under house bill No. 414 as amended, should it become a law. I would not undertake at this time to prophesy the result. It will be observed, however, that section 3942 as amended prohibits bonds being issued except on the approval of the electors in the manner provided in sections 3943 to 3947 of the General Code. This means that no bonds shall be issued (with the exceptions therein enumerated) except upon the passage of a resolution by council fixing the time of an election at which the approval of two-thirds of the electors is to be secured. It means also, if it is to be given any effect whatever, that no bonds or notes shall be issued in any other manner. This is inconsistent with the initiative and referendum statutes and possibly, too, with the constitutional provision above cited.

There is some doubt as to the effect of the initiative and referendum upon the present Longworth law, but there is no such negative provision in the present Longworth law as there is in section 3942 as incorporated in the bill. An extreme consequence of this possible condition of affairs would be a holding that amended section 3942 is unconstitutional. A less extreme conclusion, but one fraught with ridiculous consequences, would be a holding that one election would have to be held on the ordinance authorizing the issue and sale of the bonds or notes, a majority being necessary to enact the ordinance, and another and separate election would have to be held to secure the approval of two-thirds of the electors. This latter conclusion is consistent with the exact phraseology of section 3942, which assumes that an ordinance authorizing the issue and sale of bonds is to be passed as an ordinance, but is not to take effect until the question is submitted to the electors and approved by two-thirds of those voting.

In addition to the features of section 3942 as amended in the bill to which attention has been called, the following deserve consideration:

(1) In the first place, the present Longworth act applies only to the issuance of bonds; that is to say, the limitations of one, two and one-half and five per cent. do not apply to other securities or evidences of indebtedness issued by a municipal corporation or its council. Section 3942 as amended by the bill, however, prohibits the issuance without a vote of the people not only of bonds, but also of *notes*. The original bill also included *certificates of indebtedness*, but mention of these securities has been stricken out of the bill by amendment, and it may be assumed, I think, that "certificates of indebtedness," in so far as they are to be distinguished from "notes" are not within the purview of the section.

The only "certificates of indebtedness" so called which are authorized to be issued by municipal corporations generally are those provided for in section 3913 of the General Code (repealed by the bill) which affords a means of borrowing money in anticipation of the general revenue fund in any fiscal year. The notes which a municipal corporation may issue are those provided for by section 3914, which provides for borrowing money in anticipation of special assessments, and those provided for by section 3916, which authorizes a municipality to borrow money for the purpose of extending the time of payment of any indebtedness.

The special assessment notes are evidently not contemplated by section 3942 as amended, because they are excepted from its scope by paragraph "b" thereof, which has been referred to. Therefore, the only "notes" which by virtue of section 3942, as amended by the bill, may not be issued without the authority of a vote of the people, two-thirds of those voting concurring therein, are the notes which may be issued under section 3916.

The effect, therefore, of section 3942 as amended by the bill in this particular is to make the power of a municipal corporation to extend the time of payment of an unfunded debt contingent upon the approval of two-thirds of the electors voting on the proposition. This seems to be a very impolitic result. Municipalities sometimes suffer large judgments in damage cases. Such judgments are primarily a charge against the sinking fund, but in many instances the sinking fund is not able to provide for the payment of them. In such event section 3916 is the only means whereby the obligation may be met. To make the power to meet such an obligation in this convenient way dependent upon the approval of two-thirds of the electors is both cumbersome and dangerous.

This view of section 3942 as amended by the bill suggests other consequences that flow from the broad language used in the opening paragraph thereof. Without the word "notes" therein and without certain of the exceptions, such as that respecting mortgage bonds and that respecting Bense act bonds, it might be argued with great force that because of the position of the section in the Code

the prohibition against the issuance of bonds without a vote of the people is limited to bonds issued for the specific purposes mentioned in section 3939, and such bonds only.

But having regard to the section as a whole, the above features of it in particular, and, what is most important, to paragraph "c" of the exceptions, it appears that the section is certainly broader in scope than the remainder of the act. That is to say, whereas the present Longworth law authorizes the issuance of bonds for certain specific purposes and imposes limitations upon the issuance of bonds for such purpose, section 3942, as the bill amends it, prohibits the issuance of *any* bonds, *whether for the specific purposes mentioned in sections* 3939 *and* 3939-1 *or not*, without a vote of the people, except only bonds mentioned in paragraphs "a" to "f," inclusive.

The effect of the section when given such a broad scope is problematical. Take, for example, *bonds* issued under section 3916 to extend the time of payment of indebtedness which the corporation is unable to pay at maturity. The section requires the approval of two-thirds of the electors for the issuance of such bonds unless for the refunding of bonds issued prior to January 1, 1913. So far as the refunding of bonds is concerned, this time limitation is proper, for bonds issued subsequently to January 1, 1913, can not be refunded (article XII, section 11 of the constitution effective on that date); but notes issued since that date and general unfunded obligations accruing either before or after that date may have to be extended at any time by reason of the operation of the tax limitations. To require the approval of the electors to such a necessary funding or refunding, especially when a two-thirds vote must be secured, is to place municipalities in danger of bankruptcy and their public property subject to the likelihood of being seized on execution; or else, taking the other view, with the statute law with reference to the incurring of indebtedness in such a shape, the courts may feel constrained to create implied exceptions to the tax limitation laws.

(2) There is also a proviso authorizing the issuance of bonds without a vote of the people for the purpose of funding certificates of indebtedness issued prior to the passage of the act under section 3913 of the General Code. This section has been referred to. Originally the bill provided that levies to pay the interest and principal on such bonds might be made outside of all tax limitations. This, however, seems to have been stricken out by amendment.

The effect of this proviso in its present form is to legalize what was apparently illegal, but what may have been dictated by extreme exigency, namely, the issuance of certificates "in anticipation of the general revenue fund" far beyond the actual returns from the levy for that fund; for section 3913 of the General Code contemplates at least that the certificates issued thereunder shall be paid at maturity, and it is not the intention that the certificates shall be issued unless the money to pay them is levied and in process of collection. Apparently, however, some cities have issued certificates "in anticipation of the general revenue fund" far beyond their reasonable "anticipation." That being the case, the proviso has the effect of permitting bonds to be issued to fund these certificates; but by limiting this authority to certificates issued prior to the passage of the act it closes the door to a repetition of such desperate measures. Moreover, section 3 of the bill repeals section 3913 entirely, thus doing away in the future (should the bill pass) with issuing certificates of indebtedness in anticipation of the general revenue fund.

One further general observation may be made respecting section 3942 as amended by the bill, and that is that the section restores, in effect, the theory of the original Longworth act as distinguished from the present Longworth law. It

will be remembered that the original Longworth act neither required nor authorized the submission of bonds to a vote of the people until certain limitations had been reached; whereas the present law passed in 1911 authorizes council to submit any issue of bonds to a vote of the people, whether there is necessity for so doing in the light of the debt limitations or not. Section 3942 as amended does not authorize council upon its own motion to submit anything to a vote of the people. It now constitutes a *requirement*—not a *power*, with respect to the action of council. So that until bonds have been issued to the amount of one-twentieth of one per cent. of the tax duplicate, or to the amount of $75,000, for the purpose of any one paragraph of sections 3939 and 3939-1 of the General Code, or unless the particular bond issue will cause either of these limitations of paragraph "f" of section 3942 as it is incorporated in the bill to be exceeded, council would have no authority to submit any single bond issue to a vote of the people, although under the present law this might be done.

Summarizing the effect of the amendments of section 3942, then, I may say that in the first place it imposes a positive requirement independent of the debt limitations of two and one-half and five per cent., respectively, that all bond issues, with certain exceptions, shall be submitted to the people and receive an affirmative vote of two-thirds of the electors voting on the proposition. It applies to the issue of all bonds, whether under the Longworth act or not, and to funding or refunding notes as well. It reverses the rule respecting the submission of bond issues to a vote of the people, and thus has the effect of requiring the approval of two-thirds of the electors upon practically every new enterprise requiring the borrowing of money. A complete idea of the radical nature of the changes which would be made by the enactment of this section can be obtained by comparing my statement of its effect with my statement of the condition of the existing law.

Section 3949 is amended in the bill in five material particulars. The function of this section, as I have pointed out, is to define the phrase "net indebtedness" for the purpose of the two and one-half and five per cent. limitations and to specify the bonds which shall be considered in ascertaining such limitations. No change is made in the section with respect to its effect regarding the first of these two functions, the only changes being with respect to the bonds which shall not be counted in ascertaining the limitations.

(1) The first change lies in the omission of the words "one per cent." from the second sentence of the section. This is consistent with the repeal of section 3940, already alluded to.

(2) The second change is in paragraph "e." At the present this section exempts from consideration in arriving at the two and one-half and five per cent. limitation bonds issued to meet deficiencies in the revenues as provided in section 3931 of the General Code. This is qualified in the bill by the addition of the language: "If such issue is made to mature within ten years from date of issue." This qualification is reasonable and does not need to be more than mentioned herein.

There is also added to the language of paragraph "e," however, the following: "And bonds issued to redeem outstanding certificates of indebtedness under section 3942 of the General Code." The effect of this provision is to exempt such bonds from consideration in arriving at both the two and one-half and five per cent. limitations; whereas in section 3942 as amended in the bill, where such bonds are authorized it is provided that "with respect to said issue the limitation of two and one-half per cent. aforesaid shall not apply." In other words, section 3949 is inconsistent with section 3942 of the same bill, the one having the effect of taking bonds issued to redeem certificates of indebtedness out of both the limitations mentioned, and the other having the effect of taking them out of the two and one-half per cent. limitation only. This inconsistency should be corrected.

(3) The third material change consists of the description of the waterworks bonds which are not to be counted in ascertaining the two and one-half and five per cent. limitations.

Paragraph "f" of section 3949 of the present law provides as follows:

> "f. Bonds issued for the purpose of purchasing, constructing, improving and extending waterworks when the income from such waterworks is sufficient to cover the cost of all operating expenses, interest charges and to pass a sufficient amount to a sinking fund to retire such bonds when they become due."

The bill adds to the foregoing the following language:

> "and when such operating expenses and interest and sinking fund charges incurred or accrued during the last preceding calendar year were actually paid from the income of such waterworks."

The change here lies in the fact that whereas under the present law waterworks bonds need not be counted in ascertaining the debt limitations, if the income from the waterworks was sufficient to pay operating expenses and sinking fund charges, *whether actually used for that purpose or not,* the amended section makes it necessary in order that waterworks bonds shall be outside of the limitations, that the operating expenses and interest and sinking fund charges incurred during the preceding calendar year be actually paid from the income of the works.

This provision is perhaps clearer and more workable in some ways than that of the present law. I do not mean that the bill effects a change with respect to the issuance of bonds for a new waterworks, as, in my opinion, such bonds would at the outset be subject to all of the limitations under the present law. I do mean, however, that where a waterworks is a going concern and has a definite income, and it is proposed to issue bonds to make extensions or betterments, the present law would permit such bonds to be issued in the first instance without regard to any of the limitations, if the income from the works is sufficient to pay the operating expenses of the entire works and in addition thereto to pay the interest and sinking fund charges on account of the bonds then being issued.

The effect of the bill on waterworks bonds can be ascertained only by considering sections 3942 and 3949 as therein amended together. The first of these sections takes out of the general requirement that all bond issues be submitted to a vote of the people issues of bonds for "waterworks improvements or extensions." This exception, together with the repeal of the one per cent. limitation, makes the bill in one way more liberal with respect to the original issuance of waterworks bonds than the present law is, for under the bill all waterworks improvement and extension bonds can be issued without a vote of the people, regardless of the amount thereof, subject only to the two and one-half per cent. limitation; whereas under the present law such bonds could be issued without a vote of the people so as to exceed the one per cent. limitation only when the income from the waterworks was sufficient to pay, in addition to operating expenses, the interest and sinking fund charges on account of the bonds. However, the bill is *more stringent* with respect to waterworks bonds in its application to the two and one-half and five per cent. limitations, as I have pointed out, in that it requires that such bonds shall be counted in ascertaining such limitations, unless the interest and sinking fund charges and operating expenses of the preceding year have actually been paid from the income of the works.

(4) The next material change in the section is made by the addition of par-

agraph "g," which has the effect of taking out of the two and one-half and five per cent. limitations bonds issued to comply with orders of the state board of health.

(5) The next change made in the section consists of the addition to the catalogue of bonds exempt from the two and one-half and five per cent. limitations of mortgage bonds secured only upon the property and revenues of a public utility. The propriety of mentioning such bonds at all in the Longworth act has already been commented upon. Surely this clause is superfluous in section 3949, whatever may be the effect of the similar clause in section 3942; for assuming the clause to have the same effect as the descriptive clause in article XVIII, section 12 of the constitution (which is doubtful for reasons already pointed out), the constitutional provision referred to expressly provides that such bonds shall not be subject to debt limitations. Therefore, it is not necessary for the statute to take them out of any such limitations.

The foregoing comments all relate to those portions of the bill which affect debt limitations. We come now to consider section 5649-2 as amended in the bill. This is a part of the Smith one per cent. law, and its function is, and always has been, to define what is known as the "ten mill limitation" on current expense tax levies of all taxing districts. The limitation is defined as being one upon the aggregate amount of taxes that may be levied. It includes within the ten mills all levies not specifically exempted therefrom by the section itself. This might not be the case if there were not *some* exceptions in the section, in which event we might look elsewhere to find specific provisions constituting, under familiar rules, an exception to this general rule. But inasmuch as the section does except certain levies provided by other sections, the certain result is that levies not specifically excepted from the ten mills by the section itself are brought within that limitation.

The levies which are at the present time excepted from the ten mill limitation are as follows:

(1) In the first place they are those expressly excepted by present section 5649-2, namely, emergency levies provided for in section 5649-4, levies voted by the people under section 5649-5, and interest and sinking fund levies necessary to provide for indebtedness incurred prior to June 2, 1911, or subsequently to that date by a vote of the people.

(2) There are numerous levies provided for by laws passed after section 5649-2, and by such subsequently passed laws expressly made exempt from the ten mill limitation. For example, the flood emergency levies authorized by the act found in 103 O. L., 141; the so-called "Hite Road Law" levy provided for by section 6859-1 of the General Code; certain other road levies which I have in mind but have not specifically traced, and perhaps others. In short, the exact scope of the ten mill limitation as it now exists cannot be ascertained without examining laws providing for tax levies passed since June 2, 1911, and ascertaining whether or not such new levies are taken out of the ten mill limitation.

Section 5649-2 as amended by house bill No. 414 mentions two such levies, although the reference to one is erroneous. Its exceptions are as follows:

> "Except as otherwise provided in section 5649-4, section 5649-5, section 8859-1 and section 7908 of the General Code."

Of course, the reference to section "8859-1" is erroneous, there being no such section. What is meant is doubtless section "6859-1," and, when corrected in this particular, the provision would have the effect of taking the Hite road law levy out of the ten mill limitation as it was intended to be.

The reference to section 7908 has the effect of taking the levy for interest

and sinking fund purposes for bonds issued for a municipal university subsequently to June 1, 1910, out of the ten mill limitation as provided by section 7908 as amended 103 O. L. 472.

My point here is that the Hite road law levy and the municipal university bond levies are the only levies, of all the possible levies authorized by laws passed since June 2, 1911, and by such laws made exempt from the ten mill limitation, which will be exempt from that limitation under section 5649-2 if it is enacted in the form in which the bill has been submitted to me. It may be the desire of the legislature to bring all such other levies within the ten mill limitation, and if that is the case, no criticism can be made of the bill in this particular. But if it is not the intention of the legislature to bring within the ten mill limitation any levies which are at present outside of that limitation, or to favor in this particular, so to speak, the Hite road law levy and municipal university levy, to the exclusion of other levies which have heretofore been in a similar situation with respect to the ten mill limitation, then some other and different language should be used in this connection. For a form of such language I refer you to my previous opinion to you respecting this same bill.

The principal change made in section 5649-2, however, is that which results from striking out the language: "heretofore incurred or any indebtedness that may hereafter be incurred by vote of the people" and inserting in lieu thereof the language: "existing at the time this act takes effect or which may thereafter be incurred." The language inserted does not add anything to the section as it would be if it was left out entirely. The object of the amendment is merely to do away with the distinction between levies for interest and sinking fund purposes on account of bonds issued by a vote of the people and such levies on account of such bonds issued without a vote of the people, and to take all interest and sinking fund levies outside of the ten mill limitation, whether the bonds were issued prior to June 2, 1911, or subsequently thereto, and whether issued under authority of a vote of the people or without such authority.

By a saving clause added at the end of the section it is made clear that the fifteen mill limitation is not to be affected by this amendment. The change is a very material one, however, with respect to its effect upon the ten mill limitation.

In this connection I refer you to my previous opinion, in which I pointed out that in order to be consistent the legislature should not amend section 5649-2 in this particular without also amending section 5649-3a. My reasons for this view are expressed in that opinion.

Section 2 has the effect of exempting "from this act" the act authorizing the creation of rapid transit commissioners in cities, passed on May 17, 1915. It is my impression that this bill carries its own tax and debt limitations. However this may be, section 2 does not have the effect of taking the bonds and levies authorized in the Rapid Transit Commission act out of all the limitations, because "this act" (i. e., house bill No. 414) is merely an amendment of certain sections of the Longworth and Smith laws, other sections not being necessarily affected thereby. In fact, section 2 of the bill is of doubtful import and effect in the use of the words "this act."

Broadly speaking, the bill palpably seeks to make it more difficult for municipalities to incur indebtedness and easier for them to pay it. I may be permitted to say that this general policy is not open to criticism, but is entirely praiseworthy. It seems to me, however, that in numerous respects which I have pointed out the policy of the bill is not well worked out. The measure is of such importance that it ought to be framed with unusual care.

There are several detailed questions of policy concerning which I have not felt called upon to express any judgment. For example, it occurs to me that the

practical effect of the bill is to require a two-thirds vote of the electors in the acquisition or installation of any public utility, of any importance, unless it is desired to issue mortgage bonds which are of doubtful marketability.

Section 5 of article XVIII of the constitution provides for a referendum on the acquisition of a public utility which may carry by a majority vote; but a majority vote of the electors under a referendum would not be effective if a two-thirds vote were required to provide the necessary funds by the issuance of bonds other than mortgage bonds.

It may be desirable so to restrict the municipal corporations in these particulars, but it should be clearly pointed out that the bill has this effect.

Respectfully,
EDWARD C. TURNER,
Attorney General.

411.

TYPOGRAPHICAL ERROR IN TITLE OF HOUSE BILL NO. 202, DOES NOT AFFECT SUBSTANCE OF BILL.

COLUMBUS, OHIO, May 27, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—You have requested my opinion as to the effect of a typographical error in the title of house bill No. 202, passed May 20, 1915.

The error lies in the fact that the title recites that it is an act "To amend *section* 1447 of the General Code, whereas the main body of the bill, as well as other language in the title itself, shows that it is *section* 2447 that is to be amended.

In my opinion this discrepancy is to be treated as a mere clerical error and in nowise affects the substance of the bill.

Respectfully,
EDWARD C. TURNER,
Attorney General.

412.

HOUSE BILL NO. 160—CREATING PENSION FUND FOR EX-VOLUNTEER FIREMEN—QUESTION OF CONSTITUTIONALITY OF BILL.

The provisions relative to holding of elections, in house bill No. 160, authorizing the creation of a pension fund for ex-volunteer firemen, are sufficiently definite and complete; but the definition therein of those qualified to participate in the benefits of such fund is so restricted as to make the whole bill probably unconstitutional.

COLUMBUS, OHIO, May 27, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—You have asked me to examine into the provisions of section 2 of house bill No. 160, passed May 19, 1915, and to advise you as to whether or not the provisions thereof constitute complete and effective machinery for holding the election of which it speaks.

The bill, as a whole, provides for pension funds for ex-volunteer firemen. The second section of the act is in full as follows:

> "On the second Monday of the month, following the passage of the ordinance providing for the establishment of such fund, an election shall be held to choose five trustees from the ex-volunteer firemen of such municipal corporation. The president of the council shall give notice thereof through the medium of at least one newspaper of general circulation, and by written notice to the volunteer firemen's association, at least one week before said election."

Section 3 relates also to the same subject and provides as follows:

> "Voting shall be by ballot, and the votes shall be canvassed by the president of the council or under his direction. The five members receiving the highest vote shall be elected for the ensuing year. In case of a tie vote it shall be decided by lot or in any other manner agreeable to the persons for whom such a tie vote was cast, which one of them shall have the office of trustee."

By themselves these two sections do not seem to afford complete machinery for holding the election referred to, in that they do not specify who shall be entitled to a vote at such election, or otherwise provide what might be deemed to be necessary details. However, I refer you to section 9 of the bill which contains the following proviso:

> "* * * Provided that no ex-volunteer fireman shall be eligible to receive a pension from such fund, or to hold office, vote for trustees, or in any way or manner participate in the benefits of such fund unless he has served as a volunteer fireman for a period of at least five consecutive years, and be of the age of fifty-five years when this law goes into effect."

In my opinion the language above quoted, in connection with the provisions of sections 2 and 3 of the bill, make it effective in the particular concerning which you inquire. That is to say, while it does not specifically provide that the election be held at any particular place, or otherwise regulate the manner of the casting of votes except to provide that voting shall be by ballot, yet the lack of such provisions would not, in my opinion, make the bill inoperative should it be approved.

I cannot refrain, however, from calling attention to what appears to be a serious question respecting the validity of the whole law arising out of the language of section 9, above quoted. Because of its peculiar phraseology, a person who had served for five consecutive years as a volunteer fireman would not be entitled to the benefits of the fund unless he had arrived at the age of fifty-five at the time the act took effect. Should he have the other qualifications but not arrive at that age until one day after the taking effect of the bill, it would not be possible for him to participate in the benefits of the fund. This seems to be violative of article I, section 2 of the constitution of the state which declares that our government is instituted for the equal protection and benefit of the people, and prevents the general assembly from passing laws which do not operate with equality upon all members of the class to which they naturally apply.

By limiting the benefits of the act to those persons who are of the age of fifty-five years when the law goes into effect, the bill creates a favored class by an arbitrary distinction, which has no relation to the main purpose of the bill.

While I would not go so far as to state positively that the bill would be held

unconstitutional if tested in the courts, especially in view of the fact that you have not requested my opinion upon the question, yet I cannot avoid stating my conviction that the bill is violative of the constitutional principle to which I have referred.

Respectfully,
EDWARD C. TURNER,
Attorney General.

413.

VACANCY OF COMMON PLEAS JUDGESHIP WHEN ORIGINAL TERM EXPIRES DECEMBER 31, 1916—SUCCESSOR ELECTED IN YEAR 1916 BY ELECTORS OF COUNTY FOR SHORT AND LONG TERMS.

The successor of a person appointed in May, 1915, to fill a vacancy in the subdivisional comman pleas judgeship, the original term of which would expire on December 31, 1916, is to be elected at the regular election for common pleas judges in the year 1916 by the electors of the county in which the judge, whose office became vacant, resided at the time of his election. Such election would be for the short term intervening between the date thereof and December 31, 1916. At the same election there must be chosen a county common pleas judge for the regular term commencing January 1, 1917.

COLUMBUS, OHIO, May 27, 1915.

HON. FRED W. MCCOY, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of May 24, 1915, in which you request my opinion upon the following questions:

> "As you have been informed by me, Mr. Harvey J. Eckley has been appointed and commissioned judge of the court of common pleas, for the first subdivision of the ninth judicial district, to fill the vacancy occurring by the resignation of Hon. John H. Fimple, who was elected in 1910. The vacancy occurred on the fourteenth day of May, 1915. Mr. Eckley's commission is dated that day, on the fifteenth he qualified by taking the required oath of office. His commission recites that he is to 'serve until his successor is elected and qualified.'
>
> "The question arises: When is such successor to be elected?
>
> "Does the 'annual election' mentioned in section 13, of article 4 of the constitution, mean the annual election to be held in November, 1916, or the election to be held in November, 1915?
>
> "Is the successor to be elected by the electors of Carroll county only, or by the electors of the first subdivision of the ninth judicial district?
>
> "Can a judge of the court of common pleas be elected in an odd numbered year?"

All the questions which you ask have been answered in other opinions of this department. I hand you herewith a copy of my opinion to the bureau of inspection and supervision of public offices respecting several questions arising under

the amended constitution and statutes respecting the election and compensation of common pleas judges, which answers your third question by holding that the successor of Judge Eckley is to be elected by the electors of Carroll county only.

I think you have already seen my opinion to Honorable Frank B. Willis, respecting the very situation concerning which you inquire, in which I state my conclusions respecting your other questions, my view being that under the present constitution no election for common pleas judge can be held in an odd numbered year. So that whatever may be said academically of the effect of article XVII of the constitution upon article IV, section 13 thereof, the latter provision cannot be held to authorize the election of a common pleas judge except in an even numbered year.

Inasmuch as my opinion to Governor Willis was very short and merely expressed my conclusions without stating the reasons therefor, I may refer, in support of my opinion as therein given, to the case of State ex rel. v. Metcalfe, 80 O. S. 244. The facts in this case were as follows: (See opinion, page 253 et seq.)

Judge Burrows commenced a term of six years as judge of the circuit court on February 9, 1903. He resigned on December 31, 1908, his resignation to take effect on January 8, 1909. At the November election in 1908 Hon. E. E. Roberts was elected to succeed Judge Burrows for the term commencing on the ninth of February, 1909, but died on November 22, 1908.

On January 4, 1909, Governor Harris appointed Judge Metcalfe to serve from January 9, 1909, until the election and qualification of his successor. Subsequently Governor Harmon appointed Mr. Hoyt to serve from February 9, 1909, until the election and qualification of his successor, and the controversy was as to whether Judge Metcalfe or Judge Hoyt was entitled to hold the office after January 9, 1909.

The question as to how long Judge Metcalfe's appointment by Governor Harris remained effective was, therefore, directly involved in the case. It was not, of course, strictly necessary for the court, in deciding in his favor as it did, to go further than to hold that the appointment of Mr. Hoyt by Governor Harmon was without effect and that Judge Metcalfe was entitled to continue to hold the office after February 9, 1909. However, Judge Spear did say, in his opinion, at page 271 that:

> "It follows, and as conclusion we hold, that section 13 of article IV of the constitution is still in force, and that it controls this case; that the death of Judge Roberts did not create a vacancy in the office of circuit judge; that the period between the end of the six years for which Judge Burrows had been elected and the election and qualification of a successor (*November, 1910*), became a part of Judge Burrows' term; that the resignation of Judge Burrows carried with it the balance of his entire term, including the interim above referred to; that Judge Metcalfe, by reason of his appointment and qualification, succeeded to all that Judge Burrows resigned, and was thus clothed with the power to hold the office until a successor should be elected and qualified, and that the appointment of relator to take effect February 1, 1909, was ineffective to give any title to the office. We desire to emphasize that the crucial question at issue is not whether or no, as a general proposition, by force of our constitution and laws, a judge holds over until his successor is elected and qualified. But the question is, What is the effect of an appointment to fill a vacancy? We think, for the reasons heretofore given, the effect distinctly prescribed by section 13 of article IV, viz.: to clothe the appointee

with the power to hold until a successor is elected and qualified, affords the answer. If this is so, then the relator can have no possible standing to demand the office.''

If the court had regarded section 13 of article IV as requiring an election at the next succeeding November to choose a judge to succeed the appointed judge, the election in November, *1909*, instead of November, 1910, would have been designated as the proper election. It is true that this point was conceded by both sides (see page 255 of the opinion). However, on page 257 of the opinion, in speaking of the effect of the various provisions of article XVII, Judge Spear says:

''That regarding vacancies in elective state offices is practically the equivalent of the provision of section 13 of article IV, although more comprehensive in its application.''

The first branch of the syllabus of this case is as follows:

''Article XVII of the constitution, adopted November 7, 1905, does not expressly repeal or abrogate section 13 of article IV of the constitution, nor is it in conflict therewith; and applying to the construction of the former section the established rule that repeals by implication are not favored, it follows that the clause of section 13 which provides that where 'the office of any judge becomes vacant before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor until a successor is elected and qualified,' remains in force.''

It is significant that the court did not hold that entire section 13 of article IV remain in force, but only so much of it as is quoted in the above branch of the syllabus. Having regard to all these considerations, as well as to the argument of the opinion as a whole, which is too lengthy to be quoted here, it seems clear that the court held that that part of article IV, section 13 which provides that:

''* * * Such successor shall be elected for the unexpired term, at the first annual election that occurs more than thirty days after the vacancy shall have happened,''

is supplanted by that clause of article XVII, subsequently adopted, which provides as to all state officers that:

''* * * Every such vacancy shall be filled by election *at the first general election for the office* which is vacant, that occurs more than thirty days after the vacancy shall have occurred. The person elected shall fill the office for the unexpired term.''

Inasmuch as section 1 of article XVII provides that:

''Election for state and county officers shall be held on the first Tuesday after the first Monday in November in the even numbered years,''

it follows, of course, that: "general election for the office of common pleas judge" can only be held in the even numbered years.

The legislature acted on this theory when it provided in the act found in 104 O. L. 243 that:

> "* * * When a vacancy may have occurred in the office of any judge of the court of common pleas, in office or elected thereto prior to January 1, 1913, his successor shall be elected for the unexpired term at the first annual election that occurs in *an even numbered year* more than thirty days after such vacancy may have occurred, and such election shall be by the qualified electors of the county in which the judge, whose office became vacant, resided at the time of his election."

The foregoing considerations constitute my reasons for holding, as I did in my opinion to the governor, a copy of which you have seen, that Judge Eckley's successor will be elected in November, 1916.

The above quoted provision of section 1532, as amended 104 O. L. 243, constitutes my reason for holding that the election in November, 1916, will be by the qualified electors of Carroll county only, not by those of the first subdivision of the ninth judicial district. I have fully developed my reason, on this point, in the enclosed opinion to the bureau of inspection and supervision of public offices.

You will observe that in November, 1916, two positions will have to be filled, viz.: the office of common pleas judge for the term beginning immediately and extending to January 1, 1917, and the office of common pleas judge for the regular term of six years, beginning on said last named date.

Under the provisions of section 1532, supra, both of these positions will be filled by the same group of electors, viz.: those of Carroll county only.

Respectfully,
EDWARD C. TURNER,
Attorney General.

414.

DISTINCTION BETWEEN "INTERURBAN RAILROAD" AND RAILROAD—MANNER OF OPERATING PASSENGER AND FREIGHT TRAINS IS THE CRITERION.

A commercial railroad, organized and originally operated as such, does not lose its character and take on that of an interurban railroad, as to any part of its business, by installing electric cars for the transportation of passengers and operating such cars with relative frequent stops, when the train service is no more frequent than it was prior to electrification.

COLUMBUS, OHIO, May 27, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—On May 20th, you sent to me a statement of facts and other data concerning the operations of the Lorain, Ashland & Southern Railroad Company, and requested my opinion as to whether the company's operations constitute it an "interurban railroad" within the meaning of section 5416 of the

General Code with respect to its electric passenger service, it being conceded that with respect to its freight service the company is a ''railroad'' within the meaning of said section.

The facts as shown by the papers submitted are as follows:

The company was organized as a commercial railroad company, and for a time conducted its operations in the usual manner; that is, both its passenger and freight trains were hauled by steam locomotives, the former making only station stops and there being but a limited number of such passenger trains per day. Recently, however, the company has discontinued the use of steam power in the propulsion of its passenger trains and, except on very infrequent occasions, uses electric cars for such service. These cars, which are operated over the entire line of the company, stop with relative frequency, as is shown by the time table issued by the company; that is, the stops are not limited to stations, but the cars also stop at cross roads. However, the company still operates but two trains a day each way over each of its divisions.

It will not be helpful in discussing this question to quote the definitions of section 5416 of the General Code, as it must be admitted that these definitions are neither complete nor satisfactory and fail to show any distinction whatever between an ''interurban railroad company'' and a ''railroad company.'' This is for the reason that the definitions employ terms which themselves require definition, so that in the final analysis the distinction between an ''interurban railroad'' and a ''railroad'' must be sought outside of the statute.

Of course, though the distinction is difficult to find, it is a very material one, for railroad companies are required to pay excise taxes on their gross intrastate earnings at the rate of 4 per cent., while the rate as to interurban railroads is 1.2 per cent.

The company relies upon the case of Cincinnati, Georgetown & Portsmouth Railroad Co. v. Poland, 10 N. P. (n. s.), 617, affirmed without report 88 O. S., 596. In this case Judge Kinkead, of the Franklin county common pleas court, after discussing the difficulty of distinguishing between an ''interurban railroad'' and what he called a ''commercial railroad,'' held on the specific cases before him that where a company originally incorporated as a steam railroad had so changed the character of its operations as to abandon steam except for very limited freight service, to run single cars propelled by electricity, to reduce its fares, operate passenger trains making very frequent stops on a comparatively frequent schedule, etc., it had become in contemplation of the taxation law an interurban railroad company instead of a steam railroad company; but that it was possible for a company to carry on both classes of business, in which event, if the earnings from the two classes could be separated, the company should pay excise taxes both as an interurban railroad company and as a steam railroad company, basing the one charge at the rate of 1.2 per cent. on the earnings from the one class of business and the other charge at the rate of 4 per cent. upon the earnings from the other class.

Judge Kinkead had three specific cases before him, in two of which the judgment of the court was that the company should pay taxes as an interurban railroad company only. The third case, in which the judgment was that the company should pay taxes on both classes of business, was as a matter of fact a separate action.

Of these three cases the first two only were taken to the supreme court and affirmed. The third case, as the commission knows, was never passed upon by any higher court. In point of fact, when the case reached the circuit court on appeal, the plaintiff company so amended its pleadings as to pray for a judgment to the effect that it should pay excise taxes on its entire business at the rate of 1.2 per cent.; and there being no real difference between the facts of this case and

those of the two cases that went to the supreme court, they were all disposed of in precisely the same manner when the decision of the supreme court was rendered.

Thus it is seen that the affirmance by the supreme court of the case of Cincinnati, Georgetown & Portsmouth Railroad Co. v. Poland does not constitute an approval of Judge Kinkead's holding that the third company, which was the Youngstown & Ohio River Railroad Company, was liable for taxes in two capacities.

I mention these facts, however, merely to make clear what the supreme court of the state held in the case cited; for it is not necessary in order to answer your question to consider the correctness of Judge Kinkead's opinion that one company may be liable for excise taxes both as an interurban railroad company and as a railroad company, on separate branches of its business.

Upon careful examination of the record in the Cincinnati, Georgetown & Portsmouth Railroad Company case I find that the following conclusions of law are justified by the court's judgment:

In the first place, the distinction between an "interurban railroad" and a "railroad" is not determined by the motive power used. Therefore, the mere fact that an otherwise commercial railroad uses electricity to propel its passenger trains does not change the character of the operation.

It follows also from this conclusion that no particular type of motive power other than steam is necessary in order to constitute an interurban service as distinguished from a commercial service.

In the second place, the manner of operating trains, both passenger and freight, is the final criterion.

Now in the case cited, the two changes in the method of operation, other than that respecting motive power, were the change with respect to the number of stops made by each train or car and the change in the number of cars operated. There were other changes with respect to the operation of the freight service, but as freight operations are not involved in your inquiry I omit mention of them.

In the case which you submit there has been a change with respect to the frequency with which the passenger cars operated by the company stop, but there has been no change with respect to the number of trains or cars operated. The question is thus raised as to whether a change in the one particular, without a change in the other, is sufficient to change the character of the passenger service from that of a "commercial railroad" to that of an "interurban railroad."

In my opinion, both elements are necessary in order to effect a change in the character of the operation.

In Hocking Valley Railway Company v. the Public Utilities Commission, 92 O. S., —, decided May 16, 1915, and not yet reported, the Public Utilities Commission had ordered the railway company to continue to furnish a certain "interurban service" which it had undertaken, the question being as to the validity of this order. The court in sustaining the same found it necessary to determine what an "interurban service" is, and on that point used the following language, per Johnson, J.:

> "It is important that an adequate conception should be had of the meaning of the term 'interurban service.' It is obvious that the commission used the term as meaning a service consisting of cars or trains which are run more frequently than any through steam passenger service, *and also* a service in which frequent stops are made, so that patrons need not walk far along the line to arrive at the nearest stopping place. Such a service is to be distinguished from the ordinary passenger trains of steam railroads in that the latter do not stop except at regular stations

> located in cities or villages, which are at intervals much greater than the stops which the evidence shows were made by the defendant on the portion of its line involved in this proceeding.''

In this case the court seemed to recognize the two distinguishing characteristics of an interurban service as distinguished from a commercial service, and the fact that both of them are mentioned shows that the court had in mind at least that both are necessary elements of the distinction.

I, therefore, conclude that the Lorain, Ashland & Southern Railway Company did not change the character of its passenger service from ''commercial'' to ''interurban'' merely by installing electric power and increasing the frequency of the stops made by its trains, when it did not at the same time commence the operation of trains on a relatively frequent schedule, such as is the rule in the operation of interurban railroads generally.

I may add that the figures submitted with the papers show that this railroad is essentially a commercial railroad, its passenger service being quite subordinate to its freight business; so that if it should be held, notwithstanding Judge Kinkead's decision with respect to the Youngstown & Ohio River Railroad Company, that a given corporation would be subject to excise taxation either as a commercial railroad company or as an interurban railroad company, without being permitted to divide its business and pay at a different rate on each class, then, in whatever light the passenber operations of the Lorain, Ashland & Southern Railroad Company might be viewed, the road as a whole would have to be regarded as a commercial railroad.

It is therefore my opinion that excise taxes should be charged against the Lorain, Ashland & Southern Railroad Company with respect to all of its earnings at the rate of 4 per cent.

Respectfully,
EDWARD C. TURNER,
Attorney General.

415.

TOWNSHIP TRUSTEES—COMPENSATION FOR ROAD IMPROVEMENT IN TOWNSHIP—TRUSTEES PAID UNDER AUTHORITY OF SECTION 6999, GENERAL CODE—TOWNSHIP TREASURER PAID UNDER AUTHORITY OF SECTION 7015, GENERAL CODE—SERVICES OF TOWNSHIP CLERK GOVERNED BY SECTION 6999, GENERAL CODE—IN LIEU OF ALLOWANCE UNDER SECTION 3308, GENERAL CODE.

For the services rendered by the township trustees under the general plan of road improvement adopted by the electors of a township, under authority of section 6976, G. C., said trustees are to be compensated under authority of section 6999, G. C., and not under authority of section 3294, G. C., and for the services rendered by the township treasurer under such plan said treasurer is to be compensated under authority of section 7015, G. C., and not under section 3308, G. C.

For the services rendered by the township clerk in the performance of duties required by the statutes governing the aforesaid plan, said clerk is entitled to a reasonable compensation not to exceed $100.00 in any one year, to be allowed by the township trustees under authority of section 6999, G. C., and said compensation is in lieu of any allowance for said service under authority of section 3308, G. C., and is subject to the limitation of $150.00 a year provided by said section.

COLUMBUS, OHIO, May 27, 1915.

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

GENTLEMEN:—In your letter of May 12th you request my opinion upon the following questions:

> "If a road that does not enter or run through a village or city in the meaning of section 6976 is improved by a board of township trustees under sections 6976 to 7018, General Code, can officials legally draw the compensation therein provided or should they draw their compensation as fixed by other sections? That is, should the treasurer be compensated under section 7015, General Code, or 3318, and township trustees under section 6999 or section 3294, General Code?
>
> "Should the clerk draw the additional compensation provided in section 6999, General Code?"

Section 6976 to 7018, inclusive, of the General Code, as found in the chapter relating to township roads, and under the subdivision of said chapter relating to roads partly in a municipality, provide a general plan for the improvement and maintenance of the roads of a township including a road running into or through a village or city within such township.

Upon the adoption of said plan by the majority vote of the qualified electors of such township voting at an election held for said purpose, ample authority is given for the administration of the work contemplated by such plan and to provide the necessary funds to pay the cost and expense of such improvement.

Under said plan the township trustees may improve any road in the township which has been designated by the commissioners appointed under authority of section 6982, G. C.

In case the township trustees determine to improve a road in the township, designated by said commissioners under authority of section 6985, G. C., and it happens that said road does not enter or extend through a village or city in said township, you inquire whether the trustees are to be compensated under section

6999, G. C., and the township treasurer under section 7015, G. C., or should said trustees be compensated under section 3294, G. C., and said treasurer under the provision of section 3318. G. C.

These sections provide as follows:

> "Section 6999. For the duties performed under the provisions of this chapter, the trustees, upon filing an itemized statement with the clerk of such township, as provided by law, shall receive two dollars per day for the time actually employed in addition to the fees allowed otherwise by law for other services. Such compensation shall not in any one year exceed one hundred dollars each, for the services performed under such subdivision. The trustees shall allow the township clerk for his services under such subdivision a reasonable compensation, not to exceed one hundred dollars in any one year.
>
> "*Section* 7015. The treasurer of such township shall receive and disburse all money arising from the provisions of this subdivision of this chapter. He shall receive as compensation therefor one-half of one per cent. of the first ten thousand dollars, or less, distributed in any one year, and one-fourth of one per cent. of any amount in excess of ten thousand dollars, to be paid out of the township funds, and he shall not receive other compensation for services rendered under such subdivision.
>
> "*Section* 3994. Each trustee shall be entitled to one dollar and fifty cents for each day of service in the discharge of his duties in relation to partition fences, to be paid in equal proportions by the parties, and one dollar and fifty cents for each day of service in the business of the township, to be paid from the township treasury. The compensation of any trustee to be paid from the treasury shall not exceed one hundred and fifty dollars in any year including services in connection with the poor. Each trustee shall present an itemized statement of his account for such per diem and services, which shall be filed with the clerk of the township, and by him preserved for inspection by any person interested.
>
> "*Section* 3318. The treasurer shall be allowed and may retain as his fees for receiving, safe keeping and paying out moneys belonging to the township treasury, two per cent. of all moneys paid out by him upon the order of the township trustees."

It will be observed that for the duties performed by the township trustees under the provisions of sections 6976 to 7018, inclusive, of the General Code, each trustee, upon filing an itemized statement with the clerk as provided by law, is entitled to receive two dollars per day for the time actually employed "in addition to the fees allowed *otherwise* by law for *other* services."

Under section 7015, General Code, the township treasurer is required to receive and disburse all money used in the administration of the general plan of improvement, above referred to, and as compensation therefor he is entitled to one-half of one per cent. on the first ten thousand dollars, or less, distributed in any one year, and one-fourth of one per cent. on any amount in excess of ten thousand dollars, to be paid out of the township funds, and he is not entitled to any other compensation for such services.

It is clear that the provisions of section 6999 and section 7015, G. C., are special in their application and do not conflict with the general provisions of sections 3294 and 3318, G. C.

Replying to your first question, I am of the opinion that, for the services rendered by the township trustees under the general plan of road improvement adopted by the electors of the township under authority of section 6976, et seq.,

of the General Code, said trustees are to be compensated under authority of section 6999, G. C., and not under authority of section 3294, G. C., and that, for the services rendered by the township treasurer, under said plan, said treasurer is to be compensated under authority of section 7015, G. C., and not under section 3318, G. C.

The latter part of section 6999, G. C., provides:

> "The trustees shall allow the township clerk for his services under such subdivision a reasonable compensation, not to exceed one hundred dollars in any one year."

Section 3308, G. C., provides:

> "The clerk shall be entitled to the following fees, to be paid by the parties requiring the service: Twenty-five cents for recording each mark or brand; ten cents for each hundred words of record required in the establishment of township roads, to be opened and repaired by the parties; ten cents for each hundred words of records or copies in matters relating to partition fences, but not less than twenty-five cents for any one copy, to be paid from the township treasury; ten cents for each hundred words of record required in the establishment of township roads, to be opened and kept in repair by the superintendents; for keeping the record of the proceedings of the trustees, stating and making copies of accounts and settlements, attending suits for any against the township, and for any other township business the trustees require him to perform, such reasonable compensation as they allow. In no one year shall he be entitled to receive from the township treasury more than one hundred and fifty dollars."

You inquire whether the clerk of the township, in the case above referred to, is entitled to compensation for services rendered, under the above provision of section 6999, G. C., in addition to the compensation authorized by section 3308, G. C.

The provision of section 6999, G. C., as above quoted, is special in its application, is not in conflict with the general provision of secton 3308, G. C., but is limited by the provision of the latter section.

It will be observed, under the provision of section 3308, G. C., that for any business which the township trustees may require the clerk to perform, other than that enumerated in said section, said trustees may allow reasonable compensation subject to the limitation that in no one year shall said clerk be entitled to receive from the township treasury more than one hundred and fifty dollars ($150.00).

Replying to your second question, I am of the opinion that for services rendered by the township clerk in the performance of duties required by the statutes governing the aforesaid plan of township road improvement, said clerk is entitled to a reasonable compensation not to exceed $100.00 in any one year, to be allowed by the township trustees under authority of section 6999, G. C., and that said compensation is in lieu of any allowance for such service under authority of section 3308, G. C., and is subject to the limitation of one hundred and fifty dollars ($150.00) per year provided by said section.

Respectfully,
EDWARD C. TURNER,
Attorney General.

416.

HOUSE BILL NO. 469—CONFERS AUTHORITY TO LEASE CANAL LANDS ON CERTAIN BOARDS WHICH HAVE BEEN ABOLISHED.

House bill No. 469 seeks to confer authority to lease canal lands on certain boards which have been abolished. The bill may, therefore, be unworkable in its present form, and if time permits it would be wise to again amend section 13965 of the Appendix to the General Code.

COLUMBUS, OHIO, May 28, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—You have requested my opinion as to the effect of house bill No. 469 to which bill I called your attention several days ago. This bill is entitled "An act to amend section 13965 of the General Code, to provide for the extension of existing leases of state canal lands."

The section as amended follows the exact language of the old section, and also contains the following further and additional provision:

> "Any owner of an existing lease for state canal lands may surrender the same to the state in order to have the land described therein included in a new lease, which shall not be for a greater term than fifteen years, and the application therefor shall definitely set forth the reasons why an extension of the lease is desired, but before granting a new lease for such state canal land, the superintendent of public works must be satisfied that the extension of the lease is for the purpose of making a valuable improvement thereon, which the lessee could not otherwise afford to make for the remaining portion of the unexpired lease. When a new lease, which shall not be for a less rental than the original lease, has been granted and approved by the governor and the attorney general, the superintendent of public works shall cancel the original lease."

In repealing and re-enacting the section in question the author of the language used in the amended section, in so far as such amended section covers the exact subject-matter of the old section, apparently failed to note that the canal commission of Ohio, the board of public works of Ohio, and the office of chief engineer of public works of Ohio, have all been abolished by legislative enactment, and that there is not at the present time any canal commission, any board of public works, or any chief engineer of public works.

The duties of the board of public works and the Ohio canal commission in the selling or leasing of canal or state lands have by section 464, G. C., 103 O. L., 127, been cast upon the superintendent of public works. There is, therefore, grave danger that the section in its amended form, in so far as it relates to the making of new leases, is unworkable, for the reason that it seeks to confer the authority to make these leases upon officials and boards who have no existence at the present time. While it might be possible that the courts would give to this section as amended such an interpretation as to make it workable, yet if time and opportunity permit it would be advisable for the present legislature to take such action as would remove all doubt in the premises. This action would involve again amending the section by striking out the expressions "said commission," "the board of public works," and "the chief engineer of public works" wherever they

occur in the section and substituting therefor the expression "the superintendent of public works." The section as redrafted in accordance with the above suggestion would read as follows:

> "That each and every tract of land, and any part of the berme bank of any canal, canal basin, reservoir and outer slope of the towing path embankment, which the superintendent of public works shall find to be the property of the state of Ohio, the use of which, in the opinion of the superintendent of public works, if leased, would not materially injure or interfere with the maintenance and navigation of any of the canals of this state, shall be valued by the superintendent of public works at its true value in money, and if such land shall not then be under an existing lease, may be leased for any purpose or purposes other than for railroads operated by steam, but the superintendent of public works shall have power to make leases and prescribe regulations for the crossing of the canals, canal basins or canal lands by any railroad operated by steam, electricity or other motive power, or for the necessary use, for railroad purposes, of any part of the berme banks of a canal, canal basin or any portion of the canal lands for a distance not exceeding two miles, or if then under an existing lease, then at the expiration of such lease, may be leased on the terms and conditions hereinafter in this act provided for, but railroad companies unlawfully in the possession and use of state land at the date of the passage of this act shall take a lease thereon for the term of fifteen years in the same manner as when lands are leased for other purposes, or remove their tracks, buildings or other structures from said land. Any owner of an existing lease for state canal lands may surrender the same to the state in order to have the land described therein included in a new lease, which shall not be for a greater term than fifteen years, and the application therefor shall definitely set forth the reasons why an extension of the lease is desired, but before granting a new lease for such state canal land, the superintendent of public works must be satisfied that the extension of the lease is for the purpose of making a valuable improvement thereon, which the lessee could not otherwise afford to make for the remaining portion of the unexpired lease. When a new lease, which shall not be for a less rental than the original lease, has been granted and approved by the governor and attorney general, the superintendent of public works shall cancel the original lease."

I also call your attention to the fact that section 13695 is found in the Appendix of the General Code, and not in the General Code. If it should be deemed advisable to clear up by legislative action the matter first referred to herein, then the expression "General Code" as found in the title of the bill, and also in section 1 and section 2 thereof, should be changed to read "Appendix to the General Code."

Respectfully,
EDWARD C. TURNER,
Attorney General.

417.

AMENDED SENATE BILL NO. 317 AMENDS HOUSE BILL NO. 29, ALTHOUGH NO REFERENCE IS MADE IN TITLE OR ENACTING CLAUSE OF LATTER BILL TO THE FORMER—INTENTION OF LEGISLATURE IS EXPRESSED.

COLUMBUS, OHIO, May 28, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—You have submitted to me for inspection amended senate bill No. 317, and requested my opinion as to whether said bill is sufficiently definite and certain as to indicate what act it is intended to amend. The uncertainty arises out of the language used in the title of said act as well as in section 1. Said act is entitled:

> "An act to amend sections 31, 32 and 39 of the act entitled: 'An act to provide for the listing and valuation of property for purposes of taxation and to repeal certain sections of the General Code, relating thereto.'"

Section 1 provides as follows:

> "Section 1. That sections 31, 32 and 39 of the act entitled: 'An act to provide for the listing and valuation of property for the purposes of taxation and to repeal certain sections of the General Code, relating thereto,' be and the same are hereby amended to read as follows:"

While no reference is made, either in the title or in section 1 of the act, to the date on which the act which it is sought to amend was passed, yet from a consideration of the entire act I am of the opinion that the intention of the legislature to amend what is known as the Parrett-Whittemore bill, being house bill No. 29, which passed the General Assembly on May 7, 1915, and by you approved on May 8, 1915, is sufficiently expressed. No other legislation of a similar nature has been enacted by any general assembly having the title quoted, and it is therefore evident that the Parrett-Whittemore bill is the legislation sought to be amended.

Respectfully,
EDWARD C. TURNER,
Attorney General.

P. S.—Amended senate bill No. 317 is herewith returned.

418.

DELAWARE ARMORY—APPROVAL OF CONTRACT OF M. GALLUP FOR CONSTRUCTION OF ARMORY.

Proceedings of advertising and awarding of contract to M. Gallup for construction of Delaware armory is regular and accordingly approved.

COLUMBUS, OHIO, May 28, 1915.

HON. BYRON L. BARGAR, *Secretary, Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your communication of May 26, 1915, which is as follows:

"I herewith have the honor to transmit the following papers:

"(a) The five proposals for complete construction of the Delaware armory according to plans and specifications.

"(b) Extract from the minutes of the Ohio state armory board of May 25, 1915, showing the action taken by said board relative to said armory and the award of contract to the lowest bidder, subject to your approval.

"(c) Proof of publication of advertisement for bids for Delaware armory, in the Delaware Gazette.

"Three hundred eighty dollars is a little more than two per cent. of the estimated cost of the building complete. Each bid was accompanied by a certified check for not less than that amount.

"Please indicate whether the award of contract, as shown by said papers, meets with your approval."

With your letter you submit an extract from the minutes of the meeting of the Ohio state armory board held on May 25, 1915, relative to the proposed construction of the Delaware armory, which extract is as follows:

"*Delaware County:* Prior to twelve o'clock noon, the board found five bids filed according to law and pursuant to advertisement in the adjutant general's office, relating to the proposed construction of the Delaware armory. At 12:05 p. m. the said five bids were publicly opened and found to be as follows:

"Clemmer and Johnson, Hicksville, Ohio—

Labor	$6,000 00
Material	12,739 00
Total	$18,739 00
Labor (maple floor deducted)	$6,000 00
Material (maple floor deducted)	12,389 00
Total	$18,389 00
Certified check	$400 00

"J. C. Easley, Rushylvania, Ohio—

Building complete (omitting maple floor)	$18,391 50
Certified check	380 00
Bid bond	380 00

"M. Gallup, Defiance, Ohio—

Labor	$6,959 01
Material	11,489 48
Total	$18,448 49
Labor (maple floor deducted)	$6,908 01
Material (maple floor deducted)	11,058 48
Total	$17,966 49
Certified check	$400 00

"Meyers Brothers, Leipsic, Ohio—

Labor	$18,760 00
Material	18,760 00
Total	18,760 00
No bid on deduction of maple floor.	
Certified check	380 00

"Ernest Kroemer, Dayton, Ohio—

Labor (maple floor deducted)	$18,998 00
Material (maple floor deducted)	18,998 00
Total	18,998 00
Certified check	380 00

"*Delaware Armory—Continued.* After inspection and consideration of said bids it was unanimously

Resolved, That the bid of M. Gallup, of Defiance, Ohio, is the lowest bid which complies with the plans and specifications, and it is further determined that it would be to the best interests of the state to accept said bid without the maple flooring, it being the lowest bid with or without said flooring. The board, therefore, accepts the bid of M. Gallup for construction of the Delaware armory complete, according to plans and specifications, including material and labor and all branches of the work except the maple flooring, at the said bid price of seventeen thousand, nine hundred and sixty-six and 49/100 dollars ($17,966.49), and said M. Gallup is hereby awarded a contract for said work at said price, both award and contract being subject to the approval of the attorney general of Ohio. The contract bond is hereby fixed at $9,000.00.

"I hereby certify that the above is a true copy of the minutes of the Ohio state armory board.

(Signed) "B. L. BARGAR, Secretary."

The proposals of the five bidders referred to in the abstract from the minutes, together with the affidavit of publication submitted by you have been examined, and upon a comparison of the proposals it is found that the bid of M. Gallup, of Defiance, Ohio, is the lowest of those submitted providing for the construction of the Delaware armory, omitting the maple flooring specified.

I find that the notice to contractors, which was published in the Delaware Gazette for a period of four consecutive weeks to be regular, and also the proceedings of the state armory board awarding the contract to M. Gallup subject to the approval of the undersigned.

It is my opinion, therefore, that from all the facts before me the contract should be awarded to M. Gallup, of Defiance, Ohio, and when the contract is submitted to this office immediate attention will be given to the matter of its formal approval.

The proposals of the various officers, and the proof of publication are herewith returned to you for your files.

Respectfully,

EDWARD C. TURNER,

Attorney General.

419.

BOARD OF EDUCATION—CAN SELL SCHOOL LANDS VALUED AT LESS THAN $300.00, IF A RESOLUTION PASSED BY THE BOARD DETERMINES THAT A FEE IS IN THE BOARD, THE LAND IS NOT NEEDED FOR SCHOOL PURPOSES AND THE SALE IS FOR THE BEST INTEREST OF THE SCHOOL DISTRICT.

The board of education of a school district, acting under authority of section 4749, *G. C., may determine by resolution that certain real property which said boards owns in fee is not needed for school purposes and that it is for the best interest of the school district to sell the same, and if the value of said property is less than three hundred dollars the provisions of section* 4756, *G. C., as amended in* 103 *O. L.,* 536, *are not applicable to the sale of said property and the same may be disposed of at private sale.*

COLUMBUS, OHIO, May 28, 1915.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—In your letter of May 20th, you request my opinion, as follows:

> "We are requested by the board of education of a special school district in this county to advise whether or not the board can sell outright a strip of school land for one hundred dollars after the adoption of said board of a resolution authorizing the sale and without posting notices or advertising?
>
> "Section 4756 of the General Code, governs the sale of school property by a board of education when the value of said property exceeds three hundred dollars, but we find no provisions governing sales when the value is less than three hundred dollars.
>
> "We are accordingly asking that you advise if it will be necessary for the board to take any action further than to adopt a resolution authorizing the sale in question."

Section 4749, G. C., provides:

> "The board of education of each school district, organized under the provisions of this title, shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district any grant or devise of land and any donation or bequest of money or other personal property and of exercising such other powers and privileges as are conferred by this title and the laws relating to the public schools of this state."

Section 4756, G. C., as amended in 103, O. L., 536, provides in part:

> " When a board of education decides to dispose of real or personal property, held by it in its corporate capacity, exceeding in value three hundred dollars, it shall sell such property at public auction after giving at least thirty days' notice thereof by publication in a newspaper of general circulation or by posting notices thereof in five of the most public

places in the district in which such property is situated. When the board has twice so offered a tract of real estate for sale at public auction and it is not sold, the board may sell it at private sale, either as an entire tract or in parcels, as the board deems best."

Providing the board of education of the school district owns in fee the strip of land, referred to in your inquiry, said board may, under authority of section 4749, G. C., determine by resolution that said strip of land is not needed for school purposes and that it is for the best interest of the school district to sell the same and, inasmuch as the value of said land is less than three hundred dollars, the provisions of section 4756, G. C., as amended, are not applicable to a sale made in accordance with the terms of said resolution.

Replying to your question, I am of the opinion that, upon the adoption of said resolution, said board of education may dispose of said tract of land at private sale.

Respectfully,
EDWARD C. TURNER,
Attorney General.

420.

HOUSE BILL NO. 577 IS CONSTITUTIONAL—PROVISION FOR SIZE OF CABOOSE OF COMMON CARRIERS OPERATING MORE THAN TEN MILES OF TRACK.

COLUMBUS, OHIO, May 28, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—You have submitted to me house bill No. 577, passed on May 19, 1915, with the request that I advise you as to the constitutionality of the proviso therein.

The bill is in form an amendment of section 8956-3, of the General Code, which, as amended, is as follows:

"Sec. 8956-3. Except as otherwise provided in this act, it shall be unlawful, from and after the first day of July, 1919, for any common carrier operating a railroad, in whole or in part, within this state, or any manager or division superintendent thereof to require or permit the use, upon such railroad, within this state, of any caboose car or other car used for like purpose, unless such caboose or other car shall be at least twenty-four feet in length, exclusive of platforms, and equipped with two four-wheeled trucks, suitable closets and cupola; *provided, however, that the provisions of this section shall not apply to common carriers which operate less than ten miles of interstate railroad in Ohio.*"

The addition of the proviso in question constitutes the only change in the phraseology of the section affected by the amendment. (See the original section as enacted in 103 O. L., 719.)

The constitutional question which is raised arises under article I, section 2, a part of the bill of rights of the constitution of 1851, which provides in part as follows:

> "All political power is inherent in the people. Government is instituted for their *equal protection and benefit.* * * *"

No question arises under article II, section 26, which provides that all laws of a general nature shall have a uniform operation throughout the state, because the proviso does not affect the *territorial* operation of the law, as both the main part of the section and the proviso apply to all things of the classes named, wherever located in the state, and operate uniformly upon them.

State v. Nelson, 52 O. S., 88.
State ex rel. v. Ferris, 53 O. S., 314.

I can find no decisions which are exactly in point under article 1, section 2 of the constitution. However, I think that the purport of the equality provision thereof is substantially the same as, and at least not more restrictive than, that provision of the fourteenth amendment of the Federal Constitution which forbids a state to deny to "any person within its jurisdiction the equal protection of the laws."

State ex rel. v. Ferris, *supra.*

Therefore, it would seem that any authorities as to the interpretation of the fourteenth amendment of the Federal Constitution in this particular would not only mark out the power of the state as such under the Federal Constitution, but would also serve to show the extent of the limitation imposed by the state constitution upon the general assembly of the state.

I am of the opinion that the proviso does not render the amended section unconstitutional.

The New York statute, forbidding the carrying of heating appliances of a certain type upon passenger cars, but excepting railroads less than fifty miles in length, was sustained as against an objection under the fourteenth amendment in N. Y. H. & H. R. R. Co. v. New York, 165 U. S., 628; while a full train crew law from which railroads less than fifty miles in length were exempted was sustained as against the same objection in C. R. I. & P. R. R. Co. v. Arkansas, 219 U. S., 453.

The rule is that constitutional limitations requiring the equal protection and benefit of the laws do not forbid classification upon any reasonable basis. Where some reasonable basis of classification may be imagined, such a state of facts will be assumed, and the contrary must be clearly shown in order to strike the statute down. (Lindsley v. Carbonic Gas Co., 220 U. S., 61.) See Jeffrey Mfg. Co. v. Blagg, 235 U. S., 571, an Ohio case involving the constitutionality of the classification under the workmen's compensation act of establishments with those in which five or more workmen or operatives are continuously employed and those in which fewer are employed.

A reasonable basis for the classification which the proviso effects may be assumed to exist from the fact that interstate railroads less than ten miles in length will scarcely do any intrastate business at all; and although the law applies, in the absence of any federal legislation on the same subject-matter, to interstate trains as well as to intrastate trains, the primary object thereof is, and

must be, limited to matters of state concern. In making a classification of this character some line must be drawn, and the mere fact that some relatively short distance other than ten miles might have been selected for such a purpose does not make the selection of that distance arbitrary and unreasonable in the legal sense.

This opinion is limited to the constitutionality of the bill as affected by the proviso.

Respectfully,
EDWARD C. TURNER,
Attorney General.

421.

MAIN MARKET ROUTE NO. XII—FROM VINTON VILLAGE THROUGH THURMAN AND WALES TO PATRIOT, INOPERATIVE—STATE HIGHWAY COMMISSION AND GOVERNOR MAY DESIGNATE AN ADDITIONAL INTERCOUNTY HIGHWAY.

The last paragraph of section 6859-3, *G. C., insofar as it seeks to designate a main market road from Vinton village through Thurman and Wales to Patriot, is inoperative; and will so remain unless the state highway commissioner, with the approval of the governor, designates an additional intercounty highway from Vinton village through Thurman and Wales to Patriot. If the highway commissioner should see fit to designate such additional intercounty highway and such action should be approved by the governor, then the designation in question will become operative and the intercounty highway so designated will be the route of the main market road.*

COLUMBUS, OHIO, May 28, 1915.

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

SIR:—I acknowledge receipt of your communication of May 15, 1915, which reads as follows:

> "Your attention is hereby called to the wording of the first and last paragraphs of section 6859-3, G. C., which read as follows:
>
> " 'Twenty-five per cent. of all moneys paid into the treasury of the state by reason of said levy shall be used for the construction, improvement, maintenance and repair of certain main market roads in said state, and the same shall be located along and upon the route of portions of said intercounty highways designated as follows, to wit:
>
> " 'Route No. XII, to be known as the Columbus and Ironton route, commencing at Columbus, thence in a southeasterly direction passing through Lancaster, Logan, McArthur, Hamden, Wellston, Vinton village, Thurman, Wales, Patriot, Waterloo to Ironton.'
>
> "Attached hereto is a copy of the map showing the officially designated intercounty highway system, as approved by Governor Harmon in December, 1912. You will note that there was no intercounty highway designated from Vinton village to Patriot by way of Thurman and Wales, in Gallia and Jackson counties.
>
> "Kindly render me a written opinion on the following points:

"(1) Is that part of main market route No. XII, described from Vinton village to Patriot, legally designated as a main market route?

"(2) If that part of main market route No. XII, described in section 6859-3 as leading from Vinton village to Patriot, is legally designated as a main market route, how is the exact route thus established to be determined?

"(3) Can main market road funds be applied on that part of main market route No. XII, as described in section 6859-3 as leading from Vinton village to Patriot?

"(4) Can intercounty highway funds be applied on that part of main market route No. XII, as described in section 6859-3 as leading from Vinton village to Patriot?"

As indicated by you, an answer to your questions involves a consideration of section 6859-3 of the General Code of Ohio, as found in 103 O. L., 155. In the first paragraph of this section, in dealing with the location of the various main market roads established by the act, the legislature provided that such roads should "be located along and upon the route or portions of * * * intercounty highways," thus clearly indicating a legislative intent to locate the main market roads designated by the act so that the routes thereof would follow roads already designated as intercounty highways. This paragraph of section 6859-3, G. C., may well be said to be declaratory of the general policy of the legislature in this matter. In the last paragraph of the section in question, indicating the course of main market route No. XII, to be known as the Columbus and Ironton route, commencing at Columbus and ending at Ironton, the legislature provided that the route should follow an established intercounty highway through Lancaster, Logan, McArthur, Hamden and Wellston to Vinton village. From Vinton village to Patriot, the general route as indicated by the legislature is through the villages of Thurman and Wales and does not follow the line of any intercounty highway. The remainder of the main market route from Patriot through Waterloo to Ironton, follows the line of a previously established intercounty highway.

Summarizing the above facts, it appears that in the first paragarph of section 6859-3, G. C., the legislature declared its general policy to be to establish main market routes upon the lines of previously established intercounty highways, but in designating main market route No. XII, the legislature seems to have endeavored to create an exception by establishing that part of main market route No. XII extending from Vinton village to Patriot over a highway not previously designated as an intercounty highway.

Under the familiar rule of construction that where there is in the same statute a particular enactment and also a general one, which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment, it would seem clear, in the absence of any other difficulties, that the particular provisions of the last paragraph of section 6859-3, G. C., would prevail over the general provisions of the first paragraph of the section, and that there would appear a clear legislative intent to designate a main market route from Vinton village, through Thurman and Wales to Patriot, even though there be no previously established intercounty highway between Vinton village and Patriot.

A further difficulty is encountered, however, in giving effect to this legislative intent by reason of the fact that there exist several public highways extending from Vinton village through Thurman and Wales to Patriot. In designating main market route No. XII from Columbus through Lancaster, Logan, McArthur, Hamden and Wellston to Vinton village, and in designating the same

route from Patriot through Waterloo to Ironton, and in designating the eleven other main market routes provided for in the section now under consideration, this difficulty does not exist for the reason that all these points are connected by intercounty highways, which intercounty highways previous to the passage of the act in question, had been definitely designated in the manner provided by law, and their designation made a matter of public record.

As to the particular matter now under consideration, no intercounty highway has ever been designated as passing from Vinton village through Thurman and Wales to Patriot. There being several different public highways extending from Vinton village through Thurman and Wales to Patriot, and the designation by the legislature of a main market route from Vinton village through Thurman and Wales to Patriot, not pointing out which one of these several highways is to be regarded as the main market road between the points in question, I am of the opinion that in the absence of further action, there is no way of giving effect to that part of the last paragraph of section 6859-3, G. C., which attempts to locate the route of main market road No. XII from Vinton village through Thurman and Wales to Patriot.

Answering your questions specifically, I am of the opinion that as the matter now stands, no main market road can be regarded as having been designated from Vinton village through Thurman and Wales to Patriot, and that at the present time neither main market road funds nor intercounty highway funds can be legally applied to the construction, improvement, maintenance or repair of any highway extending from Vinton village through Thurman and Wales to Patriot.

I deem it proper, however, to call your attention to the fact that under section 1184-4, G. C., as amended in 103 O. L., 451, the state highway commissioner may, subject to the approval of the governor, designate additional routes as intercounty highways. Should you see fit to act under favor of this authorization and designate as an intercounty highway some one of the public highways from Vinton village through Thurman and Wales to Patriot, and should your action in this particular be approved by the governor, then that part of the last paragraph of section 6859-3, G. C., which is at present uncertain and inoperative, would become certain and operative. In other words, should you see fit to designate some public highway extending from Vinton village through Thurman and Wales to Patriot, as an additional intercounty highway, and should this action on your part be approved by the governor, then such additional intercounty highway so designated is to be regarded as the route of the main market road, and the designation attempted by the legislature will become effective. But unless and until you do designate, with the approval of the governor, some public highway extending from Vinton village through Thurman and Wales to Patriot, as an additional intercounty highway, the attempt of the legislature to designate a main market road from Vinton village through Thurman and Wales to Patriot, must be regarded as inoperative.

Respectfully,
EDWARD C. TURNER,
Attorney General.

422.

BREWERY—BAR FIXTURES—THE CONSTITUTION PROHIBITS A BREWERY LOANING BAR FIXTURES TO A LICENSEE—LEGALITY OF SALE OR LEASE OF SUCH PROPERTY IS QUESTION OF FACT IN EACH CASE.

Article XV, section 9 of the constitution, and section 1261-34, *G. C.,* (103 *O. L.,* 222) *prohibit a brewing company from loaning bar fixtures to a licensee; whether leasing of bar fixtures for compensation or sale upon deferred payments, secured by chattel mortgage, is prohibited by the constitution and law, is a question of fact to be determined from all the circumstances.*

COLUMBUS, OHIO, May 28, 1915.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of yours under date of May 8, 1915, as follows:

> "Kindly advise the state liquor licensing board whether under the law:
>
> "(1) A brewing company may loan bar fixtures to a licensee without compensation therefor, retaining the title in its own name?
>
> "(2) A brewing company may rent bar fixtures to a licensee receiving therefor compensation in the form of rent and retaining the title to the same in its own name?
>
> "(3) A brewing company may sell bar fixtures to a licensee, executing a bill of sale therefor, taking for deferred payments thereon a chattel mortgage to secure notes for balance due, in its own name?"

Each of the above questions involves a consideration of that part of article XV, section 9 of the constitution, as follows:

> "License shall not be granted to any applicant who is in any way interested in the business conducted at any other place where intoxicating liquors are sold or kept for sale as a beverage nor shall such license be granted unless the applicant or applicants are the only persons *in any way pecuniarily interested in the business* for which the license is sought and no other person shall be *in any way interested therein* during the continuance of the license; if such interest of such person shall appear, the license shall be deemed revoked."

and the same language is incorporated in section 1261-34, G. C., 103 O. L., 222.

Bar fixtures are generally recognized as being necessary to a convenient and perhaps successful conduct of the business of selling intoxicating liquors at retail, but there is no such necessity for a brewing company to possess them. The only apparent reason for a brewing company to own bar fixtures is to secure some advantage in the sale of its product. A brewing company which would allow a licensee to use its bar fixtures free of charge would only do so in pursuance of an agreement, expressed or implied, that such licensee would favor the product of that company. In other words, the supplying gratis by the brewing company of the bar fixtures would be a means employed by the brewing company to secure an interest in the licensee's business by putting him under obligations to buy

that company's product. It seems to me that such a transaction would clearly be within the inhibition of both the constitution and the law hereinbefore referred to.

The transactions described in your second and third statements seem to me to be dependent upon the peculiar facts and circumstances that may surround each particular case and the good faith of the parties to the arrangement. If a brewing company, the owner of bar fixtures, should lease them to a licensee for an actual consideration wholly independent of the obligation, express or implied, that the licensee should in any way favor the lessor; or should sell such fixtures to such licensee upon credit, taking security therefor, and without any obligation, express or implied, that the licensee should in any way favor the vendor, such transactions would not violate the law.

However, the real intention of the parties can only be gathered from all the facts and circumstances of each particular case, and it seems to me to be impossible to lay down a hard and fast rule which should govern in all cases based upon the mere form. Mere form will not be sufficient, and in each case you should look beyond the form to the substance of the transaction and you will be justified in requiring the parties to clearly establish good faith in each such transaction.

I am not unmindful of the decision of the Lucas county court of appeals decided February 15, 1915, in the case of Kopaczewski v. Breweries Company, which is not in accord with the views above expressed. In this case the question involved was whether or not the Breweries Company, which deeded to D a piece of real estate upon which to conduct a saloon and containing a condition that the beer of the grantor should be sold upon the premises exclusively, was given such an interest in the business of the grantee as contemplated within the constitutional and statutory provisions above quoted.

The court, in considering that case, said:

> "We are not able to see how the transaction set forth in the petition is in any way in conflict with the language above quoted. No license to sell intoxicating liquors on the premises in question has been granted to the brewing company nor is the brewing company interested in the license which has been granted, nor in the business conducted on the premises. The only relation set forth in the pleading is one showing that the defendants are, and are required to be for a limited period of time, customers of the plaintiff in the event that they sell beer on the premises. If the contention in this respect of the defendant, Szparagowski, were correct, it would follow that his own license to conduct the business on the premises should be revoked. Of course, a brewing company is naturally interested in the success of its customers, but that interest is no different in a legal sense in this case from the interest which it has in the success of other customers. The fact that the brewing company is to furnish the entire supply of draught beer sold by the defendants does not give that company an interest in the business any more than an electric light company which supplied light for the saloon or a water company which supplied water, or a gas company which heated the saloon, would have an interest in the business there conducted. It is not such an interest as is within the inhibition of that section of the constitution from which quotation has been made."

With all due deference and respect to that court, but mindful of the conditions sought to be remedied by the constitutional amendment and the law enacted thereunder, I am unable to agree with the Lucas county court of appeals in the conclusion reached in the above case. While ordinarily I feel bound to follow

the principle laid down in a decision of the court of appeals, yet the question involved in this case is of such importance and to my mind the decision of said court is so clearly wrong that I do not feel so bound in this matter.

I am, therefore, of the opinion that each case submitted to you presents a question for a determination of fact, and if you are satisfied that the transaction in question is one which would make the brewing company "in any way interested" in the business of the licensee, the license should either be refused or revoked, according as the case may be.

Respectfully,
EDWARD C. TURNER,
Attorney General.

423.

SETTLEMENT OF CLAIMS CERTIFIED TO AUDITOR OF STATE AND ATTORNEY GENERAL UNDER SECTIONS 20 AND 268, G. C., BY RECEIPT OF PRINCIPAL WITHOUT INTEREST REQUIRES CONCURRENCE OF AUDITOR OF STATE AND ATTORNEY GENERAL.

The settlement of such claims as are certified to the auditor of state, under section 20 and to the attorney general under section 268, G. C., by receipt of principal without interest, requires concurrence of the auditor of state and the attorney general.

COLUMBUS, OHIO, May 28, 1915.

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

DEAR SIR:—We are in receipt of your letter under date of May 18, 1915, as follows:

> "In the matter of delinquent claims certified to this office and which we request payment of under sections 20, 259 and 268, General Code, I beg to submit for your consideration the following inquiries:
>
> "Section 268 provides: * * * 'Such claims shall bear interest at the rate of six per cent. per annum from the day on which they respectively fall due and, if the attorney general and auditor of state find there is a set-off or abatement to a claim, they may adjust it in such manner as they deem equitable. * * *'
>
> "In the event an offer is made to this office of the principal without the interest and we would accept the same in full of the account, would we be thus allowing a 'set-off or abatement to a claim?' With such an offer would it be necessary to obtain your concurrence to the same before we could accept it?
>
> "Again, after a claim has been certified to your office would a settlement by you without the interest, be allowing 'a set-off or abatement?' On such a settlement would the concurrence of this office be necessary?"

Section 20 of the General Code, requires an officer or agent of the state, coming into possession of a claim due and payable, on failure to collect such claim within sixty days, to certify it to the auditor of state.

Section 268 requires the auditor of state to keep an account of the claims

reported to him, and to immediately give notice to the party indebted, of the amount and nature thereof, and if the same has not been paid within sixty days after notification the auditor shall file with the attorney general for collection or suit. Then follows the language which you have quoted in your letter.

It would appear that the claims that are certified to the auditor of state bear interest at the rate of six per cent. per annum from the date upon which they respectively fall due. Such being the fact, the interest becomes a part of the claim as much as does the principal.

The word "abatement" has various meanings in law, but as used in the statute referred to has the ordinary meaning of "abatement," as the term is defined by Bouvier in his law distionary, under the heading "In Contracts" as:

> "A reduction made by the creditor, for the prompt payment of the debt due by the payer or debtor."

and any reduction made, either on the principal or interest of a claim due, would be an "abatement," as used in the statute. Therefore, since interest is to be computed by the auditor of state upon claims received by him, and the interest is as much a part of the claim as the principal, the acceptance of an offer to pay the principal without interest in full of the account would be the allowance of an "abatement" to the claim, and as I view the statute would therefore require the concurrence of yourself and this department to the adjustment of such claim by the payment of the principal without interest, whether the claim be still in your hands for the sixty days mentioned in the statute or certified to this department.

You will understand, of course, that this opinion is written solely relative to the settlement of claims which, under the provisions of section 268, General Code, bear interest.

Respectfully,
EDWARD C. TURNER,
Attorney General.

424.

COUNTY COMMISSIONERS—NOT ENTITLED TO REIMBURSEMENT FOR BOARD AND EXPENSES INCURRED BY THEM WHILE SERVING AS MEMBERS OF THE QUADRENNIAL AND ANNUAL BOARDS OF EQUALIZATION.

COLUMBUS, OHIO, May 28, 1915.

HON. JOHN M. MARKLEY, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—Under date of May 24th, you submitted for my opinion the question as to whether or not you should bring suit to recover money drawn by the county commissioners for "board and expenses" incurred by them while serving as members of the quadrennial and annual boards of equalization.

I notified you several weeks ago that the supreme court of Ohio, in the case of State ex rel. Enos v. Stone, had held that county commissioners were not entitled to compensation while serving as members of the quadrennial board of equalization.

While it is true that the supreme court only passed upon the question as to the right of the county commissioners to receive compensation for services while

acting as members of the quadrennial board of equalization in 1910, yet the reasoning of the court and the fact that section 5597 of the General Code (which was the section under consideration) included compensation not only for members of the quadrennial county board, but also for members of the annual county board of equalization, as found in the General Code at the time of its adoption by the general assembly in 1910, lead me to the conclusion that county commissioners are not entitled to compensation for serving as members of the quadrennial county board of equalization nor as members of the annual county board of equalization.

In regard to the question as to whether or not the county commissioners would be entitled while serving as members of either the quadrennial or annual board of equalization to expenses, either for board or for other expenses, it appears that prior to the county commissioners' salary law, which was first enacted on April 21, 1904, and which in words repealed "all other acts or sections of the Revised Statutes in so far as they may be inconsistent with the provisions of this act," a county commissioner, "except in counties where the compensation of county commissioners is now or hereafter may be fixed by a stated salary" (section 897-5, R. S.), was entitled in addition to salary and mileage "any other reasonable and necessary expense actually paid in the discharge of his official duties not exceeding two hundred dollars in any one year." But since the enactment of the county commissioners' salary law fixing the compensation of county commissioners at a stated salary, the provisions of section 897-5 of the Revised Statutes are no longer in force and effect, and were not carried into the General Code.

Prior to the enactment of said county commissioners' salary law the commissioners were likewise entitled to mileage, but upon the enactment of such salary law it was so enacted as to fix a stipulated annual salary, which under the provisions of section 897-2 of the Revised Statutes was declared to be "in full of all services rendered as such commissioner."

Section 897 of the Revised Statutes is now section 3001 of the General Code, and in such section there is no mention whatever made of the right of the commissioners to either mileage or actual and necessary expenses.

Consequently, I am of the opinion that county commissioners while acting as members of the quadrennial or annual board of equalization are not entitled, and have not been since the enactment of the county commissioners' salary law, to either mileage or expenses; and if the same has been received by them it has been an illegal expenditure of money from the county treasury. Consequently, I believe that you should bring suit for the recovery of such moneys.

Respectfully,

EDWARD C. TURNER,

Attorney General.

425.

STATE DENTAL BOARD—MEMBERS OR SECRETARY MAY BE PAID BY INDUSTRIAL COMMISSION FOR SERVICES RENDERED AN INJURED EMPLOYE.

Members of the state dental board or the secretary thereof may be paid compensation for medical, nurse or hospital services rendered, or medicines furnished to an injured employe when deemed proper, by the industrial commission.

COLUMBUS, OHIO, May 29, 1915.

HON. R. H. VOLLMAYER, *Secretary, The Ohio State Dental Board, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of May 20, 1915, as follows:

> "Will you kindly advise me whether or not it is lawful for a member of the state dental board, and particularly myself, as I am on a salary, to do dental work for, and receive compensation from the state industrial commission?"

which is supplemented under date of May 24, 1915, as follows:

> "I will do as you suggest and cite a possible case:
>
> "'A laborer has his jaw broken or has several teeth knocked out or injured while at work. The company that employs him carries state liability insurance. The services of a dentist are necessary in this case and the company or it's regular physician usually employs any dentist they wish. After the dentist has rendered his services, he receives his compensation from the state industrial commission.'
>
> "I wish to know whether or not it is proper for a member of the state dental board and particularly for me (as I am on a salary as secretary) to do this work and receive pay from the commission?"

Members of the state dental board are appointed by the governor under authority of section 1314, G. C., and receive as compensation for their services as such members, the sum of ten dollars for each day actually employed in the discharge of official duties as provided by section 1317, G. C. By section 1315, G. C., such board is required to elect a secretary and is authorized by section 1317 to fix the annual salary of such secretary.

Authority of the industrial commission to pay for services of dentists under the circumstances stated in your communication, if the same exists, must be found in the provisions of section 1465-89, G. C. (103 O. L., 88), which reads as follows:

> "In addition to the compensation provided for herein, the board shall disburse and pay from the state insurance fund, such amounts for medical, nurse and hospital services and medicine as it may deem proper, not, however, in any instance, to exceed the sum of two hundred dollars; and, in case death ensues from the injury, reasonable funeral expenses shall be disbursed and paid from the fund in an amount not to exceed the sum of one hundred and fifty dollars, and the board shall have full

power to adopt rules and regulations with respect to furnishing medical, nurse and hospital services and medicine to injured employes entitled thereto, and for the payment therefor."

While dental services are not here specifically mentioned, it is believed that in view of the manifest policy and purpose of the workmen's compensation law in which this section was enacted, the courts to effect such purpose would not hesitate to give to the terms "medical, nurse and hospital services and medicine" such construction as would include the services of a dentist in those cases in which the same was necessary for the proper treatment of an injured employe.

It will be noted, however, that the state is particularly protected against fraud or exorbitant charges in these cases in that the amount to be so paid is dependent entirely upon the discretion of the industrial commission, in addition to a maximum limit thereon.

It is not made altogether clear as to whom such payments are to be made, whether to the employe as a reimbursement or to the person by whom such services are rendered. The board is authorized to adopt rules and regulations with respect to the furnishing of medical, nurse and hospital services and medicines, and the matter as to whom payment should be made is deemed to be within the control of the board under such rules and regulations.

Section 12911, G. C., provides as follows:

"Whoever, holding an office of trust or profit, by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is not connected, and the amount of such contract exceeds the sum of fifty dollars, unless such contract is let on bids duly advertised as provided by law, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

It will be observed that the provisions of this section are confined to contracts "for the purchase of property, supplies or fire insurance."

It cannot be maintained that the services of a dentist under the circumstances set forth would constitute either property, supplies or fire insurance for the use of the industrial commission, within the meaning of those terms as above used, and I am unable to find any further provision of statute that would operate as an inhibition against any member of the state dental board rendering dental services to an injured employe, payment for which may be made by the industrial commission under section 1465-89, G. C., supra.

I am, therefore, of opinion that a member of the state dental board or the secretary thereof, may render dental services to an injured employe, payment for which service is made by the industrial commission.

Respectfully,
EDWARD C. TURNER,
Attorney General.

426.

STREET PAVING—CITY COUNCIL AUTHORIZES THE KIND OF MATERIAL TO BE USED FOR PAVING CITY STREETS.

The council of a city is the proper authority to determine the kind of material that shall be used in the pavement of the city streets, and the board of control cannot authorize the director of public service to contract for a different kind of material.

COLUMBUS, OHIO, May 29, 1915.

HON. MERLE N. POE, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—In your letter of May 27, 1915, you request my opinion as follows:

> "I am requested to seek your opinion as to which of the bodies, the board of control or the city council, is the proper authority to determine the kind of material that shall be used in the pavement of city streets, the council in the preliminary legislation having reserved the right to select the material to be used.
>
> "I regret that I am not able to give you my notion of the law, but the request comes just now from the city authorities and they are very desirous of hearing from your department by Tuesday, June 1st."

In the enactment of the Municipal Code of 1902, the legislature, as a general plan or scheme in the organization of cities, divided and specified their powers as legislative, executive and judicial.

The legislative power of cities was vested in a council, to be elected as provided in section 4206, G. C., and furthur, as to the powers of the city council, section 4211, G. C., provides:

> "The powers of council shall be legislative only, and it shall perform no administrative duties whatever and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contracts has been given and the necessary appropriation made, council shall take no further action thereon."

As to the executive power of cities, section 4246, G. C., provides:

> "The executive power and authority of cities shall be vested in a mayor, president of council, auditor, treasurer, solicitor, director of public service, director of public safety, and such other officers and departments as are provided by this title."

Section 4323, G. C., provides that in each city there shall be a department of public service which shall be administered by a director of public service.

Section 4402, G. C., makes provision for a board of control consisting of the mayor, director of public service and director of public safety, and section 4403 provides that no contract in the department of public service or the department

of public safety, in excess of five hundred dollars, shall be awarded except on the approval of the board of control, which shall direct the director of the appropriate department to enter into the contract.

With respect to the powers of the director of public service, as an administrative officer of the department of public service, in the government of cities, section 4325, G. C., provides:

> "The director of public service shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wharves, docks, landings, market houses, bridges, viaducts, aqueducts, sidewalks, play grounds, sewers, drains, ditches, culverts, ship channels, streams and water courses, the lighting, sprinkling and cleaning of public places, the construction of public improvements and public works, except those having reference to the department of public safety, or as otherwise provided in this title."

Section 4328, G. C., provides:

> "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

While the awarding of a contract in excess of $500.00 cannot be made by the director of public service without the approval and direction of the board of control, as required by section 4403, G. C., no legislative power is conferred on said board by statute and its authority, in so far as the selection of a particular kind of material for the improvement of a street is concerned, is no greater than that of the director of public service.

I call your attention to an opinion rendered by my predecessor, Hon. Timothy S. Hogan, to Hon. G. T. Thomas, city solicitor of Troy, Ohio, February 3, 1913, as found in volume 2 of the annual report of the attorney general for the year 1913, at page 1468. The questions raised by Mr. Thomas were as follows:

> "First. Has council power to determine the particular material with which a street may be paved?
>
> "Second. Can the director of public service select a material in the paving of a street, other than that prescribed by council in the ordinance to proceed with the improvement?

After a careful consideration of the provisions of the statutes applicable to said questions, Mr. Hogan held that by virtue of section 3825, G. C., council is authorized to determine the character of the materials which may be used in the improvement of streets and that under this authority council can select one specific material or it can name two or more kinds of material and leave the final decision to the director of public service, and that the director of public service has no power to change the material where council has named a specific kind of paving to be used in such improvement. The opinion further holds that

where the council of a city determines in the ordinance to proceed with an improvement, that a street shall be paved with a certain kind of paving, the director of public service has no authority to contract for a different kind of paving for such street.

I concur in this opinion, and, replying to your question, I am of the opinion that the city council is the proper authority to determine the kind of material that shall be used in the pavement of city streets, and that the board of control cannot authorize the director of public service to contract for a different kind of material.

Respectfully,
EDWARD C. TURNER,
Attorney General.

427.

BOARD OF HEALTH—HAS NO AUTHORITY TO ORDER COUNCIL TO INSTALL A SEWER—MAY ABATE CONDITIONS DETRIMENTAL TO PUBLIC HEALTH—EMERGENCY BONDS FOR SEWER CONSTRUCTION—MAY NOT BE ISSUED EXCEPT IN CASE OF EPIDEMIC OR DANGEROUS DISEASE.

The board of health has no authority to order council to install a sewer, but may abate conditions detrimental or injurious to the public health.

Emergency bonds for the construction of the sewer may not be issued except in case of epidemic or threatened epidemic or during the unusual prevalence of a dangerous communicable disease.

COLUMBUS, OHIO, May 29, 1915.

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

GENTLEMEN:—This office is in receipt of a communication from Mr. Frank J. Doorley, city solicitor of Sidney, Ohio, asking for an opinion on the following state of facts:

> "Linn street, lying on the outskirts of, but within, the corporate limits of the city of Sidney, has no sanitary sewer connections and is at a distance of about 330 yards from the closest point at which a connection could be made. To make a connection would cost about $2,000.00. A large number of the residents on Linn street have water in the cellars under their houses continually owing to the lack of this sewer connection. Today the board of health visited the street and came to the opinion that to have the water continue in the cellars would be dangerous to the public health in that locality.
>
> "The city council has refused to make this sewer connection for the reason that its practice has been to pay for sewer extensions from the general fund and that the general fund is now needed to pay the regular expenses of the city.
>
> "If, however, bonds could be issued that might be paid for as emergency bonds are paid from the excess over the one per cent. tax limit, this method of installing it would be taken.
>
> "I would, therefore, ask: 1. Can the board of health order this sewer installed as a measure necessary to protect the public health?

2. If it can so order, may the sewer be paid for by issuing emergency bonds payable from the tax receipts from the rate over the one per cent. limit? 3. If the board of health does so order, is council bound to install the sewer or must the board of health look after the installation?

"I would cite you the following as being applicable to the matter: G. C., 4413, 4451 and 5649-4."

Section 4450, of the General Code, is as follows:

"In the case of epidemic or threatened epidemic or during the unusual prevalence of a dangerous communicable disease, if funds are not otherwise available, the council of a municipality may borrow any sum of money that the local board of health deems necessary to defray the expenses necessary to prevent the spread of such disease. Such money may be borrowed until the next levy and collection of taxes is made, at a rate of interest not to exceed six per cent. per annum. Thereupon the board may expend the amount so authorized to be borrowed, which amount, or so much thereof as is expended, shall be a valid claim against the municipality from the fund so created."

In order to enable the board of health to proceed under the section quoted above it is necessary that there be a condition of epidemic or threatened epidemic, or unusual prevalence of a dangerous communicable disease, and from the facts submitted by Mr. Doorley such a condition does not exist, therefore, there can be no authority for the board of health to act under the section referred to.

The authority conferred by section 4421, of the General Code, may be invoked by the board of health for the purpose of abating the condition referred to in his letter in view of the fact, as he states, that the board has determined that the condition referred to is dangerous to the public health. I do not find any provision of law which would authorize the board of health to order the city council to provide the sewer service referred to, but I invite your attention to chapter V, division VII, of the Municipal Code, entitled "Assessments" and particularly to sections 3812, 3871 and 3882 of the General Code, as under these sections the council may proceed either to establish sewer districts for the entire corporation or for such part of it as may be without sewer service.

It is, therefore, my opinion, in answer to your first question, that the board of health is without authority to order the sewer installed as a measure necessary to protect the public health, and that council is the proper body to provide the means for such sewer.

In answer to your second question, emergency bonds may not be issued for the purpose of providing the sewer in view of the fact that the conditions set forth do not warrant a proceeding under section 4450 of the General Code quoted above.

Your third question comprehends the possibility of the authority of the board of health to order the installation of the sewer which has been disposed of above.

Respectfully,

EDWARD C. TURNER,

Attorney General.

428.

DELAWARE ARMORY—CONTRACT AND BOND APPROVED.

COLUMBUS, OHIO, May 29, 1915.

HON. BYRON L. BARGAR, *Secretary, Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your favor of May 28th, with which you enclose duplicate copies of the form of contract for the construction of the Delaware armory, together with a copy of the contract bond in the sum of nine thousand dollars.

I have examined the copy of the form of contract, which provides for the building of the armory by M. Gallup, of Defiance, Ohio, for the sum of seventeen thousand nine hundred and sixty-six dollars ($17,966.00); also the form of the contract bond which is for nine thousand dollars ($9,000.00); and it is my opinion that the same are prepared in accordance with law, and I am, therefore, returning the copies to you with my approval, as to the form, endorsed thereon.

In the future in submitting matters of this kind, I would request that you submit the contracts and bonds after the same have been duly executed, so that the approval of this office may be given with a view to a consideration of every feature of the matter.

Respectfully,
EDWARD C. TURNER,
Attorney General.

429.

PRIZE FIGHT—BOXING EXHIBITION—WHERE FACTS INDICATE THAT CONTESTANTS ARE PAID AND A BOUT REALLY IS A "PRIZE FIGHT," THE SAME SHOULD BE ENJOINED.

Where contestants in bouts, boxing exhibitions, or prize fights draw crowds for the promoters and thus demand rewards for themselves and the facts indicate that the contestants are paid and a "prize" is awarded, such an exhibition would be a "prize fight" and should be enjoined.

COLUMBUS, OHIO, May 29, 1915.

HON. CHAS. F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication of May 22, 1915, which reads as follows:

> "Assuming that the Majestic Bath Club is an athletic association, duly incorporated under the laws of the state of Ohio, and which has a gymnasium for the benefit of its members, I desire to know whether, having obtained a permit from the mayor of the city of Lorain, it may legally conduct public boxing exhibitions outside of its gymnasium, the exhibition being participated in by noted pugilists who prior to the exhibition have entered into articles of agreement with reference to weight, duration of rounds, rest periods and the rules under which the contest is to be held,

and presided over by well known referees, each contestant having the seconds usually present at a prize fight, the ring being the regulation ring, and all of the other surroundings similar to those present at a prize fight. No decisions have been given at these contests, and aside from the fact that the participants have been raised and lowered in the pugilistic world in accordance with the showing made at these contests, no prize, reward or honor is at stake, the consideration for the appearance of the contestants being agreed upon before the contest.

"It is my opinion that, under section 12803, G. C., neither public gymnasiums nor athletic societies are permitted under any circumstances to hold such an exhibition as above described, to which admission is charged, and I call your attention to the language appearing in the case of State ex rel. v. Hobart, 11th Ohio Decisions, page 198, which is as follows:

" 'Quite different is a boxing match in a gymnasium or athletic club, institutions organized by men of serious purpose, who appreciate the need of physical culture and exercise, so that they may be the better fitted to pursue the ordinary vocations of life, occupations honorable and useful, of profit to themselves, and which organized society requires should be carried on for its needs. Boxing is a favorite form of amusement and is healthful exercise for men of use in the world and with whose pursuits it has no connection, but is merely incidental with other forms of exercise to the proper maintenance of the physical nature. *In this sense, and no other, the term "boxing exhibition" is used in the permissive clause of section* 6890, *Rev. Stat., and it should not be forgotten for a moment that even such a boxing match for a prize is under the law of Ohio a prize fight, and cannot be given.*'

"I am not disposed to interfere with legitimate, clean sport, but I am disposed to prevent, if possible, contests which are illegal, and I respectfully request that you give me your interpretation of these statutes to aid me in determining whether this is, or is not, a violation of the law.

"As this contest is to be staged in the early part of June, and the organization plan to erect a large structure to accommodate the crowds which will be present, I would appreciate an early reply."

Your inquiry concerns itself with the distinction between the term "prize fight" as used in sections 12800 and 12801, G. C., and the term "sparring or boxing exhibitions" as used and referred to in sections 12802 and 12803, G. C. It is a matter of law as to what constitutes a prize fight and the term "prize fight" is susceptible of legal definition. The difficulty encountered is in applying to the facts which engage your attention, the legal definition of the term "prize fight."

As noted in a previous opinion to you under date of April 29, 1915, a prize fight has been defined as a pugilistic encounter or boxing match for a prize or wager, and this definition was quoted with approval in the case of Seville v. State, 49 O. S., 117, 131.

In the case of People v. Taylor, 96 Michigan, 576, the court says that to constitute prize fighting, there must have been an expectation of reward to be gained by the contest or competition, either to be won from the contestant or to be otherwise awarded; and there must have been an intent to inflict some degree of bodily harm upon the contestant.

In the report of the case to which you refer, State ex rel. v. Hobart, 11 O. D., 166, 8 O. N. P., 246, decided in 1901, you will find an opinion upon this subject rendered to Hon. Julius Fleischmann, by Hon. Wade H. Ellis, who was at that time assistant corporation counsel of the city of Cincinnati. This opinion by Mr. Ellis was referred to by Judge Hollister in deciding the case in question, as

a most creditable legal document and as stating clearly the law on the questions involved in it. In this opinion Mr. Ellis says that prize fight is an engagement between two persons contesting with their fists for physical supremacy, intending in some degree to do bodily harm to each other and expecting as a result of the contest to receive some honor, reward or emolument. Mr. Ellis points out that it makes no difference whether the contest is with or without gloves nor what kind of gloves are used, and that it makes no difference in Ohio whether the contest is given in public or private. It is also immaterial whether the bodily harm inflicted or intended to be inflicted is slight or serious, nor whether the contest is for "points" or to a "finish," nor whether it is for a limited number of rounds or until a decision is rendered. The prize need not be in any particular form; it may be an honor or a fixed sum or a proportion of the receipts taken at the door.

In the case of State v. Purtell, 56 Kan., 479, cited by Mr. Ellis in his opinion to the mayor of Cincinnati, the court held that it was not indispensable that the prize or reward should be given to the successful contestant alone. The court pointed out that the evil designed to be remedied by a statute against prize fighting is that class of brutal exhibitions for giving which considerable sums of money are paid, and observed that the statute cannot be evaded by rewarding the unsuccessful as well as the successful combatant.

In the light of the above decisions, a prize fight, within the meaning of the Ohio statutes, may be defined as an engagement between two persons contesting with their fists for physical supremacy, either in public or private, and with or without gloves, intending in some degree to do bodily harm to each other, and having received or expecting to receive some reward or emolument for engaging in such contest.

You state that no prize, reward or honor is at stake in the contests to which you refer, the consideration for the appearance of the contestants being agreed upon before the contest. If by this you mean to say that either one or both of the contestants are paid or promised any reward, compensation or emolument for their appearance, then I have no hesitation in saying that the contests to which you refer are prize fights, and the fact that such compensation is in no way dependent on the outcome of the contests, is immaterial. In other words, the fact that the consideration for the participation of the contestants is agreed upon, or even agreed upon and paid, before the contest, would not serve to rob the contests of their character as prize fights. I am not unmindful of the fact that under the decision in the case of State v. Aston, 57 O. S., 672, 39 W. L. B., 117, a bona fide athletic club may hire persons to engage in a boxing contest, and pay them a definite compensation; and that if such persons do not intend to harm each other and do not harm each other, such contest is not a prize fight. Such a contest may be lawfully given by a bona fide athletic club, provided the proper written permission be first obtained, and in my opinion the holding of such a contest in a place other than the regular gymnasium of such club, would be immaterial.

But in the case now under consideration, it is obvious that no such boxing contest is intended. The facts that these so-called boxing exhibitions are to be held outside the gymnasium of the Majestic Bath Club, in a large structure especially designed to accommodate the crowds which it is expected will be present; that they are to be participated in by noted pugilists who, prior to the exhibitions, have entered into articles of agreement with reference to weight, duration of rounds, rest periods and the rules under which the contest is to be held, and presided over by well known referees; that each contestant is to have the "seconds" usually present at a prize fight; that the ring is to be the regulation ring; and that all the other surroundings are to be similar to those present at a prize fight; taken together, point unmistakably to the fact that what is here intended and

what will in fact occur, will be not a sparring or boxing match, but a fight. The surrounding facts stated by you leave no room to doubt the real character of the proposed encounters. Unless they be fights in which the contestants intend to inflict bodily harm upon each other, they will fail utterly to attract the crowds which are expected; and if one of these contests were to occur and the participants were not to strike each other hard and often and with intent to do bodily harm to each other, then both the participants and the promoters would be denounced as swindlers by those in attendance.

It is a matter of common knowledge that the earning ability of such men as you describe is enhanced or curtailed by the actual results of such contest. The fact that no formal decision is given does not evade the law. There is actually a real decision in the minds of the spectators and of the so-called sporting public, and there is always a decision in fact in the news accounts of these bouts. As these men are successful, their ability to draw crowds for the promoters and thus to demand greater rewards for themselves is augmented. It is, therefore, upon the success or failure in such a contest that the chances of the contestants rest for similar engagements. A prize is defined as anything of value that is taken or secured by chance, effort or desert. All of the facts stated, together with the fact that each of these contestants is paid for his appearance in the contest, satisfy me that the proposed contest is in fact a proposed prize fight, and that it will be your duty to enjoin the same.

It would be no defense in a prosecution for engaging in or aiding such a contest that the same was held by a bona fide athletic club and that written permission had been obtained from one of the officials named in section 12803.

Respectfully,

EDWARD C. TURNER,

Attorney General.

430.

IMPROVEMENT OF ROAD IN VILLAGE BY COUNTY COMMISSIONERS AND VILLAGE COUNCIL—AN IMPROVED COUNTY ROAD LYING IN A VILLAGE MAY BE FURTHER IMPROVED BY COUNTY COMMISSIONERS ON PETITION OF MAJORITY FOOT FRONTAGE—ASSESSMENT BY COUNTY COMMISSIONERS LIMITED TO PART REQUESTED BY PETITION—COUNTY COMMISSIONERS MAY USE DISCRETION AS TO PAYMENT OF COST—COUNCIL OF VILLAGE MUST PROVIDE FOR ADDITIONAL COST WHEN IT AUTHORIZES ROAD TO BE IMPROVED AT A GREATER WIDTH THAN COUNTY COMMISSIONERS CONTEMPLATE.

Under section 6903, *et seq., G. C., a part of an improved county road lying within the corporate limits of a village may be further improved by the county commissioners of a county in which said village is located, on a petition signed by the owners of at least a majority of the foot frontage on said part of said road.*

Under the provision of section 6904, *G. C., the authority of the county commissioners as an assessing board for the purpose of assessing a part or all of the damages, costs and expenses incident to the improvement of a part of a county road within the corporate limits of the village within said county, is limited to the improvement of the part of said road prayed for in the petition of the abutting property owners filed with said commissioners, under authority of section* 6903, *G. C.*

Under the provision of section 6906, *G. C., taken in connection with the provisions of section* 6904, *G. C., the county commissioners have the discretion to determine in view of the facts and circumstances of the particular case, that it is equitable and proper to pay the entire cost and expense of improving a part of a county road within the corporate limits of a village within said county, to the width prayed for in the petition of the abutting property owners, out of the county treasury or out of any state and county road improvement fund available for said purpose.*

Under the provisions of section 6905-1 *to* 6906, *G. C., inclusive, the council of said village, having determined to improve said part of said road to a greater width than is contemplated in the proceedings for such improvement by the county commissioners, has authority to provide sufficient funds to pay such costs and expense as is made necessary by the additional width to which the same is to be improved.*

COLUMBUS, OHIO, May 29, 1915.

HON. S. W. ENNIS, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—I have your letter of May 17, 1915, which is as follows:

"I would like for you to render an opinion upon the following subject:

"May 6, 1913, the council of the village of Oakwood, Ohio, passed an ordinance providing for the improvement of a certain county road running through said village to a greater width than provided for in a certain petition filed with the county commissioners of Paulding county, Ohio, on the 7th day of May, 1913, under section 6903, of the General Code of Ohio, asking for the grading, draining, guttering, curbing, etc., of a certain

street, which was an improved county road wholly within the corporate limits of said village and not extending beyond the same in either direction, which road had heretofore been stone and top dressed with gravel by the county commissioners under the two-mile pike assessment act and the joint improvement by the commissioners and village council, was to be made in accordance with the provision of sections 6903 to 6914, of the General Code of Ohio.

"I enclose you herein a full copy of all of the proceedings to this date in said matter. The village has proceeded to raise by selling its bonds, the sum of $6,113.76, which has been deposited with the county treasurer of this county to be applied in payment of its share of the cost by reason of the increased width of the road.

"I would like to have your opinion as to the law upon the following facts:

"First. Can the citizens of a municipal corporation on an improved county road wholly within the municipal corporation which has heretofore been built of stone and gravel by a petition to the county commissioners thereafter when the contemplated improvement does not extend beyond its corporate limits, ask for the improvement of the same street and road in accordance with the provisions of section 6903, of the General Code?

"Second. Do the county commissioners, under section 6904, of the General Code, act as an assessing board for the purpose of estimating the cost of the whole improvement, including the increased width thereof or only that part petitioned for?

"Third. Under sections 6905-3 and 6905-4, does the village council assess the cost of the improvement for the increased width of the street?

"Fourth. Can the county commissioners pay all the expense of this improvement as petitioned for to said board, under section 6906, of the General Code of Ohio, of the width of 12 feet and the village pay the expense of the increased width of the street? The surveyor's estimate places all of this cost of the 12 feet upon the county originally petitioned for.

"Fifth. Are the proceedings of this kind legal without the commissioners sitting as an assessing board under section 6904 and assessing the damages, cost and expense of the improvement upon the abutting property owners according to the front footage or benefits?"

From your statement of facts and from the copies of certain resolutions enclosed by you, I understand that on May 7, 1913, the owners of a majority of the foot frontage abutting on a part of an improved county road within the corporate limits of the village of Oakwood, in Paulding county, filed a petition with the commissioners of said county, asking for the improvement of said part of said road by grading, draining, curbing and paving the same to the width of 12 feet, under authority of section 6903 et seq. of the General Code; that the council of said village, acting under authority of section 6905-1, G. C., determined to improve said part of said road to a greater width than was contemplated by the proceedings for said improvement by said county commissioners, and declared its intention so to do in the resolution of May 6, 1913, a copy of which is enclosed. Said resolution designates the points between which it is desired to increase the width of said proposed improvement and the width to which the same shall be improved.

Acting under authority of section 6905-3, G. C., said village council has issued bonds and the sum of $6,113.76 realized from the sale of said bonds has been deposited with the county treasurer to be applied to the payment of the village's

share of the cost and expense of said improvement, by reason of the increased width of said part of said road, as provided in section 6905-5, G. C.

It further appears that the county commissioners have approved said resolution of said council, have granted the petition for said improvement and have adopted the plans, profiles, specifications and estimates for said improvement to the width indicated in said resolution, and are about to let the contract for said improvement. Several questions are asked by you which, by their terms, are somewhat general in application, but, in asking said questions, you evidently had in mind the facts relative to the particular improvement above referred to.

Sections 6903 to 6914, inclusive, of the General Code, provide a scheme for improving a county road or part thereof. These sections were formerly known as sections 4637-1 to 4637-11, of the Revised Statutes of Ohio.

In the case of the State of Ohio ex rel. Witt v. Craig, et al., 22 O. C. C., 135, the court held that the provisions of section 4637-1 et seq. of the Revised Statutes, confer authority upon county commissioners to improve a part of a county road lying within the limits of a municipal corporation.

Section 6903, G. C., provides:

> "On a petition therefor signed by the owners of at least a majority of the foot frontage on a county road or part thereof, the county commissioners may do any one or more of the following acts or things:
>
> "1. Cause the county surveyor to establish a grade along it, or part thereof, subject to their approval;
>
> "2. Cause it or part thereof to be widened, altered or established to a greater width than 60 feet and not more than 100 feet, to be determined by the viewers as provided in this chapter;
>
> "3. Grade, drain, curb, pave and improve it or part thereof."

I do not think the fact that the part of the county road, within the limits of the village of Oakwood, has heretofore been improved with stone and gravel by the county commissioners, is material as affecting the answer to your first question.

Replying to said question, I am of the opinion that, under section 6903 et seq., of the General Code, a part of an improved county road lying within the corporate limits of a village, may be further improved by the county commissioners on a petition signed by the owners of at least a majority of the foot frontage on said part of said road.

Section 6904, G. C., provides:

> "The county commissioners may assess the damages on account of the widening, altering or establishing of such road, or part thereof, and the costs and expenses of any or all of the improvement or such part of said damages, costs and expenses as they deem equitable under the circumstances, upon the taxable property abutting upon the road or part thereof, either according to the foot frontage or according to the benefits. The commissioners shall be an assessing board for the purpose of assessing the damages, costs and expenses, as herein set forth, upon the abutting property as aforesaid."

Section 6905, G. C., provides:

> "The board of county commissioners may enter into an agreement with the board of trustees of any township or the council of any village,

or both, into or through which a state or county road improvement is contemplated, whereby said board of trustees or council may assume and pay such a proportion of the costs and expenses of such improvement not assessed upon abutting land in accordance with section 6904, of the General Code, as may be agreed upon between said board of county commissioners and said board of trustees or council, and such agreement or agreements may be entered into at any time before the contract for said improvement is let.''

I do not understand that an agreement was made between the county commissioners and the village council, as authorized by section 6905, G. C., whereby the village is to pay any part of the cost and expense of improving said part of said road to a width of 12 feet, as petitioned for by the abutting property owners. On the contrary, it appears that the county is to bear all of said expense and the village is to pay the cost and expense incident to the increased width indicated in the resolution of said village council, and as shown on the plans prepared by the county surveyor and adopted by the county commissioners. The provisions of sections 6905-1 to 6905-6, inclusive, of the General Code, are applicable to the case where a part of the county road to be improved lies within the corporate limits of a village, and the council of said village determines, as in the case above referred to, to improve said part of said road to a greater width than is contemplated by the proceedings for said improvement by the county commissioners.

Section 6905-1, G. C., provides:

''Whenever any portion of a road to be improved under the provisions of this act lies within the corporate limits of a village, and the council of said village decides to improve any part of said road within its corporate limits, to a greater width than is contemplated by the proceedings for said improvement by the board of county commissioners, such council may, by resolution, at any time before bids for said improvement are advertised for, declare its intention so to do, which resolution shall indicate the points between which it is desired to increase the width of said proposed improvement, and the width to which it desires the same to be improved. A certified copy of such resolution shall be filed with the board of county commissioners.''

Section 6905-2, G. C., provides:

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

Section 6905-3, G. C., provides:

''Upon receipt of such copy the council of such village by taking

such action as is authorized by law for the improvement of its streets, may issue and sell its bonds in anticipation of the collection of the special assessments by it to be made upon the benefited property, or to be paid by any street railroad company operating in said road within the limits of said village, and for the purpose of meeting such cost and expense of such improvement as is by law required to be paid by said village, and the amount of the total estimated cost and expenses of so much of said improvement as is by law required to be paid by said village and the amount of the total estimated cost and expenses of so much of said improvement as is made necessary by reason of the additional width to which the same is to be improved. The proceeds of said bonds shall be paid into the county treasury, into a fund to be established for the purpose and in the manner hereinafter specified.''

Under the provisions of section 6905-3, G. C., the village council has authority to issue bonds to provide a fund sufficient to pay such cost and expense of said improvement as is made necessary by reason of the additional width to which the same is to be improved. The authority of said council to issue bonds is limited, however, by section 6905-4, G. C., which provides in part:

''* * * * * The authority herein given to the village, to issue and sell its bonds for the purpose of this act, and to levy assessments to pay for the same, shall be subject to all the limitations and conditions imposed by law upon municipal corporations in the issue and sale of bonds for street improvements.''

Replying to your second and third questions, I am of the opinion that under the provision of section 6904, G. C., the authority of the county commissioners as an assessing board for the purpose of assessing a part or all of the damages, costs and expenses incident to the improvement of that part of the county road within the corporate limits of the village, is limited to the improvement of the part of the said road as prayed for in the petition; said assessment to be made according to foot frontage or according to benefits accruing to the owners of said property, as said commissioners may determine, and that, under the provision of section 6905-3, G. C., the village council is authorized to act as an assessing board for the purpose of placing additional assessments against said abutting property, according to the benefits accruing to the owners thereof, for the purposes mentioned in said section.

Section 6906, G. C., provides:

''The county commissioners may order such part of the damages, cost and expense of such improvement as they deem equitable, to be paid out of the county treasury, or any state and county road improvement fund.''

You inquire whether the county commissioners have authority, under section 6906, G. C., to pay all the expense of said improvement to the width of 12 feet, as petitioned for by said abutting property owners, and whether the village may pay the exact expense made necessary by reason of the additional width, and whether such proceedings are legal without the commissioners sitting as an assessing board under section 6904, G. C., and assessing a part or all of the damages, costs and expense incidental to said improvement upon the abutting property according to foot frontage or according to benefits.

Section 6905-4, G. C., further provides:

''On the adoption by the council of the plans, profiles, specifications

and estimates, so prepared by the county commissioners, and the filing of the same with the village clerk, the council may adopt such legislation as is required by law for the improvement of its streets and the sale of its bonds, and pay for the same. * * * * *''

Section 6905-5, G. C., provides:

''The county commissioners shall thereupon receive bids for and let the contract for improving such portion of said road as lies within the village, at the same time and in the same manner as contracts for other road improvements are let. The total cost and expense of advertising said additional work shall be paid for by the order of the county commissioners on the warrant of the county auditor, out of the fund established as hereinbefore set forth. Any money left in said fund after the completion of said work and payment therefor, shall be refunded to the village through which said improved road extends, to be by it disposed of according to law. All damages to abutting property within said village, by reason of the improvement of the said road, shall be paid for by said village.''

Replying to your fourth question, I am of the opinion that, under the provision of section 6906, G. C., taken in connection with the provisions of section 6904, G. C., the county commissioners have the discretion to determine, in view of all the facts and circumstances of your particular case, that it is equitable and proper to pay the entire cost and expense of said improvement to the width of 12 feet, as prayed for in the petition of the abutting property owners, out of the county treasury or out of any state and county road improvement fund available for said purpose, and that under the provisions of section 6905-1 to section 6905-6, inclusive, of the General Code, said village council, having determined to improve said part of said road to a greater width than is contemplated by the proceedings for said improvement by the county commissioners, has authority to provide sufficient funds to pay such cost and expense as is made necessary by the additional width to which the same is to be improved.

The resolution of the county commissioners adopting the plans and specifications for said improvement, as prepared by the county surveyor, contains the following provision:

''The board believes the construction of this improvement to be for the public convenience and utility and hereby expresses itself as willing to proceed with the same as soon as the corporation of Oakwood shall have performed their part by selling the bonds of said village of Oakwood for their proportion, and turned the amount into the county treasurer, when this board will order the necessary transfer of funds to provide for the payment of the county's share of the cost and expense of the said proposed improvement.''

Replying to your fifth question, I am of the opinion that the county commissioners, having determined to pay all of the cost and expense of said improvement to the width of 12 feet, as prayed for in said petition, out of the county treasury, exercised their authority under sections 6904 and 6906, G. C., and that the proceedings of such county commissioners in this respect are legal.

Respectfully,
EDWARD C. TURNER,
Attorney General

431.

ARTICLES OF INCORPORATION—THE AUTOMOBILE OWNERS' MUTUAL LIABILITY AND CASUALTY COMPANY—APPROVAL.

Approval of articles of incorporation of The Automobile Owners' Mutual Liability and Casualty Company.

COLUMBUS, OHIO, June 1, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return to you herewith, with my approval endorsed thereon, proposed articles of incorporation of The Automobile Owners' Mutual Liability and Casualty Company, a former draft of which I was unable to approve.

The purpose clause of the articles still leaves something to be desired, in that it does not specify that the damage to automobiles which is to be insured against is to be that arising from cause other than fire or lightning. I have determined, however, not to make this technical defect the basis of a second rejection of the articles, for the reason that the clause as a whole clearly specifies that the company is to be organized under paragraph 2 of section 9510 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

I hereby certify that I have examined the foregoing articles of incorporation of The Automobile Owners' Mutual Liability and Casualty Company, and that the same are found by me to be in accordance with the provisions of chapter 1, subdivision II, division III, title IX, part second of the General Code of Ohio, and not inconsistent with the constitution and laws of this state and of the United States.

EDWARD C. TURNER,
Attorney General.

432.

ARTICLES OF INCORPORATION—THE MERCHANTS' MUTUAL INSURANCE ASSOCIATION DISAPPROVED

COLUMBUS, OHIO, June 1, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return to you herewith the proposed articles of incorporation of The Merchants' Mutual Insurance Association, without my approval, and with the advice that they may not be filed nor recorded, for the reason that the purpose clause thereof fails in any respect to comply with sections 9593 and 9594 of the General Code.

The clause itself is as follows:

> "Said corporation is formed for the purpose of insuring its members against loss or damage by fire and lightning to dwellings, business buildings and business stocks located in the state of Ohio."

Its deficiency may be measured by the following requirements of the statute:

(1) The kinds of property proposed to be insured must be specifically designated, and as the statute respecting the classes of property which may be insured by such corporations is itself specific, it would seem that some more definite description of the personal property which it is proposed to insure than "business stocks" should be set forth therein.

(2) The articles of incorporation of such a company must specifically set forth that one of its objects is to "enforce any contract * * * entered into (by the members of the association) whereby the parties thereto agree to be assessed specifically for incidental purposes and for the payment of losses which occur to its members."

Respectfully,
EDWARD C. TURNER,
Attorney General.

433.

APPROVAL OF FINAL RESOLUTIONS FOR IMPROVEMENT OF CERTAIN SPECIFIED ROADS.

COLUMBUS, OHIO, June 1, 1915.

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

DEAR SIR:—I have your communication of May 21, 1915, transmitting to me for examination final resolutions on the following roads:

Medina-Norwalk	Medina County
Columbus-Chillicothe	Ross County
Milford-Hillsboro	Highland County
Akron-Youngstown	Portage County
Ashland-Loudonville	Ashland County
Cadiz-Carrollton	Harrison County
Van Wert-Ottawa	Putnam County

I find these resolutions regular in form and am therefore returning them with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

434.

HAWK BOUNTIES—APPROPRIATION FOR SUCH PURPOSE MUST FIRST BE MADE BY TOWNSHIP TRUSTEES—MAXIMUM LIMITATION TWO HUNDRED DOLLARS.

House bill No. 79, passed March 8, 1915, and given section numbers 5831-1, 5831-2 and 5831-3, G. C., will apply only to hawks killed after such act goes into effect.

Under said act the township clerk cannot issue any certificates for hawk bounties until the township trustees have made an appropriation for that purpose. It is the duty of the trustees to make some appropriation for that purpose, if there be available funds in the township treasury, but the size of such appropriation within the maximum limitation of two hundred dollars rests in the discretion of the trustees.

COLUMBUS, OHIO, June 2, 1915.

HON. MEEKER TERWILLIGER, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication of May 21, 1915, in which you request my interpretation of house bill No. 79, passed March 8, 1915, and entitled "An act to provide a bounty for the killing of hawks." The act contains three sections which have been numbered 5831-1, 5831-2 and 5831-3 of the General Code. The act was filed in the office of the secretary of state March 10, 1915, and in the absence of a referendum will go into effect June 9, 1915. Section 5831-1, G. C., being the first section of the act, reads as follows:

> "That a bounty of one dollar shall be allowed and paid, in the manner hereinafter provided, for each chicken hawk, American goshawk, blue hawk, Cooper hawk, sharp shinned hawk, or duck hawk, killed in this state by an inhabitant thereof."

You inquire as to whether the law applies to hawks killed after the passage of the act and before June 9, 1915, or only to hawks killed on or after June 9th. While section 2 of the act, being section 5831-2, G. C., requires the person applying for a bounty to take each hawk to the clerk of the township in which such hawk was killed, yet the bounty is in fact to be paid for the killing of the hawk and not for its delivery to the clerk. I am, therefore, of the opinion that the law will not apply to hawks killed prior to June 9, 1915.

Sections 2 and 3 of the act provides that upon the delivery of a hawk to the township clerk he shall issue and deliver to the applicant a certificate stating the bounty to which the applicant is entitled, but such certificate shall not be issued unless there is a fund in the township treasury out of which such bounty may be paid and that such fund shall be set apart out of the general fund of the township by appropriation therefor by the township trustees, which fund in no year shall exceed the sum of two hundred dollars. You state that certain township trustees of your county are threatening to provide no fund in the township treasury out of which such bounties may be paid, their object being to prevent the clerk from issuing certificates for hawk bounties; and you inquire as to what the effect will be in case the trustees of any township fail to set apart out of the general fund of the township by appropriation therefor, any fund out of which such bounties may be paid.

The law provides that the clerk shall not issue any certificates for hawk bounties unless there is a fund in the township treasury out of which such boun-

ties may be paid, and an appropriation by the township trustees is required in order to create such a fund. It follows that until the trustees have acted in the matter and set apart by appropriation for the purpose of paying these bounties, a sum not exceeding two hundred dollars in any one year, no certificates for such bounties can be issued by the township clerk. The maximum limitation on this fund is two hundred dollars per annum, but the statute does not fix any minimum limitation, the amount of the appropriation being left within the discretion of the trustees, with the one limitation that it must not exceed two hundred dollars. While no certificates can be issued by the clerk until the appropriation has been made by the trustees, yet the language of the statute is that such fund *shall* be set apart. I am, therefore, of the opinion that it is the clear duty of a board of township trustees to make some appropriation not exceeding two hundred dollars, provided there be available funds in the township treasury from which such appropriation can be made, but the size of the appropriation within the maximum limitation of two hundred dollars rests within the discretion of the trustees. When the appropriation made by the trustees is exhausted, no more certificates may be issued by the clerk. This opinion is based on the assumption that there will be no referendum on this law and that the same will go into effect June 9, 1915.

Respectfully,

EDWARD C. TURNER,

Attorney General.

435.

STATUTE PROHIBITING SALE OF CERTAIN DRUGS—SECTION 12672, G. C., AS FOUND IN 103 O. L., 505, IS REPEALED BY SECTION 12672, G. C., AS FOUND IN 103 O. L., 304, 340.

Section 12672, G. C., as found in 103 O. L., 505, is repealed by section 12672, G. C., as found in 103 O. L., 304, 340. This opinion is based on the decision of the court of appeals of Lucas county in the case of James H. Lathrop v. The State of Ohio, decided March 27, 1915.

COLUMBUS, OHIO, June 2, 1915.

HON. OTHO W. KENNEDY, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—I have your communication of May 28, 1915, in which you state that a defendant has pleaded guilty to a violation of section 12672, G. C., 103 O. L., 505, the section in question being one prohibiting the sale, etc., of certain drugs. You now inquire as to the proper interpretation of the following language found in the section in question:

> "If it be made to appear to the court that the person so convicted is addicted to the use of any of the above mentioned drugs or substances, the court, with the consent of such person, may commit such person to a hospital or other institution for the treatment of such person."

In this connection permit me to call your attention to the decision of the court of appeals of Lucas county, in the case of James H. Lathrop v. The State of Ohio, Case No. 311. This case was decided March 27, 1915, and so far as I am informed, is not yet reported. The court in this case held that section 12672, G. C.,

as found in 103 O. L., 505, was repealed by section 12672, G. C., as found in 103 O. L., 304, 340. Under this decision there is not now in force any statutory provision such as the one about which you inquire. It should be added that unless the indictment in the case about which you inquire is so drawn as to be good under section 12672, G. C., as found in 103 O. L., 304, 340, then the defendant is not charged therein with any offense under the laws of this state.

I enclose a copy of the decision referred to above.

Respectfully,
EDWARD C. TURNER,
Attorney General.

436.

GENERAL ASSEMBLY—PROPERTY FURNISHED BY THE STATE FOR USE OF MEMBERS OF THE GENERAL ASSEMBLY MUST BE DELIVERED TO SECRETARY OF STATE AT CLOSE OF THE SESSION.

Property furnished by the state for use of members of the general assembly must be delivered to the secretary of state at the close of the session and the auditor of state must see that such property is properly delivered before any further salary is paid to a member or employe of the general assembly until he has accounted for the public property in his charge and keeping.

COLUMBUS, OHIO, June 2, 1915.

HON. ALFRED ROBINSON, *Sergeant-at-Arms, House of Represenatives Eighty-First General Assembly, Columbus, Ohio.*

DEAR SIR:—I am just in receipt of your letter of June 2d, which reads as follows:

> "Enclosed please find resolution requested. Awaiting your written opinion, I remain,
>
> "Respectfully,"

The subject-matter of the opinion desired being explained by you orally this morning as that arising under my letter of June 1st, to the secretary of state, which is as follows:

> "HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*
>
> "DEAR SIR:—Sunday's newspapers carried the story that books, stationery, and other property furnished for the use of members of the general assembly were either being disposed of by members or shipped to the members' homes. I beg to call your attention to section 49 of the General Code of Ohio, which provides as follows:
>
> "'Immediately after the close of a session, the sergeant-at-arms of each house shall take charge of the books, stationery and other property furnished for the use of such house or a member or officer thereof, and cause such property to be delivered to the secretary of state, who shall give duplicate receipts therefor. The sergeant-at-arms shall deposit one of such receipts with the auditor of state.'
>
> "I would thank you to advise me whether or not all of this property has been delivered to you."

and with a further statement that you are proceeding to box up, preparatory to shipping away, books, stationery, etc., furnished to the officers and members of the house at state expense.

The resolution to which you refer in your letter reads as follows:

"H. R. No. 47.
"81st General Assembly, Regular Session.
"HOUSE RESOLUTION .

"Directing the packing and shipping of the contents of the desks of members of the house, after the adjournment.

"*Resolved*, That when this house adjourns sine die, Frederick Blenkner, third assistant sergeant-at-arms, is hereby directed to box and ship by express, charges prepaid, to each member and officer the contents of his desk; the charges for making the boxes and the express charges on same to be paid out of the appropriate fund of the house on vouchers approved by the speaker. The third assistant sergeant-at-arms is also authorized to employ such help as he may require to assist in so packing and shipping the property of members of the house, said employes to receive the same compensation per diem they received during the session and to be paid out of the appropriate fund of the house on the approval of the speaker. Be it further

"*Resolved*, Immediately after the adjournment of the general assembly, each member of the house is requested to lock his desk and deliver the keys thereto, together with the key to his postoffice box, to the postmaster of the house.

"(Signed) JOHN P. MAYNARD.

"Adopted May 20, 1915."

Section 31 of article II of the Constitution provides:

"The members and officers of the general assembly shall receive a fixed compensation, to be prescribed by law, and no other allowance or perquisites, either in the payment of postage or otherwise; and no change in their compensation shall take effect during their term of office."

Section 49 of the General Code provides:

"Immediately after the close of a session, the sergeant-at-arms of each house shall take charge of the books, stationery and other property furnished for the use of such house or a member or officer thereof, and cause such property to be delivered to the secretary of state, who shall give duplicate receipts therefor. The sergeant-at-arms shall deposit one of such receipts with the auditor of state."

If the property referred to in house resolution No. 47 above quoted is private property of members of the house, then no public money may be spent in either making boxes or in paying express charges or for labor incident to the packing of such private, personal property. On the other hand, if the property referred to in the resolution be such as was furnished for the use of the members or officers of the house by the state, then it is your duty as sergeant-at-arms, under section 49 of the General Code above quoted, to deliver each and all of said property to the secretary of state, receiving from him duplicate receipts therefor. One of these receipts you shall retain as your own protection, and the other shall be deposited with the auditor of state.

House resolution No. 47, above quoted, is in my opinion wholly invalid.

The property furnished for the use of either the house or a member or officer thereof of the general assembly, is furnished for public and not private purposes, and the ownership to said property never at any time vested in any member or officer of the general assembly, and no officer, member or employe of the general assembly, or either branch of said assembly, has any more right to order such property boxed up at public expense and sent to him for his private use, than would the governor or the attorney general, or any other state officer, have to clean out their respective offices of everything in them, including the carpets on the floor, when they retire.

Your statement that it has been the custom for many years to ignore the provisions of section 49 of the Code is probably true, but no such custom can override the plain provisions of the Constitution or laws. The general assembly and its members must obey these laws. Neither does the fact that the members of the legislature are still in office alter the situation any. The statutes of this state, which it is not competent to change by such a resolution above quoted, provide for the furnishing of supplies at public expense for use only in the general assembly, and not at the home or private office of the members. It is further provided, as above set out, that at the close of the session (and this means each and every session) it is the duty of the sergeant-at-arms to take charge of this property and turn it over to the secretary of state.

You will see to it that duplicate receipts for all property are filed with the auditor of state, as I shall advise the auditor of state to pay no further salary to any officer, member or employe of the general assembly, until such officer, member or employe has accounted for the public property in his charge and keeping.

Respectfully,
EDWARD C. TURNER,
Attorney General.

437.

AUDITOR OF STATE—SHOULD PAY NO FURTHER SALARY TO ANY OFFICER OR MEMBER OF THE GENERAL ASSEMBLY UNTIL THE PUBLIC PROPERTY IN HIS CHARGE HAS BEEN ACCOUNTED FOR.

The public property referred to in section 49, G. C., must be accounted for before further salary is paid to any officer, member or employe of the general assembly.

COLUMBUS, OHIO, June 2, 1915.

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

DEAR SIR:—Enclosed I hand you a copy of opinion No. 436 this day rendered Hon. Alfred Robinson, sergeant-at-arms of the house of representatives of the 81st general assembly.

In this connection permit me to say that it is my opinion that you should pay no further salary to any officer or member of the general assembly until such officer or member has accounted for the public property in his charge and keeping.

Under section 49 of the General Code, which provides:

> "Immediately after the close of a session, the sergeant-at-arms of each house shall take charge of the books, stationery and other property furnished for the use of such house or a member or officer thereof, and

cause such property to be delivered to the secretary of state, who shall give duplicate receipts therefor. The sergeant-at-arms shall deposit one of such receipts with the auditor of state,''

it will be the duty of the sergeant-at-arms of the respective branches of the legislature, after having taken charge of the books, stationery, and other property furnished for the use of such house or member or officer thereof, to deposit same with the secretary of state and receive from said secretary of state duplicate receipts, one of which must be deposited with you.

It is my opinion that it is your duty to see that the public property referred to in section 49 above quoted is fully accounted for.

Respectfully,
EDWARD C. TURNER,
Attorney General.

438.

HOUSE BILL NO. 457—SHOULD BE VETOED FOR REASON THAT SENATE BILL NO. 250 ALREADY APPROVED, CONTAINS THE SAME PROVISIONS.

COLUMBUS, OHIO, June 2, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—You have submitted for my opinion house bill No. 457, which contains reference to ''The Agricultural Commission,'' which commission has been abolished by senate bill No. 250.

I beg to advise you that the provisions of house bill No. 457 are contained almost verbatim in senate bill No. 250, which heretofore has been approved by you. House bill No. 457 should, therefore, be vetoed for the reason not only that it is unnecessary, but its reference to ''The Agricultural Commission'' would cause such a degree of uncertainty as to endanger the bill if it became a law.

Respectfully,
EDWARD C. TURNER,
Attorney General.

439.

THE PHRASE ''NEXT REGULAR COUNTY ELECTION'' AS USED IN SECTION 3061, G. C., HAS REFERENCE ONLY TO THE NOVEMBER ELECTION IN THE EVEN NUMBERED YEARS AT WHICH COUNTY OFFICERS ARE ELECTED.

COLUMBUS, OHIO, June 2, 1915.

HON. CHARLES L. BERMONT, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—I acknowledge receipt of yours of May 27, 1915, as follows:

''An application has been made to the commissioners of Knox county, Ohio, for an appropriation of $10,000.00 to aid in the construction of a state armory building in Mt. Vernon, Ohio.

"There is no memorial building fund in the treasury of this county which can be paid over to the state armory board as provided in section 3063-1, G. C.

"Section 3061, G. C., provides how this memorial building fund may be raised by the submission to popular vote at the next regular county election of the question of the issue of bonds for that purpose.

"I have interpreted the words 'next regular county election' to mean the next election at which county officers are to be elected, but this interpretation does not meet with universal approval, and I have been requested to submit the same to your office for an opinion as to when this question of issuing bonds as above mentioned may be submitted to the electors."

Section 3061, G. C., provides:

"Immediately upon the appointment and organization of such board of trustees, they shall certify to the deputy state supervisors of elections of the county, the fact of their appointment and organization, and direct the submission to popular vote at the next regular county election of the question of the issue of bonds in the amount so named in the original resolution, and of the erection and maintenance of the memorial building contemplated. Such deputy state supervisors shall submit the question to popular vote at the next regular county election with such forms of ballot as the deputy state supervisors prescribe, and shall certify the result of the election to the board of trustees. If a majority of the votes cast upon the question is in favor of the issuance of such bonds and the construction and maintenance of such memorial building, the board of trustees shall proceed as hereinafter authorized."

The general understanding of a county election is an election at which all the qualified electors of the county, and only the electors of such county, are entitled to vote upon the same question or for the same officer or officers. An election of county officers, an election upon a county bond issue, or, formerly, an election to prohibit the sale of intoxicating liquors within the county, are instances of what in common parlance is termed a county election. A regular election is generally deemed to be, under the present state of the law, that election which is regularly held on the first Tuesday after the first Monday of November of each year as distinguished from an election held at a different time under a special authority or provision therefor, or at which some special question or matter is submitted to a vote of the electors. Elections are more frequently held for the election of officers and those elections which are required to be held at certain fixed dates are usually and properly termed regular elections.

I, therefore, concur in your opinion that the phrase "next regular county election" as used in section 3061, G. C., above quoted, refers only to the November election in the even numbered years at which county officers are elected.

Respectfully,

EDWARD C. TURNER,

Attorney General.

440.

AGRICULTURAL COMMISSION—UNAUTHORIZED TO PAY COSTS IN PROSECUTION OF MISDEMEANORS BEFORE MAGISTRATE—COMMISSION CAN PAY COURT COSTS IN CASE OF HUTCHINSON V. THE AGRICULTURAL COMMISSION.

The agricultural commission is unauthorized to issue vouchers for the payment of costs in the prosecution of misdemeanors before magistrates.

The agricultural commission may issue voucher for the payment of the judgment of the court of common pleas in the case of Rufina Hutchinson v. The Agricultural Commission under the facts stated in this opinion.

COLUMBUS, OHIO, June 2, 1915.

The Agricultural Commision of Ohio, Department of Agriculture, Columbus, Ohio.

GENTLEMEN:—Response to your request for an opinion has been much delayed awaiting submission of further facts as suggested in our letter under date of April 26, 1915.

You submit cost bills from the court of the mayor of Mansfield, Ohio, in two criminal causes instituted in that court by complaint charging resistance of an officer, filed by one G. S. Mechling and entitled the State of Ohio v. Austin Lybarger, and the State of Ohio v. Christian Dinninger, Percy Dinninger, Roy Dinninger, Merrill Dinninger and Carl Dinninger, and ask me to "advise whether these cases are presented in proper form, and whether the agricultural commission is authorized to issue vouchers in payment of the same?"

The offense of resisting an officer is a misdemeanor under the provisions of section 12858, G. C.

While it is not so stated in your letter, I learn from personal inquiry that there was no conviction in either of these cases.

It is the general policy of the law that officers of the state or political subdivision thereof may not make expenditures of public funds without express statutory authority therefor. Exceptions to this general rule are confined to cases in which such expenditures are necessary and essential to the performance of a duty specifically imposed by law. It is the exception rather than the rule generally, that persons responsible for the prosecution of misdemeanors are liable for costs, and such exception is founded upon the provisions of section 13499, G. C., under which a magistrate may, before a warrant is issued in a misdemeanor case, require the complainant to secure the costs of the prosecution, and in no other case in a prosecution before a magistrate, may a complainant be held liable for costs therein. It will be further noted that there is an additional limitation upon the above exception, in that sheriffs, deputy sheriffs, constables, marshals, deputy marshals, watchmen and police officers, when in the discharge of their official duties, are specifically taken out of such exception under the provisions of section 13499, G. C., etc. Thus is made manifest the legislative purpose that in no case shall those officers especially charged with the duty of enforcing criminal statutes, be held liable for costs in any case prosecuted before a magistrate.

Hence in the absence of statutory authority for the payment of costs in such case by the agricultural commission, there is an express statutory exemption from any requirement of the same by a magistrate. Furthermore, it is only in felony cases upon conviction that authority will be found for payment of costs in criminal cases from the state treasury, except by special provision therefor, and there appears no such special provision at this time applicable to the present case.

I am, therefore, of opinion that the agricultural commission is without author-

ity to pay the costs as shown by the bill submitted in these criminal prosecutions, and from this it follows that the form in which the same are presented is immaterial. You also submit with your communication a certified copy of journal entry of the court of common pleas of Richland county, Ohio, in the cause of Rufina Hutchinson, plaintiff, v. The Agricultural Commission of Ohio, et al., defendants, under date of January 8, 1915, as follows:

"IN THE COMMON PLEAS COURT, RICHLAND COUNTY, OHIO.

"Rufina Hutchinson, Plaintiff, v. The Agricultural Commission of Ohio, et al., Defendants.	Journal Entry.

"This cause now coming on to be heard upon the motion of the defendant, the agricultural commission of Ohio, to dissolve the temporary restraining order herein issued in the case, and the court being fully advised in the premises, overrules the said motion, but modifies the restraining order heretofore issued, and the said defendants and each of them are enjoined from killing the cattle described in the petition on the premises of said plaintiff and from burying the said cattle on the said premises. Said defendants not having filed any answer in said cause said injunction is hereby made perpetual and the defendants and each of them are perpetually enjoined from killing the cattle on the said premises of plaintiff or burying the same thereon. All at the costs of the defendants herein, taxed at $89.15.

"The State of Ohio, Richland County, ss.

"I, J. V. Finney, clerk of the court of common pleas, within and for the aforesaid county and state, do hereby certify that the foregoing is a true and correct copy of the original journal entry now on file in said clerk's office in the cause.

"In testimony whereof, I have hereunto set my hand and affixed the seal of this said court, at Mansfield, this 8th day of January, A. D., 1915.

"(Signed), J. V. FINNEY,
"Clerk of Common Pleas Court."

This was a civil action against the agricultural commission and other officers and agents of the state, seeking to perpetually enjoin the defendants from killing certain alleged infected cattle upon the premises of the plaintiff.

The court as shown by the certified journal entry, prior to January 8, 1915, made the temporary restraining order theretofore granted perpetual, and rendered judgment against the defendants for costs, taxed at $89.15, a summary of which costs accompanies such journal entry.

You inquire whether the agricultural commission is authorized to issue voucher in payment of this judgment? This is now a final judgment of a court of competent jurisdiction against the agricultural commission, the authority for the payment of which depends solely upon whether there are funds appropriated sufficient for the payment of the same.

It will be observed that this judgment was a liquidated and outstanding claim against the commission prior to the repeal of house bill No. 47, 104 O. L., 64, in which was included an appropriation of $1,000.00, under maintenance F-9, that is

to say, for contingencies. I learn from inquiry at the office of the auditor of state that there is of that appropriation unexpended, an amount in excess of $300.00.

I am, therefore, of opinion that the agricultural commission is authorized to issue voucher for the payment of the above judgment and that the certified copy of the journal entry, together with the summary statement of the costs, is sufficient in form.

It is suggested, however, that this opinion applies only to the facts of this particular case and may not be taken as authority for the payment of costs by the agricultural commission in other cases.

Respectfully,
EDWARD C. TURNER,
Attorney General.

441.

CANDIDATES FOR ASSESSOR—MAY HAVE NAMES PRINTED UPON BALLOTS BY FILING PETITION SIXTY DAYS PRIOR TO AUGUST PRIMARY—CANDIDATES MAY ALSO BE NOMINATED BY HAVING NAMES WRITTEN UPON BALLOTS AS IN CASE OF NOMINATION FOR OTHER OFFICES.

Candidates for the office of assessor as provided by section 17 of an act "to provide for the listing and valuation of property for purposes of taxation," etc., filed in the office of secretary of state, May 11, 1915, may have their names printed upon the ballots by filing a proper petition with the deputy state supervisors of elections of the county in which primary elections are authorized to be held sixty days prior to August 10, 1915, or candidates for such office may be nominated by having their names written upon the ballots the same as in the case of nomination for other offices and the ballots may be so printed as to permit the writing in of the names of candidates for such office.

COLUMBUS, OHIO, June 2, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of May 24, 1915, as follows:

> "We herewith submit for your opinion the following question:
>
> "An act of the legislature 'To provide for the listing and valuation of property for purposes of taxation and to repeal certain sections of the General Code relating thereto,' was filed in this office May 11, 1915.
>
> "Section 17 provides as follows:
>
> " 'At the regular election to be held in November, 1915, and biennially thereafter, assessors shall be elected in the manner provided by law for the election of ward, district, city, village and township officers as follows: Municipal corporations divided into wards, one assessor shall be elected in each ward; in villages one assessor shall be elected; in cities not divided into wards, the board of deputy state supervisors of elections or the board of deputy state supervisors and inspectors of elections, as the case may be, shall, acting in conjunction with the county auditor, within ten days after this act shall become effective, divide such cities or such part or parts thereof as may be located in their county, into such number

of assessment districts as in the judgment of the county auditor may be necessary in order to provide for the assessment of all the property therein; a division so fixed shall remain in effect for a period of four years, at the expiration of which and quadrennially thereafter a like division shall be made in the same manner, and by the same authority,' etc.

"The primary election will be held on the 10th day of August, 1915. The above act will take effect on the 9th day of August, 1915, providing no referendum is filed.

"*Question:* May candidates for assessor be nominated at the primary election where primaries are to be held on the 10th day of August by filing a primary petition sixty days before said primary election, or should a blank space be left on the primary ballot for the name of persons to be written on said ballot and thereby nominated as assessors, or must all nominations of candidates for assessor be made by petitions to be filed before the November election of 1915?"

Barring the contingency of the filing of a referendum petition thereon the law from which you quote will, at the time of holding the primary election of August 10, 1915, be effective and the elective office of assessor will have been created. Such assessors are by the provisions of the section above quoted required to be elected at the regular November election, 1915. While the law above referred to is not at this time effective in a technical sense, it is deemed to be of sufficient force to warrant an assumption for the purposes of your inquiry that at the time such primary election is required to be held it will be operative and in effect.

Notwithstanding the suspension of the operation of this law the provisions of the statute for the nomination of officers to be elected at the November election, 1915, are now in full force and effect, and the fundamental purpose of conducting such primary election as is required to be held on August 10, 1915, is the designation or nomination of candidates for such offices as are required to be elected at such subsequent November election.

In view of this sole and fundamental purpose of the conducting of such primary election, and that as above stated the law referred to by you warrants the assumption that it will be effective at the time such primary election is actually held, I am, therefore, of opinion in answer to your inquiries that candidates for the office of assessor, as is provided in the act referred to by you from which the provisions above quoted are taken, may be entitled to have their names printed upon the official ballot for the August primary 1915, by filing with the deputy state supervisor of elections of the county sixty days prior to such primary election a petition therefor, as required by section 4969, G. C., 103 O. L., 482, and that the names of persons may be written upon such ballots for nomination of candidate for such offices in the same manner as provided in other cases, and that the ballots should be so printed as to provide a space in which such names may be written, in the same manner as in the case of nominations for other offices on the primary ballot. Nominations made in either of the above ways will not preclude the nomination of candidates by petitions filed sixty days prior to the election in accordance with section 4999, G. C., et seq., 103 O. L., 944. It may be observed, however, that in the event a referendum petition upon the above law is filed prior to the ninth day of August, 1915, the nomination of candidates for assessor at the August primary will be of no force, effect or validity.

It will also be noted that nominations made by writing names upon the ballot where there occurs a vacancy for any office are subject to the provisions of house bill No. 286, filed in the office of the secretary of state May 3, 1915, as follows:

"That in the event of any office for which nominations are sought to be made at any primary election, and for which no nominating petitions or declarations of candidacy have been filed within the time prescribed by law by or in behalf of any candidate of a political party, so that in so far as such office is concerned, there is a vacancy on the primary ballot to be nominated, no valid nomination shall be made for such office unless the name of the person attempted to be nominated and receiving the highest number of votes for said office, shall have been written on at least eight per cent. of all the ballots containing such vacancy, which have been voted at such primary election."

Respectfully,
EDWARD C. TURNER,
Attorney General.

442.

EFFECT OF AMENDED SENATE BILL NO. 15—JURY COMMISSIONERS—TIME OF EMPLOYMENT LIMITED.

COLUMBUS, OHIO, June 4, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—You have submitted for my examination and opinion amended senate bill No. 15.

The first change sought to be made in the existing law is to limit the number of days that the jury commissioners of each county may be employed in counties in which there is but one common pleas judge, to ten days instead of twenty days in each year.

Your memorandum states that this bill "allows jury commissioners in large cities to be assigned clerks." This is a mistake. It does permit jury commissioners to be designated and appointed *assignment commissioners.* This is no change from the present law. I am not advised of any abuse that exists under the present law which permits jury commissioners to be employed not to exceed twenty days. Neither am I in a position to state definitely that ten days in any one year will be sufficient for the work of the jury commissioners in counties having but one judge. However, it seems to me that ten days ought to be ample time for the work.

The proposed change in section 11424 is the result of practical experience. Under the present law the jury commissioners retain the keys and jurors may not be drawn until the jury commissioners have been found and they have unlocked the wheel. In cases coming under my personal observation the necessity of going out in the country and hunting up the jury commissioners has caused a delay of a day at a time in the courts, besides considerable expense and in one recent instance where the venire had been exhausted in a murder case it not only delayed the proceedings for half a day, but cost the county ten dollars in extra expense to draw the names of eight jurors.

I am of the opinion that it would be better, as is provided in amended senate bill No. 15, that the court should be the custodian of the keys. However, this bill does not remedy the condition at which it was aimed.

Section 11426 which remains untouched by the bill under consideration requires the clerk to draw the names from the jury wheel *in the presence of* the jury commissioners, so that ordinarily nothing is to be gained by taking the cus-

tody of the keys away from the jury commissioners when the jury commissioners are required to be present at the drawing of jurors unless it be such a case as recently occurred where one of the jury commissioners came in from the country to attend the drawing of names and left his keys at home.

I herewith return amended senate bill No. 15.

Respectfully,
EDWARD C. TURNER,
Attorney General.

443.

EFFECT OF HOUSE BILL NO. 130.

COLUMBUS, OHIO, June 4, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—You have submitted for my examination and opinion house bill No. 130, specifically asking as to the effect of the words "to do" and the policy of the new matter.

I am of the opinion that the language used in original section 12875 "organized and doing" is to be preferred over "to do" in the present bill. However, I am of the opinion that the courts would construe them to be of the same effect.

As to the new matter contained in the bill, it expresses the law as it has been held to be by the courts in the absence of express statutes. I am of the opinion that the enactment of the statute is advisable. However, I might add that the inclusion of "county treasurer" and "trust funds" may raise some slight question as to just what is meant by "trust funds," but I am clearly of the opinion that the courts would hold that only such matters as were referred to in section 2983 were included therein.

I am of the opinion, therefore, that this bill should be approved.

I am returning house bill No. 130.

Respectfully,
EDWARD C. TURNER,
Attorney General.

444.

EFFECT OF AMENDED SENATE BILL NO. 121—WHETHER THE WORD "TRUSTEE" SHOULD BE CONSTRUED AS PLURAL.

COLUMBUS, OHIO, June 4, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—You have submitted for my examination and opinion amended senate bill No. 121, asking the specific question as to the effect of the use of the word "trustee" rather than "trustees."

The section referred to belongs in part 1, title 12, division 6, chapter 1 of the General Code, and therefore section 27 of the General Code is applicable thereto.

Section 27 of the General Code provides, in part, as follows:

"In the interpretation of parts first and second, unless the context shows that another sense was intended * * * words * * * in the singular include the plural number."

I am of the opinion that under the section last referred to it would be the duty of the court to read the word "trustee" in amended senate bill No. 121 as if it had been enacted "trustees."

Amended senate bill No. 121 is returned herewith.

Respectfully,
EDWARD C. TURNER,
Attorney General.

445.

BONDS—ARMORY SITE—SECTION 3939, G. C., IS UNCONSTITUTIONAL AND VOID IN SO FAR AS IT AUTHORIZES MUNICIPAL CORPORATIONS TO ISSUE BONDS FOR PURCHASING REAL ESTATE FOR ERECTION OF AN ARMORY—SUCH BONDS ARE INVALID.

Section 3939, G. C., insofar as it authorizes municipal corporations to issue bonds for the purpose of purchasing real estate to be donated to the state of Ohio as a site for the erection of an armory is unconstitutional and void, and bonds issued for this purpose are invalid.

COLUMBUS, OHIO, June 4, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am unable to advise the commission to invest in the bonds of the city of Mt. Vernon, provisionally accepted by the commission on May 6, 1915, a transcript of the proceedings in the issuance whereof has been submitted to me.

The bonds are sought to be issued under favor of section 3939 of the General Code, which expressly authorizes the issuance of bonds "for purchasing real estate with a building or buildings thereon, to be used for public purposes, or to be donated to the state of Ohio by deed in fee simple as a site for the erection of an armory." The latter part of this provision is, in my opinion, unconstitutional.

Ordinarily I would not be disposed to question the constitutionalty of an act of the general assembly. In this case, however, I feel that I cannot do otherwise than express the view that the statute is void, for two reasons:

(1) The industrial commission as an investor is entitled to advice from this office on precisely the same basis that any private investor should be advised by his counsel.

(2) The unconstitutionality of the statute is so clearly established by the decisions of the supreme court of this state as to remove all doubt.

See Wasson v. Commissioners, 49 O. S., 622;
Hubbard v. Fitzsimmons, 57 O. S., 436.

The issuance of bonds by a municipal corporation for the purpose of purchasing and donating a site to the state for armory purposes necessarily involves the levying of taxes upon the taxable property in the municipal corporation for the payment of the bonds and interest thereon.

The principle of the decisions cited is that a tax may not be levied within one of the subdivisions of the state for a purpose which pertains to the state at

large, regardless of supposed incidental and peculiar benefit to the subdivision. It is also distinctly held in the case last above cited that securing a site for an armory and constructing and maintaining the same are state purposes, and that purchasers of local bonds issued for such purposes are charged with notice of their invalidity.

Respectfully,
EDWARD C. TURNER,
Attorney General.

446.

APPROVAL OF AMENDED SENATE BILL NO. 140 WOULD TEND TO CONFUSE LAWS NOW IN FORCE.

COLUMBUS, OHIO, June 4, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—You have submitted for my examination and opinion amended senate bill No. 140, and ask me as to the policy of said bill.

Section 13117 of the General Code provides as follows:

> "Whoever, with intent to defraud, executes and delivers a false or fictitious warehouse receipt, acknowledgment, or other instrument of writing, to the purport and effect that a person held or had received in store, or held or had received in a warehouse, or in another place, or held or had received into possession, custody, or control, goods, wares, or merchandise, when such goods, wares, or merchandise were not held, or had not been received, in good faith, by such person; or, whoever indorses, assigns, transfers, or delivers, or attempts to indorse, transfer, or deliver to a person, such false or fictitious warehouse receipt, acknowledgment, or instrument of writing, knowing it to be such, shall be imprisoned in the penitentiary not less than one year nor more than three years."

While the examination of the bill has necessarily been hurried, in my opinion section 13117 covers everything that is proposed to be covered in said bill No. 140, and I can see no necessity for such a provision.

It occurred to me from the peculiar language of amended senate bill No. 140 that possibly some court had held that section 13117 applied only to a warehouseman, but careful search of all the current reports fails to disclose any case whatever bearing upon this matter. If such a holding was made it must have been under the mistaken apprehension that section 13117 was a part of the warehouse receipts act enacted a few years ago. However, such is not the fact, as section 13117 has been in force for many years, having been enacted in the 54th Ohio Laws, page 132, and it applies to all persons whether a warehouseman or not, and covers forging and uttering of a forged bill by providing that whoever indorses, assigns, transfers, or delivers, or attempts to do so, a *false* or *fictitious* warehouse receipt, etc., shall be imprisoned.

In the absence of further information showing necessity of amended senate bill No. 140, it is my opinion that your approval of this bill would only tend to confuse the laws now in force upon the subject.

I return herewith amended senate bill No. 140.

Respectfully,
EDWARD C. TURNER,
Attorney General.

447.

HOUSE BILL NO. 154—ITS EFFECT UPON HOUSE BILL NO. 249.

COLUMBUS, OHIO, June 4, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—You have submitted for my examination and opinion house bill No. 154, asking specifically as to its effect upon house bill No. 249, passed April 1st, and approved April 2, 1915.

In the drawing of house bill No. 249, the amendment of sections 1819, 1820, 1948, 1949, 1950 and 1956, in 103 O. L., page 446, was entirely overlooked. The language of section 1841, as set forth in house bill No. 154, is proper, while the following language in house bill No. 249:

> "and the powers and duties of the board of state charities under sections 1819, 1820, 1948, 1949, 1950, 1952 and 1956 of the General Code, shall cease and thereafter devolve on the board of administration alone from and after August 15, 1911,"

is unnecessary, because the powers and duties of the state board of charities under the sections named were transferred to the board of administration by the act found in 103 O. L., 446.

The balance of house bill No. 249, while desirable, is not absolutely essential, as I believe that the board of administration has the implied power, in the absence of that section, to require the information therein provided for. Hence section 1841, as set forth in house bill No. 154, is to be preferred to the same section as set forth in house bill No. 249 heretofore approved. The amendment of section 2068 takes away the right to admit a limited number of suitable patients, not to exceed ten per cent. of the total capacity, for *any* sum less than $5.00 per week. However, sections 1815-13 and 1815-14 make adequate provision for the same purpose. In other words, while still allowing persons to be cared for who are not financially able to pay $5.00 a week, it requires the difference between the amount that such person is able to pay and $5.00 a week to be made up by any person legally responsible for the support of the inmate, or in the event that there is no person legally responsible for such support, the county in which the inmate had his last legal residence must make up the difference from its poor fund. I see no objection to this provision, as it is and has been for some time the policy of the state to require the subdivisions to bear the expense in state institutions of inmates from those subdivisions.

Section 1815-15 provides that while county commissioners may agree to support or aid in the support of a resident of their county in the Ohio state sanitorium, they cannot be compelled to do so if the county is maintaining a county tuberculosis hospital, or has joined in the erection or maintenance of a district tuberculosis hospital, or has contracted with proper authorities for the treatment of such persons. I think this is an eminently fair provision. Many thousands of dollars have been spent by the various counties in the erection of a county tuberculosis hospital or a district tuberculosis hospital, and it is not fair to ask them in addition thereto to contribute to the maintenance of tubercular patients at the Ohio state sanitorium as long as the county tuberculosis hospital or the district tuberculosis hospital is not full.

I return herewith house bill No. 154.

Respectfully,
EDWARD C. TURNER,
Attorney General.

448.

EFFECT OF AMENDED SENATE BILL NO. 217—COMPENSATION AND EXPENSES OF JUDGES OF COMMON PLEAS AND COURT OF APPEALS.

COLUMBUS, OHIO, June 4, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—You have submitted for my examination and opinion amended senate bill No. 217, passed by the general assembly on May 27, 1915.

This bill amends section 2253 of the General Code, as last amended in 104 O. L., 251, and makes the following changes in the present law:

1. It deprives judges of the courts of appeals of their allowance for actual and necessary expenses, not exceeding three hundred dollars in any one year, incurred while holding court in counties in which they do not reside other than under an assignment of the chief justice of the court of appeals to hold an additional court of appeals in another district. That is to say, under sections 1528 and 1529, G. C., judges of the courts of appeals are entitled to five dollars a day while holding court in another appellate district under assignment of the chief justice of the court of appeals, such allowance being in lieu of all expenses. Under section 2253, G. C., as amended 104 O. L., 251, such judges were allowed their actual and necessary expenses, not exceeding three hundred dollars in any year, for holding court in a county other than that in which they reside—that is, for example, in another county in their own appellate district. This has been taken away by senate bill No. 217.

2. The limit upon the expense allowance of common pleas judges for holding court outside of their respective counties, otherwise than under assignment of the chief justice of the supreme court by virtue of section 1469, is reduced from three hundred to one hundred and fifty dollars. This change, however, does not affect judges elected prior to June 8, 1914.

3. The per diem allowance of common pleas judges from the county treasury for services under assignments of the chief justice of the supreme court in aiding and disposing of business of some county other than that in which they reside is reduced from ten to five dollars.

4. The limitation of three hundred dollars upon the allowance of actual and necessary expenses of common pleas judges, incurred by them under assignments by the chief justice in aiding and disposing of business of some other county than that in which they reside, is removed; there is, under amended senate bill No. 217, no limitation on the amount of actual and necessary expenses which may be charged against other counties under the amended section.

The bill also provides that judges of the courts of common pleas in adjoining counties may exchange service and assist one another and may hold court in any county within the state where their services may be required, or may be requested by the resident judges. This provision, however, is unnecessary. The chief justice of the supreme court, in a letter under date of March 27, 1915, to Hon. J. S. Thomas, judge of the common pleas court of Scioto county, used the following language:

> "I hold that the constitution, where it says that common pleas judges may temporarily preside or hold court in any county of the state, conferred jurisdiction and power upon the judges to do the very thing suggested in the constitution, and that they may arrange among themselves, in an informal manner, for exchanges such as were made under the former practice.
>
> "My idea is that you, for instance, could exchange with Judge Corn,

of Ironton, Judge Stephenson, of West Union, or, for that matter, with any other common pleas judge in the state of Ohio without any special designation by the chief justice."

In view of this authoritative interpretation of the law as it now exists, it seems that the first sentence of section 2253, General Code, as amended by the bill, is unnecessary. Of course, if common pleas judges have the right to hold court in any other county in the state, without the assignment of the chief justice, then present section 2253, General Code, affords to them reimbursement for actual and necessary expenses so incurred, not exceeding three hundred dollars in any year.

The only other material change in the section is the provision that the expenses shall be paid upon sworn itemized accounts, which, in the case of payment from the state treasury, are to be filed monthly.

The subject of compensation and expenses of common pleas judges and judges of the courts of appeals has given this department and the department of the auditor of state, and the bureau of inspection and supervision of public offices therein, a great deal of trouble. It would seem that amended senate bill No. 217, should it become a law, would still further complicate the subject.

I herewith return the bill referred to.

Respectfully,
EDWARD C. TURNER,
Attorney General.

449.

EFFECT OF HOUSE BILL NO. 687—TEACHERS' INSTITUTES.

COLUMBUS, OHIO, June 4, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—You have submitted for my examination house bill No. 687. This bill probably grows out of a ruling by this department to the bureau of inspection and supervision of public offices, opinion No. 245, dated April 15, 1915, which held that:

"Superintendents and teachers may not be paid for attending a teachers' institute held subsequent to May 20, 1914, unless such institute was duly authorized to be held by the county board of education."

It appears that there had been some misunderstanding and confusion upon the subject and boards of education were seeking to pay superintendents and teachers for attending institutes which had not been properly authorized by the county board of education.

It is the manifest policy of the law that teachers' institutes shall be subject to the control and supervision of the county boards of education, and that the same shall be conducted in accordance therewith, is made a condition precedent to the payment of teachers and superintendents for their attendance. In other words, it was clearly the purpose of the legislature that teachers and superintendents should receive pay for attending only such institutes as might be held under the provisions of section 7868, G. C., and formally authorized and approved by the county board of education.

The bill seeks to authorize boards of education to pay teachers for attendance

at institutes not held in accordance with law. Exception might well be taken to the fact that the bill undertakes to authorize boards of education to pay teachers who attended "county teachers' institutes" during the year 1914, and it is doubtful whether or not under a strict interpretation of the law there was such a thing as "a county teachers' institute" held after the time section 7868, as amended, went into effect, unless the board by formal resolution decided that one should be held. However, the intention of the legislature is, as I take it from the above bill, clear that teachers are to be paid for attending a "supposed" county teachers' institute, and further that all teachers who have received pay for attending such supposed county teachers' institutes shall be relieved from reimbursing the treasury for the money received for such attendance.

While one naturally has sympathy for the teacher who has attended under instructions of the board of education, and feels that such teacher should be paid, yet it is of very, very doubtful policy to enact any law which provides, as in the bill under consideration, that "all payments heretofore made by boards of education to teachers for such attendance at teachers' institutes during the year 1914 are hereby declared to be legal and valid, and all boards and officers making such payments are hereby relieved from any liability therefor." This is in effect establishing the precedent that if officers or boards disregard the law they may appeal to the legislature and have their acts condoned.

House bill No. 687 is returned herewith.

Respectfully,
EDWARD C. TURNER,
Attorney General.

450.

EFFECT OF SENATE BILL NO. 315.

COLUMBUS, OHIO, June 4, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—You have submitted for my examination and opinion senate bill No. 315.

Taking this bill up in the order in which the sections appear in the bill:

There are two important changes in section 3295: (a) Specifically authorizing municipalities to issue bonds "for the purpose of providing funds to pay the township's share of the cost of any improvement made under an agreement with the county commissioners." I do not at the moment recall any improvement which may be made under agreement with the county commissioners, where there is no provision for raising funds. From the tenor of the bill it is apparent to me that this provision was inserted to take care of improvements made under section 6905-1 of the Code. This last section, however, has been repealed by the highway bill and other provisions substituted therefor.

Section 132 of the highway bill (amended senate bill No. 125) makes complete provision for the municipality to sell bonds in such cases.

(b) The second new provision in section 3295 is

> "All bonds heretofore issued by township trustees under assumed authority for the improvement of roads in connection with county commissioners, shall, in so far as the same might otherwise be held invalid on

account of the absence of power of such trustees to issue bonds for such purpose, be held to be legal, valid and binding obligations of the township issuing such bonds.''

This is similar to a provision in senate bill No. 220 on which I have heretofore rendered an opinion, and which bill was vetoed by you. The language in the present bill is, however, more guarded and more limited than in amended senate bill No. 220.

Taking up section 6912-1 in the bill:

This section in the Code was a part of one of the schemes of road building. All the other sections authorizing the building of roads in the manner to which section 6912-1 would be applicable have been repealed in the highway bill (amended senate bill No. 125). Section 6912-1 was also repealed therein. To allow this bill to become a law containing this section would add considerably to a confusion of the road laws which it was the purpose of the highway bill to eliminate. There will be nothing left in the Code upon which this section could operate. The things sought to be accomplished by this section are cared for in sections 131, 132 and other sections of the highway bill. While not in the exact terms of senate bill No. 315, yet from my hurried examination I believe the provisions of the highway bill to be ample.

Taking up section 3939. In the first place there are two sections 3939 in the Page and Adams edition of the General Code. My predecessor, Hon. Timothy S. Hogan, in an opinion found in volume I, page 228, of the attorney general's reports for 1913, held that the section appearing last in said Code under the section number of 3939 was the operative section, and in this I concur. The bill under consideration makes no reference to the fact that there are two sections 3939 in said Code, and while it could be worked out all right there would still be room for more or less dispute, as is shown by the fact that the editors of the Code found it necessary to publish both sections with the explanation ''Because of doubt as to which statute is in force, both are given.'' However, the only change of consequence in this section is in subdivision 22 thereof, which adds the new matter:

''Whether such resurfacing, repairing or improving is done directly by the municipal corporation or contracted by it, or by the county commissioners under an agreement with the municipal corporation by which it has agreed to assume and pay any part of the cost thereof.''

Whether or not a municipality may enter into a contract with the county commissioners for the resurfacing, repairing or improving of roads, will, I believe, depend upon the provisions of the highway bill. I have not had time to properly digest the provisions of the highway bill.

The matters involved in this bill are so complicated that the short time allowed by the necessities of the case does not admit of the careful investigation I would prefer to make. However, from the hurried examination of the bill I am of the opinion that its approval would lead only to complications and not be of any particular benefit.

Senate bill No. 315 is returned herewith.

Respectfully,
EDWARD C. TURNER,
Attorney General.

451.

MEMBERS OF GENERAL ASSEMBLY—SUPPLIES FURNISHED—STATIONERY, BILL BOOKS, JOURNALS, ETC.—SUPPLEMENTAL OPINION TO OPINIONS NUMBERS 436, 437.

COLUMBUS, OHIO, June 4, 1915.

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

DEAR SIR:—In response to your request as to whether or not opinions Nos. 436, to Sergeant-at-Arms Robinson, and No. 437, to you, cover such items as letterheads upon which the members' names had been printed, the bill books and journals, which could be of no value to the state:

The articles named by you do not come within the opinions referred to, and I consider them personal property of the members, which could not be used by the successors of the members or anyone else, and they are of no value whatever to the state. Bills and journals were printed for public distribution.

The opinions were intended to cover such things as the General Codes, unused stationery, supplies, etc., etc., which the state would be compelled to buy again for the next general assembly, even if no extraordinary session of the present one were had. In other words, they were to cover the state's property.

You state also that, following the custom of years, the employes of the general assembly had, prior to the rendering of my opinions, incurred some expenses in making boxes. To the extent that such expenses were incurred prior to the opinions, I am willing that it would be overlooked this last time, but this principle will not apply to any expressage paid and such expressage, if paid, should be refunded.

It is not my purpose to attempt to carry the law to a ridiculous conclusion, yet, on the other hand, the real spirit and purpose of the law must be observed.

Respectfully,

EDWARD C. TURNER,

Attorney General.

452.

GRAND AND PETIT JURORS—PER DIEM EXPENSES FOR TRAVEL TO AND FROM COURT HOUSE—MILEAGE FROM RESIDENCE TO COURT HOUSE LEGAL WHEN COURT DISMISSES SAID JURORS FOR SEVERAL DAYS.

An order of the court allowing jurors, grand and petit, per diem for days necessarily used in travel in reaching court house or returning therefrom; also mileage from residence to court house on returning to court after several days adjournment, is legal.

COLUMBUS, OHIO, June 4, 1915.

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

DEAR SIRS:—Under date of May 25, 1915, you requested my opinion as follows:

> "We are herewith sending you a copy of an order made by a judge of the court of common pleas directing the clerk of the court to make certain payments of mileage and per diems to jurors. Because of this ques-

tion being liable to come up from any county at any time, we would like your written opinion as to whether this court order is a legal one as to the payment of jurors."

The copy of the order of the court, enclosed in your letter, is as follows:

"ORDER FOR COMPENSATION OF JURORS.

"The clerk of this court is hereby directed to pay grand and petit jurors as follows:—in addition to the regular fee of two dollars per day and mileage on first appearance—the per diem fee for each day or portion of day necessarily used in travel to enable him to be present at the time ordered by the court, throughout the term, whether that day be Sunday or any day of the week, or necessarily used in reaching his home after being excused by the court; and should any juror be excused before the end of the week to appear at a later date, he shall receive mileage from his home to the court house on his return, whether the day of his return be Sunday or any other day of the week; but he shall not receive mileage if no day intervenes except Sunday."

The section of the General Code which fixes the compensation and mileage of both grand and petit jurors is section 3008, which reads as follows:

"Each grand or petit juror drawn from the jury box pursuant to law, each juror selected by the court as talesman as provided by law, and each talesman, shall receive two dollars for each day of service, and if not a talesman, five cents each mile from his place of residence to the county seat. Such compensation shall be certified by the clerk of the court and paid by the county treasurer on the warrant of the county auditor."

The above order of court covers two matters: One the per diem compensation of the grand and petit jurors and the other the mileage of both grand and petit jurors. In regard to the compensation of grand and petit jurors it is to be noted that the order provides that each grand and petit juror shall be entitled to the per diem allowed under the provisions of section 3008 for each day or portion of day necessarily used in travel to enable him to be present at the time ordered by the court.

In the case of State ex rel. Beverstock et al. v. Merry, Auditor, 34 O. S., 137, the first branch of the syllabus is as follows:

"Under section 22 of the act to regulate the fees of jurors, etc. (73 Ohio L., 134), jurors are to be allowed compensation for days spent in whole or in part in going to and returning from court, and for days of attendance during the term, whether impaneled or not; and the clerk is not authorized, in addition to such days, to certify that the jurors are entitled to compensation for days as to which they were discharged and not in attendance."

Section 22 of the act referred to in said case provided, among other things, that "each petit juror shall be allowed the sum of two dollars for each and every day he may serve."

I do not see any distinction between the phrase "for each and every day he may serve and the phrase used in section 3008, G. C., "for each day of service." In the opinion in that case the court laid down the following at page 100:

"Jurors should be allowed compensation for every day spent in going to and returning from court, and for every day they are in attendance at the county seat as jurors, whether they are impaneled or not; fractions of a day to be counted as an entire day in estimating compensation.

"It follows that where, as in this case, jurors are discharged from attendance by order of the court for several consecutive days at a time during the term, the clerk is not authorized to certify that the jurors are entitled to compensation for the days they were so discharged, and not required to be in attendance."

I do not find that the case in the 34th Ohio State, above referred to, has been in any way overruled. Consequently, I am of the opinion that jurors, both grand and petit, are, under the decision above referred to, entitled to a per diem fee for each day or portion of day *necessarily* used in travel to enable him to be present at the time ordered by the court, or *necessarily* used in reaching home after being discharged by the court.

The word "necessarily" as used in the above order makes it clear that there must be some necessity for the juror to leave his home earlier than the day on which he is required to report for attendance to the court, or some necessity for him to postpone his return until the following day after being dismissed. The necessity must not be one of personal convenience, but one which arises by reason of lack of railroad facilities or some similar reason.

The next question involved in your inquiry is relative to the payment of mileage to jurors under the order of the court that "should any juror be excused before the end of the week to appear at a later date, he shall receive mileage from his home to the court house on his return," etc. In the first place it is to be noted that there is nothing in the order of the court which attempts to allow a juror mileage from the court house to his home, upon being excused by the court, as in fact he could not be, under the opinion of Hon. U. G. Denman, former attorney general, as found on page 656 of the report of the attorney general for the year 1909, Mr. Denman holding that under the provisions of section 5182, R. S., now section 3008, G. C., jurors both petit and grand, may only be allowed mileage to county seat and not returning.

The question involved here, however, is when a juror has been excused and therefore allowed to return home he can, on again returning to the court, be allowed mileage from his home to the court house.

Hon. Timothy S. Hogan, former attorney general, in an opinion rendered May 9, 1912, attorney general's report for 1912, page 1306, held that under section 3008 both grand and petit jurors are entitled to mileage from their places of residence to the county seat on the day they are summoned, but are not entitled to mileage for each day of service. In the report of the same year at page 1388, the attorney general held that if grand jurors are adjourned by order of the court, subject to the call of the clerk, they would, in the interest of economy and justice, be entitled to mileage from their place of residence to the court house upon returning upon the call. His reasoning is as follows:

"There is no provision in the above statute (Sec. 3008, G. C.), that mileage shall only be paid once, nor is there any provision that such mileage shall not be paid more than once. The statute is silent upon the subject and should, therefore, receive a reasonable construction.

"It is contemplated that whenever a grand jury is brought together, such jury shall consider all the business before it without adjournment, except from day to day, and that after such business is completed the said jury will be discharged finally. However, if in the interest of public jus-

tice and economy it is deemed advisable by the court to adjourn said jury, subject to the call of the clerk instead of holding it together during the entire term, and thus allow the jurors to return to their respective homes I believe a reasonable construction of the statutes in question would entitle said grand jurors to their mileage in returning to the performance of their duties upon order of the court and call of the clerk.''

There is no distinction that occurs to me between the mileage to be allowed to a petit or a grand juror when the court adjourns its session over a number of days. In the case found in the 34th Ohio State, hereinbefore referred to, it is distinctly held that where, as in this case, jurors are discharged from attendance, by order of the court, for service during the term, the clerk is not authorized to certify that jurors are entitled to compensation for the days they were so discharged and not required to be in attendance.

In view of the fact that jurors would not be entitled to their per diem compensation when the court dismisses them for several days, it would seem only just that said jurors should be entitled to mileage from their place of residence to the court house, on their return to duty after such adjournment, and since, as was pointed out by Mr. Hogan in the opinion referred to, there is nothing in section 3008 that states that a juror shall only be entitled once to mileage from his residence to the court house, I am of the opinion that it is proper for the court to make an order that jurors who are temporarily excused and therefore not required to give daily attendance to the court may, upon returning upon the order of the court, be entitled to such mileage. I am, therefore, of the opinion that the order of the court submitted by you is in all respects legal and proper.

Respectfully,
EDWARD C. TURNER,
Attorney General.

453.

APPROVAL OF CERTAIN RESOLUTIONS FOR ROAD IMPROVEMENT—BUTLER AND WOOD COUNTIES.

COLUMBUS, OHIO, June 4, 1915.

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

DEAR SIR:—I acknowledge receipt of your communication of June 1, 1915, transmitting to me supplemental final resolutions on the following roads:

Hamilton-Cleves Road—Butler County, I. C. H., No. 44, Pet. No. 231.
Toledo-Perrysburg Road—Wood County, I. C. H. No. 53, Pet. No. 1418.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

454.

VILLAGE OF CHICAGO JUNCTION—TRANSCRIPT FOR BOND ISSUE APPROVED.

Transcript for bond issue for improving waterworks, village of Chicago Junction, approved.

COLUMBUS, OHIO, June 4, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"IN RE:—Bonds in the amount of $3,000.00 of the village of Chicago Junction, issued for the purpose of improving the waterworks of said village *and securing a more complete enjoyment thereof.*

Under date of June 1, 1915, I received from Mr. Leonard S. Wise, solicitor of the village of Chicago Junction, Ohio, a transcript of the proceedings of the officers of said village relative to the issuance of the above bonds. I have carefully examined said transcript, and I am of the opinion that the council of said village are authorized by law to issue said bonds for the purpose named; that their proceedings and the proceedings of the other officers of said village, relative thereto, are regular and in conformity with the statutes; that the amount of the said bonds, together with the other indebtedness of said village, does not exceed any limitations imposed by law, and that said bonds, when properly drawn, executed and delivered, will constitute valid legal obligations of the said village.

As the bonds have not yet been prepared and executed, I suggest that when they are delivered to the treasurer of state that they be presented to me for approval as to their form and proper execution.

Respectfully,
EDWARD C. TURNER,
Attorney General.

455.

AMENDED SENATE BILL NO. 312—ITS SCOPE AND EFFECT—EXCISE AND PROPERTY TAX OF TELEGRAPH AND TELEPHONE COMPANIES—TIME OF FILING REPORTS CHANGED.

COLUMBUS, OHIO, June 5, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—At the request of Hon. J. H. McGiffert, chairman of the tax commission of Ohio, I am directing to you the following opinion respecting the scope and effect of amended senate bill No. 312 passed by the general assembly on May 27, 1915. This bill amends sections 5449, 5450, 5451, 5458, 5470 and 5474 of the General Code, and enacts a supplementary section, No. 5473-1.

This legislation relates primarily to the date as of which certain reports shall be made to the tax commission for excise and property tax purposes by telegraph and telephone companies.

Under the present law express, telegraph and telephone companies make but one report to the tax commission which serves the uses of the tax commission in assessing their respective properties and in ascertaining the amount of their gross receipts for excise tax purposes as well.

The making of this report and the form thereof are provided for by sections

5449 and 5450 of the General Code. This report is, by the present sections, required to be filed on or before the first day of August, and in the case of telegraph and telephone companies it is required to contain a statement of the entire gross receipts, "including" certain specified things, for the year ending the thirtieth (30th) day of June (paragraph 14 of section 5450), and a statement of facts bearing upon the value of its property as of the 30th day of June.

I am informed that at the time this legislation was drafted it was represented that express companies had to make certain reports to the federal government as of the 30th day of June, and the desire was to accommodate such companies by making their reports to the state officers relate to the same date.

I am also informed that perhaps since the sections of the General Code, to which I have referred, were enacted, the federal government has prescribed a different date, namely, the 31st day of December as the date as of which reports shall be made to it by telephone and telegraph companies, though express companies are still required to report as of the 30th day of June to the federal government.

It appears, therefore, that the present bill may have been and doubtless was passed at the instance of telegraph and telephone companies and for the purpose of extending to them the same accommodation that had been extended to express companies in 1911.

Section 5449, as amended by the bill, leaves the date of filing the statement by express companies as it has been, namely, the first day of August, but changes that date as to telegraph and telephone companies to the first day of March. The section still applies to all three classes of companies, but prescribes different dates, as aforesaid.

Section 5450 is amended in two particulars. In the first place the date as of which the facts relating to the property valuations of the respective companies shall be reported is similarly changed as to telegraph and telephone companies to the 31st day of December, and left as to express companies at the 30th day of June as it is in present section 5450.

In the second place the paragraph which in present section 5450 prescribes that telephone and telegraph companies shall report in this statement their gross receipts for the year ending the 30th day of June (paragraph 14 referred to above), is dropped from the section. The substitute for this paragraph is found in section 5473-1, as enacted in the bill to which I shall hereafter allude.

Section 5450 of the present law requires the commission to assess the property of express, telegraph and telephone companies on the first Monday in September. This is changed in the bill by amending the section so as to provide that this assessment shall be made, as to telegraph and telephone companies, on the first Monday in July, leaving the first Monday of September as the date for the assessment of the property of express companies.

A similar change, with respect to the certification by the commission to the county auditor, is made by amending section 5458, the date for such certification, as to telephone and telegraph companies, being changed from the third Monday of September to the second Monday of July. It is to be noted, in this connection, that the commission is given but one week between the date of its assessment and the date of its certification as to telegraph and telephone companies, whereas it is given two weeks as to express companies, and under the present law has two weeks as to telegraph and telephone companies. As these dates are undoubtedly directory, this shortening of time is immaterial, in my opinion.

The foregoing are all the changes made by the bill with respect to property valuations. The next change occurs by amendment of section 5470 which, in its present form, requires reports from public utilities generally for excise tax pur-

poses, but excludes from the requirement express, telegraph and telephone companies because these companies have heretofore, as I have stated, filed but the one report. The change consists in striking out of the exception clause reference to telegraph and telephone companies, thus making it obligatory on such companies to report on or before the first day of August. The next change which is made is in the language of section 5474, which prescribes the contents of the report to be made by public utilities generally for excise tax purposes. Telegraph and telephone companies, having been placed in the catalogue of the utilities required to file reports, by the amendment to section 5470, would be subject to section 5474 unless expressly excepted therefrom. It is desirable to except them from this section because the contents of the reports which should be made by them (at present prescribed by paragraph 14 of section 5450), are not exactly the same as those of the reports required to be made by public utilities generally and at present prescribed by section 5474, G. C. Therefore the words "telegraph and telephone companies" are inserted in section 5474 by the bill and in the clause defining the utilities excepted from its provisions.

It is seen, therefore, that so far in the bill, so to speak, telegraph and telephone companies are required to report annually to the commission for excise tax purposes, and I may add are subject to an excise tax of 1 2-10 per cent. as to telephone companies and 2 per cent. as to express companies, of their gross receipts. This latter result is brought about by the fact that sections 5483 and 5485 of the General Code, imposing the tax, are not in any way affected by the bill, nor are sections 5475, providing that the commission shall ascertain and determine the receipts, and 5481 providing that the commission shall certify to the auditor of state the amount ascertained, in any wise affected thereby.

But while so much of the machinery of the tax is afforded by the law as it would be changed if the bill should go into effect without section 5473-1, there would be no provision as to what should be reported by telegraph and telephone companies. Therefore, it is necessary that section 5473-1 be enacted for this purpose.

In drafting section 5473-1, the author of the bill evidently took paragraph 14 of section 5450, to which I have referred, and perhaps intended to copy it verbatim and give it the section number 5473-1. Through what appears to be a clerical error the word "in" is inserted in the second line of the section. The insertion of this word makes nonsense out of the section. I am clearly of the opinion that it will be regarded by the courts, should any question arise, as a mere clerical error of a harmless character. It might be captiously argued, however, that by its insertion the legislature has required what shall be *contained in* the entire gross receipts of telegraph and telephone companies, but has failed to require that the entire gross receipts should be reported. I think I should advise you of the possibility of the making of such a contention, but I am bound to say that I do not think it could possibly be sustained in view of the other provisions of the law unaffected by the bill, to which I have referred.

The effect of the bill, in short, is to require two reports instead of one from telegraph and telephone companies, so that their property reports may be filed as of the same date as of which such companies are required to file reports with the federal government, without affecting the date as of which and on which reports are to be filed for excise tax purposes. This is the primary purpose of the bill and is properly worked out with the one exception of the clerical error in section 5473-1, to which I have referred.

Respectfully,
EDWARD C. TURNER,
Attorney General.

456.

AMENDED SENATE BILL NO. 209—DESIGNED TO PROTECT LOANS UPON REAL ESTATE BY BUILDING AND LOAN COMPANIES AND OTHER MORTGAGES—PRIORITY OF LIENS.

COLUMBUS, OHIO, June 5, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—You have submitted to me for inspection amended senate bill No. 209, and request my opinion as to the effect of this act.

This act is primarily designed to make it possible for building and loan companies and other mortgagees to safely loan their funds upon real estate which is to be improved either by the construction of new buildings or additions or betterments to old ones, by providing a method by which building and loan companies may obtain a priority of lien for the mortgages taken by said companies and yet to fully protect the rights of subcontractors, material men and laborers.

Most funds derived from building and loan mortgages are paid out upon estimates, and the law as it now stands only gives building and loan companies priority of lien from the date when the money is actually paid out, regardless of the date of the mortgage.

This act provides that building and loan companies may have priority of liens from the date of the filing of their mortgages, provided they comply fully with all the provisions of this act.

The most important change in the law is to the effect that no money shall be paid out by the mortgagee until the expiration of fifteen days from the time of the filing of the mortgage. This is done for the purpose of giving notice to all subcontractors, material men and laborers that a loan will be made to the owner of the premises with a priority of lien to the mortgagee. During this time it is made the duty of subcontractors, material men and laborers to make known to the owner and the mortgagee of the amount of their claims. When this is done, the mortgage fund becomes a trust fund for the payment of these claims and, in my opinion, fully protects the interests of subconstractors, material men and laborers.

The act provides for the order of priority of liens and is designed to eliminate much litigation that results from the present law.

In my opinion this act puts into better and fairer effect the constitutional amendment of 1912 than the one now existing, and ought to be approved.

Amended senate bill No. 209 is returned herewith.

Respectfully,
EDWARD C. TURNER,
Attorney General.

457.

ROAD IMPROVEMENT CONTRACT—THE J. W. RUSK CONSTRUCTION COMPANY—WHERE CONTRACTOR MISCALCULATES AMOUNT OF STONE TO BE FOUND IN VICINITY OF IMPROVEMENT TO BE MADE AND BIDS AT TOO LOW A FIGURE, SUCH CONTRACTOR IS REQUIRED TO COMPLETE THE WORK ACCORDING TO PLANS AND SPECIFICATIONS WITHOUT ADDITIONAL COMPENSATION.

Where a contract was let August 4, 1914, by the state highway commissioner to The J. W. Rusk Construction Company, for the improvement of section 2 of the Mansfield-Norwalk Road, I. C. H. No. 287, Richland county, the company is required under its contract to complete the work according to the plans and specifications without additional compensation.

COLUMBUS, OHIO, June 5, 1915.

HON. T. B. JARVIS, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—I have your communication of June 2, 1915, in which you state that last year the county commissioners of Richland county made application for state aid in the construction of a certain highway and let a contract under the state aid section for improving a certain two mile stretch of road in Richland county. The engineer calculated that the county could save money by using for the sub-base stone that could be obtained in the fence corners and on the fields in the nearby vicinity. All the stone to be found in the vicinity of the improvement has been used and only one-sixth of the road is completed, the engineer having miscalculated the amount of stone that could be obtained in the neighborhood. You further state that the contract was sold according to specifications calling for stone as suggested and that now the state inspector refuses to allow any more of the stone on hand to be used for the base. Your letter indicates that there is, however, some sandstone in the neighborhood that could be obtained. It is estimated that the added cost of finishing the base by the use of hard limestone, instead of native stone obtained in the vicinity, is $2,600.00. You indicate that there is some kind of an agreement between the county commissioners and the state highway commissioner that this added cost is to be divided between the county and the state, and inquire as to what law governs in such a case. You indicate that your difficulty is as to the method of raising the county's proportion of the added expense and suggest a bond issue of $1,300.00 by the county under section 1223, G. C., or a transfer from the county building fund, the county road fund and the general county fund being practically exhausted.

I ascertain by inquiry at the office of the state highway commissioner and by an investigation of the records in that office, that the road to which you refer is section No. 2 of the Mansfield-Norwalk road, I. C. H., No. 287. The contract for the construction of this section of road was let on August 4, 1914, by the state highway commissioner to the J. W. Rusk Construction Co. upon its lump sum bid of $23,500.00. The contract was not let by the county commissioners and as the improvement was one involving the expenditure of state funds, could have been let only by the state highway commissioner. The engineering work on this improvement was handled by the employes of the state highway department. I learn from the division engineer in charge of your county that your information that all the native stone to be obtained in the vicinity has been exhausted and that only one-sixth of the road has been completed, is correct.

The contract and the plans and specifications which are referred to in the contract and made a part thereof contain no reference to stone obtainable in the

vicinity of the improvement. The contract contains a stipulation that the contractor "will perform the work * * * in accordance with the plans and specifications furnished therefor and to which reference is here made, and the same are made a part hereof as if fully incorporated herein." The plans and profile show that the base of the proposed improvement is to be three inches in thickness at the sides and four inches in thickness at the center, if built of material other than broken stone, which material meets the requirements of the general specifications. If the base is constructed of broken stone, then it is to be four inches in thickness at the sides and six inches in thickness at the center. At no place in the plans and specifications is there any language indicating that the contractor was limited to the use of stone to be found in the vicinity of the improvement or any language indicating that the contractor was to be excused from performance or given any extra compensation in case the stone found in the vicinity of the improvement was insufficient in quantity to complete the base. I am informed by the representatives of the state highway department that under the general specifications referred to in the contract, properly broken sandstone can be used in the construction of the base, and I am further informed that the action of the inspector in refusing to permit the use of certain stone now on hand is based on the fact that such stone is made up of disintegrated material and other material unfit for road building.

Under section 1204, G. C., the state highway commissioner is authorized to let a contract for extra work resulting from unforeseen contingencies not included in the original contract, but the present case cannot be said to fall within the provisions of this section. The contractor agreed to build the road in question for a fixed compensation according to certain plans and specifications, which plans and specifications contain no reference to the place from which the material for the road is to be obtained. In my opinion it is the duty of the contractor to fully complete the road according to the plans and specifications, and there is no authority in the county commissioners or in the state highway commissioner to allow any extra compensation or to pay the contractor any sum of money in addition to its bid for doing the thing which it is bound to do under the terms of its contract. There being no authority under the facts and circumstances of this case for entering into any supplemental contract with the J. W. Rusk Construction Co., your inquiry as to the manner of obtaining funds to meet the county's share of the expense becomes immaterial.

Respectfully,
EDWARD C. TURNER,
Attorney General.

458.

TOWNSHIP BOARD OF EDUCATION—BIDS FOR DEPOSITORY—BANK OR BANKS OFFERING HIGHEST RATE OF INTEREST SHOULD BE AWARDED CONTRACT.

The board of education of a school district in which but one bank is located, having determined by resolution to invite bids from the several banks in the county, including the bank located in said district, should let the contract for the deposit of its funds to the bank or banks offering the highest rate of interest for the full time the funds, or any part thereof, are on deposit.

COLUMBUS, OHIO, June 5, 1915.

HON. HUGH F. NEUHART, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—In your letter of May 25th, you request my opinion as follows:

> "May a board of education of a township in which there is *one bank, after inviting bids from other banks in the county,* under section 7607 of the General Code contract with the bank in said township as depository, when such bank in the township bids more than 2 per cent. for the funds, but which bid is lower than other bids received by the board from other banks in the county?"

Under the provision of section 7604, G. C., it is the duty of the board of education of any school district, by resolution to provide for the deposit of any or all moneys coming into the hands of its treasurer.

Section 7607, G. C., provides:

> "In all school districts containing less than two banks, after the adoption of a resolution providing for the deposit of its funds, the board of education may enter into a contract with one or more banks that are conveniently located and offer the highest rate of interest, which shall not be less than two per cent. for the full time the funds or any part thereof are on deposit. Such bank or banks shall give good and sufficient bond, or shall deposit bonds of the United States, the state of Ohio, or county, municipal, township or school bonds issued by the authority of the state of Ohio, at the option of the board of education, in a sum at least equal to the amount deposited. The treasurer of the school district must see that a greater sum than that contained in the bond is not deposited in such bank or banks, and he and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bond."

It will be observed that this section does not, by its terms, *require* the board of education of a school district, containing less than two banks, to advertise for bids in letting the contract for the deposit of its school funds. Said section authorizes said board of education to enter into a contract with any bank or banks, conveniently located, which offer the highest rate of interest, not less than two per cent., for the full time the funds or any part thereof are on deposit, and which qualify in the manner provided in said section.

The procedure of the board of education of a school district under section 7607, G. C., differs from that *required* by section 7605, G. C., which provides that:

> "In school districts, containing two or more banks, such deposit shall

be made in the bank or banks, *situated therein,* that, at competitive bidding, offer the highest rate of interest which must be at least two per cent. for the full time funds or any part thereof are on deposit,''

and which qualify as therein provided.

Under this section the board of education has no discretion except to determine the sufficiency of the security offered by the successful bidder.

It does not follow, however, that a board of education proceeding under section 7607, G. C., may not in its discretion advertise for bids in letting the contract for the deposit of its funds.

In referring to the board of education of a township in which there is but one bank, I assume that you refer to a township rural school district in which but one bank is located.

The board of education of such a district, having proceeded in the manner provided in section 7607, G. C., you inquire whether said board, after inviting bids from other banks in the county in which said rural school district is located, may let the contract to the bank located in said district, if the rate of interest offered by said bank is more than two per cent. for the full time the funds or any part thereof will be on deposit, but is less than the rate of interest specified in other bids received by said board from other banks in said county.

Section 7608, G. C., provides:

> ''The resolution and contract in the next four preceding sections provided for, shall set forth fully all details necessary to carry into effect the authority therein given. All proceedings connected with the adoption of such resolution and the making of such contract must be conducted in such a manner as to insure full publicity and shall be open at all times to public inspection.''

I call your attention to an opinion rendered by former Attorney General U. G. Denman to Hon. Harry C. Pugh, prosecuting attorney of Muskingum county, under date of June 9, 1910, as found at page 788 in the annual report of the attorney general for that year. Referring to the provisions of sections 7607 and 7608 of the General Code, Mr. Denman said:

> ''I am of the opinion, under the above quoted provisions of sections 7607 and 7608 of the General Code that boards of education should, at the time of the adoption of the resolution providing for the deposit of the funds of their school district, determine what banks are 'conveniently located' for the deposit of such funds and should designate in such resolution the territory within which they deem banks to be conveniently located for the purpose of such deposit. I do not wish to be understood, however, in this particular to hold that boards of education may arbitrarily decide as to such convenience of location; their discretion in this particular must, of course, be reasonably exercised.
>
> ''I am further of the opinion that upon such determination and the passage of such resolution, the board of education should obtain bids from all banks located in the territory so designated by them. This may be done by advertisement and by sending notices to all such banks. It would seem clear from the above quoted provisions of the General Code, and I am of the opinion, that the legislature intended such deposit of funds to be made only after the fullest of competition between the banks 'conveniently located' as to the school district, the funds of which are to be deposited, and, therefore, a board of education could not designate in such resolu-

tion particular banks in a certain territory to be 'conveniently located' to the exclusion of other banks in the same territory. In other words, all of the proceedings in regard to the deposit of school funds by board of education must be carried out with the utmost fairness and publicity with the view to obtaining the highest rate of interest payable on such funds.''

I concur in the above opinion, and in answer to your question, I am of the opinion that the board of education of the school district referred to in your inquiry, having determined by resolution to invite bids from the several banks in the county, including the bank located in said district, should let the contract for the deposit of its funds to the bank or banks offering the highest rate of interest for the full time the funds or any part thereof are on deposit.

Respectfully,
EDWARD C. TURNER,
Attorney General.

459.

TAXATION OF INTANGIBLE PERSONAL PROPERTY BELONGING TO ESTATE OF DECEASED RESIDENT OF ONE COUNTY WHEN THE TWO EXECUTORS ARE RESIDENTS OF DIFFERENT COUNTIES AND NEITHER EXECUTOR EXERCISES CONTROL OVER ESTATE TO EXCLUSION OF THE OTHER—HALF OF PROPERTY TO BE TAXED IN EACH OF COUNTIES WHERE EXECUTORS RESIDE.

Intangible personal property, belonging to the estate of deceased resident of "county A," in the possession of two executors, one a resident of that county and the other a resident of "county B," the evidences of the title to which are kept in "county C," are, when neither of the two executors exercises any peculiar management or control over the estate to the exclusion of or in preference to the other, subject to be listed for taxation, one-half of the total value thereof in county A and one-half of such total value in county B.

COLUMBUS, OHIO, June 7, 1915.

The Honorable Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter of May 27, 1915, you submit for my opinion the following facts:

> ''The will of William Hayner, deceased, a resident of Troy, Ohio, named A. F. Broomhall, of Troy, and Walter Kidder, of Dayton, executors. The executors are not under bond; the securities are kept in Cincinnati and not in the possession and under the actual control of either executor to the exclusion of the other, but are controlled jointly, neither executor having any special authority over the other. As a matter of convenience the clerical work is done at the office of the Hayner Distilling Company, Dayton.
>
> ''In 1913 the joint executors returned all the property of the decedent in Miami county. In 1914 one-half was returned in Miami county and one-half in Montgomery county.''

My advice is requested as to the situs of the property of the estate for taxation.

Because you refer to the property as the ''securities,'' I assume that the as-

sets of the estate concerning which you inquire are intangible and consist of moneys, credits and investments in bonds or stocks. This opinion will accordingly be limited to the facts as so interpreted.

The statutory provisions respecting the place of listing property and the duty to list have been the same for many years. They are at present found in sections 5370, 5371 and 5375 of the General Code, which are as follows:

> "Sec. 5370. Each person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned, or otherwise controlled by him, as agent or attorney, or on account of any other person or persons, company or corporation, and all moneys deposited subject to his order, check, or draft; all credits due or owing from any person or persons, body corporate or politic, whether in or out of such county; and all money loaned or pledged on mortgage of real estate, although a deed or other instrument may have been given for it, if between the parties, it is considered as security merely. The property of * * * an estate of a deceased person, by his executor or administrator. * * *
>
> "Sec. 5371. A person required to list property, on behalf of others, shall list it in the township, city, or village in which he would be required to list it if such property were his own. He shall list it separately from his own, specifying in each case the name of the person, estate, company, or corporation, to whom it belongs. Merchants' and manufacturers' stock, and personal property upon farms shall be listed in the township, city or village in which it is situated. All other personal property, moneys, credits and investments, except as otherwise specially provided, shall be listed in the township, city or village in which the person to be charged with taxes thereon resides at the time of the listing thereof, if such person resides within the county where the property is listed, and if not, then in the township, city or village where the property is when listed.
>
> "Sec. 5375. A person required to list property, upon receiving a blank for that purpose from the assessor, or, within five days thereafter, shall make out and deliver, annually, to the assessor, a statement, verified by his oath, of all personal property, moneys, credits, investments in bonds, stocks, joint stock companies, annuities, or otherwise, in his possession, or under his control, on the day preceding the second Monday of April of that year, which he is required to list for taxation, either as owner or holder thereof, or as parent, husband, guardian, trustee, executor, administrator, receiver, accounting officer, partner, agent, factor, or otherwise."

It was under these statutes, or their predecessors phrased in substantially the same language, that the supreme court decided the cases of:

> State ex rel. v. Mathews, 10 O. S., 431.
> Todd v. Hughes, 3 Ohio Law Journal, 206.
> Brown v. Noble, 42 O. S., 406.
> Sommers v. Boyd, 48 O. S., 648.

In the first of these cases it was held that moneys, credits, bonds and stocks of an estate, in the possession of three executors residing in the same township, but in different taxing districts and having joint control thereof, should be divided for purposes of taxation between the two taxing districts in which the executors resided, one-third of the value of the estate being assignable, so to speak, to each executor and given a situs at his domicile. This rule was constructed by the court to supply an admitted deficiency in the statute.

In the second case cited it was held that the assets of an estate, in the possession of four executors, three of whom resided in the county of the testator's domicile, two in one taxing district and one in another, and the fourth in another county, should be listed, one-fourth in the taxing district of the residence of the one executor who resided in the county of the testator's domicile and the remaining three-fourths in the taxing district in which the two executors resided, that being the taxing district of the testator's domicile, so that no part of the estate was held to be taxable in the county in which the fourth executor resided. The exact facts in this case are not available, it never having been fully reported. It does not appear, for example, whether the estate consisted of tangible or intangible property, and whether the two executors residing at the domicile of the testator had any peculiar possession or control thereof. The case, therefore, is not of much value in the solution of the question which you submit.

In the third case above cited it was held that an estate, in the possession of two administrators residing in different counties, should be listed as an entirety by the administrator having the actual possession and control thereof, and in the county wherein he resided. In this case it appeared that the second administrator, by agreement, permitted the first administrator to hold the actual possession of and exercise actual control over the assets of the estate.

In the fourth case above cited it was held that the estate of a deceased ward should be listed by his administrator and not by his guardian, and that notwithstanding the fact that the administrator lived in a county other than that in which the ward and his guardian had been domiciled, and the fact that the evidences of the credits due the estate were physically present in the latter county, the administrator should list the estate in the county of his own residence.

The following rules can be gleaned from the foregoing decisions:

(1) The place where the evidences of title and indebtedness representing intangible property belonging to the estate of a deceased person may be actually kept is, of itself, without weight in determining the situs of such property for taxation.

(2) The territorial jurisdiction of a court appointing an executor or administrator is not of importance in determining the situs. This rule is not varied in the decision of Tafel v. Lewis, 75 O. S. 182, wherein it was held that bonds belonging to the estate of a deceased person, a resident of a foreign country held by an executor appointed by the probate court of Hamilton county and actually in his possession, were taxable in that county even though the beneficiaries of the estate were also residents of a foreign country. While the physical location of the bonds and the jurisdiction of the court were both alluded to, it appears from careful examination that the court's decision was founded upon the possession and control of the executor, the jurisdiction of the court being referred to merely to show that his possession and control were lawful.

(3) Where an estate is being administered or executed by more than one person, and it consists of intangible property, each of the administrators or executors will be deemed, in the first instance, to have jointly with the others possession and control of the whole estate, and in law to have an individual legal or representative interest, so to speak, in the whole thereof, the value of which is an aliquot part of the whole, and where this is the case the duty of listing the whole estate cannot be put upon one executor or administrator to the exclusion of the others, so that each must list an aliquot part.

(4) But where one of several executors or administrators has, by agreement among them, the actual possession and control of the assets of the estate—that is, manages the estate in the active sense—the duty of listing the whole estate is thereby cast upon him to the exclusion of the others; in such event the legal fiction, which the law constructs to satisfy the equities of a case where there is

no managing executor or administrator, but all of several executors or administrators exercise equal control or dominion over the property, is discarded and the situs of the property is the domicile of such managing executor or administrator.

The rule, in short, is worked out by giving due weight to each of the provisions of the statutes which I have quoted, and particularly to that provision of section 5371 of the General Code defining taxable situs, which is to the effect that *"A person required to list property,* on behalf of others, shall list it" where he would be required to list it if it were his own. The theory is that where there are several executors or administrators, but one of them is the actual manager, he is the "person required to list the property" because of the provisions of sections 5370 and 5375 which make possession and control the criterion as to whether or not a person shall list in a representative capacity.

You state in your letter that one executor resides in the county of the testator's domicile and another in another county, that the securities belonging to the estate are kept in a third county as a matter of mere custody; that there is no managing executor, even the clerical work not being done by one to the exclusion of the other.

The rules above laid down, applied to the facts which you state, necessitate the conclusion that one-half of the property should be returned in Miami county and one-half in Montgomery county.

Respectfully,
EDWARD C. TURNER,
Attorney General.

460.

DISAPPROVAL OF CERTAIN RESOLUTIONS FOR ROAD CONSTRUCTION BY HIGHWAY DEPARTMENT—FAYETTE, ALLEN, TUSCARAWAS AND JEFFERSON COUNTY.

COLUMBUS, OHIO, June 7, 1915.

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

DEAR SIR:—I have your communication of June 2, 1915, transmitting to me for my examination final resolutions for the following roads:

Springfield-Washington C. H., Fayette County, Petition No. 972, I. C. H., No. 197;

Lima-Ottawa (Hospital), Allen County, I. C. H., No. 129;

West Lafayette-New Philadelphia, Tuscarawas County, Petition No. 1642, I. C. H., No. 408;

Ohio River, Jefferson County, Petition No. 1231, I. C. H., No. 7.

In reference to the resolutions for the Springfield-Washington C. H. and Lima-Ottawa (Hospital) roads, it appears on the face of the resolutions that the contemplated improvements are less than one mile in length, but it does not appear affirmatively on the face of the resolutions that the contemplated improvements are extensions of or connected with a permanently improved road, street or highway of approved construction. If it be a fact that these improvements are extensions of or connected with a permanently improved road, street or high-

way of approved construction and this fact be made to appear by your certificate endorsed on the resolutions, then the resolutions will be regular in form and entitled to approval.

In reference to the resolution for the West Lafayette-New Philadelphia road, it appears on the face of the resolution that the same was adopted by the county commissioners on the 29th day of December, 1913, whereas the certificate of the clerk of the board of commissioners recites that the resolution was adopted on the 22nd day of March, 1915. Either the copy of the resolution or the certificate of the clerk should be corrected to correspond with the fact, and when this correction is made the resolution will be entitled to approval.

The same situation exists in reference to the resolution pertaining to the Ohio river road. The resolution on its face appears to have been adopted on the 26th day of December, 1913, whereas the certificate of the clerk of the board of commissioners recites that the resolution was adopted on the 27th day of April, 1915. A correction making either the copy of the resolution or the certificate correspond with the fact, will remove this discrepancy. It also appears that the improvement contemplated under this resolution is less than one mile in length, but it does not appear affirmatively that the contemplated improvement is an extension of or connected with a permanently improved road, street or highway of approved construction. If such be the fact, it would be proper for you to so certify on the resolution, and after the correction above suggested has been made and your certificate placed on or attached to the resolution, the same will be in regular form and entitled to approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

461.

DISAPPROVAL OF CERTAIN FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS—WOOD COUNTY, RICHLAND COUNTY.

COLUMBUS, OHIO, June 7, 1915.

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

DEAR SIR:—I have your communication of May 28th and June 5, 1915, transmitting to me for examination final resolutions as to the following roads:

> Toledo-Perrysburg, Wood County, Petition No. 1418, I. C. H. No. 53;
> Mansfield-Galion, Richland County, Petition No. 1138, I. C. H., No. 202.

In reference to the final resolution for the Toledo-Perrysburg road, permit me to call your attention to the fact that the chief clerk of the highway department has certified on this resolution under date of May 28, 1915, to the effect that $24,833.48 of state funds was available for the improvement. House bill No. 709, appropriating unexpended balances for the use of the highway department, which unexpended balances had lapsed on March 12, 1915, was not filed in the office of the secretary of state until June 5, 1915. It is therefore apparent on the face of the resolution that the chief clerk's certificate is incorrect, or at least was incorrect on the day it was made, May 28, 1915.

As to the final resolution for the Mansfield-Galion road, the copy of the reso-

lution recites that the same was adopted on March 19, 1915, whereas the certificate of the clerk of the board of commissioners of Richland county shows that the resolution was adopted on April 2, 1915. This resolution should be returned to the clerk of the board of commissioners of Richland county for correction, and when corrected so that the date of the passage of the resolution as set forth in the copy of the resolution and in the clerk's certificate is identical, the resolution will be in regular form.

For the reasons above stated, I am returning the two resolutions in question without my approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

462.

APPROVAL OF CERTAIN RESOLUTIONS FOR ROAD IMPROVEMENTS—CHAMPAIGN, HURON, WILLIAMS, FULTON COUNTIES.

COLUMBUS, OHIO, June 7, 1915.

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

DEAR SIR:—I have your communications of June 2nd and June 4, 1915, transmitting to me for my examination final resolutions for the following roads:

Troy-Urbana-Southern, Champaign County, Petition No. 633, I. C. H., No. 471;
Plymouth-Norwalk, Huron County, Petition No. 1087, I. C. H., No. 292;
Bryan-Pioneer, Williams County, I. C. H., No. 306;
Archbold-Fayette, Fulton County, Petition No. 1228, I. C. H., No. 301.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

463.

SUPERINTENDENTS OF VILLAGE OR RURAL SCHOOL DISTRICTS OR UNION OF SCHOOL DISTRICTS—CONTRACTS OF EMPLOYMENT PRIOR AND SUBSEQUENT TO MAY 27, 1915—EFFECT OF SENATE BILL NO. 323 AMENDING SECTION 4740, G. C.—BOARDS OF EDUCATION MAY ANTICIPATE THE PROBABLE GOING INTO EFFECT OF AMENDATORY ACTS—AMENDED SENATE BILL NO. 282 MAKES IT MANDATORY UPON COUNTY BOARDS OF EDUCATION TO REDISTRICT SUPERVISION DISTRICTS INTO DISTRICTS CONTAINING NOT FEWER THAN THIRTY TEACHERS—COUNTY BOARDS OF EDUCATION MAY REDISTRICT UPON PETITION OF THREE-FOURTHS OF PRESIDENTS OF BOARD OF EDUCATION OF THE DISTRICTS CONSTITUTING COUNTY DISTRICT.

Contracts entered into prior to May 27, 1915, under section 4740, G. C., as amended 104 O. L., 141, in village or rural school districts, or unions of school districts, for supervision purposes for the employment of part time superintendents for periods of time extending beyond the taking effect of senate bill 323 passed by the 81st general assembly, amending said section 4740, are not subject to impairment by anything contained in said last amendment. In districts which are discontinued as supervision districts by such last amendment, that is to say, in districts not maintaining a first grade high school, such superintendents so employed are entitled to perform similar services, at the same compensation, during the life of their contracts, or to damages for breach of the contract, although the position of part time superintendent is abolished by the amendment referred to.

Such contracts in such districts entered into on or after May 27, 1915, however, must be regarded as having been made in contemplation of the possible going into effect of amended senate bill No. 282, passed on that day and amending section 4740 in this respect similarly to the amendment of that section effected by senate bill No. 323. Therefore, superintendents so employed after said date cannot complain of the effect of the statute upon the powers and duties of the board of education with which they contract, and the abolition of their positions by the taking effect of the act would not constitute an impairment of such contract.

Amended section 4740, G. C., as incorporated in senate bill No. 323, puts an end to state aid for the salaries of part time superintendents in separate supervision districts. This amendment of the law applies to the salaries of superintendents employed prior to May 27, 1915, state aid not being one of the obligations of such contracts, and the district having no contractual relation to the state with respect to state aid.

Technically, boards of education may not act under section 4740 as amended in 1915 until the amendatory acts become effective. It would be proper, however, for boards of education to anticipate the probable going into effect of such amendatory acts and to make their arrangements conditionally in view thereof.

Amended senate bill No. 282, passed May 27, 1915, makes it mandatory upon the county board of education to redistrict the county district into supervision districts containing not fewer than thirty teachers. Superintendents employed prior to that date by districts having fewer than thirty teachers (and more than twenty) are, notwithstanding the change in the law, entitled to similar work at the same salary for the balance of the terms of their respective contracts, if the same extend beyond the date when the amendment becomes effective, or to damages as for the breach of such contracts. Superintendents employed after such date, however, may not complain of the change in the law, as they must be deemed to have contracted with knowledge of the probability of the amendment going into effect.

Under section 4738, G. C., as amended in 1914, a county board of education may

redistrict the county district into supervision districts at any time upon petition of three-fourths of the presidents of the boards of education of the districts constituting the county district. All contracts with district superintendents made under this section must be deemed to have been made subject to the exercise of this power; so that if a county board of education acts prior to the taking effect of the amendments of 1915, *upon the petition of three-fourths of the presidents of the several boards of education, and so redistricts the county district as to make compliance with the new law possible, superintendents employed prior to May* 27, 1915, *cannot complain of such action.*

COLUMBUS, OHIO, June 8, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—In your letter of June 1, 1915, you request my opinion as follows:

> "Please give the department of public instruction your opinion on the following questions:
>
> "Sec. 4740 of the General Code, which prescribes the manner of election of part time district superintendents and also the conditions under which such part time district superintendents may be employed has been amended. The amendment will take effect August 26, 1915. Previous to August 26, 1915, practically all of these district superintendents will have been employed. The maximum term of their re-employment is three years. Under the present law the state pays a certain part of the salaries of the part time district superintendents. Under the amended section 4740, the state will pay no part of the salaries of these superintendents.
>
> "1. Will the contracts made under section 4740 of the present General Code be valid contracts after the amended section 4740 takes effect? If so, will the state be obligated to pay its part of the contract?
>
> "2. Will the boards of education have the right to act under the amended section 4740 before August 26, 1915? (This is the date on which the amended section 4740 goes into effect.)
>
> "3. Will a contract of a district superintendent made before August 26, 1915, be valid after August 26, if such superintendent supervise less than thirty teachers?"

Under the provision of section 4732, G. C., as amended in 104 O. L., 134, each county board of education was required to meet on the third Saturday of July, 1914, and organize in the manner therein provided.

The provision of section 4738, G. C., as amended in 104 O. L., 140, required said board of education, within 30 days after organizing, to divide the county school district into supervision districts, each to contain one or more village or rural school districts, and that the number of teachers employed in any one supervision district should be not less than 20 nor more than 60.

Section 4739, G. C., as amended in 104 O. L., 140, provides:

> "Each supervision district shall be under the direction of a district superintendent. Such district superintendent shall be elected by the presidents of the village and rural boards of education within such district, except that where such supervision district contains three or less rural or village school districts the boards of education of such school districts in joint session shall elect such superintendent. The district superintendent shall be employed upon the nomination of the county superintendent, but the board electing such district superintendent may by a majority vote elect a district superintendent not so nominated."

Section 4740, G. C., as amended in 104 O. L., 141, provides:

"Any village or rural district or union of school districts for supervision purposes which already employs a superintendent and which officially certifies by the clerk or clerks of the board of education on or before July 20, 1914, that it will employ a superintendent who gives at least one-half of his time in supervision, shall upon application to the county board of education be continued as a separate supervision district so long as the superintendent receives a salary of at least one thousand dollars and continues to give one-half of his time to supervision work. Such districts shall receive such portion of state aid for the payment of the salary of the district superintendent as is based on the ratio of the number of teachers employed to forty, multiplied by the fraction which represents that fraction of the regular school day which the superintendent gives to supervision. The county superintendent shall make no nomination of a district superintendent in such district until a vacancy in such superintendency occurs. After the first vacancy occurs in the superintendency of such a district all appointments shall be made on the nomination of the county superintendent in the manner provided in section 4739. A vacancy shall occur only when such superintendent resigns, dies or fails of re-election.

"Any school district or districts, having less than twenty teachers, isolated from the remainder of the county school district by supervision districts provided for in this section shall be joined for supervision purposes to one or more of such supervision districts, but the superintendent or superintendents already employed in such supervision district or districts shall be in charge of the enlarged supervision district or districts until a vacancy occurs."

Amended senate bill No. 282, passed by the general assembly, and approved by the governor on May 27, 1915, will become effective August 26, 1915, unless a petition for a referendum be filed prior to said date. This bill amends sections 4738 and 4740 of the General Code, as amended in 104 O. L., so that said sections will read as follows:

"Sec. 4738. The county board of education shall divide the county school district, any year, to take effect the first day of the following September, into supervision districts, each to contain one or more village or rural school districts. The territory of such supervision districts shall be contiguous and compact. In the formation of the supervision districts consideration shall be given to the number of teachers employed, the amount of consolidation and centralization, the condition of the roads and general topography. The territory in the different districts shall be as nearly equal as practicable and the number of teachers employed in any one supervision district shall not be less than thirty. The county board of education shall, upon application of three-fourths of the presidents of the village and rural district boards of the county, redistrict the county into supervision districts. The county board of education may at their discretion, require the county superintendent to personally supervise not to exceed forty teachers of the village or rural schools of the county. This shall supersede the necessity of the district supervision of these schools.

"Section 4740. Any village or rural school district or union of school districts for high school purposes which maintains a first grade high

school, and which employs a principal, shall, upon application to the county board of education before June 1st of any year, be continued as a separate district under the direct supervision of the county superintendent. Such district shall continue to be under the direct supervision of the county superintendent until the board of education of such district by resolution shall petition to become a part of a supervision district of the county school district. Such principals shall perform all the duties prescribed by law for a district superintendent, but shall teach such part of each day as the board of education of the district or districts may direct. Such district shall receive no state aid for the payment of the salaries of their principals, and the salaries shall be paid by the boards employing such principals.''

I note, however, that section 4740, G. C., has been further amended by senate bill No. 323, approved June 2, 1915, and which will be effective on or about September 2, 1915, so as to read as follows:

''Sec. 4740. Any village or rural school district or union of school districts for high school purposes which maintains a first grade high school and which employs a superintendent shall upon application to the county board of education before September 10, 1915, or before June 1st, of any year thereafter, be continued as a separate district under the direct supervision of the county superintendent. Such district shall continue to be under the direct supervision of the county superintendent until the board of education of such district by resolution shall petition to become a part of a supervision district of the county school district. Such superintendents shall perform all the duties prescribed by law for a district superintendent, but shall teach such part of each day as the board of education of the district or districts may direct. Such districts shall receive no state aid for the payment of the salaries of their superintendents, and the salaries shall be paid by the boards employing such superintendents.''

In order to answer your question fully it will be necessary, I think, to define what the exact purport of this legislation is.

As the law existed prior to the amendments of 1914, any village, township or special district might employ a superintendent (section 7705), and by the same section any two or more such districts might unite in employing a superintendent.

Under the provisions of sections 7669 and 7670 of the General Code, as they then existed, a township and a village maintaining a high school of any grade or two adjoining township school districts maintaining such a high school might unite such districts for high school purposes.

The amendments of 1914 preserved the latter right, merely amending sections 7669 and 7670 so as to use the term ''rural school district'' instead of ''township school district,'' but repealed the provision authorizing township, special and village school districts, as such (or as rural school districts), to employ superintendents, and at the same time took away the power which had formerly existed to unite with other similar districts in the employment of a superintendent.

However, in putting into effect the scheme of district supervision the general assembly deemed it proper to recognize village and rural school districts, and unions of such districts, which at the time of the passage of the act were then employing superintendents and which certified on or before July 20, 1914, that they would employ a superintendent, who gave at least one-half of his time

to supervision. This was the purpose of section 4740 as it appears in 104 O. L. 141. In terms and in effect the section "continues" as separate supervision districts *only* such village or rural districts, or unions thereof, as were at the time of the passage of this act employing superintendents, and upon the conditions that such superintendents should receive a certain minimum salary and give one-half of his time to supervision work. It will be observed that section 4740 as it appears in 104 O. L., 141, applies to *districts and unions of districts employing a superintendent,* regardless of whether or not any high school is maintained in such district or union of districts.

Section 4740, as amended by amended senate bill No. 282, and by senate bill No. 323, in terms "continues" as a separate district for supervision purposes a village or rural school district or union of school districts *for high school purposes.* Now, a village or rural school district or a union of school districts for high school purposes which maintains a high school (or, to be more exact, a first grade high school) did not *constitute* a separate supervision district under the amendments of 1914. So that on the face of section 4740 as amended by the two bills there is a contradiction in terms.

Looking further, however, into senate bill No. 323, I discover that the districts therein described may be "continued" as separate supervision districts upon application to the county board of education "before September 10, 1915, or before June 1st, of any year thereafter," and that "such district shall continue to be under the direct supervision of the county superintendent until the board of education of such district by resolution shall petition to become a part of a supervision district. * * *" The last of these two quoted provisions makes it clear that an annual application is not necessary to continuance when once the status of a separate supervision district is achieved. Therefore, what seems to be the controlling intention of the section as amended by senate bill No. 323 is that the districts therein referred to may be not only "continued" as separate supervision districts, but also *established* as such upon application prior to the specified dates.

It is true that this is a departure from the policy of section 4740 as it was amended in 1914. In a way it enlarges the class of districts referred to by that section, in so far as districts and unions of districts that maintained first grade high schools and did not employ superintendents are permitted to become separate supervision districts. In another way it restricts the class because whereas under original section 4740 as amended in 1914 any village or rural school district, or union of school districts, which employed a superintendent was to be continued as a separate supervision district, under the same section as amended in senate bills No. 282 and No. 323 only such village or rural school districts, or unions of school districts, for supervision purposes *which maintain a first grade high school* may be continued as a separate supervision district.

The effect, then, of the first change which was made by the present session of the general assembly in section 4740 of the General Code was to eliminate as separate supervision districts all village or rural districts, or unions of such districts, for supervision purposes which employed superintendents, but which did not maintain first grade high schools. Such districts have no rights whatever under section 4740 as amended by amended senate bill No. 282, and the purport at least of the section is to require a consolidation of such separate supervision districts (if any) with some other territory in the county district for district supervision purposes, unless such district can satisfy the requirements of a supervision district as otherwise provided by law.

Another change which was made by amended senate bill No. 282 was the elimination of the employment of a *superintendent* as a condition of continuance as

a separate supervision district and the substitution therefor of the employment of a principal. That is, the intention of section 4740, as amended in amended senate bill No. 282, appears to be that any separate supervision district existing under favor of section 4740 as amended in 104 O. L., 141, may continue to exist without the necessity of employing a superintendent, as such, provided that the high school principal shall, together with the county superintendent, act as the district superintendent. The purport of this change at any rate is to do away with superintendents in such districts and to cast their duties, at least in part, upon the high school principal employed therein (it being understood, of course, that the high school must be a first grade high school).

However, the enactment of senate bill No. 323 makes still another change in the terminology of the law. Section 4740 as amended by this bill still applies only to districts, or unions of districts, maintaining a first grade high school, but instead of making the continuance as a separate supervision district contingent upon the employment of a principal only, and casting the duties of supervision in part upon such principal, this act restores the condition that a superintendent shall be employed.

In view of this change, I am of the opinion that the general assembly in making it intended that the amendment of the section in amended senate bill No. 282 should never become effective.

At the same time section 4740 as last amended, viz.: By senate bill No. 323, does not prohibit the employment of a principal for the high school which is maintained; it merely requires as a condition of continuance as a separate supervision district the employment of a "superintendent."

This statement of the effect of the law is made because your first question must be answered, first, with reference to the different classes of districts formerly subject to section 4740 of the General Code as amended 104 O. L., 141, and second, with respect to the date on which the contracts about which you inquire are entered into.

As to a village or rural school district, or union of school districts, for high school purposes which maintains a first grade high school and employs a superintendent, it makes no difference when the contract for the employment of the superintendent is made, because such a contract would be valid under section 4740 in any of its forms (except that application for continuance as a supervision district must be made after senate bill No. 323 becomes effective and prior to September 10, 1915).

As to a village or rural school district, or union of school districts, for high school purposes heretofore employing a principal, but no superintendent, no contract can be lawfully entered into for the employment of a superintendent, at present. After section 4740 as amended by senate bill No. 323 goes into effect, such a contract may be made, because such a school district (if any such there be) is permitted by the terms of section 4740 as amended by senate bill No. 323 to be "continued" (that is, having regard to all the language of the section, to be *established*) as a separate supervision district upon the employment of a superintendent and upon application to the county board of education as therein provided.

As to a village or rural school district, or union of school districts, for supervision purposes which has heretofore employed a superintendent, but does not maintain a first grade high school, i. e., either maintains no high school at all or maintains a second or third grade high school, the purport of the law is to make it impossible for such a district to continue further as a separate supervision district. It is as to this class of districts that your first question arises.

Recapitulating, then, the exact question which I have considered in answering your first general question is as to the binding force of a contract for the em-

ployment of a superintendent entered into under original section 4740 as amended 104 O. L., 141, in a village or rural school district, or union of school districts, for supervision purposes, not maintaining a first grade high school.

While the legislature may by statute abolish such a position, the person legally employed for a period extending beyond the time when the statute abolishing the position went into effect would have to be given similar employment by the board of education, or, as pointed out hereafter, he would probably have a cause of action for damages against the school board, as the superintendent of public schools is an employe and not an officer.

Ward v. Board of Education, 21 O. C. C., 699.

Where a board of education at the time of the passage of the act amending section 4740 in 104 O. L., 141 was employing a superintendent, and such board of education, through its clerk, on or before July 30, 1914, certified that such board of education would employ a superintendent at not less than the minimum salary provided by law who would devote at least half of his time to supervision, and a contract was entered into between such board of education and such superintendent in conformity with said statute for a period extending beyond May 27, 1915, or where *that same superintendent* had, subsequent to the beginning of the school year 1914 and prior to May 27, 1915, been elected for a period extending beyond May 27, 1915, such contract is binding upon the board of education to provide similar employment for said superintendent or respond in damages.

While, as stated above, the legislature may abolish such position, the board of education under a contract extending beyond the time of the abolition of the position must provide employment of a like character, at the same compensation, or respond in damages. (Of course, with the consent of the superintendent and the board of education the employment would not have to be of the same character.) The measure of damages would be the difference between the contract price and any earning that such superintendent made, or should have made, between the breach of the contract and the expiration of the original term thereof or the bringing of the action. While such superintendent would not be obliged to take any kind of employment, he would be obliged to be reasonably diligent in securing like employment in the neighborhood. Teaching would doubtless be held to be like employment, as under the amendment of 1914 and his acceptance of employment or acquiescence in the employment thereunder, he ceased to be a superintendent only, if he had been such prior to that time, and became a teacher as well. After May 20, 1914, on which date the act found in 104 O. L., 133, went into effect, a superintendent could have been employed in such district, to fill a vacancy or otherwise, only for the term of one year, as he would then have been a district superintendent under section 4741, G. C.

On and after May 27, 1915, amended senate bill No. 282, and on and after June 2, 1915, senate bill No. 323 became, and will become, a part of any contract which has been entered into since the time when they were, respectively, filed in the office of the secretary of state. Though not in effect technically on account of the referendum period, nevertheless, it is my opinion that they are such laws as would be held to be a part of any contract made since their enactment, or at least it would be held that the contract was made in contemplation of the probable going into effect of such a law.

Stating it somewhat differently, contracts entered into since May 27, 1915, are subject to be defeated by the going into effect of the above mentioned senate bills.

You also inquire in your first question as to whether the state will be obligated to pay "its part of the contract." In this connection I observe that the amended law withdraws state aid for the payment of the salaries of district

superintendents employed under section 4740. In other words, state aid is, according to the terms of the act, withdrawn from all classes of districts which may continue as separate supervision districts under section 4740 as amended. The withdrawal of state aid will be effective when amended section 4740 goes into effect.

I am of the opinion that the withdrawal of state aid in nowise affects contracts entered into with district superintendents under section 4740. The provision for the furnishing of state aid to districts is not in the nature of a contract as between the state and the district, but is merely a provision for the raising and distribution of public revenues for a certain purpose. On the other hand, it is not one of the "obligations" of the contract between the district and the superintendent. The right of the superintendent to receive the salary agreed upon at the time of his appointment is in nowise affected substantially by the withdrawal of state aid. In other words, the state might withdraw state aid at any time without affecting the legal rights of superintendents under contracts.

Therefore, in my opinion, the state will not be obligated to pay state aid as to any of the contracts referred to in your first question and covered by the preceding discussion.

Replying to your second question, I am of the opinion that, technically, boards of education have no authority to act under the amendment of section 4740, General Code, effected by amended senate bill No. 282 or that effected by senate bill No. 323 prior to the date when said bills will, respectively, become effective. However, it is apparent from what I have stated that in those classes of districts in which these amendments will be material, every action of the board of education taken after the respective dates of the passage of these two bills must be taken in the light of the possibility or probability of their becoming effective.

In those districts, or unions of districts, which maintain first grade high schools, but have not heretofore employed superintendents, no action can be taken under the enlarged powers of such districts as provided by section 4740, as amended by senate bill No. 323, until that bill goes into effect. This is the case in a technical and exact view of the law. However, there is no objection to the board of education of such a school district, anticipating application to the county board of education, entering into negotiations with a suitable person to act as part time superintendent and teacher under the provisions of section 4740, and the making of complete arrangements, subject only to the making of the application and the establishment of the district as a separate supervision district after senate bill No. 323 goes into effect.

Your third question involves consideration of amended section 4738 of the General Code, as amended by amended senate bill No. 282. This section requires that the county board of education shall "divide the county school district any year to take effect the first day of the following September, into supervision districts, * * * the number of teachers employed in any one supervision district shall not be less than thirty."

In my opinion, this statute is mandatory. Therefore, when the act amending section 4738 takes effect it will be the duty of the county board of education to divide the county school district into proper supervision districts in accordance with its terms. This duty, to be sure, will have to be performed after August 26, 1915, and before the opening of the school year; but in spite of the brief period of time within which the action must be taken I think the statute clearly requires it.

But though this is true as a general principle, the statute cannot be applied so as to impair the obligation of valid contracts. On principles already laid down a contract for the employment of a district superintendent for a specified

district, entered into prior to May 27, 1915, may not be impaired by subsequent legislation, and a person so employed is entitled to carry out the terms of his contract, subject only to the law as it existed when the contract was entered into.

Now section 4738 of the General Code, as amended 104 O. L., 140, authorized the county board of education "upon application of three-fourths of the presidents of the village and rural district boards of the county" to redistrict the county. This provision was in the law when every contract of employment of a district superintendent now existing was entered into. It was, therefore, an element of every such contract, and no district superintendent could complain if his district were changed or abolished and his duties thereby affected by a redistricting upon application of three-fourths of the presidents of the village and rural district boards of the county.

But while this particular kind of a redistricting was in the contemplation of the parties to any contract entered into prior to May 27, 1915, they did not contemplate, of course, the mandatory redistricting required by section 4738 as amended by amended senate bill No. 282; therefore, in my opinion, a district for which a superintendent was employed prior to May 27, 1915, may be changed so as to affect the terms of his contract only upon application of three-fourths of the presidents of the village and rural district boards of the county, and as to such supervision districts section 4738 does not apply—that is to say, the requirement that the number of teachers employed in any one supervision district shall not be less than thirty and the requirement that the board of education shall divide the county district into supervision districts, so defined, though mandatory, cannot be so applied as to oust a district superintendent employed prior to May 27, 1915, or materially to alter the terms of his contract, without incurring liability to him.

But as to district superintendents employed on or after May 27, 1915, upon principles already laid down the same rule does not apply. Such contracts of employment were made in contemplation of the possible or probable going into effect of amended senate bill No. 282 and the carrying out of its requirement that the county school district be redistricted for district supervision purposes into districts containing not less than thirty teachers.

The obligation of such a contract, therefore, would not be impaired by carrying section 4738 into effect, even though such action might result either in materially changing the duties of the district superintendent or in abolishing his district and position.

Respectfully,
EDWARD C. TURNER,
Attorney General.

464.

TOWNSHIP TRUSTEES IN WHICH THERE IS NEITHER A VILLAGE NOR A CITY CANNOT SUBMIT TO ELECTORS THE ADOPTION OF ROAD IMPROVEMENT AND THEREFORE CANNOT IMPROVE ROADS UNDER SECTION 6976, G. C.

The trustees of a township in which neither a village nor city is located, cannot submit to the qualified electors therein the question of adopting the general plan of road improvement provided by sections 6976, et seq., G. C., and cannot, therefore, improve the roads of such township under authority of said sections.

COLUMBUS, OHIO, June 8, 1915.

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

GENTLEMEN:—In your letter of May 28th you request my opinion upon the following question:

> "Can trustees in a township in which there is neither a village nor a city; improve the roads therein under sections 6976 et seq?"

I deem it proper to call your attention to amended senate bill No. 125, being an act "to provide a system of highway laws for the state of Ohio, and repeal all sections of the General Code, and acts inconsistent herewith." This bill, as passed by the general assembly, was approved by the governor and filed in the office of the secretary of state June 5, 1915, and will become effective, therefore, September 4, 1915.

By provision of section 305 of said act, sections 6976 to 7108, inclusive, of the General Code, are repealed. However, section 302 of the act provides:

> "This act shall not affect pending actions or proceedings, civil or criminal, pertaining to the construction, improvement, maintenance, supervision or control of highways, bridges and culverts, brought by or against the county commissioners, county surveyor, township trustees or road superintendent under the provisions of any statute hereby repealed, but the same may be prosecuted or defended to final determination in like manner as if such statute had not been repealed."

Section 303 of the act provides in substance that said act shall not affect any rights acquired or obligations incurred under or by virtue of any law repealed by said act prior to the time when said act or any section thereof takes effect.

The answer of your question is therefore confined to proceedings by township trustees commenced prior to the date when the aforesaid act will become effective.

Sections 6976 et seq. of the General Code, as found in the chapter relating to township roads and under the subdivision of "roads partly in a municipality," provide a plan for improving the roads of a township including a road extending into or through a village or city, upon the adoption of such plan by the qualified electors of such township.

Section 6976, G. C., as originally enacted in 92 O. L., 63, provided as follows:

> "Section 1. Be it enacted by the general assembly of the state of Ohio that the trustees of any township in this state in which no free turnpikes have been constructed or in the course of construction, shall, when

the petition of one hundred or more of the tax payers of such township, including any village therein, is presented to them praying for the improvement of the public roads and streets of such township and village submit the question of the improvement of said roads and streets to the qualified electors of such township and such village, at the next general election held after the presentation of such petition.''

This section was amended in 97 O. L., 550, by the act of the general assembly, entitled ''An act to authorize the improvement of public roads of townships including streets of cities or villages therein, and to repeal sections 1 to 25, inclusive, of an act passed April 16, 1900, Ohio Laws, Vol. 94, page 284.'' This section, as amended, and as now in force, provides:

''The trustees of a township, when the petition of one hundred or more of the taxpayers of such township is presented to them, praying for the improvement of the public roads within such township and including a road running into or through a village or city, shall submit the question of the improvement of said road to the qualified electors of the township at the next general election or at a special election, held after presentation of such petition.''

While this section does not, by its terms, confine the location of the village or city to the township in which the qualified electors may adopt the aforesaid plan of road improvement, it seems clear that this was the intention of the legislature in amending said section, and I am of the opinion that said statute must be so interpreted.

Upon examination of the various sections of the General Code applicable to the improvement and repair of township roads, it will be observed that several different plans for such improvement or repair are provided for and the plan outlined in sections 6976 et seq. of the General Code is distinguished from other plans provided in other sections in that the provisions of sections 6976 to 7108, inclusive, of the General Code are only applicable to a township in which a village or city is located.

Replying to your question, I am of the opinion that the trustees of a township in which neither a village nor city is located, cannot submit to the qualified electors therein the question of adopting the general plan of road improvement provided by sections 6976 et seq. of the General Code and cannot, therefore, improve the roads of such township under authority of said sections.

Respectfully,
EDWARD C. TURNER,
Attorney General.

465.

FORMS OF BONDS FOR NATIONAL GUARD OFFICERS—OFFICERS' BONDS FOR PUBLIC FUNDS AND PROPERTY—TREASURER'S BOND.

COLUMBUS, OHIO, June 8, 1915.

HON. BENSON W. HOUGH, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—A few days ago you requested me to prescribe two forms of bonds

for use in your department, one an officer's bond for public funds and property, under section 5314 of the General Code, and the other a bond under section 5315, General Code, known as the treasurer's bond.

In compliance therewith I hereby prescribe the following form of bonds, to wit:

"OFFICER'S BOND FOR PUBLIC FUNDS AND PROPERTY.

"(Section 5314, General Code.)

"Know All Men by These Presents:

"That we, ----------, as principal, and----------, as surety, are held and firmly bound unto the state of Ohio in the penal sum of ---------- dollars ($--------), for the payment of which, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, administrators, successors and assigns.

Signed by the said ----------, as principal, and by the said ----------, as surety, and their seals attached this ---------- day of ----------, 191--.

The condition of the above obligation is such that if the said ----------, who is an officer of ----------, regiment of ----------, Ohio national guard, shall faithfully account for all public moneys and property which he may receive as such officer, then this obligation shall be void; otherwise to be and remain in full force and virtue in law.

(Two witnesses to signature of principal.)

---------- ----------(Seal)
Principal.

---------- ----------(Seal)
Surety.

----------(Seal)

If personal bond is given there must be at least two sureties, and the same must be approved by the auditor of the county wherein executed.

If a surety company bond is given the authority of the agent to sign such bond must be attached thereto together with the last financial statement of the surety company

On the back of said bond should appear the following:

If personal surety bond is given same must be certified to by county auditor, as per following form (Par. 160, regulations O. N. G.):

"State of Ohio, ---------- County, ss:

I hereby certify, That ----------, the parties whose genuine signatures appear as sureties to the within bond, are adequate security for the penal sum therein stated.

Witness my hand and official seal, this ---------- day of ----------, 191--.

(Seal) ----------
Auditor,

---------- County, Ohio.

"Note—The names of the sureties ALONE must be written in the above certificate."

"TREASURER'S BOND.

"(Section 5315, General Code.)

"Know All Men by These Presents:

"That we, ----------, as principal, and ----------, as surety, are held and firmly bound unto the state of Ohio, in the penal sum of one thousand dollars ($1,000.00), to the payment of which, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, administrators, successors and assigns.

Signed by the said ----------, as principal, and by the said ----------, as surety, and their seals attached this -------- day of ----------, 191--.

"The condition of the above obligation is such that if said ---------- ---------- who is the duly elected (appointed) treasurer of company ----------, regiment of ----------, Ohio national guard, shall faithfully discharge his duties as such treasurer, and carefully keep and disburse the funds of the said military organization, as directed by the council of administration of such organization, then this obligation shall be void; otherwise to be and remain in full force and virtue in law.

Witness:
(Two witnesses to signature of principal.)

---------- ----------(Seal)
Principal.

---------- ----------(Seal)
Surety.

----------(Seal)
Surety.

----------(Seal)
Surety.

----------(Seal)

If personal bond is given there must be at least two sureties, and the same must be approved by the auditor of the county wherein executed.

If a surety company bond is given the authority of the agent to sign such bond must be attached thereto together with the last financial statement of the surety company."

On the back of said bond should appear the following:

If personal surety bond is given same must be certified to by county auditor, as per following form (Par. 160, regulations O. N. G.):

"State of Ohio, ---------- County, ss:

I hereby certify, That ----------, the parties whose genuine signatures appear as sureties to the within bond, are adequate security for the penal sum therein stated.

Witness my hand and official seal, this -------- day of----------, 191--.

(Seal) ----------
Auditor,
----------County, Ohio."

"Note—The names of the sureties ALONE must be written in the above certificate."

Respectfully,
EDWARD C. TURNER,
Attorney General.

466.

NATIONAL BANKS MUST COMPLY WITH STATE LAWS GOVERNING TRUST COMPANIES WHEN DESIRING TO ACT AS TRUSTEES UNDER MORTGAGE TO SECURE BONDS OR AS REGISTRAR OF STOCKS AND BONDS—NATIONAL BANKS ARE NOT AUTHORIZED TO ACT AS ADMINISTRATORS OR EXECUTORS.

National banks cannot act as trustees under a mortgage to secure bonds, or as registrar of stocks and bonds without complying with the laws of Ohio governing trust companies.

National banks and state banks are not authorized in Ohio to act as administrators or executors. They may act as registrars of stocks and bonds upon complying with the laws of Ohio governing trust companies.

COLUMBUS, OHIO, June 8, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of May 22nd, requesting my opinion as follows:

"Section 11-k of the federal reserve act permits the federal reserve board

" 'To grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds, under such rules and regulations as the said board may prescribe.' "

"Section 9796-3 of the General Code, provides:

" 'No state bank or national bank shall act as administrator, executor, trustee or registrar of stocks and bonds. Provided, however, that trust companies organized under the laws of Ohio shall have the same powers in the acceptance and execution of trusts which are now conferred upon them by law, and other state banks and national banks may have the same power in the acceptance and execution of trusts which are now conferred by law upon trust companies, upon such state banks and national banks, complying with all the requirements, regulations and conditions imposed by the laws of Ohio upon trust companies in the matter of the acceptance and execution of trusts.'

"We have had the following questions submitted to us a number of times:

" '1. Can a national bank act as trustee under a mortgage given to secure bonds, or as registrar of stocks and bonds, without complying with the laws of Ohio governing trust companies?

"'2. Can a national bank, or a state bank not having trust company powers, act as administrator, executor, or registrar of stocks and bonds, by complying with the laws of Ohio governing trust companies?'

"This matter appears perfectly clear to us, but for our further guidance we would appreciate your opinion in the premises."

By the express terms of section 9796-3 of the General Code, quoted in your letter, national banks cannot act as trustees or registrars of stocks and bonds, without first "complying with all the requirements, regulations and conditions imposed by the laws of Ohio upon trust companies in the matter of the acceptance and execution of trusts."

I, therefore, answer your first question in the negative.

For the purpose of answering your second question, in part at least, I call attention to the case of Schumacher v. McCallip et al., 69 O. S., 500, the first branch of the syllabus of this case being as follows:

"Trust companies are without capacity to receive and exercise appointments as administrators of the estates of deceased persons because the legislation evincing an intention to clothe them with such capacity (sections 3821-C—3821-F, Revised Statutes) is void, being of a general nature and not of uniform operation throughout the state as required by section 26 of article II of the constitution."

The court, at page 509 of the opinion, in commenting upon the statutes prescribing the order in which competent persons are entitled to receive appointment as administrators and executors of estates, uses the following language:

"First, husband or widow of the deceased; second, the next of kin of the deceased; third, a creditor of the deceased; and, fourth, an appointment from the other classes failing, 'such other person as it shall think fit; provided, however, that letters of administration shall not be issued upon the estate of an intestate until the person to be appointed has made and filed an affidavit that there is not, to his knowledge, any last will and testament of the alleged intestate.' Not only does the latter section confer no authority for the appointment of a trust company, but by prescribing an indispensable condition, with which a corporation cannot comply, it forbids the conclusion that such authority is conferred by either section. Apart from this consideration, the view suggested conflicts with the established and very familiar doctrine that corporations have only such authority as is vested in them by the law of their creation."

Under authority of the decision of the supreme court in the above case, trust companies cannot be appointed as administrators or executors in Ohio. Since the statutes confer upon national banks and state banks, upon complying with certain requirements, regulations and conditions, only such powers in the acceptance and execution of trusts as are now conferred by law upon trust companies, it follows that, if trust companies themselves cannot in Ohio act as administrators or executors, there is no authority for the appointment of national or state banks as executors or administrators under any condition.

Trust companies do, however, have authority in Ohio to act as registrars of stocks and bonds (section 9817 of the General Code); they may also under section 9828 of the General Code, be appointed as trustees under any will or instrument creating a trust for the care and management of property. Therefore, a national

or state bank which has complied with "all the requirements, regulations and conditions imposed by the laws of Ohio upon trust companies" in the matter of the acceptance and execution of trusts, is authorized to act in Ohio as a registrar of stocks and bonds, or to accept and execute other trusts to the same extent and with the same authority as trust companies.

Respectfully,
EDWARD C. TURNER,
Attorney General.

467.

OHIO STATE ARMORY BOARD—CONTRACT AND BOND FOR ARMORY AT DELAWARE, OHIO—APPROVED.

Contract and bond of M. Gallup for the erection of the Delaware Armory regularly and legally executed.

COLUMBUS, OHIO, June 8, 1915.

HON. BYRON L. BARGAR, *Secretary of Ohio State Armory Board, Columbus, Ohio.*

DEAR COLONEL:—Permit me to acknowledge receipt of your favor of June 5th, which is as follows:

> "I herewith have the honor to transmit executed contract in triplicate for the construction of the Delaware armory. These have heretofore been approved by you as to form.
>
> "If the contracts as executed meet with your approval, please so indicate and return for distribution, whereupon I will file one with the auditor of state, one with the board and transmit one to the contractor."

I have examined the contract and the contract bond submitted with your letters of June 5th, submitting the copy of the executed contract, and of June 7th, submitting the copies of the bond for nine thousand dollars, the contract and bond being executed in triplicate. I find, upon examination of the contract and bond, that the same have been regularly executed in accordance with law, and it is my opinion that they are in proper legal form.

I enclose herewith the three copies of the contract and the three copies of the bond submitted by you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

468.

MOTHERS' PENSION ACT—LAW APPLICABLE TO "COMMON LAW" WIFE.

Relief under the mothers' pension act may be extended to common-law wife if mother of children and otherwise coming under the terms of the act.

COLUMBUS, OHIO, June 8, 1915.

HON. GEORGE M. HOKE, *Probate Judge, Tiffin, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your favor of June 5th, in which you ask for an opinion, and which is as follows:

> "I hereby wish to ask you to give me an official opinion in answer to the following question:
>
> "A and B are the parents of children as the fruit of a common law marriage. A, the father, dies leaving children not entitled to an 'age and schooling certificate.' Is B, the mother of such children, entitled to an allowance for partial support of such children under section 1683-2 and -3 of the General Code, commonly known as the 'mothers' pension law?'
>
> "I have a case of this kind and I would greatly appreciate an early reply, as the mother is very much in need of the relief if the law is broad enough to reach her case."

Section 1683-2 of the General Code (103 O. L., page 877), is as follows:

> "For the partial support of women whose husbands are dead, or become permanently disabled for work by reasons of physical or mental infirmity, or whose husbands are prisoners or whose husbands have deserted, and such desertion has continued for a period of three years, when such women are poor, and are the mothers of children not entitled to receive an age and schooling certificate, and such mothers and children have been legal residents in any county of the state for two years, the juvenile court may make an allowance to each of such women, as follows: Not to exceed fifteen dollars a month, when she has but one child not entitled to an age and schooling certificate, and if she has more than one child not entitled to an age and schooling certificate it shall not exceed fifteen dollars a month for the first child and seven dollars a month for each of the other children not entitled to an age and schooling certificate. The order making such allowance shall not be effective for a longer period than six months, but upon the expiration of such period, said court may from time to time, extend such allowance for a period of six months, or less. Such homes shall be visited from time to time by a probation officer, agent of an associated charities organization, a humane society, or such other agents as the court may direct, provided that the person who actually makes such visits shall be thoroughly trained in charitable relief work, and the report or reports of such visiting agent shall be considered by the court in making such order."

Section 1683-3 of the General Code (103 O. L., 878), is as follows:

> "Such allowance may be made by the juvenile court, only upon the following conditions: First, the child or children for whose benefit the

allowance is made, must be living with the mother of such child or children; second, the allowance shall be made only when in the absence of such allowance, the mother would be required to work regularly away from her home and children, and when by means of such allowance she will be able to remain at home with her children, except that she may be absent for work for such time as the court deems advisable; third, the mother must, in the judgment of the juvenile court, be a proper person, morally, physically and mentally, for the bringing up of her children; fourth, such allowance shall, in the judgment of the court, be necessary to save the child or children from neglect and to avoid the breaking up of the home of such woman; fifth, it must appear to be for the benefit of the child to remain with such mother; sixth, a careful preliminary examination of the home of such mother must first have been made by the probation officer, an associated charities organization, humane society, or such other competent person or agency as the court may direct, and a written report of such examination filed.''

The state of facts presented by you assumes that A and B were husband and wife under a common-law marriage. An examiation of the authorities leads to the conclusion that common-law marriages are recognized as valid in Ohio when the attendant facts and circumstances surrounding such marriages evidence the mutual intention of the parties to live together permanently as man and wife. In the case of Umbenhower v. Labus, 85 O. S., 238, it was held that,

''An agreement of marriage *in praesenti* when made by parties competent to contract, accompanied and followed by cohabitation as husband and wife, they being so treated and reputed in the community and circle in which they move, establishes a valid marriage at common law, and a child of such marriage is legitimate and may inherit from the father.''

The provisions of law quoted above providing for mothers' pensions are enacted as part of the juvenile court law, section 1683 of the General Code being as follows:

''This chapter shall be liberally construed to the end that proper guardianship may be provided for the child, in order that it may be educated and cared for, as far as practicable in such manner as best subserves its moral and physical welfare, and that, as far as practicable in proper cases, the parents, parent or guardian of such child may be compelled to perform their moral and legal duty in the interest of the child.''

The application or enforcement of the law imposes a wide discretion in the juvenile judge, he being clothed with judgment as to the law and the facts. The law referred to has for its primary purpose the care, maintenance, education, etc., of the child, and through its provisions affords the mother of the child or children, as the case may be, when under the various provisions of section 1683-3, the means whereby the purpose may be carried out.

I am of the opinion, therefore, that a common-law wife, the mother of children, and whose circumstances otherwise are as described in the section quoted above, is eligible for relief under the mothers' pension act as provided therein.

Respectfully,

EDWARD C. TURNER,

Attorney General.

469.

CONTRACTOR MAY FURNISH WORKMEN AT PER DIEM COMPENSATION TO A UNIVERSITY WHICH CONTROLS AND DIRECTS THE KIND OF WORK PERFORMED BY THE WORKMEN— WARRANT DRAWN ON AN APPROPRIATION FOR "PERSONAL SERVICE" LEGAL.

A warrant may be drawn on appropriation for "personal service" in favor of a contractor for per diem compensation of workmen furnished by him to university, said workmen to do work assigned by university and solely under its direction and control.

COLUMBUS, OHIO, June 8, 1915.

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

DEAR SIR:—Under date of May 25, 1915, you wrote me as follows:

"In the discharge of my official duties, there has arisen a question as to whether a warrant can be issued on a voucher drawn against an appropriation for 'personal service,' in payment for the services of third persons, there being no privity of contract between such third persons and the agents of the state.

"The following is a recital of the facts in a specific case in which such a situation is present:

"Ohio university, on May 11, 1915, presented at this office, for the issuance of my warrant, a voucher drawn on the university's appropriation for 'personal service A-2, wages,' in favor of Knowlton and Breinig (presumably members of a copartnership). The items for which payment is claimed are as follows:

"Services of W. H. Herron, 123 hours @ 50c per hour	$59 50
Services of H. P. Knowlton, 9½ hours @ 47c per hour	4 46
Services of Jess Orr, 32 hours @ 35c per hour	11 20
Services of James Mace, 72 hours @ 47c per hour	33 84
	$109 00

"The days on which the above services were performed are shown on the voucher. The voucher also show G. E. Knowlton to be the first-named member of the firm.

"The following is a copy of the correspondence which passed between this office and the university, in the premises:

"(COPY).

"'May 19, 1915.

"'MR. H. H. HANING, *Treas., Ohio University, Athens, Ohio.*

"'DEAR SIR:—We have issued warrant No. 65941 for $109.00 on your voucher No. 170, in favor of Knowlton and Breinig. This voucher is to cover work done by contract, at Ellis hall and agricultural building, and is drawn on personal service A-2.

"'Nowhere does it appear that either Knowlton or Breinig performed any personal service, for which the charge is therein made, but all the labor for which this voucher goes to pay was performed by third parties, presumably employed by Knowlton and Breinig. While it is true that the

amount of the voucher is for services rendered, it can in nowise be construed as constituting "personal" service, as we believe was contemplated when the word was adopted and used in the appropriation bill. Were the appropriation to cover "impersonal" service, I do not think the word "personal" would have been used, and I would therefore request that you designate what classification in maintenance this voucher is properly chargeable to. Your early advice will be appreciated.

" 'Very truly yours,
" 'A. V. DONAHEY,
" 'Auditor of State.'

" 'May 22, 1915.

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

" 'DEAR SIR:—Your letter of some days ago regarding warrant No. 65941, for $109.00 to cover voucher No. 170 in favor of Knowlton and Breinig is at hand. In answer would say that this was not contract labor, but men hired by the day. The only way you can get competent labor, anything like skilled mechanics, is to get them of a contractor, as I did in this case, when they are not employed full time by the contractor.

" 'On referring to our short budget, I find that the money was appropriated to take care of the item mentioned under "personal service." If we were to make any change in this item, we will be short on maintenance and long on personal service. And while you may be technically right in your contention that this is "impersonal service" I am positive that the money was requested and appropriated to cover this specific item under "personal service." I think from 60 to 80 per cent. of our wages, as requested, would be identical with this bill, therefore I hope that you can see your way clear to let this stand as it is, as it is somewhat difficult to have funds transferred.

" 'Thanking you for past favors, I beg to remain
" 'Very truly yours,
" 'H. H. HANING.'

"Kindly advise me as to what, in your opinion, is the proper construction of the words 'personal service,' as used in house bill 314, eighty-first general assembly, in relation to the facts herein given."

The appropriation referred to is the one passed by the general assembly on March 12, 1915, and the appropriation is as follows:

"OHIO UNIVERSITY—
"Personal Service—
"A-2 Wages ---------- $1,393.00"

There is no doubt, from the fact that the voucher is drawn in favor of "Knowlton and Breinig;" that the items to be paid are for the services of four men at a certain price per hour; and that the money to be paid under a warrant drawn in pursuance of the voucher is to be paid to a firm or persons other than those who actually performed the labor. But this, to my mind, does not necessarily control as to whether or not the moneys so paid may be paid from the personal service appropriation. In the letter of Mr. Haning hereinbefore quoted he says that "this was not contract labor, but men hired by the day. The only way

you can get competent labor, anything like skilled mechanics, is to get them of a contractor as I did in the case, when they are not employed full time by the contractor.''

It would appear, therefore, that the men who were obtained from the contractor were obtained to do such work as the university should put them to and they were not hired for any particular specific job of work. From what has been stated by Mr. Haning I assume that the men who were obtained in the manner specified were absolutely and solely under the control of the university authorities and in nowise under the control of Knowlton and Breining in the pursuance of the work which they did for the university.

There is, as I view it, a distinction between the employment of men in the manner above specified and the entering into a contract with a contractor for a particular job of work, the compensation therefor to be estimated by the number of hours of work necessary to complete the said job. Your question is as to whether a warrant can be issued on a voucher drawn against an appropriation for ''personal service,'' in payment for the services of third persons, there being no privity of contract between such third persons and the agents of the state. It should be observed, however, that there is privity between the state and the firm furnishing the services of the third parties.

My answer thereto is that if the men employed on the work of the university, though obtained from a contractor, are to perform no particular ''job'' of work, but simply to do such work as the university might direct, and who are under the control and direction of the university in the doing of the work, the services for such men could be paid from ''personal service.'' But if a contract is entered into by the university with a contractor for a particular piece of work, the work to be done under the supervision and direction of the contractor, the amount thereof cannot be paid from the appropriation for ''personal service'' even though the amount of the contract is to be estimated by the number of hours required to perform the work.

Respectfully,
EDWARD C. TURNER,
Attorney General.

470.

APPROVAL OF CERTAIN LEASES OF CANAL LANDS.

COLUMBUS, OHIO, June 9, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communications of June 2, 1915, transmitting to me for my examination the following leases of canal lands:

Lease to the Odenweller Milling Co., Ottoville, Ohio, of certain canal land in Putnam county for mill, warehouse and other business, valuation $250.00, annual rental $15.00.

Lease to W. H. Coles, of Troy, Ohio, of a portion of the berme embankment of the Miami and Erie canal in the city of Troy, Miami county, for storage and warehouse purposes, valuation $400.00, annual rental $24.00.

Lease to C. M. Wagner, of Baltimore, Ohio, of a certain portion of the water front and state land at Buckeye lake, for cottage and landing purposes, valuation $1,200.00, annual rental $72.00.

Lease to R. F. Weaver, of Akron, Ohio, of certain land on West reservoir for cottage and landing purposes, valuation $400.00, annual rental $24.00.

Lease to Nathan Cummins and W. F. Brewer, of St. Marys, Ohio, of certain land on the Miami and Erie canal in Auglaize county, for residence and agricultural purposes, valuation $300.00, annual rental $18.00.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

471.

BONDS OF CARROLL COUNTY DISAPPROVED—INDUSTRIAL COMMISSION ADVISED NOT TO ACCEPT SAME—NO PROVISION FOR SINKING FUND.

Bonds of Carroll county, Ohio, for $7,000.00 *held invalid and the industrial commission advised not to accept the same because there is no provision made in the legislation authorizing the issuance of said bonds for levying and collecting annually by taxation an amount sufficient to pay the interest on and to provide a sinking fund for the redemption of said bonds at maturity.*

COLUMBUS, OHIO, June 9, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE:—Bonds of Carroll county, Ohio, in the sum of $7,000.00, accepted by resolution of the industrial commission of Ohio, May 13, 1915, subject to the approval of the attorney general.

The transcript of the proceedings relative to the issuance of the bonds above mentioned was not submitted for my consideration until May 22, 1915.

I have carefully gone over the transcript as submitted and beg to report as follows:

The resolution adopted by the county commissioners of Carroll county authorizing the issuance of said bonds to the amount of seven thousand dollars for the purpose of constructing the superstructure of what is known as "Magnolia Bridge" over Big Sandy creek, located west of the village of Magnolia, Carroll county, Ohio, which is the only legislation, as shown by the said transcript, under authority of which said bonds are issued does not contain any provision for levying and collecting annually by taxation an amount sufficient to pay the interest on the said bonds, and to provide a sinking fund for their final redemption at maturity.

Section 11 of article XII of the Ohio constitution is as follows:

> "No bonded indebtedness of the state, or any political subdivision thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

A compliance with this provision of the constitution is essential to the validity of the bonds issued by the officers of any political subdivision of Ohio. (Link v. Karb, 89 O. S., 326.)

I am, therefore, of the opinion that the bond issue under consideration is invalid, and advise your commission not to accept the same.

In event the county commissioners by proper proceedings correct their former action by the adoption of a new resolution, and in the anticipation of a possible resubmission to me of the question of the validity of said bonds, I suggest that the following additional information be furnished in the transcript:

1. A certificate showing who are the duly elected and qualified commissioners of Carroll county, the character of the meeting at which the resolution was passed, and the number of members present.

2. A certificate showing the total bonded indebtedness of the county, the total amount of the tax duplicate, the total tax rate and the several items which constitutes this rate.

3. The form of bond and the coupon proposed to be issued.

Respectfully,
EDWARD C. TURNER,
Attorney General.

472.

CORPORATION ORGANIZED UNDER LAWS OF OHIO—MAY NOT CONVERT PREFERRED STOCK INTO COMMON STOCK BY AMENDMENT UNDER SECTION 8719, G. C.

A corporation organized under the laws of Ohio may not convert preferred stock into common stock by amendment under section 8719, *G. C.*

COLUMBUS, OHIO, June 9, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of June 7th, transmits to me a certificate of amendment of the articles of incorporation of the Minerva Hardware Manufacturing Company.

The amendment changes the fourth article of the articles of incorporation of the company so as to read as follows:

> "Fourth. The capital stock of said corporation shall be twenty thousand dollars ($20,000.00) divided into two hundred (200) shares of the par value of one hundred dollars ($100) each."

The certificate shows that the amendment was adopted "by the votes of the owners of all of its capital stock."

The fourth article of the articles of incorporation of the company as shown by the records in your office is at present as follows:

> "Fourth. The capital stock of said corporation, common and preferred, shall be twenty thousand dollars ($20,000.00) consisting of one hundred and twenty (120) shares of common stock of the par value of one hundred dollars ($100.00) each, and eighty (80) shares of preferred stock of the par value of one hundred dollars ($100.00) each; the holders

of the preferred stock shall be entitled to a dividend of six per cent. per annum, payable annually, out of the surplus profits of the company for each year in preference to all other stockholders, and such dividends shall be noncumulative.

"Such preferred stock shall not be entitled to representation on the board of directors of said company and shall have no voice in the management of said company; and such preferred stock shall not be entitled to vote at any stockholders' meetings unless and until default be made for two years in the payment of said annual dividends.

"Said preferred dividends of six per cent. as above provided, shall be the full measure of the such preferred stock to participate in the earnings of said company.

"Said preferred stock shall be a first lien upon the assets of said company after the payment of debts and liabilities, and said dividend of six per cent. shall be a preferred lien upon the net earnings of said company."

You request my opinion on the following question:

"May an Ohio corporation change issued or unissued preferred stock to common stock by amendment under the provisions of section 8719, G. C.?"

Section 8719, General Code, provides in full as follows:

"Sec. 8719. A corporation organized under the general corporation laws of the state, may amend its articles of incorporation as follows:

"1. So as to change its corporate name, but not to one already appropriated, or to one likely to mislead the public.

"2. So as to change the place where it is to be located, or its principal business transacted.

"3. So as to modify, enlarge or diminish the objects or purposes for which it was formed.

"4. So as to add to them anything omitted from, or which lawfully might have been provided for originally, in such articles. But the capital stock of a corporation shall not be increased or diminished, by such amendment, nor the purpose of its original organization substantially changed."

Section 8720, General Code, provides that amendments may be adopted by a vote of the owners of three-fifths of the capital stock then subscribed, at a meeting whereof certain notice has been given; but this notice may be waived by the holders of all the capital stock consenting thereto in writing. (Section 8723, G. C.)

It is obvious that the proposed amendment does not modify, enlarge or diminish the objects or purposes for which the company was formed. It is also obvious that nothing has been *added* to the articles in their present form. On the contrary, a great deal of language has been stricken out of them.

Whatever may be the policy of the law in authorizing the addition of something which is omitted from the articles, and which might lawfully have been provided for originally therein, without authorizing the striking out of anything which is in the articles and might lawfully have been omitted therefrom in the first instance, the statute, nevertheless, has this effect. Its terms are plain and there is no reason for interpretation.

I, therefore, conclude and advise that an Ohio corporation may not change

authorized preferred stock to authorized common stock by amendment, under the provisions of section 8719, General Code. In the view which I take of the question, it makes no difference as to the result whether at the time of the amendment the preferred stock which is authorized has been issued or not, nor that the action of the stockholders is unanimous.

In an opinion to you under date of April 20, 1915, I advised that the result sought to be accomplished by an amendment of the character now presented by you may not be accomplished by an amendment adding to a capital stock clause, providing for the issuance both of common and preferred stock, a clause to the effect that the preferred stock therein provided for upon retirement shall be converted into common stock and may be issued as such. This holding was based upon a reason which, in addition to the reason hereinbefore stated, is applicable to the precise question now presented, viz.: That by converting authorized preferred stock into authorized common stock a corporation in effect increases its common stock. Originally the phrase "capital stock" contemplated common stock only, and this was the state of the law when what is now section 8719 of the General Code was last amended (83 O. L., 193).

In this view of the case an amendment of the kind now under consideration would have the effect of increasing the capital stock, and as such would be specifically prohibited by the last sentence of the fourth paragraph of section 8719, G. C. I refer you to the previous opinion above mentioned for a more complete discussion of this principle.

The original certificate of amendment, with revenue stamp attached thereto, is enclosed herewith, and you are advised that you are without authority to receive and file the same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

473.

DISAPPROVAL OF CERTAIN FINAL RESOLUTIONS FOR ROAD IMPROVEMENT—SANDUSKY COUNTY.

COLUMBUS, OHIO, June 9, 1915.

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

DEAR SIR:—I have your communication of June 7, 1915, transmitting to me for my examination final resolutions as to the following roads:

Fremont-Castalia Road, Sandusky County, Petition No. 1176, I. C. H., No. 281;

Sandusky-Clyde Road, Sandusky County, Petition No. 1171, I. C. H., No. 276.

Permit me to call your attention to the fact that the certified copies of both resolutions recite that the same were adopted by the county commissioners of Sandusky county on the 23rd day of December, 1913. The certificates of the clerk of the board of commissioners of Sandusky county recite that the resolutions were adopted on the 27th day of May, 1915. It is manifest that either the certified copies of the resolutions or the certificates of the clerk of the board of county

commissioners are incorrect. The resolutions should be returned to the clerk of the board of county commissioners of Sandusky county for the purpose of having this error corrected.

I am, therefore, returning the same without my approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

474.

APPROVAL OF CERTAIN RESOLUTIONS FOR ROAD IMPROVEMENT—WOOD AND MUSKINGUM COUNTIES.

COLUMBUS, OHIO, June 9, 1915.

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

DEAR SIR:—I have your communication of June 8, 1915, transmitting to me for examination final resolutions as to the following roads:

Toledo-Perrysburg, Wood County, Petition No. 1418, I. C. H., No. 53;
Zanesville-McConnelsville, Muskingum County, Petition No. 1376, I. C. H., No. 345.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

475.

APPROVAL OF RESOLUTIONS FOR NILES-ASHTABULA ROAD, ASHTABULA COUNTY.

COLUMBUS, OHIO, June 9, 1915.

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

DEAR SIR:—I acknowledge receipt of your communication of June 9, 1915, transmitting to me for my examination final resolution as to the Niles-Ashtabula road in Ashtabula county, Petition No. 767, I. C. H., No. 150. I find this resolution to be in regular form and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

476.

MIAMI AND ERIE CANAL—FORM OF AGREEMENT FOR WATER LEASES ON THAT PART OF THE CANAL LEASED TO CITY OF CINCINNATI.

COLUMBUS, OHIO, June 9, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 1, 1915, transmitting to me a copy of the form of contract which your department is now using in the leasing of water for industrial purposes from the canals of the state. You request me to indicate the conditions which should be inserted in the renewal of water leases on that part of the Miami and Erie canal leased to the city of Cincinnati under an act of the general assembly, passed May 15, 1911, and found in 102 O. L., 168, being sections 14188-1 to 14188-8 of the Appendix of the General Code of Ohio. The following would be a proper form of agreement for use in renewing the leases in question:

"AGREEMENT.

"This agreement made this ---------- day of ----------, 19--, by and between the state of Ohio, acting by and through the superintendent of public works, duly authorized by law in the premises, party of the first part, and ----------, party of the second part, Witnesseth:

"That the party of the first part, in consideration of the rents hereinafter stipulated, and upon the express condition that the party of the second part shall, during the whole term of this agreement, comply with the conditions and limitations hereinafter contained, agrees to permit said party of the second part to insert into the level of the Miami and Erie canal next above lock No. ----------, a ---------- for the purpose of drawing so much of the water introduced into said level, either for the lockage of boats or otherwise, and which is not subject to lease for manufacturing purposes, as will flow through said ---------- for the term of ---------- years from ----------, except as otherwise hereinafter provided.

"The water hereby permitted to be drawn is subject to the quantity required for the lockage of boats from said level. Said water when so drawn from said level is to be used for the purpose of ----------. The party of the second part, in consideration of the right to use so much of said water as is above stipulated, agrees to put in at ---------- own expense said ---------- in accordance with the plans and directions of the superintendent of public works, or such other authorized agent of the state as may be selected to supervise the same, and to do the work in a good and substantial manner so as to prevent any break or leakage from the insertion of said ----------, which shall be so arranged at some point that the size of the pipe through which the water is taken may be readily ascertained; and during the continuance of this agreement to keep the same constantly in good order and repair, so as not to injure the banks of the canal or interfere with the navigation of the same, and in case a breach or other injury shall nevertheless occur, in consequence of said work not being substantially constructed, said party of the second part shall immediately repair the same, or be liable for

the cost of said repair if done by the state or its agents, and said party of the second part shall also be liable for all damages that may accrue from said breach or other injury.

"Said party of the second part shall pay to the state of Ohio for the right to use said water the yearly rental of ----------dollars, in advance, on the first day of ---------- in each and every year. Said payments shall be made to the superintendent of public works at his office in Columbus, Ohio, or to such other agent of the state as is duly authorized to receive the same.

"Said party of the second part hereby assumes all risk of being deprived of the use of said water during the time occupied in repairing the canal, or when the water is necessarily drawn off for any other purpose. In case said party of the second part shall fail to pay said rent for more than one month after the same falls due, or shall in any respect fail to fulfill all the engagements of said party herein expressed, any authorized agent of the state shall have full right and power to enter upon and take possession of the premises, and shut off the water hereby permitted to be drawn, and resume all the rights and privileges hereby granted. It is further mutually understood and agreed that the state reserve the right to resume the use of the water hereby permitted to be drawn out, whenever the agents of the state may deem it necessary for the purposes of navigation, and from the time of such resumption the parties to this agreement shall be absolved from all further liabilities hereunder.

"The rights herein conferred upon the party of the second part are granted, subject to all the rights of the city of Cincinnati under a certain lease executed to said city on the 29th day of August, 1912, by the state of Ohio, acting by and through the governor thereof, said lease being executed under and by virtue of an act of the general assembly of Ohio, passed May 15, 1911 (102 O. L., 168), and being sections 14188-1 to 14188-8, inclusive, of the Appendix to the General Code of Ohio; and subject to all the rights of the city of Cincinnati under the several acts of the general assembly of Ohio amendatory of or supplementary to said sections 14188-1 to 14188-8, inclusive, of the Appendix to the General Code of Ohio. It is hereby expressly understood and agreed that if at any time during the continuance of this agreement said city of Cincinnati shall complete the outlet referred to in the first paragraph of section 2 of said act, said section being section 14188-2 of the Appendix to the General Code of Ohio, or shall complete a similar outlet at any other point under and by virtue of the authority of said several acts of the general assembly of Ohio amendatory of or supplementary to said sections 14188-1 to 14188-8, inclusive, of the Appendix to the General Code of Ohio; or if at any time during the continuance of this agreement the city of Cincinnati in the construction of the outlet referred to in said original act (102 O. L., 168), or in the construction of any outlet under and by virtue of the authority of said amendatory and supplementary acts of the general assembly of Ohio, shall shut off the water in said canal; then this agreement shall at once terminate, and no notice to the party of the second part shall be required to terminate the same, and all rights of the party of the second part to receive water from said canal under this agreement shall thereupon cease. It is further expressly understood and agreed that this agreement shall not confer upon the party of the second part any right against said city of Cincinnati to have said city construct a conduit for the purpose of supplying water to said party of the second part,

or any right in said party of the second part to receive water from any conduit constructed by said city.

"In testimony whereof the parties have executed this agreement on the day and year first above written.

"THE STATE OF OHIO.

---------- "By ----------

---------- "Superintendent of Public Works."

---------- ----------

As pointed out in my opinion to you under date of May 25, 1915, a form of lease containing the conditions set forth above will fully protect the rights of the city of Cincinnati, and at the same time enable the state to derive an income from the water in that part of the canal leased to the city until such time as the state is relieved of the expense of caring for the banks.

Respectfully,

EDWARD C. TURNER,

Attorney General.

477.

SHERIFF NOT ENTITLED TO REIMBURSEMENT FOR FUEL IN ADDITION TO ALLOWANCE "FOR KEEPING AND FEEDING PRISONERS IN JAIL."

Sheriff is not entitled to reimbursement for cost of fuel used in preparation of food for prisoners in addition to allowance made "for keeping and feeding prisoners in jail."

COLUMBUS, OHIO, June 9, 1915.

HON. CHARLES E. BALLARD, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—Under date of June 5, 1915, you requested my opinion upon the following question:

"Are the county commissioners authorized to make an allowance to the sheriff for fuel used in cooking and preparing meals for the prisoners in the county jail?"

Section 2850 of the General Code provides as follows:

"The sheriff shall be allowed by the county commissioners not less than forty-five nor more than seventy-five cents per day for keeping and feeding prisoners in jail, but in any county in which there is no infirmary, the county commissioners, if they think it just and necessary, may allow any sum not to exceed seventy-five cents each day for keeping and feeding any idiot or lunatic. The sheriff shall furnish at the expense of the county, to all prisoners confined in jail, except those confined for debt only, fuel, soap, disinfectants, bed, clothing, washing and nursing when required, and other necessaries as the court in its rules shall designate."

In view of the fact that the sheriff is paid so much per day for keeping and feeding the prisoners in jail, it is his duty to cause to be prepared the meals he

furnishes the prisoners. Fuel is necessary in order to prepare the meals; therefore, I am of the opinion that the fuel used in cooking and preparing meals for the prisoners in the county jail is to be paid for by the sheriff, and that the county commissioners are not authorized to make an allowance in addition to the amount paid him for keeping and feeding prisoners, to reimburse him for the fuel used in cooking the meals of such prisoners.

Respectfully,
EDWARD C. TURNER,
Attorney General.

478.

MUNICIPALITY HAVING CHARTER—SURPLUS REVENUES FROM MUNICIPALLY OWNED WATERWORKS MAY BE USED FOR GENERAL MUNICIPAL PURPOSES.

A municipality operating under a charter may lawfully provide in its charter that the surplus revenues arising from the operation of a municipally owned waterworks plant may be used for general municipal purposes.

COLUMBUS, OHIO, June 10, 1915.

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

GENTLEMEN:—Under date of June 2, 1915, you request my opinion upon the following question:

> "May the revenues arising from the operation of a municipal waterworks plant be legally used for general purposes if there is a surplus in said fund not needed for the operation and maintenance of the plant, or would a reduction of the rentals charged consumers be required by law?
>
> "The question arises in the city of Dayton, Ohio, which is a charter city, and it is claimed by the city commission that they have such power."

The answer to your question rests primarily upon an interpretation of the charter of the city of Dayton. The purpose of article XVIII of the constitution is to grant "home rule" to such municipalities as care to avail themselves of it. Outside of limiting the tax rate and power to incur debts, providing for due administration of justice through courts, protecting the public peace and health, requiring reports as to their financial condition and transactions, providing for the examination of vouchers, books and accounts, the legislature has no control over a municipality which has adopted a charter. Therefore, unless the question propounded by you involves a conflict between the charter and some provisions of the state constitution or the provisions of laws within the competency of the legislature to pass, respecting municipalities operating under a charter, I feel that it would be improper for me to attempt to interpret the charter.

Without looking into the charter of the city of Dayton, but simply assuming that it grants the powers claimed for it by the city commission, the only matter for investigation presented by your inquiry is, whether such a provision in the charter of the city of Dayton is in conflict with the constitution of the state of Ohio.

Section 7 of article XVIII of the constitution provides that:

> "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

Section 3 of the same article, referred to in section 7 above quoted, imposes no other limitations upon the exercise of the powers of local self-government than that the local police, sanitary and other similar regulations shall not conflict with general laws.

Municipal waterworks constitute a municipal utility, managed and conducted by the municipality in its proprietary capacity as distinguished from its governmental capacity. It is clear that the local regulations which are under section 3 of article XVIII of the constitution to be subordinate to the general laws are those of a governmental character only. It follows, therefore, that the provisions of a municipal charter pertaining to the exercise by the municipality of its corporate or business functions are in no way subordinate to or controlled by the provisions of the general laws enacted for the government of municipalities generally. On the contrary, it seems reasonably clear that such general laws would not be applicable at all in a municipality operating under a charter unless the municipality had as a part of its charter, either expressly or by necessary implication, adopted such general laws." It is true that the field now under discussion has not been extensively developed by judicial decisions in this state. I believe that cases are now pending involving questions which might be considered as related to the one upon which my opinion has been requested. However, I believe the general rule will be established, at least as applied to the business functions of a municipality, that the general statutes of the state have no application in a municipality operating under a charter.

But while the *statutes* of the state for the government of municipalities generally do not apply to the business functions of such municipalities as have framed and adopted a charter, I am clear that the general limitations of the constitution of Ohio do apply to the legislative powers of such a municipality.

It is, then, this general constitutional question which I have considered in answering your question and not any question arising out of the provisions of the Dayton charter, whatever they may be.

All such questions may be merged into a single question, which may be stated as follows: Does the production, by a municipal corporation operating under a charter duly adopted, of a surplus from the operation of a public utility and the devotion of such surplus to the general purposes of such a municipality violate any provision of the constitution of Ohio or constitute taxation for local purposes, which is subject to the control of the state legislature?

The answer to this question is in the negative.

I may add that so far as the policy of the state in the past and as at present applied to municipalities other than those which have adopted charters is concerned, the laws of the state contemplate the creation of a surplus from water rentals (See section 3959, G. C.). It has not been the policy of the state to limit the rates strictly to such as might pay the mere operating expenses and bond and interest charges of the plant.

The present policy of the state as applied to charter cities is to be found in sections 4, 6 and 12 of article XVIII of the constitution. The first of these sections in effect authorize the municipality to acquire, construct, own, lease and operate any public utility, the product or service of which is to be supplied to the municipality or its inhabitants, and by condemnation to acquire the use of, or full title to, the property and franchise of any company supplying such service.

Section 6 of the same article authorizes the surplus product of a municipality owned and operated utility to be disposed of and permits the production of surplus product to the extent of fifty per cent. of the total service or product supplied within the municipality.

Section 12 of the same article authorizes the issuance of mortgage bonds for the acquisition, construction or extension of a public utility and requires that in the event of the issuance of such mortgage bonds they shall be secured not only by the property and revenues of the utility, but also by a franchise, stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure.

For the sake of accuracy I may add that not every waterworks activity of a municipal corporation is, strictly speaking, of a business character. The furnishing of water for fire protection is held to be governmental, but this distinction is of no importance in connection with the question under consideration.

As I take it, the reasonableness of the water rates is not involved in your question.

Specifically answering your question: A municipality operating under a charter may lawfully provide in its charter that the surplus revenues arising from the operation of a municipally owned waterworks plant may be used for general municipal purposes.

Respectfully,
EDWARD C. TURNER,
Attorney General.

479.

LEASE TO RUSSELL POINT POWER AND LIGHT COMPANY, A PARTNERSHIP, DISAPPROVED.

COLUMBUS, OHIO, June 10, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication of June 2, 1915, transmitting to me for my examination a lease to Russell Point Power and Light Company, a partnership. In the body of the lease it is recited that the same is executed to "Russell Point Power and Light Company, partnership," while the lease is signed by W. H. Boyd, C. F. Mitchell and H. Jos. Thompson. I am informed that as a matter of fact the persons signing the lease are the members of the partnership in question, but this fact does not appear from the lease. The lease should be drawn to W. H. Boyd, C. F. Mitchell and H. Jos. Thompson, partners, doing business under the firm name of Russell Point Power and Light Company.

I am informed that this lease meets with no opposition from other lessees of the state, and that they are in fact desirous of having this pole line constructed in order that they may secure current for lighting their cottages. I think, however, that the clause protecting other lessees should be redrafted to afford full protection, and suggest the following language:

> "This lease is executed and the rights herein conveyed shall be subject to all the rights of all other lessees of the state of Ohio; and the party of the second part, before erecting any pole upon state land already

under lease and before stringing any wires or cables over any state land already under lease, shall obtain the written consent of the present lessee, and this lease shall not confer any right to erect any pole upon or to string any wire or cable over state lands already under lease unless and until the written consent of the lessee or lessees of such lands be first obtained; and in locating poles along the embankment the poles shall be set three feet back of the top of the outer slope, and as nearly as possible upon the dividing lines between embankment lots that have heretofore been leased for cottage site purposes.''

Both in the original draft of the above paragraph of the lease and in the original draft of the succeeding paragraph, the expression ''party of the first part'' is used where the expression ''party of the second part'' is intended. The correction is made in the language suggested for the paragraph first above referred to, and should be made in the succeeding paragraph.

For the reasons above stated, I am returning this lease without my approval.

Respectfully,

EDWARD C. TURNER,

Attorney General.

480.

ELECTORS, RESIDENTS OF A COUNTY FOR PURPOSE OF ATTENDING SCHOOL ARE DISQUALIFIED FROM VOTING AT PRIMARY ELECTION, HELD AUGUST 10, 1915—HOUSE BILL NO. 56 NOT EFFECTIVE AT TIME OF PRIMARY.

House bill No. 56, passed May 19, 1915, will not operate to remove the restrictions of section 4867-1, G. C., (103 O. L., 243) upon the qualifications of electors to vote at the primary election to be held August 10, 1915.

COLUMBUS, OHIO, June 10, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of June 4, 1915, as follows:

''We submit the following question to you for an opinion:

''An act of the legislature, passed May 19th, approved by the governor May 25th, and filed in this office on the 27th day of May, provides as follows:

''To repeal section 4867-1 of the General Code and amend section 5061 of the General Code, restoring the election franchise to the citizens of the state.

''Question: Will persons coming under the provisions of this act be entitled to vote at the primary election to be held on the 10th day of August, 1915?''

The act of which you refer is house bill No. 56, passed at the recent session of the general assembly, the purpose of which was to remove certain restrictions of an act passed April 11, 1913, 103 O. L., 243, upon the qualifications of electors to vote who are residents of a county merely for the purpose of attending school.

college, academy, university or other institution of learning, and not intending to reside in said county when they shall have ceased to attend such school, college, academy, university or other institution of learning and to render it lawful for persons who are otherwise qualified to vote at all elections in the county in which they may be residing solely for the purpose of attending school or other institution of learning. Your inquiry refers particularly to the primary elections to be held August 10, 1915.

Section 4980 of the General Code relative to the qualifications of electors to vote at primary elections, provides in part as follows:

> "At such election only legally qualified electors or such as will be legally qualified electors at the next ensuing general election may vote and all such electors may vote only in the election precinct where they reside." * * *

Under section 1c, article II of the constitution, house bill No. 56, referred to in your communication, will not become effective until 90 days from the date on which the same was filed in the office of the secretary of state, to wit, August 25th, or 15 days after the primary referred to. At any time prior to August 25th a referendum petition may be filed to submit this law to a vote, in which event those electors affected by the same will not be entitled to vote at the election in November, 1915, in the county in which they reside solely for school purposes within the meaning of sections 4867-1 and 5061, as amended in 103 O. L., 243. In other words, a nomination made at the August primary, if such person were permitted to vote, might be controlled by electors who, by reason of the filing of a referendum petition on the law under consideration after such primary election will continue to be disqualified to vote at the November election in the county in which such nominations are made. That is to say, a candidate might be deprived of a nomination by electors who are now and will be disqualified to vote at the November election in the county in which such candidates sought nomination. To hold that restrictions upon the qualifications of electors under sections 4867-1 and 5061, G. C., 103 O. L., 243, are now removed for the purposes of the primary election to be held on August 10, 1915, by the enactment of house bill No. 56, is to completely override the constitutional provision above referred to. The question here under consideration is distinguishable from that of nominations of assessors considered in an opinion rendered by this office, in that if not referred, the law requiring an election of assessors will be effective when the primary election is held and if such law is referred, the rights of no electors can be substantially affected by the holding in that opinion, the only result thereof being that all action taken toward the nomination of assessors at the primary will be in every respect a nullity.

I am, therefore, of opinion that house bill No. 56 may not operate to qualify electors to vote at the primary election to be held on August 10, 1915, who are disqualified under the provisions of sections 4867-1 and 5061, G. C., as amended in 103 O. L., 243.

Respectfully,
EDWARD C. TURNER,
Attorney General.

481.

A FOREIGN INSURANCE COMPANY MAY BE ADMITTED TO OHIO TO WRITE POLICIES FOR ONE OR MORE CLASSES OF INSURANCE MENTIONED IN SECTION 9510, G. C., IF AUTHORIZED SO TO DO BY ITS FRANCHISE—CORPORATE AUTHORITY.

The American Automobile Insurance Company of St. Louis, Mo., or any other foreign insurance company with like corporate authority, may be admitted to write policies of insurance in Ohio covering any one or more of the classes of insurance mentioned in section 9510, *of the General Code.*

COLUMBUS, OHIO, June 10, 1915.

HON. FRANK TAGGART, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I have your letter of June 3, 1915, requesting my opinion as follows:

"The American Automobile Insurance Company, of St. Louis, Missouri, is incorporated by the laws of the state of Missouri. It is authorized, among other things, 'to make all kinds of insurance on automobiles and all other cars and vehicles, etc.' Section 6996 of the Revised Statutes of Missouri, as amended in 1913, is as follows:

"'Also to make all kinds of Insurance on automobiles and all other cars and vehicles, provided that any company which confines its business to insurance upon automobiles and other cars and vehicles shall also have the right to insure the owners of said automobiles, cars and other vehicles against liability for damage arising out of the ownership or operation of such automobile, cars or vehicles to the person or property of others.'

"Article 1, Section 1 of the by-laws of the company provides:

"'The business of this company shall be limited to the writing of all kinds of insurance on automobiles and motor vehicles, including fire, theft, collision, property damage and liability, and all other kinds of insurance relating to automobiles and motor vehicles.'

"The company has heretofore been admitted and licensed in this state as follows:

"'Make insurance upon automobiles against loss or damage by fire, theft, transportation; loss or damage resulting from accident to property; and make insurance, except employer's liability insurance, to indemnify persons and corporations against loss or damage for personal injury or death resulting from automobile accidents to other persons or corporations as prescribed in section 9510, of the General Code of Ohio.'

"Section 9510 provides:

"'A company may be organized or admitted under this chapter to --------(a part of paragraph 2, section 9510) make insurance against loss or damage resulting from accident to property for cause other than fire or lightning.'

"Section 9511 provides:

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

"Section 665 provides:

"'No company, corporation or association, whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in

the business of insurance or enter into any contracts substantially amounting to insurance, or in any manner aid therein or engage in the business of guaranteeing against liability, loss or damage, unless it is expressly authorized by the laws of this state and the laws regulating it and applicable thereto have been complied with.'

"In the case of the State ex rel. Sheets, Attorney General, v. The Aetna Life Insurance Company, the supreme court announced this rule:

"'In the absence of any statute in Ohio prohibiting life insurance companies from doing an employer's liability insurance in this state and the business itself being by statutes expressly authorized, a life insurance company incorporated and organized under the laws of a sister state and empowered by its charter to engage in the business of employers' liability insurance may by the comity that prevails between the states be licensed and permitted to transact such business in this state, although our statutes have not in expressed terms conferred upon domestic life insurance companies authority to engage in or transact that particular kind of insurance.'

"I am desirous of your opinion whether this company can continue doing 'fire, theft, collision, property damage and liability insurance, and all other kinds of insurance relating to automobiles and motor vehicles,' in view of the seeming conflict between these classes of insurance as is set out in section 9510 and section 9511, which prohibit domestic companies from combining in one policy insurance covering fire, theft, liability, property damage and collision in connection with automobiles, and whether it is the opinion of your department that this company and any other company writing such insurance in one policy should be required to discontinue the same."

Section 9510, referred to and quoted in part in your letter, enumerates four distinct class of insurance business which certain companies may be admitted or organized in this state to carry on. If there were no other limiting or restricting provisions of law, then any domestic company organized under said section, or any admitted foreign company, having authority therefor under its corporate franchise, might write policies of insurance under any one or more of the four classes enumerated in said section 9510 of the General Code. Section 9511 of the General Code, however, which before the enactment of the General Code formed, as did also section 9510, supra, a part of section 3641, Revised Statutes, prohibits companies organized in Ohio from issuing policies of insurance for more than one of the four classes enumerated in section 9510 of the General Code. I find in no other section of the General Code a similar restriction or limitation placed upon foreign insurance companies admitted to do business in Ohio. Therefore, under the rule of comity existing between states, as well as by the specific enabling effect of paragraph one of section 9510 of the General Code, a foreign corporation may, within the limits of its corporate franchise issue policies for more than one of the four classes enumerated in section 9510; unless a legislative policy to restrict foreign corporations in the same manner as domestic corporations is elsewhere clearly evidenced.

It becomes important, therefore, to determine whether there exists in Ohio such a policy of limiting foreign corporations to the doing of only such things as domestic corporations may do. In this connection I call attention to section 178 of the General Code, which provides the method by which foreign corporations for profit may secure a certificate from the secretary of state to do business in this state. This section in terms permits the licensing of a foreign corporation with wider latitude in doing business in this state than is conferred upon domestic corporations, the only limitation being that the purposes for which such foreign

corporation is admitted must be such as one or more domestic corporations may lawfully engage in. Although foreign banking, insurance, building and loan and bond investment corporations are excepted from the provisions of section 178, yet the policy of the state permitting a foreign corporation to engage in business the scope of which is broader than that which may be delegated to a single domestic corporation is apparently recognized. The exception of insurance and other companies from the application of section 178 is because this section deals primarily with powers and duties of the secretary of state, and foreign insurance companies must secure admission through the superintendent of insurance rather than through the secretary of state.

> "In the absence of legislative prohibition, a foreign corporation which is authorized to write distinct classes of insurance may by comity engage in its multiform business within this state subject to the restrictions of its charter provisions and such regulations and conditions as have been imposed by the legisalture."

(United States Fidelity Co. v. Linehan, 73 N. H., 41.) At page 44 of the opinion the court say:

> "The nature of the applicants' business is undoubtedly to be considered by the commissioner, as evidence, upon the question of its reliability as a business corporation; and it is conceivable that that alone might warrant his finding of the fact of its unreliability; also, the difficulty of computing the ratio between its reserve fund and its liabilities is an evidentiary fact bearing upon the question of its financial soundness. * * * If by reason of the dual character of its business, he was unable to determine the question of its liability, or if he was satisfied that such business combination rendered this company unsafe in fact for public patronage, his refusal to grant it a license would seem to have been amply justified."

A similar question arose in the case of People ex rel v. The Fidelity Casualty Company, 153 Ill., page 25. The first two branches of the syllabus in this case are as follows:

> "1. INSURANCE, foreign company may make multiform risks. There being no prohibition in the statute of Illinois against the doing of multiform insurance, the comity that prevails between the states permits a foreign corporation to do such insurance in this state, although our statute does not authorize the formation of companies for that purpose.
>
> "2. The absence of authority in our statute to organize such companies is not an implied prohibition of the transaction of multiform insurance by a foreign company within the state."

At page 33 of the opinion the court uses the following language:

> "It seems to be one of the contentions of appellant, that since a company cannot be organized, under the laws of this state, to do the different classes of insurance business done by appellee, therefore there is an implied prohibition that forbids the transaction of a multiform insurance business by one and the same company within the limits of the state,—in other words, that the doing of such multiform insurance business is in violation of the spirit of its laws. We are not satisfied of the sound-

ness of this position. It is admitted that our statutes do not, in express terms, prohibit a company from doing more than one kind of insurance. The rule is, that where there is no positive prohibitive statute, the presumption, under the law of comity that prevails between the states of the union, is, that the state permits a corporation organized in a sister state to do any act authorized by its charter or the law under which it is created, except when it is manifest that such act is obnoxious to the policy of the law of this state."

It seems to me that in the case submitted by you there is even stronger reason for the holding that the company under consideration may be authorized to do more than one class of business enumerated in section 9510, by reason of the fact that said section specifically recognizes the right of foreign insurance companies to be admitted for such purposes. The mere fact that the legislature in the same act, General Code, 9511 (97 O. L., 408), provided that domestic companies cannot engage in more than one of the several classes of business enumerated does not, to my mind, indicate that the same rule was intended to be applied to foreign corporations. It is rather an indication that the legislature intended to make a distinction and to establish a definite policy relative to companies organized under the laws of this state.

I am therefore of the opinion that the American Automobile Insurance Company, or any other foreign insurance company with like corporate authority, may be admitted in Ohio and authorized to carry on or continue the business of writing in the same or several policies more than one of the classes of insurance mentioned in section 9510 of the General Code, if it is able to and does satisfy the superintendent of insurance as to its financial responsibility, worth and standing, and otherwise complies with Ohio laws relative to securing admission and conducting its business.

Respectfully,
EDWARD C. TURNER,
Attorney General.

482.

BOARD OF HEALTH—HEALTH OFFICER CAN BE EMPLOYED TO PERFORM PHYSICIAN'S SERVICES IN QUARANTINE CASES—COMPENSATION IN ADDITION TO SALARY.

A board of health is empowered to employ a health officer to perform physicians' services in quarantine cases, under section 4436, G. C., and said health officer may be compensated by the municipality in addition to his salary for such services as are not within his duties as health officer when the persons quarantined are unable to pay.

COLUMBUS, OHIO, June 10, 1915.

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

GENTLEMEN:—I acknowledge receipt of yours under date of June 3, 1915, as follows:

"We would respectfully request your written opinion upon the following questions:

"May the health officer of a city serve as physician in quarantine cases

(smallpox) and receive additional compensation for such service, the same to be fixed by the board of health? If such compensation can be legally paid, is it required that the same be fixed by the board of health prior to the rendition of the service? See enclosed letter of Dr. W. H. Knauss, health officer of Newark, Ohio, which we would ask you to return with your reply."

Under the provisions of section 4404, G. C., the council of a city is required to establish a board of health. Section 4408, G. C., provides in parts as follows:

"The board of health shall appoint a health officer, who shall be the executive officer. He shall furnish his name, address and other information required by the state board of health. * * *"

Section 4411-1, G. C. (103 O. L., 436), is as follows:

"The board shall determine the duties and fix the salaries of its employes; but no member of the board of health shall be appointed as health officer or ward physician."

Section 4428, G. C., authorizes the board of health, upon reasonable belief of the existence of an infectious or contagious disease, to quarantine a house or locality and to restrain the persons within such house or locality, and section 4436, G. C., provides as follows:

"When a house or other place is quarantined on account of contagious diseases, the board of health having jurisdiction shall provide for all persons confined in such house or place, food, fuel, and all other necessaries of life, including medical attendance, medicine and nurses, when necessary. The expenses so incurred, except those for disinfection, quarantine or other measures strictly for the protection of the public, when properly certified by the president and clerk of the board of health, or health officer where there is no board of health, shall be paid by the person or persons quarantined, when able to make such payment, and when not by the municipality in which quarantined."

By the provisions of this section the duty is imposed upon the board of health to provide medical attendance when necessary to persons under quarantine, and when such persons are unable to pay for the same the municipality is required to do so.

Whether or not the health officer appointed may receive compensation for such service, involves a consideration of sections 3808 and 12912, G. C. Section 3808, G. C., provides that no officer of a corporation shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. Section 12912, G. C., provides as follows:

"Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work or services while

in office, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, nor both, and forfeit his office."

Attention is called to opinions of my predecessor, Hon. Timothy S. Hogan, found at pages 249 and 292 of the annual report of the attorney general for the year 1913, in which opinions it is held in effect that a "health officer" is not an officer of a city within the meaning of the term officer as used in sections 3808 and 12912, G. C., and that such health officer may be appointed as special agent for vaccinations under section 4449, G. C., and draw compensation therefor from city funds.

While the appointee under the provisions of section 4408, G. C., supra, is there termed a "health officer" and is declared to be the "executive officer" of the board, that of itself is not conclusive of the meaning of the term "officer" as found elsewhere in the statutes, and although it is held in the case of State v. Craig, 69 O. S., 236, that a health officer was not an employe within the meaning of that term as used in section 189 of the municipal code, with reference to "employes then serving in the health department," it will be noted that the conclusion of the court was based solely upon the ground that the "health officer" was designated an officer elsewhere in the statutes and this interpretation of the term "employe" was confined to its use in the particular statute referred to. This interpretation of the term "employe" was not necessary to the decision of the case and the court in fact based its judgment upon another ground stated in the succeeding paragraph of the opinion. It therefore does not follow from the decision of the court that a health officer may not be an employe of the board for other purposes and within contemplation of other statutory provisions.

That the appointee of the board of health is not an officer, seems to be supported by the case of State ex rel. v. Jennings, 57 O. S., 415, the second branch of the syllabus being as follows:

> "To constitute a public office * * * it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointment to the office, thus created and defined, and not as a mere employe, subject to the direction and control of some one else."

The appointee of the board of health has no authority independent of the board, and no duty except as determined by the board further than to furnish his name, address and other information required by the state board.

It may be further observed that in addition to the fact that such appointee serves only at the will of the board and is entirely subject to its discretion and control, and takes no oath of office nor gives any bond, no salary or compensation is provided for such appointee except authority therefor to be found within the terms of section 4411-1, G. C., supra, which authorizes the board to determine the duties and fix the salaries of its "employes." In view of the extent and nature of the duties which the board is authorized to impose upon such appointee as its "executive officer" (section 4408, G. C.), it seems conclusive that it was the legislative purpose that the salary of such appointee be fixed by the board, and it therefore follows that such appointee is an employe of the board within the meaning of that term as used in said section 4411-1, G. C., supra.

For these reasons I therefore concur in the opinion of my predecessor that a health officer appointed by a city board of health is not an officer of a municipality within the meaning of that term as used in section 3808 and 12912 of the General Code, and that therefore such health officer may lawfully be paid from the funds

of the municipality for services rendered to persons who are unable to make payments for the same within the terms of section 4436 of the General Code, when such services do not come within the duties of such health officer as determined by the board and for which he receives compensation in the salary by the board fixed for such appointee.

Of course, the salary fixed by the board and paid to such appointee is in full compensation for all those services by him rendered which are within the duties by the board determined to be performed by him as health officer and such appointee is not lawfully entitled to any further or additional compensation for the performance of any service which comes within his duties as prescribed by the board of health to be performed by him as health officer.

You next inquire if it is required that compensation so authorized to be paid for medical attendance in quarantine cases be fixed by the board of health prior to the rendition of the service.

No statutory requirement that contracts for such services be entered into between the board and the physician prior to the performance of the service, will be found except that section 4411-1, G. C., 103 O. L., 436, supra, be given such construction as to include within the term "employes," physicians engaged by the board to give medical attendance in quarantine cases. It will be observed that the board is there required to determine the duties and fix the "salaries" of its employes. The compensation of physicians for medical attendance in quarantine cases would not be held to be a salary. The term salary as here used, carries with it rather the idea of a regular periodical payment of a fixed sum for a continued service, and to my mind does not comprehend the payment for medical attendance in more or less isolated cases.

While it may be in most cases a matter of good business policy for the board to have some understanding or agreement as to the rate of compensation to be paid in such cases, and this I think it would have full authority to do, prior to the performance of the service, in my opinion the board is not by law required to determine prior to the rendition of the service the compensation to be paid therefor.

Respectfully,
EDWARD C. TURNER,
Attorney General.

483.

POLICEMEN AND FIREMEN—CONSTRUCTION OF SECTION 4383, G. C., FOR RELIEF OF DISABLED POLICEMEN AND FIREMEN BY CITY ORDINANCE—SUCH RELIEF PRECLUDES COMPENSATION UNDER WORKMEN'S COMPENSATION ACT.

An ordinance for the relief of policemen and firemen authorized by section 4383, G. C., is valid, and under it the auditor may pay the salary of such disabled policeman or fireman.

Policemen and firemen compensated under such ordinance or through policemen or firemen's relief fund or pension fund are not entitled to compensation under the workmen's compensation act.

COLUMBUS, OHIO, June 10, 1915.

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

GENTLEMEN:—This office is in receipt of a request for an opinion from Mr. Clyde C. Porter, city solicitor of Tiffin, Ohio, which is as follows:

"On the 13th day of January, 1913, the city council of the city of Tiffin, Ohio, duly passed an ordinance providing for the relief of policemen and firemen when disabled in the discharge of duty, a copy of which ordinance, prepared by the city auditor, is herewith enclosed.

"Our auditor inquires as to whether or not he shall continue 'to pay salaries when no services have been rendered, especially when disability continues longer than two or three months.'

"The city council has authority, under section 4383 of the General Code, to provide 'for relief out of the police or fire funds of members of either department temporarily or permanently disabled in the discharge of their duty.'

"The question has been raised as to whether or not 'disability' includes sickness or means simply physical injury from accident, or otherwise.

"In view of the fact that the city employes, firemen and policemen, are under protection of 'the workmen's compensation act' there is some doubt as to the validity of this ordinance; also whether or not a policeman or fireman entitled to relief under the 'compensation act' can draw the allowance from the state and also his salary from the city under this ordinance or can elect to take under the ordinance or under the 'compensation act.' We are informed that employes have drawn relief from the 'compensation act' and enough from the city under this ordinance to equal their regular salaries. This, to us, does not appear to be legal.

"Will you kindly give us your opinion in the matter, especially considering what the auditor asks?"

With his letter he encloses a copy of the ordinance referred to therein, which copy is as follows:

"To provide for the relief of policemen and firemen when disabled in the discharge of duty.

"Be it ordained by the council of the city of Tiffin, state of Ohio:

"Section 1. That when a policeman or fireman is disabled or incurs a sickness while in the discharge of duty he shall be entitled to receive and shall receive his regular salary upon furnishing to the city auditor a certificate of a duly qualified physician certifying to such disability or sickness.

"Section 2. That such relief shall be paid out of the police or fire funds, as the case may require.

"Section 3. This ordinance shall be in force and effect from and after the earliest period allowed by law.

"Passed this 13th day of January, A. D., 1913.

"Attest: T. J. K.,

"A. J. H. President."

Section 4383 of the General Code is as follows:

"Council may provide by general ordinance for the relief out of the police or fire funds, of members of either department temporarily or permanently disabled in the discharge of their duty. Nothing herein shall impair, restrict or repeal any provision of law authorizing the levy of taxes in municipalities to provide for firemen's police and sanitary police pension funds, and to create and perpetuate boards of trustees for the administration of such funds."

Under the provisions of the section quoted above, the city council would have

authority to provide for the relief of policemen and firemen as has been done in the ordinance quoted above, and the auditor would have the authority to pay the salaries of such disabled policemen and firemen under the terms of the ordinance.

I am of the opinion that the words, "disabled in the discharge of duty" as found in section 4383 of the General Code, are not to be limited to such disabilities only as follow physical injuries from accident, but that they mean disability following whatever may be the proximate cause, so long as it is incurred in the discharge of their respective duties of policeman or fireman.

I might here call attention to the fact, though not exactly in point, that the supreme court is now considering whether occupational disease is embraced within the term "injury" as used in the workmen's compensation act. This department is contending for the negative of that proposition.

If a municipality has established a policemen's or firemen's pension fund under sections 4600, et seq., of the General Code, the member of such police or fire department may not in any event receive relief from the workmen's compensation fund. (Section 1465-16.)

The letter and the spirit of the workmen's compensation act are based upon the theory of compensation for disability, and when the injured party has been compensated through the payment of his salary for time lost and for medical services made necessary through an injury, there is no such disability as would entitle him to compensation under that act.

Coming to the last question in Mr. Porter's letter, namely the resort to the workmen's compensation act for the purpose of compensating a policeman or fireman who has suffered disability and which policeman or fireman is compensated through an ordinance passed under authority of section 4383 of the General Code: In the first place, compensation may be paid from the workmen's compensation fund only following an accidental injury, excluding mere sickness or disease (unless, of course, the supreme court should hold in the case now before it that accidental injury as used in the act includes occupational diseases). In other words, the authorization for payment under section 4383 of the General Code is broader than under the workmen's compensation act.

But, even in cases which otherwise come clearly under the provisions of the workmen's compensation act, if the injured person has been compensated through the payment of his salary during the time lost and for medical services made necessary through the injury, he would not be entitled to compensation under the act.

Under the ordinance of the city of Tiffin a policeman or a fireman receiving compensation thereunder, to wit, his regular salary, would not be entitled to compensation other than medical, nurse and hospital service, and medicines as might be allowed by the industrial commission, and this notwithstanding the contribution by the city of Tiffin to the workmen's compensation fund.

In re Claim No. 4268 of the industrial commission of Ohio, A. Costello, claimant, it was held by the industrial commission, under date of May 19, 1913, and I think rightly, as follows:

> "In this claim the fact of injury, the resulting loss of time and the average weekly wage is sufficiently clear, the sole question being whether the claimant is entitled to compensation for his injury, in view of the fact that he was working under a contract of employment providing for an annual compensation, without deduction for loss of time occasioned by an injury resulting in temporary disability, it appearing further that the claimant has been fully paid in accordance with the terms of his contract for the period of time covered by his disability.
>
> "The act contemplates compensation covering the impairment of the earn-

ing capacity to the extent of two-thirds thereof, exclusive of the first week of the disability. Section 1465-65 of the General Code (section 26 of the workmen's compensation act of 1911, 102 O. L., 524). As the injury to the claimant did not result in any impairment of his earning capacity, and as the act does not contemplate compensation on account of the injury itself or the pain or the suffering resulting therefrom, we do not think that the claimant is entitled to an award and his claim will therefore be denied."

I might add that contribution to the workmen's compensation fund for policemen and firemen is mandatory upon a city which does not maintain a policemen's or firemen's pension fund under sections 4600, et seq., of the General Code, while relief under section 4383 is permissive only.

Further, I am of the opinion that the ordinance referred to is valid and that its existence precludes any disabled policeman or fireman from receiving from the workmen's compensation fund anything other than such reasonable allowance for medical, nurse and hospital service and medicines as may be allowed by the industrial commission.

A copy of this opinion has been sent to Mr. Clyde C. Porter, city solicitor of Tiffin, Ohio, and to the industrial commission of Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.

484.

MUNICIPAL CORPORATION—CONTRACT—WATER COMPANY, PRIVATE CORPORATION—VOTE OF PEOPLE NOT NEEDED—TEN-YEAR LIMITATION APPLIES—COUNCIL MAY ISSUE BONDS FOR FILTRATION PLANT—LIMITATIONS.

A contract between a municipal corporation and a private corporation, whereby the latter is to furnish a supply of water to the former, which is to filter and distribute the same, is not governed by section 3981, *G. C., and need not be submitted to a vote of the people.*

Such a contract, however, may not be made for a period exceeding ten years, that being the limitation of section 3809, *G. C.*

Council of such municipal corporation may issue bonds for the installation of the filtration plant and distribution system in order to carry out such a contract, provided the amount of such bonds, together with other bonds issued during the same year, does not exceed one per cent. of the tax duplicate of the municipality; and provided further that the amount thereof, together with other bonds then outstanding, will not cause the net indebtedness of the corporation outstanding to exceed two and one-half per cent. of such tax duplicate, in either of which events the bonds may be issued only upon a vote of the people.

COLUMBUS, OHIO, June 10, 1915.

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

GENTLEMEN:—I acknowledge receipt of your letter of June 8, 1915, requesting my opinion as follows:

"1. May a village enter into a contract with a private corporation

to furnish water supply for a period of thirty-one years, the village to own and operate the purification plant and distribution system, and must said contract, if it can be made for a period of thirty-one years, be submitted to a vote of the people under section 3981, General Code?

"2. If the bond issue for the construction of the distribution lines and filtration plant exceeds one per cent. of the tax duplicate ($170,000.00) must the same be submitted to a vote of the people, and if it is found to be necessary to do so, may the contract for water supply and the bond issue be voted upon at the same time?"

Your statement of your first question together with the statements in a letter addressed to you by the solicitor of the village of East Youngstown make it clear that the corporation with which the contract is to be made is not to furnish water either to the municipality or to its inhabitants in the sense that it is to make deliveries or even to furnish a supply of what is actually delivered for public and private use; but that the company is merely to deliver to the city a sufficient amount of raw water which the city is to filter, distribute and sell.

Section 3981, G. C., provides as follows:

"A municipal corporation may contract with any individual or individuals or an incorporated company for supplying water for fire purposes, or for cisterns, reservoirs, streets, squares and other public places within the corporate limits, or for the purpose of supplying the citizens of such municipal corporation with water for such time, and upon such terms as may be agreed upon. But such contract shall not be executed or binding upon the municipal corporation until it has been ratified by a vote of the electors thereof, at a special or general election, and the municipal corporation shall have the same power to protect such water supply and prevent the polution thereof as though the waterworks were owned by such municipal corporation."

It is apparent that the proposed contract is not one for supplying water for fire purposes because the company is not to deliver the water ready for use for such purposes; it is not one for supplying streets, squares and other public places within the corporate limits because the water is to be delivered at the filtration plant; it is not one for the purpose of supplying the citizens with water for the reason that the water is to be delivered to the citizens by the city itself, and in a state different from that in which it is delivered by the company to the city.

I am, therefore, of the opinion that section 3981 does not require the proposed contract to be submitted to a vote of the people.

I cannot refrain, however, from calling attention to section 3809, G. C., as amended 103 O. L., 526. This section provides in full as follows:

The council of a city may authorize, and the council of a village may make, a contract with any person, firm or company for lighting the streets, alleys, lands, lanes, squares and public places in the municipal corporation, or for furnishing water to such corporation, or for the collection and disposal of garbage in such corporation, or for the leasing of the electric light plant, and equipment, or the waterworks plant, or both, of any person, firm, company or municipality or for the purchase of electric current for furnishing light, heat or power to such municipality or the inhabitants thereof for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury, shall not apply to such contract, and such requirement shall not apply to street improvement

contracts extending for one year or more, nor to contracts made by the board of health, nor to contracts made by a village for the employment of legal counsel, nor to contracts by a municipality for the leasing or acquisition of the electric light plant and equipment, or the waterworks, plant, or both, of any person, firm or corporation therein situated."

I am of the opinion that the proposed contract is a contract "for furnishing water to such corporation," within the contemplation of this section.

Section 2702, R. S., the predecessor of section 45 of the Municipal Code, which has become sections 3806-3809, inclusive, G. C., was interpreted as not applicable to contracts extending beyond one year.

Defiance v. Council, 13 C. D., 96.
Water Company v. Defiance, 90 Fed., 453.

However, section 2702 contained no exceptions like those now incorporated in section 3809, G. C. That is to say, the original Worthington law, so called, simply prohibited the making of any contract when it could not be certified that money was in the treasury unappropriated for any other purpose and sufficient in amount to discharge the obligation of the corporation. The courts simply held that it could not have been intended that this restriction should apply to contracts not to be performed within one year, and which, therefore, for obvious reasons ought not to be discharged out of the revenues of any one year.

In my opinion the present law has the contrary effect. Otherwise section 3809 is absolutely without effect. Such contracts as are therein authorized to be made without a certificate "for a period not exceeding ten years" may virtually not be made at all for a period exceeding ten years for the very reasons which were pointed out by the courts in interpreting old section 2702, R. S.

Does the phrase "for a period not exceeding ten years" modify all that precedes or merely the last preceding clause.

Viewing the section from the standpoint of strict grammatical construction, one would be obliged to conclude that the modifying effect of the phrase in question is limited to the next preceding word or phrase subject to modification. However, when the whole section is studied, and due weight is given to the repetition in the latter part of the section beginning with the words "and such requirement shall not apply," and the mention in that part of the section of certain contracts which, if it had been intended that the time limitation clause should not modify all that precedes, might have as well been placed in the first part of the section and the repetition thus avoided, very strong ground appears for interpreting the statute, regradless of technical rules of grammer, so as to make the phrase apply to all which precedes. In other words, consideration of the section as a whole shows very clearly that the legislature intended that none of the contracts, mentioned in that part of the section which precedes the phrase "for a period not exceeding ten years," should be exempt from the requirements of the preceding sections unless for a period not exceeding ten years.

Accordingly, it is my opinion that it is not lawful for a municipal corporation, subject to the general laws of the state, to enter into a contract with a private corporation to furnish water to the corporation for a period exceeding ten years. So that on this account the first part of your first question must be answered in the negative.

Answering your second question I beg to state that under sections 3939-3954-1, inclusive, of the General Code, generally known as the Longworth law, the council of a municipal corporation is without power to issue bonds for the purpose of constructing water distribution lines and a filtration plant without a vote of the

people if the amount of the bond issue exceeds one per cent. of the tax duplicate, but may issue without a vote of the people if the amount of the bonds is less than that, unless the particular issue, together with the other issues made in the same year, would exceed one per cent. of the duplicate, and unless further such proposed issue, together with such other issues outstanding at the time, would cause the net bonded indebtedness of the municipality to exceed two and one-half per cent. of the tax duplicate, in either of which events the issue would have to be submitted to a vote of the people.

The answer which has been given to your first question obviates the necessity of answering the remainder of your second question.

Respectfully,
EDWARD C. TURNER,
Attorney General.

485.

ROADS AND HIGHWAYS—WHAT CONSTITUTES "REPAIR" OF A HIGHWAY—SUBSTANTIAL PART OF ORIGINAL IMPROVEMENT MUST REMAIN TO BE A REPAIR.

In order to constitute a "repair" of a highway it is first essential that there must have been an improvement of the highway, and that this improvement must have fallen into decay, either slight or extensive. Some substantial part of the original improvement must remain, and the proposed operation, to be a repair, must contemplate the use of that part of the old improvement still remaining, and must further contemplate a completed work that will be substantially like the original.

COLUMBUS, OHIO, June 10, 1915.

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

DEAR SIR:—I have your communication of June 2, 1915, which reads as follows:

> "We have for this department, as you know, three funds for the construction and repair of roads,—i. e., the inter-county highway fund, the main market funds, and the maintenance and repair fund, the law providing that certain funds shall be devoted to the repair and maintenance of certain roads.
>
> "I am asking you for an opinion as to where the repair stops and construction or improvement begins.
>
> "To be more specific, it is now proposed to resurface a section of inter-county highway No. 81, in Mahoning county, extending north and east from the village of Canfield, a distance of about two miles. It is contemplated to use substantially the present grade of the traveled road. The macadam now there will be used as a foundation course but it will be necessary to straighten up margins and in places widen a portion of the roadway. A top course of macadam will be imposed on this foundation course and bound with bitumen and the shoulders of the road brought to proper grade.
>
> "The point we wish decided is, can we legitimately pay for the above mentioned repairs from the repair fund?"

Your request involves a construction of section 6309, G. C., 104 O. L., 6, the section reading as follows:

> "The revenues derived by registration fees provided for in this chapter shall be paid by the secretary of state weekly into the state treasury. Any surplus of such revenues which may remain after the payment of the expenses incident to carrying out and enforcing the provisions of this chapter shall be used for the repair, maintenance, protection, policing and patroling of the public roads and highways of this state, under the direction, supervision and control of the state highway department."

In appropriating the surplus of automobile registration fees remaining after payment of expenses, the legislature has followed substantially the language of section 6309, G. C. It therefore becomes important to determine the meaning of the word "repair" as used in said section and in the various appropriation measures adopted by the legislature. The verb "repair" is defined in the Standard dictionary as follows: (1) "to mend, add to or make over"; (2) "to restore to a sound or good state." The noun "repair" is defined in the same work as follows: "restoration after decay, waste, injury or partial destruction." In order to constitute a repair it would seem in the light of the above definitions that there must first have been a work of some kind, and this work must have fallen into a state of decay. The extent of the decay does not seem to be material, so long as some substantial part of the original work remains. When the above situation exists, a repair would consist in restoring the work in question to its originally sound and good state, utilizing a substantial part of the original work and so conducting operations that when they are completed the new work will be substantially like the old. Applying these general principles to the word "repair" as used in connection with a highway, it is first essential that there must have been an improvement of a highway and that this improvement must have fallen into decay, either slight or extensive. Some substantial part of the original improvement must remain, and in order to constitute a repair the proposed operation must contemplate the use of that part of the old improvement still remaining and must further contemplate a completed work that will be substantially like the orignal. It will not, however, rob a contemplated operation of its character as a repair merely because it is proposed to so conduct the operation that the highway when repaired will possess certain improvements as compared with the original work. In the specific instance referred to by you, it is my opinion that the facts that some slight alterations are to be made in the grade of some parts of the road, that the margins are to be straightened up and that the roadway is to be widened in places will not change the character of the proposed operation as a repair. The present cuts and fills will be utilized, substantially the present grade will be followed and the old macadam not worn away will be used as a base. The road was originally constructed as a macadam road, a very substantial part of the old construction still remains and is to be utilized in the new work, and when the new work is completed the result will be a road of substantially the same general type as the original improvement; and I am of the opinion that you may properly regard this contemplated improvement as a repair and pay for it accordingly. I would have no hesitation in saying, however, that if it were planned to change the general type of the road, as, for instance, by paving with brick a road originally surfaced with macadam, then the proposed operation could not properly be regarded as a repair.

Respectfully,

EDWARD C. TURNER,

Attorney General.

486.

STATE BOARD OF HEALTH—PRESIDENT'S AND SECRETARY'S TRAVELING EXPENSES FOR ATTENDING HEALTH CONFERENCE LEGAL.

Reimbursement for traveling expenses of the president and secretary of the state board of health for attending the thirteenth annual conference of state and territorial health authorities with the surgeon general of the United States public health service and conference of state and provincial boards of health of North America held at the same time may be legally made from the state treasury.

COLUMBUS, OHIO, June 10, 1915.

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

DEAR SIR:—Under date of May 28, 1915, you submitted for my opinion the following:

"The state board of health has presented two vouchers to this department requesting the auditor of state's warrant for traveling expenses to Washington, D. C., and return, viz.:

"Dr. H. T. Sutton ---------- $56.18

"Dr. E. F. McCampbell ---------- 57.36

"Enclosed is copy of resolution passed by the state board of health, authorizing the secretary, president and vice-president to attend national convention.

"1st. Do sections 1232 to 1261-15, authorize such expenditure to be made by members of the state board of health?

"2nd. Do the same laws permit the state board of health to designate their secretary or other employe to attend such conventions and be paid their actual and necessary traveling expenses?"

The copy of the resolution which you enclosed is as follows:

"EXTRACT FROM MINUTES OF THE STATE BOARD OF HEALTH.

"A regular meeting of the state board of health was held at the Boody House, Toledo, Ohio, Wednesday evening, March 24, 1915, at 8 o'clock.

"There were present Messrs. Sutton, Miller, Grube, MacIvor, Brown, Hasencamp and Howell.

"The secretary called attention to the thirteenth annual conference of state and territorial health authorities with the surgeon general of the United States public health service in Washington, D. C., May 13, 1915, and the conference of state and provincial boards of health of North America to be held in that city May 14, 1915.

"It was moved by Dr. Grube and seconded by Dr. Hasencamp that the secretary be delegated to attend the conference with the surgeon general, May 13th, and that the president, vice-president, and secretary be appointed delegates to the conference of state and provincial boards of health of North America, to be held on May 14 and 15, 1915.

"Those voting in the affirmative were Messrs. Sutton, Miller, Grube, MacIvor, Brown, Hasencamp and Howell.

"In the negative, none."

After receipt of your request for opinion Mr. Laylin of this department, was asked by the secretary of the state board of health as to whether or not an official opinion had been requested in regard to the voucher in question, and upon an answer in the affirmative Dr. E. F. McCampbell, secretary and executive officer of the board of health stated that he desired to advise us in writing as to the position of the board in the matter, and on June 1, 1915, he submitted to this department a letter which is as follows:

"In conformity with the suggestion of one of your special counsel, Mr. Laylin, I take the liberty of addressing you in regard to an opinion governing the legality of certain personal expense vouchers, which opinion has been asked for by the auditor of state. The two expense accounts, the legality of which was questioned by the auditor of state, are those of the president of the state board of health, Dr. H. T. Sutton, and myself. In conformity with an act of congress, approved July 1, 1902, provision is made for the surgeon general of the United States public health service to hold an annual conference with the state and territorial health authorities relative to certain interstate public health matters. The state board of health under date of March 24, 1915, passed a motion which designated the president, vice-president, and secretary and executive officer to represent the department at the meetings in Washington. A copy of this motion was attached to the vouchers which were sent to the auditor's office. These annual conferences with the U. S. public health service are of vital importance to the various states. It is well recognized, of course, that disease is neither a local nor state matter. It is plainly a matter of national importance and it is only by means of the states co-operating with the federal government that the interstate spread of disease is checked. It is, of course, largely a function of the United States government to prevent the introduction of disease from other countries.

"I am enclosing herewith a copy of the program followed at the meeting on May 13th. You will note that the principal subject under consideration was the interstate quarantine regulations. These are being redrafted by the federal government. It will be noted from the program that all the subjects under consideration were of vital concern to the state.

"It has long been a custom for the meeting of the conference of secretaries of state and provincial boards of health of North America to be held on the day following the meeting with the surgeon general of the U. S. public health service and to be continued until the business is completely transacted. At these conferences the health authorities of the various states meet together for the discussion of public health matters which largely concern the states themselves. A copy of this program is also enclosed for your information.

"In closing I wish to say that it would be exceedingly unfortunate if the state of Ohio, the fourth state in the Union in population, should be prevented from participating in these conferences. Personally I have always felt that in attending these conferences I was proceeding legally in conformity with section 1234, G. C., and have always held the view that if the board passed a resolution directing me, as secretary and executive officer, to perform some service that of necessity the service must be performed. I am informed that the state board of health has been proceeding on the basis that it had authority to send some of its own members to these conferences, such authority being derived from a broad interpretation of section 1237 and section 1239, G. C.

"This department will await your ruling in this matter with great interest. Thanking you very kindly for many considerations, I am

"Yours very truly,

"E. F. McCAMPBELL,

"Secretary and Executive Officer."

With his letter Dr. McCampbell enclosed a pamphlet showing the general program and matters covered in the conferences. Dr. Sutton, who requests reimbursement for traveling expenses, is the president of the state board of health, and Dr. McCampbell, who likewise requests reimbursement for traveling expenses, is the secretary and executive officer of such board.

Under the provisions of section 1235 of the General Code, each member of the state board of health is entitled to a per diem of five dollars "for each day employed in the discharge of his official duties, and his necessary traveling and other expenses while engaged in the business of the board." The secretary of the state board of health, under the provisions of section 1234, G. C., is required to "perform the duties prescribed by the board and the provisions of this chapter." In regard to the traveling expenses of such secretary it is provided in said section "the necessary traveling and other expenses incurred by the secretary in the performance of his official duties shall be paid by the state on the warrant of the auditor of state upon the certificate of the president of the board."

It is to be noted from the above, that a member of the state board of health is only entitled to traveling and other necessary expenses "while engaged in the business of the board," and that the secretary is only entitled to traveling and other expenses "in the performance of his official duties."

It therefore must be determined as to whether or not the attendance by the president or the secretary at the "annual conference of state and territorial health authorities called by the surgeon general of the United States public health service, is performing services "in the business of the board" or "in performance of official duties."

The statute of the United States, referred to by Dr. McCampbell in his letter, is section 9146 of the United States Compiled Statutes, 1913, and reads as follows:

> "When, in the opinion of the surgeon-general of the public health and marine-hospital service of the United States, the interests of the public health would be promoted by a conference of said service with state or territorial boards of health, quarantine authorities, or state health officers, the District of Columbia included, he may invite as many of said health and quarantine authorities as he deems necessary or proper to send delegates, not more than one from each state or territory and District of Columbia, to said conference: Provided, that an annual conference of the health authorities of all the states and territories and the District of Columbia shall be called, each of said states, territories, and the District of Columbia to be entitled to one delegate: And provided further, that it shall be the duty of the said surgeon-general to call a conference upon the application of not less than five state or territorial boards of health, quarantine authorities, or state health officers, each of said states and territories joining in such request to be represented by one delegate."

The above statute authorizes the surgeon-general to invite as many health and quarantine authorities as he deems necessary to send delegates to a conference, and further provides that "an annual conference of the health authorities of all the states and territories and the District of Columbia shall be called, each of said states, territories, and the District of Columbia to be entitled to one

delegate." The above statute places the duty upon the surgeon-general to call an annual conference, under said section, but there is no attempt, in said statute, to require the attendance of delegates of state boards of health at such conferences, and in fact, as I view it the United States would have no authority whatever to require such attendance. Therefore, there is no duty placed upon the state board of health to send a delegate, nor upon the secretary thereof to attend, in his official capacity, any such conference, so-called, unless directed so to do by a valid order of the board.

Under section 1237, G. C., the state board of health is charged with the supervision of all matters relating to the preservation of the life and health of the people, and upon this board is conferred "supreme authority in matters of quarantine, which it may declare and enforce, modify, relax or abolish." These are far-reaching powers on a subject of first importance to the state and its people, and are to be construed in the light of the purpose sought to be accomplished. The dangers to life and health are by means confined within state borders. To intelligently establish quarantines, or to modify, relax or abolish a quarantine will very frequently demand a personal investigation outside of the state, and it would be false economy to say that while thousands upon thousands of dollars might be spent to stamp out disease when once it comes within our borders, no money could be spent in necessary investigation to prevent it getting into the state. There is nothing in the statutes which leads me to the conclusion that the legislature has adopted any such policy of false economy.

In addition to section 1237 there will be found in section 1239, G. C., a duty imposed upon the board of health to make careful inquiry as to the cause of disease and to collect, preserve and disseminate information in respect to the matters under the jurisdiction of the board.

I agree with Dr. McCampbell that the subject-matters under consideration in Washington at the time of the incurring of the expenses referred to are of vital importance to the state of Ohio. However, that alone would not be sufficient to authorize any expenses in connection therewith, but it seems clear to me that the attendance at such a conference by a duly authorized representative of the board of health, as is referred to in your inquiry, is authorized under the statutes above quoted, and that such representative of the board of health should be reimbursed for his actual and necessary expenses thereby incurred.

I am very much opposed to junkets, and this opinion is not to be taken as placing a stamp of approval upon or acquiescence in any proceeding of that kind. Each case must stand upon its own facts, interpreted according to law in the light of the purpose sought to be accomplished by the law.

I take it that your inquiry does not impose any criticism of the expense or of the wisdom of the proceeding, but only seeks to find whether there is authority in law for the payment of the expense. Such a position is to be commended.

I, therefore, hold that as a matter of law warrants should be issued upon both vouchers referred to in your inquiry as being expenses properly incurred under the circumstances by representatives of the board of health in the discharge of their duties.

Respectfully,
EDWARD C. TURNER,
Attorney General.

487.

"JERUINJER," A TEMPORARY HOME AND HOSPITAL FOR THE INDIGENT, EVEN THOUGH OPERATIONS ARE PERFORMED THERE, IS NOT AN INSTITUTION COMING WITHIN THE PROVISIONS OF SECTION 2502, G. C.—COUNTY COMMISSIONERS CANNOT AUTHORIZE PAYMENT OF MONEY UNDER SECTION 3138-1, G. C.

"Jeruinjer," a temporary home and hospital for the indigent, located at Mansfield, Ohio, is not such an institution as is contemplated within the provisions of section 2502, G. C., nor is the resolution adopted by the county commissioners, as submitted, sufficient to permit payment of money to such institution under section 3138-1, G. C.

COLUMBUS, OHIO, June 10, 1915.

HON. T. B. JARVIS, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—Under date of May 3, 1915, you submitted for my consideration the following:

> "I am herewith enclosing a letter received by our county auditor, from E. N. Halbedel, which explains itself in part, and the reference made here to Attorney General Hogan's ruling is not quite in conformity with the facts in our case.
>
> "Jeruinjer is a private home owned by one of our citizens who from his generous disposition has purchased this home and several organizations of the city have furnished different rooms and he takes in all the downs and outs—people who have no place to go that are in dire need of help; some who are not residents of the town, county, or township and cannot get into the infirmary. The institution is doing a great deal of good, but thus far has been run almost entirely by the help of some of the churches, and mostly by the Rev. S. P. Long, the founder.
>
> "We have a city emergency hospital which receives $2,500.00 a year from the city budget. We have no other hospital in the county and this is open to emergency cases only. No contagious diseased patient will be admitted.
>
> "Our commissioners recently passed a resolution granting $600 a year for this Jeruinjer hospital on the section suggested in the letter to our county auditor. I had already ruled that their resolution was void, inasmuch as I do not believe that it comes under that section.
>
> "Will you please give me your opinion as soon as possible? It is certainly a worthy cause and ought to be helped by the county if there is any law permitting it. But I take it that neither one of these statutes mentioned permits such expenditures of money inasmuch as there is no organization and no corporation, merely a private individual ownership, although open to all nationalties and all creeds."

With your letter you enclosed a letter from the bureau of inspection and supervision of public offices written to your county auditor under date of April 28th, in response to a letter from such auditor to the bureau. The letter from the auditor to the bureau is under date of April 23rd, and is as follows:

> "Mansfield, Ohio, April 23, 1915.
>
> "E. N. Halbedel, Columbus, Ohio.
>
> "DEAR SIR:—We have in Richland county, a hospital for charitable purposes, known as Jeruinjer, which is owned and controlled by S. P. Long.

"This property stands on the tax duplicates of Richland county in the name of the said S. P. Long.

"The board of county commissioners has passed a resolution authorizing the county auditor to pay to the said S. P. Long, six hundred dollars ($600.00) for the year 1915, to reimburse him for the treatment, maintenance and support of the indigent poor of said county.

"The county commissioners advise me that this resolution was passed under authority of sections 2502 and 3138-1, G. C. I cannot reconcile this resolution with sections 2502 and 3138-1 for the reason we have an emergency hospital in Mansfield supported by public funds. The city of Mansfield made a levy sufficient to raise twenty-five hundred dollars for the emergency hospital, for the year 1914; also for the reason that the board of county commissioners has not entered into an agreement of any kind with Mr. Long.

"I am mailing to you a copy of the resolution passed by the board of county commissioners and I should like very much to have you advise me as to whether or not I have authority to issue a warrant on the county treasury for the amount of six hundred dollars ($600.00).

"Yours very truly,
"John A. Dalton,
"Auditor Richland County."

Enclosed with the letter of the auditor to the bureau, foregoing mentioned, was a copy of a resolution passed by the county commissioners of Richland county, as follows:

"RESOLUTION

"In the matter of the payment of six hundred dollars from the poor fund of Richland county to Jeruinjer hospital. } April 23, 1915.

"WHEREAS, the county of Richland does not contain a hospital supported by public funds and whereas there is a hospital, known as Jeruinjer, which was organized by S. P. Long for purely charitable purposes, and which hospital is in no sense a sectarian institution and is in fact a non-sectarian institution, in which the indigent poor of said county may be received and for years have been receiving, free of charge, needed medical and surgical attention,

"*Therefore, Be It Resolved* by the board of county commissioners of Richland county, Ohio, that the sum of six hundred dollars ($600.00) be paid from the said county poor fund in equal payments as of the first day of July, 1915, and on the first day of January, 1916, to the said S. P. Long for the reimbursement of said hospital for the treatment, maintenance and support of the indigent poor of said county.

"And the auditor of said county is hereby directed to issue his warrant on the county treasurer of said county in favor of S. P. Long for the sum of three hundred dollars ($300.00) payable on July 1, 1915, from the poor fund of said county, also for the sum of three hundred dollars ($300.00) on the first day of January, 1916.

"Moved by Ed. G. Lemon, seconded by Henry Bolus, that the above resolution be adopted.

"Those voting in favor of said resolution were Lemon and Bolus, whereupon said resolution was declared duly passed.

"Henry Bolus,
"Ed. G. Lemon,
"County Commissioners."

The reply of the bureau to the letters of the auditor so enclosed with the letter of the county commissioners is as follows:

"We have worried and fretted a great deal over your question as to whether the appropriation made by resolution of your county commissioners in favor of a hospital known as Jeruinjer hospital is a legal one. You state that the commissioners make this appropriation under sections 2502 and 3138-1, General Code. In each of these sections it seems that the law contemplates that when aid is given it is to a hospital organized, or incorporated; i. e., we assume that the sections require that the institution be under the management of some association, or organization of persons. From your letter we assume that no such organization exists, but that it is owned and maintained by an individual.

"Attorney General Hogan has rendered two opinions on the subject of aid to hospitals, one you will find in the annual report of the attorney general, 1911-1912, page 1067, and the other in the annual report of the attorney general 1912, page 1346. We call your attention to these opinions in order that you may read them and see whether they, in any way, might be made to apply to the hospital in question, and we would further advise that you take this matter up with your prosecuting attorney as we have not the means of knowing the exact local conditions and we refrain from making a ruling that might be an injustice to a worthy institution when not knowing all the facts of the case. Should your prosecutor be in doubt in regard to the matter, upon his request and a statement of facts we could get a written opinion from the attorney general should you desire same.

"Yours very truly,
"Bureau of Inspection and Supervision of Public Offices.
"By E. N. Halbedel."

After the receipt of your letter, and being unable to ascertain the facts sufficiently in order to properly consider your question, this department wrote you under date of May 12th, requesting further facts, and under date of June 4th you wrote us in answer to said letter advising us that Dr. S. P. Long was, under separate cover, sending us more literature and a letter showing exactly what was being done at his institution. Under date of June 5th, we received the letter from Dr. Long, which is as follows:

"Mansfield, Ohio, June 4, 1915.

"Attorney General, State of Ohio.

"DEAR SIR:—Sometime ago the commissioners of Richland county, recognizing what I have done for the helpless of this county and what I have saved for the county, donated $600.00 for the coming year, basing their action on the section 3138-1 (house bill No. 44) page 67, Laws of Ohio 103, 1913. The people were pleased with the action of the commissioners, but our auditor is afraid that he might have some trouble because 'Jeruinjer' is private property. However, I want to remind you that it is not the custom for a man to give the whole use of his private property

wholly for charity; and in this case there is no corporation in the county for this purpose. We are crowded now from cellar to attic with the helpless and the citizens are glad that the commissioners have recognized the fact that I need a little help to carry on this work for humanity. I open the door for all religions and ages and races. It is an inn like the one between Jerusalem and Jerico for the ruined man. Out of this last sentence you can dig my newly coined name 'Jeruinjer.' I ask you to give me the interpretation of the spirit of the law. I do this at the request of Mr. T. B. Jarvis, our noble prosecuting attorney, who is in perfect sympathy with Jeruinjer, as I believe that all our citizens are. It is the only absolutely charitable institution in this county. We never make a charge for any one who enters and we help to give people a new start in life. I cannot keep up all the cost myself, and the announcement that the commissioners have offered me $600.00 to help along the next year which will mean a saving to the county of much more, if it were not paid, would only hinder others who have been kind enough to lend a helping hand to withdraw their support, and I would be worse off than if nothing had been offered. Let me assure you that I want nothing but the interpretation of the spirit of the law. I maintain that the law includes any place in a county where the helpless can be cared for—the places mentioned in the law being the only kind known as a rule.

"Yours truly,
"S. P. Long."

Enclosed with said letter was a certain pamphlet, relative to the Jeruinjer home, on the back of which is stated:

"POLICY OF THIS HOME.

"(1) It is not a prison, nor a hospital, nor an infirmary."

Dr. Long likewise enclosed us two clippings from newspapers.

From all of the foregoing it appears that this institution is in fact not a hospital, but simply a home wherein the indigent are temporarily taken care of.

The county commissioners, from the letter of the county auditor, advised that the resolution, under which the six hundred dollars ($600.00) is to be paid, was passed under authority of sections 2502 and 3138-1 of the General Code.

Section 2502, G. C., provides as follows:

"Except in counties containing hospitals supported by public funds, the commissioners of any county, in their discretion, may pay to a hospital organized or incorporated for purely charitable purposes, in which the indigent poor of the county may receive free of charge needed medical and surgical treatment, a sum not to exceed twenty-five hundred dollars each year. Such amount shall be paid from the county poor fund in equal payments on the first day of January and July, and shall be for the maintenance and support of such indigent poor and the reimbursement of such hospital for treatment thereof. Nothing herein shall authorize the payment of public funds to a sectarian institution."

It is to be noted, relative to said section, that it only applies to "a hospital organized or incorporated for purely charitable purposes." From the facts which

I have obtained from you and Dr. Long, I do not think that the Jeruinjer home can in any way be considered as a hospital organized or incorporated for purely charitable purposes, even though, as stated in your letter of June 4th, delicate operations are performed there when the emergency hospital in the city of Mansfild is full.

The mere fact that surgical operations are performed in the home does not, as I view it, constitute such a home a hospital.

Section 3138-1, G. C., 103 O. L., page 67, provides as follows:

> "Section 3138-1. That the board of county commissioners of any county may enter into an agreement with a corporation or association, organized for charitable purposes, or if there is no such corporation or association, then with any corporation or association organized for the purpose of maintaining and operating a hospital in any county where a hospital has been established, or may hereafter be established, for the care of the indigent sick and disabled, excepting persons afflicted with pulmonary tuberculosis, upon such terms and conditions as may be agreed upon between said commissioners, and such corporation or association, and said commissioners shall provide for the payment of the amount agreed upon, either in one payment, or installments, or so much from year to year as the parties stipulate."

Under this section the county commissioners are authorized to enter into an agreement "with a corporation or association organized for charitable purposes," "for the care of the indigent sick and disabled" except tuberculosis patients, on such terms and conditions as may be agreed upon, the payment for which may be made in either one payment, or installments, or so much from year to year as the parties stipulate.

There is nothing in the resolution of the county commissioners, hereinbefore set forth, which undertakes in any way to show that the county commissioners and the Jeruinjer home have agreed upon any terms and conditions for the care of the indigent sick and disabled. In fact, the sole purpose which, from the facts submitted to me, seems to be a laudable one, was to contribute, for the support and up-keep of said home, the sum of six hundred dollars ($600.00) per year, but as I view the situation the Jeruinjer home does not come within the provisions of section 2502, nor does the agreement attempted to be made by the county commissioners in any way come within the purview of section 3138-1. The sole object of the resolution seems to be to attempt to aid this private home from municipal funds, and that, I am of the opinion, the county commissioners are not authorized to do. Such being the case, I am of the opinion that the resolution, adopted by the county commissioners to aid the Jeruinjer home, hereinbefore in full set out, is void, and the county auditor would be unauthorized to pay the money over based upon said void resolution.

Respectfully,
EDWARD C. TURNER,
Attorney General.

488.

COUNTY BOARD OF EDUCATION—WITHOUT AUTHORITY TO PUBLISH A REPORT FOR SCHOOL YEAR.

The board of education of a county school district has no authority in law to publish a report of the schools of said district for the school year.

COLUMBUS, OHIO, June 11, 1915.

HON. CYRUS LOCHER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I have your letter of June 9, 1915, which is as follows:

> "We are in receipt of a communication from A. G. Yawberg, secretary of the county school board of this county in which he says:
>
> "'The county board of education wish to issue in a 9x12 pamphlet form, a printed report covering school conditions during the year. In this report they wish to show school conditions as they were found, school attendance, tax rate, amount of money spent for tuition and contingent purposes, amount of money received from the state, and a general statement regarding the progress of the schools in each district.'
>
> "He further states that prosecuting attorneys in different parts of the state have ruled that the county school boards have authority to make such a report, to be paid for out of the public funds, and he asks the opinion of this office upon that question.
>
> "Our examination of the statutes leads us to the conclusion that county boards of education have no such authority, inasmuch as there is neither express provision to that effect, nor any provision from which such authority can be clearly inferred. In addition, the fact that the legislature has specifically authorized the publication of courses of study (see section 4737, General Code, as amended February 5, 1914; 104 O. L., 133, at 140), would seem to require the inference that no other publication was intended to be authorized.
>
> "In view of this apparent difference of opinion, and of the general importance of the question throughout the state, we respectfully request your opinion upon the question.
>
> "We understand that if the publication of this report is to be of value, it must be done within the very near future, and we shall therefore especially appreciate it if you can give us an early reply."

Under the provision of section 4728, G. C., as amended in 104 O. L., 136, the supervision and control of each county school district is vested in a county board of education composed of five members. The county board of education fund under the control of this board is created from the following sources:

(1) Under the provision of section 4744-3, 104 O. L., 143.

> "The county auditor when making his semi-annual apportionment of the school funds to the various village and rural school districts shall retain the amounts necessary to pay such portion of the salaries of the county and district superintendents as may be certified by the county board. Such amount shall be placed in a separate fund to be known as the 'county board of education fund.' The county board of education shall certify under oath to the state auditor the amount due from the state as its share of the salaries of the county and district superintendents of such

county school district for the next six months. Upon receipt by the state auditor of such certificate, he shall draw his warrant upon the state treasurer in favor of the county treasurer for the required amount, which shall be placed by the county auditor in the county board of education fund."

(2) The surplus transferable from the dog tax fund under section 5653, G. C., 104 O. L., 145; said surplus to be transferred to the county board of education fund at the direction of the county commissioners.

(3) Under the provision of section 7820, G. C., 104 O. L., 104, all fees collected by the clerk of the board of county school examiners from applicants for examination, are paid into the county treasury and set apart by the county auditor to the credit of the county board of education fund.

Out of this fund expenditures are expressly authorized as follows:

Section 4734, G. C., 104 O. L., 137, provides that:

"Each member of the county board of education shall be paid his actual and necessary expenses incurred during his attendance upon any meeting of the board. Such expenses, and the expenses of the county superintendent, itemized and verified shall be paid from the county board of education fund upon vouchers signed by the president of the board."

Section 4744-1, G. C., 104 O. L., 142, provides that the salary of the county superintendent shall be fixed by the county board and shall be paid out of the county board of education fund, and further provides that said board may allow said superintendent a sum not to exceed $300.00 per annum for traveling expenses and clerical help.

Section 4743, G. C., 104 O. L., 142, provides that the compensation of the district superintendent shall be paid out of the county board of education fund on vouchers signed by the president of the county board.

Section 7860, G. C., 104 O. L., 156, provides that the expense of conducting the county teachers' institute shall be paid out of the county board of education fund.

Under the provision of section 4744-6, G. C., 104 O. L., 143, the county commissioners are authorized and required to provide and furnish offices in the county seat for the use of the county superintendent. This statute does not by its terms provide the fund out of which the expenditure of money for this purpose shall be made, but inasmuch as the county commissioners are required to incur this expense, the same should be paid out of the general expense fund of the county.

On careful examination of the statutes governing the powers and duties of the county board of education and limiting the expenditure of public funds by said board, I fail to find any provision either requiring or authorizing said board to publish the report referred to in your inquiry or to expend money for this purpose. Inasmuch as there is no duty on the part of said board to publish such report, there can be no implied authority in such board to incur the expense incident to such publication.

As suggested by you, the fact that the legislature has specifically authorized the publication of courses of study by the county board of education under the provision of section 4737, G. C., 104 O. L., 140, in a measure at least justifies the inference that their authority in this respect is limited to the express provision of the statute.

Replying to your question, I am of the opinion that the county board of education is without authority in law to publish the report referred to in your letter.

Respectfully,
EDWARD C. TURNER,
Attorney General.

489.

TOWNSHIP TRUSTEES—HAVE IMPLIED AUTHORITY TO CLOSE PUBLIC HIGHWAY WHILE REPAIRS ARE BEING MADE—MUST PROVIDE OTHER RIGHT-OF-WAYS—AFTER SEPTEMBER 4, 1915, COUNTY HIGHWAY SUPERINTENDENT HAS AUTHORITY TO CLOSE PUBLIC HIGHWAY.

In the present state of the law, township trustees have implied authority to close a public highway during the process of construction or repair carried on under their direction when such closing of the highway is necessary, provided they do not unreasonably interfere with the rights of persons desiring to use the highway. If there is no other convenient road available for the use of travelers, the trustees must provide a right-of-way for the use of persons desiring to travel on the highway to be closed. Section 170 of amended senate bill No. 125 which in the absence of a referendum will go into effect September 4, 1915, will confer express authority in this particular on the county highway superintendent.

COLUMBUS, OHIO, June 11, 1915.

HON. A. B. UNDERWOOD, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—I have your communication of June 2, 1915, which reads as follows:

> "I write to ask who, if any one, has the power to close a portion of an inter-county highway when same is being made into a stone road, under the authority of, and at the expense of township trustees.
>
> "I could find no express authority for this. I simply ask, therefore, whether or not in your opinion section 1226 could be so construed as to cover such a case."

Section 1226, G. C., to which you refer, provides for the closing of a highway whenever such action appears necessary to the state highway commissioner, provided the work is being done by the state highway department.

The first sentence of the section in question reads as follows:

> "If it shall appear necessary to the highway commissioner to close a highway or section thereof which is being constructed, improved or repaired under this act, in order to permit a proper completion of such work, he shall execute a certificate and file the same in the office of the county commissioners of the county in which such highway is situated."

By the use of the expression "under this act," the force of the authorization contained in this section is limited to improvements carried forward by the state

highway department. It is true that under section 1197, G. C., it is provided that nothing in the chapter relating to the state highway commissioner shall be construed as preventing or forbidding the local authorities from constructing, maintaining or repairing any part of the inter-county highways or main market roads, provided, however, that the plans and specifications shall first have been submitted to the highway commissioner and shall have received his approval. It is evident that the township trustees in the case cited by you are proceeding under the permission given by section 1197, G. C., but neither the act containing section 1226, G. C., nor any part of the law relating to the state highway department provides any machinery by which trustees may improve a road; and the trustees must, therefore, proceed under some one of the several schemes for road improve ment provided for elsewhere in the General Code. It is, therefore, apparent that section 1226, G. C., has no application to the facts stated by you.

I find no place in the General Code any express provision authorizing township trustees to close a highway or any portion thereof during the process of construction or repair carried on by them. It is my opinion, that even in the absence of such express authorization, township trustees possess a certain limited authority in this particular.

Public officers have not only the powers expressly conferred upon them by law, but they also possess by necessary implication such powers as are requisite to enable them to discharge the official duties devolved upon them. 23 Am. & Eng. Encyc. of Law, 2nd Ed. p. 364.

Public officials have such powers as are expressly granted to them and also such powers as are necessarily implied from the powers expressly given. State ex rel. v. Commissioners, 8 N. P. (n. s.) 281, 20 O. D., 679.

While it is true that express grants of power to public officers are ususally subjected to a strict interpretation, yet such grants are to be construed as conferring not only the powers expressly granted, but also such powers as are necessarily implied. (Mechem on public offices and officers, section 511.)

It is therefore my opinion that while no express statutory authority exists in township trustees to close a road while the same is being improved by them, yet the power expressly given them to improve roads carries with it by necessary implication the power to close a road when such power is necessary in the exercise of the powers expressly granted. In other words, township trustees have implied authority to close a public highway during the process of construction or repair carried on under their direction when such closing of the highway is necessary, provided they exercise this authority in such a manner as not to unreasonably interfere with the rights of persons desiring to use the highway. In case the trustees exercise the power to close a highway during construction or repair work, and there is no other convenient road available for the use of travelers, it would be the duty of the trustees to provide a right-of-way for the use of persons desiring to travel on the highway to be closed. From the fact that this power of township trustees is implied rather than expressed, it also follows that the action of the trustees in this particular will be subject to a strict construction, and the power should therefore be exercised only in clear cases and where it is manifestly necessary that the highway be closed in order to allow the proper execution of the work under construction.

The above opinion is based on the present state of the law and I deem it proper in this connection to call your attention to amended senate bill No. 125, passed by the general assembly May 17, 1915, approved by the governor June 2, and filed in the office of the secretary of state June 5th. Unless there should be a referendum on this law, it will go into effect on September 4, 1915. Section 170 of the act in question which has been numbered section 7213 of the General

Code, will, when it goes into effect, apply to the situation presented by you, and will confer express authority in this particular upon the county highway superintendent.

Respectfully,
EDWARD C. TURNER,
Attorney General.

490.

APPROVAL OF CERTAIN RESOLUTIONS FOR ROAD IMPROVEMENTS.

COLUMBUS, OHIO, June 11, 1915.

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

DEAR SIR:—I have your communications of June 9, 1915, transmitting to me for my examination final resolutions as to the following roads:

West Lafayette-New Philadelphia, Tuscarawas county, Pet. No. 1662, I. C. H. No. 408;
Ohio River road, Jefferson county, Pet. No. 1231, I. C. H., No. 7;
Springfield-Washington C. H., Fayette county, Pet. No. 972, I. C. H. No. 197;
Lima-Ottawa (hospital), Allen county, I. C. H., No. 129;
Columbus-Marysville, Franklin county, Pet. No. 934, I. C. H. No. 48;
Summit Station, Licking county, Pet. No. 116.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

491.

HOSPITALS FOR INSANE—INQUEST OF LUNACY—NON-RESIDENT OF STATE—COSTS NOT RECOVERABLE—RULES OF ADMISSION OF NON-RESIDENTS APPLICABLE GENERALLY TO HOSPITALS FOR INSANE APPLY TO LONGVIEW HOSPITAL.

Costs made in an inquest of lunacy of a non-resident of the state may not be recovered by the county in which the inquest is held, or by the board of administration, or by the state in its own name, from the county of the foreign state in which the insane person has a legal residence.

The rules as to the admission of non-residents applicable generally to hospitals for the insane apply also to Longview hospital.

COLUMBUS, OHIO, June 11, 1915.

HON. W. E. HASWELL, *Secretary Ohio Board of Administration, Columbus, Ohio.*

DEAR SIR:—With your letter of May 27th you enclose a letter from Hon. Wm. H. Lueders, probate judge of Hamilton county, to which is attached a bill

of costs made and paid by Hamilton county in the matter of one Verna Eads, an insane person, together with copy of a letter to the commonwealth attorney of Kenton county, Kentucky.

The question presented by the enclosures and submitted by you for my opinion is as to whether the costs made in an inquest of lunacy in the matter of a non-resident of Ohio can be recovered from the county of the foreign state of which the insane person is a legal resident.

I assume that the person referred to has been dealt with under the provisions of sections 1817 to 1820 of the General Code, amended in part in 103 O. L., 446.

These sections provide in effect that whenever application is made to a judge of the probate court for the commitment of a person to a hospital for the insane, the judge shall ascertain the legal residence of such person, and, if he finds that the person has not a legal residence in this state, and is of the opinion that the person should be committed or admitted to the institution, shall notify the Ohio board of administration, giving his reasons for requesting commitment.

Said sections further provide that the board of administration at any time upon investigation, either before or after the admission or commitment to an institution, may transport a person not having a legal residence in Ohio to his legal residence at the expense of this state.

Section 1950 of the General Code, as amended 103 O. L., 447, further enforces this policy by prohibiting the admission of any person who has not resided in the state one year next preceding the date of application, except by authority of the Ohio board of administration.

These provisions apply to Longview hospital (section 1947, G. C.).

The sections cited do not provide any different rule for the payment of costs made in inquests of lunacy, where the subject is a non-resident of the state or county, than obtains in a case where the subject is a resident. The costs in all cases are to be paid by the county. (Sections 1602, 1981, 1982 and 2031, of the General Code.)

Should it appear upon the hearing of an application for admission to any state hospital, including Longview hospital, that the subject of the inquest has not a legal residence in the county, but did have a legal residence elsewhere in the state, such finding would not have the effect of making the costs payable out of the treasury of the county in which the person had a legal residence, nor of giving to the county where the inquest was held, when such county has paid the costs, a claim against such other county for reimbursement. In other words, the expense of holding an inquest of lunacy is a county expense, regardless of the legal residence of the subject of the inquest and regardless of the outcome of the inquest itself.

This being the case, it follows that neither the state of Ohio nor Hamilton county has any claim against Kenton county, Kentucky, which is the county in which the person in whose case the costs in question were made legally resides.

Respectfully,

EDWARD C. TURNER,

Attorney General.

492.

GOVERNOR—EFFECT OF VETO OF CERTAIN ITEMS OF AN APPROPRIATION BILL.

The inclusion by the governor in a message vetoing certain items of an appropriation bill of the general introductory language of one of the sections of that bill will be deemed to have been made solely for the purpose of identifying the succeeding items therein mentioned. Such inclusion has no effect whatever upon the status of such general language.

COLUMBUS, OHIO, June 11, 1915.

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

DEAR SIR:—Your letter of June 9th is as follows:

> "In the veto of the governor to the general appropriation act of the general assembly we find the following item:
>
> "'Section 3. The moneys herein appropriated shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1916, or incurred subsequent to June 30, 1917.'
>
> "As we are now setting up the appropriations in our books, and are uncertain as to the meaning of this item of veto, will you kindly render us an opinion as to its meaning and what operation it has?"

I have before me a copy of the message of the governor disapproving certain items in house bill No. 701, and quote therefrom enough thereof to show how your question arises:

> "TO THE GENERAL ASSEMBLY:
>
> "* * * * * *
>
> "The items disapproved are as follows:
>
> "*Exceptions*
>
> "1. * * * * * *
>
> "8. OHIO STATE UNIVERSITY.
>
> "G—Additions and Betterments—
>
> "G—1 Lands—
>
> "75 acres Hess tract, Clinton township.....$55,000.00
>
> "12 acres (more or less).....5,000.00
>
> "Section 3. The moneys herein appropriated shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1916, or incurred subsequent to June 30, 1917.
>
> "9. OHIO BOARD OF ADMINISTRATION
>
> "Columbus State Hospital—
>
> "Two cottages to complete, $70,000.00; to be reduced to one cottage to complete $35,000.00
>
> "* * * * * *
>
> "Excepting the foregoing items hereby disapproved, house bill No. 701 is filed herewith in the office of the secretary of state with my approval."

As you know, the detailed items of appropriation in house bill No. 701 are provided for in two sections of the bill. Section 2 provides that

"The moneys herein appropriated shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1915, or incurred subsequent to June 30, 1917."

Then follow the items appropriated, subject to the general provisions of this introductory clause.

Section 3, the introductory clause of which has been quoted, is of similar purport, except as to the dates mentioned therein.

It is clear to me that the only reason for the mention or inclusion in the veto message of the general provisions of section 3 was to show that the items mentioned in the message following section 3 were items in section 3, and not items in section 2, and so as to show further that the items preceding section 3 were items appropriated in section 2 of house bill No. 701.

I may add that the authority of the governor under the constitution is limited to disapproval of items of an appropriation bill. He may not veto sections, or parts of sections, as such. This being the case, his message would not be, of course, susceptible to such an interpretation as would make it appear that he had attempted to exceed his authority, when any other reasonable interpretation could be given to it.

I therefore advise that the inclusion of the general language of section 3 in the governor's veto message, in the manner above referred to, is immaterial and without any effect whatsoever, save as showing that the items grouped in the message under the numbers "9" to "14," inclusive, are items found in section 3 of house bill No. 701. It seems to me that the governor has chosen the most convenient and certain method of designating the items disapproved by him by quoting the general clause of section 3.

Respectfully,
EDWARD C. TURNER,
Attorney General.

493.

APPROVAL OF CERTAIN RESOLUTIONS FOR ROAD IMPROVEMENT —RICHLAND AND ERIE COUNTIES.

COLUMBUS, OHIO, June 12, 1915.

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

DEAR SIR:—I have your communication of June 10, 1915, transmitting to me for examination final resolutions as to the following roads:

Mansfield-Galion, Sec. "L," Richland county, petition No. 1138, I. C. H. No. 202;

Cleveland-Sandusky, Erie county, petition No. 1125, I. C. H. No. 3.

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

In approving the resolution as to the Mansfield-Galion road, I am not to be taken as in any way passing upon the regularity or legality of a certain resolution of the board of trustees of Madison township, Richland county, attached to the resolution adopted by the commissioners of Richland county, my approval extending only to the resolution adopted by the commissioners.

Respectfully,
EDWARD C. TURNER,
Attorney General.

494.

BOATS AND WATERCRAFTS UPON OHIO RIVER BORDERING STATE OF OHIO—MUST PAY LICENSES—AMENABLE TO SECTION 6324, G. C.

The provisions of section 6324, G. C., are applicable to boats and watercrafts upon the waters of the Ohio river bordering the state of Ohio.

COLUMBUS, OHIO, June 12, 1915.

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

GENTLEMEN:—I have yours under date of June 9, 1915, as follows:

> "We would respectfully request your written opinion upon the following question:
>
> "Do the provisions of section 6324, General Code, apply to boats or watercrafts on the Ohio river?
>
> "The reason we ask this question is that we are informed that police officers in the city of Cincinnati are arresting persons living in house boats on the Ohio river for failure to disclose licenses as provided by this section, and the probate judge of Hamilton county has requested our examiner to secure your written opinion upon this matter."

Section 6324, G. C., to which you refer, provides as follows:

> "A person shall not live in or occupy a boat or watercraft as a place of residence or abode, or for the purpose of engaging in business, trade or traffic on a navigable water or its tributaries within the jurisdiction of this state until there has been granted to such person, by the probate court of the county in which such boat or watercraft shall lie or ply, a license to so live in or occupy such boat or watercraft."

Your question then resolves itself into whether or not a boat or watercraft upon the Ohio river opposite the state of Ohio, is within the jurisdiction of this state within the terms of the statute above quoted.

While this is not a criminal statute, it is clearly a police regulation. Section 3620, G. C., is a statute of similar character, which requires that the owner or keeper of a wharf boat on the Ohio river shall keep it open at all hours for the accommodation of the traveling public and for receiving and discharging freight.

Section 5947, G. C., prohibits the keeping of a ferry across a stream bounding on a county in this state without having obtained a license therefor. Thus the legislative policy of the state to assert jurisdiction over that part of the Ohio river flowing along the border of the state is made manifest. Such jurisdiction is sustained in the case of State v. Savors, 15 C. C. (n. s.) 65, in which it is held that the state of Ohio has jurisdiction over criminal offenses committed upon the Ohio river opposite the boundary of the state of Ohio. Also in the case of State v. Kendle, 8 N. P. (n. s.) 109. These were cases of prosecution for the selling of intoxicating liquors upon the Ohio river opposite "dry territory" in Ohio. That is to say, violations of the criminal statutes of the state of Ohio, committed beyond or without the low water mark of the Ohio river, bordering this state on the western or northwestern side thereof.

The civil jurisdiction of this state over the Ohio river along its borders is as fully sustained by both reason and authority as is the criminal jurisdiction.

The decision of the court in the case of State v. Savors, supra, was based largely upon that of Wedding v. Meyler, 192 U. S., 580; 48 L. Ed., 570, in the opinion of which case Holmes, J., says:

> "In 1789 the state of Virginia passed a statute known as the Virginia compact. This statute proposed the erection of the district of Kentucky into an independent state upon certain conditions. One of these was: Sec. 11. 'Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth, lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this commonwealth and of the proposed state on the river as aforesaid shall be concurrent only with the states which may possess the opposite shores of the said river.' 13 Hening, St. at L. 17. (The previous cession by Virginia of its rights in the territory northwest of the Ohio had been on condition that the territory so ceded should be laid out and formed into states. Act of December 20, 1783, 11 Hening, Stat. at L. 326). The act of congress of February 4, 1791, Chap. 4 (1 Stat. at L. 189) consents and enacts that the 'district of Kentucky, within the jurisdiction of the said commonwealth' of Virginia, shall be formed into a new state, and admitted into the Union. As a preliminary it recites the consent of the Virginia legislature by the above act of 1789.
>
> "Under article 4, section 3, of the constitution, a new state could not be formed in this way within the jurisdiction of Virginia, within which Kentucky was recognized as being by the words last quoted, without the consent of the legislature of Virginia as well as of congress. The need of such consent also was recognized by the recital in the act of congress. But as the consent given by Virginia was conditioned upon the jurisdiction of Kentucky on the Ohio river being concurrent only with the states to be formed on the other side, congress necessarily assented to and adopted this condition when it assented to the act in which it was contained. Green v. Biddle, 8 Wheat. 1, 87, 5 L. ed. 547, 569. Thus, after the passage of the two acts, it stood absolutely enacted by the powers which between them had absolute sovereignty over all the territory concerned, that when states should be formed on the opposite shores of the river they should have concurrent jurisdiction on the river with Kentucky. 'This compact, by the sanction of congress, has become a law of the Union. What further legislation can be desired for judicial action?' Pennsylvania v. Wheeling & B. Bridge Co., 13 How. 518, 566, 14 L. ed. 249, 269."

Thus it is clearly settled that the state of Ohio has both civil and criminal jurisdiction over the waters of the Ohio river beyond the territorial limits of the state of Ohio, technically speaking, to wit, the western or northwestern low water mark of said river. Jurisdiction in this sense is unqualified and such jurisdiction is defined by Chief Justice Robertson in Arnold v. Shields, 5 Dana, 18; 30 Am. Dec. 669, 673, as follows:

> "Jurisdiction, unqualified, being, as it is, the sovereign authority to make, decide on, and execute laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judicial and executive—as that possessed by Kentucky over so much of the Ohio river as flows between them."

It will be observed from the decision in the case of Wedding v. Meyler, supra,

that Ohio stands in the same light in respect to jurisdiction over the Ohio river as does Indiana, and that by virtue of the Virginia compact, Ohio has full jurisdiction and authority to administer its law below low water mark on the Ohio river.

I am therefore of opinion, in answer to your question, that the provisions of section 6324, G. C., referred to, are applicable to boats and watercrafts on the Ohio river bordering on the state of Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.

495.

COUNTY BOARD OF EDUCATION—NO AUTHORITY TO CREATE NEW SCHOOL DISTRICT WITHIN SUCH COUNTY DISTRICT FROM ONE OR MORE EXISTING DISTRICTS OR PARTS—CONSTRUCTION OF SECTION 4736, G. C., 104 O. L., 138.

The board of education of a county school district has no authority under the provisions of section 4736, G. C., as amended, 104 O. L., 138, or under any other statute now in force, to create a new school district within such county district from one or more existing districts or parts thereof.

COLUMBUS, OHIO, June 12, 1915.

HON. HAROLD W. HOUSTON, *Prosecuting Attorney, Urbana, Ohio.*

DEAR SIR:—I have your letter of June 2, 1915, which is as follows:

"I desire the opinion of your department on the following questions:

"1. Did a county board of education, during the month of May, 1915, have the authority, under section 4736, G. C., or any other law, to create a rural school district?

"2. If your answer to the above question is in the affirmative, would members of the board of education who, by the creation of a new district, would become non-residents of the original district, from which the new district was created, thereby lose their membership in such original board of education?

"These questions are, I believe, cleared up in the new school law, but, as indicated above, this situation developed under the law as it stood prior to the enactment of the present law, which will soon go into effect."

Section 4736, G. C., as amended in 104 O. L., 138, provides in part as follows:

"Sec. 4736. The county board of education shall as soon as possible after organizing make a survey of its district. The board shall arrange the schools according to topography and population in order that they may be most easily accessible to pupils. To this end the county board shall have power by resolution at any regular or special meeting to change school district lines and transfer territory from one rural or village school district to another. A map designating such changes shall be entered on the records of the board and a copy of the resolution and map shall be filed with the county auditor. In changing boundary lines the board may proceed without

regard to township lines and shall provide that adjoining rural districts are as nearly equal as possible in property valuation. In no case shall any rural district be created containing less than frfteen square miles."

This section has been amended by amended senate bill No. 282, as passed by the general assembly, approved by the governor and filed in the office of the scretary of state May 27, 1915, so as to read as follows:

"Sec. 4736. The county board of education shall arrange the school districts according to topography and population in order that the schools may be most easily accessible to pupils and shall file with the board or boards of education in the territory affected, a written notice of such proposed arrangement; which said arrangement shall be carried into effect as proposed, unless, within thirty days after the filing of such notice with the board or boards of education, a majority of the qualified electors of the territory affected by such order of the county board, file a written remonstrance with the county board against the arrangement of school districts so proposed. The county board of education is hereby authorized to create a school district from one or more school districts or parts thereof. The county board of education is authorized to appoint a board of education for such newly created school district and direct an equitable division of the funds or indebtedness belonging to the newly created district. Members of the boards of education of the newly created district shall thereafter be elected at the same time and in the same manner as the boards of education of the village and rural districts."

Section 4736, G. C., has been supplemented by sections 1 and 2 of amended senate bill No. 267, passed by the general assembly May 27th, approved by the governor June 4th and filed in the office of the secretary of state June 5, 1915. These sections provide as follows:

"Section 1. In rural school districts hereafter created by a county board of education, a board of education shall be elected as provided in section 4712 of the General Code. When rural school districts hereafter so created, or which have been heretofore so created, fail or have failed to elect a board of education as provided in said section 4712, or whenever there exists such school district which for any reason or cause is not provided with a board of education, the commissioners of the county to which such district belongs shall appoint such board of education, and the members so appointed shall serve until their successors are elected and qualified. The successors of the members so appointed shall be elected at the first election for members of the board of education held in such district after such appointment, two members to serve for two years and three members for four years. And thereafter their successors shall be elected in the manner and for the term as provided by section 4712 of the General Code. The board so appointed by the commissioners of the county shall organize on the second Monday after their appointment.

"Section 2. All appointments of a board of education for such rural school district heretofore made by the commissioners of the county to which such rural school district belongs shall be held to be legal, valid and binding upon such rural school district, and to give such appointed boards the same authority as have other rural school district boards. All proceedings, otherwise legal under the laws applicable to rural school boards, heretofore or hereafter had by such boards so appointed shall be

held legal, valid and binding upon such school districts. The bonds heretofore, or hereafter, issued and sold by any such rural school district having a board of education heretofore, or hereafter, appointed by the commissioners of the county to which such district belongs, shall not be declared to be invalid by reason of any want of authority of such board of education of such district to provide for the issuing and sale of such bonds, but, if regularly issued for a lawful purpose and sold for not less than par and accrued interest such bonds shall be held to be legal, valid and binding obligations of such district issuing the same."

It will be observed that the legislature, in amending section 4736, G. C., by amended senate bill No. 282, and in supplementing said section by amended senate bill No. 267, clearly authorizes the county board of education to create a new school district from one or more existing school districts or parts thereof, and makes ample provision for the appointment of members of the board of education for such new school district until such time as the members of said board may be regularly elected, so that, after said bills become effective, the authority of the county board of education in this respect will not be questioned.

However, amended senate bill No. 282 will not become effective until August 26, 1915, and amended senate bill No. 267 will not become effective until September 4, 1915.

The answer to your first question must be determined by reference to the provisions of the statutes as now in force, the authority of the county board of education to change school district lines and to transfer territory being limited to the above provisions of section 4736, G. C., as amended in 104 O. L., 138.

It will be observed that under the provisions of the said statute the county board of education has power "to change school district lines and transfer territory from one rural or village school district to another." This does not mean that a county board of education, in transferring territory from one district to another, can dissolve an existing rural or village school district. The power to dissolve a rural district and join it to a contiguous rural or village school district is governed by the provisions of sections 4735-1 and 4735-2 of the General Code, as amended in 104 O. L., 138.

The procedure governing the dissolution of a village school district containing a population of less than fifteen hundred is governed by the provisions of section 4682-1 of the General Code, as found in 104, O. L., 133.

On the other hand, I do not understand that the county board, under the provisions of section 4736, G. C., as now in force, can, by transferring territory, create a new district from one or more existing school districts or parts thereof.

The power of the county board of education under this statute must be strictly construed and is limited to transferring territory "from one rural or village school district to another." The provision: "In no case shall a rural district be created containing less than fifteen square miles," is not a grant of power to the county board to form new school districts from existing districts or parts thereof. On the contrary, I am of the opinion that said provision is a limitation on said board to the extent that in changing district lines and transferring territory from one district to another, no school district shall, as a result of such action, contain less than fifteen square miles.

Under section 4736, G. C., as now in force, no provision is made for the appointment or election of members of the board of education for a new school district, while, as before stated, said section as amended by amended senate bill No. 282 and supplemented by amended senate bill No. 267, expressly provides for

such appointment and election. This strengthens the contention that the legislature, in amending said section in 104 O. L., 138, did not vest the county board of education with power to create a *new* school district.

Replying to your first question: I am of the opinion that the board of education of the county school district has no authority under the provisions of section 4736, as amended in 104 O. L., 138, or under any other statute now in force, to create a new school district within such county district from one or more existing districts or parts thereof.

This answer to your first question disposes of your second question.

Respectfully,
EDWARD C. TURNER,
Attorney General.

496.

POLICE AND FIRE DEPARTMENTS OF A CITY—REMOVAL OR RETIREMENT FROM OFFICE—FAILURE TO APPEAL TO CIVIL SERVICE COMMISSION WITHIN THE TIME REQUIRED BY STATUTE CONSTITUTES FORFEITURE OF OFFICE.

A member of the police or fire department of a city who, upon removal or retirement, fails to appeal to the civil service commission of the city within ten days thereafter, as provided by section 4505, *G. C., forfeits any right he may have had to reinstatement in his former position by action of the civil service commission.*

COLUMBUS, OHIO, June 12, 1915.

State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I am in receipt of a request for an opinion involving an interpretation of the state civil service law from the city solicitor of Toledo. The question is one of general interest to all municipalities of the state, and I take the liberty therefore of directing to the commission an answer to the solicitor's question.

The city solicitor encloses correspondence disclosing the following situation:

A member of the fire department of the city of Toledo was, without his application or consent, retired on pension under a rule of the trustees of the firemen's pension fund adopted shortly prior to his retirement, and by the action of the director of public safety.

He did not appeal within ten days thereafter to the civil service commission, as provided by section 4505, General Code, but after repeatedly requesting and demanding of the director of public safety that he be permitted to perform the duties of his former position, he applied to the civil service commission about six months after his retirement for reinstatement, on the ground that he was illegally removed from the service of the city.

> "May the civil service commission act in the premises, or is the failure of the applicant to appeal within ten days sufficient of itself to deprive it of authority so to act?

Section 4505, General Code, provides as follows:

> "Sec. 4505. Any person in the police or fire department who is sus-

pended, reduced in rank or dismissed from the department by the director of public safety may appeal from the decision of such officer to the civil service commission within ten days from and after the date of such suspension, reduction or dismissal, in which event said director shall, upon notice from the commission of such appeal, forthwith transmit to the commission a copy of the charges and proceedings thereunder, and the commission shall hear such appeal within ten days from and after the filing of the same with it, and may affirm, disaffirm or modify the judgment of the director of public safety, and its judgment in the matter shall be final. The commission, in all hearings or appeals before it, shall have the same powers to administer oaths and to secure the attendance of witnesses and the production of books and papers as are conferred in this chapter upon the mayor."

This section was not replaced when the state civil service law was passed (103 O. L., 698), although it was mentioned in the title of the act.

My predecessor advised the commission to this effect in December, 1913 (annual report of the attorney general for that year, page 742; pamphlet "opinions of the attorney general of Ohio with reference to the civil service law of Ohio," page 37); and on May 23, 1914, my predecessor advised further that there was nothing inconsistent between the general provisions of the civil service law and section 4505 of the General Code; so that the latter is not to be regarded as having been repealed by implication when the former was enacted.

In these opinions I concur, particularly in view of the fact that section 4505 of the General Code is mentioned in section 31 of the civil service act (section 486-31, General Code); so that the legislature's failure to repeal it in the repealing clause cannot be regarded as accidental; and so that further the intention of the legislature, as gathered from the whole civil service law of 1913, was evidently that section 4505, G. C., should continue to be substantially, as well as technically, in effect as against any claim that might be asserted respecting its conflict with any provision of the civil service act.

This section of the General Code gives to persons in the police or fire department a higher degree of protection than that which is accorded by the general provisions of the civil service act to persons in other departments of the classified service of a city. The latter may be dismissed at any time for sufficient cause without the protection of an appeal to the civil service commission (section 486-17, G. C., 103 O. L., 707), and I am unable to find in the civil service act any express or implied authority on the part of a municipal civil service commission to compel the reinstatement of a person in the classified service who has been discharged or removed.

However, the effect of the general provisions of the civil service act in the specific case which has been submitted to me is neither material on the one hand, nor are sufficient facts on which to base a statement as to whether such general provisions (should they be deemed to apply) have been complied with furnished, as it does not appear whether or not the director of public safety has furnished to the member of the fire department who was removed "his reasons for the same" and otherwise complied with section 486-17, G. C., above cited.

I am clearly of the opinion, however, that a member of the police or fire department, entitled as he is to the benefits of section 4505 of the General Code, must accept also the burdens thereof; and if he fails to avail himself of the privilege therein given to him of appealing to the civil service commission, (which in the event of such appeal and upon being satisfied that his removal was not legal, could have ordered his reinstatement) he forfeits all right to such reinstatement;

and that the civil service commission of a city, not having been appealed to, as provided in section 4505, G. C., is without authority to order his reinstatement as such.

If the local civil service commission is of the opinion that the power of removal has been abused, or that the provisions of the civil service act have been violated (which I am unable to determine as a matter of law), the commission may make an investigation and a report thereof to the mayor, who, if the case warrants, may take such action as he is authorized to take under section 496-22 of the General Code (103 O. L., 710. This, however, is as far, in my opinion, as the local civil service commission is authorized to go under any circumstances in the particular case which I have considered.

Respectfully,
EDWARD C. TURNER,
Attorney General.

497.

AGRICULTURAL SCHOOL AT NEW LYME, OHIO—BOARD OF TRUSTEES OF OHIO STATE UNIVERSITY—DUTY AS PROVIDED IN HOUSE BILL NO. 413 NOT MANDATORY.

House bill No. 413, providing for the establishment of an agricultural school at New Lyme, Ohio, Ashtabula county, and authorizing the board of trustees of Ohio State University to conduct the same and to receive and control certain property, does not impose upon the trustees of the Ohio State University the mandatory duty of taking possession of the property or operating and conducting the school; so that in the absence of any appropriation available to such trustees for such purpose, and if the funds of the existing institution proposed to be taken over by the state are not sufficient to enable the trustees to conduct said school, they may and should decline to accept the property thereof and otherwise to act under said bill.

COLUMBUS, OHIO, June 12, 1915.

HON. W. O. THOMPSON, *President Ohio State University, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of June 8th, requesting my advice upon the following question:

On May 14, 1915, the general assembly passed house bill No. 413, which was approved by the governor on May 26, 1915, and by him filed in the office of the secretary of state on May 27, 1915. The law thus enacted is in full as follows:

"AN ACT.

"To create and establish a state agricultural school at New Lyme, Ashtabula county, Ohio, and to authorize the board of trustees of the Ohio State University to receive and control certain property for the use and benefit of said school.

"Be it enacted by the general assembly of the state of Ohio:

"Section 1. There is hereby created and established a state agricultural school to be located at New Lyme, in the county of Ashtabula, to be connected with the Ohio State University, and under the supervision and control of the board of trustees of said university.

"Section 2. Said board of trustees may receive and hold in trust for the special use and benefit of said state agricultural school, any grant, gift, or bequest of land or personal property, and also the lands, moneys, notes, mortgages and other personal property now held in trust for educational purposes by the board of trustees of New Lyme Institute located at New Lyme in the county of Ashtabula.

"Section 3. The board of trustees of the Ohio State University, in connection with the faculty thereof, shall provide for teaching in said school during a period of at least eight months in each year, such branches of learning as are related to agriculture, the mechanic arts, home economics and such other scientific and classic studies as will prepare students for efficient citizenship, for vocational and industrial pursuits, and for admission to colleges and universities."

In the so-called "sundry appropriation bill," the general assembly made specific appropriations for the equipment of the school thus provided for and for teaching therein. The governor vetoed these appropriations.

"Is it the mandatory duty of the trustees of the university to act under house bill No. 413, or may they decline to take over the property of the school and operate it as provided in that act?"

The fact that the general assembly made specific appropriations for the equipment of and teaching in the proposed New Lyme agricultural school, together with the fact that the appropriations in house bill No. 701 (the general appropriation bill) are made for the Ohio State University, as such, establish the conclusion, in my mind, that the general appropriations for the university are not available for the purposes for which the vetoed appropriations would have been available. That is to say, although the board of trustees, in connection with the faculty of the Ohio State University, are to maintain and operate the New Lyme agricultural school under house bill No. 413, yet as an institution it is separate and apart from the Ohio State University, and an appropriation for the uses and purposes of the Ohio State University is not available for expenditure in connection with the New Lyme state agricultural school.

It is to be observed in this connection that a separate appropriation is made by the general appropriation bill for agricultural extension, which is a work carried on under the supervision of the trustees of the Ohio State University by members of the faculty thereof.

These facts, in connection with the fact that separate appropriations were actually made for the New Lyme school, produce the conclusion which I have expressed.

It appears on the face of house bill No. 413 that what is at present "New Lyme Institute" is an educational trust. Its property and endowments are private property devoted to a public use. The legislature does not possess the power to deprive the present trustees of their property without their consent. The act, therefore, cannot go into operation unless the trustees of New Lyme Institute are willing to transfer to the board of trustees of the Ohio State University the lands, moneys, notes, mortgages and other personal property held by them in trust for educational purposes.

Moreover, if the trustees, being without funds of the state for the maintenance of the school, are unable to operate it by the use of the income from its endowments and tuitions, etc., the taking over by the trustees of the university of the property and assets of the institute would result in a breach of trust.

Indeed some question exists as to whether or not section 24 of the General

Code would apply to the trustees in conducting the school of New Lyme and require that all income, except so much of the tuitions as might be necessary to make refunds incident to conducting the school, be paid as received weekly into the state treasury.

There is also some question as to whether or not endowment funds which the trustees are authorized to receive would not have to be paid into the state treasury and become a part of the irreducible debt of the state; although without exhaustive examination of these two questions, I am inclined to think that both of them would be answered in the negative.

It is my opinion, however, that the effect of house bill No. 413 is to create and establish the state school when, and only when, the trustees of New Lyme Institute are willing to transfer the property now held by them in trust for educational purposes to the trustees of the university; and I am further of the opinion that even if the trustees of New Lyme Institute should profess to be willing to transfer the property to the trustees of the university, the latter would not be obliged to accept the same until satisfied that they are in a position to carry out the terms of the trust. So that if the fact that there is no appropriation available for the equipment and conducting of this school would disable the trustees of the university from conducting the school, they should, in my opinion, refuse to accept the property.

The foregoing comments relate to the acceptance by the trustees of the Ohio State University of the property now held in trust by the trustees of New Lyme Institute. Of course, the duty to maintain the school and to provide for the teaching of the branches specified in section 3 of the act therein is contingent upon the acceptance of the property, and contingent further upon the making of an appropriation, if such appropriation is necessary.

Though a statute may command a state officer, in mandatory terms, to perform an act involving the expenditure of public money, he cannot be compelled to perform it if the necessary funds are not provided by appropriation.

Respectfully,
EDWARD C. TURNER,
Attorney General.

498.

FEDERAL RESERVE BANKS—SHARES OF STOCK NOT SUBJECT TO STATE OR LOCAL TAXATION.

Shares of stock in federal reserve banks are not subject to state or local taxation.

COLUMBUS, OHIO, June 14, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—A question has been raised as to the taxability of shares of stock in federal reserve banks, and, in compliance with the request of Mr. McGiffert, I am addressing an opinion to the commission respecting the same.

The act of congress approved December 23, 1913, provides, in section 2 thereof, for the organization in certain federal reserve cities, to be designated, of "federal reserve banks." Within thirty days after notice from the organization committee, every national banking association within each district is required to subscribe to the capital stock of such federal reserve bank, and, under certain conditions,

individuals, partnerships and corporations, other than national banks, may subscribe to such capital stock, without, however, acquiring by the issuance of such stock any voting power.

Without alluding further to the provisions of the federal reserve act, I may observe that the foregoing features thereof make it apparent that federal reserve banks are in no sense "national banking associations," within the meaning of the section of the Revised Statutes of the United States permitting the states to tax shares of stock of such national banking associations. (Section 5219 of the Revised Statutes of the United States.)

This of itself would produce the result that all the property belonging to a federal reserve bank, and any interests therein, would be exempt from taxation by or under authority of any state.

McCulloch v. Maryland, 4 Wheat., 316.
Osborn v. United States Bank, 9 Wheat., 738.

However, section 7 of the federal act contains specific provision respecting the subject of taxation of federal reserve banks and the interest therein by the states, as follows:

> "Federal reserve banks, including the capital stock and surplus therein, and the income derived therefrom, shall be exempt from federal, state and local taxation, except taxes on real estate."

It is, therefore, my advice to the commission that shares of stock in a federal reserve bank, whether owned by member banks or by any individual firm or partnership, are exempt from state and local taxation, and that the only property belonging to or pertaining to federal reserve banks which is subject to state and local taxation is the real estate thereof.

Respectfully,
EDWARD C. TURNER,
Attorney General.

499.

STATE DENTAL BOARD—TERMS OF PRESENT MEMBERS NOT AFFECTED BY RECENT AMENDMENT TO DENTAL LAWS—AMENDED SENATE BILL NO. 84.

Neither the terms of the present members of the state dental board nor the incumbents at the time amended senate bill No. 84 becomes effective, will be affected by reason of the amendment of section 1314, *G. C.*

COLUMBUS, OHIO, June 14, 1915.

The Ohio State Dental Board, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of yours under date of May 22, 1915, in reference to amended senate bill No. 84, passed May 7, 1915, in which you request an opinion upon the following questions:

> "*First.* Will section 1314 of the new law depose the whole board, or the three members of the old board not appointed by the present governor?

"*Second.* Will the recently confirmed members have to be reappointed and sworn in again, or will this only apply to the three members of the old board not appointed by the present governor, or does it affect the board at all?"

Section 1314, G. C., as amended by amended senate bill No. 84, passed May 7, 1915, and approved by the governor May 17, 1915, and filed in the office of the secretary of state on May 19, 1915, provides as follows:

"*Section* 1314. The governor, with the advice and consent of the senate, shall appoint a state dental board consisting of five persons each of whom shall be a graduate of a reputable dental college and shall have been in the legal and reputable practice of dentistry in the state at least five years next preceding his appointment. One member shall be appointed each year as the respective terms of the present incumbents expire, and shall serve for the term of five years and until his successor is appointed and qualified. No person so appointed shall be an officer of a dental college or a member of the faculty thereof, or serve to exceed two terms."

It will first be observed that amended senate bill No. 84 is not an emergency law as defined in section 1d of article II of the constitution, and is therefore subject to the provisions of section 1c, article II of the constitution, and by reason thereof will not go into effect until ninety days after it was filed by the governor in the office of the secretary of state.

Since amended senate bill No. 84 does not take effect until the expiration of ninety days or until approved by the majority of those voting on the same if a referendum is had thereon, the repealing clause thereof is accordingly postponed and the original section will continue to be operative until that time.

McArthur v. Franklin, 16 O. S., 193.

A comparison of the amended section with original section 1314 will disclose that the only change in phraseology made by the amendment is the insertion of the phrase *"shall be a graduate of a reputable dental college and"* after *"whom,"* and the words *"and reputable"* after *"legal"* in the first sentence of the original section, and the phrase *"as the respective terms of* the present incumbents expire," after the word "year" in the second sentence of said amended section.

In 36 Cyc. 1084, it is said:

"The repeal and simultaneous re-enactment of substantially the same statutory provisions is to be construed not as an implied repeal of the original statute, but as a continuation thereof."

From this it would appear that any change in meaning of amended section 1314, G. C., must be derived from the variation of its phraseology, from the difference in its terms, and unless some substantially different provision governing the appointment of the members of the state dental board is found, the provisions of the original section relative thereto will be deemed to continue. It would not be seriously contended that either of the first two changes in terminology found in the amended section, would affect the appointments of members of the board appointed and qualified prior to the taking effect thereof.

The third and last change noted is the provision that one member shall be appointed each year, *"as the respective terms of the present incumbents expire."*

It is believed that this language clears away any ambiguity that might have

otherwise arisen from the substantial re-enactment of original section 1314, G. C. To my mind the manifest purpose of this phrase was to make it clear that the appointments referred to in the amended section were to be made only at the expiration of the terms of the "present incumbents." When this law becomes effective, it will speak from the date of its going into effect and the phrase "present incumbents" will mean those persons who are duly appointed, qualified and acting members of the board of that date.

I am, therefore, of opinion, in answer to your inquiries collectively, that if amended senate bill No. 84 goes into effect, neither the terms of the present members nor the terms of the then incumbents will be affected by reason of the amendment of section 1314, G. C., therein enacted.

Respectfully,
EDWARD C. TURNER,
Attorney General.

500.

MEMBERS OF COUNCIL—ENTITLED TO COMPENSATION FOR SPECIAL MEETINGS AND ADJOURNED MEETINGS WHEN HELD ON DIFFERENT DAYS.

Members of council are entitled to compensation for special meetings when held on different days.

COLUMBUS, OHIO, June 14, 1915.

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

DEAR SIRS:—On June 3, 1915, you requested my opinion upon the following question:

> "Are members of village councils entitled to receive two dollars for attending an adjourned session of a regular or special meeting of council? The question is, whether the word 'meeting' in section 4219, General Code, permits a charge for regular and special meetings only, or does it include adjourned sessions of such meetings?"

Section 4219 of the General Code fixes the compensation of members of a village council as follows:

> "* * * Members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year."

There is nothing in the above provision to indicate whether the legislature intended any particular kind of meeting as the one for which a member of council should receive compensation. There are, of course, regular meetings, special meetings and what are termed adjourned meetings; that is to say, meetings which are held upon adjournment to a fixed day from a former meeting, either special or general.

In view of the fact that the legislature did not indicate any particular kind of meeting, and the fact that the total sum to be received during any one year

is limited, I am of the opinion that the word "meeting," as used in the General Code, permits a charge not only for regular and special meetings, but would also include adjourned meetings, on different days.

Respectfully,
EDWARD C. TURNER,
Attorney General.

501.

APPROVAL OF PETITION FOR REFERENDUM OF AMENDED SENATE BILL NO. 72—WEIGHING OF COAL AT THE MINES.

COLUMBUS, OHIO, June 14, 1915.

HON. GEORGE B. OKEY, *Columbus, Ohio.*

DEAR SIR:—You have submitted to me for my certificate a petition for referendum, the synopsis of which reads as follows:

> "The act, known as amended senate bill No. 72 (the Gallagher act), was passed May 15, 1915, approved May 26, 1915, and amends sections 978-1, 978-2, 978-3 and 978-6 of the General Code of Ohio, relating to the weighing of coal at the mines."

I hereby certify that the foregoing synopsis is a truthful statement regarding the above entitled law.

Respectfully,
EDWARD C. TURNER,
Attorney General.

502.

MAYOR—NO JURISDICTION AGAINST MINOR—MUST TRANSFER CASE TO JUVENILE COURT—FEES FOLLOW CASE—HOW PAID.

A mayor has no jurisdiction to dispose of a case against a minor under eighteen years of age other than to transfer the case to the juvenile judge. Fees and costs originally made, are to follow the case for allowance and payment under section 1682, *G. C.*

COLUMBUS, OHIO, June 14, 1915.

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

GENTLEMEN:—This office is in receipt of a request for an opinion from Mr. Fred S. Scott, city solicitor of Nelsonville, which request is made by him at the instance of Nathan Hill, mayor of the city of Nelsonville, and is as follows:

> "Have the police officers of our city authority to make arrests and bring before me as such mayor, minors under the age of eighteen years for

the violation of laws of the state of Ohio and city ordinances, and have I, as such mayor, authority under section 1659, of the General Code of Ohio, to certify such minor defendants to and before the probate judge, acting in the capacity of juvenile judge of Athens county, Ohio?

"Will costs created in the bringing of such minor defendants before me as such mayor for the violation of state laws follow the case upon certification by me as such mayor to said probate judge?

"(Change from 1659, G. C., to 103 O. L., 874, 17 to 18 years.)

"Sec. 1659, 103 O. L., 874, Ohio Laws. 'When a minor under the age of eighteen years is arrested, such child, instead of being taken before a justice of the peace or police judge, shall be taken directly before such juvenile judge, or, if the child is taken before a justice of the peace or a judge of the police court, it shall be the duty of such justice of the peace or such judge of the police court, to transfer the case to the judge exercising the jurisdiction therein provided.'

"This section seems to divest justices of the peace and police judges of jurisdiction to hear complaints against minors under eighteen years of age. It is to be observed that the mayor is not included in this section, and it does not expressly apply to his court according to said section.

"Sec. 4534, 102 O. L., page 476. 'In felonies and other criminal proceedings not herein provided for, such mayor shall have jurisdiction and power, throughout the county, concurrent with justices of the peace, * * *'

"Lately it has been the practice of the probate judge of Athens county, acting in the capacity of juvenile judge to disregard certifications of cases where minors under the age of eighteen years have been brought before the mayor of the city of Nelsonville, Ohio, for the violation of state laws and requiring complainants to file an additional affidavit before him as such juvenile judge, allowing officers of the city of Nelsonville no fees for making original arrests or expenses incurred.

"I would be pleased to have an opinion as to whether or not mayors have power under section 1659 by reason of section 4534 to certify minor defendants under the age of eighteen years to and before the juvenile judge, and if there is any provision as to cost incurred in mayors' courts."

Section 1659, of the General Code, as amended in 103 O. L., 874, is as follows:

"When a minor under the age of eighteen years is arrested, such child, instead of being taken before a justice of the peace or police judge, shall be taken directly before such juvenile judge; or, if the child is taken before a justice of the peace or a judge of the police court, it shall be the duty of such justice of the peace or such judge of the police court, to transfer the case to the judge exercising the jurisdiction herein provided. The officers having such child in charge shall take it before such judge, who shall proceed to hear and dispose of the case in the same manner as if the child had been brought before the judge in the first instance."

Under the provisions of section 1639 of the juvenile court law:

"Courts of common pleas, probate courts and insolvency courts and superior courts, where established, shall have and exercise, concurrently, the powers and jurisdiction conferred in this chapter. * * *"

It is further provided that:

"Judges of such courts * * * at such times as they determine, shall designate one of their number to transact the business arising under such jurisdiction. * * *"

When such a designation has been made, all cases of violation of the law involving minors under the age of eighteen years are within the jurisdiction of the juvenile court, at least in the first instance, subject to the transfer of jurisdiction by the juvenile judge, as provided for in section 1681, of the General Code, which is as follows:

"When any information or complaint shall be filed against a delinquent child under these provisions, charging him with a felony, the judge may order such child to enter into a recognizance, with good and sufficient surety, in such amount as he deems reasonable, for his appearance before the court of common pleas at the next term thereof. The same proceeding shall be had thereafter upon such complaint as now authorized by law for the indictment, trial, judgment and sentence of any other person charged with a felony."

Section 1682, of the General Code, is as follows:

"Fees and costs in all such cases with such sums as are necessary for the incidental expenses of the court and its officers, and the costs of transportation of children to places to which they have been committed, shall be paid from the county treasury upon itemized vouchers, certified to by the judge of the court."

While there is no provision of law authorizing mayors to *certify* minor defendants under the age of eighteen years to and before the juvenile court under the provisions of section 1659 of the General Code, quoted above, it is provided that when a minor under the age of eighteen years is arrested, if taken before a justice of the peace or police judge such police judge or justice of the peace shall transfer the case to the judge exercising jurisdiction as juvenile judge, and it is expressly made the duty of the officer having such minor in charge to take the minor before the juvenile judge, who shall proceed to hear and dispose of the case in the same manner as if the child had been brought before him in the first instance.

Section 4534, of the General Code, is as follows:

"In felonies, and other criminal proceedings not herein provided for, such mayor shall have the jurisdiction and power, throughout the county, concurrent with justices of the peace. The chief of police shall execute and return all writs and process to him directed by the mayor, and shall by himself or deputy attend on the sittings of such court, to execute the orders and process thereof and to preserve order therein, and his jurisdiction and that of his deputies in the execution of such writs and process, and in criminal cases, and in cases of violations of ordinances of the corporation shall be co-extensive with the jurisdiction of the mayor therein. The fees of the mayor in all cases, excepting those arising out of violation of ordinances, shall be the same as those allowed justices of the peace for

similar services, and the fees of the chief of police or his deputies in all cases, excepting those arising out of violations of ordinances shall be the same as those allowed sheriffs and constables in similar cases."

It is my opinion, therefore, that under the provisions of section 1659, of the General Code, as amended and quoted above, the juvenile judge has exclusive jurisdiction to try and dispose of cases involving violations of law by minors under the age of eighteen years, subject to the exceptions made in section 1681, of the General Code; and that while a mayor has no jurisdiction to finally dispose of such a case he is, by the provisions of section 1659, of the General Code, authorized to transfer the case to the juvenile judge, it then becoming the duty of the officer having the minor in charge to take him before such juvenile judge.

Section 1659 of the General Code, quoted above does not specifically mention mayors; however, there can be no question but that it was the intention of the legislature to vest the jurisdiction over minors under the age of eighteen years in the juvenile court for final disposition, except when the charge involving such minor was a felony. Therefore a mayor has no jurisdiction to dispose of a juvenile case brought before him other than to transfer it to the juvenile judge of the county.

It is not necessary or requisite that a new affidavit be filed when such transfer is made, and the fees properly made in the first instance may be allowed and follow the case for payment under the provisions of section 1682 of the General Code.

A copy of this opinion has been sent to Mr. Fred S. Scott, city solicitor of Nelsonville, also to Mr. Nathan Hill, mayor of Nelsonville, for their information.

Respectfully,
EDWARD C. TURNER,
Attorney General.

503.

APPROVAL OF TRANSCRIPT OF PROCEEDINGS OF BOARD OF EDUCATION OF MT. VERNON, OHIO, FOR ISSUANCE AND SALE OF BONDS TO INDUSTRIAL COMMISSION OF OHIO.

COLUMBUS, OHIO, June 15, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE:—Bonds of the city school district of Mt. Vernon, Ohio, in the amount of $50,000.00 accepted by the industrial commission under resolution of June 1, 1915.

I hereby certify that I have examined the transcript of the proceedings of the board of education of the city school district of Mt. Vernon, Ohio, relative to the issuance and sale of the above bonds, also the specimen bond with the coupon attached. I find that said bonds are issued for the purpose authorized by law; that the proceedings of the said board of education and other officers have been regular and in conformity with statutory provisions; that the amount of said bonds and of the tax levy which will be necessary to pay interest thereon and to create

a sinking fund sufficient for their redemption when due exceeds no statutory limitation; and that the form of the said bonds and coupons, as indicated by the specimen copy, is properly drawn.

I therefore certify that said bonds, when properly executed and delivered, will constitute, in the hands of the legal holders thereof, valid obligations of the said city school district.

Respectfully,
EDWARD C. TURNER,
Attorney General.

504.

APPROVAL OF TRANSCRIPT OF PROCEEDINGS OF BOARD OF EDUCATION OF REYNOLDSBURG, OHIO, VILLAGE SCHOOL DISTRICT.

COLUMBUS, OHIO, June 15, 1915.

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

IN RE:—Bonds to the amount of $5,000.00 of the Reynoldsburg village school district, Franklin county, Ohio, accepted by resolution of the industrial commission of Ohio, on June 1, 1915.

I have carefully examined the transcript of the proceedings of the board of education of the Reynoldsburg village school district, Franklin county, Ohio, which was submitted to me June 12, 1915, and I am of the opinion that said board of education has acted under the authority and in compliance with the laws of Ohio relative to the issuance of said bonds; that the same are not in excess of any statutory limitation upon the bond-issuing authority of the said school district, and that a sufficient tax levy can be made within the limitations prescribed by law to pay the interest and create a sinking fund for the redemption of said bonds as they become due, and that said bonds, if properly prepared and executed, will be valid and binding obligations of the said village school district.

As no form of the proposed bonds and coupons has been submitted for my approval, I suggest that final acceptance be withheld until I have an opportunity of inspecting the executed bonds and coupons.

Respectfully,
EDWARD C. TURNER,
Attorney General.

505.

MOTHERS' PENSION ACT—DIVORCE—IMPRISONMENT OF HUSBAND PRIOR TO GRANTING DIVORCE—WIFE ELIGIBLE TO MOTHERS' PENSION.

Divorce of wife from husband, who prior to the divorce was imprisoned, does not render her ineligible to relief under the mothers' pension act.

COLUMBUS, OHIO, June 15, 1915.

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

GENTLEMEN:—Permit me to acknowledge receipt of your letter of June 8th, which is as follows:

> "We are enclosing herewith a letter from Hon. A. C. Risinger, juvenile judge of Preble county, and would request your written opinion upon the same. As the judge insists that this is rather urgent, an early reply is requested."

With your letter you enclosed a communication from Juvenile Judge A. C. Risinger, of Eaton, Ohio, which is as follows:

> "Ida Kennedy files her application in Preble juvenile court for mother's allowance. She was divorced from her husband, Marion Kennedy, on December 28, 1914, on account of his aggressions. However, on October 19, 1914, he plead guilty of forgery and was committed and is now imprisoned in the Mansfield Reformatory. All the facts as to her necessitous condition and need of assistance in order to abide with her child of tender years are in her favor. She is rather influentially represented and I have indicated to her representative my skepticism as to the claim of propriety of an allowance in that her ex-husband is a prisoner but not an existing husband. It is urged that the conditions are such as to come within the spirit of the statute. In order to satisfy parties and make sure of correctness I place the matter before you in the hope that you will render me assistance by your advices. The child is sick and the parties are rather insistent and impatient. An early reply, consistent with official convenience, will be quite satisfactory."

The application filed by Ida Kennedy, referred to in the judge's letter, is based on the fact that Marion Kennedy, from whom she was divorced on December 28, 1914, is imprisoned in the Mansfield Reformatory.

Section 1683-2, of the General Code, (103 O. L., 877) is as follows:

> "For the partial support of women whose husbands are dead, or become permanently disabled for work by reason of physical or mental infirmity, or whose husbands are prisoners, or whose husbands have deserted, and such desertion has continued for a period of three years, when such women are poor, and are the mothers of children not entitled to receive an age and schooling certificate, and such mothers and children have been legal residents in any county of the state for two years, the juvenile court may make allowance to each of such women, as follows:

Not to exceed fifteen dollars a month, when she has but one child not entitled to an age and schooling certificate, and if she has more than one child not entitled to an age and schooling certificate, it shall not exceed fifteen dollars a month for the first child and seven dollars a month for each of the other children not entitled to an age and schooling certificate. The order making such allowance shall not be effective for a longer period than six months, but upon the expiration of such period, said court may from time to time, extend such allowance for a period of six months, or less. Such homes shall be visited from time to time by a probation officer, agent of an associated charities organization, a humane society, or such other agents as the court may direct, provided that the person who actually makes such visits shall be thoroughly trained in charitable relief work, and the report or reports of such visiting agent shall be considered by the court in making such order."

In the section quoted above it will be noted that the provision relative to imprisonment is to be read as follows:

"For the partial support of women * * * whose husbnads are prisoners, * * *"

The purpose of the mothers' pension act is to supply aid to mothers who have lost the support of their husbands through some of the causes enumerated in section 1683-2, to the end that the mother may have the means necessary to "save the child or children from neglect, and to avoid the breaking up of the home of such women," as provided in section 1683-3 of the General Code (103 O. L., 878).

In your letter you refer to the fact that as the woman referred to is divorced from her husband some question has arisen as to her eligibility for relief under the statute. There is evidently no question but that Ida Kennedy was eligible to receive relief during the interval between the date of the imprisonment of her husband and the time of securing her divorce. The question naturally arises as to what bearing the divorce had on her rights, if any, which accrued prior to the divorce.

The mothers' pension law was by act of the legislature made a part of the juvenile court law, and in accordance with the provisions of section 1683, of the General Code, is entitled to a liberal construction to the end that its purposes may be carried out fully.

The securing of the divorce by Ida Kennedy did not remove her disability in the slightest.

In an opinion rendered by my predecessor, Hon. Timothy S. Hogan, on a similar provision of the mothers' pension law to Hon. Charles Krichbaum, under date of January 29, 1914, he held as follows:

"The third case which you mention is one which, in my opinion, falls within the provisions of the law. Section 1683-2, the pertinent provision of which has already been quoted, mentions the desertion of the husband, continuing for a period of three years, as a condition of relief. Nothing is said about divorce. If the actual desertion, on the part of the husband, is established, in my mind, it is immaterial whether a divorce has been obtained by the mother on that account, or not."

I am in entire accord with the holding of Mr. Hogan, supra, and it is my opinion that, subject, of course, to your determination of the various questions of

law and fact which may be involved, the fact that Ida Kennedy is now divorced from her husband, who was imprisoned while her husband, does not of itself render her ineligible to relief under the mothers' pension act.

A copy of this opinion has been forwarded to Judge Risinger for his information.

Respectfully,
EDWARD C. TURNER,
Attorney General.

506.

STATE BOARD OF HEALTH—HAS AUTHORITY TO REQUIRE DRINKING CUPS AT SODA FOUNTAINS TO BE CLEANSED IN BOILING WATER OR REQUIRE INDIVIDUAL SANITARY DEVICES TO PROTECT HEALTH.

When by reason of the repeated use thereof, infectious and contagious diseases are communicated through the medium of drinking cups, glasses, vessels, spoons, etc., at soda fountains to that degree which substantially affects the public health, the state board of health is authorized to make a rule or regulation prohibiting the repeated use of such cups, etc., that have not been thoroughly cleansed by washing in boiling water or in lieu thereof to permit the use of sanitary devices for individual use only.

COLUMBUS, OHIO, June 15, 1915.

The State Board of Health, Columbus, Ohio.

GENTLEMEN:—I have your request for an opinion as follows:

> "Has the state board of health the authority to adopt an order prohibiting the use at soda fountains and like places of any drinking cup, glass, vessel, spoon, etc., that has not been thoroughly cleansed by washing in boiling water after use by each individual, or in lieu of such procedure to permit the use of sanitary devices for individual use only?"

Section 1237, G. C., provides as follows:

> "The state board of health shall have supervision of all matters relating to the preservation of the life and health of the people and have supreme authority in matters of quarantine, which it may declare and enforce, when none exists, and modify, relax or abolish, when it has been established. It may make special or standing orders or regulations for preventing the spread of contagious or infectious diseases, for governing the receipt and conveyance of remains of deceased persons, and for such other sanitary matters as it deems best to control by a general rule. It may make and enforce orders in local matters when emergency exists, or when the local board of health has neglected or refused to act with sufficient promptness or efficiency, or when such board has not been established as provided by law. In such cases the necessary expense incurred shall be paid by the city, village or township for which the services are rendered."

The provisions of section 1237 above quoted confer upon the state board of

health the power to make special or standing orders or regulations for preventing the spread of contagious or infectious diseases, and it is assumed that the purpose of the board in making such an order as that about which you inquire, is to prevent the spread of such diseases by the repeated use of various utensils at public soda fountains without sterilization.

The state board of health is charged with the exercise of a public function primarily for the protection and conservation of the public health and is concerned with isolated individual cases only insofar as the same constitute a menace to the public health. The purpose of this regulation, as above stated, in itself assumes that the repeated use at soda fountains of drinking cups, glasses, vessels, spoons, etc., which have not been cleansed and sterilized by washing in boiling water, constitutes a medium through which contagious and infectious diseases are spread and communicated. This is a question of fact of controlling influence in determining whether or not the contemplated order is reasonable and necessary. It is the fundamental purpose of the legislation of the state relative to matters of health, that the same be made applicable to conditions existing or which may with some degree of certainty be anticipated rather than to mere theory. Hence, that such order as suggested may be reasonable and necessary to the protection and preservation of public health, it must be first determined as a matter of fact that without the enforcement of such order, rule or regulation, under known existing conditions, or conditions which may be reasonably anticipated, such spread of such contagious and infectious diseases will be effected as will in a substantial way be detrimental to the public health. In other words, such order is not made either necessary or reasonable by the mere fact that it is possible that a contagious and infectious disease may be communicated through the medium of drinking cups, etc., at soda fountains, not sterilized, as suggested, in isolated cases, but it is essential that such order be reasonable and necessary, that conditions be such that it may be reasonbly anticipated that the communication of such contagious or infectious diseases through the medium of drinking cups, etc., at soda fountains in the absence of such order or sterilization is of sufficient frequency to affect the public health in some substantial way, is distinguished from a mere speculative impairment of the same.

Legislation for the protection of the health of the people is clearly an exercise of the police power by the legislature which may be delegated by it to such agencies as it may deem best suited for the purpose. That the state board of health should have control of a matter such as the prevention of the spread of diseases is apparent from the nature of the case, involving, as it does, the necessity for uniformity in all parts of the state.

While there has been no judicial decision on the particular question asked by you, the decision of the case of Board of Health v. Greenville, 86 O. S. 1, involving the authority of the state board of health to make orders requiring the purification of sewage and public water supply, is in point. In that case the court discussed the power of the state board of health to make such orders quite fully and sustained the constitutionality of that law in every respect. The following is from the opinion of the court at page 21:

> "This particular legislation now under consideration is designed to preserve and protect the public health and comfort, and, therefore, falls directly within the police power of the state. This power includes anything which is reasonable and necessary to secure the peace, safety, health, morals and best interests of the public. It is now the settled law that the legislature of the state possesses plenary power to deal with these subjects so long as it does not contravene the constitution of the United States or infringe upon any right granted or secured thereby, or is not in direct conflict

with any of the provisions of the constitution of this state, and is not exercised in such an arbitrary and oppressive manner as to justify the interference of the courts to prevent wrong and oppression."

The powers of the state board of health to make rules and regulations under section 1237, G. C., are analogous to the powers to make orders for the purification of sewage and public water supply to such an extent that it can be said that the powers of the state board of health under section 1237 are broad enough to support an order such as you suggest, providing the same is reasonable and necessary The means to be used to accomplish the desired purpose are in the discretion of the state board of health subject to the same limitations as to reason and necessity.

I am, therefore, of the opinion that if your board finds that disease is being or has been spread among the people to a degree substantially affecting the public health through the repeated use, without sterilization, of glasses, spoons and other utensils at public soda fountains and that a rule requiring that all such utensils should be thoroughly cleansed by washing in boiling water after use by each individual or by the installation of sanitary devices for individual use only, would in a substantial way effectively prevent such spread of disease, the board has the power to make such an order and that it is the duty of the local officials to enforce the same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

507.

APPROVAL OF RESOLUTIONS FOR ROAD IMPROVEMENTS IN HIGHLAND AND COLUMBIANA COUNTIES.

COLUMBUS, OHIO, June 15, 1915.

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

DEAR SIR:—I have your communications of June 11 and June 15, 1915, transmitting to me for examination supplemental final resolutions as to the following roads:

"Hillsboro-Piketon, Highland county, pet. No. 1415, I. C. H. No. 261.
"Salem-Unity, Columbiana county, pet. No. 1445, I. C. H. No. 86."

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

508.

COUNTY COMMISSIONERS—WITHOUT AUTHORITY TO ENTER INTO CONTRACT WITH ELECTRIC COMPANY TO CONSTRUCT AT COUNTY'S EXPENSE ELECTRIC LINE FROM COMPANY'S PLANT TO CHILDREN'S HOME—SURPLUS OF SPECIAL TAX LEVY MUST BE TRANSFERRED BY COMMISSIONERS TO SINKING FUND—TRANSFER OF COUNTY FUNDS THAT MAY BE MADE ON ORDER OF COMMON PLEAS COURT—COMMISSIONERS MAY ISSUE BONDS IF ELECTORS APPROVE FOR LIGHTING BUILDINGS AT SAID HOME—IMPLIED AUTHORITY TO PROPERLY FURNISH COUNTY CHILDREN'S HOME IN COUNTY COMMISSIONERS.

The commissioners of a county have no authority in law to enter into a contract with an electric company, according to the terms of which said electric company would construct, at the expense of the county, an electric line from its light plant to the children's home in said county, over which line said electric company would furnish current to said home for lighting purposes.

Under the provisions of section 5654, *G. C., as amended in* 103 *O. L.,* 521, *it is the duty of the county commissioners to transfer any surplus of the proceeds of a special tax levy, which cannot be used, or is not needed, for the purpose for which said tax was levied, to the sinking fund of the county, and, upon their failure to make such transfer, said surplus automatically reverts to said sinking fund.*

The commissioners of a county may, on the order of the common pleas court, upon application made under authority of section 2296, *G. C., as amended in* 103 *O. L.* 522, *and in compliance with the requirements of section* 2297, *et seq., G. C., transfer a part of any county fund, other than the proceeds or balances of special levies, loans or bond issues, not needed for the purpose for which said fund is established, to another fund or to a new fund by them created.*

Where the commissioners of a county, acting under authority and in compliance with the provisions of section 3077, *G. C., as amended in* 103 *O. L.,* 889, *have submitted to a vote of the electors of said county the question of establishing a county children's home and the issue of bonds or notes of the county to provide funds therefor, and, the vote being favorable, said commissioners have proceeded to purchase a site and erect buildings thereon for said home, under authority of section* 3078, *G. C., said commissioners may issue additional bonds for the purpose of securing the necessary funds to provide for the proper lighting of said buildings, in compliance with the provisions of section* 3079, *G. C., if, upon submitting the question of said additional issue to a vote of the electors of the county, in the manner provided by section* 3077, *G. C., as amended, the vote of said electors is favorable to said additional issue.*

The county commissioners have implied authority, under the provisions of section 3078, *G. C., to properly furnish the county children's home before turning the same over to the management and control of the trustees of said home, appointed under authority of section* 3081, *G. C.*

COLUMBUS, OHIO, June 16, 1915.

HON. CHARLES L. BERMONT, *Prosecuting Attorney, Mr. Vernon, Ohio.*

DEAR SIR:—In your letter of May 5th you request my opinion, as follows:

"In 1912, the commissioners of Knox county, Ohio, submitted to the electors of Knox county, the question of establishing a children's home

for Knox county and the issue of county bonds to provide funds therefor. The vote at said election was favorable to said question and $25,000.00 in bonds were issued.

"In 1905, the commissioners made a levy by virtue of section 14654, G. C., to aid a private children's home and about $6,000.00 was realized as a result of said levy. For some reason the said sum of $6,000.00 was never turned over to the trustees of said private children's home, but has remained in the county treasury to the credit of the orphans' home fund.

"In 1913, a levy was made by the commissioners for the purpose of maintaining the county children's home, for which they were about ready to let the building contract, and about $5,000.00 has been realized from this levy.

"It now becomes necessary to have an electric light line constructed from the city of Mt. Vernon, Ohio, to this children's home, which will necessitate an expenditure of about $1,000.00.

"The question that I now want to propound is 'Can any part of the $6,000.00 or the $5,000.00 mentioned above be used for the purpose of constructing this electric light line and if not have the commissioners power to borrow money for this purpose?

"The commissioners are without funds to do this work unless they have the power to borrow money or can use a part of the sums above stated.

"I desire to further inquire as follows:

"Section 3081 of the General Code reads as follows: When the necessary site and building are provided by the county, the commissioners shall appoint a board of four trustees, etc.

"Whose duty is it to furnish this children's home with furniture, etc.? Is it the duty of the commissioners or would the trustees have authority to do this under section 3104?"

In answer to my request for additional information relative to the terms of the proposed contract between the commissioners of Knox county and the Mt. Vernon Electric Company, I have your letter of June 2nd, which is as follows:

"In answer to your letter of May 29th, I will say that the county commissioners met yesterday, and I took up the question of the contract they were contemplating making with the electric company of this city.

"They informed me that the only contract they had thought of making with this electric company was one for furnishing current for the county children's home, but this home is at such a distance from the city that the electric company will not build and maintain the line leading to it, and this would have to be done by the commissioners.

"The commissioners further informed me that they had never contemplated furnishing the property owners along this line with electricity.

"If you should determine that the commissioners are without authority to build this line, I think that they would install an electric plant of their own at this home, providing that they can get the available funds."

In submitting to the electors of Knox county the question of establishing a children's home for said county, and the issue of bonds to provide funds therefor, the commissioners of said county acted under authority of section 3077, which, prior to its amendment in 103 O. L., 889, provided as follows:

"When in their opinion the interests of the public so demand, the

commissioners of a county may, or upon the written petition of two hundred or more taxpayers, shall, at the next regular election submit to the qualified electors of such county, or of the counties forming a district, the question of establishing a children's home for such county or district, and the issue of county bonds or notes to provide funds therefor. Notice of such election shall be published for at least two weeks prior to taking such vote, in two or more newspapers printed and of general circulation in such county or in the counties of the district, and shall state the maximum amount of money to be expended in establishing such home."

Section 3078, G. C., provides:

"If at such election a majority of electors voting on the proposition are in favor of establishing such home, the commissioners of the county, or of any adjoining counties in such district, having so voted in favor thereof, shall provide for the purchase of a suitable site and the erection of the necessary buildings and provide means by taxation for such purchase and the support thereof. Such institution shall be styled the children's home for such county or district."

Section 3079, G. C., provides:

"In anticipation of the collection of taxes levied or to be levied for the purchase of such site and erection of such buildings, or for the purchase of a suitable site and buildings already erected thereon, the commissioners of any county may issue the notes or bonds of the county, to bear interest not to exceed six per cent. per annum, payable semi-annually, which shall not be sold for less than their par value."

I understand that the building for the children's home is not yet completed and that the county commissioners find that they will not have sufficient funds to provide for the lighting of said building.

In your first letter you inquire whether the said commisioners may use any part of the sum of $6,000.00, in the county treasury to the credit of the orphans' home fund, or of the $5,000.00 in said treasury to the credit of the children's home maintenance fund, for the purpose of constructing an electric light line from the city of Mt. Vernon to said children's home according to the terms of the proposed contract referred to, or, if they can not use a part of either of said funds, whether they may borrow money for said purpose.

While I am of the opinion that the authority of the county commissioners to purchase a site and erect a building for the county children's home, under the above provisions of the statute, carries with it the implied authority to provide for the proper lighting of such home, I find no provision of the statute under which said county commissioners have either express or implied authority to enter into a contract with the electric company of Mt. Vernon, according to the terms of which said electric company would construct an electric light line from said city of Mt. Vernon to said children's home, at the expense of the county, and furnish current to said home for lighting purposes at a charge to be agreed upon between said county commissioners and said electric company. I am of the opinion, therefore, that said county commissioners have no authority in law to make such a contract with said electric company.

However, since receiving second letter, I have been informed by Mr. P. S. Kelser, of your city, that the county commissioners are about to abandon the

plan of contracting with the electric company and have about decided to provide for their own lighting system, as they find it will be much less expensive than the former plan.

In my conversation with you over the telephone you confirmed this information given by Mr. Kelser and further stated that the sum of $6,000.00 which was raised by the county commissioners by tax levy in 1905 was never turned over to the trustees of the orphans' home in said county, owing to the fact that at that time there was a dispute as to the proper disposition of the fund; that said orphans' home was no longer in existence and that the said sum of $6,000.00 is in the treasury to the credit of the said orphans' home fund.

Section 5 of article XII of the constitution provides:

> "No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied."

It is evident, however, that, inasmuch as the orphans' home, to aid which the county commissioners of Knox county in 1905 made a levy under authority of the statute now known as section 14654 of the Appendix to the General Code, is no longer in existence, the aforesaid sum of money in the county treasury to the credit of said orphans' home fund is no longer needed for the purpose for which such levy was made.

I call your attention to the provisions of section 5654, as amended in 103 O. L., 521, which are as follows:

> "The proceeds of a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was levied, issued or made, except as herein provided. When there is in the treasury of any city, village, county, township or school district a surplus of the proceeds of a special tax or of the proceeds of a loan or bond issue which cannot be used, or which is not needed for the purpose for which the tax was levied, or the loan made, or the bonds issued, all of such surplus shall be transferred immediately by the officer, board or council having charge of such surplus, to the sinking fund of such city, village, county, township or school district, and thereafter shall be subject to the uses of such sinking fund."

It was the duty of the commissioners of Knox county, when the above amendment to section 5654 became effective, to immediately transfer the aforesaid sum of $6,000.00 from the orphans' home fund to the sinking fund of said county, commonly known as the county debt fund, and upon their failure to make such transfer I am of the opinion that said sum automatically reverted to said county debt fund under the above provisions of the statute, so that no part of said sum may now be considered available for any purpose other than for sinking fund purposes.

Section 2296, G. C., as amended in 103 O. L., 522, provides:

> "The county commissioners, township trustees, the board of education of a school district, or the council, or other board having the legislative power of a municipality, may transfer public funds, except the proceeds or balances of special levies, loans or bond issues, under their supervision,

from one fund to another, or to a new fund created under their respective supervision, in the manner hereafter provided, which shall be in addition to all other procedure now provided by law."

If any part of the sum of $5,000.00 in the county treasury to the credit of the children's home maintenance fund will not be needed for such purpose, or if any part of any county fund, other than the proceeds or balances of special levies, loans or bond issues, is not needed for the purpose for which said fund was established, I am of the opinion that the county commissioners may, on the order of the common pleas court, upon application duly made under authority of section 2296, G. C., as amended, and in compliance with the requirements of sections 2297, et seq., of the General Code, transfer such part of said fund to the children's home building fund, to be used by said county commissioners in establishing a proper lighting system for said building.

The only authority conferred by statute upon the county commissioners to borrow money for the purpose of establishing a county children's home is found in sections 3077, et seq., of the General Code, as above quoted. Inasmuch as this authority has been exercised and bonds were issued by a vote of the electors of Knox county, I am of the opinion that it will be necessary for said county commissioners to submit to the electors of Knox county the question of issuing additional bonds for the purpose of securing the necessary funds to provide for said lighting system, in the manner provided by section 3077, G. C., as amended, and that if the vote of said electors is favorable to said additional issue the same may be made in compliance with the requirements of section 3079, G. C.

You further inquire whether it is the duty of the county commissioners to provide the necessary furniture for said children's home, upon the completion of the construction of the building for said home, or whether this duty is placed upon the trustees of said home by the provisions of section 3104, G. C., as amended in 103 O. L., 893.

Section 3081, G. C., provides for the appointment of four trustees for the county children's home after the necessary site and buildings have been provided by the county.

After said trustees have been appointed and have been placed in charge of the children's home, it becomes their duty, under section 3104, G. C., as amended, at the time of making their annual report to the county commissioners, to file with said commissioners an estimate in writing of the wants of said home for the succeeding year, said estimate to specify separately the amount required for each of the following purposes, to wit: First, maintenance; second, repairs; third, special improvements.

Under the provisions of section 3104, G. C., as in force prior to its amendment in 103 O. L., 893, the trustees of the children's home were required to report quarterly to the commissioners of the county the condition of the home and at the time of making such report to file with said commissioners an estimate in writing of the wants of said home for the succeeding quarter. In such estimate said trustees were required to specify separately the amounts needed for each of the purposes enumerated therein, the seventh item being for furniture.

Under the provisions of the statute as amended, the trustees are only required to make an annual report to the county commissioners and to estimate the needs of the home for the succeeding year under the three general heads as above set forth.

While I think that the trustees of the home, under the provisions of the statute as amended, still have authority to request an allowance for the purchase of such additional furniture for the home as they may deem necessary, under the general head of "maintenance," and that the county commissioners, under authority of

section 3105, G. C., may make an appropriation for this purpose, I do not think that the provisions of section 3104, G. C., as amended, taken in connection with the provisions of sections 3105 and 3106, G. C., confer authority upon said trustees to equip the children's home with furniture in the first instance.

Under section 3078, G. C., the county commissioners have authority to provide for the purchase of a suitable site and the erection of the necessary buildings for the county children's home and to provide means by taxation for such purchase and the support thereof.

Replying to your second question, I am of the opinion that said commissioners have the implied authority under the above provisions of section 3078, G. C., to properly furnish the building for said children's home before turning the same over to the management and control of the trustees of said home.

Respectfully,
EDWARD C. TURNER,
Attorney General.

509.

ROADS AND HIGHWAYS—AUTHORITY OF OFFICIALS TO REPAIR A DIRT ROAD PARALLEL TO AND IN CONNECTION WITH IMPROVED ROAD.

The official or officials charged by statute with the repair of an improved state, county or township road, have authority to repair a dirt road parallel to and in connection with said improved road.

COLUMBUS, OHIO, June 18, 1915.

HON. A. B. UNDERWOOD, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—In your letter of May 19, 1915, you request my opinion as follows:

> "I am writing you in regard to repair of dirt roads running parallel, and along side of improved roads.
>
> "I have been unable to find any law upon the subject, other than an opinion of Attorney General Hogan. In this opinion, Mr. Hogan placed the duty of repair of such dirt roads upon the township trustees, i. e., not upon the improved road authorities.
>
> "I have always felt, as do most of our attorneys here, that this opinion could not have taken into consideration all the facts. It is highly impracticable for two sets of authorities to attempt to repair separately what is, in fact, but one road. The conflicts which will necessarily arise in repairing such roads independently, could be avoided if the duty of repair of both roads could be placed on the stone road commissioners. The trustees, in this county at least, did not make their levy in anticipation of handling the repair of such dirt roads. If Mr. Hogan's opinion is sound, the deterioration of such dirt roads, in this county, is sure to follow.
>
> "I hope, therefore, Mr. Turner, that you will take this matter under consideration and render your own opinion as to who bears the duty of repairing dirt roads that run parallel to improved roads."

Permit me to say that upon careful examination of the files of this office I do not find that this department has ever rendered an opinion upon the question submitted.

The only provisions of the statutes applicable to dirt roads parallel to and in connection with improved roads, are found in sections 1221 and 7045 of the General Code. Section 1221, G. C., provides:

> "Nothing in this chapter (relating to the state highway department) shall prevent the state highway commissioner or other authority having jurisdiction of such highway (a state highway), from constructing a dirt road parallel with and along side an improved road, if in his or their judgment such construction is necessary."

Section 7045, G. C., relates to the roads of a township or an election precinct therein where the trustees have created such township or part thereof into a road district, under authority of sections 7033, et seq., of the General Code, and have submitted the question of improving the roads of such district to a vote of the qualified electors therein. This section provides as follows:

> "Thereupon (after a favorable vote of the electors) the trustees shall determine the order and manner in which the public ways shall be improved, beginning, so far as practicable, with the main roads. In improving such public ways the macadamized or graveled portion shall be located, when practicable, so as to leave sufficient space for a dirt road at its side. The graveled or macadamized portion shall be not less than eight nor more than fourteen feet in width, and the gravel or macadam shall be not less than twelve inches in depth at each outer side."

I deem it proper to call your attention to amended senate bill No. 125 entitled "An act to provide a system of highway laws for the state of Ohio and to repeal all sections of the General Code and acts inconsistent herewith." This bill was passed by the general assembly May 17th and will become effective September 4, 1915. By the provision of section 305 of said bill, the above sections of the General Code are repealed and the provisions of said sections are not re-enacted by said bill.

I find no provision of the statutes as now in force, nor do I find any provision in amended senate bill No. 125 expressly authorizing township trustees or any other official or officials to keep in repair the dirt roads above referred to.

Section 241 of said amended senate bill No. 125 provides in part:

> "The public highways of the state shall be divided into three classes, viz.: state roads, county roads and township roads."

Section 244 of said amended senate bill provides:

> "The state, county and township shall each maintain their respective roads as designated in the classification herein above set forth; provided, however, that either the county or township may, by agreement between the county commissioners and township trustees, contribute to the repair and maintenance of the roads under the control of either. The state, county or township or any two or more of them, may by agreement, expend any funds available for road construction, improvement or repair upon roads inside of a village or a village may expend any funds available for street improvement upon roads outside of the village and leading thereto."

While section 7060-1, General Code, as found in 103 O. L., 402 (the provisions of which are substantially re-enacted in sections 80 to 84, inclusive, of amended

senate bill No. 125), authorizes and requires the trustees of a township to provide for dragging the graveled or unimproved roads of a township in the manner therein provided, I do not think said provisions of said statutes are applicable to a dirt road parallel to and in connection with an improved road, as referred to in sections 1221 and 7045 of the General Code, for the reason that said dirt road cannot be considered as separate and distinct from said improved road. On the contrary, I am of the opinion that said dirt road is a part of said improved road and is constructed for the purpose of relieving said improved road of a part of the traffic during certain months of the year by affording an extra driveway for said traffic.

I am informed by Mr. A. H. Hinkle of the state highway department that wherever a dirt road has been constructed parallel to an improved road, under authority of section 1221, G. C., the state highway commissioner has considered it as merely a part of said improved road and that, in repairing the improved road, it has been the practice of said department to grade and crown said dirt road and to provide proper drainage for it so that it will be available for traffic during the summer and fall seasons of the year.

As I view it, the repair of the dirt road is incidental to the preservation of the improved road with which it is connected and of which it is a part.

I am, therefore, of opinion that the official or officials charged by statute with the repair of an improved state, county or township road, have authority to repair the dirt road parallel to and in connection with said improved road.

Respectfully,
EDWARD C. TURNER,
Attorney General.

510.

MOTION PICTURE FILMS—SHALL BE APPROVED BY OHIO BOARD OF CENSORS BEFORE EXHIBITION IN PUBLIC SCHOOLS.

Motion picture films, which have not been approved by the Ohio Board of Censors may not be exhibited in the public schools of the state.

COLUMBUS, OHIO, June 18, 1915.

The Industrial Commission of Ohio, Department of Film Censorship, Columbus, O.

GENTLEMEN:—You have requested my written opinion in answer to an inquiry submitted to you by Superintendent R. J. Kiefer, of the Bellefontaine schools, enclosing with your request certain correspondence of Superintendent Kiefer, which, being somewhat lengthy, need not be quoted but may be summarized as follows:

> A large number of industrial establishments are offering motion picture films at a very nominal expense, which are considered of great value in the teaching of industries, geography and related topics and which have not been submitted to the Ohio board of censors for their approval and would not be offered if censoring were required. Superintendent Kiefer, after statement of facts, inquires as follows:
>
> "Do the words 'publicly exhibited' in section 871-49, 103 O. L., prevent use of films not bearing the stamp of the Ohio board of censors before

classes of geography, for instance, in educational institutions, especially public schools, for purely instructive purposes when no admission is charged?"

Under the act creating the Ohio board of censors of motion picture films and prescribing the duties and powers of such board, 103 O. L., page 399, it is provided:

"Section 871-48. It shall be the duty of the board of censors to examine and censor, as herein provided, all motion picture films to be publicly exhibited and displayed in the state of Ohio. * * *

"Section 871-49. * * * Before any motion picture film shall be publicly exhibited, there shall be projected upon the screen the words 'approved by the Ohio Board of Censors' and the number of the film.

"Section 871-52: Any person, firm or corporation who shall publicly exhibit or show any motion picture within the state of Ohio unless it shall have been passed, approved and stamped by the Ohio board of censors or the congress of censors, shall upon conviction thereof be fined not less than twenty-five ($25.00) dollars nor more than three hundred ($300.00) dollars, or imprisoned not less than thirty days nor more than one year, or both, for each offense."

In determining the scope of the application of the foregoing provisions of the act relating to the "public exhibition" of motion picture films, regard must be had to the purposes and objects sought to be accomplished, and the evils to be remedied by the aforesaid legislation.

The act is manifestly one in the nature of a police regulation and to provide for an official examination and criticism of pictures to be offered for public exhibition, to the end that such exhibitions may not be offensive to the course of good government or subversive of good morals and the peace and welfare of society.

While it cannot be maintained that the statutory provisions here referred to are limited in their application to theaters and similar places of public amusement, it cannot be denied that the class of motion pictures exhibited in places of this character was the occasion of this legislation and their regulation constituted its primary purpose. Indeed, it may be argued with much force that the legislature had in mind the passage of the statutory provisions here referred to the regulation only of those exhibitions of motion pictures projected for profit or public amusement and entertainment, or as incidental to or advertisement of some other business or enterprise.

Yet the application of a statute will not be limited to some concrete and specific wrong to be remedied to the exclusion of other conditions and facts clearly within the meaning of the terms of the statute as well as its spirit. While exhibitions in public theaters may have been manifestly the occasion for such legislation, their regulation cannot be said to be all that is comprehended within its clear and manifest purpose.

The full purpose of the picture censor legislation comprehends the protection of the public and perhaps more particularly the youth of the state from the exhibition of all those pictures which may fairly be held to be detrimental to the moral culture, educational advancement and wholesome amusement and recreation of the members of society as a whole, and may not, to my mind, be limited to that very considerable portion of the populace which in all propriety attend public theaters and like places of amusement and entertainment.

It therefore follows that the phrases "public exhibition" and "publicly exhib-

ited and displayed" should be given such construction within reason and the ordinary significance of the terms as will affect a substantial accomplishment of the purpose sought. These phrases are more or less relative in their application and it can not be said that the line of demarkation between a public and private exhibition may be stated with mathematical precision, but in view of what we determine to be the manifest purpose of this legislation, it is not deemed to necessitate any strained construction of the express terms thereof to say that an exhibition of motion pictures in the public schools, although confined to certain designated classes, constitutes a public exhibition within the meaning of the statutes under consideration. A promiscuous exhibition through the public schools of the state or even of a single city or district, can not be said in consistency with the general acceptation of the meaning of those terms, to be a private exhibition. The schools in which it is proposed to exhibit pictures are not in any sense private in character. The private benefit or advantage to be gained by individuals in attendance is only incidental to their public purpose. They are institutions to which a very considerable portion of society is generally admitted.

It may be argued with much force that motion pictures are a valuable aid to scientific investigation and educational advancement, but of this fact we can not say that the legislature was unmindful and hence had it been contemplated that such exhibitions should be permitted within the schools and other public institutions of similar character, appropriate provision would have been made therefor.

I am therefore of opinion, answering your question more specifically, that the class of picture films referred to in your inquiry may not lawfully be exhibited to classes in the public schools of the state except such films be censored according to the provisions of the statutes herein before referred to.

Respectfully,
EDWARD C. TURNER,
Attorney General

511.

CLERK OF JUSTICE OF PEACE COURT IN CLASSIFIED CIVIL SERVICE —WHEN CITY AND TOWNSHIP LIMITS CO-EXTENSIVE—CONSTRUCTON OF SECTION 3512, G. C.

The clerk of justice of peace court, when limits of city and township are co-extensive, provided by municipal ordinance under section 3512, *G. C., is a city employe and included in the classified service of civil service.*

COLUMBUS, OHIO, June 18, 1915.

The Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge your request for a ruling on the status of the clerk of the justice of the peace in Akron township, Summit county, which is as follows:

> "The civil service commission of Akron, Ohio, has submitted to this commission the following question and request that we get your ruling thereon. The city of Akron embraces all of Akron township, Summit county, Ohio. The city council has fixed the salaries for justices of the peace in Akron township and has also passed an ordinance providing for

a clerk of the justice's court. The local commission desires to know whether or not this clerk is in the classified service. In view of the fact that they have made a special request for an opinion of the attorney general, we do not deem it proper to answer this question ourselves.

"For your further information, we attach the letter of the president of the commission, in which all the facts are set forth."

With your request you enclose a letter from Mr. Charles Smoyer, president of the civil service commission of the city of Akron, which letter is as follows:

"Our local commission (Akron) is in considerable doubt with reference to a situation which has arisen over the position of clerk of the justice's court of Akron. If the precise point in question here has not been settled, we would much appreciate it if you would obtain the opinion of the attorney general with reference to it.

"The city of Akron embraces all of Akron township, Summit county, Ohio. By virtue of the statutes, the city council was empowered to fix salaries of the justices of the peace in Akron township. This the council has done and has further passed an ordinance providing for a clerk of the justice court. The question now is whether this clerk is subject to an examination before the local commission, the office being what amounts to a township office. I do not understand that the civil service law has any application to any township official.

"We have felt that the matter is of such importance to be submitted to the attorney-general and I should not be surprised if his office has already considered the identical matter.

"We should very much appreciate any information you can give us or can obtain for us as to whether or not we should examine the clerk of the justice court of Akron township."

A copy of the ordinance passed by the city council, and referred to in your letter, was procured from the city clerk, and I quote from its provisions as follows:

"Section 1. That the justice of the peace of Akron township, Summit county, Ohio, shall appoint a clerk who shall be a competent stenographer, at a salary not exceeding $75.00 per month, who shall be designated clerk of the justice court. Said clerk shall give bond in the sum of $1,000.00, conditioned according to law, and it shall be his or her duty, under direction of said justices of the peace to receive and file all papers and documents left at the offices of the said justices for filing, and receive and give receipts for all moneys paid in any case, civil or criminal, before any of said justices of the peace, and to pay over the same to the justices of the peace to whom the same are payable, and enter on proper dockets, and to record and index all cases civil and criminal commenced before said justices of the peace, and to perform such other and further duties as the justices of the peace may require."

The ordinance referred to was adopted under and pursuant to the provisions of section 3512 of the General Code, which is as follows:

"When the corporate limits of a city or village become identical with those of a township, all township offices shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of the city or village, except that justices of the peace and constables shall

continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks, and other officers and employes. Such justices and constables shall be elected at municipal elections. All property, moneys, credits, books, records and documents of such township shall be delivered to the council of such city or village. All rights, interests or claims in favor of or against the township may be enforced by or against the corporation."

In the case of McGill v. The State, 34 O. S., 228, the court, in passing on a statute similar to section 3512 of the General Code, said, at page 251:

"The act of May 7, 1872, (69 Ohio L., 23) preserves the corporate existence of such township for the sole purpose of electing justices of the peace and constables, evidently to meet the constitutional requirement that justices of the peace shall be elected by townships. But for all other purposes the township organization in this class of cities and villages is abolished."

Under the facts stated in your letter, Akron township being entirely within the city of Akron, the only township officers retaining a status as such under the provisions of section 3512 of the General Code, are the justices of the peace and constables, and as held in the case of McGill v. The State, 35 O. S., 228, supra, the provision for their continuance as township officers was evidently inserted to conform to the constitutional provision governing the election of justices of the peace.

In view of the provisions of section 3512 of the General Code, abolishing township officers, it is my opinion that the clerk of the justice court of Akron township, Summit county, Ohio, elected under a municipal ordinance is an employe of the city of Akron and not coming within the list of unclassified employes, is to be regarded as within the classified list of civil service employes.

A copy of this opinion has been sent to Mr. Charles Smoyer, president of the civil service commission of Akron, for his information.

Respectfully,
EDWARD C. TURNER,
Attorney General.

512.

AUDITOR OF STATE—HAS AMPLE POWER TO CONDUCT A SALE AND DECLARE THE PURCHASER—STATE LANDS—AMENDED SENATE BILL NO. 293.

Under amended senate bill No. 293 the auditor of state has ample power to conduct a sale and declare the purchaser.

COLUMBUS, OHIO, June 19, 1915.

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

DEAR SIR:—Under date of June 12th you inquire as follows:

"Amended senate bill No. 293, a copy of which we attach, provides for the execution of a deed to be prepared by the auditor of state for

certain lands in Montgomery county. The law makes provision for the advertising of notice of sale and for the payment into the state treasury of the purchase money, and the preparation and execution of the deed, but we are in doubt whether the auditor of state has any powers in the premises to conduct a sale and declare the purchaser, unless this power is to be implied from the direction that he publish the fact that he will so do. Will you kindly advise me of my duty under this act?"

Amended senate bill No. 293 is as follows:

"AN ACT

"To authorize the sale of certain real estate in Montgomery county.

"*Be it enacted by the general assembly of the state of Ohio*:

"Section 1. The governor is hereby authorized and directed to execute and deliver to the highest bidder of Dayton, Ohio, a proper deed in the name of the state of Ohio, conveying all the right, title and interest of the said state in and to the following described real estate, to wit:

"Being a tract of land situate in Sec. 32, T. 2, R. 7 M. R.'s., Montgomery county, Ohio, and more particularly described as follows:

"Beginning at the intersection of the north line of the Shantz road and the south right of way line of the D. L. & C. Ry. Co.; thence westwardly along the north line of the Schantz road to the N. and S. half section line of section 32, T. 2, R. 7, M. R.'s, said line being also the east boundary line of the Woodland Cemetery Association land extended southwardly to the Schantz road; thence northwestwardly along the said half section line and the east boundary line of the Woodland Cemetery Association's land extended southwardly to the south right of way line of the D. L. & C. Ry. Co.; thence eastwardly along the south right of way line of the D. L. & C. Ry. Co., to the place of beginning, containing 0.56 acres more or less.

"Section 2. Said conveyance shall be made only after the auditor of state of Ohio shall have caused notice of the sale of said land to be inserted weekly, in a newspaper printed and of general circulation within the county of Montgomery, Ohio, for a period of four consecutive weeks prior to a date to be fixed therefor by said state auditor. The said notice shall provide that on said date so determined, the said auditor will sell the land hereinbefore described at public auction at his office at twelve o'clock noon to the highest bidder therefor, but in no event shall the same be sold for less than seven hundred fifty dollars. Upon the payment into the state treasury by the successful bidder of the purchase price the auditor of state shall prepare such deed and the same shall be executed by the governor under the great seal of the state and be countersigned by the secretary of state.

"Filed in office of secretary of state June 1, 1915.'

Said act becomes effective on August 31, 1915.

From a reading of the above act, I am of the opinion that the auditor of state has ample power in the premises to conduct a sale and declare the purchaser.

Respectfully,

EDWARD C. TURNER,

Attorney General.

513.

INHERITANCE TAX—DEDUCTION SHOULD BE MADE FROM ESTATE FOR SAID TAXES WHERE A CONTRACT HAS BEEN MADE BY HEIRS OF AN INTESTATE PERSON TO PAY A CLAIM OF A CREDITOR OF THE ESTATE.

A sum paid by the collateral heirs of an intestate to a person claiming as a creditor of the estate of the decedent should be deducted from the estate for inheritance tax purposes.

COLUMBUS, OHIO, June 19, 1915.

HON. HOMER O. DORSEY, *Probate Judge, Findlay, Ohio.*

DEAR SIR:—Your letter of June 16th requests my opinion as follows:

"The administrator of the estate of Mary H. Firmin advises me that he is under the impression your department has rendered an opinion on the question involved in the statement below, but he is unable to find such opinion among the reports. If the question has been passed on I should be glad to have you cite me to the report or send me a summary of the finding if it is not in the printed reports.

"STATEMENT

"Mary H. Firmin, a resident of Hancock county, died intestate October 14, 1914, leaving a brother and three sisters her sole heirs at law. She left an estate appraised at approximately $30,000.00 which came to her from her deceased husband, Lorenzo Firmin. After the death of Mary H. Firmin a nephew of Lorenzo Firmin, who had lived in the family for many years, and who had performed service for both, made claim to a part of the estate based on a verbal promise made to him by Lorenzo Firmin and Mary H. Firmin. A settlement was made between the heirs of Mary H. Firmin and this nephew and a written contract entered into the terms of which are in substance that in consideration of his accepting the appointment as administrator and in consideration of services rendered to Mary H. Firmin, and in consideration of his agreement to make no charge for his services as administrator or as agent for the parties in the settlement of the estate, the heirs agree tc pay to this nephew twenty per cent. of the net amount of the estate, out of the proceeds as reduced to cash, which will amount to about $5,000.00. $3,130.00 has been paid on this contract and about $1,000.00 more due.

"*Query*: Is the amount paid on this contract a proper deduction in fixing the amount of inheritance tax the heirs are required to pay?"

As I understand your statement of the question, the nephew of whom you speak did not assert any claim as heir or distributee, but merely set up a claim against the estate for services rendered to the decedent. That is to say, if his claim was valid it was a debt of the estate.

My predecessor, Hon. Timothy S. Hogan, in an opinion to Hon. Harry P. Black, prosecuting attorney of Seneca county, on August 15, 1912, (annual report of the attorney general for that year, page 1430) held that debts are to be deducted from the value of an estate subject to the inheritance tax for the purpose of ascertaining the taxable value of the latter.

I take it from your letter that you have the reports of the attorney general and that it is, therefore, not necessary for me to supply you with a typewritten copy of the opinion referred to.

You will observe that the authorities are reviewed by Mr. Hogan, and that his conclusion is reached after a full investigation into the general purport of our own statutes and decisions under similar statutes.

You will observe that Mr. Hogan points out that presumably the appraisement of the estate as certified by the probate court is final, and that the fact that the debts of the estate may materially reduce the value of the inheritances does not alter the duty of the probate judge to certify to the county auditor a copy of the inventory; so that where the inheritors claim the benefit of the deduction of debts of the estate they should proceed under sections 5343 and 5344 of the General Code, to have the estate re-valued for the purposes of the inheritance tax.

For the manner in which Mr. Hogan has worked the matter out in detail I refer you more particularly to the opinion cited.

Your question differs from the one considered by Mr. Hogan only in the fact that the claim has been compromised by the heirs and personal representatives with the claimant. This fact does not alter the case.

(See In Re Pepper's estate, 159 Pa. state, 509; In Re Kerr's estate, Ib., 512.)

In these cases, under a law like that of Ohio, it was held that where devisees and legatees have compromised with contestants of a will, or with persons claiming title adversely to the decedent, and such compromise is approved by the court before distribution is ordered, the devisees and legatees are taxable only upon the shares actually received by them, after deducting the amount paid to the adverse claimants.

I take it from your statement of the facts that the compromise was approved by you as probate judge.

If there had been a will, and if the adverse claim had been asserted by the claimant in the capacity of an inheritor, the same result, so far as the remaining heirs are concerned, would have followed; but the share of the estate paid to the claimant, if sufficient in amount, would in that event have been taxable.

In this case, inasmuch as the claimant asserts his right in the capacity of a creditor of the estate of the decedent, the amount paid to him is not taxable.

Respectfully,

EDWARD C. TURNER,

Attorney General.

514.

PROPERTY OF DECEDENT PERSON—WHERE CORONER TAKES AN INVENTORY OF MONEYS FOUND ON BODY OF PERSON FOUND DEAD SAME SHOULD BE PAID EITHER BY THE CORONER OR BY PROBATE JUDGE TO THE EXECUTOR OR ADMINISTRATOR OF SUCH DECEDENT—CLAIM OF UNDERTAKER FOR BURIAL OF BODY SHOULD BE PRESENTED TO SUCH EXECUTOR OR ADMINISTRATOR.

Where the identity of a person found dead, and of his personal representatives is known, moneys found on his person and inventoried by the coroner, as required by statute, should be paid either by the coroner or by the probate judge to the executor or administrator of such decedent, and the claim of an undertaker for the burial of the body should be presented to such executor or administrator.

COLUMBUS, OHIO, June 19, 1915.

HON. FRANK DELAY, *Probate Judge, Jackson, Ohio.*

DEAR SIR:—Your letter of June 14th, the receipt whereof is hereby acknowledged, is as follows:

"I respectfully ask the opinion of your office upon the application of sections 2861, 2862 and 2863, G. C., to the following state of facts:

"One C. D. was recently found killed by a train, an inquest was held by the coroner, and an inventory as required by 2861 filed in this office, accompanied by $17.31 in money. The deceased, whose identity is fully established, leaves a wife and young child. The undertaker who buried him also has a claim for his services.

"What disposition should be made by this court of the money so placed in his hands?"

The statutes cited by you are as follows:

"Sec. 2861. The inventory and the return shall be made separately from the finding as to the death, and together with all the articles and moneys described in the inventory, shall be returned by the coroner or other officer, to the probate court.

"Section 2862. In case the name of the deceased person is unknown, the probate court shall make such order for the preservation of the property found on the person, other than money, as may be necessary for the future identification of the person, but if known, the court shall make such other order as to it seems best. The money found shall be applied, first, to pay the expenses of saving the body of the deceased and of the inquest and burial, and the remainder, if any, shall be paid into the county treasury and become a part of the general fund.

"Sec. 2863. When property, other than money, is found upon such person, and is not identified or claimed within one year from the time the probate court received it, after giving public notice for the period of ten days in some newspaper of general circulation in the county, the court shall proceed to sell it at public sale, and pay the proceeds thereof into the county treasury, to the credit of the general fund. If at any time thereafter, proof is made to the satisfaction of the probate court or the county commissioners, of the right of any person or persons, by in-

heritance or otherwise, to such funds or any part thereof, the court or commissioners shall certify the fact to the county auditor, who shall thereupon draw a warrant on the treasurer of the county, in favor of such claimant or claimants, for the sum so paid into the treasury. The prosecuting attorney of each county shall prosecute in the name of the state all suits necessary to enforce the provisions of this and the preceding section."

In connection with these statutes there should be read the following, which are *in pari materia:*

"Sec. 2859. When an inquest is held, as part of his finding the coroner shall give a description of the person over whose body the inquest is held, which description shall specify the name, age, sex, residence, place of nativity, color of the eyes, hair, marks, and all other particulars which may assist in the identification of the person. The coroner shall also make an inventory of all articles of property found on or about such person, describing them as minutely as can conveniently be done, and of all moneys, specifying the amount, kind and denomination thereof.

"Sec. 2860. If the friends or relatives of the deceased are known, the coroner immediately after such finding, shall give them notice, by letter or otherwise. If the friends or relatives are unknown, the coroner shall advertise in one newspaper in the proper county. In either case the coroner shall state in the notice the fact of the death, and his findings, and give a substantial description of the property mentioned in the inventory.

"Sec. 2864. No provision of this chapter shall interfere with the rights of any legally appointed and qualified administrator or executor, but such moneys and effects shall be delivered to such administrator or executor, whether before or after return thereof to the probate court."

The legislative intent embodied in these statutes is clear to me. An inventory is required in all cases; but moneys and effects belonging to a deceased person whose identity is known, and for whose estate an administrator or executor has been appointed, need not even be delivered and paid to the probate court, but it will be a sufficient return to account for them by stating that they had been delivered and paid to such an administrator or executor.

These detailed provisions are intended to apply to cases in which the identity of the deceased and his friends and relatives is unknown.

It is my opinion, therefore, that in the case you submit the money which has been paid into court should be delivered and paid to the executor or administrator of the deceased. The undertaker of whom you speak must look to the executor or administrator for the satisfaction of his claim.

Respectfully,

EDWARD C. TURNER,

Attorney General.

515.

STATE HIGHWAY COMMISSIONER—ROADS AND HIGHWAYS—CONTRACT WITH THE H. E. CULBERTSON COMPANY—ESTIMATED PART OF COST MAY BE PAID CONTRACTOR WITHOUT RELEASING SURETY.

Under the contracts with The H. E. Culbertson Company for the construction of the National road between Zanesville and Hebron in Muskingum and Licking counties, and under the proposal and contract bonds executed by the company, it is within the power of the state highway commissioner to pay to the contractor a portion of the retained estimates without releasing the surety. It would however be the part of wisdom to first obtain the formal written consent of the surety company.

COLUMBUS, OHIO, June 19, 1915.

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

DEAR SIR:—I have your communication of June 14, 1915, which reads as follows:

> "In the contract of The H. E. Culbertson Company for the construction of the National road between Zanesville and Hebron in Muskingum and Licking counties, there is to date a retained percentage on the work done to the amount of something less than $45,000.00.
>
> "Mr. Culbertson has appealed to me for a partial allowance of this retained percentage of approximately $25,000.00 to permit him or assist him in carrying on the work.
>
> "If this request is granted, I will ask you what effect it would have on the contract and bond for the completion of the work.
>
> "I am advised by the resident engineer that the remaining portion of the work is relatively heavy and expensive to construct. While Mr. Culbertson's reputation as a contractor is good, there might be an inducement by releasing a liberal portion of the percentage retained for him to abandon the contract and involve us in vexatious delays and legal entanglements."

I have examined the contracts and bonds to which you refer and find in the specifications which are referred to in the contracts and made a part thereof, the following clause:

> *"Forms and methods of payments.* At the end of each month, providing the work is progressing satisfactorily, there will be made an estimate of the amount and value of material in place and work done. Eighty-five per cent. of the value so determined, less any previous payments made, will be paid to the contractor on or before the tenth day of the succeeding month. The commissioner may, at his discretion, allow a partial estimate for material delivered on the improvement. No monthly payments as a rule will be made for any amount less than five hundred dollars. Any or all estimates may be withheld indefinitely until any or all of the orders given by the commissioner, in compliance with and by virtue of the terms of the contract, have been complied with by the contractor. No partial payment shall be construed as an acceptance by the commissioner, of any material furnished or work done."

The proposal and contract bonds furnished by The H. E. Culbertson Company contain the following clause:

> "And the said surety hereby stipulates and agrees that no changes, extensions, alterations, deductions, or additions, in or to the terms of the said contract, or in or to the plans and specifications accompanying the same shall in any wise affect the obligation of said surety on its bond."

In the absence of the above quoted stipulation found in the proposal and contract bonds, I would have no hesitation in saying that if the contracts called for the retention of fifteen per cent. out of each estimate and you should subsequently modify the contracts by paying to the contractor a part of the percentage so retained, the effect of such subsequent modification in the contract would be to release the surety at least to the extent of the amount of the retained percentage paid to the contractor under the arrangements subsequently made. In the particular case under consideration, however, the surety company has expressly stipulated and agreed that no changes in the terms of the contracts shall in any wise affect the obligation of the surety on its bonds. The time of payments and the percentage of estimates to be retained are terms of the original contracts and in the bonds given to secure the performance of the contracts, the surety company has expressly agreed that its obligation on its bonds shall not be in any wise affected by changes in the terms of the contracts.

It is, therefore, my opinion that should you see fit to modify the original contracts and pay to the contractor a part of the retained percentage of the estimates already allowed, such action on your part would have no effect upon the bonds given by the contractor.

Should you see fit to pay the contractor a part of the retained estimates, it would however be the part of wisdom to first obtain the formal written consent of the surety company signing the bonds, and this consent should be executed by the proper officers of the company and not by an agent.

In this opinion I am passing only upon the legal feature of the matter expressly covered and do not desire to be taken as in any way advising either for or against the wisdom of releasing and paying to the contractor any part of the estimates retained by the state highway department, under the terms of the original contracts. The question of whether or not you should pay to the contractor any part of the percentage of estimates retained by you is one policy for your department, and it is manifest from your letter that you are fully advised as to the grave responsibilities involved in such action.

Respectfully,
EDWARD C. TURNER,
Attorney General.

516.

ARTICLES OF INCORPORATION APPROVED—THE MERCHANTS' MUTUAL INSURANCE ASSOCIATION.

COLUMBUS, OHIO, June 21, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of June 17, 1915, enclosing for my examination the proposed articles of incorporation of The Merchants' Mutual Insurance Association, of Holgate, Ohio.

I find that said proposed articles of incorporation are drawn in accordance with chapter 1, subdivision 2, division III, title IX, part second of the General Code of Ohio, and that the same are not inconsistent with the constitution and laws of Ohio, or of the United States.

Respectfully,
EDWARD C. TURNER,
Attorney General.

517.

ABSTRACT OF TITLE—PROPERTY SITUATE IN ATHENS COUNTY—APPROVAL OF DEED FROM LOVINA H. SILVUS AND EBER G. SILVUS AND WIFE.

COLUMBUS, OHIO, June 21, 1915.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of June 2nd, transmitting abstract of title to the following described real estate, situate in Athens township, Athens county, Ohio, and bounded and described as follows:

"*First Tract.* Beginning on the north line of lease lot No. 60 in sections Nos. 14 and 15, town No. 9, range No. 14 of the Ohio company's purchase at a point 21.11 chains north 85 degrees west of the northeast corner of said lot and thence running south 4½ degrees west, parallel with the west line of said lot, 40.34 chains to the south line thereof; thence north 85½ degrees west, along the south line of said lot, 12.82 chains to the southwest corner thereof; thence north 4½ degrees east, along the west line of said lot, 40.34 chains to the northwest corner thereof; thence south 85 degrees east, along the north line of said lot, 12.82 chains to the place of beginning, containing 51.71 acres, more or less.

"*Second Tract.* Beginning at the southwest corner of lease lot No. 97 in sections Nos. 15 and 21, town No. 9, range No. 14 of the Ohio company's purchase and thence running south, 85¼ degrees east, along the south line of said lot, 18.25 chains to the southeast corner thereof; thence north 4½ degrees east, along the west line of lease lot No. 60, 40.00 chains to the northwest corner of said lease lot No. 60; thence south 85 degrees east, along the north line of said lease lot No. 60, 17.10 chains to the southwest corner of lease lot No. 61; thence north 4½ degrees east, along the east line of said lease lot No. 97, 18.05 chains to the southeast corner of one hundred and sixteen acres described in the deed of Lovina H. Silvus and Eber G. Silvus and wife to the state of Ohio, dated May 14, 1904, and recorded in deed book 93 at page 331 record of deeds of Athens county, Ohio; thence north 68 degrees west, along the south line of said one hundred and sixteen acre tract, 37.33 chains to the west line of said lease lot No. 97; thence south 4¾ degrees west, along the west line of said lot, 69.19 chains to the place of beginning, excepting and reserving 16.27 acres off the south end of said lease lot, and containing, after such exception, 140.16 acres, more or less.

"*Third Tract.* Beginning at the southeast corner of lease lot No. 96. in sections Nos. 15 and 21, town No. 9, range No. 14 of the Ohio company's purchase and thence running north 4¾ degrees east, along the east line of

said lot, 69.19 chains to the south line of one hundred and sixteen acres described in the deed of Lovina H. Silvus and Eber G. Silvus and wife to the state of Ohio, dated May 14, 1904, and recorded in deed book 93 at page 331 of record of deeds of Athens county, Ohio; thence north 68 degrees west, along the south line of said one hundred and sixteen acre tract, 15.21 chains to the middle of the county road; thence south 41 degrees west, along the middle of said road, 9.83 chains to the north line of lease lot No. 98; thence south 84 degrees east, along the north line of said lot No. 98, 11.57 chains to the northeast corner thereof; thence south 4¾ degrees west, along the west line of said lease lot No. 96, 65.57 chains to the southwest corner thereof; thence south 85¼ degrees east, along the south line of said lease lot, 9.00 chains to the place of beginning, excepting and reserving 16.27 acres off of the south end of said lease lot, and containing, after such exception, 53.13 acres, more or less."

Also the following described real estate situate in Athens township, Athens county, Ohio, and bounded and described as follows:

"*First Tract.* 16.27 acres off of the south end of lease lot No. 97 in sections Nos. 15 and 21, town No. 9, range No. 14, of the Ohio company's purchase.

"*Second Tract.* 16.27 acres off of the south end of lease lot No. 96 in sections Nos. 15 and 21, town No. 9, range No. 14 of the Ohio company's purchase."

The first three tracts above described are contained in the deed of Lovina H. Silvus, widow, and Eber G. Silvus and Rosetta Silvus, his wife, to the state of Ohio, executed May 27, 1915, before W. E. Peters, notary public in and for Franklin county, Ohio. The last two tracts above described are contained in an option to the state of Ohio, executed by Lovina H. Silvus, Eber G. Silvus and Rosetta Silvus, under date of May 27, 1915, which deed and option accompanied the abstract of title.

I have carefully examined the abstract of title and from such examination am of the opinion that on the 13th day of April, 1915, Lovina H. Silvus and Eber G. Silvus were seized of an estate in fee simple to said premises, subject only to the following:

(1) The taxes for the last half of the year 1914, due June, 1915, amounting to $43.95.

(2) The taxes for the year 1915, the amount of which are as yet undetermined.

(3) The right of William P. Wyatt to cut and remove timber from said premises until February 1, 1916, under and by virtue of a contract entered into by and between Eber G. Silvus and said William P. Wyatt, January 10, 1914.

I have also examined the deed from Lovina H. Silvus and Eber G. Silvus and wife, above referred to, and find that the same is in proper form.

The abstract, deed and option are herewith returned.

Respectfully,

EDWARD C. TURNER,
Attorney General.

518.

VILLAGE SCHOOL DISTRICT—TITLE TO SCHOOL PROPERTY VESTS IN BOARD OF EDUCATION OF CONTIGUOUS RURAL SCHOOL DISTRICT WHEN VILLAGE SCHOOL DISTRICT IS DISSOLVED—PRIOR INDEBTEDNESS OF VILLAGE SCHOOL DISTRICT SUBJECT TO TAX OF ONLY THAT SUBDIVISION.

Upon the dissolution of a village school district under authority of section 4682-1, *G. C., as found in* 104 *O. L.*, 133, *the title to the school property of said district passes to and vests in the board of education of the contiguous rural school district to which said village school district is joined, but only the property within the limits of said village school district will be subject to a tax levy for the payment of any indebtedness incurred by the board of education of said village school district, and the board of education of said rural school district has no authority in law to assume said indebtedness or to levy a tax to provide a fund for the payment thereof, either upon the property within the limits of said village school district or upon the general duplicate of the rural school district.*

COLUMBUS, OHIO, June 21, 1915.

HON. P. A. SAYLOR, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—In your letter of June 9th, you request my opinion as follows:

"Recently Gratis township rural school district voted on the proposition to dissolve said district and annex to West Elkton village school district under provisions of 4735-1 of the General Code of Ohio. The proposition failed by one vote. The township now wants the village school district to vote under section 4682-1 on the question of dissolving the village school district and becoming a part of Gratis township rural school district. The West Elkton village school district has a bonded indebtedness of about $20,000.00. The board of education of Gratis township rural school district want to know if they can enter into a contract with the W. Elkton school district to assume this bonded indebtedness and have the same become a debt of the whole of said rural school district in the event that said village district dissolves. Under section 4689 of the General Code, as we understand it, the village could not dissolve until they had provided for taking care of this bonded indebtedness just the same as a municipal corporation. This would practically result in maintaining two tax rates for the same taxing district in the event that the village voted in favor of dissolving. No one wants this situation and the township board would like to, in consideration of the township receiving the school property of the West Elkton village district in case of dissolution, assume and agree to pay this bonded indebtedness and have the same tax rate all over the same taxing district. Can this be done? Mr. McCurdy *of the bureau of uniform information* says that it is being done and has been done all over the state. We would like to have your opinion on the subject at as early date as possible as they would like to have the vote as soon as they can. In the event that the contract cannot be made, or the indebtedness taken over by the township board, there will be no vote. Will you kindly give us your opinion on this subject?"

Your question has been answered in opinion No. 287 of this department,

rendered to Honorable F. C. Goodrich, prosecuting attorney of Miami county, under date of April 26, 1915. This opinion holds that, upon the dissolution of a village school district under authority of section 4682-1, G. C., as found in 104 O. L., 133, the title to the school property of said district passes to and vests in the board of education of the contiguous rural school district to which said village school district is joined, but only property within the limits of said village school district will be subject to a tax levy for the payment of any indebtedness incurred by the board of education of said village school district, and the board of education of said rural school district has no authority in law to assume said indebtedness or to levy a tax to provide a fund for the payment thereof, either upon the property within the limits of said village school district or upon the general duplicate of the rural school district. The opinion further holds that if the levy for the payment of such indebtedness will not have been made by the board of education of said village school district at the time of dissolution of said village school district as a separate taxing district, and its board of education as its taxing authority, must continue for the purpose of levying a tax for the payment of such indebtedness until such time as said indebtedness will have been paid.

I enclose herewith copy of this opinion.

Respectfully,
EDWARD C. TURNER,
Attorney General.

519.

DISTRICT ASSESSOR—TRANSFER OF TERRITORY ON TAX LIST FROM ONE SCHOOL DISTRICT TO ANOTHER—LATEST DATE FIRST MONDAY IN JUNE.

The latest date on which a district assessor may be required to transfer territory on his tax list from one school district to another, on account of changes in the boundaries of school district lines made by the county board of education, is the first Monday in June.

COLUMBUS, OHIO, June 21, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge the receipt of your letter of June 15th, requesting my opinion

> "as to the latest date on which a district assessor may be required to transfer territory on his tax list from one school district to another, on account of changes in the boundaries of school district lines made by the county board of education."

You refer to the case of State ex rel. v. Craig, 21 O. C. C., 13.

This case involved the question of the levy of municipal taxes in territory annexed to a village. It was held, in effect, that in the absence of special provisions to the contrary the boundaries of a taxing district for a given taxing year are to be determined as of the date on which the final act of the authorities levying on behalf of such district may be committed.

At that time the statute with reference to municipal corporations required the certification of the levy by the municipal authorities to the county auditor on or

before the first Monday in June of each year. There was special provision for the making of the levy in annexed territory after that date, but the requirements of this provision had not been complied with. The annexation, however, had occurred prior to the first Monday in June, and it was held that the auditor could be compelled by mandamus to extend the municipal levy upon the duplicate of the annexed territory under these circumstances.

In my opinion, the principle involved in this case is sound and of universal application.

School taxes were formerly required to be levied "on or before the first Monday in June of each year" when the levy was to be made by the board of education, and "on or before the first Monday in August of each year" when the levy was to be made by the county commissioners, who have authority to act in case the board of education neglects its duties.

(See section 7594, General Code.)

The former date happens to be the same as that provided in section 5649-3a of the General Code, which requires the levying authorities of the various taxing districts "on or before the first Monday in June, each year" to submit an annual budget to the county auditor.

It is true that the budget commission does not meet for the purpose of acting on such budgets until the first Monday in August. (See section 5649-3b of the General Code, as amended 103 O. L., 552 and 104 O. L., 237; also as amended by house bill No. 342, filed by the governor in the office of the secretary of state April 30, 1915, and effective July 30, 1915.)

It is true also that these dates are all directory insofar as the validity of any levy which may be made thereafter is concerned; but for the purpose of ascertaining the territory within which a given levy is to apply they are, in my opinion, determinative; and this is clearly the case if force is to be given to the decision cited.

Under the provisions of section 4736 of the General Code, as amended 104 O. L., 138, district lines may be changed by the county board of education at any time, but if such boundaries are changed after the first Monday in June in any year the levies must be made according to the original district lines, and the adjustment of revenues between or among the districts affected must be made under the provisions of section 4696 of the General Code, which is to the effect that "when territory is transferred from one school district to another, the equitable division of funds or indebtedness shall be determined upon at the time of the transfer * * *."

Respectfully,
EDWARD C. TURNER,
Attorney General.

520.

TAX COMMISSION—FORM FOR MAKING RETURNS OF INCORPORATED COMPANIES—OFFICERS OF CORPORATIONS NOT REQUIRED TO ANSWER ALL QUESTIONS ON BLANK FORMS SUBMITTED—HOW TO COMPEL ANSWER FOR SUCH RETURNS.

The tax commission has authority to prescribe the form of blanks for making returns of incorporated companies, and in the exercise thereof may lawfully include in the blank forms questions the answers to which would be of assistance to the district assessor in making such revision and correction of corporate returns as he is authorized by statute to make, including questions contained in district assessors' form No. 10. *However, the officers of corporations are not required to answer all such questions on the blank forms, though answers may be compelled in separate proceedings to inquire into the correctness of such returns under sections* 5399 *to* 5403, *inclusive, G. C. Such information may be used by the district assessor in verifying and checking up the return of the corporation, but not directly as the basis of an assessment of the corporate property.*

COLUMBUS, OHIO, June 21, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—With your letter of May 25th you enclose a communication from the Ohio Manufacturers' Association, signed by its secretary, the purport of which is that the executive office of the association has advised the manufacturing corporations which are members of the association that they are not obliged to answer certain questions on the first page of the blank form of returns of incorporated companies prescribed by the commission for use by the district assessors in the year 1915.

The secretary of the association asserts the claim that these questions, some twenty-eight in number, have no relation to the valuation of the taxable property of corporations for taxation, and will in no respect aid the taxing officers in arriving at a proper valuation of such property; that on the contrary many of the questions constitute an illegal and unwarranted inquisition into the private affairs of corporations and provide a means by which unprincipled persons may use information extorted in this way, to the injury of those required to answer the interrogatories; and that questions which may be admitted to have some bearing upon the value of the property of corporations are covered by other questions in the blank form and are therefore unnecessary.

The secretary of the association also states that the questions, or at least some of them, were originally prescribed by the commission upon the theory that it was possible and proper to assess the property of a corporation upon its unit value as a going concern, and calls attention to the fact that the supreme court of this state has held that this theory is erroneous and that the property of a corporation is to be considered and assessed distributively, without regard to such enhancement of value as the whole plant or property of the corporation might acquire by reason of the use of the different kinds or items of such property together for a common purpose; in other words, that what constitutes a particular subject of assessment and valuation, belonging to a corporation, is the same as what constitutes a particular subject of assessment when belonging to an individual.

In your letter you state the reasons of the commission for the inclusion in the blank forms of the questions to which objection is made. The questions are as follows:

"1. Name of corporation----------
"2. Organized under the laws of the state of ----------
"3. Location of principal office as specified in articles of incorporation ----------
"4. Authorized capital stock ----------
"5. Capital stock issued and outstanding----------
"6. Par value of each share ----------
"7. Market value of each share ----------
"8. Actual value (if there is no market value) of each share --------
"9. Surplus, undivided profits and reserve ----------
"10. Capital stock representing patents or good will ----------
"11. Bonded indebtedness ----------
"12. Assessed value of real estate in said county in daily operation ----------
"13. Assessed value of other real estate in said county ----------
"14. Fire insurance carried on building in said county ----------
"15. Fire insurance carried on personal property in said county ------
"16. Money on hand or in bank in said county on the day preceding the first Monday of April, 191--, ----------
"17. Money in bank outside of said county on the day preceding the the first Monday of April, 191--, ----------
"18. Accounts receivable on the day preceding the first Monday of April, 191--, ----------
"19. Other credits on the day preceding the first Monday of April, 191--, ----------
"20. Accounts and bills payable on the day preceding the first Monday of April, 191--, ----------
"21. Last inventory of real property in said county ----------
"22. Last inventory of personal property in said county ----------
"23. Last inventory of real property in Ohio and outside of said county ----------
"24. Last inventory of personal property in Ohio outside of said county ----------
"25. Last inventory of real property outside of Ohio ----------
"26. Last inventory of personal property outside of Ohio ----------
"27. Date of last inventory taken ----------
"28. Merchandise, stock, machinery or other property on consignment on the day preceding the first Monday of April ----------"

Your statement of the commission's view as to these questions and the reasons for incorporating them in the blank is as follows:

"Questions 1 to 3, inclusive, are necessary in order to procure the name of the corporation to be taxed and the situs of its property.

"Questions 4 to 15, inclusive, bear upon the total value of the property of the company and are used, not for the purpose of fixing the valuation upon the basis of capitalization, but for the purpose of giving the district assessor an opportunity to know whether the aggregate of all the items of property returned by the company bears some relation to the capitalization. The answers to these questions are used as a basis of inquiry upon notice to the corporation to appear before the district assessor and not for fixing arbitrary valuations in accordance with the capital.

"Questions 16 and 17 are asked in order that the district assessor may see that the corporation—if an Ohio corporation—returns not only

money located in the county in which the corporation has its principal office, but also the money on deposit in other places. It frequently finds in incorporated companies a failure to report for taxation money on deposit in other counties which is taxable in the county where the corporation is located.

"Questions 18, 19 and 20 are asked for the purpose of making a distinction between accounts receivable and bills receivable, and other forms of credits. It is frequently found that accounts receivable are not returned as credits, or at least not at their true value.

"Questions 21 to 28, inclusive, bear upon the value of the property reported on the second page of the blank under items 1 to 12, inclusive.

"The commission believes that it is fully warranted in law in prescribing these questions to be answered by an incorporated company and desires your opinion in the matter.

"Concerning the second paragraph of the enclosed letter, the commission desires to say that the blank for 1915 was not issued under a theory that it was possible and proper to assess the property of a manufacturing corporation upon its unit value, as a comparison of the blank for 1915 with that of 1914, clearly indicates."

No question is raised by the Ohio Manufacturers' Association as to the authority of the commission to prescribe proper blank forms for use in making returns of the property of incorporated companies. The statutes clearly confer this power and duty upon the commission. (See section 5624-8, G. C., section 55 of the Warnes law, so-called, 103 O. L., 800.)

Right at this point, however, I am constrained to advise that there is no direct obligation on the part of the officers of any corporation to answer *on the blank form* any of these questions; so that the advice which the secretary of the Ohio Manufacturers' Association says has been given to the corporate members of such association is technically correct, though not necessarily for the reasons assigned by him in his letter to the commission.

Sections 5404 and 5405 of the General Code, require the proper officers of every incorporated company, except those whose taxation is otherwise specifically provided for, to list the personal property thereof for taxation and to return the same to the auditors of the respective counties where the property is situated. Section 5406, General Code, provides for furnishing the necessary blanks for making such returns. This is as far as the statutes go in imposing duties upon the officers of corporations. They are required to list and return the property of their respective corporations, *but not to answer questions bearing upon the correctness of their own valuations of such property.*

The provision which is lacking here is one like section 1465-18, of the General Code, which is as follows:

"Sec. 1465-18. Each company, firm, corporation, person, association, co-partnership or public utility, shall furnish the commission in the form of returns prescribed by it all information required by law and all other facts and information, in addition to the facts and information in this act specifically required to be given, which the commission may require to enable it to carry into effect the provisions of the laws which the commission is required to administer, and *shall make specific answers to all questions submitted by the commission.*"

In my opinion, some such provision as this is necessary in order to impose any specific duty upon the officers of corporations to answer on such blank form such questions as those about which you inquire.

It is true that section 55 of the Warnes law, *supra,* after giving to the tax commission the authority which has been described, provides further that

> "* * * All persons required to list property for taxation shall use true copies of such blank forms."

This provision, however, does not, in my opinion, have the effect either of authorizing the commission to prescribe anything but a form for listing property or of requiring persons required to list property to do anything except to list property. That is to say, the answers to the questions which have been quoted do not constitute a listing of property. On the contrary, they merely afford information by the use of which the taxing authorities may form a judgment as to whether or not the property actually listed on another page of the blank is fully listed, or listed at its true value in money by the officers of the corporation.

While the authority of the commission to prescribe a form of tax list, including these questions, cannot be doubted, its authority to require answers to them as a part of the act of tax listing cannot be sustained; and the duty of the persons required to list to answer such questions cannot be predicated upon their duty to "use true copies of such blank forms."

My predecessor, Hon. Timothy S. Hogan, in an opinion to the commission respecting a similar question, (found in the report of the attorney general for the year 1912, page 545) held that such questions might properly be prescribed in the blank forms and that corporations should answer all such pertinent questions so prescribed, for the reason that if answer were not made the county auditor (the then assessing officer) might, in the exercise of the powers of inquiry and correction given to him by sections 5398 to 5403, inclusive, of the General Code, call their officers before him and examine them generally as to facts bearing upon the correctness of the valuations given in their original returns, compelling answers to all such pertinent questions by proceedings in contempt as provided in section 5403 of the General Code.

Mr. Hogan did not hold that the officers of corporations were under any direct, legal obligation to answer the questions prescribed in the blank form, but merely that the county auditor had the power to ask such questions in another proceeding, so that a corporation might avoid the necessity of such separate proceeding by answering them in the first instance.

When I express the view, then, that such general questions, assuming them to bear upon the value of the corporate property as such, need not be answered by the officers making out the returns, except at their pleasure, I do not in any way modify Mr. Hogan's opinion.

There remains to be considered the question as to whether or not the questions, about which the Ohio Manufacturers' Association complains, may be properly prescribed by the commission, it being understood that there is no direct obligation to answer them.

As I have stated, Mr. Hogan's conclusion in the opinion to which I have referred was that because the county auditor was authorized to correct returns he might lawfully make such inquiries of the officers of corporations required to make returns as would aid him in arriving at the true value in money of the property returned; so that the blank prescribed for his use by the tax commission might lawfully contain such questions.

Of course, at the present time the power and duties of the county auditor, both with respect to the assessment of corporate property and with respect to making corrections, are vested in and imposed upon the district assessor (section 5 of the Warnes law, section 5585, G. C.).

The following is an abstract of such powers formerly possessed by the auditor but now possessed by the district assessor:

(1) To "ascertain and determine the value of the property of such (incorporated) companies." (Section 5405, General Code.)

This provision makes the auditor in effect the assessor as to the property of incorporated companies. In this respect there has been a change in the phraseology of the section, as prior to its amendment in 102 O. L., 60, the statute did not contain this language.

(2) To "have the property valued and assessed" if "of the opinion that false or incorrect valuations have been made, that the property of the corporation or association has not been listed at its full value, or that it has not been listed in the location where it properly belongs, or if no return has been made." (Section 5406, General Code.)

Of course, this provision seems to be inconsistent with the direct assessing power given to the auditor (and now the assessor) by section 5405, G. C. However, it has been held in several cases that the return of an incorporated company made under oath is still entitled to the presumption which was originally accorded to a return made under oath, and which is still accorded to a sworn return of an individual. So that changes in valuations as fixed by the officers of the corporation in listing its property are still said to be additions or deductions from original returns instead of original assessments by the auditor.

This was seemingly one of the points decided in the case of Champion Coated Paper Co. v. Long, treasurer, referred to by the secretary of the Ohio Manufacturers' Association. A somewhat similar holding was made in the case of Fearon Lumber & Veneer Co. v. Robinson, auditor, 18 C. C. (n. s.) 146, in which it was decided that an annual county board of equalization was without power to add to the return of an incorporated company after the amendment of section 5405, G. C., without notice and without placing a statement of the facts upon its records, such a return being a "return made under oath."

These decisions make the question as to the status of the return of an incorporated company in the hands of the auditor somewhat doubtful, being seemingly inconsistent with the plain requirement of section 5405, to the effect that the auditor shall ascertain and determine for himself the true value in money of the property of the corporation, from which the inference seems irresistible that the valuations placed upon its property by the corporation are not primarily binding upon the auditor, as formerly. At any rate, the situation is such as to call for a further examination into the powers of the auditor in revising and correcting corporate returns, assuming them to have the status of original assessments or valuations.

Section 5406, G. C., as above quoted, provides in terms that the auditor, if he is in doubt as to the correctness of a return made by an incorporated company, "shall have the property valued and assessed," but affords no machinery whatever for such valuation and assessment. There is machinery, however, for the correction of corporate returns, which will be hereinafter dealt with.

(3) To correct corporate returns under section 5399, General Code, which provides that if any person required to make return to the auditor fails to make a return, makes return of a portion only of his taxable property, or fails to return his taxable property or any part thereof accord-

ing to the true value in money, the auditor (now, of course, the assessor) shall "ascertain as near as practicable the true amount of personal property, moneys, credits and investments that such person ought to have returned or listed, and the true value at which it should have been taxed in his county for not exceeding the five years next preceding the year in which the inquiries and corrections provided for in this section and in the next preceding and the next two succeeding sections are made."

This section applies "to all kinds of omitted property for the taxation of which, for any of the years in which it was omitted, provision has not been made by law." The exact effect of this provision is not clear, the question being as to whether it authorizes corrections to be made for the current year. This is expressly authorized by section 5401 as to returns of assessors, but inasmuch as corporate property is not assessed through assessors, some doubt is raised as to whether section 5401 applies, in view of the reference to the "next two succeeding sections" in section 5399. However, in State ex rel. v. Halliday, 61 O. S., 352, it seems to have been assumed that the power to correct for the current year existed. Bradbury, C. J., stated in the opinion at page 373, that

> "if any mistakes or errors occur in these returns either on the part of the persons making them or of a county auditor, whether such mistakes and errors consist in omitting to return all property lawfully taxable, or in the values placed on that returned, or both, there is provided by law an appropriate remedy for the same."

and the context makes it seem that Judge Bradbury had in mind proceedings by the county auditor, for in the previous sentence he said:

> "The duty of fixing its value for taxation and making return thereof to the county auditor devolved on its officers and agents, subject, of course, to the control and revision of the *former*."

It seems, therefore, that the statutes so far abstracted have been interpreted together so as to give the auditor the power to revise and correct the returns of corporations as to the current year, as well as to the five years next preceding. This is further exemplified by the reference in section 5403, G. C., which provides generally for proceedings in the probate court to compel persons to appear before the county auditor and give testimony, to "proceedings against companies or corporations required to make return to the county auditor for taxation."

Reading all the sections together, it is clear that the auditor has at least the power to revise and correct corporate returns, and in that capacity to summon persons to appear before him and give testimony and, by the proceedings provided by section 5403, G. C., to compel answers to questions put to them by him "touching the matter under examination."

Assuming for the moment that the district assessor, succeeding to the powers of the auditor, would have the right to question the correctness of a return made by a corporation, to call its officers before him and examine them under oath as to the value of such property, and instead of doing this, for his own convenience, may submit certain questions which will assist him in determining the correctness of the return and incorporate them in the blank form of return, leaving it optional with the officers of the company to answer them or not, at the peril of being called before the assessor, there remains to be considered the question as to whether the specific questions to which your inquiry relates are material as reflecting upon the value of the different items of corporate property.

As you state in your letter, the first three questions are necessary in order to procure the name of the corporation to be taxed and the situs of its property. No objection can be made to these questions.

No objection can be made to questions 12 and 13, relating to the assessed value of real estate. To be sure, these questions are asked in another form on the second page of the blank, but the questions on the first page are more specific and afford a means of comparison by which the assessor can better arrive at the assessed value of the real estate in the county used in daily operation, on the basis of which, in part, he must distribute the value of the personal property as determined by him under section 5405 of the General Code, which requires that when the value of the personal property is ascertained it "shall be apportioned by the auditor to such * * * taxing districts * * * in proportion to the value of the real estate and fixed property included in the return, in each of such * * * taxing districts."

The 15th question, relating to fire insurance carried on personal property in the county, is certainly pertinent. In inquiring as to the correctness of a return of personal property, the assessing officer may, in my opinion, investigate the amount of fire insurance carried thereon, for reasons which it seems to me are obvious.

Questions 16 to 28, inclusive, cannot be objected to. It is true that these questions are in a way covered by the return itself and the questions asked on the other pages of the blank, but, as you state in your letter, experience shows that property is likely to escape returns and taxation when it is listed in the ordinary way, and these questions, by the additional detailed information which may be elicited, are of undoubted pertinency and value in checking the more general return.

The 4th to the 11th questions on the first page of the blank, together with the 14th, present a more difficult problem. It is true, of course, that the capital stock, surplus and bonded indebtedness of a corporation do not reflect directly upon the value of the separate articles of personal property which it may own, but rather upon the value of the corporation's property considered as an entirety or unit and as a going concern. You state in your letter that such questions are asked "not for the purpose of fixing the valuation upon the basis of capitalization, but for the purpose of giving the district assessor an opportunity to know whether the aggregate of all the items of property returned by the company bears some relation to the capitalization. The answers to these questions are used as a basis of inquiry upon notice to the corporation to appear before the district assessor and not for fixing arbitrary valuations in accordance with the capital."

You make this statement with respect to questions 4 to 15, inclusive, and it is to be noted in this connection that the assessed value of the real estate and fire insurance carried on personal property, together with the questions to which I have referred, would have to be asked in order to give a true index to the value of the corporate property as a unit.

There is no question in my mind that the secretary of the Ohio Manufacturers' Association is correct in assuming that this group of questions at any rate is designed to show what the unit value of the corporation's property is. Does it, however, follow that because the assessment may not be made on the unit basis the assessing officer is precluded from considering the unit value of the property, in an effort to account for all the corporate property considered distributively and to assign to each item thereof its proper distributive value?

I think the answer to this question is in the negative. I see no objection to a district assessor ascertaining what the value of the entire property of a corporation is and then proceeding, by inquiry or otherwise, to resolve the unit value into its component parts, so long as the corporation is permitted to explain what is represented by its capital stock, surplus and bonded indebtedness and to have proper

deductions made for good will or earning capacity, management and profits, patent rights and other non-taxable elements, and so long as the assessor must actually and separately value each group or item of things constituting personal property.

It seems to me that the unit value might, in many conceivable cases, afford a very valuable index to the distributive value in just this way.

In this connection I observe that the 10th question inquires as to the "capital stock representing patents and good will"; that the 12th and 13th questions relate to the assessed value of real estate. Where the property of a corporation is all located in one county, a deduction of the values scheduled in answer to these three questions from the gross sum arrived at by adding together the actual value of the capital stock and the bonded indebtedness should, in almost every case, furnish a very close criterion to the actual physical value of the personal property. This might not have been true in former years when real estate was valued for taxation quadrennially, but under the present law, when real estate is supposed at least to be assessed annually at its true value in money, there should be no difference between the actual value of real estate as assets of the corporation and the assessed value thereof; at least there should be no difference for purposes of taxation.

Of course, the result arrived at in this way is the mere suggestion as to what the aggregate value of the different items of personal property is, and can be used by the assessor only in checking such aggregate value with the figures returned by the corporation itself, and not as the basis of any unit assessment.

The question being, then, as to whether the group of questions last considered is pertinent and material in an inquiry as to whether or not a corporation has returned all of its taxable personal property, I am of the opinion that the answer thereto is in the affirmative.

Of course, where the property of a corporation is situated in more than one county, these questions would be of no value whatever without other questions which are included in the list, such as the value of property located outside of the county. However, questions 21 to 26, inclusive, cover more or less accurately the necessary facts to apply the other group of questions which has been considered even to corporations in this situation.

Even the technical rules of evidence, which by no means govern taxing boards and officers in the inquiries which they are authorized to make, justify the use of such evidence as this in arriving at the facts sought to be established. As Professor Wigmore says in his work on Evidence,

> "the second axiom on which our law of evidence rests is this: *All facts having a rational probative value are admissible, unless some specific rule forbids.*"

I have explained why the going concern value of the property of a corporation, taken in connection with the facts showing what deductions should be made therefrom, tends to prove the aggregate distributive or physical value of the property. The only technical rule of evidence which could be invoked to prevent the admission of such evidence which occurs to me is what is known as the "best evidence rule." That is, it might be asserted that actual view of the property, investigation into the market value of each class of property considered distributively, etc., afford better evidence of such value than facts of the kind which have been discussed.

I do not think the taxing authorities are bound by the "best evidence rule." Be that as it may, however, value is after all but a question of judgment and opinion, and is never a perfectly demonstrable fact. It is provable by view, by estimation and by opinion testimony. Hence, it seems that any evidence having probative worth is properly admissible. Admissibility falls short of proof or dem-

onstration (Wigmore, section 12). So evidence of this character may, in many conceivable cases, fall short of proving or demonstrating anything with respect to the aggregate physical or distributive value of the personal property of the corporation. This, however, does not destroy its relevancy.

In State ex rel. v. Jones, auditor, 51 O. S., 492, at pages 512 et seq., will be found a discussion of the relation between the value of the capital stock of a corporation and the value of its tangible property, as well as of the philosophy underlying the so-called "unit rule." The language of the opinion of the court in this case bears out the statements herein made.

I conclude, therefore, that all of the questions which the commission has prescribed on the blank forms for the returns of incorporated companies are questions which the district assessor is entitled to ask in order to assist him in arriving at the physical and distributive value of the property of such a company. Being such, I am further of the opinion that they may lawfully be incorporated in the form of returns. As previously stated, such companies are not required to answer these questions on the blank forms in the sense that any penalty may be visited upon them for failing to do so, nor in the sense that their return without answers to these questions would not be a valid return. So that if the officers of a corporation prefer to answer these questions personally upon being called before the district assessor for the purpose of inquiry and correction, they may take this course. Should they fail or refuse to answer such questions in such a proceeding, however, they may, under the provisions of section 5403 of the General Code, be compelled to do so by proceedings in the probate court.

Respectfully,
EDWARD C. TURNER,
Attorney General.

521.

STATE HIGHWAY COMMISSIONER—CONTRACTS MAY BE ENTERED INTO IN ANTICIPATION OF MONEYS THAT WILL COME INTO STATE TREASURY AT AUGUST, 1915, SETTLEMENT—CERTAIN CONDITIONS.

The state highway commissioner may at the present time enter into contracts in anticipation of the moneys that will come into the state treasury at the August, 1915, *settlement, provided such contracts are so arranged that it will not be necessary to actually make any payments to contractors from the proceeds of the August settlement until the funds have come into the state treasury.*

COLUMBUS, OHIO, June 21, 1915.

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

DEAR SIR:—I have your communication of June 17, 1915, in which you state that you are submitting, under separate cover, final resolutions relating to inter-county highway improvements, that these resolutions call for a sum larger than that available from the proceeds of the February, 1915, settlement, now in the state treasury and appropriated by house bill No. 314, and that you desire my opinion as to whether or not your department may legally enter into contracts at this time in anticipation of the moneys that will come into the state treasury at the August, 1915, settlement and which moneys are appropriated in the first item of house bill No. 709.

While the resolutions submitted by you do not raise the question which you propound, I deem it proper, nevertheless, to answer your inquiry, inasmuch as this question will necessarily arise in the near future.

A similar question was answered by my predecessor, Hon. Timothy S. Hogan, in an opinion to the state highway commissioner rendered May 23, 1914, in which it was held that it was both proper and legal for the state highway department to contract for the aggregate amount of money that had been levied and appropriated for the entire tax year, even though the second installment of the tax had not come into the state treasury and would not come into the state treasury until August, for the reason that such installment of tax had been levied, placed on the duplicate and was in the process of collection and would be in the state treasury before it was actually needed and before the fund arising from the first installment of the year's tax would have been exhausted in payments to contractors on estimates.

I concur in the views expressed by my predecessor in the opinion above referred to.

Under the appropriation measures now in force and relating to the inter-county highway funds of your department there are, therefore, now the following sums available for contract purposes:

> "1. The item of $780,976.50 carried by house bill No. 314 and being $8,874.73 for each county.
>
> "2. The item of $478,138.67, being the second item carried by house bill No. 709 and being a sum equal to the balances which existed in the inter-county highway fund to the credit of the several counties of the state, with certain exceptions, on the 12th day of March, 1915, and which balances were lapsed by the provisions of house bill No. 314.
>
> "3. The sum of $707,100.00, being the first item carried by house bill No. 709 and being the sum of $8,035.22 for each county, this being the proceeds of the August, 1915, settlement and being the appropriation about which you specifically inquire."

The item of $780,976.50 carried by house bill No. 314 and the item of $478,138.67, carried by house bill No. 709, represent funds now in the state treasury and the item of $707,100.00, carried by house bill No. 709, represents the money that will come into the state treasury at the August, 1915, settlement.

Under the terms of house bill No. 314 the item carried by that bill is now available for contract purposes and under the provisions of house bill No. 709 the various items carried in that bill were available for contract purposes as soon as the bill became a law, which was on June 4, 1915, unless the fact that certain items in the bill represent moneys that are not yet in the state treasury should be taken to require an opposite conclusion.

It is a matter of common knowledge that it requires a considerable time, even after a contract is let, before the work can be so far prosecuted by the contractor as to require or even warrant the payment of estimates.

The appropriation about which you inquire, as has before been observed, represents a tax that has been levied, placed on the duplicate and is in the process of collection and that will come into the state treasury at the August, 1915, settlement and the legislature has appropriated the same and sought to make it available for contract purposes at the present time. To hold that contracts might not be entered into, where the contractors are to be paid either in whole or in part from this appropriation, would serve no useful purpose and the only

result would be to delay the letting of contracts until so late in the working season that little could be accomplished by the contractors before the coming of bad weather would interfere with the work.

Answering your question specifically, it is, therefore, my opinion that you may at the present time enter into contracts in anticipation of the moneys that will come into the state treasury at the August, 1915, settlement. The only precaution to be observed by you in the premises being to so arrange the contracts that it will not be necessary to actually make any payments to the contractors from the appropriation about which you inquire until after the funds represented by such appropriation shall have come into the state treasury.

Respectfully,
EDWARD C. TURNER,
Attorney General.

522.

STATE HIGHWAY COMMISSIONER—CONTRACTS—COUNTY COMMISSIONERS SHOULD FILE WRITTEN AGREEMENT WITH HIGHWAY COMMISSIONER AS TO AMOUNT COUNTY WILL PAY BEFORE STATE SHOULD CO-OPERATE WITH LOCAL AUTHORITIES—ATTORNEY GENERAL SHOULD APPROVE CONTRACT AS TO FORM AND LEGALITY.

Under section 1212, *G. C.* 103 *O. L.*, 457, *no contract should be let by the state highway commissioner or work done by him where the co-operation of the local authorities is contemplated unless the county commissioners of the county in which the improvement is to be made shall have made a written agreement to assume in the first instance the share of the cost and expense over and above the amount to be paid by the state, and such agreement shall have been filed in the office of the state highway commissioner with the approval of the attorney general thereon as to form and legality.*

COLUMBUS, OHIO, June 21, 1915.

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

DEAR SIR:—I have your communication of June 17, 1915, transmitting to me for my examination final resolutions as to the following roads:

"Paulding-Woodburn, Paulding county, Pet. No. 1404, I. C. H. No. 433.
"Toledo-Wauseon, Fulton county, Pet. No. 1221, I. C. H., No. 20.
"Mansfield-Norwalk, Richland county, Pet. No. 822, I. C. H. No. 287.
"Mansfield-Shelby, Richland county, Pet. No. 823, I. C. H. No. 436."

As to the resolutions pertaining to the improvements in Paulding and Fulton counties, I find the same to be in regular form and am, therefore, returning these resolutions with my approval endorsed thereon.

In reference to the two resolutions pertaining to improvements in Richland county, it appears that these resolutions were adopted by the board of county commissioners of Richland county on July 18, 1914, and were received by the then state highway commissioner on July 23, 1914. These resolutions were not submitted to the then attorney general for approval and on August 4, 1914, con-

tracts for the construction of the improvements covered by these resolutions were awarded to The J. W. Rusk Construction Company and this company is now engaged upon the work and has been paid substantial estimates.

The letting of contracts to The J. W. Rusk Construction Company for these improvements, without first securing the approval of the attorney general upon the resolutions, was in violation of the plain provisions section 1212, G. C., 103 O. L., 457, which provides in part that no contract shall be let by the highway commissioner or work done by him where the co-operation of the local authorities is contemplated unless the county commissioners of the county in which the improvement is to be made shall have made a written agreement to assume in the first instance the share of the cost and expense over and above the amount to be paid by the state and that such agreement shall be filed in the office of the state highway commissioner, with the approval of the attorney general thereon as to form and legality.

In the instances now under consideration the agreements required by section 1212, G. C., were made by the county commissioners, but the approval of the then attorney general was not secured. I find that these resolutions are in regular form and that they would have been entitled to approval had they been presented to my predecessor, in office at the time they were received by the then state highway commissioner, on July 23, 1914.

Without herein passing upon the effect of the failure of your predecessor to secure the approval of the then attorney general to these final resolutions before letting contracts for the improvements in question, and without passing upon the question of whether or not an approval of the resolutions by this department at the present time would serve to cure any infirmities existing by reason of the facts above stated, I am returning the resolutions, with my approval endorsed thereon and with the further observation, as above indicated, that the letting of the contracts in question was premature and that, under section 1212, G. C., no contracts of this character should have been let until the agreement of the county commissioners to assume the share of the cost and expense over and above the amount to be paid by the state were filed in the office of the state highway commissioner, with the approval of the attorney general endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

523.

MEMBER OF BOARD OF EDUCATION—WHAT CONSTITUTES TEMPORARY REMOVAL FROM DISTRICT—NO VACANCY IN BOARD IN CASE OF TEMPORARY REMOVAL.

Where the facts in a particular case show that the removal of a member of the board of education of a school district is only temporary; that he maintains a home in said district during his absence and that he fully intends to return to said district at a specified time, said removal does not create a vacancy in said board of education within the meaning of section 4748, *G. C.*

COLUMBUS, OHIO, June 21, 1915.

HON. E. A. SCOTT, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—In your letter of June 1st, you request my opinion as follows:

"Frank Bradney was elected as a member of the board of education for Meigs township, Adams county, Ohio, at the last regular election and was qualified and has acted as such member until the present time.

"On March 1, 1915, he removed to an adjoining township, as he claims, temporarily, with the intention of returning to Meigs township and claims Meigs township as his voting place and place of residence. Since his removal from the township he has continued to attend the meetings of the Meigs township board and desires to continue a member of this board. Has his removal created a vacancy under section 4748 of the General Code of Ohio?"

In answer to my request for additional information you state that the said Frank Bradney, member of the board of education of Meigs township rural school district, is married; that he has moved his household goods into the adjoining township and his family is living there; that it was his purpose in moving into said adjoining township to raise a crop during the present year and he contemplates moving back into said school district when the crop is gathered; that he still maintains a home in said school district and so stated in the local paper before moving into said adjoining township.

Section 4748 of the General Code provides:

"A vacancy in any board of education may be caused by death, nonresidence, resignation, removal from office, failure of a person elected or appointed to qualify within ten days after the organization of the board or of his appointment, removal from the district or absence from meetings of the board for a period of ninety days, if such absence is caused by reasons declared insufficient by a two-thirds vote of the remaining members of the board, which vote must be taken and entered upon the records of the board not less than thirty days after such absence. Any such vacancy shall be filled by the board at its next regular or special meeting, or as soon thereafter as possible, by election for the unexpired term. A majority vote of all the remaining members of the board may fill any such vacancy."

It will be observed that this section specifically provides that a vacancy in any board of education may be caused by removal from the district. The question arises whether, in view of the facts submitted by you, the removal of the member in question created a vacancy within the meaning of the above provision of the statute.

In an opinion of my predecessor, Hon. Timothy S. Hogan, rendered to Hon. Frank W. Miller, superintendent of public instruction, under date of June 19, 1914, the question asked by Mr. Miller was as follows:

"A legally elected member of the Canton board of education has temporarily removed from the city of Canton. Under these conditions is he still a member of the said board of education with all the rights and powers of a member of the said board?"

As stated in the opinion, it appeared from the statement of facts attached to said inquiry that the member of the board of education of the Canton city school district had removed from said school district for an indefinite period of time and was living on a farm outside of the said school district of the city of Canton.

Mr. Miller's question was answered by reference to the provisions of section 4748, G. C., as above quoted. The opinion held that the word "may" used in said

section, should be read as "shall," and that the removal of said member of the Canton board of education from the city school district of Canton created a vacancy on said board within the meaning of the statute.

From the statement of facts upon which the above opinion was based, it will be observed that the member in question had removed from the Canton city school district for an indefinite period of time and that he was not maintaining a home within said district. There is nothing in said statement of facts to show that the removal of said member was only temporary and that it was his intention to return to said school district at any specified time in the future.

The facts in the case under consideration are materially different from those in the case above referred to. The member of the board of education of Meigs township rural school district is maintaining a home in said district, and before removing to the adjoining township he made public a statement to the effect that his removal was only temporary, and that he intends to return to said home in said district in the fall of the present year. He still claims Meigs township as his voting place and place of residence. He has continued to attend the meetings of the board of education of said school district and desires to continue a member of said board.

It seems clear, therefore, that the removal of said member is only temporary and that he fully expects and intends to return to his home in said school district at the time above stated.

Mechem, in his work on Public Offices and Officers, at section 438, lays down the following rule:

> "Where the law thus requires the officer to reside within the district which he represents, and *a fortiori* so where it expressly declares *that his removal from the district shall create a vacancy*, a permanent removal from the district represented will be deemed an abandonment of the office and a vacancy will result.
>
> "But a merely temporary removal for a limited time and with no intention to abandon or surrender the office or to cease to perform its duties, will not have this effect."

In support of this proposition the following authorities are cited:

Yonkey v. State, 27 Ind., 236.
Curry v. Stewart, 8 Bush (Ky.) 560.
State v. Graham, 26 La. Ann. 568.
People v. Parker, 3 Neb. 409.

In the case of Curry v. Stewart, supra, the court held that temporary absence from the district represented for the purpose of engaging in business for a limited time will not amount to an abandonment of the office, but that a permanent removal by an officer from the district represented will at once ipso facto affect the office.

Replying to your question, I am of the opinion that, in view of the facts in this particular case, the removal of said member from said rural school district into the adjoining township does not create a vacancy within the meaning of section 4748, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney General.

524.

SUPERINTENDENT OF PUBLIC WORKS—CONTRACT TO BUILD EXTENSION TO MIDDLETOWN DAM—AMOUNT TO BE PAID.

Under the facts as submitted by the superintendent of public works, Frank J. Davis, who contracted to build an extension dam and buttress to the Middletown dam is now entitled to receive the sum of $1,969.16 *and no more.*

COLUMBUS, OHIO, June 21, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 1, 1915, relating to a certain contract entered into on September 23, 1913, between the state of Ohio, acting by and through yourself as superintendent of public works, and Frank J. Davis, of Middletown, Ohio, the contract being for the furnishing of material and the building of an extension dam and buttress to the Middletown dam near Middletown, Ohio. Under the terms of this contract the work was to have been completed by January 1, 1914, but on December 20, 1913, the time for the completion of the contract was extended to April 1, 1914, and the fact of this extension in time was endorsed by you on the original contract.

In the last of March, 1914, a freshet in the Miami river washed away the temporary dam which was built by the state to supply the feeder to the canal and also serve as a cofferdam for the new construction being carried on by Mr. Davis. You state that when the first of April came the work comprised within the Davis contract was in such condition that, acting under the terms of the contract and following the advice of the then attorney general, your department revoked the contract and took over the work under the terms described in sections 27 and 28 of the general specifications, said specifications being referred to in the contract and made a part thereof.

The contract in question was on a unit price basis, and the estimated amount of work was only an approximation. You state that the nature of such work makes it impossible to do otherwise than to approximate the amount of excavation, backfill, number of yards of concrete, etc., and that such work must therefore of necessity be let on a unit price basis rather than on lump sum bids. The contractor was given four estimates on the work done by him, the first being given November 5, 1913, and the last February 5, 1914. The aggregate of these estimates was $9,897.70, of which sum $7,918.16 was paid to the contractor, while twenty per cent. or $1,979.54 was under the terms of the contract retained by you.

You state that the department of public works took charge of the contract on the 3rd day of April, 1914, purchased the necessary material, supplied the equipment and hired the men, and completed the work at a cost substantially below the maximum estimate. The contractor was given an allowance for all material ordered by him and used by the state, and such of his machinery as could be used by the state was overhauled and he was allowed the customary price for the use of the same. The contractor was allowed the sum of $1,138.75 for the use of his tools and for material left by him, and was charged with the sum of $1,149.13, being the cost of repairing and cleaning his machinery and the cost of restoring a wall which has been built by the contractor and for which he had been paid, but which was destroyed by the freshet late in March, 1914. The above mentioned charge against the contractor exceeds the credit allowed to him for the use of tools and machinery by $10.38.

The work was completed by the state in September, 1914, and a controversy has arisen as to the amount of compensation, if any, which the contractor is entitled to receive, one theory being that the contractor is now entitled to receive

the twenty per cent. retained by the state out of the estimates allowed to him for work actually done by him, less the sum of $10.38 referred to above, while the contractor maintains that he is entitled to receive not only the retained per cent. amounting to $1,979.54, but also the difference between his bid for the work not done by him and the actual cost to the state of doing such work, this difference amounting to a very considerable sum by reason of the fact that the state was able to do the work at a cost substantially below the amount of the contractor's bid.

Sections 27 and 28 of the general specifications referred to by you are as follows:

> "Section 27. If at any time the superintendent of public works shall be of the opinion that said work is unnecessarily delayed and will not be finished in the time named in contract, he shall notify the contractor in writing to that effect. If the contractor shall not within five days thereafter take such measure as will, in the judgment of the superintendent, insure the satisfactory completion of the work, the superintendent shall notify the aforesaid contractor to discontinue all work under the contract, and the contractor hereby agrees that he will immediately respect said notice and stop work and cease to have any right to possession of the ground.
>
> "Section 28. Should the superintendent notify the contractor to discontinue work, as provided in section 27, he may then place the required number of persons as he may deem advisable, by contract or otherwise, on the work and use such materials and tools as he may find thereon, or procure other materials and masonry equipment to complete the said work, and shall all costs and expenses thus incurred for labor, materials, and equipment to said contractor, and the costs and expenses so charged shall be deducted and paid out of any moneys due, or that may thereafter become due, to the said contractor; and in case such costs and expenses are less than the sum which would have been payable to the contractor under his contract (if the same had been completed by him), he shall be entitled to receive the remainder or difference; and in case said costs and expenses are greater than said sum, then the contractor, or his sureties, shall pay to the state of Ohio, department of public works, the amount the costs and expenses are in excess of the said sum, the payment of which, to be made within 20 days after receiving notice thereof."

The provisions of sections 27 and 28 of the general specifications, quoted above, were also incorporated in the contract, and the specifications further provide that the superintendent of public works may at any time prior to, or within ten days after the date named in the contract for the completion of the work, grant an extension of time for said completion and fix a definite date to which the extension of time is granted.

You state that your department took over the work under the terms of sections 27 and 28 of the specifications, and from the files in your office it appears that on April 3, 1915, you addressed the following communication to the contractor:

> "Agreeable to our conversation of March 30th and also of April 2nd, I wish to notify you that your contract for constructing the extension dam at Middletown is annulled, and we shall proceed to finish the work as provided in sections 27 and 28 of said contract."

Despite the language used by you in your communication to me and in your

letter to the contractor, quoted above, it is apparent that you could not be held to have taken over the works under sections 27 and 28 of the specifications, for these sections apply only to the taking over of the work during the time given to the contractor for completion. If your statement that you took over the work under these sections were correct, then the present claims of the contractor as to the amount of compensation due him would also be correct. The very fact that your department did not take over the work under sections 27 and 28 is to my mind the decisive fact in the controversy now existing between the state and the contractor.

The contractor agreed to complete the work in question by January 1, 1914. On December 20, 1913, the superintendent of public works extended the time for completion to April 1, 1914. The contractor failed either to complete the work or to make substantial progress on the same by April 1, 1914, less than twenty-five per cent. of the work being finished on that date, and the superintendent of public works did not grant any further extension of time. It is apparent from the terms of the contract and specifications that the parties regarded the time of completion as one of the essential elements of the contract. When the superintendent of public works took over the work on April 3, 1914, he could not have been acting under sections 27 and 28 of the specifications or under the corresponding provisions of the contract, because the same were by their terms limited to the taking over of the work before the time named in the contract for its completion, on account of unnecessary delays on the part of the contractor, which delays might threaten the completion of the work within the time fixed in the contract.

It is not every breach of a contract that will operate to discharge the same, but in the case now under consideration it is evident that there was such a breach on the part of the contractor as to operate as a discharge. As before observed, the contract and specifications point unmistakably to the fact that the parties to the contract had in mind that time was an essential element.

Although given one extension of three months, the contractor failed to complete more than about twenty-five per cent. of the work and by his delay in violation of the terms of his contract, the work which he had completed and for which he had been allowed estimates, was left in such shape that it was badly damaged by a freshet in the last of March, 1914; whereas, had the contractor kept his contract, the work would have been so far advanced at the time of the freshet as to have escaped any damage therefrom. The contractor having broken his contract, and sections 27 and 28 of the specifications and the corresponding provisions of the contract not having any application to the facts now under consideration, I am of the opinion that the claim of the contractor, insofar as it extends to the difference between the amount of his bid and the cost to the state of doing the work after he had broken his contract, must be rejected. Any other conclusion would not only do violence to the terms of the contract and give an unwarranted application to sections 27 and 28 of the specifications, but it would also put a premium on inefficiency and delay on the part of contractors on public work of this class; and in this particular case a different conclusion would allow the contractor, after a breach of the contract on his part, to reap a reward of several thousand dollars from his own delay and the further fact that the state was subsequently able to complete the work at a cost substantially below the contractor's bid.

As to the $1.969.16 held by the state out of the estimates allowed the contractor, the controlling purpose in retaining the same was to protect the state in case of a subsequent breach on the part of the contractor. While the contract was subsequently broken by the contractor, yet it appears that no damage resulted to the state. I am, therefore, of the opinion that the contractor should be paid the sum of $1,969.16, being the sum retained by the state out of estimates

allowed the contractor for work actually done by him, less the $10.38 referred to above. As previously indicated, the contractor will not be entitled to receive any sum in excess of this amount.

Respectfully,
EDWARD C. TURNER,
Attorney General.

525.

APPROVAL OF LEASE OF CANAL LANDS, LOGAN, OHIO, TO JAMES HUTCHISON.

COLUMBUS, OHIO, June 22, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication of June 2, 1915, transmitting to me for my examination a lease of certain canal lands in the city of Logan to James Hutchison, the land being valued at $300.00, and the annual rental being $18.00.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

526.

BOARD OF EDUCATION—CLERK OF BOARD MAKES ANNUAL SETTLEMENT WITH COUNTY AUDITOR WHEN SCHOOL TREASURER HAS BEEN DISPENSED WITH—CLERK NOT ENTITLED TO COMPENSATION AND MILEAGE WHICH WAS FORMERLY ALLOWED TREASURER FOR MAKING SETTLEMENT.

Section 4770, G. C., is not repealed by implication by the provisions of section 4782, G. C., as amended in 104 O. L., 158. The provisions of section 4770, G. C., are still in force and taken in connection with the provisions of section 4782, G. C., as amended, and section 4783, G. C., prescribe the duties of the clerk of the board of education of a school district in making the annual settlement with the county auditor.

The clerk of a board of education which has dispensed with its school treasurer, under authority of section 4782, G. C., as amended, is not entitled to the compensation and mileage formerly allowed to said treasurer, under authority of section 4771, G. C., for making the anual settlement with the county auditor, as required by the provision of section 4770, G. C.

COLUMBUS, OHIO, June 23, 1915.

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

GENTLEMEN:—In your letter of May 4, 1915, you request my opinion upon the following questions:

"Section 4782, as amended in 104 Ohio Laws, has been construed that it is compulsory for the boards of education to dispense with the services of a school treasurer.

"Section 4770 provides that the treasurer of the school funds shall, within the first ten days of September, each year, settle with the county auditor for the preceding school year.

"The last quoted section has not been repealed, but there is no treasurer with whom the county auditor can settle. Is the section (4770) repealed by implication?

"Section 4771 provides for the payment of the school treasurer for making such settlement. Section 4771 has not been repealed.

"Section 4782 provides that the clerk of the board of education shall perform all the services, discharge all the duties, and be subject to all the obligations required by law of the treasurer of such school districts.

"Is the clerk to make settlement with the county auditor, and in case he does so, is he entitled to the payments prescribed by section 4771?"

Section 4782, G. C., as amended, 104 O. L., 158, provides:

"When a depository has been provided for the school moneys of a district, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members, *shall* dispense with a treasurer of the school moneys belonging to such school district. In such case, the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school districts."

This section, prior to its amendment, provided in part:

"When a depository has been provided for the school moneys of a district, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members, *may* dispense with the treasurer of the school moneys belonging to such school district. * * *"

It was evidently the intent of the legislature in changing the word "may" to "shall," to make it compulsory for the board of education of a school district, which has provided a depository for the school moneys of such district, to dispense with the office of school treasurer, and the latter provision of said section, as amended, places the duties heretofore performed by said treasurer, upon the clerk of said board of education.

Section 4783 of the General Code, provides:

"When the treasurer is so dispensed with, all the duties and obligations required by law of the county auditor, county treasurer or other officer or person relating to the school moneys of the district shall be complied with by dealing with the clerk of the board of education thereof. Before entering upon such duties, the clerk shall give an additional bond equal in amount and in the same manner prescribed by law for the treasurer of the school district."

Section 4770, G. C., provides:

"Within the first ten days of September, each year, the treasurer (treasurer of the school district) shall settle with the county auditor for

the preceding school year, and for that purpose he shall make a certified statement showing the amount of money received, from whom, and on what account, the amount paid out, and for what purpose. He shall produce vouchers for all payments made. If the auditor, on examination, finds the statement and vouchers to be correct, he shall give the treasurer a certificate of the fact, which shall prima facie be a discharge of the treasurer for the money paid. When the treasurer's term begins on the first day of September, the annual settlement shall be made by the outgoing treasurer."

In a school district in which a clerk of the board of education, by giving the additional bond required by the latter provision of section 4783, G. C., has succeeded to the duties of the school treasurer under the above provision of section 4782, G. C., as amended, said clerk is required by the provision of section 4770, G. C., to make a settlement with the county auditor within the first ten days of September, each year, and the duty of the county auditor, relating to the school moneys of said district, is complied with by dealing with said clerk, according to the provisions of section 4783, G. C.

Replying to your first question, I am of the opinion that section 4770, G. C., is not repealed by implication by the provisions of section 4782, G. C., as amended.

The provisions of section 4770, G. C., are still in force, and, taken in connection with the provisions of section 4782, G. C., as amended, and section 4783, G. C., prescribe the duties of the clerk of the board of education in making the annual settlement with the county auditor.

You inquire whether the clerk of a board of education which has dispensed with its school treasurer under section 4782, G. C., as amended, having made the annual settlement with the county auditor, as required by the provision of section 4770, G. C., is entitled to the compensation and mileage authorized by section 4771, G. C., which provides:

"For making such settlement, the treasurer shall be entitled to receive the sum of one dollar, and also five cents per mile for traveling to and from the county seat, to be paid from the county treasury, on the order of the county auditor."

While the clerk, in the case above referred to, is required by the provision of section 4782, G. C., as amended, to "perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school district," and it therefore becomes his duty to make the annual settlement with the county auditor as required by section 4770, G. C., the statutes do not expressly provide that said clerk shall receive additional compensation for the performance of said additional duties, or that he shall be reimbursed for actual and necessary expenses incurred in the performance of said duties.

In the case of the State ex rel. Thomas L. Pogue, prosecuting Attorney, v. Charles A. Groom, acting city solicitor, of the city of Cincinnati, Ohio, 91 O. S., 1, decided by the supreme court November 24, 1914, the fourth branch of the syllabus provides in part:

"The general assembly has the authority to create new duties and require such duties to be performed by the incumbents of an existing office," etc.

In this case the court had reference to the duties to be performed by a

member of the board known as the budget commissioners for the annual adjustment of the rates of taxation, for the performance of which no additional compensation is authorized by statute.

Section 4781, G. C., provides:

> "The board of education of each school district shall fix the compensation of its clerk and treasurer, which shall be paid from the contingent fund of the district. If they are paid annually, the order for the payment of their salaries shall not be drawn until they present to the board of education a certificate from the county auditor stating that all reports required by law have been filed in his office. If the clerk and treasurer are paid semi-annually, quarterly, or monthly, the last payment on their salaries previous to August 31st, must not be made until all reports required by law have been filed with the county auditor and his certificate presented to the board of education as required herein."

I call your attention to an opinion of this department rendered by my predecessor, Hon. Timothy S. Hogan, to Hon. B. F. Enos, prosecuting attorney of Guernsey county, on September 12, 1914. Mr. Enos in his request for an opinion, after quoting the provisions of section 4781, G. C., and of 4782, G. C., as amended in 104 O. L., 159, asked the following question:

> "I would like to have your written opinion as to whether the clerk is entitled to extra compensation in performing the duties of the treasurer or is he only entitled to the same compensation that he received before these additional burdens were cast upon him."

In answer to this question, Mr. Hogan, after a careful consideration of the provisions of the statutes applicable thereto, held that the clerk of the board of education may receive extra compensation for the performance of such additional duties and that the board of education has the right to fix the compensation of such clerk when he is required to perform said additional duties, because of the dispensing of the school treasurer under the provision of section 4782, G. C.

I concur in this opinion and enclose herewith copy of the same.

The first part of your second question has been answered in the affirmative and, replying to the second part of said question, I am of the opinion that the clerk of a board of education which has dispensed with its school treasurer, under authority of section 4782, G. C., as amended, is not entitled to the compensation and mileage formerly allowed to said treasurer, under authority of section 4771, G. C., for making the annual settlement with the county auditor, as required by the provision of section 4770, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney General.

527.

AGRICULTURAL COMMISSION—DISPOSAL OF STRUCTURES ERECTED ON FARM OF STATE VETERINARIAN AND USED FOR SERUM PLANT—INFECTED BUILDINGS.

There can be no objection to the Agricultural Commission disposing of certain infected buildings used for serum plant erected on farm of Dr. Paul Fischer, state veterinarian, under the facts submitted.

COLUMBUS, OHIO, June 23, 1915.

The Agricultural Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of yours under date of June 7, 1915, as follows:

"At a meeting of the agricultural commission held May 18, 1915, the following resolution was, on the motion of the Commissioner Williams, supported by Commissioner Strode, unanimously adopted:

"'That a committee of appraisal and adjustment, consisting of Dr. C. E. Thorne, director of the experiment station division, W. G. McCracken, chief engineer, Ohio State University, and Harry C. Holbrook, architect, of Columbus, Ohio, be appointed to visit the farm of Dr. Paul Fischer, located near Reynoldsburg, Ohio, inspect and appraise the value of the buildings in question and to determine a reasonable rental, either based upon the acreage or otherwise, for the land used by the state as a serum farm.'

"The committee met, visited the farm of Dr. Paul Fischer, inspected the premises and made its report to the agricultural commission.

"At a meeting of the commission held June 4, 1915, the following resolution, on the motion of Commissioner Price, supported by Commissioner Williams, was adopted:

"'That the report of the committee appointed to inspect and appraise the value of the buildings and to determine a reasonable rent, if any, for the use of the land belonging to Dr. Fischer as a state serum farm, be received and referred to the attorney general for approval. If approved by the attorney general and the terms are satisfactory to Dr. Fischer, then the said Dr. Fischer shall give a bond for the performance of the obligations required by the report of the committee.'

"The original of the committee's report is herewith enclosed, and the report no doubt contains all the information necessary to guide you in the consideration of this question.

"The agricultural commission will thank you for as prompt a report as your convenience will permit."

With the above communication you submit also a report of the committee referred to, as follows:

"To the Agricultural Commission of Ohio:

"We, the undersigned, duly appointed to appraise and adjust the value of the buildings located on the farm of Dr. Paul Fischer, state veterinarian, at Reynoldsburg, Ohio, do hereby submit the following report:

"We find that out of funds appropriated in 1909, five frame buildings were constructed by day's labor out of material taken from a discarded

exhibition building at the Ohio state fair grounds. These buildings were originally of a temporary nature and constructed for their respective purposes in such a way as to be of little value for other purposes.

"A sixth building was constructed three years ago out of new lumber, but as it is built on wood post foundation, it cannot be removed.

"On account of the highly infectious nature of hog cholera, the entire group of buildings being used for the manufacture of preventative serum should not be moved or the buildings wrecked and the lumber sold.

"As the state has used the land of Dr. Fischer for the past seven years, and the matter of a proper rental has never been determined, we feel that the operation of this serum plant has deprived him of the use of his farm, and advise that the buildings in question be given to Dr. Fischer, in lieu of all rental, claims and damages of whatsoever nature he had or may have against the state.

"We believe, also, that Dr. Fischer should give a guarantee or bond that he will not sell or dispose of these buildings to outside parties who may remove or wreck same, or that in case he should sell his entire farm with buildings standing thereon, the test pen and infected booths be destroyed by fire, thereby removing this source of infection.

"Believing that this is the best method of disposing of these structures and that the best interests of the state are thus served, we beg to remain."

Bearing in mind the rule that the powers of public officers are limited to those expressly granted by statute and only such implied powers as are essential and necessary to the performance of the duties so expressly imposed, or the exercise of powers expressly granted, it must follow that unless some statutory authority may be found therefor, your commission would, to my mind, be unauthorized to sell or dispose of property of the state of Ohio. However, from the facts stated in your communication, I doubt whether, under familiar rules of real estate law, the property really belongs to the state of Ohio.

In this particular case I see no harm in carrying out the proposed arrangement. There is no provision in law for the attorney general, either approving or disapproving such an arrangement.

Respectfully,
EDWARD C. TURNER,
Attorney General.

528.

AMENDED SENATE BILL NO. 197—COUNTY AUDITOR MAKES ANNUAL REPORT FOR THIS YEAR—STATUTE REQUIRING COUNTY COMMISSIONER'S REPORT REPEALED, 106 O. L.

If a referendum petition is not filed on amended senate bill No. 197, county commissioners do not make an annual report this year, but the county auditor makes an annual report.

COLUMBUS, OHIO, June 23, 1915.

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

DEAR SIRS:—Under date of June 18, 1915, your department sent a letter to

this department and enclosed a letter from Mr. John Scott, clerk of the board of county commissioners of Franklin county, Ohio, and requested my opinion thereon. The said letter of Mr. Scott is as follows:

> "An examination of the bills passed by the general assembly discloses the fact that senate bill No. 197 repeals the law requiring the county commissioners to prepare and publish an annual report; the law enacted providing that the county auditor shall make and publish a report in lieu thereof.
>
> "A question has arisen in my mind as to whether a report for the fiscal year ending August 31, 1915, should be made by the county commissioners or by the county auditor. This question arises as a result of the provisions of the constitution as to the right of referendum. I do not know the exact date of the filing of this bill with the secretary of state, but in any case, the ninety day limitation for the purpose of a referendum will expire between the date the report covers and the date on which the same is required to be submitted and published.
>
> "Will you not advise me at once in this matter, inasmuch as if the report is to be made by the county commissioners, it is necessary that the preparation thereof be started at once?"

Amended senate bill No. 197 is an act to amend sections 2507, 2508 and 2509, and to repeal sections 2404 and 2697 of the General Code. Said act was filed in the office of the secretary of state June 4, 1915, and will therefore be effective on September 3, 1915. Prior to the going into effect of said act the sections amended and repealed thereby will be in full force and effect.

Section 2507, prior to its amendment, provided that on or before the third Monday in September of each year, the county commissioners shall make to the court of common pleas of the county a detailed report of their financial transactions during the year next preceding such date.

Section 2508, prior to its amendment, provided that such reports shall be published immediately in certain newspapers.

Section 2509, prior to amendment, provided that each county commissioner shall forfeit and pay into the county treasury five dollars for each day that the making and filing of such report is delayed after the third Monday in September.

Section 2404, repealed by amended senate bill No. 197, provided that at the September session (to wit the first Monday in September) the county commissioners shall examine and compare the accounts and vouchers of the county auditor and treasurer, count the funds in the treasury, and direct the auditor to publish an exhibit of the receipts and expenditures for the past year.

Section 2697, prior to repeal by amended senate bill No. 198, provided for a joint statement of the county treasurer and the county auditor to be signed by them and published, giving the amount of moneys and other assets remaining in the county treasury, at the close of business on the last day of August.

Amended senate bill No. 197 provides for the making of a complete detailed report in writing, of all the financial transactions of the county for the fiscal year ending August 31st, by the county auditor, said report to be made on or before the 30th day of September, annually. (Section 2507.) It further provides that the auditor shall forfeit and pay into the county treasury five dollars for each day after the 30th day of September that the making and filing of the report is delayed, and a further sum on failure to have the same published. (Section 2509.)

As before stated this bill becomes effective on September 3rd. When the third Monday of September of this year arrives, former section 2507 will have been repealed and now section 2507 will be in effect. Therefore, on said date there will

be no law under which the county commissioners are required to make a report, and no forfeiture for delay can attach for failure so to do. When the 30th day of September of this year arrives section 2507 as amended will be in force and said section requires the county auditor to make a complete detailed report of the financial transactions of the county for the fiscal year ending August 31st. Under the provisions of section 2509 there is a forfeiture for delay to be charged against said county auditor. It is true that section 2507, prior to amendment, authorizes the county commissioners to make their annual report *on or* before the third Monday in September, but there can be no mandatory duty for them to do so before the third Monday in September, and when the 30th day of September arrives, under section 2507 as amended, it will be the duty of the county auditor to make a report of the financial condition of the county.

I am therefore of the opinion that a report for the fiscal year ending August 31, 1915, should be made by the county auditor, under amended senate bill No. 197, and that no report is to be made this year by the county commissioners.

The above opinion is written on the basis that a referendum petition be not filed on amended senate bill No. 197.

Respectfully,
EDWARD C. TURNER,
Attorney General.

529.

APPROVAL OF SYNOPSIS FOR REFERENDUM OF ACT CREATING BOARD OF AGRICULTURE OF OHIO.

COLUMBUS, OHIO, June 23, 1915.

HON. C. L. SWAIN, 57 *Atlas Bank Bldg., Cincinnati, Ohio.*

DEAR SIR:—You have submitted to me for my certificate a petition for referendum, the synopsis of which reads as follows:

> "An act to create the board of agriculture of Ohio and to prescribe its organization, its powers and its duties; to amend sections 1079 to 1089 inclusive, 1091 to 1136 inclusive, 1136-1, 1137 to 1169 inclusive, 1177-12 to 1177-20 inclusive, 1390, 12757, 1850, 12743, 5782, 12798, 12794, 6336, 7965, 7965-1, 7965-2, 2616, 1391 to 1394 inclusive, 1405, 1411, 1421, 1422, 1423, 1424, 1435, 1437, 1438, 1445, 1446, 1453 to 1455 inclusive, 1460, 485, 2269, 2274,, 12521, 12523, 265, 6087 to 6089 inclusive, 6091 and 3357 of the General Code, and sections 122 and 123 of an act 'to create the agricultural commission of Ohio and to prescribe its organization, its powers and its duties,' approved May 3, 1913 (O. L. 103, page 340),
>
> "to wit:
>
> "An act to create the board of agriculture of Ohio and to prescribe its organization, its powers and its duties; to amend sections 1079 to 1089 inclusive, 1091 to 1136 inclusive, 1136-1, 1137 to 1169 inclusive, 1177-12 to 1177-20 inclusive, 1390, 12757, 1850, 12743, 5782, 12798, 12794, 6336, 7965, 7965-1, 7965-2, 2616, 1391 to 1394 inclusive, 1405, 1411, 1421, 1422, 1423, 1424, 1435, 1437, 1438, 1445, 1446, 1453 to 1455 inclusive, 1460, 485, 2269, 2274, 12521, 12523, 265, 6087 to 6089 inclusive, 6091 and 3357, of the General

Code, and sections 122 and 123 of an act 'to create the agricultural commission of Ohio and to prescribe its organization, its powers and its duties,' approved May 3, 1913 (O. L. 103, page 340)."

I hereby certify that the foregoing synopsis is a truthful statement regarding the above entitled law.

Respectfully,
EDWARD C. TURNER,
Attorney General.

530.

APPROVAL OF ABSTRACT OF TITLE TO REAL ESTATE FOR ARMORY AT CHILLICOTHE, OHIO.

COLUMBUS, OHIO, June 23, 1915.

Ohio State Armory Board, Columbus, Ohio.

GENTLEMEN:—Sometime since Hon. John A. Poland, of Chillicothe, Ohio, transmitted to me for examination abstract of title to the following described real estate, situate in the city of Chillicothe, county of Ross, and state of Ohio, and described as follows:

"Beginning at a point in the north line of Riverside street, fifty (50 ft.) feet easterly from the northeast intersection of Paint and Riverside streets; hence with the north line of said Riverside street extended westerly, crossing said Paint street diagonally, two hundred and eighteen and nine-tenths (218.9 ft.) feet to a point; thence parallel with said Paint street, northerly, three hundred and forty-nine (349 ft.) feet to a point; thence at right angles to said Paint street easterly, two hundred (200 ft.) feet to a point; thence at right angles and parallel with said Paint street, southerly, two hundred and sixty (260 ft.) feet to the point of beginning."

I have carefully examined said abstract of title and from such examination am of the opinion that on the 8th day of May, 1915, the date of said abstract, the city of Chillicothe, Ohio, was possessed of an estate in fee simple in said real estate, free and clear from all incumbrances whatever, and that by proper instrument can convey to the state of Ohio an estate in fee simple to said real estate.

I am not in this opinion passing upon the authority of the city of Chillicothe to join with the county in the erection of a joint memorial armory building.

Respectfully,
EDWARD C. TURNER,
Attorney General.

532.

MUNICIPAL CORPORATION—CERTIFICATES OF INDEBTEDNESS—WHEN FUNDS TO PAY SAME ARE DIVERTED BY OFFICERS OF CITY, BONDS TO EXTEND TIME OF PAYMENT MAY BE ISSUED.

When the general revenue fund received from taxes and revenue funds at the next semi-annual settlement which are by law appropriated for the payment of certificates of indebtedness theretofore issued under authority of section 3913, *G. C., has been misappropriated or diverted by the officers of the city without the fault of the holders of such certificates and the same remain unpaid, the city may issue bonds under sections* 3916 *and* 3917, *G. C., for the purpose of extending the time of payment of such certificates.*

COLUMBUS, OHIO, June 24, 1915.

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

GENTLEMEN:—I acknowledge receipt of yours under date of June 2, 1915, as follows:

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

"If a city council has authorized the issuance of certificates of indebtedness under section 3913, General Code, to provide for the city's portion of special assessment improvements, the same to be redeemed within six months, may such indebtedness be refunded by issuance of bonds under sections 3916 and 3917, General Code, if the proceeds from tax levy have not produced sufficient moneys to provide for other municipal purposes and the redemption of such indebtedness at maturity?"

Section 3913, G. C., to which you refer, is as follows:

"In anticipation of the general revenue fund in any fiscal year, such corporations may borrow money and issue certificates of indebtedness therefor, signed as municipal bonds are signed, but no loans shall be made to exceed the amount estimated to be received from taxes and revenues at the next semi-annual settlement of tax collections for such fund, after deducting all advances. The sums so anticipated shall be deemed appropriated for the payment of such certificates at maturity. The certificates shall not run for a longer period than six months, nor bear a greater rate of interest than six per cent., and shall not be sold for less than par with accrued interest.

Certificates of indebtedness may be issued only in anticipation of the collection of general revenue fund. The general revenue fund of a municipality is not defined in statutory terms but as here used is deemed to include the aggregate revenues of such municipality from whatever source derived other than those funds specifically set apart by law as for instance interest and sinking fund, and from which the semi-annual appropriations may properly be made. From this general revenue fund appropriations may be made for the portion of the cost and expense of special assessment street improvements required to be paid by the city.

Under the provisions of section 3820, G. C., municipal corporations are required to pay not less than one-fiftieth of all cost and expense of improvements for which

special assessments are levied in addition to the cost of intersections. Such expense may be paid from any funds in the treasury properly appropriated for that purpose, or the municipality may issue and sell bonds to pay its part of the expense of such improvement under section 3821, G. C., or may issue certificates of indebtedness under section 3913, G. C., in an amount not to exceed the amount estimated to be received from taxation and revenues at the next semi-annual settlement of tax collections for the fund from which such indebtedness is properly payable. It is specifically provided that the sums so anticipated and necessary to pay the certificates of indebtedness authorized by section 3913, G. C., when the same shall become due, shall be deemed appropriated for their payment. It therefore becomes the duty of the city auditor and treasurer of such municipalities, immediately after the next semi-annual settlement, to set apart a sufficient amount of the proper fund to pay all outstanding certificates of indebtedness issued under said section at maturity, and it is specifically provided that no such certificates of indebtedness should be outstanding for a longer period than six months. That is to say, at the time of the next succeeding semi-annual settlement, an amount of the funds sufficient to cancel all outstanding certificates at maturity is by force of law appropriated for that purpose and the city auditor and treasurer are wholly unauthorized to pay out such funds for any other purposes and would be liable to the city on their official bonds for all such misappropriations. If under this condition and state of facts it develops that there is a deficiency in the funds for current expenses or other proper purposes, it becomes incumbent upon the fiscal authorities of the municipality to make provision therefor in such manner as is authorized by law, and there would be neither occasion nor authority for the issuance of bonds for the payment of certificates of indebtedness theretofore issued under said section 3913, G. C.

It may be further observed that in view of the provision for the payment of of such certificates of indebtedness they should, in every case where authorized to be issued, be made to mature immediately subsequent to the next succeeding semi-annual settlement and that the city auditor and his sureties are liable for the diversion of any part of the fund by law appropriated for the payment of such certificates or any misapplication thereof.

Your inquiry, however, comprehends additional facts not therein stated. I am informed that in the case to which you have particular reference, no funds have been set aside for the payment of outstanding certificates and there are not now in the municipal treasury any funds out of which payment may be made or which may be set aside for the payment of such certificates at maturity. In other words, funds appropriated by law for the discharge of the certificates of indebtedness issued under authority of section 3913 as stated by you, have been expended without authority for other purposes, and there is no money in the treasury of the city out of which such payment of certificates may be made, and your inquiry is whether or not under this state of facts bonds may be issued under sections 3916 and 3917 for refunding or extending the time of payment of such indebtedness.

Section 3916 and 3917, G. C., to which you refer, read as follows:

> "Section 3916. For the purpose of extending the time of payment of any indebtedness, which from its limits of taxation the corporation is unable to pay at maturity, or when it appears to the council for the best interest of the corporation, the council thereof may issue bonds of the corporation or borrow money so as to change but not to increase the indebtedness, in such amounts, for such length of time and at such rate of interest as the council deems proper, not to exceed six per cent. per annum, payable annually or semi-annually.
>
> "Section 3917. No indebtedness of such municipal corporation shall be

funded, refunded, or extended, unless it shall first be determined to be an existing valid and binding obligation of the corporation by a formal resolution of the council thereof. Such resolution shall also state the amount of the existing indebtedness, to be funded, refunded or extended, the aggregate amount of bonds to be issued therefor, their number and denomination, the date of maturity, the rate of interest they shall bear, and the place of payment of principal and interest."

It will be noted that under the authority of section 3916, G. C., the council of a municipality may issue bonds extending the time of payment of any indebtedness under either of two existing conditions. First, when by reason of the limitation of taxation the corporation is unable to pay the same and second, when it appears to the council for the best interest of the corporation that the time of payment of such indebtedness be so extended. Assuming then, as above stated, that the certificates referred to constitute a valid indebtedness of the city, it only remains to be determined by the council to be for the best interest of the corporation to bring them within the authority of this section when standing alone, to issue bonds for the purpose of extending the time of payment. The authority conferred by section 3916, G. C., is limited by section 3917, G. C., supra, which makes it a condition precedent that the council determine by formal resolution what is above assumed, viz., that the certificates represent an existing valid and binding obligation to the corporation and such resolution shall further state the amount of indebtedness to be extended or refunded, the amount of the bonds to be issued, their number and denomination, date of maturity, rate of interest and place of payment.

The certificates of indebtedness were in the first instance payable from that part of the general revenue fund of the city by law appropriated for their discharge. But since they were not so paid the question now arises as to whether or not they become a claim against or indebtedness of the city generally. In Dillon on Municipal Corporations, section 860, it is said:

"Where a city has authority to create and contract with reference to a particular fund, and to make the debt payable therefrom only, or where by law the debt or obligation is chargeable against, and payable only out of the particular fund, a warrant drawn on such fund is chargeable against and payable only from that fund, and there can be no recovery from the city, unless there is some breach of duty on its part * * *. But a city which contracts with reference to a special fund, and issues a warrant payable therefrom, is under the duty of performing all the legal steps necessary to the raising of the fund."

Warner v. New Orleans, 167 U. S., 478;
New Orleans v. Warner, 175 U. S., 129.

"If moneys belonging to the particular fund have been received by the city, a diversion of these moneys from the fund is a breach of contract for which the city is liable to the holder of the warrants drawn on the fund."

State v. Pillsbury, 30 La. Assn., 705;
Vallian v. Newton County, 81 Mo., 591;
Ayers v. Thurston County, 63 Neb., 96;
Pine Tree Lumber Company v. Fargo, 12 N. D., 360;
R. R. V. N. Bank v. Fargo, 14 N. D., 88;
Potter v. New Whatsom, 20 Wash., 589;
O. C. N. Bank v. Laconm, 27 Wash., 259.

That the funds for the payment of the certificates were in the treasury and available for their payment at the semi-annual settlement next succeeding their issue, comes of necessity and that the diversion thereof was a violation of the duty of the city and a breach of its contract all beyond the control and without the fault of the holders of the certificates is conclusive, and by reason thereof such certificates continue to be a valid and binding obligation of the city and to my mind an indebtedness within the terms of section 3916, G. C., supra.

The fact that the agents or officers of the city by whom these funds were misappropriated, are liable to the city on their official bonds therefor and that such officers ought to be made to respond to such liability will not in any respect discharge the obligation of the city to pay. Nor would any liability of such officer upon his official bond to the holder of any such certificate discharge the obligation of the city thereon.

I am therefore of opinion that the city council is authorized to issue bonds under the provisions of sections 3916 and 3917, G. C., to extend the time of payment of the certificates issued under section 3913, G. C., where the funds appropriated by law for the payment of such certificates have been misappropriated by the officers and agents of the city and without any fault on the part of the holder of such certificate.

Bonds issued under authority of sections 3916 and 3917, G. C., are subject to the provision of section 5649-1, G. C., as amended in 104 O. L., 12, making it necessary that the taxing authorities of the city levy a tax sufficient to provide a sinking fund for the payment of such bonds at maturity, together with interest on the same, and the further provision of section 11 of article 12 of the constitution, which requires that in the legislation under which indebtedness is incurred or renewed, provision shall be made for levying and collecting annually an amount sufficient to pay interest on said bonds and to provide a sinking fund for their redemption at maturity.

It should be observed, however, that the conclusion herein would not be applicable to certificates issued in excess of the amount of the general revenue fund in good faith, estimated to be received from taxes and revenues at the next semi-annual settlement of tax collections for such fund after deducting all advances.

Respectfully,
EDWARD C. TURNER,
Attorney General.

533.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS

COLUMBUS, OHIO, June 24, 1915.

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

DEAR SIR:—I have your communications of June 21 and June 22, 1915, transmitting to me for my examination final resolutions as to the following roads:

Cleveland-Sandusky, Erie county, Pet. No. 1125, I. C. H., No. 3;
Cleveland-Buffalo, Lake county, Pet. No. 852, I. C. H., No. 2;
Wooster-Massillon, Wayne county, Pet. No. 754-755, I. C. H., No. 69;
Akron-Canton, Stark county, Pet. No. 1462, I. C. H. No. 66;

Ashland-Medina, Medina county, Pet. No. 1118, I. C. H. No. 139;
Springfield-Washington C. H., Clark county, Pet. No. 1004, I. C. H. No. 197.
Dayton-Chillicothe, Greene county, Pet. No. 1120, I. C. H., No. 29;
Urbana-Sidney, Champaign county, Pet. No. 1680, I. C. H. No. 192;
Caldwell-Woodsfield, Monroe county, Pet. No. 1024, I. C. H. No. 386;
Malaga-Alledonia, Monroe county, Pet. No. 1022, I. C. H. No. 108;
Youngstown-Warren, Trumbull county, Pet. No. 1559, I. C. H. No. 80;
Steubenville-Cambridge, Harrison county, Pet. No. 938, I. C. H. No. 26;
St. Mary's-Ft. Wayne, Mercer county, Pet. No. 766, I. C. H. No. 173;
Akron-Cuyahoga Falls, Summit county, Pet. No. 1367, I. C. H., No. 92;
New Comerstown-Urichsville, Tuscarawas county, Pet. No. 1521, I. C. H. No. 413;.
Wooster-Canal Dover, Tuscarawas county, Pet. No. 1522, I. C. H. No. 414.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

534.

MUNICIPAL CORPORATIONS WITH POPULATION OF TWO THOUSAND OR MORE—MAY NOMINATE INDEPENDENT CANDIDATES FOR MUNICIPAL AND WARD OFFICES BY PETITION—ELECTIONS.

Independent candidates for municipal and ward offices in municipalities with a population of two thousand or more may be nominated by petition under the provisions of section 4999, *G. C., as amended,* 103 *O. L.,* 844.

COLUMBUS, OHIO, June 24, 1915.

HON. CHAS. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of yours under date of June 16, 1915, as follows:

> "We herewith submit to you for opinion the following questions:
> "'How and under what section of the General Code can independent candidates for municipal or ward officers in municipalities containing a population of more than two thousand have their names placed on the ballot?'"

The nomination of candidates for public office by petition was first authorized in this state by section 12 of the act of April 30, 1891, 88 O. L., 449, which first provided for the nomination of candidates for any state, county, or city, by petition signed by a certain prescribed number of the electors of such state, county or city, respectively.

This provision was followed in the same section of this act by the provision

that nominations of candidates for other offices might be made by petitions signed by a distinctively different number of qualified electors of the district or division for which such candidates were to be nominated.

This section was amended on April 18, 1892, 89 O. L., 432, by omitting candidates for state offices from its provisions and including candidates for township or municipal offices and candidates for members of the board of education and also changing the number of petitioners necessary in Cuyahoga and Hamilton counties.

By the amendments of the chapter of which this section is a part, in the act of April 8, 1898, 93 O. L., 94, the above provisions were re-enacted verbatim. This section was again amended by section 7 of the act of April 23, 1904, 97 O. L., 226, to read as follows:

> "Nominations of candidates for any county, township, municipal or ward office, or members of the board of education may be made by nomination papers, signed in the aggregate for each candidate by not less than three hundred qualified electors of the county, or fifty qualified electors of the city, or twenty-five qualified electors of the township, ward or village, or twenty-five electors of either sex of the school district respectively; except in counties containing annual registration cities, such nomination papers shall be signed by petitioners not less in number than one for every fifty persons who voted at the next preceding election in such county. Nominations of candidates for other offices may be made by nomination papers, signed for each candidate by qualified electors of the state or the district or division for which such candidates are nominated, not less in number than one for every one hundred persons, who voted at the next preceding general election in the state or such district or division. * *"

By codification of 1910, the provisions here quoted were designated and made to constitute sections 4996 and 4999 of the General Code, except for the elimination of members of the board of education from the provisions of section 4996, G. C., by reason of the amendment of section 3897-a R. S., 97 O. L., 340, which was carried into the General Code as sections 4997 and 4998 thereof, and by the act of May 10, 1911, 102 O. L., 120, the latter section was amended to include candidates for United States senator.

We may also note here the provisions of Sec. 7, Article 5 of the constitution of Ohio, as adopted September 3, 1912, as follows:

> "All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator; but direct primaries shall not be held for nomination of township officers or for officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality. * * *"

Sections 4996 and 4999, G. C., were amended by the act of April 10, 1913, 103 O. L., 844, to read as follows:

> "Section 4996. Nominations of candidates for any elective office in any township or in any municipality which at the last preceding federal census had a population of less than two thousand, may be made by petitions, signed in the aggregate for each candidate by not less than twenty-five qualified electors of such township or village.
>
> "Section 4999. Nominations of candidates for other offices, may be made by petitions, signed for each candidate by qualified electors of the

state or the district, or county for which such candidates are nominated, not less in number than one for each one hundred persons who voted at the next preceding general election in the state, district or county."

From the above it conclusively appears that the phrase "other offices" as used in section 4999, G. C., prior to the amendment in 103 O. L., 844, supra, had reference solely to offices other than county, township, municipal or ward offices or members of the board of education as enumerated in sections 4996 and 4997, G. C., so that prior to such amendment the nomination of candidates for all county, township, municipal or ward offices and members of the board of education by petition was governed exclusively by sections 4996, 4997 and 4998 of the General Code, and provided a separate and distinct scheme of nomination for the nomination of candidates for the offices therein named from that provided for the nomination of candidates for other offices as provided in section 4999 of the General Code, the latter including within its terms by reference such offices as were not specifically enumerated in the preceding section herein last referred to. By the amendment of section 4996, G. C., 103 O. L., 844, supra, there were eliminated from its provisions county and municipal and ward offices in municipalities with a population of two thousand, or it was made to include only elective offices in a township or a municipality with a population of less than 2000. Section 4999, G. C., in its present form is dependent, as it was in the original enactment, upon reference to the preceding statutes above referred to for any significance of meaning whatever.

Whether "other offices" as now used in section 4999, G. C., has any broader or different meaning by reason of the amendment in 103 O. L., 844, supra, is not free from doubt. In its original use, however, it is believed to have been the legislative purpose to include within the meaning of the phrase "other offices" all those elective offices within the state not theretofore specifically enumerated, and if this purpose followed the amendment last referred to, any exclusion of offices from the terms of section 4996, G. C., would result in an addition of the offices so excluded to those offices included within the meaning of "other offices" as found in amended section 4999, G. C. This view is supported by the addition of "county" in section 4999, G. C., as last amended, and is at the same time weakened by the omission therefrom of any reference to any municipal or ward offices. If on the one hand it be held that "other offices" is in the amended section restricted to its original meaning, the word "county" must be read out of section 4999, G. C., as amended in 103 O. L., and on the other hand if this phrase is construed to include all those offices within the state not now specifically enumerated in sections 4996 and 4997 of the General Code, it will necessitate reading into this section the term "municipal" and "ward offices."

In view of the general policy of the authorization of the nomination of candidates for office by petition, which had been consistently maintained from the act of April 30, 1891, supra, until the amendment of sections 4996 and 4999, G. C., 103 O. L., I am inclined to the view that it was the purpose and intent of the legislature that such policy be continued and that candidates for all offices within the state not enumerated in sections 4996 and 4997, G. C., as the former was amended, 103 O. L., 844, supra, should be authorized to be nominated by petition under the provision of section 4999, G. C., as amended by the act herein last referred to.

I am therefore of opinion that independent candidates for municipal and ward offices in municipalities with a population of two thousand or more may be nominated by petition under the provisions of section 4999, G. C., as amended in 103 O. L., 844.

Respectfully,

EDWARD C. TURNER,

Attorney General.

535.

BOARD OF EDUCATION—VICE-PRESIDENT, DULY ELECTED, MAY ACT AS PRESIDENT WHEN OFFICE OF LATTER IS VACATED BY RESIGNATION OF PRESIDENT.

The vice-president of the board of education of a school district, duly elected by the members of said board under authority and in compliance with the requirements of section 4747, G. C., as amended in 104 O. L., 139, may act as president of said board and perform the duties of said office which has been vacated by the resignation of the president of said board from said office.

COLUMBUS, OHIO, June 25, 1915.

HON. HUGH F. NEUHART, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—In your letter of June 20, 1915, you request my opinion as follows:

"The president of the Caldwell special school district has moved away and resigned from the board. The board was duly organized with president, vice-president and clerk as provided by section 4747 of the General Code.

"Of course the vacancy can be filled under the provisions of 4748 for a member of the board.

"The question now arises whether the board has authority to elect a president at this time, or whether the vice-president shall be the president for the unexpired term for which the outgoing president was elected.

"Section 4747 is the only section I am able to find with reference to organization.

"Section 4753 relative to pro tempore president and clerk which seems to have been passed before 4747 provided for a vice-president and I find nothing setting forth the duties or powers of the vice-president.

"This question is important at the present time as the meeting for the election of a member of the county board will be held next Saturday, June 26th, and we do not want any question of legality of election of such member to be questioned on this proposition."

Section 4747, G. C., as amended in 104 O. L., 139, provides:

"The board of education of each city, village and rural school district shall organize on the first Monday of January after the election of members of such board. One member of the board shall be elected president, one as vice-president and a person who may or may not be a member of the board shall be elected clerk. The president and vice-president shall serve for a term of one year and the clerk for a term not to exceed two years. The board shall fix the time of holding its regular meeting."

There is no express provision of the statute prescribing the duties of the vice-president of a board of education, duly elected under authority and in compliance with the requirements of section 4747, G. C., as above quoted, or authorizing said vice-president to act as president of said board in case of the resignation of the president from office.

It will be observed, however, that under the above provisions of section 4747, G. C., a president and vice-president shall be elected for a term of one year, at

the meeting of the board held on the first Monday of January after the election of the members thereto. No provision is made for filling a vacancy in the office of president which may occur during the term for which he is elected. While section 4753, G. C., provides that if the president or clerk is absent at any meeting of the board the members shall choose one of their members to serve in his place pro tempore, this statute clearly applies to temporary absence as distinguished from a vacancy and its provisions are not necessarily inconsistent with the provisions of section 4747, G. C., for the reason that in the case of temporary absence of both president and vice-president, the provisions of section 4753, G. C., would still apply. If the view be taken that the provisions of section 4753, G. C., are inconsistent with those of section 4747, G. C., the provisions of the latter section, being of subsequent enactment, must control. The legislature, in authorizing a board of education to elect a vice-president at the same time and for the same term as the president, must have intended that the office of vice-president shall have a definite relation to the office of president in so far as the duties of the latter office are concerned.

The Standard dictionary defines the word "vice" as used in the above connection, as follows:

> "Used with official names to form compound words each of which denotes one who has the right to act on occasion in place of the officer designated or one who is just below such officer in rank."

It seems clear therefore that, where the president of a board of education resigns his office at any time during the term for which he is elected, the vice-president has authority to perform the duties of said office and to act as president of said board during the remainder of said term.

Replying to your question, I am of the opinion that the vice-president of the board of education of the Caldwell school district, duly elected by the members of said board under authority and in compliance with the requirements of section 4747, G. C., as amended, may act as president of said board and perform the duties of said office which has been vacated by the resignation of the president of said board from said office.

Respectfully,
EDWARD C. TURNER,
Attorney General.

536.

CIVIL SERVICE—CLASSIFICATION OF APPLICANTS IN ACCORDANCE WITH POLITICAL AFFILIATIONS, INEFFECTIVE—FIXING OF DEFINITE TERM OF SERVICE OF APPOINTEES NOT INCONSISTENT WITH CIVIL SERVICE LAWS—INDUSTRIAL COMMISSION—STEAM ENGINEERS.

The provisions of section 1040, *G. C., classifying applications for appointment under the civil service law, in accordance with political affiliations, is ineffective.*

The fixing of definite term of service of appointees under civil service is not inconsistent with civil service laws.

COLUMBUS, OHIO, June 25, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge the receipt of your letter asking for an opinion relative to the application of the civil service law to the positions of district examiner of steam engineers, which letter is as follows:

> "The industrial commission of Ohio has received from the state civil service commission a list of names which purports to be an eligible list of persons eligible to appointment to the position of district examiner of steam engineers in the Cincinnati district. Upon this list appear the names, general averages and addresses of the supposed eligibles. There is no designation of the party politics of the supposed eligibles.
>
> "The industrial commission respectfully requests an opinion as to whether or not the provisions of section 1040, General Code, are still in effect, in view of the civil service status of steam engineers, particularly that part of said section which provides that 'not more than five of said district examiners so appointed shall be members of the same political party, each of whom shall be a competent and practical steam engineer, and shall serve for a term of three years and until his successor is appointed and qualified.'
>
> "The two points about which we are in doubt are: (1) the provision which requires that not more than five of said district examiners shall be of the same political party, and (2) that part of the section which fixes the term of service for three years, inasmuch as appointments made under the civil service law do not seem to be made for a definite period."

In your letter you refer to section 1040 of the General Code, which is as follows:

> "The chief examiner of steam engineers shall divide the state into ten districts. With the approval of the governor he shall appoint an assistant chief examiner and ten district examiners of steam engineers, provided, however, that not more than five of the said district examiners so appointed shall be members of the same political party, each of whom shall be a competent and practical steam engineer, and shall serve for a term of three years, and until his successor is appointed and qualified. Upon the resignation, removal or death of the chief examiner, assistant chief examiner, or a district examiner, the vacancy shall be filled for the unexpired term in the manner provided for the original appointment."

No question is raised as to the particular positions being included in the

classified service of the civil service of the state, save as to how that status may be affected by the provision in section 1040 of the General Code, quoted above, as follows:

> "* * * not more than five of the said district examiners so appointed shall be members of the same political party * * * each of whom shall serve for a term of three years * * *"

Section 486-2 of the General Code, 103 O. L., 698, which is section 2 of the civil service act, is as follows:

> "Method of appointment. On and after January 1, 1914, appointments to and promotions in the civil service of this state and the counties, cities and city school districts thereof shall be made only according to merit and fitness to be ascertained as far as practicable by examination which, as far as practicable, shall be competitive; and, on and after January 1, 1914, no person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted or reduced as an officer or employe in the civil service under the government of this state, the counties, cities, and city school districts thereof, in any manner or by any means other than those prescribed in this act."

Rule 10 of the state civil service commission, is as follows:

> "Appointments, promotions and retentions in the classified service of the state shall be determined on the basis of merit alone, and lack of merit shall be the only consideration in reduction and removals."

Section 6 of rule 5 of the state civil service commission, is as follows:

> "No question in any examination shall in any way relate to political or religious opinions or affiliations, nor shall any appointment to, promotion or reduction in, or removal from the classified service be influenced in any manner by politics or religion."

In section 486-7, of the General Code, (103 O. L., page 700) which is section 7 of the civil service act, under the head of "Powers and Duties," the first power enumerated is as follows:

> "First: Prescribe, amend and enforce rules for carrying into effect section 10 of article 15 of the constitution of Ohio, and the provisions of this act, and such rules shall have the force and effect of law."

Section 486-11 of the General Code, (103 O. L., 703) which is section 11 of the civil service act, contains in sub-section 5 a provision as follows:

> "(5.) Such other information as may be reasonably required touching the applicant's merit and fitness for the public service; but no enquiry shall be made as to any religious opinions or political affiliations of the applicant."

It will be noted from a reading and consideration of the foregoing provisions of the civil service law and the rules of the state civil service commission quoted, which rules, under the provisions of section 486-7 of the General Code, supra, are

to have the force and effect of law, that under the present existing civil service law which governs the appointment in the civil service of the state, save in the particular cases where exception has been made, there is not only no machinery provided for the purpose of carrying into effect the provisions of section 1040 of the General Code, with reference to the political affiliation of the applicant, but on the contrary, by the express provisions of the law, any reference to politics in connection with appointments is prohibited.

The state civil service commission, in certifying the eligible list in the case under consideration, would be unable to classify the eligibles thereon along political lines and it is my opinion, in answer to your first question, that the provisions of section 1040 of the General Code, with reference to political affiliation is rendered ineffective by the civil service act and does not control in the appointment of district examiners of steam engineers therein provided for.

Coming to your second question asking for an opinion as to "that part of the section (1040, G. C.) which fixes the terms of service for three years, inasmuch as appointments made under the civil service law do not seem to be made for a definite period," permit me to say that the civil service law expressly recognizes the existence of definite terms in the classified service under the provisions of section 486-17 of the General Code, (103 O. L., 707) which, in part, is as follows:

> "Reductions, suspensions and removals. No person shall be discharged from the classified service, reduced in pay or position, laid off, suspended or otherwise discriminated against by the appointing officer for religious or political reasons. In all cases of discharge, lay off reduction or suspension of a subordinate, whether appointed for a *definite term* or otherwise * * * the appointing officer shall give * * * such subordinate * * * time to file an explanation. * * *"

In the case of State ex rel. v. Schneller, Vol. 15, N. P. N. S., 438, this question was considered at length, and in the decision the court, at page 445, says:

> "But there is nothing inconsistent between the provisions of the civil service act and statutes fixing definite periods of time during which appointees shall hold certain offices or perform certain duties. Every provision of the civil service act would apply to the incumbent of such an office, without regard to how he was appointed, but his term of office would not be lengthened.

It is my opinion, therefore, in answer to your second question, that that part of section 1040, General Code, which provides for a term of three years for district examiners of steam engineers is in full force and effect and that its application to appointees under the civil service act is in harmony therewith.

A copy of this opinion has been sent to the state civil service commission.

Respectfully,
EDWARD C. TURNER,
Attorney General.

537.

BOARD OF COUNTY COMMISSIONERS—QUORUM AUTHORIZED TO TRANSACT BUSINESS WHEN THERE IS A VACANCY—MAY DO SO UNTIL APPOINTMENT AND QUALIFICATION OF AN ELECTOR TO FILL SUCH VACANCY.

A quorum of the board of county commissioners is authorized to transact business of the county in case of a vacancy in such board by death, resignation or removal, until the appointment and qualification of an elector to fill such vacancy is made.

COLUMBUS, OHIO, June 25, 1915.

HON. JOHN C. D'ALTON, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of June 16, 1915, as follows:

"Confirming telephone conversation with your Mr. Ballard, upon request of the auditor of this county, I would appreciate an opinion from you as to the existence or non-existence of a board of county commissioners, and, in the event of the non-existence of a board, the legality of any action which the two remaining commissioners, acting in unison, may attempt.

"On the night of the 26th of May, County Commissioner Frank Westfall was killed in an automobile accident here. His body was not recovered until June 3rd. The board authorized to fill the vacancy has been unable to agree upon a successor, and we are still without a third commissioner.

"On June 2nd the attention of this office was directed to the fact that the remaining two commissioners were attempting to do business, make contracts, and spending money for new improvements, etc. I thereupon, after investigation of the law, wrote them as per copy of my letter attached thereto.

"As we construe section 2408 of the General Code, the official representative of the county, vested with authority to contract, to sue and be sued, and to conduct the business of the county, consists of a 'board of county commissioners * * * of three persons, who shall be elected biennially,' etc. While the statute contemplates that two members of the board shall constitute a quorum, in our opinion there must be a board of three members before there can be a quorum thereof.

"Strange to relate, a thorough search of the books discloses no parallel situation. The importance of the matter and the amount of work pending in this county seem to warrant our requesting an opinion from you as to your view of the situation."

Section 2395, G. C., to which you refer, and section 2403, G. C., provide as follows:

"Section 2395. The board of county commissioners shall consist of three persons, who shall be elected biannually, and hold their office for two years, commencing on the third Monday of September next after their election."

"Section 2403. A majority of the board shall constitute a quorum at any regular or special meeting."

In the case of Cupp v. Commissioners, 19 O. S., 173, it was held that a quorum of the board of county commissioners, as defined by section 2403 of the General Code, as above quoted, were authorized to transact business of the board in a proceeding for locating and establishing ditches, drains and water courses, as in other cases. That is to say, a quorum—or a majority of the board of county commissioners, as the term is used in section 2395,—had full power and authority in the exercise of the functions of such board.

Attention is called to the provisions of section 2397 of the General Code, which are as follows:

> "If a vacancy in the office of commissioner occurs more than thirty days before the next election for state and county officers, a successor shall be elected thereat. If a vacancy occurs more than thirty days before such election, or within that time, and the interest of the county requires that the vacancy be filled before the election, the probate judge, auditor, and recorder of the county, or a majority of them, shall appoint a commissioner, who shall hold his office until his successor is elected and qualified."

From an examination of the provisions of this section, it will be noted that if a vacancy occurs either more than thirty days before such election in which event a successor is required to be elected at the next election for state and county officers, or within the period of thirty days prior to such election it is discretionary with the probate judge, auditor and recorder of the county, or a majority of them, to appoint a qualified elector to fill such vacancy. That is to say, the appointment to fill such vacancy depends upon the judgment of the appointing authority in determining whether or not the interests of the county require that such appointment be made prior to the election and qualification of a successor to fill such office. Thus it is manifestly within the contemplation of the legislature that such vacancy may continue for a period even longer than thirty days prior to the election and qualification of an elector to fill such vacancy, unless it be determined by the appointing authority that the interests of the county should require that an appointment to fill such vacancy be made during such interval. Though it appears clear from the above that a vacancy in such office may continue even for a longer period than thirty days, it cannot be maintained that it was contemplated by the legislature that the business of the county should be completely suspended during such period. On the contrary, it seems quite clear that the provisions of section 2397 would not have been so enacted except in view of the authority conferred upon a quorum of such board by the provisions of section 2403, G. C.

That the vacancy to which you refer has occurred a very considerable time previous to the next election for state and county officers, is a matter that would enter materially into the consideration of the appointing authority in determining whether or not the interest of the county requires that the vacancy so occasioned be filled, and if in view of this length of time and the volume and importance of the business of the county such appointing authorities determine that it is for the best interests of the county that such vacancy be filled by appointment, it then becomes their duty to proceed as expeditiously as is consistent with a proper performance thereof, to make such appointment. Until such appointment is made, however, and the appointee qualifies for the discharge of his duties, I am of the opinion that it is not only within the power and authority of the present members of the board of county commissioners, but their duty to proceed with the transaction of the business of the county in such manner as in their judgment is to the

best interests of the county and in the discharge of such duties as are imposed upon them by law, and every action taken by them in all other respects according to law are valid and binding upon the county.

Attention is directed to the case of the State ex rel. Pogue v. Groom, 901 O. S., 1, decided by the supreme court November 30, 1914, in which the court, referring to section 5649-3b, G. C., prior to its amendment in 103 O. L., 552, said:

> "It is true that this section is subject to the same objection urged against these amendments, yet it is expressly provided that a quorum of the budget commission is authorized to transact business, and at least two of the members designated by the original act to serve as members of the county budget commission are county officers elected by a constitutional majority of the electors of the county."

Respectfully,
EDWARD C. TURNER,
Attorney General.

538.

SENATE BILL NO. 314 CONSTITUTIONAL—GOVERNOR'S APPOINTMENT OF ADDITIONAL COMMON PLEAS JUDGE FOR LORAIN COUNTY, VALID.

COLUMBUS, OHIO, June 25, 1915.

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

DEAR SIR:—I acknowledge receipt of a letter from you dated May 25, 1915, but which was not received in this department until the afternoon of June 16, 1915. Your letter is as follows:

> "Will you kindly advise this department in the following matter:
> "An act was passed (senate bill 314) providing for an additional judge of the court of common pleas for Lorain county. A judge was appointed by the governor for said additional office. No election had been held, and no judge had been theretofore elected to such office. The appointment being merely to fill a judgeship provided by the general assembly until an election could be had pursuant to law.
> "We would like to know whether such judge was legally appointed or whether such appointment was unconstitutional."

Senate bill No. 314, to which you refer is in full as follows:

> "AN ACT.
> "To provide for the election and appointment of an additional judge in Lorain county.
> *"Be it enacted by the general assembly of the state of Ohio:*
> "Section 1. From and after the passage of this act, two-thirds of the members elected to each house thereof concurring, there shall be one additional judge of the court of common pleas, in and for Lorain county, who shall reside therein.

"Such additional judge shall be elected every six years, beginning in 1916, and to hold his office for a term of six years, commencing on the 9th day of January, A. D., 1917, next after his election.

"Until such additional judge of the court of common pleas is so elected and qualified, the governor shall appoint such additional judge.

"Vacancies occurring in the office of such additional judge in Lorain county, shall be filled in the manner prescribed for the filling of vacancies in the office of judge of the common pleas court.

"He shall exercise the same powers and jurisdiction and perform the same duties as the judges of the court of common pleas; and shall receive the same compensation as is provided by law for the judges of the court of common pleas in Lorain county.

"Section 2. This act is hereby declared to be an emergency law necessary for the immediate preservation of the public peace, health and safety and shall take effect and be in force from and after its passage. The necessity arising from the fact that by reason of the large number of both civil and criminal cases now pending in the court of common pleas of said county, occasioned by the rapid increase in population and growth of commercial business and the consequent inability of one judge to try and hear the same with reasonable promptness, the public peace, health and safety are thereby menaced."

There is no question here as to the intention of the legislature. That is made sufficiently clear by the express direction to the governor to appoint an additional judge until the election of the first judge therein provided for and his qualification thereunder.

I also call attention to the emergency of the bill, which makes it clear that the general assembly desired to provide Lorain county with an additional judge immediately.

The question raised by you is quite similar to the situation following the amendment of the constitution providing that:

"The supreme court shall, until otherwise provided by law, consist of a *chief justice* and six judges * * *. The judges of the supreme court shall be elected by the electors of the state at large."

Under the constitution no chief justice, the office of which had been created by the amendment, could be elected until November, 1914.

The General assembly in 1913, by an amendment of section 1467, G. C., (103 O. L., 408) provided that:

"Until a chief justice is so elected and qualified the governor shall appoint a chief justice."

The right of the legislature to enact such a provision and of the governor to act thereunder was much discussed at the time, but no one ever challenged the validity of the enactment or of the appointment by the governor. Of course, mere acquiescence does not make law, but it sometimes tends strongly to show what the law is.

While the legislature would have been without the power to authorize the governor to appoint a chief justice or judge of the supreme court for a constitutional term, it was within the power of the legislature to provide that *until a chief justice could be elected* under the constitution the governor might make a provisional or initiatory appointment.

While it is true that the amendment of section 1467, G. C., authorizing the

governor to appoint a chief justice was the carrying out of the constitutional provision, it is also true that the creation of an additional judgeship is just as fully authorized as was the office of chief justice. To my mind the difference is one of degree rather than principle and the analogy is sufficiently complete to say that there is no difference in principle.

Section 3 of article IV of the constitution provides:

> "One resident judge of the court of common pleas, *and such additional resident judge or judges as may be provided by law,* shall be elected in each county of the state by the electors of such county * * *."

Section 1 of article XVII of the constitution provides:

> "Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in the even-numbered years * * *."

It is within the province of the legislature to provide for an additional resident judge in any county in any year. It is not possible, however, to elect a judge save at the November election in the even-numbered years.

While the legislature could not provide for the appointment regularly or beyond the period when an election might be held lawfully, I am clearly of the opinion that where the legislature creates an additional judgeship it may, if it sees fit, confer upon the governor power to fill the office until an election may be held.

If the present legislature had attempted at the session just past to create a judeship to become effective *after the November,* 1916, election, it could not have authorized the governor to appoint to such office, for between the passage of the act and the beginning of the office it would have been possible to have held an election.

I, therefore, hold that it was within the power of the legislature to pass senate bill 314 and that thereunder the governor had the power to appoint an additional judge for Lorain county until a lawful election could be held to fill the office.

I presume that your question arises out of the fact that you will be called upon to issue warrants upon the treasury for the salary of such judge and I, therfore, advise you further that even if it should be held that the appointment was not valid, that such judge would at all events be held to be a de facto officer, and while payments out of the public treasury could not be compelled by the de facto officer, yet where the compensation has been paid to a de facto officer it may not be recovered and the officer disbursing the same would not be liable therefor.

Respectfully,
EDWARD C. TURNER,
Attorney General.

539.

APPROVAL OF ABSTRACT OF TITLE, ARMORY AT PIQUA, OHIO.

COLUMBUS, OHIO, June 24, 1915.

The Ohio State Armory Board, Col. Byron L. Bargar, Secretary, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt, for examination and approval, of the abstract of title to and deed from The Orr Felt and Blanket Company to the state of Ohio for the following described real estate situated in the city of Piqua, county of Miami and state of Ohio, to wit:

"First Lot. Being the ground occupied by the original mill and mill yards, and bounded on the north by the south end of Spring street, said south end of Spring street there being co-incident with the south side of Water street; on the east by the west line of lot number ten hundred and forty-nine (1049) in said city; on the south by the Great Miami river; and on the west by the east lines of lots numbers nineteen (19) and forty-one (41), in said city; said first lot being the lands lying immediately south of the present termination of spring street in said city, and having formerly been the south end of said street; and including therein also that piece of land which was formerly a part of Spring and Water streets in said city and which is within lines running as follows, that is to say: Commencing at the northeast corner of the formerly called Piqua Woolen Mills; thence north fourteen (14) feet; thence west fifty-seven and one-half (57½) feet; thence south to the north wall of said mills; thence east to the place of beginning; said last described parcel of land being the premises described in the resolution of the city of Piqua council, passed June 3, 1885, and found in council record four (4), at page 548, of said city; and also described in a vacating ordinance of said city passed July 20, 1885, and title to which was quieted in the former owner The F. Gray Company, in action number twelve thousand and ninety (12090) in the common pleas court of Miami county, Ohio, in a decree entered in said action by said court on May 2, 1892, which will be found in journal thirty-five (35), at page three hundred and forty-two (342) of the records of said court, and a transcript of which will also be found in the deed records of said Miami county, in book ninety-four (94), page six hundred and eight (608); also

"Second lot. Being the ground occupied in part by the new addition to said mill on the west of the old building and being described as being all of those portions of lots numbers nineteen (19) and forty-one (41), in said city, according to the original plat and also according to the present numbering, which lie east of the Miami and Erie canal; said lots having been numbered respectively thirty-two (32) and thirty-three (33) on Bevins map of Piqua; also

"Third lot. Being the ground occupied in part by the brick warehouse of said company, and being a part of the aforesaid lot number ten hundred and forty-nine (1049) in said city; the portion herein and hereby conveyed being bounded by lines which begin, run and terminate as follows: that is to say, commencing at the junction of Spring and Water streets in said city, at the south side of Water street; and running thence east with Water street, eighty-nine (89) feet; thence south to the Great

Miami river; thence westerly with the meanderings of said river, to a point on a line which would be a projection of the east line of said Spring street; thence north to the place of beginning. * * *"

I have made a careful examination of said abstract and as a result of such examination I find that no liens or incumbrances against said premises are disclosed by the abstract except the second half of the 1914 taxes amounting to $38.68 and the undetermined taxes for the year 1915, and the balance of the special assessments for construction of certain sewers and pavements, amounting to $190.53.

No examination appears to have been made of the records of the United States court, and I would suggest that a certificate of the clerk of said court, as to the existence or non-existence of judgments against The Orr Felt and Blanket Company, be attached to the abstract. The deed from the Orr Felt and Blanket Company to the state of Ohio is duly signed and acknowledged and is in proper form, and I am of the opinion that upon the discharge of the above mentioned liens the grantee will acquire, by said deed, a good and sufficient title to said premises in fee simple.

The abstract of title and deed are herewith transmitted to you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

540.

CIVIL SERVICE COMMISSION—PROCEDURE TO BE FOLLOWED IN CASE CHARGES ARE FILED AGAINST MEMBER OF SAID COMMISSION.

COLUMBUS, OHIO, June 24, 1915.

HON. FRANK B. WILLIS, *Governor, Columbus, Ohio.*

MY DEAR GOVERNOR:—I am in receipt of your request for opinion under date of June 22, 1915, which reads as follows:

"Please advise me as to what is the proper procedure in the case of proceeding with charges against a member of the state civil service commission of Ohio."

Section 486-3 of the General Code (103 O.L., 699) provides in part as follows:

"Section 486-3. * * * The governor may remove any member of the state civil service commision of Ohio at any time for inefficiency, neglect of duty, or malfeasance in office, having first given to such commissioner a copy of the charges against him and an opportunity to be publicly heard in person or by counsel in his own defense, and any such act of removal by the governor shall be final.

"A statement of the findings of the governor, the reasons for his action and the answer, if any, of the commissioner, shall be filed by the governor with the secretary of state and shall be open to public inspection. * * *."

(1) The first step, being the one conferring jurisdiction, is the filing with

the governor of written charges against the member of the commission upon the ground of either, any two, or all of the following, to wit: inefficiency, neglect of duty or malfeasance in office.

These charges should embody facts which in judgment of law constitute one or more of the above mentioned statutory grounds.

(2) A copy of said charges duly certified by the governor as a true copy, should be served personally upon the commissioner by some person designated by the governor, and such person should make return to the governor showing personal service of the charges upon the accused commissioner. It will not be sufficient that the written charges simply allege that the commissioner was inefficient, or that he had neglected his duty, or that he had been guilty of malfeasance in office, for such allegations would be merely legal conclusions. The charges should contain a recital of facts which constitute one or more of the statutory grounds.

(3) Accompanying the charges should be a notice from the governor stating the time when and place where said commissioner will be given an opportunity to be publicly heard in person or by counsel in his own defense. The time set in the notice should give the accused a reasonable opportunity to prepare his answer and be present at the appointed place. What is reasonable time is dependent upon the facts and circumstances of the particular case.

(4) At the time set for the hearing, or at any time prior thereto between the date of the service of a copy of the charges and the time set for the hearing thereon, the defendant will have the right to file an answer to the charges.

(5) The statute does not require that evidence in addition to the charges filed be offered on behalf of complainant or, in other words, to support the charges. On the other hand, the governor may, in his sound discretion, hear or receive evidence other than the charges, but which must be material and relevant to the charges contained in the written copy served upon the accused.

However, it should be here pointed out that the supreme court of Ohio has at least seemed to have held that evidence to support the charges must be offered. See State ex rel. Meader et al., v. Sullivan, 58 O. S., 504-516. In view of this last mentioned case it would be the safer course to pursue to require evidence in support of the charges though, as above stated, I am of the opinion that the charges when signed by the person who prefers them constitute at least a prima facie case and place the burden upon the accused to refute them. This is contrary to the ordinary procedure in a court of justice where it is required that evidence to support an indictment must be offered first or the charge fails. Hence, in the application of the above suggestion care must be exercised that no injustice is done the accused.

(6) At the time and place appointed the charges as filed, a copy of which had theretofore been duly served upon the accused, should be read publicly and the accused called upon to offer his defense thereto in person or by counsel.

(7) I am of the opinion that under the cases decided by the supreme court of Ohio the governor would not have the right arbitrarily to refuse to hear any witnesses offered by the accused as to matters tending to exculpate the accused from the charges as filed. The number of witnesses or the limitation beyond which the testimony on behalf of the accused might go in addition to and outside of that material and relevant as a defense will rest in the sound discretion of the governor. In the absence of abuse of such discretion the courts would be without power to interfere upon such ground.

(8) No evidence may be offered and considered against the accused, however, which is not relevant and material to the charges as filed, or at least in rebuttal of such evidence as the governor has allowed the accused to offer. The

governor will be the sole judge of the relevancy, materiality, weight and sufficiency of all evidence offered, and unless there was a clear abuse amounting to unfairness to the accused the courts would not be authorized to review such matter.

(9) Whether or not testimony shall be given under oath rests in the sound discretion of the governor. However, the governor would not be authorized to require the evidence of the accused or his witnesses to be given under oath if the evidence in support of the charges was not also given under the sanctity of an oath.

(10) Neither the governor, the person or persons preferring the charges, nor the accused have any power to compel the attendance of witnesses nor may a witness be compelled to be sworn. Documentary evidence and signed writings may be admitted providing they are communicated to the accused.

From the foregoing it will be seen that common sense and fair play, rather than any technical rules, are to govern the procedure. Where charges have been filed with the governor embodying facts which in judgment of law constitute either inefficiency, neglect of duty or malfeasance in office on the part of a member of the state civil service commission, a copy of the charges has been served upon the accused member, such accused member has been given reasonable notice of the time and place when and where such charges would be heard publicly and the accused has been given a full and fair opportunity to be heard in his own defense, either in person or by counsel, and testimony is offered in support of the charges (the charges themselves may be offered as a part of the testimony), the action of the governor is final and cannot be reviewed by the courts.

A statement of the findings of the governor, the reasons for his action and the answer, if any, of the commissioner shall be filed with the secretary of state.

Respectfully,
EDWARD C. TURNER,
Attorney General.

541.

FORM OF COMMISSION FOR APPOINTMENT BY GOVERNOR DURING RECESS OF SENATE WHEN CONFIRMATION BY THAT BODY IS REQUIRED BY STATUTE.

COLUMBUS, OHIO, June 24, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of June 21, 1915, which is as follows:

> "Will you kindly advise this department the correct form and wording to be used in commissioning an appointee requiring confirmation of the senate during the recess of that body? The forms in use by this department in commissioning appointees are hereto attached."

I have examined the forms attached to your letter and am of the opinion that none of them are exactly appropriate for the purpose referred to by you.

Section 12, G. C., provides as follows:

> "When a vacancy in an office filled by appointment of the governor, with the advice and consent of the senate, occurs by expiration of term or otherwise during a session of the senate, the governor shall appoint a

person to fill such vacancy and forthwith report such appointment to the senate. If such vacancy occurs when the senate is not in session, and no appointment has been made and confirmed in anticipation of such vacancy, the governor shall fill the vacancy and report the appointment to the next session of the senate, and, if the senate advise and consent thereto, such appointee shall hold the office for the full term, otherwise a new appointment shall be made."

It is obvious that under the second division of this section the tenure of a person appointed by the governor, when the senate is not in session, is for the full term unless the senate, at its next session, fails to advise and consent to the appointment, or the governor fails to report the appointment to the next session of the senate.

None of the forms which are attached to your letter contain blanks for the insertion of the official term for which the appointment was made, but I am informed that it is customary to write in the designation of the term thus:

"* * * Whereas _____ of _____ county has been duly appointed to the office of_____, *for the term of* _____ *years commencing on the* _____ *day of* _____. * * *"

This practice, which has evidently been followed in the past, cannot be substantially objected to, and in view thereof the blank form of the commission to be used in making appointments of the kind referred to by you should be as follows:

"KNOW YE, That whereas _____ of _____ county, has been duly appointed to the office of _____ (here state the name of the office and the regular or unexpired term thereof for which appointment is made) *when the senate was not in session.*

"THEREFORE, by virtue of the authority vested in the governor by the constitution, and in pursuance of a provision of the statutes, I do hereby commission him, the said _____, _____ to be _____, authorizing and empowering him to execute and discharge, all and singular, the duties appertaining to said office, and to enjoy all the privileges and immunities thereof *during the aforesaid term, if the senate at its next session advise and consent to the said appointment; otherwise until his successor is appointed and qualified according to law.*"

Respectfully,

EDWARD C. TURNER,

Attorney General.

542.

VACATIONS—OUTSIDE OF A FEW STATUTES APPLYING TO PARTICULAR POSITIONS THERE IS NO STATUTORY AUTHORIZATION—QUESTION LEFT LARGELY TO THE SOUND DISCRETION OF THE HEAD OF THE DEPARTMENT—PUBLIC OFFICIALS.

Public officials have such powers only as are either conferred expressly or by necessary implication. Outside of a few statutes applying to particular positions there is no statutory authorization for vacations. The commonly accepted theory and practice of vacations on pay is that they will be granted at a time in the year when the work of the department is slack and where those who remain on duty will be able to care for the work of those who are absent. In this way there is no loss to the state and at the same time the employe who gets the vacation earns it by making up for the time out in helping care for the work while his fellow-employes are taking their vacations. I know of no statutory authority for the payment of employes for services not rendered.

However, it is difficult to lay down any hard and fast rule to cover all cases, as they will depend upon the facts and circumstances of each particular case. I feel that within a well guarded zone such matters should be left largely to the sound discretion of the head of the department, such head of department being careful not to abuse the discretion.

COLUMBUS, OHIO, June 24, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of June 9, 1915, you requested my opinion as follows:

> "Please advise the industrial commission whether or not unused personal service funds which have accrued since February 16, 1915, are available for payment of temporary clerks who are employed by this commission to render services during the absence of regular clerks who are absent on leave with pay (vacation period)."

Public officials have such powers only as are either conferred expressly or by necessary implication. Outside of a few statutes applying to particular positions there is no statutory authorization for vacations. The commonly accepted theory and practice of vacations on pay is that they will be granted at a time in the year when the wok of the department is slack and where those who remain on duty will be able to care for the work of those who are absent. In this way there is no loss to the state and at the same time the employe who gets the vacation earns it by making up for the time out in helping care for the work while his fellow-employes are taking their vacations. I know of no statutory authority for the payment of employes for services not rendered.

However, it is difficult to lay down any hard and fast rule to cover all cases, as they will depend upon the facts and circumstances of each particular case. I feel that within a well guarded zone such matters should be left largely to the sound discretion of the head of the department, such head of department being careful not to abuse the discretion.

One of the members of your commission has informed me that you desire the opinion not only as applied to vacations, but as to the hiring of temporary clerks irrespective of the question of vacations, and what follows hereafter will be based on that phase of the question.

Your question is so general that I shall have to assume an interpretation of it.

I take it that the "funds" which you mention are those available under appropriation accounts created by the partial appropriation bill of 1915, house bill No. 314. If that is the case I call your attention to the fact that section 2 of the bill provides that:

> "Moneys appropriated in the preceding section shall not be in any way expended to pay liabilities or deficiencies existing prior to February 16, 1915, or incurred subsequent to June 30, 1915."

It follows that if there is an unexpended balance in any of the appropriation accounts created by this bill, the same cannot be used to pay for services rendered subsequently to June 30, 1915, under any circumstances whatever.

Still assuming that you are referring to the expenditure of moneys under authority of the appropriation made in the bill above referred to I beg leave to point out that the appropriations, on account of personal service, to the industrial commission show an aggregate of $149,285.00 for specified salaries; an appropriation of $405.00 for mechanical and clerical labor and an appropriation of $3,020.00 for unclassified service described as "fees for local medical examinations, etc."

In my opinion the appropriation for wages—"mechanical and clerical labor" may be used for the purposes referred to provided the services for which payment is made are rendered prior to June 30, 1915.

I am of the opinion that the appropriation for "personal service"—unclassified—fees for local medical examinations, etc., may not be so used. If there had been no appropriation to the commission for "mechanical and clerical labor," and if the appropriation for "unclassified personal service" had not been qualified by the clause "fees for local medical examinations," etc., a contrary result might have followed. But the legislature has clearly distinguished, in the language used by it, between extra clerk hire and unclassified personal service so as to indicate that the former is not included in the latter.

The appropriations for salaries, aggregating as aforesaid $149,285.00, are all specific. In the first place they are divided by departments as: salaries in the mining department, in the department of boiler inspector, workshops and factories, film censorship, examiner of steam engineers, state insurance, investigation and statistics and general offices.

In the second place these salaries are appropriated specifically for certain designated positions except in such instances as in which lump sums are appropriated for a specified number of clerks. Thus, in the mining department there is an appropriation for the salary of the chief clerk and also a lump sum appropriation for the salary of two clerks. This is an instance of what occurs in the case of appropriations for each of the departments.

These appropriations being specific, you are advised that no transfer can be made, under favor of section 3 of the bill, from one such appropriation account to another. Therefore, the only questions which could possibly be considered respecting the use of these appropriations may be stated thus:

(1) If a clerk, for whose salary a specific appropriation has been made, is employed at less than the amount appropriated for the period between February 15th and June 30th, may the difference between the amount of the salary paid to him under the terms of his employment and the amount in the appropriation for the salary of his position be paid to another who takes his place while such clerk is absent on leave with pay, provided such extra services are rendered prior to June 30th?

(2) Where there is a lump appropriation for a specified number of clerks, and the specified number is employed but at a compensation, in the aggregate, less

than the amount appropriated for the period, may an extra clerk be employed under the circumstances above mentioned and paid out of the balance in such appropriation account, the services being rendered prior to June 30, 1915?

(3) Where there is a lump appropriation for a specified number of clerks, and fewer than the specified number are employed, may the balance or unused portion of such appropriation account, set aside for payment of a salary of a position which has not been permanently filled, be used to pay such an extra clerk?

The answers to the first two questions are, in my opinion, in the negative for the reason that the legislature has, by the form of its appropriation, specified that the sums appropriated shall be paid to a certain number of persons, or rather to the incumbents of certain specified positions. Such appropriations are, therefore, not available to pay extra clerk hire under any circumstances.

But where a lump sum appropriation has been made for a specified number of clerical salaries, and one of the positons thus appropriated for is not filled, and there remains therefore an unused balance, there is nothing to prevent the industrial commission from filling such theretofore vacant position (that is, vacant from the viewpoint of the appropriation bill) even for a brief period of time and temporarily, and paying the compensation of the person so employed from the unused balance of such appropriation account.

The third question suggested by me is therefore answered in the affirmative.

Repeating my answers to your general question I beg to advise, first, that the apropriation of $405.00, under the designation "A2 wages—mechanical and clerical labor," is available to pay for services such as you describe if rendered prior to July 1, 1915, and that where there is a lump sum appropriation for the salaries of a specified number of clerks of a certain class, and fewer than the number of clerks whose salaries are thus appropriated for have been actually employed, a person temporarily employed may be paid from the balance or unused portion of such appropriation provided the services are rendered prior to July 1, 1915. In this last connection, however, I should observe that an unused balance, of the character which I have last described, in an appropriation for the salaries of clerks of one class, may not be used to pay the compensation of an extra or temporary clerk performing services of another class.

I call your attention further to the fact that the foregoing will not apply to the appropriations available on and after July 1, 1915.

I trust that the foregoing answers the question which you have in mind.

Respectfully,
EDWARD C. TURNER,
Attorney General.

543.

APPROVAL OF CONTRACTS FOR OHIO STATE UNIVERSITY—GREENHOUSES FOR BOTANY AND ZOOLOGY BUILDING—DRIVEWAY FROM PAGE HALL TO NEIL AVENUE.

COLUMBUS, OHIO, June 26, 1915.

HON. CARL STEEB, *Secretary Ohio State University, Columbus, Ohio.*

DEAR SIR:—Under date of June 22, 1915, you submitted for my approval

(1) A certain contract for greenhouses Nos. 8, 9 and 10 for the botany and zoology building of the university, the contract for which was

awarded on May 18, 1915, to the Foley Greenhouse Manufacturing Company, and a contract duly entered into for said work on May 22, 1915;

(2) A certain contract for a driveway on the south side of the campus from Page hall to Neil avenue, and a driveway from Twelfth avenue and High street to the Ohio Union, on the Ohio State University campus, the contract for which was awarded on the same date to S. T. Knight, and a contract duly entered into for said work under date of May 25, 1915.

I have carefully examined said contracts and the contract bonds submitted therewith, and find them to be in all respects in compliance with law, and that appropriations for the same are available, and, consequently, have this day approved the same.

I herewith return to you copies of said contracts, and have filed the original in the office of the auditor of state.

Respectfully,
EDWARD C. TURNER,
Attorney General.

544.

COLLATERAL INHERITANCE TAX—WHAT FACTS CONSTITUTE AN EXCUSE BY AN ADMINISTRATOR IN NOT PAYING TAX AT TIME REQUIRED BY STATUTE—ANCESTRAL AND NON-ANCESTRAL VALUES—LITIGATION—PENALTY.

Where the collateral heirs of an intestate decedent are of remote degrees of relationship and reside in various parts of the United States, so that the administrator in the exercise of due diligence was unable for some time to acquire the information necessary to enable him to distribute the estate or to know the number and amount of the various shares into which it is to be divided; and, where, moreover, part of the real property of the estate, which constitutes the major portion of its value, is ancestral and part is non-ancestral and litigation arises as to the inheritance thereof which is not terminated for some time, failure of the administrator to pay the collateral inheritance tax on the various shares thereof within one year after the death of the decedent, if due to such causes, is excusable and the eight per cent interest provided for by section 5335, G. C., being in the nature of a penalty, should not be collected.

COLUMBUS, OHIO, June 26, 1915.

HON. T. B. JARVIS, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—I acknowledge the receipt of your letter of June 21st, enclosing a statement of facts with reference to the administration of the estate of Hugh McFall, late of the city of Mansfield, and requesting my opinion as to the collection of the eight per cent. interest on the taxable inheritances under the circumstances therein detailed.

It appears from the statement of facts that the decedent died intestate, and that his estate consisted principally of real property. His heirs were all collateral, the degrees of relationship being in each case quite remote. The administrator was unable to determine who were the proper distributees of the estate and in

what proportion the estate should be distributed to them, because not only of the difficulty of ascertaining the exact degrees of relationship, but also because of the fact that part of the estate was ancestral and part was non-ancestral. Moreover, the heirs resided in different parts of the United States and it was difficult to obtain information as to their identity, and even as to their number at the date of the testator's death.

There was considerable litigation in connection with the estate, such litigation involving almost half of the property of the estate in value. This litigation was finally disposed of in February, 1915, and complete information as to the identity of the heirs was received within the last month.

The administrator is now ready, and has at all times during the last month been ready, to pay the tax, but the question is as to his liability for the eight per cent. interest under the provisions of section 5335 of the General Code, which is in part as follows:

> "* * * If such taxes are not paid within one year after the death of the decedent, interest at the rate of eight per cent. shall be thereafter charged and collected thereon. * * *"

In my opinion, this interest is not collectible under the facts as stated by you. I refer you to the case of In re Bates' Estate, 7 N. P. (n. s.) 625, in which it was held that the eight per cent. interest provided by the statute is a penalty, and that, therefore, it will not be enforced except where the failure to pay the tax is the result of some positive neglect or default on the part of the executor; so that when a valid reason exists for delay, even though not amounting to actual impossibility of ascertaining the amount of the tax, as in the case of contingent remainders, etc., the penalty will not be enforced.

In the case cited the court refused to enforce the penalty because it was generally supposed for some time that the collateral inheritance tax law was unconstitutional on account of the decision of the supreme court relative to the direct inheritance tax. During the period of time in which this was the state of the public mind and until the supreme court had held the collateral inheritance tax law to be constitutional, the court held that an executor or administrator was justified in declining to pay the tax, and that, therefore, the penalty for failure to pay was not collectible.

The Bates case is an extreme application of the doctrine that is recognized in other states.

> See: In re Banks, 5 Pa. Co. Ct., 614; People v. Prout, 53 Hun. 541; State v. Pabst, 139 Wis., 561.
> Contra: Shelton v. Campbell, 109 Tenn., 690.

Although the rule is not uniformly adhered to, it was followed, as I have pointed out, in the only case which has been decided in Ohio on the subject, and, accordingly, I think that it is the rule to be followed in Ohio.

In my opinion, if the administrator of the estate named by you used due diligence to ascertain the identity and relationship of the heirs of the decedent, and if the litigation was of such a character as to suspend the determination of the method of distributing the estate (which I take it was the case), the facts stated by you constitute a sufficient reason for the failure on the part of the administrator to pay the tax, and the penalty should not be collected. This follows because under the Ohio law the tax is assessed against the various shares, and not against that part of the estate which is distributed to collateral relatives in bulk; so that

so long as there is any bona fide question as to the amount of each distributive share passing to a collateral relative, and it is not known to what extent the exemptions will cut down the aggregate taxable value of the estate the tax cannot with accuracy and safety be computed and paid.

Respectfully,
EDWARD C. TURNER,
Attorney General.

545.

BUILDING—CONTRACT MUST BE AWARDED UNDER ADVERTISEMENT FOR BIDS BEFORE ANY LIABILITY RESTS WITH THE STATE.

Not until a contract is awarded under an advertisement for bids under sections 2314, et seq., G. C., is there any liability on the part of the state to pay contract price.

COLUMBUS, OHIO, June 26, 1915.

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

DEAR SIR:—Under date of June 22, 1915, you submitted for my opinon the following:

> "If an advertisement is inserted before July 1, 1915, for bids for the construction of a building under the provisions of sections 2314, et seq., of the General Code, does such advertisement create a liability to the extent that at the end of the advertising period a contract or contracts could be entered into after July 1, 1915, payable from the appropriations available prior to July 1, 1915?"

The mere insertion of an advertisement, in a newspaper, calling for bids for the construction of a building under the provisions of sections 2314, et seq., of the General Code, does not create any liability on the part of the state for payment of anything other than costs for such advertisement.

Not until a contract is awarded under an advertisement for bids is there any liability on the part of the state to pay the contract price, and funds not available at that time cannot be applied to such contract. Therefore, your question is answered in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney General.

546.

STATE HIGHWAY COMMISSIONER—PATENTED ARTICLES MAY BE USED IN ROAD CONSTRUCTION—LIMITATION IS THAT ARTICLE BE FURNISHED TO ALL CONTRACTORS AT A FIXED AND REASONABLE PRICE.

The state highway commissioner may specify and use patented articles in road construction, provided there is filed with him an agreement on the part of the person or company owning the patent and producing the patented article to the effect that said person or company will furnish such article to all contractors desiring to bid on the work at a certain fixed and reasonable price.

COLUMBUS, OHIO, June 26, 1915.

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

DEAR SIR:—I have your communication of June 5, 1915, in which you state that the state highway department is frequently importuned to specify and use patented materials in highway construction, and that by reason of the fact that such materials are patented, their production is limited to certain firms or individuals. You observe that many of such products are not without merit, as for example Warrenite, and you transmit to me a number of documents relating to Warrenite, and ask my opinion as to the right of the state highway department to specify and use this and other materials similarly protected by a patent. Accompanying your communication is a copy of the specifications for Warrenite road on any approved form of foundation, and the specifications enclose a blank form of agreement, containing the following clause:

> "Warren Brothers Company, owner of the patents used in the construction of the Warrenite road, shall file with the proper official or board, which is about to receive bids for the work, a properly executed binding agreement to furnish to any contractor desiring to bid for the work all the necessary Warrenite surface material, mixed ready for use, and Warrenite cement, and the sand, gravel or stone screenings for the surface finish course, in accordance with sections, 'wearing surface' and 'surface finish,' at a definite reasonable price per ton. Said price shall include a license to use all of the patents required in the construction of the Warrenite road as herein specified."

A question very similar to the one now propounded by you was passed upon by the circuit court of Lucas county in the case of Holbrook v. Toledo, 18 O. C. D., 284. That case involved the question as to whether a city in calling for bids for a street improvement may advertise for and accept a construction, the materials entering into which or the method and proportions of assembling which, are covered by letters patent. Plaintiff sought to enjoin the city officials of Toledo and others, from proceeding under contract awarded to one Streicher, and it was charged in the petition that the contract in question involved a misapplication of the funds of the city and an abuse of its corporate powers, for the reason that the specifications for the construction of said improvement called for Warren's bitulithic pavement exclusively, and that certain elements entering into said pavement were covered by letters patent, as were also the machinery and appliances for laying said pavement and the process of mixing the materials used therein, and that by reason thereof no person could make use of any of the machinery, appliances, methods or materials so covered by letters patent, save and except upon the consent of said Warren Brothers Company.

It was averred, by reason of the above situation, that there could not have been

such competitive bidding for the improvement as is contemplated by the laws of the state of Ohio. The court held against the contention of the plaintiff, observing that no provision of law directly prohibited a contract of this character, and that the statutes of Ohio did not set forth the terms upon which a patented improvement might be used.

The court in the concluding portion of its opinion, used the following language:

> "Not much encouragement would be given to the inventor of a patented pavement if his market were restricted to individuals, if municipalities were shut out of the number of the purchasers of that which he has invented. Individuals do not ordinarily buy pavements. And the question then comes, whether it is public policy to discourage invention along this line, which in the end may insure to the highest benefit of the cities. We have passed through very many stages of bad roads; from the old clay roads, the corduroy and the plank roads, through the divers forms of pavement. Now we have the bitulithic pavement, which has been selected by this board of public service, and it has seemed to this court, and to each member of it, that it is wise that the people, who have organized themselves into municipalities, should be free to avail themselves of every beneficent invention, keeping pace with the world's progress."

The statute relating to the board of public service which had sought to award the contract in the above case, required the letting of the contract to the lowest and best bidder. The only similar statute relating to your department is section 1201, General Code, which requires the highway commissioner to award the contract to the lowest responsible bidder. I see no distinction between the case passed upon by the circuit court of Lucas county and that which now presents itself, unless it be that in the case now under consideration a greater degree of competition is preserved, inasmuch as any contractor may do the work and a considerable part of the materials may be obtained from any source, and the patented articles consisting of the binder and the screenings for the surface finish course may be obtained by any contractor at a certain fixed price, which price shall also include a license to use all the patents required in the construction of Warrenite road.

I am not unmindful of the fact that section 3811, G. C., provides that no municipal corporation shall adopt plans or specifications for a public improvement, required by law to be made by contract, let after competitive bidding, which requires the exclusive use of a patented article or process protected by a trade mark, or any article or process wholly controlled by any person, firm or corporation or combination thereof. This section is, however, by its terms, limited to municipal corporations, and the fact that the legislature deemed it necessary to legislate on the subject, would seem to add strength to the conclusion that in the absence of an express prohibition, a public official vested with the power of letting contracts for public improvements would have the right under certain conditions to specify a patented article. Previous to the enactment of the section above referred to, the supreme court held in the case of Hastings v. Columbus, 42 O. S., 585, that the fact that a street improvement is to be made with a specific patented pavement is no valid objection to an assessment for such improvement, if, before the contract was let, the city had acquired the right to permit any bidder who might be successful, to use on reasonable terms, such patented material in making the improvement.

It is therefore my opinion that upon the filing with you of a properly executed agreement on the part of the company owning the patents and producing Warrenite or other similar patented article used in road construction, which agreement should be along the general lines of that referred to above, and upon your being satisfied that the price fixed for the patented material is a reasonable one, you may specify and use such patented article, even in those cases where you are required to let contracts at

competitive bidding. The agreement referred to herein should be filed before advertisement is made, in order that all bidders may be advised of their ability to obtain the patented article at a certain fixed price.

Respectfully,
EDWARD C. TURNER,
Attorney General.

547.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS.

COLUMBUS, OHIO, June 26, 1915.

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

DEAR SIR:—I have your communication of June 23, and June 24, 1915, transmitting to me for examination, final resolutions as to the following roads:

"Chillicothe-Lancaster, Ross county, Pet. No. 1672, I. C. H. No. 361;
"Chillicothe-Lancaster, Ross county, Pet. No. 1672, I. C. H. No. 361;
"Fremont-Castalia, Sandusky county, Pet. No. 1176, I. C. H. No. 281;
"Sandusky-Clyde, Sandusky county, Pet. No. 1171, I. C. H. No. 277;
"Lancaster-New Lexington, Perry county, Pet. No. 894, I. C. H. No. 357;
"Upper Sandusky-Findlay, Wyandot county, Pet. No. 616, I. C. H. No. 222;
"Canton-Steubenville, Stark county, Pet. No. 1470, I. C. H. No. 75;
"Ravenna-Parkman, Portage county, Pet. No. 955, I. C. H. No. 326;
"Lima-Spencerville, Allen county, Pet. No. 1535, I. C. H. No. 132;
"Warren-Sharon, Trumbull county, Pet. No. 1564;
"Warren-Sharon, Trumbull county, Pet. No. 1564."

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

548.

AUTOMATIC FIRE SPRINKLER INSTALLED IN STATE BUILDING AS A FIXTURE—WAIVER OF COMPETITIVE BIDS—HOW OBTAINED —OHIO STATE UNIVERSITY.

An automatic fire sprinkler system which is to be installed in a state building already erected, is not to be regarded as an alteration or improvement of, or an addition to said building within the meaning of section 2314, *G. C. Where such system is to be paid for from funds appropriated by house bill No.* 701, *the expenditure is to be governed by the terms of said bill, and the question of the waiving of securing competitive bids is one to be presented to and determined by the board created by section* 4 *of said bill.*

COLUMBUS, OHIO, June 28, 1915.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I have your communication of June 24, 1915, which reads as follows:

"The board of trustees of the Ohio State University desires to install, during the vacation period, an automatic sprinkler system as a means of fire protection in old university hall.

"The cost will probably be about $13,000.00, and the funds for the improvement will become available July 1, 1915.

"The opinion of the attorney general is requested on the following point:.

"Is this particular kind of an improvement contemplated under sections 2314-2317 of the General Code?

"The above question is raised for the following reasons:

"1. The sprinkler system of fire protection is a patented article of manufacture. The manufacturers prepare and submit their own lay-outs as to plans and specifications on their own particular systems. There are but few systems on the market, and each could be requested to submit lay-out and bid. It is not practicable for our architect to prepare plans, etc., in advance, as contemplated in section 2314.

"2. University hall is used to its full capacity for recitation purposes, and if it is necessary to publicly advertise for bids, the delay will prove quite serious, as it will require at least ninety days to install the system after the contract is let

"The board of trustees will hold its next meeting June 28, 1915, and if a reply from the attorney general could be had by that time, it will be greatly appreciated."

Section 2314, G. C., to which you refer, reads as follows:

"Before entering into contract for the erection, alteration or improvement of a state institution or building or addition thereto, excepting the penitentiary, or for supply of materials therefor, the aggregate cost of which exceeds three thousand dollars, each officer, board, or other authority by law charged with the supervision thereof, shall make or cause to be made the following: Full and accurate plans, showing all necessary details of the work, with working plans suitable for the use of mechanics and other builders in such construction, so drawn and represented as to be plain and easily understood; accurate bills showing the exact amount of different kinds of ma-

terial necessary to the construction to accompany such plans; full and complete specifications of the work to be performed, showing the manner and style required with such directions as will enable a competent mechanic or other builder to carry them out and afford bidders all needful information; a full and accurate estimate of each item of expense and of the aggregate cost thereof."

Section 2315, G. C., requires that the plans, etc., required by section 2314 be submitted to the governor, auditor of state and secretary of state for approval. Sections 2316 and 2317 relate to the giving of notice by publication of the time when and place where, bids will be received, and section 2318, G. C., requires the awarding of the contract to the lowest bidder.

Your inquiry raises a question as to whether the automatic sprinkler system to be installed in university hall is an alteration or improvement of, or an addition to, a state institution or building, within the meaning of section 2314, G. C. Having reference to the terms of section 2314, G. C., it may be observed that the installation of an automatic sprinkler system in university hall will not serve to substantially alter the building or change its arrangement, so that it could hardly be said that the installation of such a system would constitute an alteration. The installation of a sprinkler system will not improve the building in the sense that it will be made more convenient for use, the only purpose in installing an automatic sprinkler system being to secure fire protection. In considering the question of whether or not such a system is to be regarded as an addition to a building, I have had in mind certain elementary rules relating to fixtures which are defined as tangible property whose status as realty or personalty is indeterminate. The status of fixtures becomes determinate according as certain facts appear, and they then fall into one or the other category. The test of annexation to the realty is not always conclusive as to whether or not a fixture is to be regarded as realty or personalty, and many instances might be cited in which physical annexation has been held insufficient to constitute a fixture a part of the realty. Trade fixtures might be cited as an illustration, as they have always been regarded as personal property, and the right to remove such fixtures, although attached to the realty, has always been recognized on grounds of public policy.

Questions involving the principles now under discussion have most frequently arisen between landlord and tenant, mortgagor and mortgagee, or grantor and grantee. I see no reason, however, why the general principles laid down by the courts in defining the rights of landlord and tenant, mortgagor and mortgagee, and grantor and grantee, are not applicable to the matter now under consideration. In the case of Star Distillery Co. v. Mihalovitch-Fletcher Co., 9 N. P. (n. s.), 218, the facts were that a lease for a term of years contained a covenant that the lessee should equip the leased buildings with an automatic fire sprinkler system at the expense of the lessee. The action was one by the lessor to enjoin the receivers of the lessee from removing the fire sprinkler system from the premises, and the court held that the system was a trade fixture, properly removable by the receivers, on surrender of the premises. Limitations of time imposed by your inquiry prevent an extended discussion of the matter, and my conclusion is that the automatic sprinkler system to be installed in university hall is not to be regarded as an alteration or improvement of, or an addition to, said building within the meaning of section 2314, G. C.

Inasmuch as the sprinkler system is to be paid for from funds appropriated by house bill No. 701, it follows that the expenditure for such a system is to be governed by the terms of that bill. It is provided by section 6, of house bill 701, that the moneys appropriated by the bill shall be drawn upon requisitions or vouchers, which requisitions or vouchers must show that competitive bids were secured, unless otherwise provided by law, or unless in the judgment of the board, provided in section 4 of the

act, it is impracticable, because of the peculiar nature or location of the work to be done, in which case such board may, in writing, authorize the department affected to proceed to do the work. The board provided by section 4 of the act, consists of the governor or any competent disinterested person to be appointed by him for such purpose, the chairman of the finance committees of the house of representatives and senate respectively, the attorney general and the auditor of state. The question of the propriety of relieving the board of trustees of Ohio State University from the necessity of securing competitive bids for the installation of an automatic sprinkler system in university hall is, therefore, one to be presented to and determined by the above named board, and the question may be presented to and determined by said board at any time after July 1st.

Respectfully,
EDWARD C. TURNER,
Attorney General.

549.

TEACHERS' PENSION FUND—APPLICATION TO A PARTICULAR CASE—RETIRED TEACHER—DECEDENT.

The provisions of section 7892, *G. C., are not applicable to the case of a person who has been retired as a teacher by the board of education of a school district under authority of section* 7880, *G. C., and who has been granted a pension by said board of education under authority of section* 7883, *G. C.*

COLUMBUS, OHIO, June 28, 1915.

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

GENTLEMEN:—I am in receipt of a letter from Hon. John C. Hover, secretary of the board of trustees of the teachers' pension fund for the city school district of Bellefontaine, Ohio, under date of June 7th, requesting my opinion on certain questions therein stated, and I deem it advisable to address my opinion on these questions to you.

Judge Hover's letter is as follows:

> "I am secretary of the board of trustees of the teachers' pension fund for the city school district of Bellefontaine, Ohio. The board of trustees, as provided for by statute, was created about two years ago. Section 7875, etc.
>
> "In December, 1914, Prof. John W. McKinnon was granted a pension at the rate of forty-five dollars per month. He had contributed to the fund but one year, $18.00, when he was retired by the board of education. He applied for pension under the statute and the board granted the pension at the maximum rate of forty-five dollars per month, upon condition that he would draw no money from the treasury until the full amount, six hundred dollars, had been contributed. He drew a hundred and eighty dollars, which was turned back to his credit on the six hundred dollars, that would be required before he would be entitled to the full amount of the pension and in compliance with the condition that was imposed upon the granting of the pension in the first instance.
>
> "On the eleventh day of April the pensioner died. He had contributed one hundred and ninety-eight dollars to the fund, and had in fact drawn nothing.

"The administratrix of his estate has made application for rebate under section 7892. I would like an opinion from your office on this question before the board acts.

"The question is: Is the estate of Prof. John W. McKinnon, deceased, entitled to fifty per cent. of the whole amount contributed to the fund, or to any rebate? Is the estate entitled to one-half of the amount that had been contributed before the contribution of the amount of forty-five dollars per month pension? The amount contributed before was eighteen dollars. I would be pleased to have your opinion on this question at an early date."

Sections 7875 et seq., of the General Code, as found in the chapter relating to teachers' pensions, authorize the establishment of a school teachers' pension fund by the board of education of a school district, and provide that said fund shall be under the management and control of a board to be known as "The Board of Trustees of the School Teachers' Pension Fund" for such district.

Section 7877, G. C., provides:

"When the board of education of any school district has declared the advisability of creating a school teachers' pension fund, its clerk shall notify each teacher in the public schools and high schools, if any, of the school district, by notice in writing of the passage of such resolution, and require the teachers to notify the board in writing, within thirty days from the date of such notice, whether they consent or decline to accept the provisions of law for creating such a fund; but teachers who, prior to the first day of July, 1911, were in the employ of a board of education which has created such a fund under this law shall not be denied the right of accepting the provisions hereof before the first day of January, 1912. After the election of the board of trustees herein provided for, two dollars ($2.00) shall be deducted by the proper officers from the monthly salary of each teacher who accepted such provisions and from the salary of all new teachers, such sum to be paid into and applied to the credit of such pension fund; and such sum shall continue so to be deducted during the term of service of such teacher.

"All persons employed for the first time as teachers by the board of education which has created such a pension fund shall be deemed new teachers for the purpose of this act, but the term new teachers shall not be construed to include teachers serving under reappointments. New teachers shall, by accepting employment as such, accept the provisions of this act, and thereupon become contributors to said pension fund in accordance with the terms hereof. And the provisions of this act shall become a part of and enter into such contract of employment."

I understand that John W. McKinnon, in compliance with the requirements of section 7877, G. C., as above quoted, contributed to the teachers' pension fund established by the board of education of the Bellefontaine city school district for the period of one year, and that the sum of eighteen dollars was deducted from his salary for said year. It further appears that in December, 1914, the said John W. McKinnon was retired by said board of education under authority of section 7880, G. C., which provides:

"Such board of education of such school district, and a union, or other separate board, if any, having the control and management of the high schools of such district, may each by a majority vote of all the members composing the board, on account of physical or mental disability, retire any teacher under such board who has taught for a period aggregating twenty years.

One-half of such period of service must have been rendered by such beneficiary in the public schools or high schools of such school district, or in the public schools or high schools of the county in which they are located, and the remaining one half in the public schools of this state or elsewhere."

Section 7881, G. C.. provides:

"The term 'teacher,' in this chapter, shall include all teachers regularly employed by either of such boards in the day schools, including the superintendent of schools, all superintendents of instruction, principals, and special teachers, but in estimating years of service, only service in public day schools or day high schools, supported in whole or in part by public taxation, shall be considered. (R. S., section 3897d.)"

Section 7882, G. C., prescribes the conditions under which a teacher may voluntarily retire from service and become a beneficiary of the teachers' pension fund.

After the said John W. McKinnon was retired from service by said board of education, upon application duly made by him, he was granted a pension of forty-five dollars per month for ten months of each year during the remainder of his natural life, under authority of section 7883, which provides:

"Each teacher so retired or retiring shall be entitled during the remainder of his or her natural life to receive as pension, annually, twelve dollars and fifty cents for each year of service as teacher, except that in no event shall the pension paid to a teacher exceed four hundred and fifty dollars in any one year. Such pensions shall be paid monthly during the school year."

I assume that the board of education, in granting Mr. McKinnon the maximum allowance of four hundred and fifty dollars per year, found that he was qualified under the provisions of section 7880, G. C., and that he had served as teacher for at least thirty-six years.

Section 7884, G. C., provides:

"No such pension shall be paid until the teacher contributes, or has contributed, to such fund a sum equal to twenty dollars a year for each year of service rendered as teacher, but which sum shall not exceed six hundred dollars. Should any teacher retiring be unable to pay the full amount of this sum before receiving a pension, in paying the annual pension to such retiring teacher, the board of trustees must withhold on each month's payment twenty per cent. thereof, until the amount above provided has been thus contributed to the fund. (R. S., section 3897d.)"

Under authority of this section the board of education of Bellefontaine city school district, in granting said pension, imposed the condition that before the said John W. McKinnon should be entitled to the full amount of said pension he must contribute to said pension fund the maximum sum of six hundred dollars. Of this sum he had already contributed eighteen dollars before said pension was granted. He was not compelled to contribute more than twenty per cent. of the monthly allowance of forty-five dollars, to wit: nine dollars per month, in order to be entitled to the balance of thirty-six dollars per month for ten months of each year.

Had he lived and continued to exercise his right to draw thirty-six dollars per month for ten months during each school year, the board of trustees would have with-

held said sum of nine dollars per month for ten months of each year. Under such plan six years and seven months would have elapsed before Mr. McKinnon would have been entitled to his full allowance of forty-five dollars per month.

He chose, however, to contribute the entire sum of forty-five dollars per month to said pension fund, and in this way to shorten the period of time that would have to elapse before he would be entitled to said full monthly allowance. Having contributed one hundred and ninety-eight dollars to said fund, this pensioner died on April 11, 1915, and you inquire what amount, if any, the administratrix of his estate is entitled to recover under authority of section 7892, G. C., which provides:

> "In case of the death of a teacher, the heirs, legatees or assigns of the deceased, shall be entitled to receive half of the total amount paid by such teacher into such fund upon application therefor, with proof of claim to the satisfaction of the board of trustees. (R. S., section 3897h.)"

If the said John W. McKinnon had contributed the sum of one hundred and ninety-eight dollars to said pension fund, while serving as a teacher in said district, and had died before having a pension granted to him by said board of education, it is clear that his estate would be entitled to fifty per cent. of said sum under the above provision of section 7892, G. C.

I think, however, that having been retired by said board under authority of section 7880, G. C., and having been granted a pension by said board under authority of section 7883, G. C., his status in relation to said pension fund was changed. He was no longer a teacher, within the meaning of section 7892, G. C., contributing to said fund in compliance with the requirements of section 7877, G. C. On and after the date when said pension was granted he was a beneficiary of said fund, and as such, entitled to a monthly allowance of thirty-six dollars per month for ten months each year.

The fact that he chose to turn said monthly allowance of thirty-six dollars back into said fund, which, if he had lived, would have had the effect of shortening the period of time which would have had to have elapsed before he would have been entitled to the full monthly allowance, is not material as affecting his relation as beneficiary to said fund.

I find no decisions of the courts in which the question submitted by you has been construed. However, in the case of Venable v. Shaffer, et al., 7 O. C. C. (N. S.), 337, the first branch of the syllabus provides:

> "School teachers' pension fund does not provide a bounty, but the basis of a mutual contract, in the nature of insurance; hence all terms should be given a fair interpretation without favor, and where one does not come within the express terms there is no reason to strain them to include such person."

I think a distinction must be made between the class of teachers, in the service, contributing to said fund, and who have received no benefits from said fund, and that class of persons, formerly in the service, who have retired or been retired by the boards of education of their respective districts, and have been granted pensions, and are beneficiaries of said pension fund.

The purpose of the legislature in providing that:

> "No such person shall be paid until the teacher contributes, or *has contributed*, to such fund a sum equal to twenty dollars a year for each year of service rendered as teacher, but which sum shall not exceed six hundred dollars. (7884, G. C.)"

was to equalize the burden between teachers who have paid for the full term of service and those who have not.

There could be no good reason for the withholding of a definite sum from the monthly salary of teachers in the service, for the creation of said pension fund, and for the requirement of section 7884, G. C., above quoted, if the legislature intended that the provisions of section 7892, G. C., should be applicable to both of the above defined classes. It seems clear, therefore, that the granting of the pension eliminates the beneficiary thereof from the class of persons to which the provisions of section 7892, G. C., are applicable.

Replying to your question I am of the opinion that the administratrix of the estate of the said John W. McKinnon, deceased, is not entitled to recover any part of the aforesaid sum of one hundred and ninety-eight dollars.

Respectfully,
EDWARD C. TURNER,
Attorney General.

550.

COUNTY COMMISSIONERS—WITHOUT AUTHORITY TO TRANSFER MONEY FROM FEE FUND OR OTHER FUNDS OF COUNTY TO PAY MOTHERS' PENSION—ALLOWANCES SHOULD BE MODIFIED TO KEEP WITHIN LEVY—JUVENILE COURT.

County commissioners are not authorized to transfer money from fee funds or other funds of the county to pay mothers' pensions when the levy provided for by section 1683-9, *G. C.,* 103 *O. L.,* 879, *does not produce enough revenue to pay all allowances made for mothers' pensions by the juvenile court.*

When the allowances for mothers' pensions exceed the funds made available by the above levy the court should modify or discontinue sufficient of the allowances to bring the aggregate of the allowances within the amount of money produced by the levy, having due regard for the most needy cases.

COLUMBUS, OHIO, June 28, 1915.

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

GENTLEMEN:—Your letter of June 18, 1915, requesting my opinion, received, and is as follows:

> "We would respectfully request your written opinion upon the following question:
>
> "Section 1683-9 of the mothers' pension law, 103 O. L., page 879, reads:
>
> " 'It is hereby made the duty of the county commissioners to provide out of the money in the county treasury, such sum each year thereafter, as will meet the requirements of the court in these proceedings. To provide the same, they shall levy a tax not to exceed one-tenth of a mill on the dollar valuation of the taxable property of the county.'
>
> "We have an instance in mind where the taxable value of the duplicate of a county is $118,000,000.00. If the maximum amount of levy were made as provided in section 1683-9, as above quoted, this would produce a fund of $11,800.00, but in the county in question the juvenile judge has awarded mothers' pensions to pay which requires $16,800.00 per year.

"QUESTION: May the county commissioners transfer from the surplus of the county officers' fee funds, an amount sufficient to meet the differences; if not, are the pensions to be pro-rated to keep within the limitations of the levy?"

As to the first part of your question, to wit: whether the commissioners may transfer from the surplus of the county officer's fee funds, an amount sufficient to make up the difference between the amount produced by the levy made for the purpose of providing a fund from which to pay mothers' pensions and the amount which has been allowed by the court; section 1683-9 of the General Code (103 O. L., page 877) provides as follows:

"It is hereby made the duty of the county commissioners to provide out of the money in the county treasury, such sum each year thereafter, as will meet the requirements of the court in these proceedings. To provide the same they shall levy a tax not to exceed one-tenth of a mill on the dollar valuation of the taxable property of the county. Such levy shall be subject to all the limitations provided by law upon the aggregate amount, rate, maximum rate and combined maximum rate of taxation. The county auditor shall issue a warrant upon the county treasurer for the payment of such allowance as may be ordered by the juvenile judge."

While this section by its terms makes it the duty of the commissioners to provide a fund sufficient to meet the allowances made by the court, it also contains the express limitation, that the levy for that purpose shall not exceed one-tenth of a mill on the dollar valuation of the taxable property of the county, thus defining clearly the point beyond which the commissioners cannot go. The fact that applications for mothers' pensions might, and probably would exceed the amount of funds thus made available was taken into consideration by the general assembly, and to meet such a situation, they enacted section 1683-5 of the General Code (103 O. L., page 877), as follows:

"Should the fund at the disposal of the court for this purpose be sufficient to permit an allowance to only part of the persons coming within the provisions of this act, the juvenile judge shall select those cases in most urgent need of such allowance."

It is therefore clear, that the court in making allowances, is limited by the amount of money available, and it follows that no liability on the county is created by allowances made by the court in excess thereof.

It is true, that the legislature at its extraordinay session (104 O. L., page 199), provided for the transfer of funds from any other fund of the county in which a surplus might exist for the purpose of providing a fund to pay mothers' pensions, in the following language:

"For the purpose of providing a sum which will meet the requirements of the juvenile court until the proceeds of the tax required to be levied under the provisions of section 1683-9 of the General Code shall become available, any board of county commissioners may transfer from any surplus moneys in the county treasury to the credit of any fund therein, to a fund for the use of the juvenile court under the provisions of section 1683-2 to 1683-9, inclusive, of the General Code, the creation of which for such purpose is hereby authorized. * * *"

It is plain, however, that this was only a temporary provision, designed to make possible the payment of mothers' pensions prior to the time that a levy could be made as provided in section 1683-9, supra, and that its force ended when the levy so provided for was made, and that after such a levy has been made there is no further power to transfer funds under the provisions of this section.

Sections 2296, et seq., of the General Code, make provision for the transfer, under certain conditions and by proper procedure, of moneys of the county from one fund to another, and section 2985 of the General Code provides for transfers from county officers' fee funds, but it is clear that the legislature intended to limit the amount of money that could be expended in any county for mothers' pensions, and the commissioners would not be permitted to do indirectly what they cannot do directly, and therefore, would have no power to make such a transfer under these general provisions.

I am therefore of the opinion, in answer to your first question, that the commissioners have no power to transfer from the surplus of the county officers' funds an amount sufficient to make up the difference between the amount of money produced by the levy provided for by section 1683-9 of the General Code, and the amount of allowances made by the court for mothers' pensions.

As to your second question, to wit: whether the allowances are to be pro-rated to keep within the limitations of the levy, your attention is directed to the fact that the amount of allowance on any application is in the discretion of the juvenile judge limited only as to the maximum which can be allowed, and that said judge has the power to modify such allowances at any time. See section 1683-4, General Code, as follows:

> "Whenever any child shall reach the age for legal employment, any allowance made to the mother of such child for the benefit of such child shall cease. The juvenile court may, in its discretion, at any time before such child reaches such age, discontinue or modify the allowance to any mother and for any child."

Neither the commissioners, the auditor, nor anyone else has any authority to reduce or modify any allowance made by the court, and such would be the effect of any such pro-rating as that about which you inquire. The court, however, under the section last above quoted, would have the power to order that sufficient of the allowances be reduced or discontinued to bring the aggregate of the claims within the amount of available funds to pay the same. In so doing the court should select the most needy cases, as provided in section 1683-5, supra, and after providing for such cases, make proper orders reducing or discontinuing the allowances in other cases. In the absence of such orders from the court, and in the absence of a certification by the court to the auditor of allowances as they are made, the auditor can only apply the funds to the payment of claims in the order of priority of their presentment to him, until the money is exhausted.

Specifically answering your second question, therefore, I am of the opinion that the claims are not to be pro-rated to keep within the limitations of the levy.

Respectfully,
EDWARD C. TURNER,
Attorney General.

551.

SYNOPSIS FOR REFERENDUM ON GERRYMANDER BILL, KNOWN AS THE SPRAGUE BILL, APPROVED.

COLUMBUS, OHIO, June 28, 1915.

HON. TIMOTHY S. HOGAN, *Hayden Building, Columbus, Ohio.*

MY DEAR MR. HOGAN:—You have submitted to me for my certificate a synopsis to be embodied in a referendum petition to referend house bill No. 710; said synopsis being in the following words:

> "The act, known as house bill No. 710 (the Sprague act), was passed May 27, 1915, approved June 2, 1915, and amends section 4828-1 of the General Code of Ohio, relating to the apportionment of the state of Ohio into congressional districts under the thirteenth census of the United States."

I hereby certify that the foregoing synopsis is a truthful statement regarding the above entitled law.

Respectfully,
EDWARD C. TURNER,
Attorney General.

552.

COUNTY COMMISSIONERS—WITHOUT AUTHORITY TO PURCHASE OR LEASE LAND FOR ESTABLISHING MERIDIAN LINES—PUBLIC HIGHWAYS MAY BE USED TO ESTABLISH LINES.

County commissioners are without authority to purchase or lease land for the purpose of establishing thereon meridian lines. If the county owns an infirmary farm near the county seat, it would be proper to establish the lines on such farm, or the same might be established on a public highway near the county seat if the owners of the abutting property consent thereto.

COLUMBUS, OHIO, June 28. 1915.

HON. JOS. T. MICKLETHWAIT, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—I have your communication of June 7, 1915, which reads as follows:

> "The commissioners of this county are desirous of establishing a true meridan line under section 2480 of the Code.
>
> "Have they power under this or any other section of the Code to appropriate land or lease land for this purpose?"

Section 2480, General Code, to which you refer, reads as follows:

> "When it has not been done, the county commissioners shall employ a suitable person of competent skill to establish at or near the county seat of the county, lines not exceeding forty rods or perches in length, corresponding with the true meridian of the place, and furthermore, simultaneously de-

termine to within one-half of one second of an arc the geographical latitude, and to within one and one-half second of an arc the geographical longitude of the station occupied by the instrument in such operation."

It will be noted that the above quoted section does not authorize the purchase or lease of land where the same is desired for the purpose of establishing thereon meridian lines, and I am of the opinion that the county commissioners are without authority to purchase or lease lands for such purpose. If the county owns an infirmary farm near the county seat, it would be proper to establish the lines on such farm, or the same might be established on a public highway near the county seat if the owners of the abutting property consent thereto.

Respectfully,
EDWARD C. TURNER,
Attorney General.

553.

APPROVAL OF CONTRACT FOR CONSTRUCTION OF GREENHOUSES AT OHIO STATE UNIVERSITY.

COLUMBUS, OHIO, June 28, 1915.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I have carefully examined the contract entered into by your board of trustees with Hitchings & Company of Elizabeth, New Jersey, under date of June 18, 1915, for the construction and completion of greenhouses Nos. 1, 1-A, 1-B, 1-C and 3 for the horticulture and forestry building, Ohio State University, and find the same to be in compliance with law.

I have caused to be filed the original contract with the auditor of state, and herewith hand you duplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney General.

554.

MUNICIPAL CORPORATION—COUNCIL MAY IMPROVE ITS STREETS BY FORCE ACCOUNT—IF COST OF MATERIAL IS LESS THAN FIVE HUNDRED DOLLARS, COMPETITIVE BIDDING NOT NECESSARY—IF OVER FIVE HUNDRED DOLLARS, COMPETITIVE BIDDING NECESSARY.

1. *Council may improve its roads and streets by force account.*
2. *If it determines upon a specific improvement and money is duly appropriated therefor, said improvement to be made with gravel, and the amount of gravel necessary therefor amounts to less than five hundred* ($500) *dollars, competitive bidding is not necessary. If over five hundred* ($500) *dollars, competitive bidding is necessary.*

COLUMBUS, OHIO, June 29, 1915.

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

GENTLEMEN:—Under date of May 11, 1915, you submitted for my opinion the following:

> "The council of a village has levied a tax amounting to several thousand dollars, the proceeds of which are to be used in the improvement of the roads and streets of the municipality. May such funds, raised by taxation, be expended in the purchase of material and the employment of the necessary labor, or do the provisions of section 4221 and 4222, General Code, govern and require that such expenditures be made upon contract (including both labor and material) let at competitive bid, the amount involved being more than $500.00?
>
> "If you hold that the council may construct said improvement by force account, if the amount to be expended for gravel used in said improvement amounts to over $500.00, must the same be purchased at competitive bid?"

I note from your letter that the money to be used for the improvement of the roads and streets in question was raised solely by a tax levy, and that, therefore, there is no question in this matter regarding either bond issues or improvement of streets under the assessment plan. I assume that an appropriation of such moneys in the treasury of the village has been duly made, and that the same has been made generally for improvements of streets and roads, without any special designation as to what streets and roads are to be improved thereunder.

Section 4219 of the General Code provides that the council of a village shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law.

Under the provisions of section 4364, G. C., the street commissioner to be appointed by the mayor and confirmed by council under the provisions of section 4363, is under the direction of council, to "supervise the improvement and repair of streets" and to "perform such other duties consistent with the nature of his office as council may require."

Section 4365, G. C., provides that:

> "Such street commissioner * * * shall have such assistants as council may provide, who shall be employed by the street commissioner, and shall serve for such time and for such compensation as is fixed by council."

Since the authority of the street commissioner is solely to supervise the improve-

ment and repair of streets, I am inclined to view that the word "assistants," as used in section 4365, G. C., must refer solely to "assistant street commissioners" as it were, and that the term "assistants" as so used in said section cannot be interpreted to mean the employes on the work under the supervision of the street commissioner; especially so since the council is to fix the time of service as well as the compensation.

However, under the provisions of section 4219, G. C., hereinbefore referred to, it is the duty of council to fix the compensation of the employes of the village. If council decides to improve the roads and streets by what is familiarly known as "force account," that is to say, where the laborers on the work are employed directly by the council, I am of the opinion that such laborers so employed are to be considered as employes of the village for the time that they are so employed.

Section 4221 of the General Code, to which you refer in your inquiry, after providing how the contracts made by the village council shall be signed, provides as follows:

> "Section 4221. * * * When any expenditure other than the compensation of persons employed therein, exceeds five hundred dollars, such contracts shall be in writing, and made with the lowest and best bidder, after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the village. The bids shall be opened at twelve o'clock noon on the last day for filing them, by the clerk of the village, and publicly read by him."

The laborers doing work under "force account" being "persons employed" in the village, the expenditure of moneys to compensate them for their work on a given improvement is not to be taken into contemplation in determining whether or not the said improvement will exceed five hundred ($500.00) dollars.

Your first question asks whether funds raised by taxation in the manner described can be expended in the purchase of material and the employment of the necessary labor, or whether the provisions of sections 4221 and 4222 of the General Code govern and require that such expenditures be made upon contract (including both labor and material) let at competitive bid, the amount involved being more than five hundred ($500.00) dollars.

If I understand your question correctly it is as to whether or not a village may provide by force account the improvement of its streets and roads, and my answer thereto is that the village can so provide, and that in determining the expenditure of money for an improvement, under the provisions of section 4221, G. C., the pay of the laborers employed under force account is not to be taken into contemplation in determining whether or not said improvement will exceed five hundred ($500.00) dollars.

Having determined that council may construct such an improvement by force account, you ask if the amount expended for gravel used amounts to over five hundred ($500.00) dollars, whether or not the same must be purchased at competitive bid. My answer thereto is yes, for the reason that from your statement it appears that the expenditure for the material, to wit, gravel, necessary for the improvement, is in excess of five hundred ($500.00) dollars.

Council would, of course, not have authority to evade the law by splitting up the contract for gravel necessary for the contemplated improvement so as to make more than one expenditure for the same improvement, each of less than five hundred ($500.00) dollars.

Respectfully,
EDWARD C. TURNER,
Attorney General.

555.

WORKMEN'S COMPENSATION ACT—HUTSON COAL COMPANY NOT ENTITLED TO PROTECTION UNDER SAID ACT BECAUSE OF FAILURE TO PAY PREMIUM PRIOR TO DEATH BY INJURY OF ITS EMPLOYE—COMPANY STILL LIABLE—SEE SUPPLEMENTAL OPINION No. 657.

The Hutson Coal Company, having failed to pay its premium under the Workmen's Compensation Act, prior to death by injury in the course of employment of one of its employes, is not entitled to protection of the act to release it from liability under section 27 of the act.

COLUMBUS, OHIO, June 29, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge receipt of your letter concerning the payment of the premium of The Hutson Coal Company, which is as follows:

"The Hutson Coal Company is a corporation duly organized under the laws of the state of Ohio, and is engaged in the operation of certain coal mines in Portage and Harrison counties, this state, and in the operation of such mines employs five or more employes.

"On May 24, 1914, said The Hutson Coal Company paid to the treasurer of state the sum of $570.00, the same being its estimated premium due to the state insurance fund for the six months' period beginning May 25, 1914, and ending November 24, 1914, for conducting said mining operations, the amount of said premium of $570.00 having been first ascertained by the industrial commission of Ohio and a pay-in order having been issued by said commission authorizing the payment of the same in the manner aforesaid according to the rules of the commission.

"On December 18, 1914, said The Hutson Coal Company filed with the industrial commission of Ohio its payroll report showing the amount of money paid in wages to its said employes from May 25, 1914, to November 30, 1914, to have been $80,697.10, the estimated payroll having been $38,000.00. There was therefore due and payable from said The Hutson Coal Company to the state insurance fund an additional premium on $42,697.10 of wage expenditure, the same being the difference between the estimated payroll and the actual payroll for said period, which at the rate of $1.80 per $100.00 of wage expenditure amounted to $753.80.

"On February 23, 1915, said The Hutson Coal Company paid to the treasurer of state the sum of $453.80, the same being then and there received by the treasurer as a credit on said additional premium for said period, leaving a balance due and unpaid on that date of $300.00.

"Upon making its payroll report for its first six months' insurance period, the coal company included in its payroll its total wage expenditure for the whole of the month of November in order that its second insurance period might begin with the first day of December, which was agreeable to the industrial commission and the second insurance period of said company then extended from December 1, 1914, to May 31, 1915.

"For the second six months' insurance period of said The Hutson Coal Company, beginning December 1, 1914, and ending May 31, 1915, said company made no payment whatever to the treasurer of state for credit to the state insurance fund. For said second period its advance estimated

payroll was $35,000.00, which at the rate designated and fixed by the commission produced an estimated premium of $655.00, which, as above stated, was not paid. Said company has made no report to the commission of its actual wage expenditure for said second period beginning December 1, 1914, and ending May 31, 1915.

"On May 31, 1915, one of the regular employes of said The Hutson Coal Company while in the due course of his employment sustained an injury which resulted in his death.

"On June 7, 1915, the commission certified to you for collection the unpaid balance due from said company to the state insurance fund for said first period above mentioned, and also at the same time certified to you for collection said advance estimated premium of $655.00 for said second period above mentioned. Neither of said sums had been collected and paid into the state insurance fund at the time of the injury and death of said employe, which occured on May 31, 1915.

"The Hutson Coal Company now desires to pay into the state treasury the balance due to the state insurance fund on said first period, the whole of the premium due to the fund for its second period and make the advance payment for the third period beginning June 1, 1915, and ending November 30, 1915.

"Before accepting payment from the said company it is the desire of this commission to obtain your opinion as to the status of said company and its employes with reference to liability growing out of the death of said employe, or liability on account of injury or death of any other employes of said company for said second period, or liability on account of the injury or death of its employes occuring in the interim between the end of the second period and the date of the payment of the premium for the third period should such payment be made.

"Thanking you in advance for your opinion on the questions of law involved. * * *"

From the statements contained in your letter it will be noted that The Hutson Coal Company was not only in default for the payment of the sum of $300.00 on the amount due for the first six months' period, but in addition, allowed the entire second six months' period, ending May 31, 1915, to pass without the payment of anything.

The purpose and scope of the act known as the compulsory workmen's compensation act is best stated by a reference to the provisions of the recent amendment to the constitution of the state, which became effective January 1, 1913, and is known as section 35 of article II of the constitution, as follows:

"For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational diseases, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contributions thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom, and taking away any or all rights of action or defenses from employes and employers; but no right of action shall be taken away from any employe when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employes. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto."

Section 1465-60 of the General Code (103 O. L., 77), which is section 13 of the act is as follows:

"The following shall constitute employers subject to the provisions of this act:

"1. The state and each county, city, township, incorporated village and school district therein.

"2. Every person, firm and private corporation including any public service corporation that has in service five or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express, or implied, oral or written."

Under the provisions of section 1465-69 of the General Code (103 O. L., 79), which is section 22 of the act, I am informed that employers have been granted a month's latitude in making payment of their respective premiums in view of the language used in reference to the time of payment of premiums, which language is as follows:

"Except as hereinafter provided, every employer mentioned in subdivision two of section thirteen hereof shall, in the month of January, 1914, and semi-annually thereafter, pay into the state insurance fund, * * *"

Section 1465-73 of the General Code (103 O. L., 82), which is section 26 of the act, is as follows:

"Employers mentioned in subdivision two of section thirteen hereof, who shall fail to comply with the provisions of section twenty-two hereof, shall not be entitled to the benefits of this act during the period of such non-compliance, but shall be liable to their employes for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employes, and also to the personal representatives of such employes where death results from such injuries, and in such action the defendant shall not avail himself or itself of the following common law defenses:

"The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence.

"And such employers shall also be subject to the provisions of the two sections next succeeding."

Section 1465-75 of the General Code (103 O. L., 83), which is section 28 of the act, is as follows:

"If any employer shall default in any payment required to be made by him to the state insurance fund, the amount due from him shall be collected by civil action against him in the name of the state as plaintiff; and it shall be the duty of the state liability board of awards on the first Monday in February, 1914, and on the first Monday of each month thereafter, to certify to the attorney general of the state the names and residences of all employers known to the board to be in default for such payments for a longer period than five days, and the amount due from each such employer, and it shall then be the duty of the attorney general forthwith to bring, or cause to be brought against each such employer a civil action in the proper court for the collection of such amount so due, and the same when collected, shall be paid into the state insurance fund, and such employer's compliance with

the provisions of this act requiring payments to be made to the state insurance fund shall date from the time of the payment of said money so collected as aforesaid to the treasurer of state for credit to the state insurance fund."

From the statements made in your letter it is clear that The Hutson Coal Company, under the provisions of section 1465-73 of the General Code, supra, is not entitled to the benefits of the workmen's compensation act during the second six months' period, notwithstanding the fact that the claim of $955.00 against the company for $300.00 balance due on premium for the first six months' period, and $655.00 for estimated premium for the entire second six months' period has been referred to this department for collection, as the protection, if any, under the act which may be extended to The Hutson Coal Company will, under the provisions of section 1465-75 of the General Code, supra, be effective only from the time when the premium is collected.

It is my opinion, therefore, that The Hutson Coal Company, having failed to pay its premiums for the period in which the death of the employe referred to occurred is not entitled to receive the benefits of the workmen's compensation act insofar as such benefits may attach to release the company from liability for the death of its employe, which occurred on May 31, 1915, and transfer such liability to the workmen's compensation fund.

Respectfully,
EDWARD C. TURNER,
Attorney General.

556.

GOVERNOR—NO POWER TO DIRECT BOARD OF ADMINISTRATION TO TRANSFER PATIENTS FROM OTHER STATE INSTITUTIONS TO LIMA STATE HOSPITAL—TRANSFER OF INSANE CONVICTS FROM LIMA WHEN SENTENCE HAS NOT EXPIRED, WHERE CONVICT'S REASON HAS BEEN RESTORED—OTHERWISE DISCHARGED—GOVERNOR MAY DIRECT BOARD TO ASSUME MANAGEMENT WHEN BUILDING IS SUBSTANTIALLY COMPLETED.

1. *The governor has no power to direct board of administration to transfer patients from other state institutions to Lima State Hospital.*

2. *If insane convicts confined in Lima State Hospital, whose terms of sentence have not expired, have been restored to reason, they shall be transferred forthwith to the penitentiary or reformatory from which they came.*

3. *Those persons, not convicts, so confined, cannot be returned to state institutions, but may be discharged under section* 1998, *G. C.*

4. *When Lima State Hospital is substantially completed, and work of contractors accepted, governor may, if he deems it to interests of hospital and state, direct board of administration to assume management.*

COLUMBUS, OHIO, June 30, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Under date of June 28th, you submitted for my written opinion, three questions touching the management and control of the Lima State Hospital.

Your first question is as follows:

> "(1) Has the governor of Ohio the power to direct the state board of administration to transfer patients from other state institutions to the Lima State Hospital; the Lima State Hospital being so far completed now as to make it possible to care for patients in that institution?"

The Lima State Hospital, under the provisions of section 1985 of the General Code, shall be used for the care, custody and special treatment of insane persons of the following classes:

> "1. Persons who become insane while in the state reformatory or the penitentiary.
> "2. Dangerous insane persons in other state hospitals.
> "3. Persons accused of crime, but not indicted because of insanity.
> "4. Persons indicted, but found to be insane.
> "5. Persons acquitted because of insanity.
> "6. Persons adjudged to be insane, who were previously convicted of crime.
> "7. Such other insane persons as may be directed by law."

From your question I assume that there are only two classes concerning which you inquire, to wit, the first and second classes.

The admission of patients to the Lima State Hospital from "a state hospital" is provided for by sections 1993 (103 O. L., 448) and 1994 of the General Code, which sections read as follows:

> "Section 1993. The superintendent of a state hospital for insane may make application to the Ohio board of administration for an order of transfer to the Lima State Hospital of any or all inmates thereof that exhibit dangerous or homicidal tendencies, rendering their presence a source of danger to others. The board, upon satisfaction that such order is advisable, may order the transfer of such persons to the Lima State Hospital.
> "Section 1994. In case a patient of another state hospital at any time exhibits such dangerous or homicidal tendencies, the same proceedings may be instituted and had, and he may be transferred to the Lima Hospital in the manner herein provided. The expenses of transferring an inmate shall be paid by the hospital from which he is transferred."

It appears, therefore, that under the provisions of section 1993, *supra*, the right of removal from any of the state hospitals to the Lima State Hospital rests upon application to the Ohio board of administration, and an order from such Ohio board of administration for the transfer of such patients.

There is no authority that I can find which authorizes the governor to direct the board of administration to transfer patients from state hospitals to the Lima State Hospital. The application must be made by the superintendent of the state hospital, and "upon satisfaction that such order is advisable" the board of administration may order the transfer. The question of transfer seems to be optional with the superintendent to make the application and the board to order the transfer.

Relative to the first class, to wit, those who become insane while in the state reformatory or the penitentiary, sections 2216, 2217 and 2218 of the General Code apply. Said sections are as follows:

> "Section 2216. When the physician of the penitentiary or reformatory reports in writing, to the warden or officer in charge thereof, that in his opinion

a convict confined therein is insane, such warden or officer shall apply to the probate court of the county in which the institution is located, for an examination to be made of such convict, by two physicians of at least three years' practice in the state, not connected with the penitentiary or reformatory, and to be designated by the court. If satisfied, after a personal examination, that the convict is insane, they shall so certify in the form and manner prescribed for the commitment of insane persons to state hospitals.

"Section 2217. Such warden or officer shall apply to the court for an order transferring the convict to the Lima State Hospital, accompanying his application with the medical certificate of lunacy. If satisfied that the convict is insane, the court shall issue an order of transfer, and the warden or officer shall thereupon cause the convict to be transferred to the Lima State Hospital and delivered to the superintendent thereof, with the certificate of lunacy and order of transfer.

"Section 2218. Such insane convict shall be received into such hospital and detained there until lawfully discharged. The warden or officer before so transferring the convict, shall see that he is physically clean, and provided with a new suit of clothing, such as is furnished convicts upon their discharge from the penitentiary. At the time of transfer there shall be transmitted to the superintendent of the hospital, the original certificate of conviction.'

These sections require an action in the probate court for the transfer of convicts from the Ohio State Reformatory and the penitentiary to the Lima State Hospital.

I am, therefore, of the opinion that the governor does not have the power to direct the state board of administration to transfer patients from other state institutions to the Lima State Hospital.

Your second question is as follows:

"(2) If patients are transferred to the Lima State Hospital, by the board of administration, from other institutions, and it should become desirable later to re-transfer these patients from Lima, say to the Ohio Penitentiary or to any other state institution, would the board of administration have power, once having transferred patients to the Lima State Hospital subsequently, to transfer them to some other state institution under its control?"

Section 2221 of the General Code provides, relative to the re-transfer of an insane convict whose reason has been restored, and is as follows:

"Section 2221. When an insane convict confined in the Lima State Hospital, whose term of sentence has not expired, has been restored to reason, and the superintendent of the hospital so certifies in writing, he shall be transferred forthwith to the penitentiary or reformatory from which he came. The officer in charge shall receive such convict into the penitentiary or reformatory."

In regard to those patients who have been received from state hospitals, and whose reason has been restored, the only provision of law that I have been able to find is section 1998 of the General Code, which provides as follows:

"Section 1998. The superintendent may discharge any inmate, not under sentence for crime, who, in his judgment, is recovered, or who has not recovered, but whose condition has improved to such extent that his dis-

charge will not be detrimental to the public welfare or injurious to him. Before ordering such discharge, the superintendent shall ascertain that some friend will properly care for him at his home."

I am, therefore, of the opinion that patients transferred to the Lima State Hospital, from the Ohio Penitentiary or Ohio State Reformatory, may be returned to the penitentiary or reformatory under the provisions of section 2221, *supra*, but that those patients who are transferred from state hospitals cannot be returned, but may be discharged under section 1998, *supra*.

Your third question is as follows:

"(3) Under what circumstances, if at all, is the governor of Ohio given authority to terminate the existence of the present board of building commissioners of the Lima State Hospital and require that institution to be turned over to the management and control of the Ohio board of administration?"

The erection of necessary buildings for the Lima State Hospital is entrusted to the "board of commissioners for the erection of the Lima State Hospital," and under the provisions of section 1989, G. C., the commission is authorized to appoint a superintendent to superintendend the work of construction "and open such building as are ready for occupancy during the progress of the work." The superintendent is given charge of the buildings when occupied, and of all patients kept therein, and, under the direction of the commissioners, is authorized to employ the necessary officers and employes.

Section 1991 of the General Code (103 O. L., 448), reads as follows:

"Section 1991. The commissioners may furnish and occupy such buildings as become ready for occupancy during the work of construction and until such time as the governor deems it to the interests of the hospital and the state to direct the Ohio board of administration to assume the management thereof. Upon the issuance of such order the terms of the commissioners shall terminate."

The commissioners are, therefore, authorized not only to have charge of the buildings under construction, but also to operate the buildings that become ready for occupancy during the work of construction, and until such time as the governor deems it to the interests of the hospital and the state, to turn the management over to the board of administration.

From a reading of the entire act, as originally enacted and as now found in the various sections of the General Code, I am of the opinion that it was the intent of the legislature that the commissioners should take charge of the entire construction of the buildings at the Lima State Hospital, and not only that, but that such buildings, as during the construction of the entire plant, were so far completed as to be fit for the reception of patients, they are authorized to operate; and further, that they have the right to operate the plant even after the entire work of construction is completed, until such time as the governor directs the board of administration to take charge of the same.

Whenever the institution is substantially completed, and the work of the contractors has been accepted, then and in that event, the governor may, if he deems it to be to the interests of the hospital and the state so to do, direct the Ohio board of administration to assume the management thereof. Upon the issuance of such order by you, the terms of the commissioners shall terminate.

Respectfully,
EDWARD C. TURNER,
Attorney General.

557.

APPROVAL OF TRANSCRIPT OF PROCEEDINGS OF BOARD OF EDUCATION OF BARLOW RURAL SCHOOL DISTRICT, WASHINGTON COUNTY, FOR BOND ISSUE.

COLUMBUS, OHIO, June 30, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"*In Re:* Bonds to the amount of $12,000.00, purchased by the industrial commission of Ohio, under resolution dated May 18, 1915, from the board of education of the *Barlow rural school district, Washington county, Ohio.*"

On June 28, 1915, I received from Hon. Allen T. Williamson, prosecuting attorney of Washington county, the completed transcript of the proceedings of the board of education of the Barlow rural school district of Washington county, Ohio, relative to the issuance of the above bonds. I have examined the transcript, and I am of the opinion that said board of education is authorized by law to issue said bonds for the purpose and in the amount named; that the proceedings of the various officers of said district, relative thereto, have been regular and in conformity with the statutes; that the amount of said bonds does not exceed any limitations imposed by law; and that a sufficient tax levy can be made to pay interest upon and create a sinking fund for the redemption of said bonds as they become due.

I am therefore of the opinion that said bonds, drawn in conformity with the bond and coupon form attached to said transcript, and executed by the proper officers, will constitute valid legal obligations of said rural school district.

Respectfully,
EDWARD C. TURNER,
Attorney General.

558.

CONSTRUCTION OF WORDS "AGRICULTURAL EXTENSION SCHOOL" USED IN SECTION 7973, G. C.—ONLY ONE SUCH SCHOOL IN A COUNTY IN A GIVEN YEAR—OHIO STATE UNIVERSITY.

An "agricultural extension school" within the meaning of section 7973, G. C., applicable to the Ohio State University, means a school conducted as an activity of the college of agriculture and domestic science of said university in the manner therein specified.

When one such school, fulfilling all the requirements of said section, has been held in a given county in a given year, no other such school may be so held therein in that year; but the board of trustees of the Ohio State University has authority to provide free public lectures, and the giving of such free public lectures in any county in any year would not preclude the holding of an agricultural school in such county in that year.

The ultimate distinctions between public lectures and agricultural extension work are academic rather than legal.

COLUMBUS, OHIO, June 30, 1915.

Board of Trustees of Ohio State University, Columbus, Ohio.

GENTLEMEN:—Under date of June 15th, Professor Clark S. Wheeler, supervisor of extension schools, college of agriculture, of your university, wrote a letter to this department requesting an opinion, and deeming it advisable to render an opinion in the matter I am doing so, addressing the same to you and sending a copy thereof to Professor Wheeler.

The letter of Professor Wheeler is in full as follows:

"Section 7973, Revised Statutes of Ohio, provides that the Ohio State University shall extend its teachings in agriculture and domestic science throughout the state. About three years ago the attorney general ruled that funds appropriated for this purpose might be used in holding a one week meeting at the Ohio State University in Columbus for the benefit of farmers and their wives, regularly resident and points distant from Columbus. These farmers and their wives not being in attendance at the Ohio State University, lectures and meetings during one week for their benefit were held to be an extension enterprise. I now have at hand a petition from farmers in the vicinity of Canal Winchester, Ohio, requesting that an agricultural extension school be held at that place during the coming winter. I write to inquire whether the holding of an extension school at Canal Winchester, Franklin County, in addition to farmers' week at Columbus, Franklin county, for the benefit of farmers throughout the state, would be construed as a violation of that part of section 7973 which reads, 'No such school shall exceed one week in length and not more than one be held in any one county during the year.' In support of the contention that the farmers' week meeting at the Ohio State University is not in fact an extension school in Franklin county and would therefore not constitute a second school in this county, I submit the information that farmers' week as held last year was attended by farmers from eighty-seven of the eighty-eight counties of this state. Should you desire further information before determining the point at issue, I should be pleased to submit any facts that I can."

The opinion referred to by Professor Wheeler was rendered by Honorable Timothy S. Hogan, the then attorney general, to the president of Ohio State University, on April 11, 1912, and is found in the annual report of the attorney general for that year, page 994.

The question then submitted was as follows:

"May the Ohio State University hold an *agricultural extension school* on the campus of the university for the convenience of the farmers and other interested persons of Franklin county and other parts of the state?"

This question was answered in the affirmative, with the qualification that no other such school should be held in Franklin county.

I concur in Mr. Hogan's opinion.

You observe that the president of the university in asking this question described the proposed school as an "agricultural extension school."

Professor Wheeler's letter seems to raise the question as to whether "farmers' week" at Ohio State University is an "agricultural extension school."

I call attention to the following provisions of the statutes relative to the Ohio State University.

Section 7954, General Code:

"* * * The board (of trustees of Ohio State University) may provide for courses of lectures, either at the seat of the university or elsewhere in the state, which shall be free to all."

There is no limitation upon the exercise of this authority. Free lectures may be given at the seat of the university or anywhere in the state, without regard to the number which may be given in any county in the state in any one year.

Agricultural extension by county schools is provided for in section 7973 of the General Code, which is as follows:

> "The college of agriculture and domestic science of the university shall arrange for the extension of its teachings throughout the state, and hold schools in which instructions shall be given in soil fertility, stock raising, crop production, dairying, horticulture, domestic science and kindred subjects. No such school shall exceed one week in length, and not more than one be held in any county during a year."

It is obvious that insofar as agricultural extension consists of "courses of lectures, * * * free to all," the particular provisions of the subsequently enacted section 7973 of the General Code control to the exclusion of the general and unrestricted provisions of the older section 7954 of the General Code. That is to say, if agricultural extension teachings consist of public lectures free to all, then as to such lectures there may be but one course not exceeding one week in length in any county in the state in any one year.

If, then, "farmers' week" at Ohio State University is agricultural extension, it is obvious that the former opinion, with which I agree, must apply; but if the work is not agricultural extension, then there is sufficient authority under section 7954, *supra*, to provide for it, if it consists of a course of lectures at the seat of the university, free to all.

I am not prepared to state that section 7973 of the General Code requires that extension teachings shall be something other than a course of lectures free to all.

The question as to what constitutes extension work is more properly academic than legal. If, however, in the practical discharge of the authority granted in section 7973, G. C., the college of agriculture has exacted a small registration fee of attendants at the extension schools, or has limited the attendance thereat to any class of persons, such as farmers and their wives, and if this is the character of "farmers' week" to which you refer, then I would be of the opinion that section 7954 of the General Code would not apply, and that the only authority of the college to conduct "farmers' week" would be referable to section 7973.

Conversely, if the proposed "school" at Canal Winchester is to consist of a course of lectures free to all, and is of a different character from the extension work which is authorized to be given under section 7973, G. C., it may be conducted regardless of the character of "farmers' week."

One other distinction must be observed: The free lectures authorized by section 7954, G. C., are to be provided for by the board of trustees of the university, while the agricultural extension schools provided for by section 7973, G. C., are to be conducted by the college of agriculture. I am clearly of the opinion that the college of agriculture, as such, is not authorized to give free public lectures, and that the board of trustees, as such, is not directly authorized to provide for agricultural extension schools.

If "farmers' week" at the university is an activity of the college of agriculture then presumably it consists of extension work, and the fact that it has been held in a given year would preclude another school at another place in Franklin county in the same year. If, however, "farmers' week" is an activity of the board of trustees, as such, I am clearly of the opinion that it does not constitute extension work, and that a separate extension school may lawfully be held in Franklin county.

I note Professor Wheeler's offer to submit any additional facts. If the alternative answers which have been given in this opinion are not sufficient to apply the principles herein stated so as to arrive at a definite answer to the question which confronts Professor Wheeler, I shall be glad to have such additional facts as may be suggested by the preceding discussion.

Respectfully,
EDWARD C. TURNER,
Attorney General.

559.

MIAMI UNIVERSITY—CONTRACTS FOR CONSTRUCTION OF BOILER ROOM EXTENSION TO POWER HOUSE BUILDING AND CONSTRUCTION OF BOILERS APPROVED.

COLUMBUS, OHIO, June 30, 1915.

The Board of Trustees of Miami University, Oxford, Ohio.

GENTLEMEN:—I am in receipt of your letter of June 28, 1915, submitting for my approval two contracts, one entered into with Wespiser & Taylor of Oxford, Ohio, for the construction and completion of the boiler room extension to the power house building of Miami University, and the other entered into with Woollen & Callon of Indianapolis, Indiana, for the construction and completion of an H. R. T. boiler with setting and smoke connection; feed water heater and metering tube, boiler feed pumps and vacuum heating pumps for the power plant of Miami university.

In regard to the second contract I find that on certain items thereof the said Woollen & Callon were not the lowest bidders, but that under date of June 26, 1915, under authority granted by section 2319, G. C., the governor of Ohio, the auditor of state and the secretary of state have consented in writing to the acceptance of the bid of Woollen & Callon as to those items upon which they were not the low bidders.

I have carefully examined the two contracts mentioned and the contract bonds and find the same to be in compliance with law and have approved the same.

I have filed the two original contracts and bonds attached thereto with the auditor of state and herewith hand you duplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney General.

560.

CONFESSION OF GUILT—OPEN COURT—CRIME—SECOND DEGREE MURDER—COURT—SENTENCE GENERALLY TO PENITENTIARY —NO DEFINITE TERM.

Upon confession of guilt in open court and fixing of the degree of the crime as murder in the second degree, the court should sentence generally to the Ohio Penitentiary and not for a definite term.

COLUMBUS, OHIO, June 30, 1915.

HON. JOHN M. MARKLEY, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—In answer to your telegraphic request for opinion, reading as follows:

> "Defendant pleads guilty to murder in the second degree, killing occurred June twelfth this year, shall sentence be for life or indeterminate; please answer immediately."

which was received last evening, I wired you as follows:

> "After provisions of section thirteen thousand six hundred and ninety-two have been observed, court should sentence generally, that is, indeterminately; but sentence for definite term not void; see one hundred and three. Ohio Laws, page twenty-nine."

Confirming the above telegraphic opinion, I call your attention to section 13692 of the General Code, which provides in part as follows:

> "* * * If the offense charged is murder, and the accused is convicted by confession in open court, the court shall examine the witnesses, determine the degree of the crime, and pronounce sentence accordingly."

You will find that this feature of this section has been passed upon in the case of Craig v. State, 49 O. S., 415.

Section 2166 of the General Code, as amended in 103 O. L., page 29, provides as follows:

> "Courts imposing sentences to the Ohio penitentiary for felonies, except treason, and murder in the first degree, shall make them general and not fixed or limited in their duration. All terms of imprisonment of persons in the Ohio penitentiary may be terminated by the Ohio board of administration as authorized by this chapter, but no such terms shall exceed the maximum term provided by law for the felony of which the prisoner was convicted. If a prisoner is sentenced for two or more separate felonies, his term of imprisonment may equal, but shall not exceed, the aggregate of the maximum terms of all the felonies for which he was sentenced and, for the purposes of this chapter, he shall be held to be serving one continuous term of imprisonment. If through oversight or otherwise, a sentence to the Ohio penitentiary should be for a definite term, it shall not thereby become void, but the person so sentenced shall be subject to the liabilities of this chapter, and receive the benefits thereof, as if he had been sentenced in the manner required by this section."

Therefore, after the plea of guilty has been made by the defendant and the court, after examination of sufficient witnesses to convince him that the degree of the crime is properly murder in the second degree, the court should proceed to sentence the defendant generally and not for a definite term to the Ohio penitentiary. However, if through oversight or otherwise the defendant has been sentenced for life, such sentence would not be void but the person so sentenced would be held as if sentenced for an indefinite term.

I call your further attention to the fact that after the passage and approval of the indeterminate sentence law the legislature amended section 2169 of the General Code (103 O. L., 474), so as to read as follows:

> "The Ohio board of administration shall establish rules and regulations by which a prisoner under sentence other than for treason, or murder in the first or second degree, having served the minimum term provided by law for the crime of which he was convicted and who had not previously been convicted of felony or served a term in a penal institution, or prisoner under sentence for murder in the second degree having served under such sentence ten full years, may be allowed to go upon parole outside of the building and enclosure of the penitentiary. Full power to enforce such rules and regulations is hereby conferred upon the board, but the concurrence of every member shall be necessary for the parole of a prisoner. The board may designate geographical limits, within and without the state, to which a paroled prisoner may be confined, or may at any time enlarge or reduce such limits, by unanimous vote."

Respectfully,

EDWARD C. TURNER,

Attorney General.

561.

TOWNSHIP TRUSTEES—BIDDERS NOT REQUIRED TO SEPARATELY STATE THEIR BIDS FOR LABOR AND MATERIAL—SECTION 7047, G. C., CONSTRUED.

While in the exercise of a sound discretion the township trustees may require bidders to separately state their bids for labor and materials when proceeding under section 7047, G. C., provided such requirement be inserted in the advertisement and brought to the attention of all prospective bidders, yet in the absence of such a requirement by the trustees properly brought to the attention of prospective bidders, bidders are not required by section 7047, G. C., to separately state their bids for the labor to be performed and the material to be furnished.

COLUMBUS, OHIO, June 30, 1915.

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

GENTLEMEN:—I have your communication of June 16, 1915, in which you inquire as to whether, in bidding on a contract for a road improvement let by the trustees of a township under the provisions of section 7047, G. C., the bidder must separately state his bid for the labor to be performed and the material to be furnished.

Section 7047, G. C., to which you refer, reads as follows:

> "The contracts for furnishing the materials and performing the labor in and about such improvement, shall be made by such sections and in like manner as provided by law for other township improvements."

This section is a part of the scheme of road improvement provided by sections 7033 to 7052, inclusive, of the General Code, which sections provide for the creation of road districts, a district to consist of a township, or that part of a township outside of a municipal corporation situated therein, or an election precinct or part thereof. These sections contain no provision as to the form of bids, and in view of the provision of section 7047, G. C., that the contracts shall be made in like manner as provided by law for other township improvements, it becomes necessary to examine the statutes relating to other schemes of township improvement, for the purpose of ascertaining their provisions as to the separate stating of bids for labor and material. A scheme of road improvement by township trustees other than that now under consideration is provided by sections 6976 to 7018, inclusive, of the General Code. As to this scheme of improvement, it is specifically provided by section 6990, G. C., that bidders shall separately state their bids for each class of work, in such manner as the trustees demand, and bid separately for the material to be furnished. Another scheme of road improvement by township trustees is provided by sections 7019 to 7032, inclusive of the General Code. As to this scheme of improvement it is provided in section 7025, G. C., that the work of the construction and the furnishing of the material therefor, shall be publicly let, excepting such work as may be done by the road superintendent of the road district, as otherwise provided, and that the contract for the material to be used in the construction of the road improvement, and the contracts for hauling material upon the roads, shall be let separately. There is no requirement, however, under this scheme of improvement, that separate contracts shall be let for the material and for the labor of construction, and no requirement that bidders shall bid separately for the material and for the labor of construction.

The scheme of improvement by road districts, as established by sections 7095 to 7136, inclusive, of the General Code, may properly be considered in this connection, for while the improvement under these sections is not technically a township improve-

ment, yet the district consists of not less than two nor more than four townships, and the road commissioners are nominated by the township trustees. As to this scheme of improvement, section 7116, G. C., provides in part as follows:

> "When the road commissioners by resolution have determined to improve a designated road or part thereof, the work of its construction, including all labor and the hauling and spreading of materials, shall be by them publicly let to the lowest responsible bidder. The furnishing of the material shall also be by them publicly let at the same time, if possible, to the lowest responsible bidder."

While the above language seems to require a separate letting as to labor and material, yet it could not be construed as authorizing a single contract and requiring the bidders to separately state their bids as to labor and material. Section 7117, G. C., requires bidders to separately state their bids for each class of work in such manner and upon such blank forms as the road commissioners require. There is no requirement in this section that bidders shall separately state their bids for labor and materials, and this fact lends force to the argument that as to this particular scheme of road improvement the legislature intended that there should be separate contracts for labor and materials.

Section 3274, G. C., provides that when money is received into the township treasury for road purposes, the trustees shall cause such money to be appropriated to building bridges or repairing public roads within the township. After public notice they shall let by contract to the lowest bidder, such part or parts of any road as they deem expedient, equal to the amount of money to be appropriated, if in their opinion such bidder is competent to perform the work. When such labor is performed in accordance with the contract or conditions of the letting, the trustees shall draw an order in favor of the person who has performed such labor for the amount due therefor. This section seems to relate only to labor and could not be taken as authority for the proposition that where a contract for both labor and materials is authorized, the bidders must bid separately as to the two items.

The above references to the various provisions of the General Code as to township improvements are sufficient to show that the statutes are far from being in harmony upon the proposition of whether bidders must state separately their bids for labor and materials when bidding for the construction of a township improvement, and that it is impossible to construct any general rule applicable in all cases. Section 7047, G. C., about which you inquire, does not attempt to establish any rule as to the separation of bids for labor and materials, and the use of the word "contracts," instead of "contract" was rendered necessary by the fact that the work is to be let in sections. It is my opinion that the provision that the contracts shall be made in like manner as provided by law for other township improvements was mainly intended to require advertisement and the letting of the contracts on competitive bids, and that while in the exercise of a sound discretion the township trustees might require bidders to separately state their bids, provided such requirement be inserted in the advertisement and thus brought to the attention of all prospective bidders, yet in the absence of such a requirement by the trustees properly brought to the attention of prospective bidders, the bidders are not required by section 7047, G. C., to separately state their bids for the labor to be performed and the material to be furnished.

Respectfully,
EDWARD C. TURNER,
Attorney General.

562.

BOARD OF ADMINISTRATION—INMATES OF PENAL AND CORRECTIONAL INSTITUTIONS MAY BE USED IN CONSTRUCTION WORK AT ANY STATE INSTITUTION—BUILDING MATERIALS MANUFACTURED AT ANY STATE INSTITUTION MAY ALSO BE USED—COST OF SUCH LABOR AND MATERIALS NOT COUNTED AS PART OF TOTAL COST.

The labor of inmates of penal and correctional institutions under the management of the Ohio board of administration may be used in construction work at any state institution under the management of said board. Similarly, building materials manufactured at any state institution may be used in such construction work. The cost of state labor and materials so used is not to be counted as part of the total cost of an improvement within the meaning of section 2314, *G. C., and succeeding sections, constituting the building regulations, applicable generally, and when advertising for bids thereunder the board of administration should exclude from the work to be let the performance of such labor as is to be performed by such inmates and the furnishing of such materials as are produced at any such institution. If the total cost of the improvement, less these items, exceeds the sum named in section* 2314, *G. C., however, the remaining branches of the work should be dealt with as provided in that and succeeding sections.*

COLUMBUS, OHIO, June 30, 1915.

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

DEAR SIR:—I acknowledge the receipt of your letter of June 22d, requesting my opinion as follows:

> "The appropriation act (104 O. L., 64, 69) for 1914, in its appropriation for the uses of the state board of administration for the repair, improvement and construction of buildings, contained a provision as follows:
>
> " 'Insofar as the labor of inmates of state institutions is employed, expenditures for repairs and improvements to be exempt from section 2314 of the General Code of Ohio.'
>
> "In response to a request from this department, the attorney general rendered an opinion respecting the operation of this language, on July 21, 1914.
>
> "We note that in the current appropriation acts this language is omitted.
>
> "The opinion just referred to, however, seems to be based partly upon the language of the appropriation act and partly upon the provisions of section 2230, G. C. So that, although this specific language is omitted from the current appropriation acts, we are in doubt as to the extent to which sections 2314, 2315 and following sections apply to expenditures of the state board of administration.
>
> "Will you kindly advise us in this respect?"

I have before me the opinion of Mr. Hogan to the board of administration, referred to by you. The following is an abstract of his reasoning:

The language of the 1914 appropriation act (104 O. L., 64, 69), "insofar as the labor of inmates of state institutions is employed, expenditures for repairs and improvements to be exempt from section 2314 of the General Code of Ohio," can mean but one of two things, viz.:

> "(1.) The labor of inmates of state institutions may be employed by the board of administration in constructing improvements, and the provisions

of section 2314 of the General Code shall not require that the labor which may be performed by such inmates shall be contracted for.

"(2.) In cases in which the labor of inmates of state institutions is employed section 2314 of the General Code shall not apply at all, and the board of administration may construct such improvements without preparing plans, specifications, estimates and bills of material."

It will be necessary, then, to choose between these two interpretations. The choice falls upon the second of them, for the reason that sections 2228 and 2230 of the General Code authorize and require the board of administration, as the successor of the board of managers of the penitentiary and the Ohio State Reformatory, to employ convicts and inmates in construction and repair work in and about any state institution, and expressly forbid the state authorities from making any contract by which the labor or time of such prisoners or inmates shall be "let, farmed out, given or sold to any person, firm, association or corporation."

So, as to the labor of convicts in the penitentiary and the Ohio State Reformatory the subsequently enacted provisions of sections 2228 and 2230, General Code, constitute an exception to section 2314 and succeeding sections, known as the "Building Regulations." That is to say, any construction or repair work in and about any state institution, on which convicts of the reformatory or the penitentiary may be employed, must be carried on by their labor, and this of itself constitutes, so to speak, an exemption or withdrawal from the operation of section 2314 requiring labor on state institution improvement work to be let by contract.

It being presumed that the legislature in passing the appropriation act of 1914 did not intend a vain thing, the interpretation which will give the language some substantial effect is to be preferred to one which will produce an effect little, if any, different from the state of the law in the absence of the enactment of such language.

It is not necessary at this time to review Mr. Hogan's opinion and to consider its correctness in its entirety. One statement made therein is possibly too broad. It is to the effect that without the language found in 104 O. L., 69, expenditures in the repair and improvement of state institutions "are necessarily exempt from the operation of section 2314, to the extent of labor performed thereon by inmates of state institutions," so that "if the language in question is to be so construed, it becomes wholly meaningless, in view of prior provisions of section 2230, authorizing such labor."

It would have been more accurate, I think, to say that to the extent of labor performed in the repair and improvement of state institutions *by prisoners serving sentences in the penitentiary and reformatory,* expenditures in the repair and improvement of state institutions are necessarily exempt from the operation of section 2314, because it might be possible and lawful to employ the labor of inmates of such institutions as that for the feeble minded, those for the insane, etc., on such work of construction and improvement, and as to such labor section 2230 does not apply.

It is at least clear that section 2230 of the General Code does constitute a partial exception to the general provisions of section 2314, et seq., of the General Code. In the absence of any other exemption as a condition of the expenditure of a main appropriation, the former section then must be consulted in order to determine the application of the latter section.

I quote sections 2228 to 2230, inclusive, of the General Code:

"Section 2228. The board of managers of the Ohio Penitentiary, the board of managers of the Ohio State Reformatory, or other authority, shall make no contract by which the labor or time of a prisoner in the penitentiary or reformatory, or the product or profit of his work, shall be let, farmed out, given or sold to any person, firm, association or corporation. Convicts in such institution may work for, and the products of their labor may be disposed

of, to the state or a political division thereof, or for or to a public institution owned or managed and under the control of the state or a political division thereof, for the purposes and according to the provisions of this chapter.

"Section 2229. The board of managers of the penitentiary and the board of managers of the reformatory, so far as practicable, shall cause all prisoners serving sentences in such institutions, physically capable, to be employed at hard labor for not to exceed nine hours of each day other than Sundays and public holidays.

"Section 2230. Such labor shall be for the purpose of the manufacture and production of supplies for such institutions, the state or political divisions thereof; for a public institution owned, managed and controlled by the state or a political division thereof; for the preparation and manufacture of building material for the construction or repair of a state institution, or in the work of such construction or repair; for the purpose of industrial training and instruction, or partly for one and partly for the other of such purposes; in the manufacture and production of crushed stone, brick, tile, and culvert pipe, suitable for draining wagon roads of the state, or in the preparation of road building and ballasting material."

It will be observed that these sections relate solely to the labor of prisoners in the penitentiary or reformatory.

With respect to labor of inmates of other institutions, the following provisions of the chapter relative to the powers and duties of the board of administration are quoted:

"Section 1845. The board may assign among the correctional and penal institutions the industries to be carried on therein, having due regard to the location and convenience thereof with respect to other institutions to be supplied, to the machinery therein and the number and character of inmates.

"Section 1846. The board shall fix the prices at which all labor performed and all articles manufactured in said institutions shall be furnished to the state or the political divisions and public institutions thereof, as is or may be provided by law, which shall be uniform to all and not higher than the usual market prices for like labor and articles.

"Section 1848. * * * It may direct the purchase of any materials, supplies or other articles for any institution subject to its management from any other such institution at the reasonable market value thereof, to be fixed by the board, and payments therefor shall be made as between institutions in the manner provided by law for payment for supplies. * * *

"Section 1858. The board may detail temporarily from a correctional or penal institution, with the consent of the managing officer thereof, any inmates under its control, to perform specified labor."

Summarizing the effect of the sections above quoted, it may be observed that the board of administration is expressly authorized to employ the labor of prisoners in the penitentiary and the reformatory upon construction work at any state institution. It is also authorized to determine what industries shall be carried on at the several correctional and penal institutions by the inmates thereof, and to fix prices therefor. It is also authorized to direct the purchase of materials, supplies or other articles, for any institution subject to its management from any correctional or penal institution and provide for payment as between institutions. It is also authorized to detail temporarily from any correctional or penal institution, with the consent of the managing officer thereof, any inmates under its control.

Section 1857 of the General Code (not above qouted), authorizes it to employ an architect for the preparation of the plans, specifications, estimates and details for buildings; also the employment of engineers, superintendents and supervisors.

Section 1869 of the General Code (not above quoted), authorizes each managing officer to develop such occupations as shall best promote the welfare of the inmates of his institution.

There is, then, certainly specific authority to employ prisoners in the penitentiary and the reformatory in the performance of labor on construction work. There is also specific authority for the employment of the inmates of any correctional or penal institution, subject to the control and management of the board of administration, in the production of any material, including building material.

I think there is sufficient authority for the detail of inmates from any penal or correctional institution (which would add to the penitentiary and reformatory the Boys' Industrial School and the Girls' Industrial Home) to perform any kind of labor. There is certainly no authority for employing the labor of any inmates at any state institution on contracts, by farming the same out to contractors, nor is there any authority to sell building materials to contractors.

All these statutes are of later enactment than section 2314 of the General Code, and insofar as they are in conflict with the latter, must be held to govern.

In my opinion, the joint effect of all the sections, including section 2314 of the General Code, in the absence of any express provision in an appropriation bill like that found in the 1914 bill, is as follows:

> "Any building material which may be produced at any state institution under the control and management of the Ohio board of administration may be excepted from the contract required to be entered into under section 2314, G. C., and furnished directly by one institution to the other.
>
> "Any labor of convicts, or otherwise, which the state board of administration may lawfully employ upon construction work is likewise to be eliminated from the contract which is required to be entered into by section 2314, G. C.
>
> "In case the labor to be so furnished by the board of administration embraces that on all branches of the work, then the only contract to be let should be for the materials, and not for the doing of the work, unless some of the materials are to be likewise purchased from another institution.
>
> "In case the labor is to be furnished on certain branches of the work only, the general contract to be let should exclude these branches of the work, and the branches upon which the labor of inmates is to be employed should be provided for by separate contracts for the purchase of materials.
>
> "In cases in which materials are to be furnished by one institution to another for construction work, the contract should be for the performance of the labor only, except to the extent, as already pointed out, to which the labor of inmates may be employed.
>
> "No improvements at the penitentiary are to be governed at all by section 2314, G. C., such improvements being expressly excepted by that section itself from its remaining terms.
>
> "The aggregate cost of an improvement within the meaning of section 2314, G. C., in the event of the use of materials or labor furnished by a state institution, is the estimated cost of the labor and materials not so furnished.

From the foregoing it will be observed that the result arrived at under the provisions of the permanent statutes, without an express exemption like that embraced in 104 O. L., 64, 69, is not the same as that produced by such an express exemption.

Respectfully,

EDWARD C. TURNER,

Attorney General.

563.

CORPORATION MAY NOT INCREASE ITS AUTHORIZED CAPITAL STOCK UNTIL ORIGINAL CAPITAL STOCK IS FULLY SUBSCRIBED AND AN INSTALLMENT OF TEN PER CENT. PAID ON EACH SUBSCRIPTION—COMMON STOCK.

A corporation for profit may not increase its authorized capital stock under section 8698, G. C., so as to authorize the issuance of additional common stock until the original capital stock of the corporation is fully subscribed, and an installment of ten per cent. has been paid on each subscription.

COLUMBUS, OHIO, June 30, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have submitted to me a letter addressed to you by Messrs. Harter & Harter, attorneys at law, Canton, Ohio, accompanied by proposed certificate of increase of capital stock, both common and preferred, of The Gordon Rubber Company, together with a check of that company in the sum of $300.00, and an uncancelled ten cent revenue stamp, and have verbally requested my opinion upon the questions presented thereby.

The certificate recites that at the time a certain meeting of the stockholders of the company was held, the preferred capital stock of the company had all been subscribed and paid for, and more than fifty per cent. of the common stock thereof had been subscribed and paid for; that at said meeting, by a vote of the holders of a majority of the stock of the company, and the written assent of three-fourths in number of the stockholders, representing more than three-fourths of the capital stock of the company, it was resolved, that the capital stock "be increased from $300,000.00, its present capital stock, $200,000.00 of which is common stock, and $100,000.00 of which is preferred stock, to $600,000.00 of capital stock, $300,000.00 of which shall be common stock, and $300,000.00 of which shall be preferred stock, divided into 6,000 shares of $100.00 each, so that the capital stock of the company shall then be $600,000.00, $300,000.00 of which shall be preferred stock, and $300,000.00 of which shall be common stock."

The resolution further provides for certain specific designations of preferences in voting powers with respect to the preferred stock.

The question presented, and which is discussed in the letter of counsel, is as to whether or not a corporation may increase its authorized common or preferred capital stock, or either, before the original capital stock of either class is fully subscribed for, and an installment of ten per cent. on each share has been paid thereon.

The question invites consideration of the following provisions of the General Code:

> "Section 8698. After its original capital stock is fully subscribed for, and an installment of ten per cent. on each share of stock has been paid thereon, a corporation for profit, or a corporation not for profit, having a capital stock, may increase its capital stock or the number of shares into which it is divided, prior to organization, by the unanimous written consent of all original subscribers. After organization the increase may be made by a vote of the holders of a majority of its stock, at a meeting called by a majority of its directors, at least thirty days' notice of the time, place and object of which has been given by publication in some newspaper of general circulation, and by letter addressed to each stockholder whose place of residence is known. Or, the stock may be increased at a meeting of the stockholders at which all are present in person, or by proxy, and waive in writing such notice by pub-

lication and letter, and also agree in writing to such increase, naming the amount thereof to which they agree. A certificate of such action shall be filed with the secretary of state.

"Section 8699. Upon the assent in writing, of three-fourths in number of the stockholders of a corporation, representing at least three-fourths of its capital stock, to increase the capital stock, it may issue and dispose of preferred stock in the manner by law provided therefor. Upon such increase of stock, a certificate shall be filed with the secretary of state, as provided in the next preceding section."

It is admitted by counsel, that the supreme court in Peter v. Union Manufacturing Company, et al., 56 O. S., 181, held, that under the statute corresponding to section 8698 of the General Code, as it then existed, the original capital stock of a corporation for profit must be fully paid up before the authorized capital stock may be increased; but it is urged that the section has been amended since this decision was rendered, in such a way as to destroy the force of that decision as a precedent, and further justify the interpretation now contended for, such interpretation being that the second sentence of this section as it now stands is not qualified by the restrictions found in the first sentence thereof, which are to be interpreted as applying only to an increase of capital stock made prior to organization, so that as to an increase made after organization it is not necessary that the original stock be subscribed for and an installment of ten per cent. paid on each share.

The transaction involved in Peter v. Union Manufacturing Company, *supra*, took place in 1889, and was governed by the provisions of section 3262 of the Revised Statutes, as it then stood, viz.: as amended in 83 O. L., 134. The section then read as follows:

"Section 3262. A corporation for profit, after its original capital stock is fully paid up, or a corporation not for profit, having a capital stock, may increase its capital stock or the number of shares into which its capital stock is divided, by a vote of the holders of a majority of its stock, at a meeting called by a majority of its directors, at least thirty days' notice of the time, place and object of which has been given by publication in some newspaper of general circulation, and by letter addressed to each stockholder whose place of residence is known; or such increase may be made at any meeting of the stockholders at which all the holders of such stock are present in person or by proxy, and waive in writing such notice by publication and by letter; and also agree in writing to such increase, naming the amount of increase to which they agree; and a certificate of such action of the corporation shall be filed with the secretary of state."

Subsequently the section was amended so as to read as follows: (90 O. L. .141.)

"Section 3262. A corporation for profit, after its original capital stock is fully subscribed for, and an installment of ten per cent. on each share of stock has been paid thereon, or a corporation not for profit, having a capital stock, may increase its capital stock or the number of shares into which its capital stock is divided, by the unanimous written consent of all original subscribers, if done prior to organization, and after organization then by a vote of the holders of a majority of its stock, at a meeting called by a majority of its directors, at least thirty days' notice of the time, place and object of which has been given by publication in some newspaper of general circulation, and by letter addressed to each stockholder whose place of residence is known;

> or such increase may be made at any meeting of the stockholders at which all the holders of such stock are present in person, or by proxy, and waive in writing such notice by publication and by letter and also agree in writing to such increase, naming the amount of increase to which they agree; and a certificate of such action of the corporation shall be filed with the secretary of state."

It must be conceded that the section is liberalized by this amendment, but not to the extent claimed by counsel for The Gordon Rubber Company. There were two changes made by the amendment of 1893:

In the first place, a procedure was provided whereby an increase of stock might be effected prior to organization, which could not be done under the section in its previous form.

In the second place, the phrase "after its original capital stock is fully paid up" was stricken out and the phrase "after its original capital stock is fully subscribed for and an installment of ten per cent. on each share of stock has been paid thereon" was substituted therefor.

The phraseology of amended section 3262 of the Revised Statutes, so far as the question now under discussion is involved, is plain and unambiguous. Eliminating superfluous language which relates to the other matters to which the amendments applied, it reads as follows:

> "A corporation for profit, after its original capital stock is fully subscribed for, and an installment of ten per cent. on each share of stock has been paid thereon, * * * may increase its capital stock * * * by the unanimous written consent of all original subscribers, if done prior to organization, and after organization then by a vote of the holders of a majority of its stock * * *; or such increase may be made at any meeting of the stockholders at which all the holders of such stock * * * agree in writing to such increase * * *."

There was but a single sentence in section 3262, R. S., and there is no doubt whatever that the phrase "after its capital stock is fully subscribed for, and an installment of ten per cent on each share of stock has been paid thereon" is a condition precedent to the exercise of any power therein granted to a corporation for profit, whether exercised prior to organization or after organization. In other words, the section makes it plain that the only difference between a proceeding prior to organization and that after organization is one of method.

The only respect, then, in which the section is liberalized in its application to the condition upon which an increase might be made, as compared with its provisions as they stood when the facts in Peter v. Union Manufacturing Company, *supra*, arose is that instead of the requirement after amendment being that the original stock must be fully paid for, it is merely that it must be fully subscribed for, and an installment of ten per cent. paid on each subscription.

The mere fact that the statute was then made less drastic than it had been theretofore does not justify the conclusion that it is any more liberal in its effect than its terms, as amended, would import.

The amendment in 90 O. L., 141, was the last change made by the legislature in the language of this section as such. In codifying this statute, it was divided into four sentences in place of one, but upon the most familiar principles of statutory interpretation this change in punctuation, with such changes in phraseology as might be necessary in order to divide the section into separate sentences, is presumed not

to have effected any change in the substance of the law. Revision is not amendment, unless the terms of the revised statute clearly import a meaning different from that of the prior statute.

In this instance the terms of present section 8698, G. C., do not clearly show that a substantial change was intended. On the contrary, the most natural interpretation of section 8698 of the General Code, arrived at without recourse to the pre-existing law, is that which makes the conditions of the first sentence apply to the exercise of the power granted in the second and third sentences. The second sentence, for example, provides that "after organization *the increase* may be made" (in a certain manner). The phrase "the increase" obviously means the increase referred to in the preceding sentence. Such increase may be made only "after its original capital stock is fully subscribed for, and an installment of ten per cent. on each share of stock has been paid thereon," when made by a corporation for profit.

But even if the statute in its present form should be regarded as ambiguous, the legislative history thereof, as I have outlined it, makes the meaning very clear. For example, it is argued in the letter of counsel that public policy does not require any restriction upon the increase of capital stock after organization; yet this is exactly what was required in the very plainest of terms by section 3262, R. S., as amended in 83 O. L., 134, that section not even authorizing an increase prior to organization, and conditioning increases made after organization upon the payment in full of the original capital stock.

I have given very careful consideration to the arguments in the letter of Messrs. Harter & Harter, and find that it is substantially conceded therein that as section 3262, R. S., stood immediately prior to codification, i. e., as amended 90 O. L., 141, the requirement that the entire original capital stock be subscribed and an installment of ten per cent. paid thereon was a condition precedent to the increase of capital stock after organization. So that in the last analysis the argument is that a change in the statute has been effected by the verbal changes made in process of codification. This view, for the reasons stated, can not be sustained.

I am, therefore, of the opinion that no increase of capital stock may be made under section 8698 of the General Code, unless the original capital stock of the corporation is fully subscribed for and an installment of ten per cent. on each share of stock has been paid thereon.

With respect to increase of capital stock under section 8699 of the General Code, by the issuance and disposition of preferred stock, the question is somewhat different.

I find that my predecessor, Hon. Timothy S. Hogan, advised the then secretary of state, Hon. Charles H. Graves, on March 16, 1914, that an increase of capital stock by the issuance or sale of preferred stock is not governed by the conditions stipulated in section 8698 of the General Code. So that capital stock already authorized need not be fully subscribed for and an installment of ten per cent. need not be paid thereon prior to an increase of preferred stock only under section 8699 of the General Code. Mr. Hogan, in his opinion, however, stated very clearly his view that the conditions in the first sentence of section 8698, G. C., governed all proceedings under that section.

The certificate tendered to you by The Gordon Rubber Company constitutes an attempt to exercise powers both under section 8698 and section 8699 of the General Code. Not being in compliance with section 8698, G. C., and the resolution not being severable into two parts the whole certificate must be rejected, and I accordingly advise that you do not file or record the same.

I return herewith the certificate of increase of capital stock, together with check of The Gordon Rubber Company, in the sum of $300.00, and uncancelled ten cent revenue stamp.

Respectfully,
EDWARD C. TURNER,
Attorney General.

564.

TRANSCRIPT OF BOND ISSUES FOR VILLAGE OF WEST PARK, CUYAHOGA COUNTY, OHIO, APPROVED.

COLUMBUS, OHIO, July 1, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of the village of West Park, Cuyahoga county, Ohio, in the amount of $20,206.99, purchased by the industrial commission of Ohio, under resolution dated May 24, 1915, said bonds consisting of the following issues:

1. Delinquent sidewalk improvement bonds for sidewalks constructed on Midland avenue, Belden avenue and Osborn street, 6 bonds aggregating	$ 5,341.00
2. Delinquent sidewalk improvement bonds for Raymond avenue, Warren avenue, Lesuer avenue, Vernon avenue, Leland avenue, Hendon street and Clayton street, 11 bonds aggregating	10,848.97
3. Nicholas avenue assessment bonds for the improvement of Nicholas avenue from Berea road to the west line of Kinney estate, 2 bonds aggregating	397.69
4. Osborn street assessment bonds for the improvement of Osborn street from Lorain street to Allison street, 2 bonds aggregating	496.56
5. Belden avenue assessment bonds for the improvement of Belden avenue from Triskett road to Raymond avenue, 2 bonds aggregating	847.18
6. Raymond avenue assessment bonds for the improvement of Raymond avenue from Lorain street to Triskett road, 2 bonds aggregating	585.80
7. Warren avenue assessment bonds for the improvement of Warren avenue from Lorain street to Triskett road, 2 bonds aggregating	818.27
8. Midland avenue assessment bonds for the improvement of Midland avenue from Highland avenue or West 117th street and the intersection of Vinton row and Desdemona street, 2 bonds aggregating	343.04
9. Leseur avenue assessment bonds for the improvement of Lesuer avenue from Lorain street to Triskett road, 2 bonds aggregating	$ 528.50

I have examined the completed transcript covering the several issues of bonds above enumerated, which was submitted to me under date of June 28, 1915, and I am of the opinion that the issuance of said bonds is for a purpose authorized by law; that the proceedings of the council and other officers of said village have been regular and in conformity with statutory requirements; that no limitation, either constitutional or statutory, of indebtedness or taxation has been exceeded in the issuance of said bonds; that proper provision has been made in the legislation of the village council for levying and collecting annually a sufficient tax to pay interest and provide a sinking fund for the redemption of said bonds as they

become due; that said bonds, when properly prepared and executed, will be valid and binding obligations of the said village, and I hereby certify my approval of the same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

565.

OHIO UNIVERSITY—FEES COLLECTED FOR MATERIAL USED—UNEXPENDED BALANCE TO BE RETURNED PRO RATA TO STUDENTS PAYING SAME—UNIVERSITY CAN RETAIN WEEKLY PAYMENTS ENOUGH TO CARE FOR ANTICIPATED REFUNDS.

Of the fees collected by Ohio University for material used, the balance unexpended to be returned pro rata to the students paying same, the university is authorized to retain from weekly payments a sum sufficient to care for anticipated refunds, making itemized statement of disposition of the same as provided in section 24 as amended.

COLUMBUS, OHIO, July 1, 1915.

HON. ALSTON ELLIS, *President Ohio University, Athens, Ohio.*

DEAR SIR:—Under date of June 19, 1915, you wrote me as follows:

"Sometime ago, Hon. E. M. Fullington gave me a copy of your decision as to the manner in which the fees taken from students occupying the college dormitories should be collected and handled. That decision is perfectly clear and I am in no doubt whatever as to the action necessary to be taken regarding it. However, I need information and advice on the matters herewith presented:

"1. In our department of home economics, laboratory supplies of raw material and things needed for practical illustration of the different phases of work for which the department was established are a necessity. The various supplies so needed are used up by the students in the different lessons and exercises scheduled in the department. Each student is charged a fee, not for the purpose of revenue, but to cover, in part, the actual cost of the materials used. If all collections above the actual cost, if such exist at the close of a definite period, term, or semester, are pro rated among the students, does that form of collection and use conflict with the provisions of the 'Mooney law,' so-called, requiring certain fees and collections to be turned into the state treasury weekly?

"2. Exactly the same conditions exist in our department of manual training, where no practical work can be done without material—not equipment—such as lumber, etc. Fees are charged for the same purpose as stated in number *one*. Their use, when collected, is as stated in reference to fees collected in the department of home economics. What shall be done with these fees?

"3. Similar conditions exist in the department of paidology and psychology, where the experimental work calls for a large amount of special material for the use of students. What shall be done with the fees col-

lected to buy this illustrative material? No fees so collected are for institutional support, but solely for securing what is needed by the students in the prosecution of their work—the surplus, if any, to be pro rated among those paying the fees.

"4. Of a like kind with the foregoing, are the fees charged and collected from students receiving classroom and laboratory instruction in the classes connected with the department of public school drawing and handwork. Such students use up a quantity of rather expensive material. The fees charged meet the expenses incurred in fair measure but not with any considerable excess of receipts over expenditures. No revenue is sought here. The excess of receipts is to be prorated among the students receiving instruction.

"5. In general, are all fees collected in the manner, and for the purpose, herein indicated, to be turned into the state treasury under the terms of the 'Mooney bill' or may they be used in the purchase of supplies such as must be used by the students in their scheduled work with pro rata distribution among them of all excess of such fees beyond the actual cost of the material used up by them in their classroom and laboratory work?

"I regret to ask your time to a consideration of these questions, but I need to be guided in the handling of these fees by better and more authoritative legal advice than I can get elsewhere. I want to observe strictly all legal requirements in the matters referred to. The authorities of the Ohio University and the State Normal College are under no legal obligation to charge fees of any kind, but they have done so in the past and will continue to do so until the state, by legislation, fixes a schedule of charges to be followed in the state-supported institutions of learning. No part of the fees herein referred to will be remitted even though, if collected, they must be turned into the state treasury. I inclose a complete schedule of all fees charged at Ohio University save room rent fees charged students who find quarters in the two dormitories connected with the university. I have a clear understanding of the manner in which such dormitory fees must be handled, but I need, and solicit, your advice as to the manner in which the fees collected in the department of home economics, manual training, experimental psychology, drawing and hand-work, and possibly some others, shall be handled."

Accompanying your letter was a memorandum of the fees charged at the Ohio University, among which are the fees referred to in your letter.

Under date of June 22nd I requested you to give me further information in the matter, and under date of June 23rd you wrote me as follows:

"It is altogether likely that I did not make my statements as clear as I intended in the communication I recently sent to your office.

"What I meant in reference to the fees heretofore collected is that all of them without exception found their way directly into the state treasury. No fees were returned to the students, even though such fees might be in excess of the actual cost of the material used by such students. Heretofore all such fees have been held to the credit of the university; now, under recent legislation, all such fees sent into the state treasury form a part of the general revenue fund of the state.

"It seems to me that all the fees referred to in my communication are of a like nature with the fees charged students who occupy quarters

in our dormitories. There may be a distinction, but it seems to me to be a distinction without much of a difference. What I wanted to know is whether it is permissible, under the law, for us to charge students fees for material actually used by them in laboratory work such as that described in my former letter. We want no revenue from this source, and my thought was, and is, to keep an exact account of the cost of material absolutely used by students, and at the close of a given period to pro rate any excess of collections over the actual cost of material used among the students in that particular branch of our work. You understand, I am sure, that we are under no legal obligation to charge any fee whatever; but it seems to me unreasonable for the state to supply students with material used up by them just the same as it would be unreasonable to supply them with books and food while they are in college.

"Again, my meaning was that we should continue to collect these fees just as we have been doing, although it was decided that, if collected, they could be sent to the state treasury and made a part of the general revenue of the state. What I am trying to do is to get information that will enable me to act strictly within the meaning and letter of the law. I am in doubt about the matter, and that is why I ask your office for authoritative help. Whatever your decision may be, it will be carried out to the letter. We shall continue to charge the fees and shall make just such disposition of them when collected as, through your courtesy in giving me a decision, may be pointed out."

The opinion to which you refer in your letter was one rendered to the budget commission under date of January 23, 1915, as to whether or not section 24 as amended in 104 O. L., 178, makes it obligatory upon colleges receiving state aid to turn in such extra funds as deposits by students for supplies used and breakage of apparatus with other funds. In said opinion I held:

"I am of the opinion that deposits by students for supplies used and breakage of apparatus, from which the student is entitled to a refund, if he does not consume the requisite amount of supplies or destroy a sufficient quantity of apparatus, are to be regarded as 'tuitions and fees,' to the conducting of which 'refunds' are 'incident,' within the meaning of the second half of the section. (Section 24 as amended.)

"As to moneys of this character, there should be deducted from the weekly payments a sufficient amount to enable the officers to care for the anticipated refunds, and at the end of the term an itemized statement of the disposition of all such funds is to be filed with the auditor of state."

This ruling clearly covers the matters contained in your letter.

I therefore hold that your university is authorized to retain, out of the fees in question, from the weekly payments a sum sufficient to enable the officers to care for the anticipated refunds, of course making the itemized statement of the disposition of all such funds at the end of each term as provided by said section 24 as amended.

Respectfully,
EDWARD C. TURNER,
Attorney General.

566.

GOVERNOR'S VETO—AUDITOR OF STATE IS ADVISED TO FOLLOW THE VETO MESSAGE OF THE GOVERNOR IN THE MATTER OF THE APPROPRIATION TO THE OHIO BOARD OF ADMINISTRATION UNDER STRUCTURES AND PARTS, COLUMBUS STATE HOSPITAL.

COLUMBUS, OHIO, July 1, 1915.

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

DEAR SIR:—Your letter of June 12, 1915, received in this department on June 16, 1915, requests my opinion as follows:

> "Among the items of exception included in the veto of the governor to the general appropriation act appears an item of veto as follows:
>
> "'Ohio Board of Administration.
>
> "'Structures and parts—Columbus state hospital, 2 cottages to cost $140,000.00 complete, $70,000 to be reduced to one cottage to cost $70,000 —$35,000.00'
>
> "The appropriation was for an entire sum to be used for two cottages, no separation of the entire sum being made by the general assembly, and, apparently the proportion of the whole that was to go into each of the two cottages being left to the board's discretion. In other words the item of appropriation was 'two cottages, $70,000.00' and not 'two cottages at $35,000.00 each, total, $70,000.00.'
>
> "We are in doubt whether this particular item of veto is a proper exercise of the power, or whether some construction may be made which will give it some kind of operation. Will you kindly advise us in the matter?"

This matter is by no means free from doubt and so far as Ohio is concerned there have been no cases before the courts involving a similar situation.

Section 16 of article 2 of the constitution of Ohio provides, in part:

> "* * * The governor may disapprove any item in any bill making an appropriation of money and the item or items so disapproved shall be void unless repassed in the manner herein prescribed for the repassage of a bill."

Among the items disapproved was the one under consideration. That the governor did not intend to disapprove this item in toto is quite apparent. That the governor did not approve the bill as containing the original item or file the bill with the secretary of state without his disapproval is just as apparent.

Decisions in other states upon some of the points involved are not in harmony. In the case of Commonwealth v. Barnett, 199 Pa. St., 161, the majority of the supreme court held that the governor had the power to veto part of an item by reducing the amount, but the supreme court of Wyoming (State v. Forsythe, 133 Pac. R., 521) after saying:

> "It will thus be observed that there is not a concurrence of judicial opinion respecting the power of the governor to disapprove part of an item or items or part or parts of an act appropriating money."

refused to follow the supreme court of Pennsylvania.

And even more difficult and more doubtful question is presented by the action of the governor in changing the number of cottages from two to one. The weight of judicial opinion outside of Ohio seems to make a distinction between the *purpose* of an appropriation and the *amount* of the appropriation. The above observations, however, as to what the governor did and did not do apply equally to this phase of the question. He had the power to veto the whole item had he so chosen and it should hardly be said, in the absence of judicial decision in this state to the contrary, that he did not have the power to veto part of the item.

Two diametrically opposed arguments may be advanced as to the action of the governor: (1) That the governor disapproved the whole item and it was not within his power to restore any part of it, therefore there is no money available for even one cottage; (2) That the governor had no power to make a limited or qualified disapproval, hence such attempted action was void and therefore the entire amount is available.

A third argument upon still another ground might be offered; that while the executive had the power to reduce the *amount* of the appropriation, he had no power to change the *purpose* by reducing the number of cottages from two to one.

To accept either of the foregoing suggested arguments is to disregard the plain intention of the executive whose acts in this respect are entitled to the same presumption of validity as is accorded the acts of the general assembly and unless clearly unconstitutional it would be the duty of the courts to uphold same. To say that the governor would have vetoed the whole item or, on the other hand, that he would have approved the whole item if he had not believed himself clothed with the power he attempted to exercise, would be mere speculation or guess work. No private rights whatever are involved in the matter, the question is purely a public one involving a public policy only.

I therefore advise you to set the appropriation up as "one cottage to cost $70,000.00_____$35,000.00," and to issue your warrants accordingly.

Respectfully,
EDWARD C. TURNER,
Attorney General.

567.

PROBATE COURT—QUESTION OF JURISDICTION OF ESTATE UNDER LAWS OF DESCENT AND DISTRIBUTION TO SINGLE HEIR—PART OF REAL PROPERTY IN ANOTHER COUNTY—PROBATE COURT OF FIRST COUNTY HAS EXCLUSIVE JURISDICTION—WHERE TAXES SHOULD BE PAID AND HOW APPORTIONED—INHERITANCE TAX.

Where an estate, of which the probate court of one county has principal jurisdiction, passes under the laws of descent and distribution to a single heir, and part of the estate consists of real property located in another county, the probate court of the first county has exclusive jurisdiction to appoint appraisers of the real estate upon application under section 5343, *G. C., and the entire tax should be paid into the treasury of that county.*

The share of the tax belonging to the municipality or township in the other county in which the real estate is located should be ascertained and should be paid by the treasurer of the first county to the treasurer of the second county as undivided tax moneys and distributed by the latter treasurer to such municipality or township at the succeeding semi-annual settlement.

In order to discharge the lien of the tax as a matter of record in the county in which the real estate is situated, duplicate receipts should be taken from the treasurer of the first county upon the payment of the tax and filed with the probate court of the second county.

COLUMBUS, OHIO, July 1, 1915.

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

GENTLEMEN:—I acknowledge the receipt of your letter of June 24th, requesting my opinion upon the question presented in a letter of one of the state examiners as follows:

> "An intestate decedent died in Hamilton county and was at the time of his death a resident of Cincinnati township. He had a personal estate in Hamilton county and was the owner of real estate in Vinton county. There is but one heir, a brother.
>
> "What is the proper procedure for the appraisement of the real estate and the collection and distribution of the tax?"

The following sections of the General Code are involved in this question: Section 5331, as amended 103 O. L., 463:

> "* * * Fifty per cent. of such tax shall be for the use of the state; and fifty per cent. of such tax shall go to the city, village or township in which said tax originates. * * * Such taxes shall become due and payable immediately upon the death of the decedent and shall at once become a lien upon the property, and be and remain a lien until paid.
>
> "Sec. 5335. Taxes imposed by this subdivision of this chapter shall be paid into the treasury of the county in which the court having jurisdiction of the estate or accounts is situated, by the executors, administrators, trustees, or other persons charged with the payment thereof. * * *
>
> "Sec. 5343. The value of such property, subject to said tax, shall be its actual market value as found by the probate court. If the state, through

the prosecuting attorney of the *proper county,* or any person interested in the succession to the property, applies to the court, it shall appoint three disinterested persons, who, being first sworn, shall view and appraise such property at its actual market value for the purposes of this tax, and make return thereof to the court. The return may be accepted by the court in a like manner as the original inventory of the estate is accepted, and if so accepted, it shall be binding upon the person by whom this tax is to be paid, and upon the estate. The fees of the appraisers shall be fixed by the probate judge and paid out of the county treasury upon the warrant of the county auditor. * * *

"Sec. 5344. The probate court, having either principal or auxiliary jurisdiction of the settlement of the estate of the decedent, shall have jurisdiction to hear and determine all questions in relation to such tax that arises, affecting any devise, legacy or inheritance under this subdivision of this chapter, subject to appeal as in other cases, and the prosecuting attorney shall represent the interests of the state in such proceedings.

"Sec. 5345. Each probate judge, at least once in six months, shall render to the county auditor a statement of the property within the jurisdiction of his court that has become subject to such tax during such period, the number and amount of such taxes as will accrue during the next six months, so far as they can be determined from the probate records, and the number and amount thereof due and unpaid. Each probate judge shall keep a separate record, in a book to be provided for that purpose, of all cases arising under the provisions of this subdivision of this chapter.

"Sec. 5347. A final settlement of the account of an executor, administrator or trustee shall not be accepted or allowed by the probate court unless it shows, and the judge of that court finds, that all taxes imposed by the provisions of this subdivision of this chapter, upon any property or interest therein, belonging to the estate to be settled by such account, have been paid. The receipt of the county treasurer shall be the proper voucher for such payment."

I assume from the letter of the examiner that the probate court of Hamilton county has principal jurisdiction of the settlement of the estate of the decedent in question, and that such jurisdiction has been acquired.

That being the case, I am of the opinion that the probate court of Hamilton county has the jurisdiction described in section 5344 of the General Code, with respect to all questions, regardless of the location of any of the property embraced in the estate. I am also of the opinion that the jurisdiction of the Hamilton county court fixes the place of the payment of the tax under section 5335 of the General Code, and that the same should be paid into the treasury of Hamilton county.

Similarly, I am of the opinion that the "proper county" within the meaning of section 5343 of the General Code, is Hamilton county, and "the court" within the meaning of that section is the probate court of Hamilton county.

See In re Kennan, 5 N. Y. Supp., 200.

Therefore, I am of the opinion that application for the appointment of appraisers of the land in Vinton county should be made by persons interested in the succession of the property or by the prosecuting attorney of Hamilton county to the probate court of Hamilton county. The court may appoint for this purpose any "three disinterested persons." They may be residents of Hamilton county or of Vinton county, there being no requirement that the appraisers shall be resi-

dents of the county where the property is situated, other than the practical one that it would tbe best and fairest to have appraisers resident of the vicinity wherein the real estate is located.

I think there is no question that real property is subject to the appraisement provided for in section 5343 of the General Code (see section 5348, G. C., where the word "property" is defined so as to include real and personal estate), although the machinery for the ascertainment of the value of the estate in the absence of an appraisement under section 5343 does not afford any preliminary appraisement of real estate other than that of the auditor's duplicate; so that in the absence of an appraisement under section 5343 I am of the opinion that the duplicate value of the real estate in Vinton county could and should be accepted as the value thereof for the purpose of the collateral interitance tax.

There is no direct provision for the payment of any traveling or other necessary expenses of appraisers, but the authority of the court to fix their fees, as found in section 5343, General Code, affords ample provision, in effect, for their reimbursement.

The lien of the tax, of course, attaches to the property in Vinton county, and some method should be devised for discharging same. Such a method is, in my judgment, afforded by the provisions of section 5345 and 5347 of the General Code. It is the duty of the probate judge of Vinton county to make up each six months a statement of the property within his jurisdiction that has become subject to the collateral inheritance tax within the semi-annual period. It is likewise the duty of the treasurer of Hamilton county to issue a receipt upon the payment of the whole tax to him. A duplicate receipt should be taken by the administrator from the treasurer of Hamilton county and filed with the probate judge of Vinton county, who should show in his next semi-annual statement that the taxes have been paid. This will discharge the lien of the tax as a matter of record in Vinton county.

The most troublesome question which is involved in the general query of the examiner is that respecting the distribution of the tax. This department has held that the phrase "in which such tax originates," as used in the amended constitution and in section 5331 of the General Code as amended 103 O. L., 463, denotes the municipality or township in which any property belonging to a taxable estate would have been located for property taxation purposes. That being the case, the municipality or township in Vinton county wherein the real estate in question is located is entitled to such portion of one-half of the entire tax as is represented by the relative value of the real estate as compared with the total value of the taxable inheritance, the exemptions being likewise pro-rated. That is to say, this is the rule which must be followed where, as in this case, there is but a single inheritor, so that but a single tax payment is to be made on account of the whole taxable inheritance. While the statute contains no express provision in this respect, its implications are so obvious that the result is reached without any practical difficulty.

In order, however, to protect the treasurer of Hamilton county and avoid all questions, it would be best to have the probate court of Hamilton county, acting under section 5344 of the General Code, and exercising the jurisdiction therein provided for, determine specifically and enter upon its records a finding as to the proportions of the tax due to the city of Cincinnati and the district or districts in Vinton county wherein the real estate in question is located, due allowance being made for the exemptions. Upon such determination being made, the money in the treasury of Hamilton county arising from the collection of the tax should be treated as undivided tax money. At the semi-annual settlement fifty per cent. thereof, less seventy-five per cent. of the cost of collection and other necessary, legitimate expenses incurred by the county in the collection of the taxes, should be credited to the state treasury. The share of the city of Cincinnati in the remainder (and this without any deduction on account of fees, etc., which are paid out of

the county treasury and for the reimbursement of which the local taxing districts are not liable under the present statutes) should be paid by warrant under sections 2602 and 2689 of the General Code, to the city treasurer. The balance, which belongs to a certain taxing district or districts in Vinton county, should, in my judgment, be paid by auditor's warrant prior to the next semi-annual settlement to the treasurer of Vinton county and by him distributed under the sections above cited.

I reach this conclusion because sections 2602 and 2689 of the General Code, do not authorize direct payment out of the undivided taxes to the treasurer of a taxing district wholly within another county, because section 2602 expressly provides that accounts shall be opened with each district "in the county." Of course, the treasurer of Vinton county will not be entitled to any fees for handling this money, as he did not make the collection, and the treasurer's fees are computed on collections. (Section 2685, General Code.)

The above outlined procedure for the distribution of the proportion of the tax belonging to the districts in Vinton county is extra-statutory. The legislature should, of course, have enacted appropriate legislation when the constitution was so amended as to require distribution of a specific portion of the tax to the "city, village or township in which the tax originates.". It has failed to do this. But inasmuch as by force of the constitution and the statute the money belongs, under facts like those involved in the present question, to taxing districts in a county other than that in which the collection is made, some means must be devised for its payment to such district. In the absence of express statutory provision, I prefer the method which I have outlined to direct payment from the Hamilton county treasury to the taxing districts in Vinton county.

I may add that the inheritance tax laws frequently lack machinery which is practically essential. The courts have not hesitated in proper cases to supply such machinery, and, in my judgment, the present case is a proper one for the application of this principle.

Respectfully,
EDWARD C. TURNER,
Attorney General.

568.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF ROADS IN SUMMIT, FRANKLIN AND MONTGOMERY COUNTIES.

COLUMBUS, OHIO, July 1, 1915.

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

DEAR SIR:—I have your communications of June 22, June 28 and June 29, 1915, transmitting to me for examination final resolutions as to the following roads:

"Akron-Wooster, Summit county, Pet. No. 1371, I. C. H., No. 96.
"Columbus- Newark, Franklin county, Pet. No. 933, I. C. H. No. 47.
"Dayton-Troy, Montgomery county, Pet. No. 980, I. C. H. No. 61."

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

569.

DISSOLUTION OF VILLAGE SCHOOL DISTRICT AND UNION OF SAID DISTRICT WITH CONTIGUOUS TOWNSHIP RURAL SCHOOL DISTRICT—SECTION 4682-1, G. C., MUST BE COMPLIED WITH—VILLAGE SCHOOL DISTRICT THEN HAS NO AUTHORITY TO WITHDRAW AND RE-ESTABLISH VILLAGE DISTRICT.

Where a township contains sixteen or more square miles and a village is created out of said township, under provision of section 4687, *G. C., as amended* 104 *O. L.,* 134, *said village becomes a village school district separate and distinct from the township rural school district and the dissolution of said village school district and the union of said district with the contiguous township rural district, under the provision of section* 4682-1, *G. C., can be realized only upon the proper action of the board of education of said village school district in compliance with the requirements of said section.*

No action on the part of the board of education of said rural school district in connection with said dissolution and union is either authorized or required, and said board of education of said rural school district has no power to prevent such dissolution and union.

After said village school district has been dissolved and joined to the contiguous township rural school district, said village, or the electors thereof, have no authority in law to withdraw the territory within the corporate limits of said village from said township rural school district and re-establish said village school district.

COLUMBUS, OHIO, July 1, 1915.

HON. GEO. C. VON BESELER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—I have your letter of June 8, 1915, which is as follows:

"Prior to the taking effect of the School Code (so called), 104 O. L., 133 to 145, the township of Perry, Lake county, Ohio, was a township school district. After said law went into effect the village of Perry was organized out of a part of said Perry township.

"Section 4687 is as follows:

"'Upon the creation of a village, it shall thereby become a village school district, as herein provided, and, if the territory of such village previous to its creation was included within the boundaries of a rural school district and such rural school district included more territory than is included within the village, such territory shall thereby be attached to such village school district for school purposes, provided such territory has an area of less than sixteen square miles.'

"There is no disposition on the part of the village to organize its board of education. It is the desire of the village to remain a part of Perry Rural School District. On the other hand there are some electors and tax payers of Perry Rural School District, residing without the newly incorporated village, who desire to have the village withdraw from the rural district. What is the status of affairs when the village refuses to organize? The board of education of Perry Rural School District now consists of five persons, four of whom now reside in the territory now lying without the village and one of whom now resides in the territory now lying within the village.

"Section 4735 is as follows:

"'The present existing township and special school district shall constitute rural school districts until changed by the county board of education, and all officers and members of boards of education of such existing districts shall continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and qualified.'

"It is my opinion that the then existing township school district of Perry township continues as Perry Rural School District including the territory of the village of Perry, until such time as the village will organize and that all officers and members of the board of education of the then existing district continue to hold and exercise their respective offices and powers until such time as their successors are elected and qualified and until such time as Perry village organizes its own board.

"May matters continue as they are, or shall Perry village organize its own board of education and then dissolve in accordance with the provisions of section 4682-1? Again, in the event a contiguous rural school district does not want a village school district to dissolve and join with it, can the contiguous rural school district be made to receive the territory of an incorporated village, and if so, what would be the method to compel the rural district so to receive the territory and the schools within the village for school purposes?

"This additional question also may arise. Once a village has regularly dissolved and has joined a contiguous rural school district, can this village thereafter withdraw again from said contiguous rural school district?"

It will be observed that under section 4687, G. C., as amended, in 104 O. L., 134, the provisions of which have been quoted by you, upon the creation of the village of Perry out of Perry township in Lake county, said village became a village school district separate and distinct from Perry Township Rural School District.

You state that the territory within said village, prior to its incorporation, was included within the boundaries of Perry Township Rural School District. Inasmuch as said rural school district included more territory than is included within said village, if such territory has an area of less than sixteen square miles, it is automatically attached to said village school district under the above provisions of section 4687, G. C.

I assume, however, from your statement of facts, that said territory has an area of more than sixteen square miles and that your questions are based on this assumption.

I deem it proper to call your attention to the provisions of section 4692, G. C., as amended by amended senate bill No. 282, which was passed by the general assembly May 27, 1915, and which will become effective August 26, 1915. On and after said date of August 26, 1915, under the provisions of section 4692, G. C., as amended by said amended senate bill No. 282, the county board of education will have power to "transfer a part *or all* of a school district of the county school district to the adjoining district or districts of the county school district. This section as amended further provides:

"Such transfer shall not take effect until a map is filed with the auditor of the county in which the transferred territory is situated, showing the boundaries of the territory transferred and a notice of such proposed transfer has been posted in three conspicuous places in the district or districts proposed to be transferred, or printed in a paper of general cir-

culation in said county for ten days; nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred, shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer."

However, under the statutes now in force, the only way said village school district can dissolve and become a part of said township rural school district, providing said village school district has a population of less than 1500, is in the manner provided by section 4682-1, G. C., 104 O. L., 133, and in compliance with the requirements of said section and with the provisions of law relating to the power to settle claims, dispose of property or levy and collect taxes to pay existing obligations of a village which has surrendered its corporate powers (section 4689, G. C., 104 O. L., 134).

Under section 4735, G. C., 104 O. L., 138, the provisions of which you have quoted, the four members of the board of education of Perry Township Rural School District, now residing within the territory constituting said rural school district as it now exists, will continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and qualified.

By the creation of said village, which automatically established said village school district, the office of the 5th member of said Perry Township Rural School District, as it existed prior to said creation, who now resides within the corporate limits of said village, was vacated for the reason that by the establishment of said village school district said member became a non-resident of said Perry Township Rural School District, as it now exists.

Section 4784, G. C., provides:

"A vacancy in any board of education may be caused by death, non-residence, resignation, removal from office, failure of a person elected or appointed to qualify within ten days after the organization of the board or of his appointment, removal from the district or absence from meeting of the board for a period of ninety days, if such absence is caused by reasons declared insufficient by a two-thirds vote of the remaining members of the board, which vote must be taken and entered upon the records of the board not less than thirty days after such absence. Any such vacancy shall be filled by the board at its next regular or special meeting, or as soon therafter as possible, by election for the unexpired term. A majority vote of all the remaining members of the board may fill any such vacancy."

This vacancy in said township rural school district may be filled as above provided.

Section 4708, G. C., provides:

"In village school districts, the board of education shall consist of five members elected at large at the same time as municipal officers are elected and in the manner provided by law."

Section 4709, G. C., provides:

"At the first election in such district, a board of education shall be elected, two members to serve for two years and three to serve for four years. At the proper municipal election held thereafter, their successors shall be elected for a term of four years"

If the village of Perry fails or has failed to elect a board of education, as provided in section 4709, G. C., the commissioners of Lake county are authorized and required to appoint such board under the provisions of section 4710, G. C., 103 O. L., 166, and the members so appointed shall serve until their successors are elected and qualified. Section 4710, G. C., as amended, provides as follows:

> "In villages hereafter created, a board of education shall be elected as provided in the preceding section. When villages thereafter created, or which have been heretofore created, fail or have failed to elect a board of education as provided in the preceding section, the commissioners of the county to which said district belongs, shall appoint such board, and the members so appointed shall serve until their successors are elected and qualified. The successors of the members so appointed, shall be elected at the first election for members of the board of education held in such district after such appointment; two members to serve for two years and three members for four years and thereafter their successors shall be elected in the manner and for the term as provided by section 4709 of the General Code. The board so appointed by the county commissioners shall organize on the second Monday after their appointment. If the members of such board are elected at a special election held in such district the members so elected shall serve for the term indicated in the preceding section, from the first Monday in January after the preceding election for members of the board of education and the board shall organize on the second Monday after such election."

As before stated, Perry village school district was established by the incorporation of said village. Replying to your first and second questions, I am of the opinion that before said village district can be dissolved in the manner provided by the statutes hereinbefore cited, and in compliance with the requirements of said statutes, a board of education must be elected as provided by section 4709, G. C., or appointed by the commissioners of Lake county under authority of section 4710, G. C., as amended, for the reason that the dissolution of said village school district and the union of said district with Perry Township Rural School District, under the provisions of section 4682-1, G. C., can be realized only upon the proper action of the board of education of said village school district in compliance with the requirements of said section, which provide:

> "A village school district containing a population of less than fifteen hundred may vote at any general or special election to dissolve and join any contiguous rural district. After approval by the county board such proposition shall be submitted to the electors by the village board of education on the petition of one-fourth of the electors of such village school district or the village board may submit the proposition on its own motion and the result shall be determined by a majority of such electors."

Upon the dissolution of a village school district, under authority of section 4682-1, G. C., and in compliance with the requirements of said statutes, the territory comprising said village school district becomes a part of the contiguous rural school district to which it is joined, by a majority vote of its electors, and all school property held by the board of education of such village school district passes to and becomes vested in the board of education of such rural school district (section 4683, G. C., 104 O. L., 133). The management and control of the schools of said village vests in the board of education of said rural school district.

I am of the opinion, therefore, in answer to your second question, that no action on the part of said board of education of said rural school district, in con-

nection with said dissolution and union, is either authorized or required, and that said board of education of said rural school district has no power to prevent such dissolution and union.

You further inquire whether, after said village school district has been dissolved and has been united with Perry Township Rural School District, said village can withdraw the territory within its corporate limits and re-establish said village school district.

Under the provisions of section 4736, G. C., as amended in 104 O. L., 138, and as now in force, the power to change district lines and to transfer territory from one rural or village school district to another is vested exclusively in the county board of education. Under the above provisions of section 4692, G. C., as amended by amended senate bill No. 282, said county board of education will have authority within the limitations therein provided to change district lines and transfer a part or all of a school district to an adjoining district or districts, and under the provisions of section 4736, as amended by amended senate bill No. 282, said county board of education will have power within the limits provided in said section, to transfer territory and "to create a school district from one or more school districts or parts thereof."

Should the Perry Village School District be dissolved and joined to the Perry Township Rural School District, I am of the opinion that, under the provisions of section 4736, G. C., as amended by amended senate bill No. 282, the county board of education of Lake county would have authority, after said amended senate bill becomes effective, to separate the territory within the corporate limits of said village from said rural school district and re-establish said village school district in the manner provided by said amended section.

I find no provision of the statute, however, under authority of which said village of Perry, or the electors thereof, may, after said village school district has been dissolved and joined to Perry Township Rural School District, withdraw the territory within the corporate limits of said village from said township rural school district and re-establish said village school district.

Your third question must, therefore, be answered in the negative.

Respectfully,

EDWARD C. TURNER,

Attorney General.

570.

BOARD OF EDUCATION OF RURAL SCHOOL DISTRICT—COMPENSATION OF MEMBERS FOR YEARS 1913, 1914, 1915, 1916, 1917—WHERE DISTRICT CONTAINS SIXTEEN OR MORE SQUARE MILES, MEMBERS ENTITLED TO COMPENSATION FOR NOT MORE THAN FIVE MEETINGS IN ANY ONE YEAR IN ANY OF SAID YEARS, EXCEPTING 1913 AND 1914.

Each member of the board of education of a rural school district elected in November, 1913, *was entitled to* $2.00 *compensation for each meeting attended during the year* 1914, *but for not more than ten meetings in said year. For the years* 1915, 1916 *and* 1917, *said member is entitled to* $2.00 *compensation for each meeting attended, but for not more than five meetings in any of said years provided such rural school district contains sixteen or more square miles.*

COLUMBUS, OHIO, July 1, 1915.

HON. HUGH F. NEUHART, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—In your letter of June 20, 1915, you request my opinion as follows:

> "In re compensation of members of board of education elected in 1913, for four years.
>
> "Section 4715, General Code, provided prior to the amendment in vol. 104 page 135 for the compensation of members of the board of education at $2.00 for each meeting actually attended by each member, but for not more than ten meetings in any one year.
>
> "The amendment cuts this number to five.
>
> "Since the date of the passage of this amendment, may members of a board elected in 1913, draw compensation for only five meetings in any year, or may they continue to draw for ten meetings, if that many are held, under the law as it was at the time they were elected?"

Section 4715 of the General Code, prior to its amendment in 104 O. L., 135, provided as follows:

> "Each member of the township board of education shall receive as compensation two dollars for each meeting actually attended by such member, but for not more than ten meetings in any year. The compensation allowed members of the board shall be paid from the contingent fund."

This section, as amended, provides:

> "Each member of the board of education of rural school districts, except such districts as contain less than sixteen square miles, shall receive as compensation two dollars for each regular meeting actually attended by such member, but for not more than five meetings in any year. The compensation allowed members of the board shall be paid from the contingent fund."

Said amended section, by its terms, clearly limits the compensation of a member of the board of education of a rural school district, containing 16 or more square

miles, to $2.00 for each meeting actually attended and for not more than five meetings in any one year. I call your attention, however, to the provisions of section 4735, G. C., as amended in 104 O. L., 138, which are as follows:

> "The present existing township and special school districts shall constitute rural school districts until changed by the county board of education, and all officers and members of boards of education of such existing districts shall continue to hold and exercise their respective offices and powers until their terms expire and until their successors are elected and qualified."

Under this statute, as amended, the former township school districts now constitute rural school district unless changed by the county board of education, but the members of the boards of education of said township school districts, elected in November, 1913, continue in office and their powers and duties are preserved by the provisions of said amended statutes until the expiration of their terms of office and until their successors are elected and qualified.

The question arises whether the compensation of said members is limited by the above provisions of section 4715, G. C., as amended, or whether they are entitled by the provisions of section 4735, G. C., as amended, to compensation for ten meetings attended in any year during the term for which they were elected.

I call your attention to an opinion of my predecessor, Hon. Timothy S. Hogan, rendered to Hon. Olin M. Farber, prosecuting attorney of Richland county, under date of December 8, 1914. The question asked by Mr. Farber was as follows:

> "A member of a township board of education during the year 1914, attended a regular meeting of the board on the first Monday of January, February, March, April, May, June, July and August. Presuming that he will attend four more regular meetings of the board during the year 1914, what compensation will he be entitled to for such services performed during the year 1914?"

This question was answered by reference to the provisions of the above sections of the General Code, as amended in 104 O. L., I quote the following from Mr. Hogan's opinion:

> "Your question presents an entanglement of legal difficulties. Whatever theory of solution is adopted in answer to the difficulty presented meets with an obstruction of serious legal consequences, and I am unable to arrive at any conclusion which presents a clearly smooth and satisfactory legal answer. I, therefore, feel urged to present that solution which has the best appearance of fairness and logical practicability. To my mind, the best construction that the conflicting provisions can be given would be the holding that the officers in question be permitted to draw the salaries prescribed by a statute prior to the amendment above referred to, for the entire year 1914. I, therefore, advise that the officers be permitted to draw their salaries for the year 1914, under section 4715, General Code, under the assumption that said statute remains in force and effect until the first Monday of January, 1915. The officers, therefore, will receive $2.00 per meeting for each meeting actually attended during the year 1914, but for not more than ten meetings in the year. After that time, the compensation prescribed by the amended statute above quoted may, in equity and fairness, be permitted to control."

I concur in this opinion, as I think it offers a practical solution to the problem presented by the conflicting provisions of the statutes.

I am of the opinion, therefore, in answer to your question, that each member of the board of education of a rural school district, elected in November, 1913, was entitled to $2.00 compensation for each meeting attended during the year 1914, but for not more than ten meetings in said year, and that, for the years 1915, 1916 and 1917, said member is entitled to $2.00 compensation for each meeting attended, but for not more than five meetings in any of said years, provided such rural school district contains 16 or more square miles.

A copy of Mr. Hogan's opinion above referred to is enclosed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

571.

BANKS PURCHASING BONDS ISSUED BY MUNICIPALITIES OUTSIDE OF OHIO AND RESELLING THEM TO OWN CUSTOMERS WHEN SALES AMOUNT TO MORE THAN FIFTY PER YEAR COME UNDER PROVISION OF "BLUE SKY" LAW—SUCH BANK SHOULD BE LICENSED AS "DEALER."

The Bremen Bank Company, Bremen, Ohio, which purchases quantities of bonds issued by municipalities outside of Ohio primarily for its own account, but many of which are sold to its own customers desiring investments, such sales numbering more than fifty per year, should be licensed as a "dealer" under the provisions of the "blue sky" law.

COLUMBUS, OHIO, July 1, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of June 23, 1915, requesting my opinion as follows:

> "The Bremen Bank Company, of Bremen, Ohio, is organized under the laws of the state of Ohio and subject to examination and regulation by the banking department, under the provisions of the banking laws of Ohio.
>
> "The company does a general banking business at Bremen, Ohio. It carries on its books a bond account averaging about twenty-five thousand dollars. The cashier of the bank, Mr. George W. Baldwin, informs this department that the bank buys municipal bonds issued by municipalities outside the state of Ohio, and that very few of the bonds of Ohio municipalities are bought by the bank. The primary object of these purchases, Mr. Baldwin says, is to carry that amount of money invested in assets readily convertible into cash, in the event that the reserve of cash falls below the limit. The cashier also informs the department that the bank sells the bonds to those of its customers who insist upon making an investment, but not in any instance does it insist or offer, or initiate an offer to sell the bonds. The profit which the bank realizes from the sale of the bonds to customers varies from one-eighth to one-half of one per cent. never exceeding, so the cashier states, one-half per cent. The sales would not be made, according to the statement of the cashier, except to

accommodate customers of the bank and prevent them from going elsewhere to make investments. The officers of the bank admit that the number of sales of bonds by them will exceed fifty each year.

"Under the above statement of facts, is the Bremen Bank Company a 'dealer' within the meaning of the Ohio blue sky law, and is it necessary for the bank to be licensed as such dealer?"

The term "dealer" as used in the Ohio blue sky law is defined in section 6373-2 of the General Code. This section is quite lengthy, and I quote such part only as is applicable to the situation presented in your letter:

"* * * The term 'dealer,' as used in this act, shall be deemed to include any person or company, except national banks, disposing or offering to dispose, of any such security, through agents or otherwise, and any company engaged in the marketing of flotation of its own securities either directly or through agents or undewriters or any stock promotion scheme whatsoever, except:

"(a) An owner, not the issuer of the security, who disposes of his own property, for his own account; when such disposal is not made in the course of repeated and successive transactions of a similar character by such owner; or a natural person, other than the underwriter of the security, who is the bona fide owner of the security and disposes of his own property for his own account. * * *."

The primary purpose of the blue sky law is to prevent fraud in the sale of securities and certain other kinds of property, and thereby to protect and assist the investing public. Since the disposition of worthless or doubtful securities is usually accomplished through unscrupulous agents, commission brokers and promotors who do not own the securities sold by them, it was natural that the supervisory and regulatory features of the law are chiefly directed towards these classes of sellers, and that the owners of such securities are, within certain limitations, excepted from the requirements of the act and are permitted to sell such property outside of the requirements of the law.

Therefore, under the statutory definition above quoted, an owner of securities, such as are referred to in your letter, may dispose of the same without the necessity of being first licensed as a "dealer" "when such disposal is not made in the course of repeated and successive transactions."

If the Bremen Bank Company confines its disposal of securities to such a limited number of sales as would properly enable it to carry out what you have designated in your letter as "the primary object of these purchases," i. e., to readily secure cash in event the bank's cash reserve falls below the limit, I would be inclined to the opinion that such sales were not "made in the course of repeated and successive transactions of a similar character."

It appears from the statements of your letter, however, that the bank also sells these bonds "to those of its customers, who insist upon making an investment, but not in any instance does it insist or offer or initiate an offer to sell bonds." It further appears that a considerable number of such sales are made each year. The bank, therefore, has a double purpose to serve in purchasing these securities; a considerable portion of the same are purchased, not simply to secure ownership for investment purposes, but to be resold to its customers "in repeated and successive transactions." It is immaterial in such transactions whether or not the bank solicits its customers to purchase or the customer solicits its bank to sell. The point of importance is, that such sales constitute *repeated and successive transactions.*

I am of the opinion that the facts stated in your letter bring The Bremen Bank Company of Bremen, Ohio, within the definition of the term "dealer," and that it should be required to secure a license as such dealer.

Respectfully,
EDWARD C. TURNER,
Attorney General.

572.

VILLAGE SCHOOL DISTRICT—SUBJECT TO A TAX FOR ANY INDEBTEDNESS INCURRED BEFORE DISSOLUTION—OLD BOARD CONTINUES TO PROVIDE LEVY UNTIL OBLIGATION IS PAID—NO PROVISION TO RE-ESTABLISH A VILLAGE SCHOOL DISTRICT ONCE IT UNITES WITH A CONTIGUOUS RURAL SCHOOL DISTRICT.

Upon the dissolution of a village school district under authority of section 4682-1, *G. C.*, 104 *O. L.*, 133, *only the property within the limits of said village school district will be subject to a tax levy for the payment of any indebtedness incurred by the board of education of said village school district and the board of education of said rural school district has no authority in law to assume such indebtedness or to levy a tax to provide a fund for the payment thereof. If the levy for the payment of said indebtedness shall not have been made by the board of education of said village school district at the time of dissolution, said village school district as a separate taxing district, and its board of education as its taxing authority, must continue for the purpose only of levying a tax for the payment of such indebtedness until such time as said indebtedness will have been paid.*

After a village school district has been dissolved under authority of section 4682-1, *G. C.*, 104 *O. L.*, 133, *and united with the contiguous rural school district, there is no provision of the statutes now in force under authority of which the territory within the corporate limits of the village may be separated from said contiguous rural school district and under which said village school district may be re-established.*

COLUMBUS, OHIO, July 1, 1915.

HON. G. A. STARN, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—In your letter of June 25th, you request my opinion as follows:

> "On July 12th, the Doylestown Village School District will hold a special election to dissolve and join the contiguous rural district. The village district has a bonded indebtedness, which bonds were issued for the purpose of constructing their building, and the last of these bonds do not mature until 1923.
>
> "This election is being held by reason of the provisions of sections 4682-1 and 4683 of the General Code as found in volume 104, page 133, of Ohio laws.
>
> "Should the election result in a dissolution of the village district who then will pay the balance of this bonded indebtedness, the village district or the newly formed rural district?
>
> "Section 4735-2 as found in the same year book, page 138, provides that a dissolution shall not be complete until the board of education of the

district has provided for the payment of any indebtedness that may exist. However, this section does not have application to the one which provides for the dissolution of a village district. I do not know of any section of law that provides for the payment of indebtedness upon the dissolution of a village district and for that reason I could not properly advise the citizens of the Doylestown Village School District.

"I would be very much obliged if you will advise me on this matter at once as the citizens desire to know before they hold their election, and I should know at least several days before the election so as to fully inform all of the people.

"In the event that the village district is obliged to pay this indebtedness then I take it that the dissolution could not be complete until this indebtedness is paid, for the reason there could be no taxing district in which to make a levy to raise the money for the purpose of paying this indebtedness.

"Should this dissolution take place at this time and after a period of several years the citizens of Doylestown should again desire to form a village district for their village, what method should be pursued to bring this about?"

Your first question has been answered in opinion No. 287 of this department rendered to Hon. F. C. Goodrich, prosecuting attorney of Miami county, under date of April 26, 1915. This opinion held that, upon the dissolution of a village school district under authority of section 4682-1, G. C., as found in 104 O. L., 133, the title to the school property of said school district passes to and vests in the board of education of the contiguous rural school district to which said village school district is joined, but only property within the limits of said village school district would be subject to a tax levy for the payment of any indebtedness incurred by the board of education of said village school district, and the board of education of said rural school district has no authority in law to assume said indebtedness or to levy a tax to provide a fund for the payment thereof, either upon the property within the limits of said village school district or upon the general duplicate of the rural school district.

The opinion further holds that, if the levy for the payment of said indebtedness shall not have been made by the board of education of said village school district at the time of dissolution, said village school district as a separate taxing district, and its board of education as its taxing authority, must continue for the purpose only of levying a tax for the payment of such indebtedness until such time as said indebtedness will have been paid.

I enclose herewith copy of this opinion.

I find no provision of the statute under authority of which said village of Doylestown or the electors thereof may, after said Doylestown Village School District has been dissolved and united with the contiguous rural school district, withdraw the territory within the corporate limits of said village and re-establish said village school district.

I call your attention, however, to the provisions of section 4736, G. C., as amended by amended senate bill No. 282, passed by the general assembly May 27, 1915, and which will become effective August 26, 1915. This section as amended provides:

"The county board of education shall arrange the school districts according to topography and population in order that the schools may be most easily accessible to the public, and shall file with the board or boards of education in the territory affected, a written notice of such proposed arrangement; which said arrangement shall be carried into effect as proposed unless, within thirty days after the filing of such notice with the

board or boards of education a majority of the qualified electors of the territory affected by such order of the county board, file a written remonstrance with the county board against the arrangement of school districts so proposed. The county board of education is hereby authorized to create a school district from one or more school districts or parts thereof. The county board of education is authorized to appoint a board of education for such newly created school district and direct an equitable division of the funds or indebtedness belonging to the newly created district. Members of the boards of education of the newly created district shall thereafter be elected at the same time and in the same manner as the boards of education of the village and rural districts."

Should the Doylestown Village School District be dissolved at this time and joined to the contiguous rural school district I am of the opinion, in answer to your second question that, prior to August 26, 1915, the date when said amended senate bill No. 282 becomes effective, there is no provision of the statute under authority of which the territory within the corporate limits of said village of Doylestown may be separated from said contiguous rural school district and under which the said Doylestown Village School District may be re-established. I am of the opinion, however, that on and after said date of August 26, 1915, the board of education of Wayne county will have authority, under the provisions of section 4736, G. C., as amended by said amended senate bill No. 282, to separate the territory within the corporate limits of said village from said contiguous rural school district and re-establish said village school district in the manner provided in said amended section.

Respectfully,
EDWARD C. TURNER,
Attorney General.

573.

COUNTY COMMISSIONERS FIX BOND OF COUNTY TREASURER—HOW AMOUNT SHOULD BE DETERMINED—SURETIES MAY BE PERSONAL OR BONDING COMPANIES.

The commissioners of the county are authorized to fix the amount of the bond to be required of the county treasurer before entering upon the discharge of his office, but the bond should not be fixed in an amount less than the probable maximum of the public moneys that may come into the custody of the treasurer at any one time during his term.

The treasurer is authorized to furnish a bond with two or more surety or bonding companies as sureties thereon, and the expense thereof is to be paid by the commissioners out of the general fund of the county. The treasurer may at his option furnish bond with four or more freehold sureties, but the commisisoners have no option to require such freehold sureties against the option of the treasurer.

COLUMBUS, OHIO, July 1, 1915.

HON. CLARK GOOD, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—Under date of June 21, 1915, you requested my written opinion as follows:

"As I understand the new law with reference to the bond for county treasurer provides that they shall give a surety bond (and the cost), therefor shall be paid by the county.

"In our county it is the desire of our county commissioners to reduce the treasurer's bond from $170,000 to $50,000, in order to save the extra premium.

"Please let me know if you think this would be advisable, and whether or not, in your opinion, there is any way to avoid this law and follow the old procedure."

Section 2633, G. C., as amended 103 O. L., 540, provides:

"Before entering upon the duties of his office, the county treasurer shall give bond to the state in such sum as the commissioners direct with two or more bonding or surety companies as surety, or at his option, with four or more freehold sureties approved by the commissioners and conditioned for the payment, according to law, of all moneys which come into his hands, for the state, county, township or other purposes. If bond with bonding or surety companies as surety, be given, the expense or premium for such bond shall be paid by the commissioners and charged to the general fund of the county. Such bond, with the oath of office and the approval of the commissioners endorsed thereon, shall be deposited with the auditor of the county and by him carefully preserved in his office. Such bond shall be entered in full on the record of the proceedings of the commissioners, on the day when accepted and approved by them."

The foregoing section requires that the treasurer, before entering upon the duties of his office, shall give bond to the state in such sum as the commissioners direct, and while it is the duty of the commissioners in determining the amount for which bond should be required, to have due regard for the amount of the public moneys that will probably come into the custody of the treasury, to the end that the bond shall provide adequate security against misappropriation of such public moneys, yet the authority to determine the amount of the bond so to be required of the treasurer is vested in the county commissioners.

Section 2635, G. C., provides:

"When, in the opinion of a majority of the county commissioners, the sureties have become insufficient, they may require the county treasurer to give additional sureties on his previously accepted bond. When in their opinion more money has passed or is about to pass into the hands of the treasurer than is or would be covered by his bond, they may demand and receive from such treasurer an additional bond, payable and conditioned as required for the original bond with such sureties and in such sum as they direct. If a county treasurer fails or refuses to give such additional sureties or bond for ten days from the day on which the commissioners so require, his office shall be vacant and another treasurer appointed, as in other cases of vacancy."

The foregoing section clearly evidences the legislative intent that the amount of the treasurer's bond shall at all times be equal to the maximum amount of public money that has passed or may pass into his hands at any time during his term.

In the instance of which you inquire, if the commissioners find that a bond in the sum of fifty thousand dollars will cover the maximum amount of the public moneys that may pass into the custody of the treasurer at any time during his

term they are authorized to fix his bond in that amount, but the bond should not be fixed in an amount below the probable maximum of the money that may come into the treasurer's custody during his term.

The bond required of the county treasurer may be either a bond with two or more surety or bonding companies, as sureties thereon, or with four or more freehold sureties, at the option of the treasurer.

This bond, of course, is to be a joint and several bond and it was held in an opinion rendered by this office to Hon. S. W. Ennis, prosecuting attorney, Paulding, Ohio, under date of January 30, 1915, that two separate bonds, each with one surety or bonding company as surety thereon, is not a compliance with the statute and that unless the bond is joint and several and contains the names of at least two bonding or surety companies as surety, it should be rejected.

If, however, a bond in proper form and in the amount directed by the commissioners, with two or more sufficient surety or bonding companies as sureties thereon, is offered by the treasurer before entering upon the discharge of his office, it is the duty of the commissioners to accept and approve such bond and pay the premium or expense thereof out of the general fund of the county.

The option to provide a bond with four freehold sureties may only be exercised by the treasurer and is not available to the commissioners, and the acceptance of a bond with two or more sufficient surety or bonding companies as sureties, which is in all other respects in conformity with the requirements of the statutes and in the amount directed by the commissioners, is a duty which would be enforced by mandamus. See State ex rel. Eppler v. Lewis, 10 O. S., 128; State ex rel. Bellows v. City Council of Cincinnati, 11 O. S., 544; State ex rel. Barnes v. Commissioners of Belmont county, 31 O. S., 451.

I, therefore, advise that the authority to fix the amount of the bond of the county treasurer is vested in the commissioners of the county, and in the instance of which you inquire, the commissioners are authorized to fix the incoming treasurer's bond at $50,000.00 provided they find this amount will cover the maximum amount of the public moneys that will probably come into the custody of the treasurer at any one time during his term, but the bond should not be fixed at an amount below the probable maximum of the money so coming into his hands; that the treasurer is authorized to furnish bond with two or more surety or bonding companies as sureties, the expense or premium therefor to be paid by the commissioners and charged to the general fund of the county, and that the treasurer cannot be required to furnish a bond with freehold sureties against his option.

Respectfully,
EDWARD C. TURNER,
Attorney General.

574.

DISAPPROVAL OF RESOLUTION FOR IMPROVEMENT OF CHILLICOTHE-McARTHUR ROAD IN ROSS COUNTY.

COLUMBUS, OHIO, July 1, 1915.

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

DEAR SIR:—I have your communication of June 30, 1915, transmitting to me for examination final resolution as to the Chillicothe-McArthur road in Ross county, petition No. 1671, I. C. H. No. 365.

Permit me to call your attention to the fact that while the estimated cost of this improvement is $14,400.00, the amount appropriated and certified by the

county commissioners is $9,800.00 and the amount certified by the chief clerk of the state highway department is $4,400.00, making a total of only $14,200.00, or $200.00 less than the estimated cost and expense of the improvement. It is, therefore, apparent that the total amount to be expended by the state and county is $200.00 less than the total estimated cost and expense, and for this reason I am returning the resolution in question without my approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

575.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF ROADS, ROSS AND KNOX COUNTIES.

COLUMBUS, OHIO, July 1, 1915.

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

DEAR SIR:—I have your communication of June 30, 1915, transmitting to me for examination final resolutions as to the following roads:

Chillicothe-Lancaster, Ross county, petition No. 1672, I. C. H., No. 361.
Mt. Vernon-Coshocton, Knox county, petition No. 990, I. C. H. No. 339.

I find that these resolutions are in regular form and therefore return the same with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

576.

AGRICULTURAL COMMISSION—DEAN OF COLLEGE OF AGRICULTURE OF OHIO STATE UNIVERSITY DISQUALIFIED FROM ACTING AS MEMBER OF AGRICULTURAL COMMISSION AFTER EXPIRATION OF TERM AS DEAN.

The member of the agricultural commission of Ohio who holds his office by virtue of being dean of the college of agriculture of the Ohio State University does not continue as a member of the agricultural commission after the expiration of his term of appointment or employment as dean of said college until his successor is appointed and qualified; nor is he entitled to continue in the position of dean until his successor is appointed and qualified, such position not constituting an office of public trust.

COLUMBUS, OHIO, July 1, 1915.

Agricultural Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of June 29th, in which you submit for my opinion a question which, for the sake of brevity, may be stated as follows:

"Does the member of the agricultural commission of Ohio, who holds his office by virtue of being dean of the college of agriculture of the Ohio

State University, as provided by section 1079 of the General Code, (as amended 104 O. L., 201) continue as a member of the agricultural commission after the expiration of his term of appointment or employment as dean of said college until his successor is appointed and qualified?"

In the specific case, the term of the member in question as dean has expired, but no successor has been chosen.

I find upon further investigation at the office of the secretary of the board of trustees of the Ohio State University that the capacity in which the gentleman in question was acting as member of the agricultural commission prior to June 30, 1915, was by virtue of his incumbency of the position of dean of the college of agriculture of the university, as stated by you, and not by virtue of what I take it was his original appointment as member of the commission under original section 1079, G. C., as enacted 103 O. L., 304.

This original law provided in effect that the fourth member of the commission should be appointed by the trustees of the Ohio State University in the same manner as is provided by law for the appointment and removal of professors of the university, and that the persons so appointed should have general charge, subject to the board of trustees of the university, of the college of agriculture thereof.

The manner in which the trustees of the university have been electing their professors under section 7949 of the General Code, is for specified terms of one year, and this, in my opinion, is legal.

I ascertained the fact to be that the tenure of the person in question under his original appointment expired on June 30, 1914; so that nothing in section 3 of the act found in 104 O. L., 201, amending section 1079 of the General Code, as enacted in 1913, had the effect of preserving his tenure under such original appointment. That being the case, the sole question to be considered is the interpretation of section 1079 of the General Code, as amended 104 O. L., 201, in the light of the amendments then made and the provisions relative to the appointment of college officers by the trustees of the Ohio State University, with a view to determining whether or not the fourth member of the agricultural commission is governed by the provisions of section 8 of the General Code, which is as follows:

"Sec. 8. A person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

Section 1079, G. C., as last amended, provides as follows:

"Sec. 1079. There shall be an agricultural commission of Ohio and by that name the commission may sue and be sued. The agricultural commission shall consist of four members, three of whom shall be appointed by the governor with the advice and consent of the senate. The three members appointed by the governor shall be directly identified with agriculture or agricultural education, and not more than two of the members so appointed shall be of the same political party. Within thirty days from the time that this act shall take effect, the governor shall with the advice and consent of the senate appoint a member who shall serve two years, another who shall serve four years, and another who shall serve six years; and thereafter each member appointed by the governor shall be appointed and confirmed for a term of six years. Vacancies shall be filled in the same manner for unexpired terms. They shall be subject to removal

as may be provided by law. The dean of the college of agriculture of the Ohio State University shall be the fourth member of such commission and the governor of the state shall be ex-officio member thereof."

The meaning of this section is very plain to me. There is specific provision therein for the terms of office of the three members of the commission to be appointed by the governor and for the filling of vacancies therein. But as to the fourth member it is simply provided that the dean of the college of agriculture shall be such fourth member. There is no requirement that the trustees of the university shall appoint a dean, nor that there shall at all times be an incumbent of the position of dean of the college of agriculture of the Ohio State University. Nevertheless, if there is at any time a vacancy in the deanship, or a failure to elect a dean, a vacancy is thereby created in the position of the fourth member of the agricultural commission, and there is no means of filling such vacancy otherwise than by the appointment of such a dean.

It is obvious, then, that the moment a person who has been dean of the college of agriculture ceases to be such dean, he likewise ceases to be a member of the agricultural commission, as his membership on such commission is not personal, but ex-officio.

It follows, therefore, that unless the position of dean of the college of agriculture of the Ohio State University is subject to section 8 of the General Code, the the said section does not apply to the position of fourth member of the agricultural commission, because that position is filled not by "a person" within the meaning of section 8, as such, but by the incumbent of the other position, as such.

In my opinion, the position of dean of the college of agriculture of the Ohio State University is not "an office of public trust" within the meaning of section 8, G. C. In order to create an office legislation is necessary, and no such position is referred to in the statutes of the state other than section 1079 of the General Code, which has not the effect of creating the office of dean. Moreover, permanency is one of the chief and distinguishing characteristics of an office, whereas even if the position of dean be regarded as a college office, it cannot be regarded as permanent, for the trustees of the university may create and abandon it at will.

It is my opinion, therefore, that upon the expiration of the term of service or employment of the gentleman in question as dean of the college of agriculture of the Ohio State University, and the failure of the trustees of the university to elect a successor to him in such capacity, he was not entitled by virtue of section 8 of the General Code, to continue as dean of the college of agriculture, and not being entitled to continue in such capacity he thereby ceased to be a member of the agricultural commission, and the position of fourth member of such commission thereby became vacant, and will not be filled again until the trustees of the university elect some one as dean of the college of agriculture of the university.

Respectfully,

EDWARD C. TURNER,

Attorney General.

577.

BOND ISSUE IN VILLAGES—ELECTION—RETURNS—HOW COUNTED —DISPUTED BALLOTS COUNTED BY VILLAGE CLERK, UNLESS IT IS IMPOSSIBLE TO DETERMINE CHOICE OF VOTER.

The returns of elections upon the question of bond issue held in villages, is required by the provisions of section 5114, *G. C., to be made to the clerk of the village. In the event the judges of election at such village election cannot agree as to how a ballot or any part of the same should be counted, all such ballots should be placed in an envelope and returned with the returns of the election to the clerk of the village and should be opened and counted by the clerk in the presence of the mayor as provided by sections* 5114 *and* 5090, *G. C. Disputed ballots in such case should be counted by the clerk if, as a matter of fact, it is not impossible to determine therefrom the choice of the voter.*

If it is impossible to determine the choice of the voter from such disputed ballot the same should not then be counted in determining the total number of voters voting upon the question.

COLUMBUS, OHIO, July 2, 1915.

HON. IRVING CARPENTER, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of June 16, 1915, as follows:

"At a special election held yesterday in the village of Greenwich, this county, there was submitted the question of issuing the bonds of said village, for the improvement and extension of the village water works plant. At this election 97 votes were cast in favor of the issue and 47 against it, with two ballots which, instead of having the cross marks in the space at the left, before the words 'For the issue of bonds,—no,' had the word 'no' written. Two of the judges of the election insisted that these ballots should not be counted at all, the other two were equally insistent that they be counted as negatives, which would have defeated the election.

"Being unable to agree these ballots were sealed up and return of the entire election made to the secretary of the deputy state supervisors of elections. The deputy state supervisors are now asking my advice in the matter and I, in turn, wish to ask you the following questions:

"(1) To whom should return of such election be made?

"(2) By whom should the question as to how these ballots should be counted, be determined, the judges of election being deadlocked on the question?

"(3) Should these ballots be counted?

"My own opinion is, this being a municipal election, return should be made to the village clerk and not the deputy state supervisors of election; that by him the vote should be canvassed, but whether he would have power to determine the manner of counting disputed ballots like these, is a serious question to me and I am unable to determine it. It is my opinion that it is possible to determine the intention of the elector in this case and that that intention was a negative vote.

"A prompt decision of this question will be very much appreciated, both by the people of Greenwich and myself."

The above is supplemented under date of June 22, 1915, as follows:

"Supplementing my communication to you of the 16th and your inquiry about the same under date of the 18th, regarding the special election held in the village of Greenwich, beg to advise you that I have secured a copy of the resolution authorizing the election and find therein the recital that the proceeding is 'under and by authority of sections 3941, 3949 and 3952, and other sections of the General Code, relating to this subject as to the limitation of bond issue.'

"I have also secured a form of the ballot used in that election and find it to be in the following form, rather than the form suggested in my former letter:

	For the issue of Bonds
	Against the issue of Bonds

"Trusting that this information may prepare you to give me an early response, I am."

Section 3945, G. C., with reference to elections held under the provisions of section 3942, 3943 and 3944 of the General Code, provides:

"The election shall be held at the regular place or places of voting in the municipality, and be conducted, canvassed and certified in like manner, except as otherwise provided by law, as regular elections in the municipal corporation for the election of officers thereof."

Section 5114, G. C., relative to municipal elections, provides:

"The returns of municipal elections shall be made by the judges and clerks in each precinct to the clerk or auditor of the municipality. Such clerk or auditor, or, in his absence or disability, a person selected by the council, shall call to his assistance the mayor, and, in his presence, make an abstract and ascertain the candidates elected, as herein required with respect to county officers. Such clerk or auditor shall make a certificate as to each candidate so elected, and cause it to be delivered to him. If there is no mayor, or he is absent, disabled or a candidate at such election, the clerk or auditor shall call to his assistance a justice of the peace of the county."

In registration cities the returns of the election of municipal officers, members of the board of education and justices of the peace are required, under the provisions of section 5115, G. C., to be made to the board of deputy state supervisors of elections. From the provision of section 5114, G. C., supra, it seems quite clear

that the returns of the election to which you refer are required to be made to the clerk or auditor of the municipality in which the same was held, and the clerk or auditor, or such persons as may be selected by council in his absence or disability, is charged with the duty of making an abstract of the vote cast in the presence of the mayor, or a justice of the peace in the absence, disability or disqualification of the mayor.

Section 5083, G. C., provides for the manner in which the ballots shall be counted and that "in the event the judges do not agree as to how any part of the ballot shall be counted, such ballot shall not be counted but shall be placed in an envelope provided for the purpose."

Section 5090, G. C., as amended in 103 O. L., 266, provides as follows:

> "If there are any ballots placed in the envelopes for uncounted ballots, such envelopes shall be sealed and returned to the deputy state supervisors with the returns of the election, to be by him counted. At least one day before the beginning of the official count, the board of deputy state supervisors, in the presence of one person duly authorized by the chairman of each county controlling committee and the chairman of the committee of each set of candidates nominated by petition, shall open the envelopes containing the uncounted ballots and determine what part and for whom each such ballot shall be counted, and proceed to count and tally the same. Said ballots shall be further preserved for such judicial or other investigation as may be necessary."

Here it will be noted that the disputed ballots are required to be returned to to the deputy state supervisor of elections *with the returns of the election.* The returns of municipal elections, except in registration cities, as seen above, are required to be made to the clerk or auditor of the municipality. Thus the question arises whether or not the disputed ballots referred to shall be returned with the returns of the election to the clerk or auditor of the municipality, as provided in section 5114, G. C., or to the deputy state supervisor of elections with the returns, as provided in section 5090, G. C.

If it be held that a strict and literal construction of section 5090, General Code, should be maintained, it would result that the auditor or clerk of the municipality would be unable to determine the result of the election, as there is no statutory requirement that the result of the counting of disputed ballots by the deputy state supervisor of elections be certified or communicated to such clerk or auditor. It is more natural to conclude that it was the legislative purpose in the enactment of section 5114, G. C., supra, to substitute the clerk or auditor and the mayor of the municipality for the deputy state supervisor of elections, in case of municipal elections, and that all the powers and duties of the deputy state supervisor of elections relative to canvassing the vote and counting the disputed ballots in county, state and municipal elections in registration cities, should in municipalities devolve upon the clerk or auditor of the municipality, to be exercised and performed in the presence of the mayor or such other person, as provided by section 5114, G. C.

Since it has been determined that the returns of the election in the municipality referred to should be made to the clerk and it is provided that the disputed ballots should be returned with the returns, I am therefore of the opinion, in answer to your second question, that the disputed ballots should be transmitted with the returns to the village clerk and be by him opened, and upon examination thereof he should then determine whether or not the same, or what part of them, should

be counted. The determination of this latter question, which is third submitted by you, involves a consideration and application of sub-division 9 of section 5070, G. C., which provides:

> "No ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice."

From this it follows that every case must be determined from its own facts. That is to say, this is in every case purely a question of fact for the determination of which no rule can be laid down. The answer to your third question then must be—if it is not impossible for the clerk of the village to determine from the ballot the choice and intention of the voter, it is his duty to count the same in accordance with the voter's choice so expressed.

The question of determining the result of the election, although not submitted, is suggested by your inquiry. Section 3947, G. C., provides as follows:

> "If two-thirds of the voters voting at such election upon the question of issuing the bonds vote in favor thereof, the bonds shall be issued. Those who vote in favor of the proposition shall have written or printed on their ballots, 'For the issue of bonds'; and those who vote against it shall have written or printed on their ballots, 'Against the issue of bonds'."

It will be observed that it is here required that two-thirds of the voters voting upon the question vote in favor thereof. "Vote" is defined to be the expression of wish or choice or preference, to the exclusion of the means by which or the method through which that result was accomplished.

> 29 Am. and Eng. Ency., 1074;
> 40 Cyc., 224.

To vote then is to express the choice or preference of the voter upon the question to be determined, and the "voters voting" comprehends only those electors who have given effective expression to their choice, preference or will relative to such question. In other words, to vote is to communicate the will or choice of the elector by whatever appropriate means or method adopted or established. The means of expressing the choice of electors in public elections is established by law in this state to be the ballot, but the mere casting of a ballot under the present system of elections, is not assumed to give effective expression to the choice of the voters and cannot therefore be held to be voting in the proper sense of the term.

An attempt to give expression to the will of the voter upon a ballot, if wholly unintelligible, cannot be said to constitute a vote. The vote is the expressed or communicated choice of the voter, while the ballot constitutes only the established facility for such expression—a means to the end sought.

In the case of Dexter v. Raine, Auditor, 18 L. B., 62, it is said:

> "A vote is but the expression of the will of the voter." State v. Greene, 37 O. S., 230. "Where no will is expressed no vote is cast. The man who casts a ballot expressing no will, does not cast a vote any more than he who absents himself from the polls."

If then it is impossible to determine the will of the voters from the ballots in question, they do not constitute votes upon the question within the meaning of the terms of the statute and should not be counted in a computation of the total

number of those voting upon the question. The total number of those voting, as per your letter, would be 144, and 97 being cast in favor of the question—more than two-thirds of the total—the issuance of the bonds is approved.

If it be determined that it is not impossible to ascertain the will of the voters from the ballots referred to and that such will or choice of the voter is in the affirmative, upon the question submitted, the total number of votes will then be 146, 99 of which votes being in the affirmative, the bond issue would therefore be approved. If the will of the voters of these two ballots be determined to be in the negative, the total number of votes will be 146, with but 97 votes in the affirmative or less than two-thirds of the total, and the issue of bonds will have failed of approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

578.

STATE BUILDING REGULATIONS—WHETHER APPLICABLE TO A BUILDING ERECTED AT COST LESS THAN $3,000, AND PAID FOR FROM APPROPRIATIONS UNDER HOUSE BILL NO. 701.

A building of a state institution to be erected at a cost of less than three thousand dollars, to be paid for from appropriations made under house bill No. 701, is not subject to state building regulations (sections 2314, et seq., G. C.), but is subject to section 6 of house bill No. 701.

COLUMBUS, OHIO, July 1, 1915.

HON. R. M. HUGHES, *President, Miami University, Oxford, Ohio.*

DEAR SIR:—Under date of June 28th, you wrote to me as follows:

> "Some time since, we advertised for bids on eight different items included in the necessary alterations to enlarge our heating plant. Among these was an extension to the engine room. The estimate on this item was lower than the bid, and so we were obliged to reject the bid on this part of the work. The low bid was a little over $1,700.00 and there were several other bids very little higher. It occurs to me that as the total cost of this addition is less than $3,000.00, it might be possible for us to construct this on a time and material basis without further advertising. Will you kindly advise me if this is permissible under the law?"

The sections of the General Code relative to building regulations are sections 2314, et seq.

Section 2314 provides as follows:

> "Before entering into contract for the erection, alteration or improvement of a state institution or building or addition thereto, excepting the penitentiary, or for the supply of materials therefor, the aggregate cost of which exceeds three thousand dollars, each officer, board, or other authority by law charged with the supervision thereof, shall make or cause to be made the following; full and accurate plans, showing all necessary details of the work, with working plans suitable for the use of

mechanics and other builders in such construction, so drawn and represented as to be plain and easily understood; accurate bills showing the exact amount of different kinds of material necessary to the construction to accompany such plans; full and complete specifications of the work to be performed, showing the manner and style required with such directions as will enable a competent mechanic or other builder to carry them out and afford bidders all needful information; a full and accurate estimate of each item of expense and of the aggregate cost thereof."

Since the aggregate cost of the improvement under contemplation will not exceed three thousand dollars, the above sections will not apply.

The improvement in question is to be made from the appropriation made to your university under house bill No. 701, and is to be made, as I am informed, from the appropriation known as

"G Additions and Betterments.
"G 2. Structures and Parts.
"Completing improvements to heating and lighting plant_____$6,100.00."

Under section 6 of said bill, after providing that the moneys appropriated by the bill shall be drawn upon a requisition or voucher, it is provided as follows:

"Such requisitions or vouchers shall set forth in itemized form and specify the classification of the service rendered, material furnished, or expenses incurred, and the date of purchase or time of service, and show that competitive bids were secured, unless otherwise provided by law; or unless in the judgment of the board as provided in section 4 herein, it is impracticable because of the peculiar nature or location of the work to be done, in which case the above mentioned board may in writing authorize the department affected to proceed to do the work, or that it was an emergency requiring purchase."

Although, as before stated, the improvement in question does not come under the building regulations as found in the General Code, nevertheless, the expenditure of such money must show that competitive bids were secured, unless otherwise provided by law. I do not find any statute that provides that competitive bidding shall not be secured.

The board mentioned in section 4 consists of the governor or any competent, disinterested person appointed by him for such purpose, the chairman of the finance committee of the house of representatives and senate, respectively, the attorney general and the auditor of state.

In order, therefore, that the university may construct the extension to the engine room referred to on a time and material basis without further advertising, it must obtain the authorization in writing of the above mentioned board.

It would seem to me, therefore, that at least the better way to do is to advertise for bids in order that competitive bidding may be secured. The length of advertising or the manner of advertising is not specified in the appropriation bill, but rests in the sound discretion of the board of trustees.

Respectfully,
EDWARD C. TURNER,
Attorney General.

579.

BUREAU—UNAUTHORIZED TO MAKE FINDING FOR RECOVERY OF FEES AND COSTS COLLECTED BY SPECIAL CONSTABLE APPOINTED BY JUSTICE OF THE PEACE—SECTION 3331, G. C., DISCUSSED.

The bureau of inspection and supervision of public offices is unauthorized to make a finding for recovery of fees and costs collected and received by a special constable appointed by a justice of the peace, although none of the grounds therefor as set forth in section 3331, *G. C., in fact exist.*

COLUMBUS, OHIO, July 3, 1915.

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

GENTLEMEN:—I acknowledge receipt of your favor under date of June 8, 1915, which is as follows:

> "We would respectfully request your written opinion upon the following question:
>
> "In an instance where it is known that a justice of the peace appoints a special constable in order to favor some friend and to ignore the regularly elected constables of his township without observing the particular reasons for such appointment as stipulated in section 3331, General Code, could our examiners make a finding against the person so appointed as special constable for the recovery of fees so paid him?"

The general authority for the appointment of special constables is found in section 3331, G. C., to which you refer and which reads as follows:

> "*Section* 3331. A justice of the peace may appoint a constable or constables for a special purpose, either in civil or criminal cases, when such appointment becomes necessary in the following cases:
>
> "1. When there is no constable in the township;
>
> "2. In case of disability of one of the regular constables in the township;
>
> "3. When the constable therein is a party to the suit;
>
> "4. When, from the pressure of official business, the constables therein are not able to perform the duties required by the office.
>
> "The justice making the appointment, shall make a memorandum thereof on his docket, and require the person appointed to take an oath, as in other cases."

From the above it will be noted that special constables may be appointed only for particular cases and when there exists one or more of the enumerated causes therefor and that the justice of the peace making such appointment is required to make a memorandum thereof on his docket. The authority to determine the existence of the statutory causes, therefore, rests exclusively with the justice of the peace making such appointment, and the fact of making the appointment and the entry of the memorandum on his docket in the manner provided, sufficiently evidences such determination.

The statute provides that the justice of the peace *may appoint.* The authority thus conferred involves the exercise of discretion on the part of the appointing officer and is not the performance of a purely ministerial function, which might

be controlled by the courts in mandamus. The justice exercises discretion, both in determination of the ground upon which such appointment is authorized and in his selection of a proper person so to be appointed. Appointments so made are valid, except for fraud or gross abuse of discretion, and persons so appointed would be entitled to the legal fees for services rendered pursuant thereto.

Authority to appoint special constables is conferred upon justices of the peace and such appointments though made for a fraudulent purpose or in the absence of any statutory ground therefor, cannot be said to be void. A person so appointed becomes a de facto officer and so long as his authority to exercise the functions of the office is unrestrained by legal proceedings and he continues to perform the duties thereof, he is entitled to receive the fees, compensation or emoluments thereof provided by law.

It may also be observed that the fees of constables received for services in either civil or criminal cases are not public moneys or moneys in which the public is in any way interested. While "public money" as defined in section 286, G. C., 103 O. L., 509, "includes all money received or collected under color of public office," etc., this definition must be read in the light of the further provisions of the same section at least and particularly that provision which limits the right of recovery of such public money by public authorities to an action "in the name of the political subdivision or taxing district to which such public money is due." It is thus clearly indicated that public money comprehends only such money received or collected under color of office, etc., as is due to some political subdivision or taxing district of the state.

As above stated, it cannot be maintained that constables' fees in any case constitute money due to any political subdivision or taxing district. Such fees are money due only to the officer for services performed and that the obligation to pay the same is imposed by law does not of itself alter their character.

While the practice of appointing special constables may be subject to great abuse, I am of opinion that the bureau of inspection and supervision of public offices is unauthorized to make a finding for recovery of fees collected by a special constable appointed in the manner stated by you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

580.

VILLAGE BOND ISSUE UNDER SECTION 3939, G. C.—WHEN WITHIN ONE PER CENT. LIMITATION SUBJECT TO REFERENDUM—APPROVAL OF ORDINANCE BY MAJORITY VOTE OF ELECTORS, SUFFICIENT.

An ordinance duly passed by a village under section 3939, G. C., to issue and sell bonds, which bonds together with others will not exceed one per cent. as specified in section 3940, G. C., is subject to referendum, and the approval of such ordinance "by a majority of those voting upon the same" under section 4227, G. C., will be sufficient.

COLUMBUS, OHIO, July 3, 1915.

HON. A. A. SLAYBAUGH, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I acknowledge receipt of your letters of June 21st and June 26th respectively, submitted for my opinion on the following questions:

Council of the village of Leipsic acting under section 3939 of the General Code, undertook by ordinance to issue and sell bonds for the purpose of purchasing fire apparatus in an amount not sufficient in connection with the tax duplicate of the village and the amount of the bonds then outstanding to require submission of the question of issuing such bonds to the board of electors under sections 3942 to 3947 inclusive, of the General Code. Within thirty days after the passage of this ordinance a referendum petition was filed, as you state, with the council, signed as I assume by the requisite percentage of the electors of the municipality, and ordering the submission of the ordinance to a vote of the people.

Is a measure such as this subject to the referendum?

Preliminary to a discussion of the question, I take the opportunity to point out that in villages referendum petitions must be filed with the village clerk (section 4227, G. C., 104 O. L., 239).

Assuming that your statement to the effect that the petition was filed "with the council" is to be interpreted as meaning that it was filed with the clerk, I am of the opinion that such filing was proper and that the ordinance in question was subject to the referendum.

Section 4227-2 provides in part:

"Any ordinance or other measure passed by the council of any municipal corporation shall be subject to the referendum except as hereinafter provided."

The exceptions are found in section 4227-3 as amended 103 O. L., 212, which provides as follows:

"Whenever the council of any municipal corporation is by law required to pass more than one ordinance or other measure to complete the legislation necessary to make *and pay for* any public improvement, the provisions of this act shall apply only to the first ordinance or other measure required to be passed and not to any subsequent ordinances and other measures relating thereto. Ordinances or other measures providing for appropriations for the current expenses of any municipal corporation, or for street improvements petitioned for by the owners of a majority of the feet front of the property benefited and to be especially assessed for the cost thereof as provided by statute, and emergency ordinances or measures necessary for the immediate preservation of the public peace, health or safety in such

municipal corporation, shall go into immediate effect. Such emergency ordinances or measures must, upon a yea and nay vote, receive the vote of two-thirds of all the members elected to the council or other body corresponding to the council of such municipal corporation, and the reasons for such necessity shall be set forth in one section of the ordinance or other measure. The provisions of this act shall apply to pending legislation providing for any public improvement."

Whatever difficulty there may be in reconciling the referendum provisions with what is popularly known as the Longworth act, sections 3939, et seq., G. C., it is clear that the comprehensive language of the former, which was the latest enactment in point of time, is sufficient to embrace the latter. Indeed, the specific reference in section 4227-3 to measures "* * * to pay for any public improvement" clearly shows that such measures were intended as a general rule to be subject to the referendum. Inasmuch as the great majority of public improvements of any considerable cost are paid for by the issuance of bonds, under section 3939, G. C., it is inconceivable that the legislature intended that any restricted meaning should be given to its otherwise sufficiently inclusive language so as to exclude the measures provided for by the Longworth law from the operation of the later statute, which does not in express terms have such effect.

In this view of the case, the fact that the amount of bonds which the council attempted to issue does not exceed the limitation to which council might go, in the absence of a referendum for a vote of the people initiated by its own legislation, is immaterial. The right of the people to have a referendum on the issuance of bonds extends to all cases, although in cases in which the limitations are operative this right need not be asserted by the filing of referendum petitions, but is secured to them by the provisions of sections 3942, et seq., G. C.

Although you do not inquire concerning it, the most difficult question which arises on the state of facts which you present is as to the vote which will be necessary to carry the proposed bond issue at the referendum election. Had the submission to popular vote been under section 3942, G. C., as it might have been had council wished even though the limitations do not so require (which is the conclusion expressed in the opinion to the city solicitor of Akron, copy of which has been sent to you) a two-thirds vote of the electors voting on the proposition would have been necessary in order to authorize the issuance of the bonds. I find that my predecessor has held that an initiated ordinance for the issuance of bonds beyond the limit to which council might go without a vote of the people requires a two-thirds vote in order to authorize such issuance, but in this instance, in which the action of the council, if not interrupted by the filing of a referendum petition, would of itself have been sufficient to authorize the issuance and sale of bonds, a contrary result I think follows. The electors will in substance vote on the question of sustaining what council has done and although in any view of the case something must be supplied, as the express provisions of the referendum statutes do not fit with perfect harmony into the scheme of the Longworth act, I am of the opinion that in such a case as that which you have, the approval of the ordinance "by a majority of those voting upon the same" (section 4227-2, G. C.) would be sufficient, with the legislation already adopted by the council itself, which I assume has received the affirmative vote of two-thirds of the members elected or appointed to council, will be effective to authorize the issuance of bonds.

Respectfully,
EDWARD C. TURNER,
Attorney General.

581.

BOARD OF SINKING FUND TRUSTEES OF A CITY HAVING DESIGNATED A BANK AS DEPOSITORY CANNOT LATER COMPENSATE BANK FOR HANDLING BOND AND COUPON ACCOUNT WHEN BONDS ARE PAYABLE AT CITY TREASURER'S OFFICE.

A board of sinking fund trustees of a city, having accepted a bid of a bank to act as depository, cannot subsequently thereto undertake to compensate the bank for alleged services rendered by said bank in handling the bond and coupon account, when the bonds are payable at the office of the city treasurer.

COLUMBUS, OHIO, July 3, 1915.

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

GENTLEMEN:—Under date of June 21, 1915, you wrote requesting my opinion as follows:

> "We enclose herewith pages 71 and 72 of the report of H. D. Waddell, state examiner, upon the city of Springfield, Ohio, also copy of opinion of E. P. McKee, solicitor of said city, relative to finding returned of $235.00 rendered by him against The American Trust and Savings Bank of Springfield, Ohio, in payment of services rendered by said bank in handling the bond and coupon account of said city.
>
> In view of the fact that the solicitor of said city had passed upon the question we did not desire to make finding for recovery without the approval of your department."

The pages of the report of the examiner, to which you refer, contain the following statement:

> "The sinking fund trustees, as the laws require, advertised for bids for the deposit of their funds in bank. The bids were received as of the date of May 8, 1914, and on this date the bid of The American Trust and Savings Bank was accepted and a contract was entered into for a period of two years ending March 8, 1916. The said bank agreed to pay two per cent. per annum computed on daily balances, payable quarterly or monthly and to furnish a personal bond to the satisfaction of the sinking fund trustees. .
>
> "BOND OF DEPOSITORY.
>
> "In accordance with the terms of the above contract the depository, The American Trust and Savings Bank executed a bond in favor of the sinking fund trustees in the sum of $150,000.00 with the following sureties: N. H. Fairbanks, H. S. Kissell, H. V. Bretney, P. E. O'Brien, George C. Lynch, H. E. Freeman, Lew Levy, Chas. G. Heckert. The above bond was approved by the city solicitor as to its proper legal form and by the sinking fund trustees as to security.
>
> "FINDING OF PREVIOUS EXAMINER.
>
> "In a previous report of Will E. Heck, state examiner, bearing date of April 4, 1914, a finding of $239.83 was made against The American

Trust and Savings Bank for depository interest. The said bank recognizing the justness of this claim paid the above amount into the treasury of the sinking fund.

"ILLEGAL PAYMENT

"The sinking fund records show that on June 9, 1914, a bill of $235.00 was presented to the board of trustees of the sinking fund by L. H. Cooke, secretary-treasurer of The American Trust and Savings Bank, of Springfield, Ohio, for services in handling the bond and coupon account of said city. This bill was approved and ordered paid by the trustees.

"The American Trust and Savings Bank is the active depository of the city and sinking funds of the city, the same having been selected April 26, 1912, under authority of council and through competitive bidding.

"It is the duty of the city treasurer to redeem all matured bonds and interest payable at the city of Springfield, and the above named bank is under contract to act as the depository of the sinking funds. I am of the opinion that the trustees of the sinking fund had no authority to allow the said depository additional compensation for any services provided for in the contract with the said bank, or for services which the law provides the city treasurer shall perform. I therefore make a finding for recovery against the bank in favor of the sinking fund in the amount of $235.00 with interest from the date of payment.

I incorporate the letter of Solicitor McKee in explanation of said item of expenditure, but cannot agree with the conclusions of law set forth therein."

The opinion which was given by the city solicitor of Springfield to the state examiner is as follows:

"April 16, 1915.

"MR. H. D. WADDEL, *State Examiner, City.*

"DEAR SIR:—Replying to your inquiry concerning item of $235.00 in voucher No. 656, to L. H. Cook for services rendered for retiring bonded indebtedness of the city of Springfield, Ohio, from August 1, 1912, to January 1, 1914, I beg to submit the following:

"The express powers of the board of sinking fund trustees are found in sections 4506 and 4522, inclusive, G. C. O., and contain among other provisions the following:

"Section 4507 provides they 'shall have the management and control of such sinking fund.'

"Section 4508 authorizes the payment by the trustees out of the funds under their control the cost of premiums on surety bonds of the members, together with all other incidental and necessary expenses of such trustees.

"Section 4510. They shall make their own rules, etc., not inconsistent, of course, with the specific provisions of law.

"Section 4515, relating to depositories, provides that same shall be to the bank or banks * * * which offer, at competitive bidding, the highest rate of interest and best security and accommodation, etc.

"Section 4519 gives them such other powers not inconsistent with the nature of the duties prescribed for them by law as may be conferred upon or required by council.

"No specific provision is apparently made by law laying down definite rules to govern the sinking fund trustees as to what arrangements shall be

made by them to handle the payment of maturing interest and bonds, but it is apparent that as such payment is a legal obligation on the part of such board, they must make some provision therefor, and it would appear to be a matter within their discretion as to the method employed.

"It also appears that under section 4515 they would have the right to make such arrangements with their legal depository, as this section states that the accommodations offered may be considered in determining which is the best bid. I have looked in the records of the board but find no copy of the advertisement asking for the bids for deposit of such funds during the three year period ending March 1, 1914, and I presume it will depend somewhat upon the wording of the advertisement as to just what the intention of the trustees and the bidders were. It appears, however, that such provision was not made at the time the bid of 2.75 per cent. for deposits was accepted, and that the matter was afterwards considered between the board and the depository with the result that the board passed a resolution which in effect reduced the rate to two per cent. in consideration of the banks handling and paying the city's bonds and coupons when presented for payment.

"The right to do this was questioned by Mr. Will E. Heck, state examiner, and on February 19, 1914, he received instructions from the bureau of inspection and supervision of public offices that such an agreement was void, and upon notification thereof, additional interest of 75/100 per cent. was paid over to the sinking fund by the depository.

"I have not had access to the opinion upon which the above mentioned ruling was based, but presume it was upon the theory that the contract having been made as the result of competitive bidding, and no definite agreement therein having been made concerning the payment of the city's bonds and coupons, it would be unfair to other banks who had submitted bids to allow such contract to be so changed.

"It would seem, however, that the trustees have the implied power to make provision for the payment of their bonds and coupons, and such, I understand, has been the general practice, many cities negotiating with eastern banks as a place for such payments, and while the objection to any change in bids submitted by a depository based upon such a consideration, is readily apparent, yet if the sinking fund desires to make a separate contract with some bank or banks for such purpose, even though such bank may happen to be the depository of their funds, such objection would not obtain, in my opinion.

"It appears that such an arrangement was entered into by the trustees and Mr. Freeman, representing The American Trust and Savings Bank, which agreement would therefore be proper in substance but was made objectionable by the manner in which they endeavored to carry it out, and these facts seemed to be borne out by the data contained in the former report of Mr. Will E. Heck, state examiner.

"In order to overcome this objection, it seems the bill was presented from the bank to the trustees of the sinking fund for the amount in question. This bill was made in favor of L. H. Cook, Mr. Cook being, however, the cashier of the above mentioned bank, and stating upon its face that it was for services rendered in connection with the payment of bonds and coupons for the sinking fund during the period therein covered, and on June 9, 1914, at a meeting of the board of sinking fund trustees the bill was ordered paid by unanimous vote of the members of the board, and a voucher was thereafter issued therefor and the money paid.

"It would seem that a decision of the exact question as to the legality

or illegality of this payment arising out of the above circumstances will not be necessary at this time for the reason that it would appear that inasmuch as the services have been performed by the one party and payment made therefor by the other, the transaction in the event it should be found to be tainted with any illegality arising out of the form or manner in which the same was done, would fall within the rule of law set forth in the case of State ex rel. v. Fronizer, 77 O. S., 7, holding that the section of the law authorizing a prosecuting attorney to bring action to recover back money of the county which had been misapplied or illegally drawn from the county treasury, does not authorize the recovery back of money paid on a bridge contract by the county commissioners executed but rendered *void* because of lack of certificate of money in the treasury to the credit of the proper fund, etc., there being no claim of unfairness or fraud in the making, or fraud or extortion in the execution of such contract for such work, nor any claim of effort to put the contractor in statu quo by a return of the bridge or otherwise, the same having been accepted by the board of commissioners and incorporated as a part of the public highway.

"If the bill had been presented, and payment refused, then it would have been necessary to pass upon the legality of the bill in order to determine whether or not same should have been paid, or whether it would have fallen within the rule of Buchanan Bridge Company v. Campbell, 60 O. S., 406, which holds that a contract made in violation or disregard of a statute on the subject is void, and no recovery can be had for its value as the court will leave the parties as it finds them and refuse relief.

"I note that a recurrence of this claim has been obviated by the action of the trustees, who, in their advertisement for bids for depositories for the three year period beginning in March of 1914, specifically state that the successful bidder shall act as agent of the board in the payment of bonds and coupons and the accepted bid was based upon that proposition."

I am unable to agree with the opinion as rendered by the city solicitor for the following reasons:

The provisions of the statutes pertaining to trustees of the sinking fund for cities and villages are found in sections 4506 et seq., of the General Code.

Section 4509, G. C., provides for the election of a secretary if council by ordinance provides therefor.

Section 4515 provides in part as follows:

"At least once every three years the trustees of the sinking fund shall advertise for proposals for the deposit of all sums held in reserve and shall deposit such reserve in the bank or banks, incorporated under the laws of this state or of the United States, situated within the county, which offer, at competitive bidding, the highest rate of interest and best security and accommodation and give a good and sufficient bond issued by a surety company authorized to do business in this state, or furnish good and sufficient surety in a sum not less than twenty per cent. in excess of the maximum amount at any time to be deposited. * * *"

Section 4518 provides how money shall be drawn from the sinking fund as follows:

"Money shall be drawn by check only, signed by the president and at least two members of the board, and attested by the secretary or clerk."

The sinking fund trustees, at the time of receiving bids, under the provisions of section 4519, G. C., must take into consideration the rate and security offered, and the accommodation to be afforded, and when they award the bid it is upon the basis that they have obtained not only the highest rate of interest but also the best security and accommodation. They are presumed to have taken into consideration the question of the accommodation, and cannot, as I view it, subsequently endeavor to compensate the depository bank for the accommodation which it affords.

Under date of June 30th you further inform me as follows:

> "We have been informed that the bonded indebtedness of the city of Springfield, Ohio, is made payable at the office of the city treasurer and in no instance is such indebtedness made payable at the depository bank of the sinking funds of said city."

It appears, therefore, that the bonds in question were made payable at the office of the city treasurer. Consequently, there was no duty to be performed by the depository bank nor accommodation to be afforded by it other than the payment of the check drawn under favor of section 4518, *supra*. If the bank undertook to take in the bonds for the accommodation of the city treasurer, that is a matter which rests between the bank and the city treasurer, but in no way can it be considered as an obligation on the part of the sinking fund trustees to recompense the bank for doing the work of the city treasurer.

The city solicitor seems to be of the opinion that although the payment of the money to the depository bank might be considered illegal, nevertheless under the case of State ex rel. v. Fronizer, 77 O. S., 7, a recovery could not be made against said bank for the amount paid for alleged services by the bank to the sinking fund trustees. The case of State v. Fronizer was a suit brought by the state on the relation of the prosecuting attorney against a certain bridge company for the recovery of money alleged to have been illegally drawn from the treasury of the county by the defendants. The bridge company, in contracting with the county for the erection of a bridge, failed to procure a certificate of the county auditor that the money required for the payment of the obligation created by the contract, was in the treasury of said county to the credit of the bridge fund of said county, or had been levied and placed on the duplicate of said county and in process of collection and not appropriated for any other purpose. The court held (page 16):

> "This court is of opinion that such recovery is not authorized. The principle applicable to the situation is the equitable one that where one has acquired possession of the *property* of another through an unauthorized and void contract, and has paid for the same, there can be no recovery back of the money paid without putting, or showing readiness to put, the other party in *statu quo*, and that rule controls this case unless such recovery is plainly authorized by the statute. The rule rests upon that principle of common honesty that imposes an obligation to do justice upon all persons, natural as well as artificial, and is recognized in many cases."

The court says later in its opinion (page 18):

> "The county should not be permitted to retain both the consideration and the bridges."

On page 17 the court in its opinion refers to the case of Vindicator Printing Company v. State, 68 Ohio State, 362, and states:

"That case is authority for the proposition that there may be a recovery back by the prosecuting attorney where the money has been paid for the publishing of certain notices *the publication of which was not authorized by law.* The publications were not only without authority of law but they were of no value to either the county or the public. Therefore no property of the company had been obtained by the county. Clearly the case is not analogous to the case at bar."

So in the matter which I have under consideration, as I view the law, any subsequent contract made with the depository bank was without authority of law, and being absolutely without authority of law, and furthermore the services for which it was attempted to compensate said bank being services which the city treasurer was required to perform, any attempt to reward said bank for such services was without authority of law, and the recovery of the moneys so paid may be had by civil action in the name of the taxing district, in pursuance of section 286, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney General.

582.

LIMITATION OF FEES THAT MAY BE TAXED IN GARNISHEE CASES FOR SERVICES OF JUSTICE OF PEACE AND CONSTABLE DOES NOT APPLY TO SINGLE MAN WITH NO FAMILY LEGALLY DEPENDENT UPON HIM.

The provisions of section 10271, *G. C., as amended* 103 *O. L.*, 567, *limiting the fees that may be taxed in garnishee cases for services of a justice of the peace and constable, does not apply to a single man with no family legally dependent upon him.*

COLUMBUS, OHIO, July 3, 1915.

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

GENTLEMEN:—Under date of June 23rd, you submitted for my written opinion the following question:

"Does the provisions found in section 10271, General Code, as amended 103 O. L., 567, limiting the fees that may be taxed in garnishee cases for services of a justice of the peace and constable to $2.00, apply to a person not the head of a family?"

Sections 10253, et seq., of the General Code provide relative to attachment. In section 10253, it is provided:

"If attachment of the personal earnings of the defendant be sought, the affidavit also must state that he is not the head or support of a family nor in good faith the support of a widowed mother wholly dependent upon him for support."

Section 11725, G. C., states what property may be held exempt from execution by "every person, who has a family, and every widow," and the sixth paragraph thereof states in part as follows:

> "If the claim, debt or demand for the payment of which it is sought to subject personal earnings is one for necessaries furnished to the debtor, his wife or family, only ninety per cent. of such earnings shall be so exempt as against such claim, debt or demand."

Section 10271, G. C., (103 O. L., 567) provides:

> "The personal earnings *now exempted by law*, in addition to the ten per cent. for necessaries, shall be further liable to the plaintiff for the actual costs of any proceedings brought to recover a judgment for such necessaries, in any sum not to exceed two dollars and the necessary garnishee fee. * * *"

A man who is not the head or support of a family, nor in good faith the support of a widowed mother wholly dependent upon him for support, is not entitled as a person "who has a family" to any exemptions whatever.

Therefore, I am of the opinion that the limitations found in section 10271, G. C., as amended 103 O. L., 567, do not apply in the case of an attachment against a single man, not the head of a family or having the support of a widowed mother wholly dependent upon him.

Respectfully,
EDWARD C. TURNER,
Attorney General.

583.

FEES FOR SPECIAL INSTRUCTION AT A UNIVERSITY MUST BE PAID INTO STATE TREASURY—INSTRUCTOR NOT PERMITTED TO COLLECT SUCH FEES AND APPLY SAME ON HIS SALARY.

Fees charged students by a university for special instruction, and upon which no refund is to be given, must under the provisions of section 24, G. C., as amended, be paid into the state treasury.

A university is not authorized to permit the instructor to collect the fees himself and apply the same upon his salary as fixed.

COLUMBUS, OHIO, July 3, 1915.

HON. ALSTON ELLIS, *President Ohio University, Athens, Ohio.*

DEAR SIR:—Under date of June 19th, you requested my opinion in two matters. Your first inquiry is as follows:

> "(1) Connected with the College of Liberal Arts at Ohio University is a department of painting, a school of oratory, and a college of music.
>
> "In each of these, most of the students receive individual instruction, from the very nature of the case. All such students pay, as do other students, the regular registration fee which finds its way into the state treasury under the provisions of the 'Mooney bill.' But in addition to

this registration fee, all students receiving individual instruction in painting, music and public speaking pay a special fee varying in amount according to the kind of instruction received, length and number of recitation periods, etc. Can the whole, or any part, of the salaries of employes, giving this special individual instruction, be paid from such special fees—fees over and above the registration fees paid by all students? (See schedule of fees recently sent to you under another cover.)"

From an examination of the schedule of fees which you sent to this department it appears that for special instruction an additional fee is required of the student taking such special instruction.

Your question is whether the whole or any part of the salaries of employes giving such special instruction can be paid from such fees. I understand that you mean thereby whether or not such fees may be paid directly to the instructor in charge, or whether or not the fees should be collected by the university and, under the provisions of section 24, G. C., as amended 104 O. L., 178, the same should be turned into the state treasury, section 24 as amended providing for a weekly pay in of all moneys, etc., received for the use of a state institution, college, normal school or university receiving state aid from, among other things, fees, "or otherwise."

There is a further provision in said act that where tuitions and fees are paid to the officer or officers of any college, normal school or university receiving state aid, the officer or officers shall retain a sufficient amount of said tuition fund and fees to enable them to make *refunds* of tuition and fees incident to conducting of the tuition fund and fees. That, however, only applies when there is an intention upon the part of the university or college to make refunds; otherwise, all tuition and fees under the "Mooney bill" are required to be paid weekly into the state treasury.

If such fees, whether regular registration fees or special fees from which no refunds are to be made, are not turned in to the state treasury weekly, the failure so to do would be a violation of section 24, G. C., as amended.

I am, therefore, of the opinion that all such fees must be paid into the state treasury in pursuance of said section. Whether or not the whole, or any part, of the salaries of employes giving special, individual instruction may be paid from special fees depends upon the appropriation made to the university. I find, however, that the appropriation made in house bill No. 701, under the head of "personal service," appropriates a certain sum of money for the positions therein, and does not undertake to appropriate receipts and balances of special fees. Consequently, I am of the opinion that not only should the fees be turned in, but also that the payments must be made from within the appropriation.

Your second inquiry is as follows:

"(2) Two years ago, Ohio University instituted a system of extension teaching. At first this outside instruction was given by teachers regularly in service. These teachers received the fees paid by extension students—which fees were almost nominal and used the same in paying all expenses and in compensating themselves for the extra teaching service rendered. So popular was this extension teaching and so necessary was it under new academic and professional qualifications required of teachers and prospective teachers under legislative enactments, that the authorities at Ohio University asked for, and received, appropriations to enable them to extend this department of the institution's educational work. Three instructors gave their whole time to this work throughout the college year just closed. The recent appropriation bills provide for continued

extension service by three instructors for the biennial period ahead. This instruction, supplemented by instruction given by the regular class teachers immediately connected with the university would meet, in fair measure, but not fully even then, the growing demand for this outside instruction. My desire is to confine the teaching service of our regular instructors to classes organized at the university. To do this will be to decline doing some outside work for which there is a strong and, it seems to me, a reasonable demand. Should an additional instructor be employed to give extension teaching, could his salary be legally paid from the extension fees collected? Be it understood that all extension class fees now collected are turned into the general revenue fund of the state. No law requires the collection of these fees; but if collected, they form a part of institutional receipts that should find their way into the state treasury under the terms of the 'Mooney bill.' But if a part of these fees is collected by an instructor himself and used by him as a part of the whole of his salary, what then?"

This question likewise is to be answered in the negative. To permit the fees charged by the university for special services to be turned over directly to the professor, instead of being paid to the proper officer of the university, would be an evasion of the law as laid down in section 24, G. C., as amended. While it may be true that there is no law requiring the collection of the fees, nevertheless, if the university charges fees for such services, the charge is one made by the university and not by the professor in charge. To permit the professor attached to the university to make an individual charge himself, on a stipulated schedule fixed by the university, would, as before stated, be purely an evasion of the law.

I, therefore, hold that all such fees are to be collected by the university as fees and paid into the state treasury in pursuance of section 24, G. C., as amended.

Respectfully,
EDWARD C. TURNER,
Attorney General.

584.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF CHILLICOTHE-McARTHUR ROAD IN ROSS COUNTY.

COLUMBUS, OHIO, July 3, 1915.

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

DEAR SIR:—I have your communication of July 2, 1915, transmitting to me for examination final resolution as to the Chillicothe-McArthur road in Ross county, petition No. 1671, I. C. H. No. 365.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

585.

A CORPORATION IS NOT AUTHORIZED TO EXERCISE ANY OF ITS CORPORATE FRANCHISES UNTIL CERTIFICATE IS FILED THAT TEN PER CENT. OF ITS CAPITAL STOCK IS SUBSCRIBED—AN INCOMPLETE CORPORATION IS NOT REQUIRED TO SURRENDER ITS ARTICLES OF INCORPORATION—DATE OF INCORPORATION —WHEN CERTIFICATES OF DISSOLUTION SHALL BE GRANTED—FOREIGN CORPORATION.

A corporation which has not filed a certificate that ten per cent. of its capital stock has been subscribed is not authorized to exercise any of its corporate franchises; is not in fact a corporation, but has only secured authority to become a corporation, and may by suit in quo warranto be ousted from any attempt to exercise corporate franchises.

Until such certificate has been filed and the directors elected, no corporate action can legally be taken.

Such incomplete corporation is not required to file report under section 5495; *and in order to surrender its articles of incorporation it does not need to secure the certificate mentioned in section* 5521, *G. C.*

Within the meaning of section 5519, *G. C., the date of incorporation is the date upon which a certificate is filed in the office of the secretary of state showing that ten per cent. of its capital stock has been subscribed.*

The annual franchise fee of a domestic corporation is not due until August 15, *within the meaning of section* 5521, *G. C.; and the tax commission may until that date furnish the certificate mentioned in said section even though the taxes for the current year have not been paid. For foreign corporations said annual tax is not due until October* 15*th of each year, within the meaning of section* 5521, *G. C.*

COLUMBUS, OHIO, July 3, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of May 11, 1915, requesting my opinion as follows:

> "The commission's attention has just been called to an opinion rendered by you to the secretary of state under date of February 11, 1915, in which you hold that,
>
> " 'Until a certificate showing that ten per cent. of the capital stock of a corporation has been subscribed, has been filed with the secretary of state, and the stockholders have elected a board of directors, that there is no corporation in existence, and that a certificate of dissolution may be filed in such cases by the secretary of state without certificate of the tax commission as provided for in section 5521 of the General Code.'
>
> "It would seem that this opinion, if adhered to, will make a very considerable change in the procedure of this commission in subjecting domestic corporations for profit to the payment of the franchise taxes, as provided in sections 5595, et seq., of the General Code.
>
> "In an opinion rendered to this commission under date of April 5, 1912, your predecessor held that:
>
> " 'When articles of incorporation have been procured from the secretary of state there is in existence a corporation "organized under the laws of this state" within the meaning of sections 5495, et seq., General Code;

such corporation is not entitled to the certificate provided for in section 5521 of the General Code, when it has filed no report and paid no annual fee as required by said sections; in case of default in making report or paying fee, on the part of such a corporation, the tax commission must certify the corporation to the secretary of state who must then cancel its articles of incorporation as provided in section 5509 of the General Code.'

"Since the date of this opinion the commission has been proceeding in accordance therewith. It now desires to know whether your opinion reverses that of your predecessor in any or all respects.

"You are also requested to advise as to the effect of your opinion upon the provisions of section 5519 which has been heretofore construed to mean that a corporation shall not be required to file its first annual report until the proper month for the filing of such report next following the expiration of six months from the date of filing its articles of incorporation. Is this to be changed to the date upon which a certificate showing that ten per cent. of the capital stock of a corporation has been subscribed, has been filed with the secretary of state, and the stockholders have elected a board of directors?

"You are also requested to furnish the commission with your opinion upon the following:

"Is the commission authorized to issue the certificate provided for in section 5521 of the General Code, to a domestic corporation which has made its report during the month of May and desires to dissolve at any time between the first day of June and the time when the franchise fee is computed and charged, without being required to pay the franchise fee for that year?

"The same question arises with reference to foreign corporations desiring to retire from business in this state."

The opinion of my predecessor, Honorable Timothy S. Hogan, under date of April 5, 1912, found in the annual report of the attorney general for that year, in volume 1, page 530, was fully and carefully considered by me in arriving at my opinion to the secretary of state referred to in your letter.

I have the highest regard for the legal ability and sound judgment of Attorney General Hogan, and would not have issued my former opinion had I not been fully convinced that the conclusion therein expressed was in full accord with the proper interpretation of the statutes and court decisions relative thereto.

It is to be observed also that General Hogan was apparently not firmly convinced of the correctness of his conclusion as it is stated in the opinion that the question was in doubt.

I am firmly convinced, as expressed in my former opinion, that "until a certificate showing that ten per cent. of the capital stock of a corporation has been subscribed, has been filed with the secretary of state, and the stockholders have elected a board of directors, there is no corporation in existence" or "organized under the laws of Ohio" within the meaning of section 5495 of the General Code, which is required to make the report therein provided.

Section 5495, 5496 and 5497 of the General Code are as follows:

"Section 5495. Between the first day of May and the first day of July, 1911, and annually thereafter during the month of May, each corporation, organized under the laws of this state, for profit, shall make a report, in writing, to the commission in such form as the commission may prescribe.

"Section 5496. Such report shall be signed and sworn to before an

officer authorized to administer oaths, by the president, vice-president, secretary or general manager of the corporation, and forwarded to the commission.

"Section 5497. Such report shall contain:

"1. The name of the corporation.

"2. The location of its principal office.

"3. The names of the president, secretary, treasurer and members of the board of directors, with the postoffice address of each.

"4. The date of the annual election of officers.

"5. The amount of authorized capital stock and the par value of each share.

"6. The amount of capital stock subscribed, the amount of capital stock issued and outstanding, and the amount of capital stock paid up.

"7. The nature and kind of business in which the corporation is engaged and its place or places of business.

"8. The change or changes, if any, in the above particulars, made since the last annual report."

The obvious impossibility of compliance with the provisions of the above sections by the incomplete corporate organization, to my mind, clearly indicates the legislative intent to require reports only from corporations which have completed their corporate organization.

Section 5521 of the General Code, referred to in your letter, is as follows:

"In case of dissolution or revocation of its charter, on the part of domestic corporations, or of the retirement from business in this state, on the part of a foreign corporation, the secretary of state shall not permit a certificate of such action to be filed with him unless the commission shall certify that all reports, required to be made to it, have been filed in pursuance of law, and that all taxes or fees and penalties thereon due from such corporation have been paid."

I agree, but for entirely different reasons, with the opinion of Attorney General Hogan, that such a corporation (one which has not completed its organization by filing a certificate showing subscription of the ten per cent. of its capital stock and by the election of the directors) is not entitled to a certificate of dissolution under the above section; not, however, because it has failed to file a report and pay its annual fees, but because it is not a completed corporate organization, has not, in fact, a corporate existence, and therefore needs no certificate of dissolution.

I am, also, for the same reasons, of the opinion that the provisions of section 5509 of the General Code have no application to such incomplete corporate organization.

Replying to the second question contained in your letter, relative to the interpretation to be placed upon the provisions of section 5519 of the General Code, which section is as follows:

"A corporation shall not be required to file its first annual report under sections one hundred and six to one hundred and fifteen (G. C., sections 5495 to 5504) inclusive, of this act, until the proper month, hereinbefore provided, for the filing of such report, next following the expiration of six months from the date of its incorporation or admission to do business in this state."

This section applies to corporations whose corporate organization has been

completed, at least to the extent of filing with the secretary of state the certificate showing that ten per cent. of its capital stock has been subscribed. As there is no ready means of ascertaining when directors of a corporation have been elected, I suggest that the date of the filing of the certificate showing that the requisite stock has been subscribed and paid in be considered as the date of the incorporation for the purpose of determining when the first annual report of such corporation should be filed.

In support of the conclusion above expressed I call attention to the case of the American Ball Bearing Company v. Adams, decided April 12, 1915, by the United States district court of the northern district of Ohio, 13 Ohio law reporter, June 28, 1915, 137. At page 142 in the opinion, Judge Clarke uses this language:

> "The Ohio law differs from the law of many states in that the mere filing of articles of incorporation in due form does not create or bring into existence a corporation, notwithstanding the provision of G. C., 8629, that a certified copy of the articles of incorporation shall be prima facia evidence of the existence of the corporation therein named. This is distinctly decided in State ex rel. v. Insurance Co., 49 O. S., 440, the fifth paragraph of the syllabus of that case reading as follows:
>
> " 'The making and filing, for purposes of profit, of articles of incorporation in the office of the secretary of state, do not make an incorporated company; such articles are simply authority to do so. *No company exists within the meaning of the statute, until the requisite stock has been subscribed and paid in and directors chosen.*'
>
> "Before the plaintiff can maintain this action as a de jure corporation, this rule of law requires an affirmative answer to the question, 'Had the K Company a lawfully constituted and elected board of directors so that it was an "existing" corporation when it became a party to this suit?'
>
> "Again the law of Ohio requires that ten per cent. of the capital stock of the proposed corporation shall be subscribed and this fact certified by the incorporation to the secretary of state before an election of directors may be held (G. C., 8633 and 8635); that at the time of making a subscription to the capital stock of a corporation, ten per cent. of each share subscribed for, shall be payable (G. C., 8632); * * *."

Again, at page 143, this language is used:

> "That these are not merely directory provisions of law, but are mandatory and must be complied with before a corporation can come into existence under Ohio law, is sufficiently established by Telephone Co. v. Cincinnati, 73 O. S., 64, which decided that:
>
> " 'Section 3243 (G. C., 8632), 3244 (G.C., 8633) and 3245 (G. C., 8636), Revised Statutes, taken together, require that an installment of ten per cent. on each share of stock shall be payable at the time of making the subscription; that as soon as ten per cent. of the capital stock is subscribed notice for the election of directors may be given; that no person shall vote for director for any share on which any installment is due and unpaid, and the votes of a majority of the number of shares shall be necessary for a choice. Tested by these requirements the record shows that there had been no legal election of directors, and that the corporation had not been organized in such a manner as to entitle it to a decree under section 3641.'
>
> "Trust Co. v. Floyd et al., 47 O. S., 525, Syl. par. 3:
>
> " 'The corporate powers, business and property of corporations formed

for profit, must be exercised, conducted and controlled by a board of directors, who cannot be chosen until ten per cent. of the capital stock specified in the articles of incorporation has been subcribed.' (See also City of Cincinnati v. Queen City Tel, Co., 2 N. P. n. s., 349.)"

It seems to me that the principles laid down in the above decision and in the cases therein cited fully sustains the conclusion above expressed.

Answering your third question relative to the authority of your commission under section 5521 of the General Code, which is as follows:

"Section 5521. In case of dissolution or revocation of its charter, on the part of a domestic corporation, or of the retirement from business in this state, on the part of a foreign corporation, the secretary of state shall not permit a certificate of such action to be filed with him unless the commission shall certify that all reports, required to be made to it, have been filed in pursuance of law, and that all taxes or fees and penalties thereon *due* from such corporation have been paid."

The machinery for the assessment and collection of the tax on domestic corporations is as follows: A report must be filed "during the month of May." Section 5495 of the General Code. On the filing of this report, the commission shall determine the amount of the subscribed or issued and outstanding capital stock of the corporation "on the first Monday of July" (section 5498 of the General Code), and certify the amount so determined "on the first Monday in August" to the auditor of state (section 5498 of the General Code), who shall charge the fees of three-twentieths of one per cent. upon the amount so certified "on or before August fifteenth" for collection (section 5498 of the General Code). The corporation then has until the "first day of the following October" to pay the fee without delinquency. (Section 5498 of the General Code.)

It might be observed that the period between the first Monday of July and the first Monday of August is available to a corporation as the time within which it may be heard upon its application for a correction of the primary determination of the commission (section 5504 of the General Code).

It is obvious that the tax cannot be "due" until it is finally determined, and I am of the opinion that it is not "due" until the charge for collection is actually made.

This is, I think, the interpretation of the word "due" as used in section 5521 of the General Code, although for some other purposes one might say that the tax is "due" on the date as of which the amount thereof is to be ascertained, viz.: the thirty-first day of May, or the date of the making of the report, if filed prior to that date and in the month of May.

Any other interpretation of the word "due" in section 5521 would read the word out of the statute entirely, for if the commission were required to certify merely that all the taxes and fees which would become collectible on account of the report filed had been paid, the language of the section might well read as follows:

"The commission shall certify that all reports * * * have been filed in pursuance of law, and that all taxes or fees and penalties thereon * * * have been paid."

But when the words "due from such corporation" are put into the statute, I

think that for the purpose of the certificate the intent is manifested that the taxes and fees shall not be regarded as "due" until they are actually due in a technical sense.

The purpose of section 5521 is to prevent a corporation which is delinquent in any way from being dissolved during its delinquency. This purpose is fully served by permitting the dissolution of a corporation which has filed the report, but has not yet paid the fee, because the same is not due. No substantive rights of the state can be in any way jeopardized by such a holding, for the liability of the corporation is fixed by the fact that it existed during the month of May, and upon dissolution prior to the time when the fee becomes due the assets of the corporation in the hands of the winding-up trustees would be liable for the amount.

Any other holding would produce the effect that a domestic corporation may not dissolve, or be dissolved, between the thirty-first of May and the fifteenth of August. Such cannot be the result. There is no machinery for collection of the tax or fee between these dates; if there were, a contrary answer might be given.

In your letter you refer also to foreign corporations. The answer is the same as to these, excepting that the dates are July 31st, and October 15th, respectfully, as provided in sections 5499 and 5503, General Code.

* * * * * * * * * * * * *

In connection with the answer to the first two questions asked by your commission it should be noted that until a certificate has been filed by the incorporators showing that ten per cent. of the stock of the proposed corporation has been subscribed no authority is conferred upon such incorporators by virtue of the articles of incorporation secured by them to exercise any corporate franchise or to file any report required of the corporation. Any attempted exercise of such corporate right may and should be prevented by proceedings in quo warranto.

Respectfully,
EDWARD C. TURNER,
Attorney General.

586.

APPROVAL OF RESOLUTION FOR IMPROVEMENT OF MANSFIELD-SHELBY ROAD, RICHLAND COUNTY, OHIO.

COLUMBUS, OHIO, July 6, 1915.

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

DEAR SIR:—I have your communication of July 3, 1915, transmitting to me for examination final resolution as to the Mansfield-Shelby road, Richland county, petition No. 1145, I. C. H. No. 436.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

587.

APPROVAL OF TRANSCRIPT OF PROCEEDINGS FOR ISSUANCE OF BONDS BY CARROLL COUNTY, OHIO.

COLUMBUS, OHIO, July 8, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"In re: Bonds of Carroll county, Ohio, in the sum of $7,000.00 purchased by the industrial commission of Ohio under resolution dated June 21, 1915."

I have examined the transcript of the proceedings relative to the issuance of the above bonds, which was submitted to me under date of June 28, 1915, and I am of the opinion that the issuance of said bonds is for a purpose authorized by law; that the proceedings of the county commissioners and other officers of said county have been regular and in conformity with statutory requirements; that no limitation, either constitutional or statutory, of indebtedness or taxation has been exceeded in the issuance of said bonds; that provision has been made in the legislation under which said bonds are issued for levying and collecting annually a sufficient tax to pay the interest and provide a sinking fund for the redemption of said bonds as they become due; that said bonds when properly prepared and executed will be valid and binding obligations of Carroll county, and I hereby certify my approval of the same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

588.

MIAMI UNIVERSITY—CONTRACT FOR COMPLETION OF BOILER ROOM EXTENSION AND ENGINE ROOM EXTENSION TO POWER PLANT APPROVED.

COLUMBUS, OHIO, July 8, 1915.

HON. R. M. HUGHES, *President, Miami University, Oxford, Ohio.*

DEAR SIR:—Under date of July 6th, you submitted for my approval a contract and bond of Woollen & Callon for the construction and completion of the power piping changes and additions (including pipe covering) in the boiler room extension and engine room extension to the power plant, Miami University, Oxford, Ohio, payment for same to be made from funds available July 1st.

I have carefully examined said contract and bond, and find the same to be in all respects in compliance with law, and have therefore approved them in triplicate.

I have filed with the auditor of state the original contract and bond as approved by me, and herewith enclose you duplicate copies thereof.

Attached to one duplicate copy thereof you will find a bond entered into on May 28, 1915, by the said Woollen & Callon, in the sum of one thousand dollars. This bond has been superseded by a bond for fifteen hundred dollars entered into

by the said Woollen & Callon on July 1, 1915, and, therefore, the one thousand dollar bond entered into on May 28, 1915, should be returned to Messrs. Woollen & Callon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

589.

SYNOPSIS FOR PETITION TO INITIATE AN AMENDMENT TO THE CONSTITUTION TO FIX THE TERMS OF ALL COUNTY OFFICES AT FOUR YEARS.

COLUMBUS, OHIO, July 8, 1915.

HON. GEORGE B. OKEY, *Columbus, Ohio.*

DEAR SIR:—You have submitted to me for my certificate a petition to initiate an amendment to the constitution of the state of Ohio, the synopsis of which reads as follows:

> "A proposition, by initiative petition, to so amend section 2, and repeal section 3 of article X of the constitution as to fix the terms of all county officers at four years, provide for their election quadrennially, and applying the amendment to incumbents."

I hereby certify that the foregoing synopsis is a truthful statement regarding the above entitled proposed amendment.

Respectfully,
EDWARD C. TURNER,
Attorney General.

590.

APPROVAL OF TRANSCRIPT OF PROCEEDINGS FOR BOND ISSUE, CITY OF CANTON, OHIO.

COLUMBUS, OHIO, July 9, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—IN RE: Bonds of the city of Canton, Ohio, in the aggregate amount of $85,100.00 purchased by the industrial commission of Ohio, under resolution dated May 24, 1915, said bonds, as indicated by the transcripts furnished me, including the following issues:

1. $1,500.00 of bonds for the purchase of lot No. 3357 as site for engine house. Due five years from date, March 1, 1915, bearing interest at the rate of five per cent. per annum.

2. $9,000.00 of bonds for the purchase of triple combination fire wagon. Due ten years after date, March 1, 1915, bearing interest at the rate of five per cent. per annum.

3. $1,500.00 of bonds for the re-laying of floor in safety building with creosoted wood block. Due five years after date, March 1, 1915, bearing interest at the rate of five per cent. per annum.

4. $47,000.00 of bonds for laying permanent water mains. Due ten years after date, March 1, 1915, bearing interest at the rate of five per cent. per annum.

5. $9,000.00 of bonds for the purpose of meeting deficiency in city's portion of sundry street improvements. Due ten years from date, March 1, 1915, bearing interest at the rate of five per cent. per annum.

6. $5,000.00 of bonds to pay property portion of improving 19th street NW. from Cleveland avenue to Frazer avenue NW. Due five years from date, March 1, 1915, bearing interest at the rate of 5½ per cent. per annum.

7. $5,000.00 of bonds to pay city's portion of improving 19th street NW. Due in five years after date, March 1, 1915, bearing interest at the rate of five per cent. per annum.

8. $1,600.00 of bonds for sanitary sewer in Lawn avenue NW. from Tuscarawas street west to Seventh street NW. Due five years after date, March 1, 1915, bearing interest at the rate of five per cent. per annum.

9. $5,500.00 of bonds for the purpose of purchasing an auto service and ladder truck for the Central Fire Department of the city of Canton. Due ten years after date, March 1, 1915, bearing interest at the rate of five per cent. per annum.

I here call the commission's attention to the fact that the copy of the resolution adopted by the commission on May 24, 1915, recites that bonds to the amount of $85,100.00 were purchased from the finance committee of the city of Canton, Ohio. The itemized list of bonds purchased by the commission, as set forth in the resolution, amounts in the aggregate to $79,600.00,—the last mentioned series, above described, to wit $5,500.00 of bonds for the purpose of purchasing an auto service and ladder truck, being omitted. I assume that this was a clerical mistake in your office, and that the commission agreed to purchase bonds aggregating $85,100.00, as above listed.

I also call attention to the fact that the $5,000.00 issue mentioned above to pay the city's portion of improving 19th street NW. is in reality a part of an issue of $8,400.00 of bonds to pay the city's portion of the cost and expense of improving 19th street N. W. from Cleveland avenue NW. to Frazer avenue NW., and of Schroyer avenue SW. from Tuscarawas street west to Sixth street SW. and Third street SW. from the B. & O. Railroad to Schroyer avenue SW.

I have examined the several transcripts of the proceedings of council and other officers of the city of Canton relative to the bond issues above enumerated, which completed transcripts were submitted to me under date of July 7, 1915, and I am of the opinion that the proceedings of the council and other officers of the said village have been regular and in conformity with statutory requirements; that no limitation, either constitutional or statutory, of indebtedness or taxation has been exceeded in the issuance of said bonds; that proper provision has been made in the legislation of the city council for the levying and collecting annually a sufficient tax to pay interest and provide a sinking fund for the redemption of said bonds as they become due; and that said bonds, when properly prepared and executed, will be valid and binding obligations of the said city.

As I have had no opportunity of examining the bonds and coupon form, I suggest that when the same are delivered that you submit them to me for my approval as to form and execution.

Respectfully,
EDWARD C. TURNER,
Attorney General.

591.

AMENDED SENATE BILL NO. 7—REGULATES LOANING OF MONEY ON PERSONAL PROPERTY—NO EXPENDITURE OF FUNDS CAN BE MADE UNTIL ACT BECOMES OPERATIVE ALTHOUGH APPROPRIATION BILL CARRIES AN AMOUNT FOR PURPOSE OF MAKING IT EFFECTIVE.

Sections 6346-1 *to* 6346-7, *G. C., as amended and supplemented by the addition of sections* 6346-8 *to* 6346-10, *G. C., by amended senate bill No.* 7, *passed May* 7, 1915, *do not become operative until August* 11, 1915, *and no expenditure of the funds or incurring of obligations for the purpose of putting the provisions of said sections into effect can be made until August* 11, 1915.

COLUMBUS, OHIO, July 12, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of July 8, 1915, requesting my opinion as follows:

> "On August 11, 1915, section 6346 of the General Code, providing for the regulation for the loaning of money on personal property, etc., becomes operative. The general assembly appropriated certain funds for the use of this department and the appropriation is available as of July 1, 1915. Would you please advise us as to whether or not we can legally proceed to organize this department and use the funds made available for the use of the department before the law actually becomes operative?
>
> "If this cannot be done, would we be permitted to employ the man now and pay him after the law becomes effective for services rendered prior to that date?"

As stated in your letter, the act regulating and licensing the loaning of money on personal property, salaries, etc., will, unless a referendum petition be filed, become operative August 11, 1915. Until that date the law remains dormant, and in the meantime no duty is imposed upon any person or company engaged in the business toward which the act is directed, and no authority to act under its provisions is conferred upon your department.

The fact that funds appropriated by the general assembly for a specific purpose in the act are, under the terms of the appropriation bill, available cannot hasten into operation the provisions of a law which requires the expenditure of such funds for its proper administration. It will be presumed that the legislature intended that such appropriation should be available and ready for use when the law under which the expenditure of such fund is to be made becomes operative. Money

appropriated by the legislature can only be disbursed for lawfully authorized purposes, and the purpose of the expenditures concerning which you enquire will not be authorized until August 11, 1915, and thereafter.

I am therefore of the opinion that your department has no authority to spend any of the funds appropriated by the general assembly for the purpose of carrying into effect the provisions of law mentioned in your letter before August 11, 1915. Neither have you authority to employ a man for that purpose now and then after the law becomes effective pay him for services rendered prior to August 11, 1915.

Respectfully,
EDWARD C. TURNER,
Attorney General.

592.

AGRICULTURAL COMMISSION IS AUTHORIZED TO MAKE REGULATIONS TO PREVENT SPREAD OF INSECT PESTS AND PLANT DISEASES—GYPSY MOTH.

Under the provisions of the agricultural commission act, particularly sections 1122, 1123 *and* 1134, *G. C., the agricultural commission is authorized to make regulations and cause suitable measures to be taken for the prevention and eradication of insect pests and plant diseases within the state. This authority extends to the taking of such measures as are reasonable and necessary to prevent the development and spread of the gypsy moth from any premises which there is good cause to believe are infested with the eggs or larvae of such insect.*

COLUMBUS, OHIO, July 12, 1915.

The Agricultural Commission of Ohio, Division of Agriculture, Columbus, Ohio.

GENTLEMEN:—Under date of June 29, 1915, you request my written opinion upon the following statement of facts and inquiry:

> "In attempting to control an outbreak of gypsy moth in Bratenahl village, Cuyahoga county, we have met with opposition on the part of one property owner in the infected area.
>
> "In hauling some boulders, received from New England, from the railway siding at Bratenahl along the boulevards, to one of the estates, eggs of the gypsy moth with which the boulders were infested were scattered along the way. The principal measure to pursue in preventing the establishment of this pest was to thoroughly spray all trees along these boulevards and those on the estate adjoining. This work has been done in co-operation with the village council and with the federal authorities connected with this work. Willing co-operation was given by all property owners with the exception of the instance given above, where strenuous objection has been made by the owner, Mr. C. H. Gale, a Cleveland attorney.
>
> "The agricultural commission desires your written opinion as to the proper course for it to pursue. Has our commission the authority within the law as stated either in sections 1123 or 1134, to spray these premises or to force the owner to do so?
>
> "It is true that no evidence of the insect has been found to be present

on these premises. The nature and habits of the gypsy moth are such that spraying must be done before the larvae appear. It is impossible to destroy them by spraying after they have developed to any extent.

"The agricultural commission considers this insect the most dangerous and destructive known and its establishment within the state would be a calamity.

"A prompt opinion as to the proper course for this commission to pursue in the matter will be appreciated."

Sections 1122 to 1140, G. C., inclusive, of the agricultural commission act, so called, 103 O. L., page 304, et seq., provide, among other things, that the agricultural commission of Ohio shall be authorized to make regulations and cause suitable measures to be taken for the prevention and eradication of insect pests and plant diseases within the state.

While the provisions of the aforesaid legislation relate for the most part to the inspection of orchards and nurseries and the fumigation and treatment of nursery stock found to be infested or infected with insect pests or plant diseases, yet I am of the opinion that the scope of the authority conferred is not restricted to such inspection and treatment of nursery stock, but from certain of the provisions of the aforesaid sections, it is clear to my mind that a general authority to investigate outbreaks of insect pests and plant diseases within the state and to take suitable measures for their eradication and control is intended to be conferred.

Section 1122, G. C., as amended in 103 O. L., 313, provides:

"The agricultural commission may make such regulations as it deems necessary for the prevention and control of insect pests or plant diseases. The term 'nursery stock' as used in the section herein relating to nursery and orchard inspection, includes trees, shrubs, plants, vines, buds, scions and cuttings commonly grown in nurseries and orchards except greenhouse plants and cuttings thereof, bulbs, flowers and vegetable plants. The terms 'insect pests' and 'plant diseases' as used in such section include San Jose scale, peach yellows, black knot and other dangerously injurious insect pests and plant diseases."

Section 1123, G. C., as amended 103 O. L., 313, provides:

"The agricultural commission shall appoint a competent entomologist as chief inspector and such assistant inspectors as it deems proper. The agricultural commission shall have charge of the inspection of nurseries, orchards and all other premises whereon trees, shrubs, plants and vines are grown, except greenhouse plants and cuttings thereof, bulbs, flowers and vegetable plants. It may investigate, or cause to be investigated, outbreaks of insect pests or plant diseases, cause suitable measures to be taken for their eradication or control, devise, test and demonstrate practical remedies for their suppression, and publish the results of such investigations, together with such other information as it deems necessary."

Section 1134, G. C., as amended in 103 O. L., page 316, provides in part:

"Upon the application of a nurseryman or other person for inspection as provided in section 47, (1125, G. C.) or upon the written request of a free-holder or lessee resident of this state, the agricultural commission shall cause nursery stock and premises of the applicant or petitioner and all premises in dangerous proximity thereto, to be examined. In the prosecu-

> tion of official duties the agricultural commission may enter within reasonable hours upon any premises or into any building containing nursery stock. If an examination discloses the presence of insect pests or plant diseases, the agricultural commission shall notify the owner or lessee of the premises of such fact by mailing a notice to his usual postoffice address. The notice shall specify the nursery stock to which treatment shall be applied and the time within which the order of the agricultural commission must be complied with. * * *"

It will be observed that certain of the language above quoted is appropriate to evidence and express a legislative intent to vest in the agricultural commission a general authority to take necessary measures for combating invasions or outbreaks of destructive insect pests within the state, and must be so interpreted unless restricted by other provisions of the act. As above noted, the act makes provision somewhat in detail in relation to the inspection and treatment of "nursery stock," but I am unable to find that any of such provisions have the force of limiting the more general language of the act to the scope comprehended by that term, while some of the language above quoted seems clearly to relate to subject matter outside or in addition to that comprehended by the term "nursery stock" as defined in these statutes.

You state in your letter that the gypsy moth is a most destructive and dangerous insect and the only effective and practical means for its destruction or for preventing its spread from the infected district along the boulevard where the eggs have been scattered is to spray the trees along and adjacent to such boulevard and it is therefore assumed that this insect is one that attacks and injures trees, including as well, no doubt, those of the character commonly grown in orchards and nurseries, as other kinds of trees and vegetation.

Hence it may fairly be determined that the gypsy moth is properly regarded as an "insect pest" within the classification comprehended by that term, as defined in the statutes.

The agricultural commission is charged with the exercise of a public function primarily for the protection and conservation of the trees and vegetation of the state against the injury and destruction that would result or that may be reasonably anticipated from the establishment or spread of insect pests or plant diseases within its borders.

It is now well settled that the legislature in the exercise of the police power, is authorized to enact such reasonable measures as are necessary and appropriate to preserve and protect the public health, safety and welfare including the authority to delegate the administration and enforcement of the policy of the state so enacted to an appropriate agency of the government, with discretion as to the means and measures to be adopted for the accomplishment of the desired result. While there has been no judicial determination of the question presented by you, yet the decision of the supreme court in the case of The State Board of Health et al., v. The City of Greenville et al., 86 O. S., page 1, is upon a very similar question. In the course of the opinion the court said:

> "This particular legislation now under consideration is designed to preserve and protect the public health and comfort, and therefore, falls directly within the police power of the state. This power includes anything which is reasonable and necessary to secure the peace, safety, health and best interests of the public.
>
> "This legislation * * * creates this state board of health as an

agency to assist the legislature in that important function of government looking to the preservation of public health and comfort and authorizes it to determine what will best conduce to such ends."

The court sustained the constitutionality of the law and the powers therein conferred upon the state board of health.

It is observed from your statement that no evidence of the presence of the insect on the premises in question has been found, but that the said premises are adjacent to the boulevard over which the infected boulders were conveyed and along which the eggs of the moth were scattered; and further that the nature and habits of the gypsy moth are such that spraying must be done before the larvae appear to effect their destruction as it is practically impossible to destroy them after they have developed to any extent.

Whether or not the probability of the presence of these moths on the premises in question, under the facts and circumstances as you may find them to exist, is sufficiently strong to constitute a menace to the adjacent estates and community and the state at large is a question of fact that must be first determined; and only in the event of its determination in the affirmative, of course, could the measure contemplated by the inquiry be considered a necessary or reasonable one.

But in such event it is entirely possible, in view of the nature and habits of the insect, that the proper or even the only effective and practicable way to combat the establishment and spread of the moth within the state, would be to take such precautionary measures against its development as that suggested by you.

Having determined that there is such a probability of the presence of the eggs or larvae of the moth upon the premises of Attorney Gale, as to menace the adjoining estates and threaten a spread of the moth through the state at large, the measures to be adopted for combating and preventing its spread are within the discretion of the agricultural commission, subject only to the limitation that the action and measures taken by the commission must be necessary and reasonable, having regard to the nature and habits of the insect and the means appropriate and effective for its destruction.

There being no judicial decision in this state amounting to a direct precedent for the interpretation to be given the provisions of the legislation under consideration, and the said legislation not being entirely clear and specific, the determination of the scope of the authority conferred upon the agricultural commission is not at all free from difficulty, but in view of the apparent purpose of the legislation to confer authority to combat and prevent the establishment and spread of dangerous and destructive insect pests and plant diseases within the state, I am of the opinion that the agricultural commission should proceed to exercise the authority as above interpreted until there has been a judicial determination to the contrary.

Respectfully,

EDWARD C. TURNER,

Attorney General.

593.

PLATS—DIRECTOR OF PUBLIC SERVICE—APPROVAL OF PLATS LOCATED WITHIN THREE MILES OF A CITY—COUNTY RECORDER.

Where it is desired to plat lands located within three miles of the corporate limits of a city, and within the same county, a plat of such lands is not entitled to record in the recorder's office of such county until the approval of the director of public service of said city is endorsed thereon, and the above rule is not changed by the fact that such lands adjoin a village.

COLUMBUS, OHIO, July 12, 1915.

HON. JOSEPH T. MICKLETHWAIT, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—I have your communications of June 30 and July 3, 1915, in which you state that it is planned to plat certain lands in Scioto county and that the lands in question are without the corporate limits of the village of New Boston, but adjacent to said village and within three miles of the city of Portsmouth. The east corporation line of the city of Portsmouth and the west corporation line of the village of New Boston are identical. The lands which it is now desired to plat are also adjacent to another allotment which is adjacent to the east corporation line of the village of New Boston. You inquire whether the approval of the director of public service of the city of Portsmouth or the approval of the village council of New Boston must be endorsed on the plat before it can be recorded, and cite sections 4346 and 3586 of the General Code, as bearing on the question, and also call my attention to an opinion of my predecessor, Hon. U. G. Denman, rendered to Hon. F. J. Rockwell, prosecuting attorney of Summit county, November 25, 1910.

Section 4346, G. C., to which you refer, provides, among other things, that the director of public service shall be the platting commissioner of the city and that when any person plats any lands within three miles of the corporate limits of a city, the platting commissioner shall, if they are in accordance with the rules as prescribed by him, endorse his written approval thereon, and that no plat of such land shall be entitled to record in the recorder's office in the county in which such city is located, without such written approval so endorsed thereon; provided that the approval of the platting commission of a city shall not be required unless such city is the nearest to the lands sought to be allotted.

An examination of section 3586, to which you refer, discloses the fact that while the section applies to both cities and villages, it can have no application to the facts now under consideration for the reason that it extends only to lands located within a municipal corporation and has no application, where the lands which it is desired to plat are located outside of a municipal corporation.

Your inquiry is therefore to be answered solely with reference to the provisions of section 4346, G. C.

I assume that the lands to which you refer are located in Scioto county. The lands being within three miles of the corporate limits of the city of Portsmouth and not being located within any other municipal corporation, and the city of Portsmouth being the nearest *city* to such lands, it follows that no plat of such lands is entitled to record in the recorder's office of Scioto county until the approval of the director of public service of the city of Portsmouth is endorsed thereon. In other words, New Boston being a village instead of a city, the provision that the approval of the platting commission of a city shall not be required unless

such city is nearest to the lands sought to be allotted, has no application, it evidently being the intention of the legislature to limit extra territorial jurisdiction in this matter to cities and to deny the same to villages.

The opinion of my predecessor, Hon. U. G. Denman, to which you refer, was based upon the fact that in that instance the platted lands were located within a village and also within three miles of a city, and it was very properly held under such facts, that section 3586, G. C., was to be taken as the controlling section and that section 4346, G. C., had no application. The opinion herein expressed is in full accord with that expressed by former Attorney General Denman, the opposite conclusion being reached by reason of the fact that in the case considered by him the lands in question were within the village while in the case now under consideration the lands are located without the corporate limits of the village.

Respectfully,
EDWARD C. TURNER,
Attorney General.

594.

COUNTY MEMORIAL BUILDING—WHAT CONSTITUTES "COMPLETION" OF SUCH BUILDING.

A memorial building, constructed under authority of sections 3059 *et seq., G. C., is completed within the meaning of section* 3068, *G. C., when all the labor has been performed and material furnished according to the plans and specifications prepared by the trustees in charge of the construction of said building and adopted by them as required by section* 3066, *G. C., upon which the contract for said construction is based.*

COLUMBUS, OHIO, July 12, 1915.

HON. CHARLES E. BALLARD, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—In your letter of June 15th you request my opinion as follows:

> "A memorial building to commemorate the services of the soldiers, sailors, marines and pioneers, is being erected in Clark county, at a cost not to exceed $250,000.00, as authorized by sections 3059 et. seq., G. C.
>
> "The building will be turned over to the county commissioners as authorized by section 3068, G. C.
>
> "Said section provides in substance, that the commissioners shall provide for the maintenance, equipment, decorations and furnishing thereof, the cost of which shall not exceed $25,000.00.
>
> "Said last named section also authorizes the trustees of the memorial building to turn over to the county commissioners such building *upon completion.*
>
> "The building when completed will contain pipes for lighting by gas, and wiring for lighting by electricity. It will contain pipes for heat, which can be heated by a furnace in said building or by the heat furnished by connection with the City Light, Heat and Power Company.
>
> "The question is, what is a completion of the memorial building? Are

the trustees of the memorial building to install the chandeliers for lighting? Are the trustees of the memorial building to install a furnace and smoke stack for heating?"

Section 3068, G. C., provides:

"Upon completion of the memorial building the trustees shall turn it over to the county commissioners, who shall provide for the maintenance, equipment, decoration and furnishing thereof, not to exceed the sum of twenty-five thousand dollars in the same manner as they are authorized to care for and maintain other property of the county. The board of commissioners of the county, in addition to all other levies authorized by law, shall levy an annual tax in the year 1910, and annually thereafter to care for such building, and to make such improvements thereof as are necessary to carry out the purposes for which it was constructed. They may permit the occupancy and use of the memorial building, or any part thereof, upon such terms as they deem proper."

Upon the completion of the Clark county memorial building, constructed under authority of sections 3059 et. seq., of the General Code, the trustees are required to turn said building over to the commissioners of said county and it is the duty of said commissioners under the above provision of section 3068, G. C., to provide for the maintenance, equipment, decoration and furnishing thereof, and to expend for this purpose an amount not to exceed twenty-five thousand dollars.

As I view it said buildings will be completed, in so far as the trustees are concerned, when all the labor has been performed and material furnished according to the plans and specifications prepared by said trustees and adopted by them as required by section 3066, G. C., upon which the contract for the construction of said building was based. From your statement of facts it appears that when the construction of said building has been completed according to said plans and specifications, it can be lighted by either gas or electricity, or both, and said building will contain pipes for heating which may be furnished from the furnace set in the room provided therefor, or by connecting said pipes with the heating plant of the City Light, Heat & Power Company.

I assume that the specifications adopted by the trustees of said building, and which were a part of the contract for the construction thereof, do not require the contractor to equip said building with lighting fixtures and a heating plant. The placing of said lighting fixtures and a heating plant in said building properly come under the head of the equipment of said building within the meaning of the above provision of the statute.

I am of the opinion therefore, in answer to your question, that after said building is turned over to the county commissioners it will be the duty of said commissioners under the above provision of section 3068, G. C., to equip said building with lighting fixtures and to provide for the heating of said building either by establishing a heating plant therein or by connecting the pipes in said building with the heating plant of the municipal light, heat and power company.

Respectfully,
EDWARD C. TURNER,
Attorney General.

595.

ROADS AND HIGHWAYS—HOUSE BILL NO. 493 IN 103 O. L., 549, CONSTITUTIONAL—ACT DOES NOT PROVIDE FOR NOTICE TO ABUTTING PROPERTY WHERE ROAD SUPERINTENDENTS DESTROY BRUSH IN THE ROADS.

House bill No. 493 found in 103 O. L., 549, and being sections 7148 to 7148-2, G. C., is a constitutional and valid enactment.

COLUMBUS, OHIO, July 12, 1915.

HON. GEORGE C. VON BESELER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—I have your communication of July 6, 1915, in which you ask my opinion as to whether or not house bill No. 493, found in 103 O. L., 549, and being sections 7148 to 7148-2 inclusive, of the General Code, can be enforced to the extent of certifying to the county auditor the amount of the cost of work done under section 7148, G. C.

Your inquiry is evidently designed to raise the question of the constitutionality of house bill No. 493 passed by the general assembly May 18, 1913, upon the ground and for the reason that no provision is made in such act for notice to the owner of abutting property. Section 7146, G. C., which was in force prior to the passage of the act above referred to, provides that pike superintendents, turnpike directors, road superintendents and street commissioners shall destroy all brush, etc., within the limits of roads, streets or alleys within their jurisdiction, the work to be done between the 1st and 20th days of June, and between the 1st and 20th days of August, and if necessary between the 1st and 20th days of September of each year.

Sections 7148 and 7148-1, G. C., as enacted in house bill No. 493, read as follows:

> "Sec. 7148. The superintendent of such road shall allow a land owner or tenant to destroy such brush, briars, burrs, vines, thistles or other noxious weeds, growing or being on such roads along the lands abutting thereon, owned or occupied by such land owner or tenant. Such land owner or tenant shall do the work or cause it to be done before the first day of the month in which it is required to be done as specified in section 7146. In case such owner or tenant fails to comply with section 7146 and the foregoing provisions of this section, the superintendent of roads or turnpikes shall do the work or cause it to be done.
>
> "Sec. 7148-1. When such work is done by the superintendent the township trustees shall certify to the auditor of the county the amount of the cost of the work with the expense thereto attached, and a correct description of the land upon which the work was performed, and the auditor shall place the amount upon the tax duplicate to be collected as other taxes. The county treasurer shall pay the amount when collected to the township treasurer as other funds."

An examination of the files of this office discloses the fact that a similar question was passed upon by my predecessor, Hon. Timothy S. Hogan, in an opinion rendered to Hon. G. G. O. Pence, member of the house of representatives. The opinion in question being rendered on February 18, 1913, and being found at page 24 of the annual report of the attorney general for that year.

This opinion was rendered in response to a request for an opinion as to the

constitutionality of house bill No. 198, which bill was very similar to house bill No. 493, and in holding that the proposed measure was constitutional the then attorney general used the following language:

> "It is a well established principle of law that acts of the legislature are presumed to be constitutional and valid, and the courts will not declare them unconstitutional unless it is clearly made to appear that they are so. I see no reason for holding house bill No. 198 unconstitutional. In my judgment it comes within the police power of the state, being a measure for the preservation of the public health, convenience and welfare."

I concur in the opinion expressed by my predecessor, and therefore hold that house bill No. 493, as found in 103 O. L., 549, is a constitutional and valid enactment and that all the provisions of the same may be lawfully enforced.

Respectfully,
EDWARD C. TURNER,
Attorney General.

596.

BOARD OF EDUCATION OF A RURAL SCHOOL DISTRICT HAVING SUBMITTED TO A VOTE THE PROPOSITION OF DISSOLVING SAID DISTRICT AND JOINING WITH A CONTIGUOUS RURAL OR VILLAGE DISTRICT WHICH VOTE IS UNFAVORABLE MAY AGAIN SUBMIT QUESTION UPON PETITION OF ELECTORS.

Where the board of education of a rural school district under authority of section 4735-1, *G. C.,* 104 *O. L.,* 138, *submits to a vote of the qualified electors of said district the proposition of dissolving said district and joining it to a contiguous rural or village school district, and the vote is unfavorable thereto, upon the petition signed by not less than one-fourth of the electors residing in said district, said board of education may again submit said proposition to a vote of the electors of said district.*

COLUMBUS, OHIO, July 12, 1915.

HON. P. A. SAYLOR, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I have your letter of July 1st requesting my opinion as follows:

> "The Gratis township rural school district, Preble county, Ohio, in May or June of this year, voted on the question to dissolve and join or annex to West Elkton village school district. This vote was taken because a petition signed by twenty-five per cent. of the electors of said rural school was presented to the board of education, as provided in section 4735-1, of the General Code, of Ohio. The proposition to dissolve was defeated by one vote. Afterwards another petition signed by twenty-five per cent. of the qualified electors of said Gratis rural school district was presented to said board of education and another vote was taken on said petition. On the second vote the proposition to dissolve was carried by something like fifteen votes. At a meeting last night the question was raised by some of the members of Gratis rural school district whether the election was legal because the petition for the vote on dissolution (the second petition) was not signed by more than twenty-five per cent. of the

electors. I told the board that I did not think that the second petition under section 4735-1 had to be signed by more than twenty-five per cent. of the voters. Some of the members said that they had been told that the second petition would have to be signed by forty per cent. of the electors of the rural district. I cannot find any law for this proposition on the question of dissolution but can find where you have to have forty per cent. on a second vote on the question of centralization, but this is not a question of centralization but one of dissolution and we cannot see that section 4726 has anything to do with the question of dissolution. Will you please take this matter up and let us have your opinion at the earliest possible date as the village board will have to provide conveyances if the election is legal and this will have to be looked after soon or the school will suffer by the delay."

Section 4735-1, G. C., as found in 104 O. L., 138, provides:

"When a petition signed by not less than one-fourth of the electors residing within the territory constituting a rural school district, praying that the rural district be dissolved and joined to a contiguous rural or village district, is presented to the board of education of such district; or when such board, by a majority vote of the full membership thereof, shall decide to submit the question to dissolve and join a contiguous rural or village district, the board shall fix the time of holding such election at a special or general election. The clerk of the board of such district shall notify the deputy state supervisors of elections, of the date of such election and the purposes thereof, and such deputy state supervisors shall provide therefor. The clerk of the board of education shall post notices thereof in five public places within the district. The result shall be determined by a majority vote of such electors."

It appears that in compliance with the provisions of this statute one-fourth of the electors of Gratis township rural school district in Preble county signed a petition which was presented to the board of education of such district, praying that said rural school district be dissolved and joined to West Elkton village school district, and the question being submitted to a vote of the electors of said district, the proposition to dissolve was defeated by one vote. It further appears that a second petition signed by twenty-five per cent. of the qualified electors of said township rural school district was presented to said board of education and that upon submitting the proposition to dissolve and to annex said rural district to said village school district, to the vote of the electors the majority vote was in favor of said proposition. You inquire whether the second petition, above referred to, as signed by twenty-five per cent. of the electors of said rural school district, was a compliance with the statute or whether said petition had to be signed by forty per cent. of the electors of said rural school district.

The provision of section 4726, G. C., as found in 104 O. L., 139, governing the percentage of electors who must sign a petition for the resubmission of the question of centralization in a rural school district after the proposition to centralize has been submitted to the electors of such district and has been defeated, has nothing to do with the procedure to dissolve a rural school district and join it to another contiguous thereto. The only provisions of the statute applicable to such procedure are found in section 4735-1, G. C., as above quoted.

I am of the opinion therefore, in answer to your question, that the petition for the resubmission to the electors of Gratis township rural school district of the

proposition to dissolve said district and join it to West Elkton village school district, as signed by twenty-five per cent. of the electors of said rural school district, complied with the requirements of said section 4735-1, G. C., and that the action of the board of education of said rural school district was authorized by said statute. The election was therefore legal providing said board of education complied with the other requirements of the statute governing the submission of said question to a vote of the electors.

Respectfully,
EDWARD C. TURNER,
Attorney General.

597.

GOVERNOR—NOT REQUIRED TO ISSUE PROCLAMATION TO HAVE LIMA STATE HOSPITAL OPENED—GOVERNOR AND SECRETARY OF STATE REQUIRED TO ISSUE CERTIFICATE TO EACH OF COURTS OF STATE THAT HOSPITAL IS OPEN TO RECEIVE PATIENTS.

The law does not require the governor of Ohio to issue a proclamation stating that the Lima State Hospital is open and ready for the reception of inmates, but does require a certificate of the governor and secretary of state to the courts to that effect. Form of certificate suggested.

COLUMBUS, OHIO, July 12, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Under date of July 2nd you requested my opinion on the following matters:

> (1) "Does the law require the governor of Ohio to issue a proclamation stating that the Lima State Hospital is open and ready for the care of patients before the courts are authorized to commit criminal insane to that institution?
>
> (2) "If so, in order that there may be no mistake about the matter, I very respectfully request that you indicate the proper form of such proclamation."

The statute under which the Lima State Hospital was erected is found in the 98th volume of Ohio Laws, page 236, and is entitled "An act to provide for the erection, organization and management of the Lima State Hospital for Insane."

Section 1 of said act provides that the hospital shall be known as "The Lima State Hospital."

Section 25 thereof provided as follows:

> "This act shall go into effect on and after its passage, except that the provisions of sections twelve (12) to fifteen (15), inclusive, shall not have the force of law until the Lima State Hospital is ready for the reception of insane, which fact shall then be certified to the courts by the governor and secretary of state."

Section 12 of said act provided for "persons not indicted because of insanity."

Section 13 provided for "disposition of insane under indictment."

Section 14 provided for "persons acquitted because of insanity."

Section 15 provided for "commitment of insane persons previously convicted for certain crimes."

Sections 12, 13, 14 and 15 of the original act, are now found in the General Code of Ohio, under sectional numbers 2003, 13577, 13614, 13615 and 13679. Original section 25 of the act was repealed at the time of codification, but the provisions thereof were incorporated in the various sections of the General Code hereinbefore referred to.

Section 2003, G. C., reads as follows:

> "When in an inquest of lunacy a judge of the probate court finds to be insane a person theretofore convicted of arson, assault, rape, robbery, burglary, homicide, or attempt to commit such acts, he shall commit such person to the Lima State Hospital if ready for the reception of inmates, which fact shall be certified to the courts by the governor and secretary of state."

Section 13577, G. C., reads as follows:

> "If a grand jury upon investigation of a person accused of crime finds such person to be insane, it shall report such finding to the court of common pleas. Such court shall order a jury to be impaneled to try whether or not the accused is sane at the time of such impaneling, and such court and jury shall proceed in a like manner as provided by law when the question of the sanity of a person indicted for an offense is raised at any time before sentence. If such person is then found to be insane, he shall be committed to the Lima State Hospital until restored to reason. This section shall not be in force and effect until the Lima State Hospital is ready for the reception of inmates as certified to the courts by the governor and secretary of state."

Section 13614, G. C., reads as follows:

> "If a person under indictment appearing to be insane, proceedings shall be had as provided for persons not indicted because of insanity. If such person is found to be insane he shall be admitted to the Lima State Hospital and restored to reason when the president thereof shall notify the prosecuting attorney of the proper county who shall proceed, as provided by law, with the trial of such person under indictment."

Section 13615, G. C., reads as follows:

> "The next preceding section shall not be in force and effect until the Lima State Hospital is ready for the reception of inmates as certified to the courts by the governor and secretary of state."

Section 13679, G. C., reads as follows:

> "When a person tried upon an indictment for an offense is acquitted on the sole ground that he was insane and proceedings are had thereafter as provided by law, he shall be committed to the Lima State Hospital. This

section shall not be in force and effect until the Lima State Hospital is ready for the reception of inmates as certified to the courts by the governor and secretary of state.

Under section 2003, supra, the probate court is to commit the person thereunder to the Lima State Hospital, if ready for the reception of inmates, the fact of the hospital being so ready to be certified to the courts by the governor and secretary of state.

Section 13577 provides that a person found insane thereunder shall be committed to the Lima State Hospital, but that such section shall not be in force until the Lima State Hospital is ready for the reception of inmates, as certified to by the governor and secretary of state.

Section 13615 provides that section 13614 shall not be in effect until such certificate is given.

Section 13679 provides that such section shall not be in force until a certificate is given.

Nowhere, however, is there any provision for a proclamation to be issued by the governor.

"Proclamation" is defined in 32 Cyc., 571, as follows:

> "The act of proclaiming; a declaration or notice by public outcry; a public notice in writing given by a state or city official of some act done by the government, or to be done by the people; the act of causing some state matters to be published or made generally known; a written or printed document in which are contained such matters issued by proper authority; a notice publicly given of anything whereof the executive thinks fit to inform and notify the public; a publication by authority; an official notice given to the public."

New Standard Dictionary:

> *"Proclamation*: (Law) An official public notification by some executive authority of the occurrence of an event important to the public, or of command, caution, or warning in relation to a matter impending."

The statutes only provide for a certificate by the governor and secretary of state to the courts. Nowhere is there found any intent on the part of the legislature that the public generally shall be informed of the fact of the opening of the Lima State Hospital. And such certificate is only for the purposes mentioned in the sections of the General Code hereinbefore set out and for the information of the courts of this state, which would have jurisdiction in the matter.

Therefore, in answering your first question, I would state that the governor of Ohio is not required by law to issue a proclamation in regard to the matter, but that he and the secretary of state are required to issue a certificate to each of the courts of the state that the Lima State Hospital is now ready for the reception of inmates.

(2) You request me to indicate the proper form of a proclamation.

Herewith I indicate what to my mind would be a proper form of the certificate to be issued to the courts:

> "We, Frank B. Willis, as governor of the state of Ohio, and Charles

Q. Hildebrant, as secretary of state of the state of Ohio, in pursuance of the authority in us vested by law, do hereby certify that the Lima State Hospital is now ready for the reception of inmates.

IN TESTIMONY WHEREOF, I, Frank B. Willis, as governor of the state of Ohio, have hereunto subscribed my name and affixed the great seal of the state of Ohio, and I, Charles Q. Hildebrant, as secretary of state of the state of Ohio, have hereunto subscribed my name and affixed my official seal, at Columbus, Ohio, this ----------day of ----------A. D., 1915.

"----------

"(Great Seal of the State of Ohio) Governor of Ohio.

"----------

"(Seal of Secretary of State) Secretary of State."

Respectfully,
EDWARD C. TURNER,
Attorney General.

598.

SUSPENSION OF SENTENCE—POWER OF COURTS TO SUSPEND SENTENCE OF A PERSON WHO HAD THERETOFORE BEEN IMPRISONED FOR CRIME—DECISION IN 83 O. S., 447, FOLLOWED.

Following the decision in State v. Whiting, 83 O. S., 447 (decided without opinion). Courts have power to suspend the sentence of a person who had theretofore been imprisoned for crime, and place the defendant on probation notwithstanding the provisions of section 13706, G. C.

COLUMBUS, OHIO, July 12, 1915.

HON. A. M. HENDERSON, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—Your letter of July 1, 1915, requesting my opinion, received and is as follows:

"Section 13706 of the General Code reads as follows:

"'In prosecutions for crime, except as hereinafter provided, where the defendant has pleaded or been found guilty, and the court or magistrate has power to sentence such defendant to be confined in or committed to the penitentiary, the reformatory, a jail, workhouse, or correctional institution, and the defendant has never before been imprisoned for crime, either in this state or elsewhere, and it appears to the satisfaction of the court or magistrate that the character of the defendant and circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and that the public good does not demand or require that he shall suffer the penalty imposed by law, such court or magistrate may suspend the execution of the sentence and place the defendant on probation in the manner provided by law.'

"One A. F. Clause was indicted by our grand jury for grand larceny and upon arraignment entered a plea of guilty to this charge. This man has a wife and seven children totally dependent upon him for support. He has heretofore been in prison for crime. The trial judge believes

that the character of the defendant and the circumstances of the case are such that he is not likely again to engage in an offensive course of conduct and that the public good demands that he shall not suffer the penalty imposed by law, but the court has considerable doubt as to his right and power to invoke the terms of this statute in this case, although, owing to the dependent condition of his family upon the defendant, he is desirous of taking advantage of this law, if it can be done legally. Judge Anderson has suggested that I communicate with you for the purpose of securing an expression of opinion from you covering this question."

The question presented by you is clearly covered by section 13706 of the General Code, quoted by you, and under the provisions of that section, if recognized and enforced by the courts, the defendant, having been heretofore imprisoned for crime, is not eligible to be placed on probation.

However, in answering your question, it is necessary to take into consideration the case of State of Ohio v. Jeanette Whiting, decided at the 1910 term of the supreme court of this state and reported without opinion in 83 O. S., 447.

That case originated in the common pleas court of the fourth judicial district of the state of Ohio and was tried before Hon. R. M. Wanamaker, then judge of the common pleas court in that district. Jeanette Whiting was indicted by the grand jury of Summit county on a charge of cutting with intent to wound. She was tried and convicted and Judge Wanamaker sentenced her to be imprisoned in the penitentiary of this state for the period of two years and to pay the costs of prosecution, which sentence was suspended by the court in the following language:

"It is further ordered and adjudged by the court notwithstanding the fact that said defendant has heretofore at about the 30th day of July, 1907, been imprisoned in the workhouse at Cleveland this state, as punishment for the offense of unlawfully cutting another person, that the sentence herein imposed imprisoning the defendant in the penitentiary of this state be suspended upon the following conditions, to wit:

"1st. That said defendant pay or cause to be paid to the satisfaction of the clerk of this court the costs in this case.

"2nd. That said defendant report to this court every six months hereafter and bring with her affidavits of her parents and employers showing that she has been guilty of no violation of law and has lived an upright, sober, industrious and moral life, which reports are to continue for the period of two years at which time the court will make further order as to the conditions of the suspension of the sentence herein. The court in making the above suspension does not make the same under authority of an act entitled, "An act to provide for probation of persons convicted of felonies and misdemeanors," but does so under claimed inherent authority on the part of the court to suspend such sentence. To all of which order of suspension the prosecuting attorney on behalf of the state of Ohio here and now excepts."

The prosecuting attorney, on leave, filed a bill of exceptions in the supreme court on the sole question of the power of the court to suspend said sentence in the face of undisputed evidence that the defendant had been theretofore imprisoned for crime.

The briefs filed in the case show that this was the only question under consideration, the prosecuting attorney contending that the court was bound to observe

the provisions of section 13706 of the General Code, quoted above, and the attorney for the defendant claiming that the suspension was justified by reason of the inherent power of the court to suspend the sentence.

As stated above, the case was decided by the supreme court October 11, 1910, without opinion, overruling the exceptions of the prosecuting attorney, Crew, Davis, Shauck and Price, judges, concurring.

In the absence of an opinion by the court it is, of course, impossible to say absolutely what the grounds of the decision were, but, as there was only one question raised in the case, it is safe to assume that the decision was based on the claimed inherent right of the court to suspend the sentence.

Therefore, in the light of this decision and until it is overruled by the supreme court, I am compelled to advise you that, notwithstanding the plain provisions of sections 13706, et seq., of the General Code, the court has the inherent power to suspend the sentence of the defendant in question. The entry should show that the suspension is made under the inherent power of the court and not under the statute.

This opinion is based solely upon the Whiting decision, above referred to, and my duty to follow the decisions of the supreme court.

Respectfully,
EDWARD C. TURNER,
Attorney General.

599.

SUPERINTENDENT OF BANKS—BONDS OF MUNICIPALITIES OF OTHER STATES CAN BE DEPOSITED AS SECURITY FOR MUNICIPAL FUNDS WITH A BANK ACTING AS DEPOSITORY OF SUCH MUNICIPAL FUND.

Legally issued bonds of cities and villages of any state or territory of the United States may be accepted by the proper municipal officers as security for municipal funds deposited with a bank which has been legally designated as a depository of such municipal funds.

COLUMBUS, OHIO, July 12, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of July 8, 1915, as follows:

> "Would you please advise us as to whether or not bonds of municipalities of states, other than Ohio, can be used as security for municipal funds in this state?
>
> "Section 4295 of the General Code seems to make it perfectly clear that they can be used as security for all moneys other than state funds. However, we are asking for your opinion for our future guidance."

I take it from the language of your letter that you desire my opinion as to whether or not the proper municipal officers of an Ohio municipality are authorized

to accept as security for municipal funds deposited in a bank which has been properly designated as a municipal depository, legally issued bonds of any city or village of any other state or territory of the United States.

Section 4295 of the General Code, referred to in your letter, (103 O. L., 113) is as follows:

> "The council may provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer, in such bank or banks, situated within the municipality or county, as offer, at competitive bidding, the highest rate of interest and give a good and sufficient bond issued by a surety company authorized to do business in the state, or furnish good and sufficient surety, or secure said moneys by a deposit of bonds or other interest bearing obligations of the United States or those for the payments of principal and interest of which the faith of the United States is pledged, including bonds of the District of Columbia; bonds of the state of Ohio or of any other state of the United States; legally issued bonds of any city, village, county, township or other political subdivision of this or any other state or territory of the United States and as to which there has been no default of principal, interest or coupons, and which in the opinion of the treasurer are good and collectible providing the issuing body politic has not defaulted at any time since the year 1900, in the payment of the principal and interest of any of its bonds, said security to be subject to the approval of the proper municipal officers, in a sum not less than ten per cent. in excess of the maximum amount at any time to be deposited. And whenever any of the funds of any of the political subdivisions of the state shall be deposited under any of the depository laws of the state, the securities herein mentioned, in addition to such other securities as are prescribed by law, may be accepted to secure such deposits."

The language of the section above quoted, relative to the question submitted, is clear and susceptible of but one interpretation.

I am, therefore, of the opinion that legally issued bonds of any city or village of any other state or territory of the United States, as to which bonds "there has been no default of principal, interest or coupons, and which in the opinion of the treasurer are good and collectible providing the issuing body politic has not defaulted at any time since the year 1900 in the payment of the principal and (or) interest of any of its bonds, said security to be subject to the approval of the proper municipal officers," may be accepted by the proper officers of an Ohio municipality as security for municipal funds deposited in a bank which has been lawfully designated as a depository for such municipal funds. The bank having such bonds as security should furnish information by certificate or otherwise to the satisfaction of the municipal officers showing that such securities meet the requirements of the language above quoted.

Respectfully,
EDWARD C. TURNER,
Attorney General.

600.

CIVIL SERVICE COMMISSION—ASSISTANT FOR TAX COMMISSION—IN CLASSIFIED SERVICE IF PRACTICABLE TO DETERMINE MERIT AND FITNESS BY COMPETITIVE EXAMINATION—PRACTICABILITY TO BE DETERMINED BY STATE CIVIL SERVICE COMMISSION.

The position of assistant for the tax commission, for which an appropriation of $900.00 is made by house bill No. 701, is in the classified service of the state civil service if it is practicable to determine the merit and fitness of applicants by competitive examinations. The question of whether or not it is practicable to determine the merit and fitness of applicants by competitive examinations is one to be determined by the state civil service commission, its determination to be based upon the nature of the duties to be performed by the assistant in question.

COLUMBUS, OHIO, July 12, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your communication under date of July 6, 1915, which reads as follows:

> "House bill No. 701, line 2440 on page 100, provides for the appointment of an assistant. This has no reference whatever to line 2439, and should be construed by itself.
>
> "The duties to be performed by this assistant are those of a general nature, ranging from messenger to typist, and are impossible to classify. The civil service commission have informed this commission that they have no position under that name.
>
> "This commission would ask your opinion as to whether or not said assistant is in the classified service."

The item contained in house bill No. 701, and which is referred to in the above quoted communication as line 2440, is as follows:

"Assistant ----------$900.00".

The item contained in said bill and which is referred to in the above quoted communication, as line 2439, which item immediately precedes the one above referred to, is as follows:

"Corporation Accountant ----------$2,400.00."

Waiving for the purpose of this opinion any question as to whether the assistant for which an appropriation of $900.00 is made is an assistant to the corporation accountant or an assistant who is to perform such general duties as may be assigned to him by the tax commission, and adopting the view of the tax commission as to this feature of the matter, which is that the item referred to as line 2440 has no reference whatever to the item referred to as line 2439 and should be construed by itself, the inquiry of the tax commission then is as to whether the position of assistant, for which the appropriation now under consideration was made, is in the classified or unclassified service.

Section 4861-8 of the General Code, being section 8 of the civil service law now in force, provides as follows:

"The civil service of the state of Ohio and the counties, cities and city school districts thereof shall be divided into the unclassified service and the classified service.

"(a) The unclassified service shall comprise the following positions which shall not be included in the classified service, except as otherwise provided in section 19 hereof:

"1. All officers elected by popular vote.

"2. All heads of principal departments, boards and commissions appointed by the governor or by and with his consent or by the mayor, or if there be no mayor such other similar chief appointing authority of any city or city school district.

"3. All officers elected by either or both branches of the general assembly.

"4. All election officers.

"5. All commissioned, non-commissioned officers and enlisted men in the military service of the state.

"6. All presidents, superintendents, directors, teachers and instructors in the public schools, colleges and universities; the library staff of any library in the state supported wholly or in part at public expense.

"7. Two secretaries or assistants or clerks for each of the elective and principal executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such a secretary, assistant or chief clerk.

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

"9. Bailiffs of courts of record.

"10. Employes and clerks of boards of deputy state supervisors and inspectors of elections.

"(b) The classified service shall comprise all persons in the employ of the state, the counties, cities and city school districts thereof, not specifically included in the unclassified service, to be designated as the competitive class.

"1. The competitive class shall include all positions and employments now existing or hereafter created in the state, the counties, cities and city school districts thereof, for which it is practicable to determine the merit and fitness of applicants by competitive examinations. Appointments shall be made to, or employment shall be given in, all positions in the competitive class that are not filed by promotion, reinstatement, transfer or reduction, as provided in sections 15, 16 and 17 of this act and the rules of the commission, by appointment from those certified to the appointing officer in accordance with the provisions of section 13 of this act."

It is evident from an examination of the ten subdivisions of the unclassified service that the position now under consideration does not fall within any of such subdivisions unless it be the 7th, and I learn by inquiry that the tax commission has already selected two other secretaries, assistants or clerks and designated the same as in the unclassified service. It therefore follows that the position of assistant now under consideration is within the classified service or competitive class, under the provisions of the section above quoted, if it is practicable to determine the merit and fitness of applicants for such position by competitive examinations. The fact that the state civil service commission has not as yet held any examinations for a position under this name and therefore has at present no eligible list, and the further fact that the duties to be performed by such assistant

are of a general nature ranging from messenger to typist, and that the position does not therefore fall under any of the classifications so far adopted by the state civil service commission, are all immaterial in the present inquiry, and in the absence of further and more explicit information, I am unable to say, as a matter of law, that the position in question is or is not within the classified service. The question to be determined is as to whether or not it is practicable to determine the merit and fitness of applicants by competitive examinations and that fact is one to be determined by the state civil service commission, its determination to be based upon the nature of the duties to be performed by the assistant in question. In the absence of an abuse of discretion, the finding of the civil service commission will be final.

Until the civil service commission finds that it is not practicable to determine the merit and fitness of an applicant by competitive examination, the position must be considered to be within the classified service.

Respectfully,
EDWARD C. TURNER,
Attorney General.

601.

COUNTY COMMISSIONERS—LEVIES—THREE MILL LIMITATION—LEVY BY COUNTY COMMISSIONERS FOR IMPROVEMENTS TO BE PAID ON TAXABLE PROPERTY OF TOWNSHIP IS NOT LEVY MADE BY TAXING OFFICIALS OF TOWNSHIP FOR TOWNSHIP PURPOSES—TWO MILL LIMITATION—TEN MILL LIMITATION—FIFTEEN MILL LIMITATION.

The levy made by the commissioners of a county, under authority of section 6956-14, *G. C., to pay the county's proportion of the cost of improvements made under authority of sections* 6956-1, *et seq., G. C., is not one of the levies enumerated in section* 5649-3a, *G. C., and excluded by the provision of said statute from the three mill limitation for county purposes therein provided, and said levy must therefore come within said limitation.*

The levy made by said county commissioners on the taxable property of a township in which an improvement is located, in whole or in part, to pay the proportion of the cost of said improvement apportioned to said township by said county commissioners, under authority of section 6956-10, *G. C., is not a levy made by the taxing officials of the township for township purposes, within the meaning of section* 5649-3a, *G. C., and said levy does not have to come within the two mill limitation for township purposes provided by said section.*

Each of the levies above referred to must come within the ten mill limitation provided by section 5649-2, *G. C., as amended in* 103 *O. L.,* 552 *and the* 15 *mill limitation provided by section* 5649-3b *as amended in* 103 *O. L.,* 57.

COLUMBUS, OHIO, July 12, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of July 1, 1915, in which you request my opinion on the following questions:

"1. May the county's share of the cost of the construction of a road,

improved under the provisions of sections 6956-1 to 6956-16, inclusive, be levied over and above the three mill limitation for county purposes, as provided by section 5649-3a?

"2. May the township's portion of such cost be levied in excess of the two mill limitation provided by said section 5649-3a?

"3. May either of such levies be in excess of either the ten mill or the fifteen mill limitation of the so-called one per cent. law?"

Section 6956-10, G. C., relates to the apportionment of the cost of improving a county road by the commissioners of such county under authority of sections 6956-1 to 6956-16, inclusive, of the General Code, and provides as follows:

"When the improvement is wholly within one county, the cost and expense of said improvement including all damages and compensation awarded shall be apportioned by the commissioners as follows: Not less than thirty-five per cent. (35%) nor more than fifty per cent. (50%) thereof shall be paid out of the proceeds of any levy or levies upon the grand duplicate of all the taxable property of the county, or out of any funds available therefor, as provided in section 6956-14 of this act; not less than twenty-five per cent. (25%) nor more than forty per cent. (40%) thereof shall be paid out of the proceeds of any levy or levies upon the grand duplicate of the county levied upon the taxable property of any township or townships in which said improvement may be situated in whole or in part, as provided in section 6956-14 of this act; and the balance, which shall not be less than twenty per cent. (20%) nor more than thirty-five per cent. (35%) thereof shall be assessed upon and collected from the owners of real estate lying and being within one mile from either side, end or terminus of the improvement and assessed according to benefits derived from the improvement as determined by the commissioners. Such assessment shall be in addition to all other assessments authorized by law notwithstanding any limitations upon the aggregate amount of assessments on such property."

Section 6956-11, G. C., provides:

"When any part of the improvement is in more than one county or along the line between two or more counties, the cost and expense of the entire improvement including all damages and compensation awarded shall be divided between the counties in which such improvement may be in the proportion the distance in such county bears to the whole distance improved, and the amount of expense so falling upon the several counties shall be assessed by the commissioners of said counties separately in the same manner and form as though the improvement was wholly in one and the same county, and in the proportion provided in the preceding section."

Section 6956-14, G. C., provides:

"The said proportion of the cost and expense of said improvement to be paid by the county shall be paid out of the state and county road improvement fund or out of any road, road improvement or road repair fund of the county available therefor. If there are not sufficient funds available therefor, then for the purpose of providing by taxation funds for the payment of the county's proportion of the cost and expense of all the

improvements made under the provisions of this act, the county commissioners are hereby authorized to levy upon all the taxable property of the county a tax or taxes not exceeding in the aggregate in any one year the sum of one mill upon each dollar of the valuation of the taxable property in the county. Said levy shall be in addition to all other levies authorized by law, notwithstanding any limitation upon the aggregate amount of such levies now in force. For the purpose of providing by taxation funds for the payment of said proportion of the cost and expense of all improvements made under the provisions of this act to be paid by the township or townships in which such road improvement may be situated in whole or in part, the county commissioners are hereby authorized to levy upon all the taxable property of any township or townships in which such road improvement is situated, in whole or in part, a tax not exceeding ten mills in any one year upon each dollar of the valuation of the taxable property in such township or townships. Said levy shall be in addition to all other levies authorized by law, notwithstanding any limitation upon the aggregate amount of such levies now in force."

You inquire whether a levy made by the commissioners of a county, under authority of section 6956-14, G. C., to pay its proportion of the cost and expense of improving a county road under sections 6956-1, et seq., of the General Code, as apportioned by the said county commissioners, under authority of section 6956-10, G. C., must come within the three mill limitation for county purposes, as provided in section 5649-3a, G. C.

Section 5649-3a provides in part as follows:

"* * * The aggregate of all taxes that may be levied by a county, for county purposes, on the taxable property in the county on the tax list, shall not exceed in any one year three mills. The aggregate of all taxes that may be levied by a municipal corporation on the taxable property in the corporation, for corporation purposes, on the tax list, shall not exceed in any one year five mills. The aggregate of all taxes that may be levied by a township, for township purposes, on the taxable property in the township on the tax list, shall not exceed in any one year two mills. The local tax levy for all school purposes shall not exceed in any one year five mills on the dollar of valuation of taxable property in any school district. Such limits for county, township, municipal and school levies shall be exclusive of any special levy, provided for by a vote of the electors, special assessments, levies for road taxes that may be worked out by the taxpayers, and levies and assessments in special districts created for road or ditch improvements, over which the budget commissioners shall have no control. * * *"

Section 5649-3a, G. C., is a part of the act of the general assembly known as the Smith one per cent. law, which became effective June 2, 1911. Being of subsequent enactment to the provisions of sections 6956-1 to 6956-15, inclusive, of the General Code, known as the Braun law, passed by the general assembly May 10, 1910, and which became effective May 17, 1910, the provisions of said law, limiting tax levies in the various taxing districts of a county, must control. It follows, therefore, that, insofar as section 6956-14, G. C., is in conflict with said limitations, said section must be held to be repealed by implication by the provisions of section 5649-2 to section 5649-5b, inclusive, of the General Code.

In the case of Rabe et al v. Board of Education, 88 O. S., 403, the syllabus provides in part:

"1. Sections 5649-2 to 5649-5b, General Code, inclusive, limit the rate of taxes that can be levied in any taxing district for any and all purposes. Any statutes existing at the time of the passage of these sections, in direct conflict therewith and not specifically repealed thereby, are repealed by implication.

"2. These sections of the General Code furnish the basis of calculation for the issue of bonds in anticipation of income from taxes levied or to be levied."

The provision of section 6956-14, G. C., limiting the levy which the commissioners of a county may make to pay the county's proportion of the cost of improvements, made under authority of sections 6956-1, et seq., of the General Code, to one mill in any one year, is not in conflict with the limitations provided by sections 5649-2 to 5649-5b, inclusive, of the General Code, and is therefore in full force and effect at the present time, but the provision of section 6956-14, limiting the levy which said county commissioners are authorized to make on the taxable property of a township in which said road improvement is located, in whole or in part, for the purpose of providing a fund for the payment of the proportion of the cost and expense of said improvement, made under the provisions of sections 6956-1, et seq., of the General Code, to be paid by said township, to ten mills in any one year, is clearly in conflict with the provisions of said sections 5649-2 to 5649-5b, inclusive, of the General Code, and is therefore repealed by implication.

Inasmuch as the levy made by the county commissioners, under authority of said section 6956-14, G. C., to pay the county's proportion of the cost of improvements made under authority of sections 6956-1, et seq., of the General Code, is not one of the levies enumerated in the latter part of the provision of section 5649-3a, G. C., above quoted, and which are excluded by said provision of said statute from the three mill limitation for county purposes therein provided, I am of the opinion, in answer to your first question, that said levy must come within said limitation.

The levy made by the commissioners of a county under authority of section 6956-14, G. C., on the taxable property of a township in which an improvement is located, in whole or in part, to pay the proportion of the cost of said improvement apportioned to said township by said county commissioners, under authority of section 6956-10, G. C., is not a levy made by the taxing officials of a township for township purposes, within the meaning of section 5649-3a, G. C. The trustees of said township have nothing whatever to do with the proceedings of the county commissioners in making said improvement and have no control over the levy made by the county commissioners on the taxable property of said township.

I am of the opinion, therefore, in answer to your second question, that said levy does not have to come within the two mill limitation for township purposes, provided by said section 5649-3a, G. C.

Replying to your third question, I am of the opinion that, inasmuch as neither one of the levies referred to in your inquiry is made by the county commissioners for sinking fund purposes to pay the principal and interest of indebtedness incurred prior to June 2, 1911, or thereafter incurred by a bond of the people, each of said levies must come within the ten mill limitation provided by section 5649-2, G. C., as amended in 103 O. L., 552. Inasmuch as neither of said levies comes within the exceptions to the fifteen mill limitation which is provided by section 5649-5b, as amended in 103 O. L., 57, I am of the opinion that each of said levies must come within said limitation.

Respectfully,
EDWARD C. TURNER,
Attorney General.

602.

ADJUTANT GENERAL—WITHOUT AUTHORITY TO FURNISH RATIONS OR OTHER SUPPLIES FOR RELIEF OF DESTITUTE MINERS—NO SPECIFIC APPROPRIATION.

There is no authority in law for the state of Ohio to furnish rations or other supplies for the relief of destitute miners as no specific appropriation has been made by the general assembly for such purpose.

COLUMBUS, OHIO, July 13, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—In reply to your letter of June 30th, I wish to state that after a very careful search of the statutes I am unable to find any lawful way in which rations or other supplies can be furnished by the state of Ohio, through the office of the adjutant general or otherwise, for the relief of destitute miners, no specific appropriation having been made by the general assembly for that purpose.

Respectfully,
EDWARD C. TURNER,
Attorney General.

603.

SYNOPSIS OF PETITION FOR REFERENDUM ON LAW RELATING TO CENSOR OF MOTION PICTURE FILMS, APPROVED.

COLUMBUS, OHIO, July 13, 1915.

MR. B. J. SAWYER, *Cleveland, Ohio.*

DEAR SIR:—You have submitted to me for my certificate a petition for referendum, the synopsis of which reads as follows:

> "An act to amend section 871-48, 871-49 and 871-52 of the General Code, was passed May 19, 1915, approved May 25, 1915, and filed in the office of the secretary of state May 27, 1915; it amends the foregoing sections of the law relating to the consoring of motion picture films, as found in 103 O. L., pages 399, 400 and 401."

I hereby certify that the foregoing synopsis is a truthful statement regarding the above entitled law.

Respectfully,
EDWARD C. TURNER,
Attorney General.

604

TRANSCRIPT OF PROCEEDINGS FOR ISSUE OF BONDS BY BOARD OF EDUCATION OF POMEROY VILLAGE SCHOOL DISTRICT, APPROVED.

COLUMBUS, OHIO, July 14, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

"In re: Bonds of the village school district of Pomeroy, Ohio, in the sum of five thousand dollars, accepted by the industrial commission under resolution adopted May 24, 1915."

I hereby certify that I have examined the transcript of the proceedings of the board of education of Pomeroy village school district relative to the issuance and sale of the above bonds; also the specimen bond and coupon attached. I find that the purpose for which said bonds are issued is authorized by law; that the proceedings of the said board of education and the other officers relative thereto have been regular and in conformity with statutory provisions; that the amount of said bonds and the tax levy which will be necessary to pay interest thereon and create a sinking fund sufficient for their redemption when due exceeds no statutory limitation; and that the form of said bonds and coupons, as indicated by the specimen copy, are properly drawn.

I, therefore, certify that said bonds, when properly executed and delivered, will constitute valid obligations of said village school district.

Respectfully,
EDWARD C. TURNER,
Attorney General.

605.

STATE CIVIL SERVICE COMMISSION—LIBRARY STAFF—MESSENGER WITH CERTAIN DUTIES IS IN UNCLASSIFIED SERVICE.

The messenger in the state library, whose duties are as follows:

"Handles all mail and all shipments whether by freight or express, looks after the newspaper files, prepares magazines and other periodicals for the state bindery, has charge of supplies, plates, new books, and assists in keeping the property of the library clean and orderly,"

is a member of the library staff of the state library, and is, therefore, in the unclassified service under section 486-8 *of the General Code.*

COLUMBUS, OHIO, July 14, 1915.

Board of Library Commissioners, Columbus, Ohio.

GENTLEMEN:—I am in receipt of request for opinion from Hon. C. B. Galbreath, state librarian, under date of June 28, 1915, as follows:

"I am asking your opinion relative to the appointment of janitors and messengers under the board of library commissioners. I desire to know whether or not such employes are in the classified service.

"In an opinion rendered by your office December 8, 1914, a copy of which is on file in this office, I find that the question involved seems to be answered in the following language:

"'The term 'library staff' does not necessarily mean all the employes of the library and if the legislature had intended to exempt all the employes of a library, it could have easily so expressed it. It is my conclusion that the library staff does not include all the employes of the library. It includes those employes which have to do with the handling of the books. It means something more than a janitor or porter.'

"Are we to understand that the board of library commissioners must employ a janitor or messenger from eligible applicants certified by the civil service commission?"

In response to a request for further information relative to the employment of a janitor by the board of library commissioners we were advised by Mr. Galbreath, under date of July 6, 1915, that there was no appropriation made for a janitor either in the state library or the traveling library and, in view of that fact, of course the question of the employment of a janitor is eliminated from Mr. Galbreath's former request.

I am also advised by Mr. Galbreath, under date of July 10, 1915, in response to an inquiry from this office as to the duties of the messenger, as follows:

"The messenger handles all mail and all shipments whether by freight or express, looks after the newspaper files, prepares magazines and other periodicals for the state bindery, has charge of supplies, plates, new books and assists in keeping the property of the library clean and orderly."

In Mr. Galbreath's letter of June 28th he cites and quotes from an opinion of this department under date of December 8, 1914, being opinion No. 1282, copy of which he states is on file in his office. That opinion is in part as follows:

"Section 8 of the civil service act, section 486-8, General Code, places ten classes of positions in the unclassified service. In subdivision 6 (a) the following are placed in the unclassified service:

"All presidents, superintendents, directors, teachers and instructors in the public schools, colleges and universities; the library staff of any library in the state supported wholly or in part at public expense.

"The library in question is supported at public expense. This is shown by section 14995, General Code, hereinafter quoted. Therefore, by virtue of section 8, subdivision 6 (a) of the civil service act the 'library staff' of the public library in Cincinnati is in the unclassified service.

"The term 'library staff' is not defined by the civil service act. It must be given its ordinary meaning.

"In section 8 of the civil service act the legislature has used the words 'employes,' 'clerks' and 'officers,' and it is to be presumed that the legislature had in mind these terms when it adopted the provision as to a 'library staff.' If the legislature had used the word 'employes' or the words 'employes and officers,' there could be no doubt as to the intention.

"The term 'library staff' does not necessarily mean all the employes of the library, and if the legislature had intended to exempt all the employes of a library, it could have easily so expressed it.

"It is my conclusion that the term 'library staff' does not include all the employes of a library. It includes those employes who have to do with the handling of the books. It means something more than a janitor or a porter."

While the opinion above quoted was not directed to the specific question involved here, the question in that case being whether the state civil service commission or the municipal civil service commission had jurisdiction over employes of the Cincinnati library, that library being "supported wholly or in part at public expense," yet it became necessary in answering that question to determine whether any of the employes of such a library were in the classified civil service, and the distinction between members of the "library staff" and other employes of the library was made.

I agree with the reasoning of that opinion and with the definition therein contained as to what constitutes the "library staff." The duties of the messenger in the state library, as outlined above, bring him within the definition and make him a member of the library staff.

I am of the opinion, therefore, that such messenger is in the unclassified service and that it is not necessary that he be selected from eligible lists certified by the civil service commission.

Respectfully,
EDWARD C. TURNER,
Attorney General.

606.

HOUSE BILL NO. 657 UNCONSTITUTIONAL—ACT AUTHORIZING BOARD OF EDUCATION OF PICKAWAY COUNTY TO PAY SAMUEL M. SARK CERTAIN AMOUNT, RETROACTIVE.

The provisions of house bill No. 657, as passed by the general assembly May 27th, and approved by the governor May 29, 1915, are in conflict with that part of section 28, article 2 of the constitution, which provides that: "The general assembly shall have no power to pass retroactive laws," and said special act is therefore unconstitutional.

COLUMBUS, OHIO, July 14, 1915.

HON. MEEKER TERWILLIGER, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—I have your letter of June 10, 1915, enclosing certain memoranda, including a copy of the opinion of Judge Goldsberry of the court of common pleas of Pickaway county in the case of Samuel M. Sark, plaintiff, v. John H. Cook, O. P. Clutts and J. S. Worrall, defendants, No. 13478 in said court, also a copy of the opinion of the court of appeals of the fourth appellate district of Ohio.

You request my opinion as to the constitutionality of house bill No. 657, as passed by the general assembly May 27th, and approved by the governor May 29, 1915, entitled "an act to authorize the board of education of Pickaway county to pay Samuel M. Sark for services as district superintendent of schools in said county."

This act provides as follows:

"Be it enacted by the general assembly of Ohio; section 1, that the board of education of Pickaway county, Ohio, be and is hereby authorized and directed to allow and pay to Samuel M. Sark, *out of any funds under its control not otherwise appropriated* the sum of four hundred and sixteen dollars and sixty-six cents, being the amount of his salary for the period from August 1, 1914, to January 1, 1915, as district superintendent for the supervision district composed of Muhlenberg and Monroe townships in said county of Pickaway. Upon the order of the said county board of education, the clerk of said board is hereby authorized and directed to issue his duplicate warrant in favor of Samuel M. Sark for the above amount."

The facts in connection with the above controversy are briefly and concisely stated by Judge Goldsberry in his opinion, as follows:

"It appears from the agreed statement of facts that at a joint meeting of the board of education of Muhlenberg and Monroe townships, held July 24, 1914, said townships agreed to join to form a supervision district and that plaintiff was by said joint supervision district employed as superintendent thereof at a salary of one thousand dollars for the school year 1914-1915; that a certificate of said joinder of said townships into a supervision district and the employment of plaintiff by the said boards of education of said townships, as aforesaid, was, on July 24, 1914, delivered to O. M. Dick, a member of the county board of education of Pickaway county, Ohio, and that the same was by him filed with the county auditor of said county on July 25, 1914, and which was before the county board took any action dividing the county into supervision districts; that for the school year 1913-1914, Muhlenberg township rural school district employed A. J. Dunkel as superintendent of its schools, and said A. J. Dunkel served and acted as such for said school year; that for the school year 1913-1914, Monroe township rural school district employed Earl D. Wolfe as superintendent of its schools and that said Earl D. Wolfe served and acted as such until November 14, 1913, on which date he resigned and that no person was employed thereafter by the board of education of said Monroe township rural school district to act as superintendent of its schools for the remainder of said school year and no person served as such superintendent for said school year from and after November 14, 1913; that prior to July 24, 1914, the board of education of Muhlenberg township rural school district had not employed a superintendent for its schools for the school year 1914-1915. And that prior to July 24, 1914, the board of education of Monroe township rural school district had not employed a superintendent for its schools for the school year 1914-1915; that said Muhlenberg and Monroe township rural school districts are contiguous districts and join each other.

* * * * * * * * *

"It is admitted that the school district formed by the union of Muhlenberg and Monroe townships has duly certified that it will employ a superintendent and that it duly applied to the county board of education to continue it as a separate supervision district.

* * * * * * * * *

"The county board of education of Pickaway county, Ohio, on September 9, 1914, annexed Muhlenberg rural school district for supervision purposes to Jackson township rural school district, of which last named school district O. P. Clutts, one of the defendants herein, is superintendent, and that said board of education on September 9, 1914, annexed Monroe

township rural school district to Deer Creek township rural school district, of which last named school district J. S. Worrall, one of the defendants herein, is superintendent."

After a careful consideration of the statutes applicable to the facts Judge Goldsberry held that, after May 21, 1914, (the date when the new school law, so-called, became effective) the township rural school districts of Muhlenberg and Monroe could not unite to form a school district for supervision purposes; that the county board of education was authorized to annex Muhlenberg township rural school district to Jackson township rural school district for supervision purposes, and to annex Monroe township rural school district to Deer Creek township rural school district for supervision purposes; under authority of section 4740, G. C., as amended in 104 O. L., 141, which provides in part as follows:

"Any school district or districts, having less than twenty teachers isolated from the remainder of the county school district by supervision districts provided for in this section, shall be joined for supervision purposes to one or more of such supervision districts, but the superintendent or superintendents already employed in such supervision district or districts shall be in charge of the enlarged supervision district or districts until a vacancy occurs."

The agreed statement of facts submitted in said case showed that said township rural school districts were isolated from the remainder of the county school district within the meaning of the above provision of section 4740, G. C., and employed less than twenty teachers.

The court denied the injunction prayed for by the plaintiff and dismissed his petition. The case was then appealed to the court of appeals for the fourth appellate district, and that court affirmed the judgment of the court of common pleas.

Under the provision of the act above referred to it will be observed that the board of education of Pickaway county is authorized and directed to pay the claim of the said Samuel M. Sark "out of any funds under its control not otherwise appropriated."

The only fund under the control of the county board of education is the "county board of education fund" which is derived from the following sources:

(1) Under section 4744-3, G. C., as found in 104 O. L., 143, which provides:

"The county auditor when making his semi-annual apportionment of the school funds to the various village and rural school districts shall retain the amounts necessary to pay such portion of the salaries of the county and district superintendents as may be certified by the county board. Such amount shall be placed in a separate fund to be known as the "County board of education fund." The county board of education shall certify under oath to the state auditor the amount due from the state as its share of the salaries of the county and district superintendents of such county school district for the next six months. Upon receipt by the state auditor of such certificate, he shall draw his warrant upon the state treasurer in favor of the county treasurer for the required amount, which shall be placed by the county auditor in the county board of education fund."

(2) From fees collected from applicants for examination, by the board of county school examiners under authority of section 7820, G. C., 104 O. L., 104.

(3) From the surplus transferable from the dog tax fund under section 5653, G. C., 104 O. L., 145, by direction of the county commissioners.

The principal source of the county board of education fund is the one first above mentioned and under the provision of section 4744-3, G. C., as amended and as above quoted, it will be observed that the amount realized from this source is limited to the salaries of the county and district superintendents as certified to the county auditor by the county board of education. Inasmuch as the salaries of the county and district superintendents of Pickaway county, including the salaries of the said O. P. Clutts and the said J. S. Worrall, have been paid out of the county board of education fund of said county, it is evident that the only money in said fund at this time, if any, must have been derived from the second and third sources above mentioned.

In view of the fact that, under provisions of the statutes several other expenditures must be made out of said fund, such as the actual and necessary expenses of members of the county board and county superintendent incurred in attendance upon any meeting of said board (section 4734, G. C., 104 O. L., 137), the allowance to the county superintendent for traveling expenses and clerical help (section 4744-1, G. C., 104 O. L., 143), and the expenses of conducting the county teachers' institute (section 7860, G. C., 104 O. L., 156), I am unable to see how the county board of education would have sufficient money in the county treasury to the credit of the county board of education fund, at the time said special act would become effective, out of which the claim of Samuel M. Sark might be paid, assuming that said act is valid. In this connection the fact must be borne in mind that the county board of education has no authority in law to levy a tax for any purpose and no additional authority would be conferred by the provisions of said house bill No. 657.

However, under the decisions of the courts above referred to, the supervision district composed of Muhlenberg and Monroe township rural school districts, and the office of district superintendent of such supervision district never existed. Said rural school districts were properly annexed to adjoining supervision districts for supervision purposes, the schools of said rural school districts were supervised for said year 1914-1915, and said districts contributed their proper shares of the salaries of the district superintendents, who were lawfully employed to supervise said adjoining supervision districts and were regularly certified to the county auditor by the county board of education. The salaries of said superintendents were also certified to said county auditor who performed the duties required of him by the above provisions of section 4744-3, G. C., when making his semi-annual apportionment of the school funds to the various village and rural school districts, by retaining the amount necessary to pay such portion of the salaries of the county and district superintendents as was certified to him by said county board of education.

From the agreed statement of facts in the above case it appears that on September 10, 1914, Mr. Sark was duly notified by the county board of education of its action in annexing said township rural school districts to said adjoining supervision districts for supervision purposes.

It seems clear, therefore, that there is not now and never has been either a legal or moral obligation on the part of the county board of education to pay the claim of Mr. Sark.

If I am correct in this conclusion the question naturally arises has the legislature power by a special act to authorize and direct the county board of education of Pickaway county to pay said claim; in other words, does the special act above referred to violate any provision of the constitution of Ohio?

It is well settled that a statute should never be declared unconstitutional by the courts if the case can be disposed of on any other tenable grounds; that the presumption is always in favor of the validity of a law and it is only when there

is a clear usurpation of power, or a manifest assumption of authority, or a clear incompatibility between the constitution and the law that judicial tribunals will refuse to execute it. Ireland v. Turnpike, 19 O. S., 369; State v. Garver, 13 O. C. D., 140; State ex rel. v. Baker, 55 O. S., 1.

> "Statutes are always presumed to be constitutional and this presumption will be indulged in by the courts until the contrary is clearly shown. This rule is one of universal application and the principle is equally well established that statutes will be construed, whenever, wherever, it is possible to do so, so that they shall harmonize with the constitution, to the end that they may be sustained." 8 Cyc. 801, Senior v. Ratterman, 44 O. S., 661.

The answer to your question, however, calls for an opinion as to the constitutionality of said house bill No. 657, and you call my attention to the provision of section 28 of article 2 of the constitution, which provides in part:

> "The general assembly shall have no power to pass retroactive laws or laws impairing the obligation of contracts."

In the case of Rairden & Burnet v. Holden, Admr., etc., 15 O. S., 207, the court, in commenting on the above provision of the constitution, said:

> "Since the introduction of this prohibition into the fundamental law of our state, this court has not had occasion to define it; and so far as we are aware no similar provision is to be found in the constitution of any of the states of the union, except in that of New Hampshire, which declared that 'retrospective laws are highly injurious, oppressive and unjust. No such laws should, therefore, be made either for the decision of civil cases, or the punishment of offenses.' The words 'retrospective' and 'retroactive' as applied to laws, seem to be synonymous; and as such they are used interchangeably by Mr. Sedgwick in his treatise on Constitutional Law. In The Society v. Wheeler, 2 Gallison's R., 139, a case arising under the constitution and laws of New Hampshire, Mr. Justice Story thus defines a retrospective law. 'Upon principle, every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disabilty, in respect to transactions or considerations already passed, must be deemed retrospective.' * * *
>
> "Judge Story's definition of 'retrospective laws' was quoted with approval by the superior court of judicature of New Hampshire in Dow v. Norris, 4 N. H. R., 16, and in subsequent cases seems to have been steadily adhered to and to have been accepted as furnishing the proper rule of decision."

In the case of Miller et al. v. Hixson, Treasurer, 64 O. S., 39, the first branch of the syllabus provides:

> "A statute which imposes a new or additional burden, duty, obligation, or liability, as to past transactions, is retroactive, and in conflict with that part of section 28, article 2 of the constitution, which provides that, 'The general assembly shall have no power to pass retroactive laws.'"

In the case of State v. Board of Education, 22 O. C. C., 244, the court held that the act of the general assembly, as found in 94 O. L., 563, authorizing the board of education of a certain township to pay to the board of education of a

special school district set off and created therein a sum of money equal to the equitable share due the latter from the township school funds, was a retroactive law in that it attempted to create and enforce a liability that did not before exist, in violation of section 28, article 2 of the constitution.

The special act of the legislature above referred to, as found in 94 O. L., 563, was as follows:

> "Be it enacted by the general assembly of the state of Ohio:
> "Section 1. That the board of education of said Northfield township be hereby authorized to pay to the board of education of said Macedonia special school district said sum of eight hundred and eighty-five dollars and sixty-two cents as the equitable share of said surplus fund due said special school district, being based upon the relative value of the taxable property in said special school district and the taxable property of the entire township."

It will be observed that in the special act above quoted and considered by the court, in the case of State v. Board of Education, supra, the legislature attempted to authorize the board of education of the township to pay to the board of education of the special district set off and created therein the equitable share of the township school funds and the court, for the reason above given, held said act unconstitutional.

It seems clear that inasmuch as the special act in question, by its terms, not only authorizes but directs the board of education of Pickaway county to pay the claim of Samuel M. Sark out of any funds under its control not otherwise appropriated, said special act is in violation of the above provision of the constitution in that it attempts to create and enforce a liability that did not before exist.

While in the case of State ex rel. Ampt, et al. v. Gibson, Treas., etc., 4 O. C. C. (N. S.) 433, it was held that the general assembly may pass an act authorizing a county to pay a demand not legally enforcible, but which, in good conscience, it ought to pay, the constitutionality of the special act in question is not supported by the decision of the court in this case for the reason that there is no moral obligation on the part of the board of education of Pickaway county to pay said claim.

In the case of Board of Education v. State, 51 O. S., 531, the first branch of the syllabus provides:

> "Where no obligation, legal or moral, rests upon a board of education, to pay a claim asserted against it by a private individual, an act of the general assembly, procured by the claimant, commanding such board to levy a tax for its payment is unconstitutional and void."

I am of the opinion therefore in answer to your question that, inasmuch as there is neither a legal nor a moral obligation on the part of said board of education to pay said claim, the legislature was without power to authorize and direct the payment of said claim; that the provisions of house bill No. 657, violate the above provision of the constitution, and that said special act is therefore unconstitutional.

Respectfully,
EDWARD C. TURNER,
Attorney General.

607.

FORM OF RESOLUTION FOR USE UNDER SECTION 13971 OF THE APPENDIX TO THE GENERAL CODE OF OHIO—SALE OF CANAL LANDS.

COLUMBUS, OHIO, July 14, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of July 9, 1915, in which you transmit to me resolutions providing for the sale of certain canal lands in the village of Waverly, Pike county, Ohio. There are two tracts of land involved, each valued at $500.00, and it is proposed to sell one tract to Albert Foster and the other tract to Philip Lorbach, Jr.

I have carefully examined the records of your proceedings in these matters and find that all the jurisdictional facts exist. The adoption of a formal resolution is manifestly an appropriate and proper method by which the governor, attorney general and superintendent of public works may exercise the powers conferred upon them by section 13971 of the Appendix to the General Code. It is my opinion, however, that this resolution should recite all the jurisdictional facts and I therefore suggest the substitution of the following form of resolution for the one prepared by you.

Office of the Governor of Ohio.

Columbus, Ohio, ----------, 1915.

The governor of Ohio and the attorney general of Ohio, having duly considered the request of John I. Miller, superintendent of public works of Ohio, relating to the sale of a certain described tract of land located in the village of Waverly, Pike county, Ohio, to one Albert Foster, hereby join with said superintendent of public works in the adoption of the following resolution:

WHEREAS, It has been found by John I. Miller, superintendent of public works of the state of Ohio, that the state of Ohio is the owner in fee simple of the following described land, to wit:

That portion of the abandoned Ohio canal property in the village of Waverly, Pike county, Ohio, that lies east of the center line of the state canal property as shown by the survey of said canal made by W. O. Sanzenbacher in the summer of 1912, and commencing at the southwesterly line of Market street in said village, and extending thence southeasterly 175 feet and containing 6,875 square feet, more or less, and,

WHEREAS, It has been found and determined by said superintendent of public works that said land above described is not necessary or required for the use, maintenance and operation of any of the canals of the state, and,

WHEREAS, Said land above described has been found by said superintendent of public works to be of the value of five hundred dollars, and has therefore been appraised by said superintendent of public works at five hundred dollars, and,

WHEREAS, It has been found and determined by said superintendent of public works that said land above described cannot be leased so as to yield six per cent. on said valuation of five hundred dollars, and,

WHEREAS, One, Albert Foster, of Waverly, Pike county, Ohio, is desirious of purchasing said land above described, NOW, THEREFORE,

BE IT RESOLVED: By Frank B. Willis, governor of the state of Ohio; Edward C. Turner, attorney general of the state of Ohio, and John I. Miller, superintendent of public works of the state of Ohio; that the said tract of land above described be and the same hereby is sold at private sale in accordance with the provisions of section 13971 of the Appendix to the General Code of Ohio, to the said Albert Foster, of Waverly, Pike County, Ohio, for the said sum of five hundred dollars ($500.00) in cash, and upon the payment of the purchase money therefor to the treasurer of state, the auditor of state is directed to prepare a deed for the same for execution by the governor, conveying said land to said Albert Foster, reserving, however, to the state of Ohio all oil, gas, coal or other minerals on or under the land herein sold, with the right of entry in and upon said premises for the purpose of selling or leasing the same, or prosecuting, developing or operating the same.

Governor of Ohio.

Attorney General of Ohio.

Superintendent of Public Works of Ohio.

It will be noted that the form of resolution suggested by me is so worded as to apply to the contemplated sale to Albert Foster, but it will serve as a sufficient guide to you in the preparation of a resolution relating to the other contemplated sale.

When the papers relating to these matters, which I herewith return to you, are returned to me with the modification above suggested, I will be glad to take such action as may appear to be proper in the premises.

Respectfully,
EDWARD C. TURNER,
Attorney General.

608.

BOARD OF CONTROL OF OHIO AGRICULTURAL EXPERIMENT STATION—ALL CONTROL WAS TRANSFERRED TO SAID BOARD FROM AGRICULTURAL COMMISSION BY HOUSE BILL NO. 163—WHEN IN EFFECT.

House bill No. 163 which was filed in the office of the secretary of state April 8, 1915, and went into effect on July 8, 1915, transferred to the board of control therein authorized to be created, all control of the Ohio agricultural experiment station and on the taking effect of the same all authority of the agricultural commission over said experiment station ceased.

COLUMBUS, OHIO, July 14, 1915.

The Agricultural Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your request for an opinion, under date of July 9, 1915, as follows:

"Under house bill No. 163, passed April 6, 1915, approved April 8, 1915, filed in the office of secretary of state April 8, 1915, the control of the Ohio

agricultural experiment station was transferred from the agricultural commission of Ohio to the board of control, appointed by the governor of the state.

. QUESTION. Will the control of said station remain with the agricultural commission until the new board qualifies, organizes and certifies to the agricultural commission that it is duly organized and ready to assume control?"

House bill No. 163, to which you refer, went into effect July 8, 1915. Sections 1 and 2 of the act provide:

"Section 1. There shall be a state agricultural experiment station for the benefit of practical and scientific agriculture and the development of the agricultural resources of the state. It shall be known as the 'Ohio Agricultural Experiment Station.'

"Section 2. The state agricultural experiment station shall be under the supervision and direction of a board of control which shall consist of five members, who shall be practical farmers and who shall be appointed by the governor with the advice and consent of the senate, one member to serve for one year, one for two years, one for three years, one for four years and one for five years. Thereafter one member shall be appointed each year who shall hold his office for a term of five years. Not more than three members shall belong to the same political party."

Section 6 of the same act provides:

"Section 6. The board of control shall appoint a director, who shall be a person of acknowledged ability and training in the principles and practice of scientific agriculture. It shall fix the terms of office and salaries of all officers and employes of the station and upon written charge for good and sufficient cause may remove them. The director shall have control of the affairs of the station, and be responsible to the board of control for the management of all of its departments. With the approval of the board of control he shall appoint chiefs of departments, assistants and other employes necessary for the proper management of the station and shall assign them to their respective duties. He may suspend an officer or employe of the station for cause, which suspension with the reasons therefor he shall immediately report to the board of control for its final action."

These and the further sections of this act transfer all the authority over and the control of the Ohio agricultural experiment station from the agricultural commission to the board of control, as therein authorized to be created, and expressly repeal original sections 1174 to 1177, inclusive, and 1177-1 to 1177-11, inclusive, of the General Code (103 O. L., 304), and by necessary implication repeal sections 1170 to 1173, inclusive, of the General Code (103 O. L., 323-324).

In the very nature of things the repealing clause, and repeal by implication, became effective at the same time as the other provisions of the act, on July 8, 1915, so that on that date all authority of management and control of the agricultural experiment station by the agricultural commission ceased.

The fact that a law is not put into execution alone cannot operate to suspend the taking effect of the law and that part of the original law which is by it repealed

is dead from the time the repealing clause becomes effective, or those parts of the new enactment which by necessary implication had the effect of repealing the original law may be put into execution.

This case rests on an entirely different basis than those in which an officer is authorized to hold an office and exercise its functions until his successor is elected or appointed and qualified. Here the tenure of no officer is affected. The effect of the act, in the first place, is to abolish the authority of the agricultural commission to exercise certain functions and it is immaterial in that regard that some delay may be occasioned in the exercise of that authority by those on whom it has been conferred.

The fact that in certain cases officers may be authorized to exercise the functions of their office beyond their term does not warrant the conclusion that they may exercise an authority which has itself been abolished.

I am of the opinion, therefore, that the authority of the agricultural commission to control, supervise and manage the Ohio agricultural experiment station ceased on July 8, 1915.

Respectfully,
EDWARD C. TURNER,
Attorney General.

609.

BOARDS OF EDUCATION—UNION OF TWO RURAL OR RURAL AND VILLAGE SCHOOL DISTRICTS FOR HIGH SCHOOL PURPOSES—SECTIONS 7669, G. C., ET SEQ., GOVERN.

Where the boards of education of two or more adjoining rural school districts, or of a rural and village school district, unite such districts for high school purposes, under authority of section 7669, G. C., as amended in 104 O. L., 229, said boards should be governed by the provisions of sections 7669, et seq., of the General Code, and should complete the proceedings commenced by them under said sections.

COLUMBUS, OHIO, July 14, 1915.

HON. HUGH F. NEUHART, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—In your letter of July 1, 1915, you requested my opinion as follows:

> "Under section 7669 of the General Code as amended in vol. 104, page 229, two boards of education of this county have united for high school purposes.
>
> "They do not propose to submit the question of levying a tax on their respective districts for the purpose of erecting a building or purchasing a site therefor, and issue bonds. They have not sufficient money in the treasury to purchase a site and erect a building, neither has either board a suitable building that can be used for high school purposes.
>
> "They are proposing and have passed the resolution and posted notices for an election under section 7592 of the General Code for an additional tax levy, for the purpose of renting a building for high school purposes and for the maintenance of such school.
>
> "Sections 7671 and 7672 provide for the maintenance of high schools established under 7669.

"*QUERY.* May the two boards or joint committee proceed under 7592 as above or must they be governed by 7669-7670-7671-7672?"

In the case of Rabe et al. v. Board of Education of the Canton School District, et al., 88 O. S., 403, the court held:

"The provisions of sections 5649-2, et seq., in reference to the rate that may be levied in any taxing district, are so clearly in conflict with the provisions of sections 7591 and 7592, General Code, that these sections are necessarily repealed by implication."

Inasmuch as the supreme court has held that section 7592, G. C., is no longer in force, the boards of education referred to in your inquiry cannot proceed under said section to provide an additional tax levy for the purpose of renting a building and maintaining a high school for the joint district created under section 7669, G. C., as amended in 104 O. L., 229.

Under the provision of section 7669, G. C., as amended, each board of education may submit the question of a tax levy for the purpose of providing a site and erecting a building for the joint high school, or, if said boards have sufficient money in their treasury for such purpose, or if there is a suitable building in either district owned by the board of education of said district, that can be used for said high school, said boards are not required to submit said proposition to a vote of the electors.

From your statement of facts it appears that the boards in question do not desire to submit the question of an extra tax levy to a vote of the electors, under authority of section 7669, G. C., as amended, that they have not sufficient money in their treasury available for this purpose and that neither of said boards own a building that can be used for the joint high school.

Said boards cannot proceed under section 7592, G. C., and the question arises—may said boards of education rent a building for high school purposes and if so may they provide for the expenses incident thereto and for maintaining said high school? Under the provision of section 7670, G. C., the management and control of a high school established under authority of section 7669, G. C., as amended, is vested in a committee to be elected by the boards of education as therein provided.

Section 7671, G. C., provides:

"The funds for the maintenance and support of such high school shall be provided by appropriations from the tuition or contingent funds, or both, of each district, in proportion to the total valuation of property in the respective districts, which must be placed in a separate fund in the treasury of the board of education of the district in which the school house is located, and paid out by action of the high school committee for the maintenance of the school."

Section 7672, G. C., as amended in 104 O. L., 230, provides:

"Boards of education exercising control for the purpose of taxation over territory within a rural or joint rural high school district shall determine by estimate the amount necessary for the maintenance of any rural or joint rural high school to which such territory belongs and shall certify such amount to the county auditor in the annual budget as provided

in section 5649-3a. All funds derived from levies so made shall be kept separate and be paid out for the maintenance of the school for which they were made."

I am of the opinion that the boards of education in question have no authority under sections 7669, et seq., of the General Code to rent a building to be used for the joint high school.

The action of said boards in voting to unite for high school purposes is the first step in the proceedings authorized by said section, and I do not think said proceedings will be complete until a building has been acquired in the manner therein provided for or found available for said purposes, and until the committee provided for by section 7670, G. C., has been elected and qualified. It would then be the duty of said board of education, under the provisions of section 7671 and section 7672, G. C., as amended, to provide for the maintenance and support of the high school established in the manner herein set forth. If said boards find that the maximum levy allowed by the county budget commissioners under authority of section 5649-3c, G. C., would not produce sufficient money in the tuition and contingent funds to provide for the additional expenditure of money incident to the maintenance and support of said high school, the question of an additional levy for said purpose might be submitted to the vote of the electors, under authority of section 5649-5 and 5649-5a, G. C., and subject to the limitations of section 5649-5b, G. C., as amended in 103 O. L., 57.

Even if we were to assume that there is implied authority for said boards of education to rent a building for the joint high school, in view of the fact that there will not be sufficient money in the treasuries of said districts available for this purpose, an additional tax levy would have to be submitted to a vote of the electors in compliance with the requirements of sections 5649-5 and 5649-5a of the General Code, and this could not be done until the regular election in November. No part of the funds derived from the proceeds of said additional tax levy would be available for use until after March 1, 1916.

Replying to your question, I am of the opinion that inasmuch as said boards of education cannot proceed under section 7592, G. C., they should be governed by the provisions of sections 7669, et seq., of the General Code and should complete the proceedings commenced by them under said sections.

Respectfully,

EDWARD C. TURNER,

Attorney General.

610.

BANKS AND BANKING—SUPERINTENDENT OF BANKS' DUTY TO SEE THAT NATIONAL BANKS EXERCISING TRUST FUNCTIONS COMPLY WITH OHIO LAWS IN MATTER OF ACCEPTANCE AND EXECUTION OF TRUSTS—AUTHORIZED TO MAKE EXAMINATIONS OF TRUST DEPARTMENTS OF NATIONAL BANKS.

It is the duty of the superintendent of banks to see that national banks, which have elected to exercise trust functions under the authority of section 11-k of the federal reserve act, to comply with the requirements, regulations and conditions imposed by Ohio laws upon trust companies in the matter of the acceptance and execution of trusts.

The superintendent of banks is authorized to make examinations of the trust department of a national bank which has elected to exercise trust functions under section 11-k of the federal reserve act, and which has qualified under the Ohio law to act in such capacity.

COLUMBUS, OHIO, July 15, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of July 9, 1915, requesting my opinion as follows:

> "Under the provisions of the federal reserve act, the federal reserve board is authorized: 'To grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator or registrar of stocks and bonds under such rules and regulations as the said board may prescribe.'
>
> "Section 9796-3 of the General Code provides: * * * 'and other state banks and national banks may have the same power in the acceptance and execution of trusts which are now conferred by law upon trust companies, upon such state banks and national banks complying with all the requirements, regulations and conditions imposed by the laws of Ohio upon trust companies in the matter of the acceptance and execution of trusts.'
>
> "Several national banks have applied for and have been granted permission to exercise this power and the question arises with us, whose duty is it to see that the requirements, regulations and conditions imposed by the laws of Ohio upon trust companies in the matter of acceptance and execution of trusts are complied with. Should not national banks engaged in this kind of business be required to do so the same as trust companies? Would this department have the right to make an examination of this department of a national bank?"

Section 11-k of the federal reserve act, a part of which is quoted in the first paragraph of your letter, enlarges the scope of possible activities under a national bank franchise. It does not in and of itself confer upon national banks the right to act in any instance as trustee, executor, administrator or registrar of stocks and bonds, but gives to such banks under certain conditions and limitations permissive authority to act in such enlarged capacity in any state, provided the laws of such state do not deny that right.

The purpose of this language of the act was to permit corporations created under federal authority for definite purposes to go beyond the purpose of the specific authority of the articles of incorporation and to perform certain functions

in such of the several states as do not by law prohibit the same. The several states are therefore the final arbiters as to whether or not and upon what conditions and subject to what limitations a national bank may perform the functions named in the said act.

Section 9796-3 of the General Code (104 O. L., 186), a part of which is quoted in your letter, clearly sets forth when and under what conditions and terms national banks may act in a trust capacity, to wit:

> "Upon such * * * national banks * * * complying with all the requirements, regulations and conditions imposed by the laws of Ohio upon trust companies in the matter of the acceptance and execution of trusts * * *."

A national bank, therefore, in order to exercise in Ohio the permissive authority conferred in section 11-k of the federal reserve act must comply with all the requirements, regulations and conditions to which trust companies are subject under the laws of Ohio in the matter of the acceptance and execution of trusts, otherwise it would be "in contravention of state law" within the meaning of section 11-k of the federal reserve act.

The same duties and authority, therefore, devolve upon your department, relative to trust activities of a national bank when such bank has elected to exercise the charter authority conferred upon it by said section 11-k, as are now performed and exercised by you relative to like activities of trust companies.

I am, therefore, of the opinion that it is your duty, as superintendent of banks to see that national banks exercising trust functions under section 11-k of the federal reserve act comply with the requirements, regulations and conditions imposed by the laws of Ohio upon trust companies in the matter of the acceptance and execution of trusts; also that such national banks should be required to apply to the superintendent of banks for permission to exercise trust functions in the same manner as trust companies, and that the superintendent of banks has the right to make examinations of this department of a national bank in the same manner and to the same extent that similar examinations of trust companies are authorized or required by Ohio laws.

Respectfully,
EDWARD C. TURNER,
Attorney General.

611.

RESOLUTION FOR IMPROVEMENT OF MANSFIELD-WOOSTER ROAD, RICHLAND COUNTY, DISAPPROVED.

COLUMBUS, OHIO, July 15, 1915.

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

DEAR SIR:—I have your communication of July 12, 1915, transmitting to me for examination final resolution as to the Mansfield-Wooster road in Richland county, petition No. 1136, I. C. H., No. 146.

Permit me to call your attention to the ambiguous wording of the appropriation clause in the resolution of the county commissioners, due to the use of a printed form and the failure to strike out the word "of" and insert the expression "less than." While this defect may not be serious, yet it is one that can be easily and

speedily corrected, and I am returning this resolution, therefore, without my approval, with the suggestions that the matter be brought to the attention of the county commissioners of Richland county and that they be requested to adopt a new resolution in the proper form.

Respectfully,
EDWARD C. TURNER,
Attorney General.

612.

BOARD OF EDUCATION OF RURAL SCHOOL DISTRICT—MAY BORROW MONEY TO PAY COUNTY BOARD OF EDUCATION WHEN LATTER BOARD FURNISHES TRANSPORTATION TO PUPILS OF SAID RURAL DISTRICT.

The board of education of a rural school district may borrow money, under authority of section 5656, G. C., to pay a charge against said district made by the board of education of a county district, in which such rural district is located, in case said county board of education furnishes transportation to pupils of said rural district, as required by section 7731, G. C., as amended, when the local board fails or neglects to furnish such transportation, or to pay for services actually rendered under a contract of employment for this purpose.

COLUMBUS, OHIO, July 15, 1915.

HON. J. W. WATTS, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—In your letter of July 7, 1915, you request my opinion as follows:

> "We have in our county a rural school district in which there are a number of pupils living more than two miles from the nearest school and the board of education of that district has made no provision for the transportation of these children to the only school house in this district, which was organized about three years ago as a special school district. The parents of these children have appealed to the county board of education asking them for transportation and the county board is at a loss to know what to do, as the tax levy in this rural district for school purposes is now up to the limit.
>
> "Section 7731, page 140 of vol. 104 O. L., provides that, 'transportation of pupils living less than two miles from the school house, etc., shall be optional with the board of education.' That, 'In all rural and village districts where pupils live more than two miles from the nearest school the board of education shall provide transportation,' etc., and this section further provides that the county board of education shall, upon the failure of the local board, provide such transportation and the cost thereof shall be charged against the local school district.
>
> "The present tax levy, which is up to the limit, provides only enough money to pay the teachers and to provide fuel and other necessary incidental expenses.
>
> "The board of education of this local school district has already employed teachers not having the requisite qualifications to entitle it to state aid. The question now confronting the county board of education is,

as to how it is going to reimburse itself and, under the circumstances and conditions above set out, whether it would be authorized in assuming the responsibility of hauling the children in this local district."

Section 7731, G. C., as amended in 104 O. L., 140, provides:

"In all rural and village school districts where pupils live more than two miles from the nearest school the board of education shall provide transportation for such pupils to and from such school. The transportation for pupils living less than two miles from the school house, by the most direct public highway shall be optional with the board of education. When transportation of pupils is provided, the conveyance must pass within one-half mile of the respective residences of all pupils, except when such residences are situated more than one-half mile from the public road. When local boards of education neglect or refuse to provide transportation for pupils, the county board of education shall provide such transportation and the cost thereof shall be charged against the local school district."

If the board of education of Highland county furnishes transportation for pupils residing in the rural district in question and living more than two miles from the nearest school, the cost of such transportation must be charged against said rural school district, under the above provision of the statute.

Inasmuch as the board of education of said district is unable, because of its limits of taxation, to provide the necessary fund to pay for the transportation of said pupils or to pay the amount charged against said district by the county board of education, in case said county board furnishes said transportation, the question arises—may the board of education of said rural district borrow money for this purpose under authority of sections 5656, et seq., of the General Code?

I call your attention to an opinion of my predecessor, Hon. Timothy S. Hogan, rendered to Hon. Cheevar W. Pettay, prosecuting attorney of Harrison county, under date of November 5, 1914. The question asked by Mr. Pettay was as follows:

"May a board of education borrow money under section 5656, General Code, to pay for the transportation of pupils?"

Mr. Hogan, after quoting the above provisions of section 7731, G. C., said:

"I would be of the opinion that if transportation were provided for by the hiring of a team and driver, the contract would be only for the employment of a school employe within the meaning of section 5661, General Code. It is at least clear that if the local board of education neglects or refuses to provide transportation and the same is provided by the county board of education and the cost thereof is charged against the local school district, the charge against the district will constitute a legal indebtedness of the district within the meaning of section 5656, General Code.

"It being at least clear, then, that the board of education may borrow to pay a charge against the district on account of transportation when the same is made by the county board of education, and it being reasonably clear (at) least that a contract for furnishing transportation would be a contract of employment, I am of the opinion that a local board of education has power, under section 5656, General Code, to borrow money for this purpose to the extent that transportation may be *required by law.*

However, as pointed out in my opinion respecting the exercise of the borrowing power for the purpose of paying teachers, it is not competent under his section to borrow money and thus create a fund in advance. The contract must be made with the person who is to provide the transportation and a liquidated liability, under the contract, must be incurred before section 5656 becomes available. This distinction should be carefully observed."

I concur in this opinion and therefore hold that the board of education of the rural school district in question may borrow money under authority of section 5656, G. C., to pay a charge against said district made by the county board of education in case said county board of education furnishes transportation to pupils of said district, as required by section 7731, G. C., as amended, when the local board fails or neglects to furnish such transportation, or to pay for services actually rendered under a contract of employment for this purpose.

A copy of the opinion referred to is herewith enclosed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

613.

MONEYS FOUND ON BODY OF DECEASED PERSON—HOW PERSONAL REPRESENTATIVES WHEN KNOWN, CAN OBTAIN SAME—APPOINTMENT OF ADMINISTRATOR, STRICTLY LEGAL WAY.

The only strictly legal way in which moneys found on the body of a deceased person, the subject of a coroner's inquest, can be turned over to the personal representatives of the deceased, when known, is through the appointmnt of an administrator.

COLUMBUS, OHIO, July 16, 1915.

HON. FRANK DELAY, *Probate Judge, Jackson, Ohio.*

DEAR SIR:—I acknowledge the receipt of your letter of June 23rd, supplementing your request for opinion answered by me on June 19th by the statement of additional facts, and requesting my opinion upon the whole question as thus modified.

In your former letter you stated that a person, the identity of whom was fully established, was found dead in the county and that the coroner, upon inquest, filed in your office an inventory of the property found on the body, accompanied by $17.31 in money. You stated further that the decedent left a wife and young child, and that the undertaker who buried him has a claim for his services.

Upon your request for opinion as to the disposition of the money, you were advised that the same should be paid over to the executor or administrator of the decedent.

You now advise that the deceased person left no property excepting that found on his body, so that the appointment of an administrator would consume in costs the entire estate. That being the case, you now request my opinion as to what shall be done with the money.

In my opinion, the only way in which the probate judge may lawfully dispose of money found on the body of a deceased person, the subject of a cor-

oner's inquest, and returned by the coroner, otherwise than in the manner provided in section 2862 of the General Code, is to pay the same to the executor or administrator of the person.

Whatever may be the practice as to the appointment of an administrator in cases where the estate of the deceased is insignificant in value, the statutes clearly contemplate such appointment, and fail to provide any lawful way of distributing the money in question to the personal representatives of the deceased otherwise than through the executor or administrator.

Therefore, I am unable to add anything to my previous opinion, save the observation that if the court chooses to assume the risk of turning this small sum of money over to whom he believes entitled to it, he would be liable only to such person as would be able to show a better title.

Respectfully,
EDWARD C. TURNER,
Attorney General.

614.

STATE HIGHWAY COMMISSIONER—WITHOUT AUTHORITY TO ALLOW EXTRA COMPENSATION TO THE H. E. CULBERTSON COMPANY, UNDER CONTRACT TO IMPROVE CERTAIN SECTIONS OF NATIONAL ROAD.

Upon the facts as submitted by the state highway commissioner, that official has no authority to allow and pay any extra compensation to the H. E. Culbertson Company under its contracts for the improvement of two sections of the National road located in Licking and Muskingum counties.

COLUMBUS, OHIO, July 16, 1915.

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

SIR:—I have your communication of May 13, 1915, relating to the contracts entered into by your department with the H. E. Culbertson Company for the improvement of two sections of the National road located in Licking and Muskingum counties. It appears that on the 15th day of April, 1914, the then state highway commissioner opened bids for the construction of a portion of the National road. This portion of the road was to be constructed in two sections; one known as Ohio Post road, National pike, highway G, in Licking county; and the other as Ohio Post road, National pike, highway I, in Muskingum county. The H. E. Culbertson company was awarded the contract for the construction of both sections. Its bid for the work in Licking county was $218,500.00 for the road work and $34,500.00 for drainage structures, and its bid for the work in Muskingum county was $160,400.00 for the road work, and $14,400.00 for the drainage structures. As to the work in both counties, the Culbertson Company agreed to repair all old stone culverts and arches for the cost of labor and materials, plus ten per cent. Written contracts were entered into between the state highway commissioner and the Culbertson Company, and that company began the work of construction and is still engaged on the work. Recently Mr. H. E. Culbertson of the Culbertson Company, presented to you certain claims for extra compensation over and above the contract prices above referred to, and you desire my opinion as to your rights and duties in the premises.

The claims presented on behalf of the Culbertson Company may be classified as follows:

(1) It is claimed on behalf of the company that at the time it submitted bids for building a sixteen foot roadway, certain conversations occurred between the

president of the company on the one hand, and the state highway commissioner or his deputies on the other hand, which conversations were to the effect that the Culbertson Company would bid upon the work only in case it was understood that the company should have the full co-operation of the highway department, that the things that the state must do toward the work should be done promptly, and that the company should be given every opportunity to do the work economically. Complaint is made that this agreement on the part of the department to co-operate with the contractor was violated, in that the highway department did not exercise proper diligence in securing the removal of three lines of telegraph and telephone poles from the right of way of the road. The president of the company says that when he discovered that these lines of poles were so situated on the right of way as to prevent economical work in grading, he at once took the matter up with the highway department, but that the department did not exhaust its efforts to get the poles removed until at least three months had elapsed, although very frequently appealed to by the contractor during that time, and then it was some time before the obstructions were out of the way. It is claimed that the presence of these poles and failure of the highway department to secure their removal from the right of way resulted in a considerable added cost to the contractor in the work of grading.

(2) It is further complained that the highway department has been too rigid and has at times been inconsistent in the work of inspecting material to be used on the contract, and that material passed by the inspector at the quarry was rejected when it reached the site of the work. As I understand the facts in this connection, however, the inconsistency complained of was not between the work of different state inspectors, but was between the work of a state inspector and that of a Federal inspector, the presence of the latter being accounted for by the fact that the United States government contributed toward the cost of the improvement. It is claimed that the state inspector passed some material at the quarry, but that a Federal inspector who was on the work refused for a time to allow this material to be used, and the claim is that this inconsistency in the work of inspection resulted in delay and consequent loss to the contractor.

(3) As I understand the claims of the contractor, the principal contention of the company is that the detailed plans showing the work to be done, and upon which the bids of the Culbertson Company were based, lacked the accuracy and care requisite for a contract of this magnitude, that the original cross sections were not taken frequently enough and appear to have been done by men lacking experience, and that, as a result of inaccuracy in the original estimates upon which the bids were based, the contractor has as a matter of fact, according to its claims, had to do substantially more excavating than that shown by the original estimates, the contractor claiming that the excess excavation has amounted to twenty-five per cent. or more. The contractor further claims that another result of this inaccuracy has been that on certain sections of the road the cuts have been taken out as shown on the profile and extended beyond the proposed cross section; and still a great amount of material is lacking to make the bermes as shown, which bermes the material from the cuts was supposed to make. It is also alleged that on certain sections, it was necessary to borrow substantial quantities of earth where the profile showed a substantial waste, this condition also being charged to the alleged inaccuracies in the estimates of quantities. A number of other complaints are made, but as I understand the facts, the things complained of were, according to the contractor, due to the alleged inaccuracies in the original estimates.

(4) The company also claims that in bridge and culvert work the company has handled more foundation excavation and put in more yards of concrete and stone work than the quantities shown by the estimates.

(5) It is also complained of by the company that in placing concrete it was several times necessary to stop the concrete mixer, this stoppage being occasioned

by the putting in of cast iron pipe and culverts by force account, or being due to a change of plans, which change would not be decided upon promptly enough to allow the contractor to get the work done without interfering with the actual placing of the concrete.

(6) It is also claimed that the department was not as prompt as it should have been in furnishing grade stakes when needed.

(7) The further claim is made, according to my understanding of the facts, that in at least two or three instances the contractor constructed the sub-grade according to grade stakes furnished by the highway department, and was then required to change the sub-grade to correspond with new grade stakes furnished by the department, which new grade stakes did not check with the ones formerly furnished.

Your communication to me under date of May 13th concludes as follows:

"It would require a considerable expenditure of effort and of public funds on the part of the state highway department to determine the accuracy of the claims advanced by the Culbertson Company. It therefore becomes important for the highway commissioner to know in advance of making an investigation into this matter, just what his rights and duties would be in case it would develop that all or some part of the claims of the Culbertson Company are well founded. If it be the law that the state highway commissioner is authorized to pay additional compensation to a contractor, under the circumstances of this case, then as I see it, it would be my duty to use such members of my staff as might be necessary to make a thorough examination into the facts, for the purpose of determining just how much additional compensation ought to be allowed. If, however, there is no lawful method of allowing additional compensation, assuming that the claims of the Culbertson Company are well founded and that the facts set forth in the communication of Mr. Culbertson to former State Highway Commissioner Marker referred to above, are true, then it would be a useless expenditure of money for the state highway department to employ the time of any of its men in going into the matter and making the required investigation.

"I therefore desire your opinion as to whether or not, assuming that the claims of the Culbertson Company are based upon actual facts, any right exists in the state highway commissioner to pay the company any compensation in addition to the amount of its bids."

In answering your inquiry it becomes necessary in the first instance to examine the law under which these improvements are being carried forward, the same being found in 103 O. L., 155, and being the law creating a system of main market roads, and providing for their construction, improvement, maintenance and repair.

Section 4 of the act in question, being section 6859-4, G. C., provides that the construction, improvement, maintenance and repair of main market roads shall be executed in such manner and method, and with such materials and in accordance with such plans, details and specifications, as may be adopted by the state highway commissioner with the approval of the governor. It is further provided in this section that no procedure for construction, improvement, maintenance and repair of roads as is provided for in any other act or acts of the general assembly shall apply to such main market roads.

Subsequent sections of the act expressly authorize the highway commissioner to construct, improve, maintain and repair main market roads by force account and to use convict labor on said roads. At no place in the law is there any direct authorization for the state highway commissioner to invite bids and let contracts for the construction of main market roads, this power being left to an inference based on the extremely broad provisions of section 4 of the act.

In the case now under consideration, the highway commissioner elected to prepare plans, specifications and estimates, make public advertisement of the letting, award the contracts at competitive bidding, and enter into written agreements with the successful bidder, which written agreements, together with the plans and specifications and other similar documents to which reference is made, purport to contain the entire contract between the highway commissioner and the contractor. In other words, the highway commissioner in the making of these improvements elected to proceed in substantially the same way in which the law requires him to proceed in the construction of inter-county highways; and, without herein passing in any way upon the power or authority of the highway commissioner, under favor of the sweeping provisions of section 6859-4, G. C., to modify by subsequent agreement such a written contract as the ones entered into between him and the Culbertson Company and now under consideration, it may be observed that in the matter now under consideration, there is no claim that the original contracts with the Culbertson Company were in any way modified by any subsequent agreement between the highway commission and the company. It would therefore seem clear that since the highway commissioner elected to proceed with this improvement by letting contracts at competitive bidding, the rights of the parties must be determined under the terms of those contracts. It therefore becomes important to examine the terms of the contracts in question, especially in so far as they relate to the claims advanced by the contractor. The terms of the contracts for the improvements in the two counties are identical.

The contracts in question are silent so far as any reference to the removal of telegraph or telephone poles is concerned. It does appear from the specifications which are referred to in the contracts and made a part thereof, that the contractor is to move certain obstructions at his expense, it being provided that the contractor is to move all fences in the line of the work and that grading shall include the grubbing out and clearing away of all trees, stumps and boulders within the lines of the improvement.

As pointed out by me in an opinion rendered to your department on April 30, 1915, section 7524, G. C., places that part of the National road outside of municipalities in the care and control of boards of county commissioners, and by sections 2408 and 2424, G. C., suits growing out of injuries to or obstructions of state and county highways are to be brought by the county commissioners of the proper county. From the above provisions it will be seen that no authority exists in the state highway commissioner to bring any suits for the purpose of securing the removal of telegraph and telephone poles from the public highways of the state. Inasmuch as the contracts in question are absolutely silent with reference to the removal of telegraph and telephone poles, and the specifications which are referred to in said contracts and made a part thereof, provide that the contractor, as a part of its work, shall be required to move all fences in the line of work and to grub out and clear away all trees, stumps and boulders within the lines of the improvement, I am unable to see how, under the terms of said contracts, any authority exists in you to compensate the contractor for losses due to delays caused by the presence of telegraph and telephone poles in the line of the improvement.

As will be later pointed out more specifically, all bidders were requested to carefully examine the site of the proposed improvement and satisfy themselves as to the character of the work, and if the representatives of the contractor in question complied with this request and went over the route of the proposed improvement, they must have observed the lines of poles in question. These contracts must also be taken to have been made with reference to the existing law of the state, which law affords no means by which the highway commissioner could take any official action to secure the removal of telegraph and telephone poles from the line of the highway. It would seem that any delays incident to

the presence of telegraph and telephone poles within the line of the improvement, must be regarded as one of the hazards assumed by the contractor, and that bidders should have taken this fact into consideration in making their bids. In any event, it may safely be asserted that if delay was caused to the contractor by reason of the presence of poles in the right of way, nothing can be found in the contract which would authorize the allowance of additional compensation, and such reference to the removal of other obstructions as are found in the contract, points to the conclusion that all such matters were to be cared for by the contractor at its own expense.

In reference to the claim that certain materials passed at the quarry by a state inspector were rejected by a Federal inspector who was on the work, it may be observed that the specifications provide for the appointment of inspectors who were authorized to reject defective materials. It is further provided in the specifications that the judgment and decision of the highway commissioner, as to whether or not the materials supplied complied with the requirements of the contract, shall be final. The complaint here is not that the state inspector rejected materials which should have been passed, but that materials which were passed by a state inspector were rejected, at least for a time, by a Federal inspector. The instructions to bidders, bound with and made a part of the contract, invited the attention of all bidders to the fact that the proposed improvement was to be participated in by the United States government, through the postmaster general and the secretary of agriculture, and bidders were referred to the postoffice appropriation bill passed by congress for the fiscal year of 1913, to a contract between the state of Ohio and the secretary of agriculture, and also to a certain opinion of the attorney general of the United States. It is unnecessary to determine whether or not, under such appropriation bill and under the contract referred to, the Federal inspector had a right to pass upon materials. If the Federal inspector had such a right and was acting within his power, and if the contractor was subject to a double inspection by reason of the participation of both state and Federal governments, then the rights of the contractor were not infringed by the action of the Federal inspector. If under the Federal appropriation bill and the contract referred to between the state and the secretary of agriculture, no right of inspection exists in the Federal government, then it was within the power of the contractor once the material had been passed by the state inspector, to disregard the action of the Federal inspector and to proceed to use the material in the work of construction. In effect, the contractor is now asking reimbursement from the state not by reason of any contract with the state, or by reason of any act of any state official, but he is basing his claim for compensation from the state on an alleged unauthorized or illegal act on the part of a Federal inspector. Nothing contained in the contract would warrant the allowance of a claim of this nature.

The major part of the Culbertson Company's claim is based upon the allegation that the detailed plans showing the work to be done and upon which the bids of the company were based, were inaccurate and that the contractor has had to do substantially more excavating than that shown by the original estimates, the excess amounting to twenty-five per cent. or more.

In connection with this claim attention is invited to the following language used in the instructions to bidders:

> "Bidders are requested to carefully examine the site of, and the plans, profiles and specifications for this proposed work, *and they shall satisfy themselves as to the* character, *quantity* and nature *of the work to be done.*

These contracts were let on what is known as lump sum bids. Most certainly the contractor would not claim that if the estimates had been larger than the actual

quantities to be moved, the compensation to be paid the contractor would be thereby correspondingly decreased. The obligation in this respect must be mutual and it follows that the contractor, where the contract is let on lump bids, is not entitled to an extra compensation by reason of the fact that the actual excavation exceeded the estimates, when there is no provision in the contract for such extra compensation and no guarantee that the estimates are correct, especially when the instructions to bidders are to the effect that they *shall satisfy themselves as to the quantity of the work to be done.*

So far as these alleged inaccuracies have resulted in the necessity of borrowing earth in order to complete fills, it may be observed that the specifications contemplate that a certain amount of borrowing will be necessary and refer explicitly to the same, and provide that the grading shall include such borrowing. No place in the contract is there any language used which would warrant the inference that any extra compensation was to be allowed to the contractor under any circumstances or conditions, but the whole spirit of the contract and specifications is to the effect that the bid of the contractor is to cover all the work necessary for the completion of the road according to the original plans and specifications, and the following express provision found in the specifications points to the conclusion that no extra compensation is to be allowed, unless clearly provided for either in the original or in a supplementary contract:

> "Any minor details of work not specifically mentioned in the specifications or shown on the plans, but obviously necessary for the proper completion of the work, shall be considered as being a part of and included in the contract and shall be executed in the proper manner, *and the contractor shall not be entitled to any extra or additional compensation for the same.*"

I am of the opinion that, under the terms of the contracts in question, the claim of the contractor for additional compensation by reason of excess excavation, is no better founded than would be a refusal of the state to pay him the full amount of his bid in case the estimate of excavation had been larger than the actual quantities moved, that no authority exists in the state highway commissioner, under the contracts in question, to allow such extra compensation. The same statement applies with equal force to the claims of the company that in bridge and culvert work the company has handled more foundation excavation and put in more yards of concrete and stone work than the quantities shown by the estimates.

As to delays occasioned by the putting in of culverts by force account, changes of plans and failure of the highway department to be as prompt as it should have been in furnishing grade stakes when needed, the specifications provide for variations from the original plans, profiles, cross sections and drawings, as may be required by exigencies of construction, such variations to be determined in all cases by the highway commissioner; but the contract does not refer either directly or indirectly to the allowing of any extra compensation for these variations. It is not every variation that could be required by the commissioner under the original contract, but it would be within his power to require a variation not substantially altering the character or quantity of the work. The specifications also provide that the highway commissioner may suspend work at any time for such period as is necessary, and the rights of the contractor are cared for by the further provision that in case of such suspension during the working session, the time within which the contractor is required to complete the work shall be extended by as many days as work is suspended, plus an additional ten days. The specifications also give the highway commissioner full discretion to determine the places at which work shall be prosecuted, the time when such work shall be done, and the forces which shall be used by the contractor. It would seem that any delay such as complained

of, must be regarded as a suspension of the work and that the rights of the contractor under these contracts in question are fully protected when the proper extension in the time of completion of the work, has been allowed. I am advised that such an extension has been granted the contractor.

As to the last claim of the contractor to the effect that in at least two or three instances the company constructed a sub-grade according to grade stakes furnished by the highway department and was then required to change the sub-grade to correspond with new grade stakes furnished by the department, which new grade stakes did not check with the ones formerly furnished, it may be observed in the first instance, that the letter from the contractor addressed to your predecessor in office, shows that this claim is disputed by the engineers of the highway department who were employed upon this work, who denied setting the original stakes in any of the instances referred to, and stated that they were not responsible for their use in building the original sub-grade. Even if the claims of the contractor in this particular should prove to be correct, it would appear that the contractor having once constructed a sub-grade according to stakes furnished by the engineers of the highway department, should have stood upon its rights and refused to reconstruct the sub-grade to conform with a new and different line of stakes. There is no claim made that the sub-grade was reconstructed under any supplementary contract, under the terms of which contract additional compensation was to be allowed to the contractor.

Summarizing the above statements, and answering your question specifically, it is my opinion that at the present time the rights and duties of the state highway commissioner in relation to this matter are to be determined entirely by the written contracts existing between the highway commissioner and the company, no supplementary contracts having been entered into between the parties. Under those contracts, it is my opinion that you have no power or authority to allow any additional compensation to the Culbertson Company by reason of the facts set forth above, and that your authority in making payment to said company is limited to the payment of estimates made from time to time, less the deductions provided for in the contracts, and to the payment of final estimates when the contracts are completed, the total amounts to be paid the company being those set forth in its bids, upon which bids the contracts were awarded to it.

In reference to the alleged failure of the state highway commissioner to secure the removal of lines of poles from the rights of way, it is contended that there was a parol agreement between the highway commissioner and the Culbertson Company covering this matter, that this parol agreement was an inducement or consideration for the written contract, and that parol evidence would be admissible to establish such contract and that the same is enforceable. Without conceding the correctness of the legal principles upon which the above contention is based, it may be observed that even if such legal principles be assumed to be sound, then the Culbertson Company would have only a claim for damages for breach of contract and not a right to compensation under such contract. The only appropriation available to the state highway commissioner is one for the construction, improvement, maintenance and repair of main market roads, and such an appropriation would not be available for the payment of damages for breach of contract. It, therefore appears that even if all the contentions both of fact and law made on behalf of the Culbertson Company in this particular be admitted to be correct, there is no appropriation available out of which any payments could be made to said company on account of the alleged failure of the state highway commissioner to secure the removal of the lines of poles in question.

Respectfully,
EDWARD C. TURNER,
Attorney General.

615.

UNDER SECTION 7681, G. C., 103 O. L., 897, PARENT OF CHILD ATTENDING SCHOOLS OF A DISTRICT MUST RESIDE WITHIN SAID DISTRICT DURING TIME OF ATTENDANCE IN ORDER THAT CHILD MAY BE ENTITLED TO SUCH SCHOOLING FREE OF CHARGE.

Under the provision of section 7681, G. C., as amended 103 O. L., 897, the parent of a child attending the schools of a district must in fact reside within said district during the time of such attendance in order that said child may be entitled to such attendance free of charge.

COLUMBUS, OHIO, July 16, 1915.

HON. ORTHA O. BARR, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—In your letter of June 11th you request my opinion as follows:

> "Section 7681 of the General Code provides in part as follows: 'The schools of each district shall be free to all youth between six and twenty-one years of age, who are children, wards or apprentices of actual residents of the district, etc.'
>
> "Two pupils have been attending school in the village of Spencerville, Allen county, Ohio, during the last school year. During the year 1912, the parents of these children lived in the village. The father owned a farm in Jennings township, Van Wert county, about seven (7) miles west of the village, and in 1912, he moved to the farm. However, he claimed his residence in the village of Spencerville, and continued to vote at the elections held in the village, and refrained from voting at the elections in Van Wert county. He continued to send his children to the Spencerville school during the school year of 1913 and 1914, and the school year 1914 and 1915. In February, 1915, he again moved from his farm in Jennings township, Van Wert county, to the village of Spencerville, in Allen county.
>
> "Query. Is the parent of these children who attended school in the village of Spencerville, liable for their tuition while attending said school while he was living on his farm in Van Wert county, and while he claimed the village as his residence and voting place, although he had no property situated in the village?"

Section 7681, G. C., as amended in 103 O. L., 897, provides:

> "The schools of each district shall be free to all youth between six and twenty-one years of age, who are children, wards or apprentices of actual residents of the district, including children of proper age who are inmates of a county or district children's home or orphans' asylum located in such a school district but the time in the school year at which beginners may enter upon the first year's work of the elementary schools shall be subject to the rules and regulations of the local boards of education. But all youth of school age living apart from their parents or guardians and who work to support themselves by their own labor, shall be entitled to attend school free in the district in which they are employed."

The answer to your question depends on the meaning to be given to the words "actual residents" as used in the above provision of the statute.. "Residents" is used generally to express the connection between persons and places, its exact signification being left to construction to be determined from the context and the apparent object to be attained by the enactment. State ex rel. v. Kuhn, 8 O. N. P., 197.

A new residence is acquired by removal with intention to make the new location the permanent home. Hall v. Earnst, 51 W. L. B., 30.

Absence with intent to return not destroyed by some unequivocal act, though for years, does not defeat the right to claim uninterrupted residence. Egan v. Lumsden, 13 Dec. Rep., 103.

In the case of State ex rel. v. Kuhn, supra, the second branch of the syllabus provides:

> "Every person must have a domicile somewhere. No person can have more than one domicile at the same time. Every person who is sui juris and capable of controlling his personal movement may change his domicile at pleasure. A change of domicile is a question of fact and intention."

In the case of Grant v. Jones, 39 O. S., 506, the court in its opinion at page 515 states:

> "What constitutes a person a resident of Ohio for the purpose of voting, of admission to the public schools and benevolent institutions of the state, for the administration of estates and in other cases, has been a frequent matter for consideration in the courts. There is no substantial difference between the words residence and domicile in regard to these matters, although they are not always synonymous. For business purposes and perhaps for purposes of education, a man may have more than one residence, but he can have but one domicile."

If the statute provided that the schools of each district shall be free to the children of residents of the district, I am of the opinion that the children in question would be entitled to attend the schools of said village school district without charge for tuition, during the time the parents of said children were absent from said district and living on the farm in Van Wert county, for the reason that, from your statement of facts, it is evident that said parents did not intend, by said removal from said district, to thereby establish a new residence outside of said district. The fact that the father voted at the elections held in said village during said time and claimed his residence therein, taken in connection with the fact of their return to said village, is evidence of the intention of the parents of said children to maintain their residence in said village. However, the provision of the statute in this connection limits the attendance of children, free of charge, to children of "actual residents of the district."

The Standard Dictionary defines the word "actual" as follows:

> "Existing in fact, as opposed to merely possible, constructive, conceivable or ideal; real, as distinguished from conjectural or imputed by construction; as actual possession."

Actual residents within the meaning of the above provision of the statute must be distinguished from constructive residents and requires that the parent of a child attending the schools of a district must in fact reside within said district during the time of such attendance in order that said child may be entitled to such attendance free of charge.

If the children in question had lived in said village school district apart from their parents during the time the parents were absent from said district and had worked to support themselves by their own labor, they would have been entitled to attend the schools of said district free of charge, but as I understand it the children in question lived with their parents on the farm in Van Wert county from the time of their removal from said school district in 1912, until the time they

moved back into said district in February, 1915, and during this interim said parents maintained a home on said farm, but continued to send the children to the school in said village school district.

It cannot be said they were "actual residents" of the village school district within the meaning of the above provision of the statute during said time.

I am of the opinion, therefore, in answer to your question, that the board of education of said village school district is entitled to the payment of tuition for such part of said time as said children were in actual attendance in the schools of said district.

Respectfully,
EDWARD C. TURNER,
Attorney General.

616.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS

COLUMBUS, OHIO, July 16, 1915.

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

DEAR SIR:—I have your communication of July 15, 1915, transmitting to me for examination final resolutions as to the following inter-county highway improvements, located in Paulding county, to wit:

Van Wert-Paulding, petition No. 1401, I. C. H. No. 430.
Paulding-Woodburn, petition No. 1404, I. C. H. No. 433.
Continental-Paulding, petition No. 1402, I. C. H. No. 431.
Defiance-Delphos, petition No. 1398, I. C. H. No. 425.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

617.

TRANSCRIPT OF PROCEEDINGS FOR ISSUE OF BONDS BY VILLAGE OF BETHESDA, OHIO—SAME DISAPPROVED.

COLUMBUS, OHIO, July 17, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—IN RE: Bonds of the village of Bethesda, Ohio, in the sum of $9,000.00 conditionally purchased by the industrial commission under resolution adopted May 24, 1915.

I have examined the several transcripts purporting to contain a record of the proceedings of the council and other officers of the village of Bethesda relative to the issuance of the bonds above mentioned, and advise your commission as follows:

The transcript reveals that the publication of the several resolutions, notices and ordinances including the ordinance (No. 63) under authority of which the bonds in question are issued, was made in the Belmont Chronicle and the St. Clairsville Gazette, two newspapers of opposite politics and of general circulation in the village of Bethesda, but neither of which is in whole or in part printed in the village of Bethesda.

Although the transcript is silent as to whether or not the village of Bethesda contains a local newspaper, yet I am informed by Mr. Chappell, village solicitor, that there is now and was at the time such publications were made a local paper printed in and having general circulation in said village, and that none of the resolutions, notices and ordinances referred to in the transcript were published in such local paper. The ordinance authorizing the issuance of the bonds in question (ordinance No. 63) recites that the council is acting under the provisions of section 3939 of the General Code. It therefore necessarily follows that the several resolutions, declaring it necessary to improve certain streets, the service of notices by publication or otherwise upon property owners and the ordinances to proceed with the improvement of the several streets mentioned were not necessary steps in proceedings to issue the bonds in question, and the character of the publications of the said resolutions of necessity, notices to property owners and ordinances to proceed have no bearing on the question of the validity of said bonds and might very well have been omitted from the transcript.

Under authority of section 3939 of the General Code, the village council might have authorized the issuance of said bonds to pay the village's portion of the cost of improving certain streets, or of the village's streets generally, prior to the enactment of any legislation authorizing the improvement of any of such streets. (See Heffner v. Toledo, 75 O. S., 413.)

Therefore in arriving at a conclusion relative to the validity of the bond issue in question I have not considered and do not pass upon the validity of the proceedings of council authorizing the improvement of said streets; nor the sufficiency of any necessity publication in connection therewith.

Ordinance 63 under authority of which said bonds are issued was, however, also published in the Belmont Chronicle and in the St. Clairsville Gazette, and no publication was given it in the local paper. Since said ordinance No. 63 is an ordinance requiring publication, I am of the opinion that the rule laid down by the supreme court in the case of the village of Elmwood v. Schanzle, No. 14836 on the docket of said court, decided March 9, 1915, applies, and that said bond ordinance must, before it can go into effect, be published in the Bethesda local paper.

I am informed that this ordinance was published in the manner indicated in the transcript in an effort to comply with the decision of the court of appeals of Muskingum county in the case of Vermillion et al. v. The Village of New Concord et al., No. 17 on the docket of said court. The supreme court, however, in the case cited above has overruled the doctrine of the court of appeals in the New Concord case, and I am constrained to follow the holding of the supreme court and insist upon the necessity of complying with the rule therein laid down, especially in view of the fact that its decision was announced March 9, 1915, and the ordinance under which the bonds in question are issued was passed April 27, 1915.

I am therefore of the opinion that the bonds in question have not been issued in conformity with law, and advise your commission to decline to accept the same.

Respectfully,

EDWARD C. TURNER,

Attorney General.

618.

AUTOMOBILE—COUNTY BOARD OF EDUCATION MAY ALLOW COUNTY SUPERINTENDENT AN AMOUNT TO COVER EXPENSE OF MAINTAINING AND OPERATING AN AUTOMOBILE OWNED BY HIMSELF AND USED IN DISCHARGE OF HIS DUTIES—LIMITATION BY STATUTE AS TO AMOUNT TO BE EXPENDED—BILLS OF EXPENSES MUST BE ITEMIZED—NO MONTHLY INSTALLMENTS ALLOWED.

The county board of education may allow a county superintendent an amount sufficient to cover the actual and necessary expense of maintaining and operating an automobile owned by him and used in the discharge of his duties, having due regard for the extent of such use in public and private business.

The provisions for the allowance to a county superintendent of "a sum not to exceed three hundred dollars per annum for traveling expenses and clerical help" is a limitation upon the amount of expenses of such superintendent which may be allowed by the county board, which expenses can only be allowed upon itemized bills of expenses actually incurred, and the county board has no authority to allow the superintendent three hundred dollars a year in monthly installments of twenty-five dollars each.

COLUMBUS, OHIO, July 17, 1915.

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

GENTLEMEN:—Your letter of July 10, 1915, requesting my opinion, received and is as follows:

> "A county superintendent of schools owns an automobile which he uses almost exclusively in traveling about the county in the performance of his official duties. Under the terms of section 4744-1, 104 O. L., 142, may he include the cost of gasoline, lubricating oil, repairs to tires and parts of his automobile as traveling expenses under the provisions of this section; also may the board of education allow the county superintendent $300.00 a year in monthly installments of $25.00, or is a superintendent required to render itemized bills of the expenses actually incurred?"

Section 4744-6, General Code (104 O. L., 143), provides as follows:

> "The county commissioners of each county shall provide and furnish offices in the county seat for the use of the county superintendent. Such offices shall be the permanent headquarters of the county superintendent and shall be used by the county board of education when in session."

Section 7706-3, General Code (104 O. L., 144), provides as follows:

> "The county superintendent shall hold monthly meetings with the district superintendents and advise with them on matters of school efficiency. He shall visit and inspect the schools under his supervision as often as possible and with the advice of the district superintendent shall outline a schedule of school visitation for the teachers of the county school district."

The headquarters of the county superintendent being fixed at the county seat of the county and his duties requiring his presence in various parts of the county at intervals, it is plain that it was within the contemplation of the general assembly that he would necessarily incur traveling expenses in going about the county and, in the very nature of things, such traveling could not be limited to travel by rail, but he would be compelled to make use of a vehicle or conveyance of some sort.

Section 4744-1, General Code (104 O. L., 142), provides for the payment of such traveling expenses in the following language:

> "The county board may also allow the county superintendent a sum not to exceed three hundred dollars per annum for traveling expenses and clerical help."

The money thus allowed may undoubtedly be used to pay the expenses incurred by the county superintendent in providing himself with the necessary means of conveyance for the performance of his duties. The ownership of the vehicle would not preclude the payment of expenses necessarily incurred in the operation thereof. Just what expenses or what proportion of the expenses may be charged against public funds will depend upon the facts in each particular case. It is really more a matter of policy than of law. If the automobile were used exclusively in his work as county superintendent, the reasonable and necessary expense of maintaining the same might be allowed by the county board (subject, of course, to the maximum limitation). Where, however, the automobile is not so exclusively used but is used as well for private purposes, there should be some definite arrangement entered into between the board and the superintendent. I would suggest that this arrangement be made upon a mileage basis. For instance, if the automobile were run 300 miles in a month, 200 in official business and 100 for private purposes, it would be fair and equitable for the board of education to allow two-thirds of the expenses of the upkeep for the month. If such an arrangement be not practical, the board might agree to allow the superintendent a reasonable rate per mile covered by the automobile in public business as traveling expenses of the superintendent. These, however, are mere suggestions.

As to the second part of your question, to wit: "May the board of education allow the county superintendent $300.00 a year in monthly installments of $25.00, or is the superintendent required to render itemized bills of the expenses actually incurred?" Section 4744-1, G. C., (104 O. L., 142), provides as follows:

> "The salary of the county superintendent shall be fixed by the county board of education, to be not less than twelve hundred dollars per year, and shall be paid out of the county board of education fund on vouchers signed by the president of the county board. Half of such salary shall be paid by the state and the balance by the county school district. In no case shall the amount paid by the state be more than one thousand dollars. The county board may also allow the county superintendent a sum not to exceed three hundred dollars per annum for traveling expenses and clerical help. The half paid by the county school district shall be pro-rated among the village and rural school districts in the county in proportion to the number of teachers employed in each district."

This section provides for the fixing of the salary of the county superintendent by the county board of education, and also provides for the allowance of expenses of such superintendent. The provision for the allowance of expenses cannot be construed to in any way increase the compensation of the county superintendent for services rendered and it therefore follows that only actual expenses incurred by him may be paid.

I am therefore of the opinion that the county board of education cannot allow the county superintendent $300.00 a year in monthly installments of $25.00, but the county superintendent must render itemized bills of the expenses actually incurred, which itemized bills so rendered may be allowed by the county board, so long as the aggregate of such bills does not exceed three hundred dollars per annum.

Respectfully,

EDWARD C. TURNER,

Attorney General.

619.

EIGHT HOUR LABOR LAW—SECTIONS 17-1 AND 17-2, G. C., NOT APPLICABLE TO CONTRACTS ENTERED INTO PRIOR TO JULY 1, 1915 —ARTICLE II, SECTION 37 OF CONSTITUTION, SELF-EXECUTING —MIAMI UNIVERSITY.

Section 17-1 and 17-2, G. C., do not apply to contracts entered into prior to July 1, 1915.

Article II, section 37 of the constitution is self-executing and appropriate action may be taken thereunder on contracts entered into prior to July 1, 1915.

COLUMBUS, OHIO, July 17, 1915.

HON. R. M. HUGHES, *President, Miami University, Oxford, Ohio.*

DEAR SIR:—Under date of July 9th, you submitted for my opinion the following question:

> "Under the date of March 11, 1914, Attorney General Timothy S. Hogan rendered an opinion to the effect that Miami University is not included under the eight-hour law, directing that all public work should be limited to an eight-hour day. My request to which his opinion referred related to our regular employes, engineers, janitors and laborers, in addition to those who have charge of the domestic work in the boarding department. The question has now arisen whether or not the law applies to work in connection with the erection of buildings by contract on our grounds, buildings paid for by state funds. The immediate question arises from Taylor and Wespiser, contractors for an addition to our heating plant. The ordinary day here in Oxford is a ten-hour day, and their original contract was made on the assumption that they could use ten-hour laborers. They are now raising the question whether they will be liable under the law should they proceed in this way. I should be greatly obliged for your advice relative to this matter."

From a reference to the files in my department I ascertain that the contract concerning which you inquire, made with Wespiser and Taylor, was entered into on June 28, 1915, approved by me and filed in the office of the auditor of state on June 30, 1915.

While the constitutional amendment adopted in September, 1912, provided that, except in cases of extraordinary emergency, not to exceed eight hours should constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, yet there was no sanction or penalty attached for a violation of said constitutional provision.

The legislature passed an act on April 28, 1913, which was approved by the governor on May 9, 1913, and filed in the office of the secretary of state on May 13, 1913. Said act provided in section 2 thereof for a penalty for a violation of the provisions thereof; but in section 3 it is provided:

> "This act shall be in force and applicable to all contracts let on and after July 1, 1915."

In view of the fact that the contract with Wespiser and Taylor was let prior to July 1, 1915. I am of the opinion that they are not liable for the penalty under section 2 of said act should they employ "ten-hour laborers" on such contract, but in view of the fact that the constitutional provision is self-executing and has been in effect since January 1, 1913, appropriate action might be taken in the courts to enforce the provisions thereof.

Respectfully,

EDWARD C. TURNER,

Attorney General.

620.

BOARD OF EDUCATION—BONDS—PURPOSE OF CONSTRUCTING NEW SCHOOL BUILDING—ORDER MADE BY STATE INSPECTOR OF WORKSHOPS AND FACTORIES—SMITH ONE PER CENT. LAW LIMITATIONS MAY BE EXCEEDED—LEVY MAY BE MADE UNDER SECTIONS 7630-1 AND 5649-4, G. C.

Where under authority of section 7603-1, G. C., bonds are issued by a board of education for the purpose of constructing a new school building, in compliance with the order of the state inspector of workshops and factories, and thereafter a sinking fund levy cannot be made for the purpose of paying the interest on said bonds and retiring the same at maturity without exceeding the fifteen mill limitation provided by law, said board of education may make said levy under authority of said section 7630-1, G. C., and section 5649-4, G. C., irrespective of the limits provided by sections 5649-2 to 5649-5b, G. C., and referred to in said section 5649-4, G. C.

COLUMBUS, OHIO, July 19, 1915.

HON. FRED W. MCCOY, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—I have your letter of July 3, 1915, enclosing copies of certain resolutions passed by the board of education of Carrollton village school district, also a copy of notice issued to the treasurer of Carroll county and setting forth the schedule of tax levies for the various taxing districts of said county for the year 1914.

You inquire whether the budget commissioners of said county may allow said board of education a levy for the payment of the interest and to provide a sinking fund for final retirement at maturity of certain bonds issued by said board of education, and described in said resolution, under authority of sections 7630-1 and 5649-4 of the General Code, as found in 103 O. L., 527, which provide as follows:

> "*Section* 7630-1. If a school house is wholly or partly destroyed by fire or other casualty, or if the use of any school house for its intended purpose is prohibited by any order of the chief inspector of workshops and factories, and the board of education of the school district is without sufficient funds applicable to the purpose, with which to rebuild or repair such school house or to construct a new school house for the proper accommodation of the schools of the district, and it is not practicable to secure such funds under any of the six preceding sections because of the limits of taxation applicable to such school district, such board of education may, subject to the provisions of sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven, and upon the approval of the electors in the manner provided by sections seventy-six hundred and twenty-five and seventy-six hundred and twenty-six issue bonds for the amount required for such purpose. For the payment of the principal and interest on such bonds and on bonds heretofore issued for the purposes herein mentioned and to provide a sinking fund for their final redemption at maturity, such board of education shall annually levy a tax as provided by law.
>
> "*Section* 5649-4. For the emergencies mentioned in sections forty-four hundred and fifty, forty-four hundred and fifty-one, fifty-six hundred and twenty-nine, seventy-four hundred and nineteen and 7630-1 of the General Code, the taxing authorities of any district may levy a tax sufficient to provide therefor irrespective of any of the limitations of this act."

From your letter and enclosed memoranda, it appears that on September 30, 1912, said board of education, by resolution, declared the necessity of levying a tax of two mills or less for a period of five years, in addition to the rate which could be allowed by the county budget commissioners, under authority of section 5649-2 and 5649-3 of the General Code; that at the meeting of said board on October 5, 1912, the state inspector of workshops and factories, or his deputy,

was present and notified said board that the school building then in use was condemned and that a new building would have to be erected and ready for use at the beginning of the next school year. Said board thereupon passed the following resolution:

> "Resolved by the board of education of the village school, Carrollton, Ohio, that it is necessary for the proper accommodation of schools of said district to erect and equip a new school house, that it will require $50,000 to make said improvement, and the funds at the disposal of said board or that can be raised under the provision of section 7629 of the General Code of Ohio, are not sufficient to accomplish said purpose, it is therefore resolved that the election be held in said school district on the question of the issuing bonds in the amount of $50,000 for the purpose herein specified, on the 5th day of November, 1912, and the clerk of the board be directed to forward a copy of these (this) resolution to the deputy state supervisor of election and request said supervisor to provide election supplies and conduct said election, and that the clerk be also directed to publish notice of said election as provided by law."

It further appears that at the election held in said district on November 5, 1912, the additional levy declared necessary by said board in its resolution of September 30, 1912, was submitted to a vote of the electors of said district under authority and in compliance with the requirements of sections 5649-5 and 5649-5a of the General Code, and at the same time the question of the $50,000 bond issue above referred to was submitted to a vote of such electors, under authority and in compliance with the requirements of sections 7625, et seq., of the General Code, and that the vote was favorable to both of said propositions.

On November 11, 1912, said board, by resolution duly passed, authorized the issuance of $50,000 of bonds for the purpose therein provided. It further appears that on March 24, 1914, said board acting under authority of sections 7625, et seq., of the General Code, determined to submit to a vote of the electors of said district an additional bond issue of $12,000, for the purpose of completing the construction of its school building, and that on April 14, 1914, said election was held and the vote of the electors was favorable to said issue.

On April 21, 1914, said board, by resolution, authorized said additional issue of bonds and in said resolution provided for an annual tax levy sufficient to pay the interest on said bonds and to provide a sinking fund for their final retirement at maturity. I assume that these bonds were sold and that a levy for the above purpose was made for the year 1914.

The schedule of tax levies issued by the county treasurer, taken in connection with the statement of facts submitted in your letter, shows that the levy in said school district for the year 1914 for all purposes, including the additional levy authorized by a vote of the people, under sections 5649-5 and 5649-5a of the General Code, but excepting a sinking fund levy for said bond issues, was 14.60 mills.

Prior to the date when the act of the general assembly, supplementing section 7630, G. C., and amending section 5649-4, G. C., so as to include levies made under authority of section 7631, G. C., as found in 103 O. L., 527, became effective, the above mentioned sinking fund levy was subject to the fifteen mill limitation provided by section 5649-5b, G. C. It will be observed that under the provisions of section 7630-1, G. C., the authority conferred by said section on said board of education may not be invoked by said board unless it finds that it is unable to provide a levy sufficient for the aforesaid purpose, under authority of sections 7625 to 7630, inclusive, of the General Code, because of the limits on tax levies applicable to said district. In other words, if the aggregate levy for said district for the year 1915, and thereafter, including said sinking fund levy, will not exceed the 15 mill limitation above referred to, the authority conferred on said board of education by section 7630-1, G. C., and section 5649-4, G. C., as amended, may not be invoked.

Inasmuch, however, as the aforesaid bonds were issued by said board of educa-

tion for the purpose of constructing a new school building, in compliance with the order of the state inspector of workshops and factories, I am of the opinion that, if the said board of education finds that said sinking fund levy cannot be made without exceeding said fifteen mill limitation, said board may make said levy under authority of said sections 7630-1, G. C., and 5649-4, G. C., as amended, irrespective of the limits provided by sections 5649-2 to 5649-5b, inclusive, of the General Code, and referred to in said section 5649-4, G. C., as amended.

Respectfully,
EDWARD C. TURNER,
Attorney General.

621.

BUDGET COMMISSIONERS—STATUTE NOW PROVIDES THAT COUNTY AUDITOR, COUNTY TREASURER AND PROSECUTING ATTORNEY SHALL CONSTITUTE COMMISSION—WHEN ACT BECAME EFFECTIVE.

House bill No. 342, passed April 27, 1915, and filed in the office of the secretary of state April 30, 1915, if no petition for referendum is filed thereon prior to July 30, 1915, will go into effect on that date. Said bill amends section 5649-3b, G. C. In other respects the laws governing budget commissioners remain the same. Under said bill the budget commissioners will consist of the county auditor, county treasurer and prosecuting attorney.

COLUMBUS, OHIO, July 19, 1915.

HON. JOHN SCHRIDER, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—I am in receipt of a letter from Hon. Charles R. Lowe, county auditor of your county, submitting for my opinion a question as follows:

> "There seems to be difference of opinion in this county as to who will constitute the budget commission in a county, and under what law they will work."

In accordance with the usual custom I am addressing the opinion to you.

Section 5649-3b of the General Code was originally enacted in 102 O. L. page 266, was amended in 103 O. L., page 552, and again in 104 O. L., page 237.

The supreme court in the case of State ex rel. Pogue v. Groom, 90 O. S., 1, on September 4, 1914, held this section as amended unconstitutional, the first two branches of the syllabus being as follows:

> "The act of the general assembly passed February 16, 1914, (104 O. L., 237), amending section 5649-3b, General Code, as amended April 16, 1913, (103 O. L., 552), insofar as it purports to designate who shall constitute the county budget commission, is unconstitutional and void.
>
> "The act of the general assembly passed April 16, 1913 (103 O. L., 552) purporting to amend section 5649-3b, General Code, by designating who shall constitute the county budget commission, is to that extent unconstitutional and void, and the repealing clause of the act, insofar as it repeals that portion of section 5649-3b, is invalid."

A careful reading of the entire opinion, however, makes it clear that the supreme court intended merely to hold that the provision respecting the personnel of the budget commission was unconstitutional without holding the entire section to be void. This conclusion was reached in an opinion to the tax commission of Ohio by this department under date of April 27, 1915, being opinion No. 295, a copy of which I enclose herewith.

House bill No. 342 as passed April 27, 1915, approved April 29, 1915, and filed in the office of the secretary of state April 30, 1915, amends section 5649-3b of the General Code. That bill is as follows:

"Sec. 5649-3b. There is hereby created in each county a board for the annual adjustment of the rates of taxation and fixing the amount of taxes to be levied therein, to be known as the budget commissioners. The county auditor, the county treasurer and the prosecuting attorney shall constitute such board. The budget commissioners shall meet at the auditor's office in each county on the first Monday in August annually, and shall complete their work on or before the third Monday in that month, unless for good cause the tax commission of Ohio shall extend the time for completing the work. Each member shall be sworn faithfully and impartially to perform the duties imposed upon him by law. Two members shall constitute a quorum. The auditor shall be the secretary of the board and shall keep a full and accurate record of all proceedings. The auditor shall appoint such messengers and clerks as the board deems necessary, who shall receive not to exceed three dollars per day for their services for the time actually employed, which shall be paid out of the county treasury. The budget commissioners shall be allowed their actual and necessary expenses. Such expenses shall be itemized and sworn to by the person who incurred them and paid out of the county treasury when approved by the board. For the purpose of adjusting the rates of taxation and fixing the amount of taxes to be levied each year the county auditor and the budget commissioners shall be governed by the amount of the taxable property as shown on the auditor's tax list for the current year; provided, that if the auditor's tax list has not been completed, the county auditor shall estimate as nearly as practicable the amount of the taxable property for such year and such officers shall be governed by such estimate.

"Section 2. That said original section 5649-3b of the General Code be and the same is hereby repealed."

This bill, if a petition for referendum thereon is not filed prior to that time, will go into effect on July 30, 1915, and I therefore advise you, in answer to the above question that, the county auditor, the county treasurer and the prosecuting attorney will constitute the budget commissioners and that the laws under which they will operate are the same as those in force in 1914 with the exception of the amendment to section 5649-3b above quoted.

Respectfully,
EDWARD C. TURNER,
Attorney General.

622.

WHERE IMPROVEMENTS SUCH AS WALKS, ROADS, SEWERS AND TUNNELS COSTING IN EXCESS OF THREE THOUSAND DOLLARS ARE MADE, THE PROVISIONS OF SECTION 2314, G. C., MUST BE FOLLOWED — STATE FUNDS — STATE BUILDINGS — OHIO STATE UNIVERSITY.

Sections 2314, G. C., et seq., apply to the construction of walks, roads, sewers and tunnels on the campus of the Ohio State University, and the provisions of said sections must be observed as to all of such improvements costing in excess of three thousand dollars.

COLUMBUS, OHIO, July 20, 1915.

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

DEAR SIR:—I have your communications of June 26 and July 7, 1915, in which you state that the board of trustees of the Ohio State University contemplates making certain improvements on the campus this summer, consisting of walks, sewers, tunnels and roads, all of which will be on the unit price basis, and you then inquire as to whether or not such improvements fall under sections 2314 to 2317, inclusive, of the General Code.

By inquiry I learn that the tunnels referred to in your communication are designated to connect the central heating plant and power station with certain other buildings on the university campus.

Section 2314, to which you refer, requires certain action before a contract can be entered into "for the erection, alteration or improvement of a state institution or building, or addition thereto, excepting the penitentiary, or for the supply of materials therefor, the aggregate cost of which exceeds three thousand dollars." Your inquiry therefore raises the question as to whether walks, roads and sewers to be constructed on the campus of the Ohio State University and tunnels to be constructed thereon for the purpose of connecting the central heating plant and power station with other buildings, are to be regarded as improvements of or additions to a state institution or building within the meaning of section 2314, G. C. This section was section 782 of the Revised Statutes, and the language of that section, insofar as it is pertinent to the present inquiry, was as follows:

> "The directors, trustees, commissioners, or other officer or officers, to whom is confided by law the duty of devising and superintending the erection, alteration, addition to, or improvement of, any state institution, asylum, or other improvement (excepting the penitentiary), erected, or now being erected, or to be erected by the state, before entering into any contract for the erection, alteration, addition to, or improvement of such institution, asylum, or other improvement, or for the supply of materials therefor, the aggregate cost of which erection, alteration, addition or improvement and materials therefor, exceed the sum of three thousand dollars, shall, etc."

Under the language of section 782 of the Revised Statutes, it is manifest that the section would have applied to the improvements referred to by you. The codifying commission made substantial changes in the language of the section and it remains to determine whether such changes have so modified the legal effect of the section that it does not in its present form apply to such improvements. An answer to this question involves a consideration of the word "institution" as found in the section in question. In the case of State ex rel. Walton v. Edmondson, 89 O. S., 351, in discussing the meaning of the word "institution" the court observed that the word is sometimes used as descriptive of the establishment where the operations of an association are carried on, and I am of the opinion that it is in such sense that the word is used in the section now under consideration. I, therefore, conclude that the buildings and campus of the Ohio State University, taken together, are to be regarded as an institution within the meaning of section 2314, G. C., and that said question and the succeeding sections apply to the construction of all of the improvements referred to by you, the aggregate cost of which exceeds three thousand dollars. It may be observed that any other construction would read out of the statute the word "institution" and give it a meaning no broader than it would have if the legislature had used only the word "building." It is a familiar rule of statutory construction that some effect must, if possible, be given to all the language used by the legislature, and in the present case this can be done only by arriving at the conclusion above announced, which conclusion is also in harmony with the history of the statute under consideration. I am not unmindful of the conclusion expressed by me in an opinion rendered to Hon. Carl E. Steeb, secretary of the board of trustees of Ohio State University, under date of June 28, 1915, to the effect that an automatic fire sprinkler system, which it was proposed to install in university hall, did not fall within the provisions of sections 2314, G. C., et seq., but that opinion was based on certain elementary principles of the law of fixtures; and the conclusion herein expressed is not out of harmony with that expressed in the opinion to Mr. Steeb.

Respectfully,

EDWARD C. TURNER,

Attorney General.

623.

STATE FIRE MARSHAL—SECTION 840, G. C., CONSTRUED AS TO WHEN YEAR BEGINS FOR SAID DEPARTMENT—SECTION 841, G. C., CONSTRUED AS TO WHEN YEAR ENDS—LEGISLATURE MAY MAKE APPROPRIATIONS IN EXCESS OF YEARLY RECEIPTS OF THE DEPARTMENT.

The year of the state fire marshal's department, referred to in section 840, *G. C., begins on November* 1*st; and the year referred to in the last sentence of section* 841, *G. C., ends on October* 31*st.*

It is competent for the general assembly to appropriate money from the general revenue fund in spite of the limitations of sections 840 *and* 841 *requiring the department of the state fire marshal to be self-supporting; and the appropriations of the general assembly may be made according to a year which does not correspond with the year therein referred to.*

COLUMBUS, OHIO, July 20, 1915.

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

GENTLEMEN:—I have your letter of July 14, 1915, in which you request my opinion as follows:

"Kindly let us have your written opinion on the following propositions at your earliest convenience:

"1. When does the year begin to which reference is made in section 840 of the General Code?

"2. When does the year end to which reference is made in section 841 of the General Code?

"3. In view of the provisions of sections 840 and 841 of the General Code, may the legislature legally make appropriations for the state fire marshal in excess of the yearly receipts as indicated in section 841, or should the amount appropriated be kept within the amount of money collected from the insurance companies and paid into the state treasury, and should the appropriation year coincide with the year designated in section 840, G. C.?"

Sections 840 and 841 of the General Code, are as follows:

"Section 840. The state fire marshal shall receive an annual salary of three thousand dollars; the first deputy fire marshal, eighteen hundred dollars, and the second deputy fire marshal, fifteen hundred dollars. Such salaries, compensation of clerks and assistants and all other expenses of the department of the state fire marshal necessary in the performance of the duties imposed on him by law, shall not exceed in any year the amount paid in the state treasury for that year by fire insurance companies as provided in the next following section.

"Section 841. For the purpose of maintaining the department of state fire marshal and the payment of the expenses incident thereto, each fire insurance company doing business in this state, shall pay to the superintendent of insurance in the month of November each year, in addition to the taxes required by law to be paid by it, one-half of one per cent. on the gross premium receipts of such companies on all business transacted by it in Ohio during the year next preceding, as shown by its annual statement under oath to the insurance department. The superintendent of insurance shall pay the money so received into the state treasury to the credit of a special fund for the maintenance of the office of state fire marshal. In any portion of such special fund remains unexpended at the end of the year, for which it was required to be paid, and the state fire marshal so certifies, it shall be transferred to the general revenue fund of the state."

The answer to your first question may be approached by the observation that the words "year," as it occurs in the last sentence of sections 840 and 841, is obviously the year for which the tax is required to be paid as provided in section 841. Obviously also the legislature conceived of the tax payment as being prospective and not retrospective; that is to say, conceived that the tax is payable at the beginning of the year and not at the end of the year. This conclusion is not altered by the fact that the tax is based upon the gross premium receipts for the preceding year. Instances are numerous wherein excise taxes, based upon receipts or other measures of apportionment ascertained with reference to time past, are interpreted as based upon a privilege to be exercised in the future as the real subject of taxation. In section 841 this intention is reasonably clear for when this section first went into effect, if the "year for which it is required to be paid," within the meaning thereof meant the year then just passed, the whole sum would have had to be paid into the treasury immediately upon its receipt.

Moreover, in another sense, a tax considered from the viewpoint of the public, as a source of revenue, is always *for* a period of time following its collection; i. e., collected for the purpose of defraying the expenses of government during such period. This seems to be the exact sense in which the term is used in those parts of the sections to which I have referred.

It is my opinion therefore, in answer to your first question, that the year to which reference is made in section 840, G. C., begins on November 1st; and in answer to your second question that the year to which reference is made in the last sentence of section 841, G. C., ends on October 31st.

For the sake of accuracy, however, I may add that the word "year," as repeatedly used in section 841, does not mean the same thing in each case. Its first use occurs in the context "in the month of November each year." Obviously the word "year" denotes the calendar year.

The next use of the word is in the context "all business transacted by it in Ohio during the year next preceding, as shown by its annual statement under oath to the insurance department." The word "year" in this context means the calendar year preceding the November in which the report is made. (See section 5432, G. C., which requires a report of the gross premiums from foreign insurance companies and uses the explicit term "the preceding calendar year.")

The next use of the word is in the context "If any portion of such special fund remains unexpended at the end of the year, for which it was required to be paid." This obviously can, of course, not mean the preceding calendar year and it must mean a year "for the purpose of maintaining the department of state fire marshal and the payment of the expenses incident thereto." Accordingly I have arrived at the conclusions above expressed.

In answering your third question I beg to state that it is within the power of the legislature to make appropriations for the state fire marshal in excess of the yearly receipts, and moreover to make appropriations according to years which do not coincide with section 840, G. C.

The policy of sections 840 and 841, reduced to simplest terms, is that the department of the state fire marshal shall not be, even in part, a burden upon the general revenue fund. One general assembly, however, has no power to restrain its successors from appropriating money from the general revenue fund for any lawful object, and to this extent sections 840 and 841, while valid laws, are simply persuasive or advisory in respect to their effect upon succeeding sessions of the general assembly. There is a wide distinction between a case of this kind and one where the amount which an officer may legally receive is fixed by law and a larger appropriation is made for the purpose of paying him. In such event he would be limited to the amount fixed by law. In the event, however, that the requirement is, as it is in the present instance, that the aggregate expenses of a certain department shall not exceed the income of a certain fund and shall be paid therefrom, whatever restraint the statute exerts is, in reality, directed to the suc-

ceeding sessions of the general assembly and operative upon them in the making of appropriations. This being its character it is obvious that it can have only the limited effect above described.

The first part of your third question is therefore answered in the affirmative and the alternative questions therein are answered in the negative.

I may add that section 841, G. C., as above quoted and interpreted, is the section at present in force. However, the general assembly, at is session in 1915, twice amended this section, once by amended senate bill No. 50, approved May 7th, and once by amended senate bill No. 297, approved June 3rd, and filed in the office of the secretary of state June 4th. Neither one of these amendments in anywise affects the question presented by you; and inasmuch as neither one of the measures will go into effect for some time I deem it necessary merely to call your attention to them in explanation.

Respectfully,

EDWARD C. TURNER,
Attorney General.

624.

FOREIGN CORPORATION—TRANSACTIONS BY SUCH COMPANIES IN SALE OF CIGARETTES IN OHIO—OHIO REPRESENTATIVES WHO MAKE COLLECTIONS NOT LIABLE FOR WHOLESALE CIGARETTE DEALER'S LICENSE—REFUNDERS—HOW APPORTIONED IN SUCH CASE.

A corporation located outside the state through its salesmen sells cigarettes to retail dealers in Ohio and ships the same direct. The retail dealers receive no invoices from the corporation, which sends the invoices to an Ohio representative who presents the invoices to the retailers, makes collection and settles with the corporation, deriving a profit from the transactions. Such transactions are in legal effect sales by the corporation direct to the retail dealers and the Ohio representative who makes the collections is not liable for the wholesale cigarette dealer's license under section 5894, *G. C.*

Refunding orders drawn under section 5896, *G. C., should be drawn against the general county fund and such fund should be reimbursed by charging the amount of the refunder against the undivided proceeds of collections of cigarette assessments in the treasury to the credit of the state and county and the city, village or township to which the original assessment, on account of which the refunder was made, was distributed and in the same proportion as such original distribution was made under the statute, and if there are not sufficient of such proceeds of assessments, to the credit of any such beneficiaries, the amount chargeable against it should be deducted from the undivided tax distribution due it at the next settlement.*

COLUMBUS, OHIO, July 20, 1915.

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

GENTLEMEN:—Your communication, enclosing two letters of Thomas A. Bowles and requesting my written opinion upon the facts and inquiries therein stated, received.

The inquires of Mr. Bowles are as follows:

> "Liggett & Myers are a corporation with headquarters in St. Louis, Mo. The town of Piqua, we will say to illustrate, has four cigarette retail dealers. These dealers receive shipments of cigarettes direct from St. Louis factory. In Piqua is another tobacco dealer who represents Liggett & Myers, and to whom are sent the invoices covering the cigarettes shipped to the four dealers mentioned. The four retailers get no invoices from

L. & M., but L. & M.'s representative takes their invoices sent to him, presents them to the retailers and collects the money therefor and settles with L. & M.

"QUESTION: Is Liggett & Myers' representative liable for the wholesale license of $30.00?'

"2. A dealer in cigarettes, the only one in a village, makes application for license. He pays the $15.00; say in June. The auditor distributes the amount at his August settlement. In September the dealer goes out of the business and demands his refunder, and of course gets it.

"QUESTION: From what source will the auditor issue the refunder? You will understand there is no other dealer in this village nor has any one engaged in the traffic since the merchant quit, and no immediate prospect of one starting. If the auditor should take it out of the general cigarette fund, what authority has he to apportion the refunder to other districts?"

Mr. Bowles further states in a supplemental letter as follows:

"The gentleman who acts as the distributing agent in Piqua for Liggett & Myers is a wholesale tobacco dealer. The salesman for the factory will take orders for cigarettes from different retail dealers, together with tobacco orders. The merchandise is shipped direct to the dealers and billed to the wholesale man, who in turn credits the factory on his books. Then he makes out the several bills to the retailers plus his profit. These bills to the retailers of course include the cigarettes and the wholesaler derives a profit on the cigarettes. This procedure, as you probably know, is called in trade, 'drop shipments.'

"Mr. Armstrong, the wholesale man, never sees the cigarettes, but derives a profit from the sale as made by the factory representative."

Section 5894, of the General Code, provides:

"A person, firm, company, corporation, or co-partnership, engaged in the wholesale business of trafficking in cigarettes, cigarette wrappers or a substitute for either, shall annually be assessed and pay into the county treasury the sum of thirty dollars, or, if so engaged in such traffic in the retail business, the sum of fifteen dollars for each place where such business is carried on by or for such person, firm, company, corporation or co-partnership."

Your first inquiry involves a determination of the question of whether or not the dealer, referred to in your inquiry as representing Liggett & Myers, is engaged in the wholesale business of trafficking in cigarettes, cigarette wrappers or a substitute for either within the state.

This legislation providing for a tax on the business of trafficking in cigarettes is an exercise of the police power of the state, which cannot operate extra territorially, and, therefore, only such sales as are made within the state of Ohio constitute a business subject to the tax imposed by such legislation.

In an opinion rendered by this office to the State Liquor Licensing Board, under date of April 3, 1915, it was held that where a person has an office in the state of Ohio and acts in the capacity of agent for a distilling company of another state, transmitting to such distilling company the orders taken, to be filled by the distilling company by shipment from the distillery direct to the purchaser in Ohio, the collections from the purchaser being made by the agent, the sale was made at the distillery and outside of the territorial operation of the Dow-Aiken law.

In the case of Bellefontaine v. Vassaux, 55 O. S., 323, it is held:

"When anything remains to be done to identify the goods or discriminate them from other like things the sale is not completed."

The following is quoted from the opinion in the case of Bonham v. Hamilton, 66 O. S., 82:

> "Where, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is bound to accept them, or as is sometimes worded into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property.
>
> "The general rule is that the title to goods intended to be transported pass from the vendor to the purchaser upon delivery by the former to a common carrier consigned to the purchaser, whether paid for or not."

Substantially to the same effect are the cases of:

Jung v. Talbot, 59 O. S., 511;
Diehl Brewing Co. v. Beck, 10 O. C. C. N. S., 361;
A Brewing Co. v. Brister, 179 U. S., 444.

It is the general rule that sales made upon solicitation in one state of orders by mail or through traveling salesmen or local agents, requiring deliveries to be made from the foreign factories to the customers in another state, thus necessitating interstate transportation, constitute interstate commerce.

Toledo Mfg. Co. v. Glenn Mfg. Co., 55 O. S., 217;
Robbins v. Shelby County Taxing District, 120 U. S., 489;
Bremen v. Titusville, 153 U. S., 289.

In the case of Voss v. Haggerty, 26 W. L. B., 268, in construing a provision of the Dow law, similar to the legislation under consideration, the court said:

> "The whiskey was all outside of the state of Ohio, and none of it was at any time during the ownership of the plaintiff or his vendor in the state of Ohio. * * * If the Dow law applied to such a sale, it would be in violation of the constitution of the United States, as being an interference with the freedom of interstate commerce, and the presumption therefore is that such a sale is not within the purview of the act."

The last branch of the syllabus is as follows:

> "The sale of liquors not located in Ohio is not within the purview of such law."

In an opinion rendered by my predecessor, Hon. U. G. Denman, to Hon. W D. Gilbert, auditor of state, under date of April 25, 1906, it is said:

> "The negotiation of sale of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made is interstate commerce."
>
> Robbins v. Shelby County, 120 U. S., 479;
> Enert v. Missouri, 156 U. S., 313;
> Toledo Co. v. Glenn Co., 55 O. S., 221;
> Vance v. Vanderhook, 170 U. S., 444;
> Bowman v. Chicago, etc., Ry., 125 U. S., 489.

I am therefore of the opinion that the transactions made in the manner detailed by Mr. Bowles are in legal effect sales made outside of the state of Ohio, hence not within the purview of the provisions of section 5894, G. C. See section 8399.

It is further to be observed from your statement that the sales in question are negotiated by agents of the St. Louis firm, Liggett & Myers, and the orders filled from the stock of said company at St. Louis, shipment being made direct to the retailers, and that Mr. Armstrong, the representative of the company in Ohio, never has the control or possession of said goods and has no other connection with the transactions than that the invoices are made out to him, that he credits the same to the company on his books and makes collections from the retailers, and that he realizes certain compensation or profit from the transactions. Under this state of facts I am of the opinion that the representative of said company, Mr. Armstrong, never was the owner nor the seller of the merchandise involved in such transactions and therefore is not, on account of such transactions, a trafficker in cigarettes, cigarette wrappers or a substitute for either within the meaning of section 5894, G. C.

You state that Mr. Armstrong is a wholesale tobacco dealer, but it is assumed from your statement that he has no dealings in cigarettes, cigarette wrappers or substitutes for either, other than in the manner detailed by Mr. Bowles in his statement and this opinion is based on such state of facts.

It was held in Brooks v. VanNes, 38 Bulletin, 262, affirmed without report 57 O. S., 642:

> "A whiskey broker who negotiates sales of liquor between different parties but who neither owns nor procures the liquor so sold is not subject to the tax * * * under the Dow law."

In the case of Voss v. Haggerty, supra, the court said:

> "It also appears that frequently * * * the certificates are transferred by the vendor into the broker's name and by him in turn transferred to the vendee. Also, in many cases, before the transfer to him by the vendor the broker receives the money from the vendee; but that in other cases he pays the vendor with his own check and upon his transfer to the vendee is repaid by that party. But I am satisfied from the evidence before me that whatever form the transaction is made to assume, for the purpose of concealing the identity of the parties for facilitating the transfer, it remains substantially always a transaction in which the broker is a mere agent or trustee for one or both of the parties to the sale. It is never a sale but is always a sale between the parties affected through the broker as an agent."

I am accordingly of the opinion that the transactions, in legal effect, were sales by the Liggett & Myers Company direct to the retail dealers, and that the relation of Mr. Armstrong to such transactions was merely that of agent.

Your second inquiry refers to the refunder of a portion of the assessment paid by a dealer, upon his discontinuing the business, and the particular fund from which such refunder shall be made.

No express provision is made by the statutes of Ohio as to the particular fund upon which such refunding order shall be drawn. Section 5895, G. C., provides:

> "The assessments provided in the next preceding section shall be paid by such person, firm, company, corporation or co-partnership on or before the 20th day of June of each year. When such business is commenced after the fourth Monday of May, such assessments shall be proportionate in amount to the remainder of the assessment year, except that it shall not be less than one-fifth of the whole amount to be assessed in any one year."

Section 5896, G. C., provides:

"When the person, firm, company, corporation or co-partnership described in section fifty-eight hundred and ninety-four, which has been so assessed, and which has paid or is charged upon the tax duplicate with the full amount of such assessment, discontinues such business, the county auditor shall issue to such person, firm, company, corporation or co-partnership, a refunding order for a proportionate amount of the assessment. Such order shall not be less than one-fifth of the whole amount to be assessed in one year."

Section 5900, G. C., provides:

"The revenues and fines collected under the provisions of this chapter and the penal laws relating to cigarettes, shall be distributed as follows, to wit: In each county, one-half of the money paid into the county treasury on account of such business in a city, village or township therein, shall be placed to the credit of the general revenue fund of the state, and paid into the state treasury by the county treasury as provided in other cases."

Section 5901, G. C., provides:

"One-fourth of the money paid into the county treasury on account of such business in a municipal corporation shall be paid, upon the warrant of the county auditor, into the treasury of such corporation to the credit of the police fund, or in a corporation having no police fund to the credit of the general revenue fund. The remaining one-fourth thereof shall be credited to the poor fund of such county; but in counties having no county infirmary, it shall be credited to the infirmary fund or poor fund of the township, village or city in which it was collected. In counties where such money is paid on account of such business conducted in a township outside of a municipal corporation, the last named two-fourths shall be credited to the infirmary fund or the poor fund of such township."

While there has been no judicial decision in Ohio upon the exact question presented by you, under the cigarette tax law, yet the provisions of the Dow law, imposing a tax upon the business of trafficking in intoxicating liquors, are very similar to those of the legislation here under consideration, in respect to the collection and distribution of the tax provided for; and both acts are similar in the further respect that neither provides the particular fund from which the refunder shall be made.

In the cases of State v. Rouch, 47 O. S., 478, and Village of Van Wert v. Brown, 47 O. S., 477, arising under the Dow law, the court said:

"We think there need be no embarrassment or difficulty about the character of the order to be drawn by the auditor. The statute provides that the auditor, upon being satisfied that the dealer has discontinued business, shall issue to such dealer a refunding order. It does not direct what particular fund or funds the order shall be drawn upon. In such case it would be lawful to draw on the general fund. Such was the holding in Zimmerman v. Canfield, 42 O. S., 469. An order so drawn would at least be a valid order. Whether it has been the custom of auditors to draw these orders without designating any fund, or on the general fund,

or on the poor fund, or proportionately upon several funds, or, where drawn without designating any, for the treasurer to pay partly from the several funds, we are not concerned to inquire."

In the case of Zimmerman v. Canfield, 42 O. S., 463, which arose under an act authorizing county commissioners to establish ditches through private property, the following is quoted from the opinion, page 469:

"It is to be supposed that when the commissioners enter upon the location and construction of a ditch, which must involve the 'taking' of lands, they do so in contemplation of the fact that compensation for lands so taken must, if applied for, be first paid or deposited, and it seems clear that if no other fund is provided, nor payment or deposit otherwise made by those to be benefited by the ditch, the general county fund is to be resorted to."

I am of the opinion that the dealer who becomes entitled to a refunder under the provisions of section 5896, G. C., thereby becomes a creditor of the county and the refunder to which he becomes so entitled constitutes a claim properly payable from the general fund of the county treasury, and, pursuant to the holding of the supreme court, supra, I advise that the auditor draw such refunding orders against the general fund of the county.

Coming now to the question of reimbursement of such fund, considerations of equality and equity demand that the amount of refunder so paid be deducted from the next distribution of taxes to the state, county, and municipal corporation or township, which under the statute were beneficiaries of the proceeds of the assessment on account of which the refunder is made, and in the same proportions, respectively, as the assessment was distributed to such beneficiaries, and that the amount so deducted be applied to reimburse the said general fund of the county from which the refunder was made.

The amount necessary to reimburse such fund should be deducted from the undivided proceeds of cigarette tax assessments when there are sufficient of such collections available, to the credit of the state, county, municipal corporation or township respectively, from which such reimbursement may be made, but where there are not sufficient of the proceeds of such collections in the treasury to cover the amount of the refunder chargeable against any village or township, etc., as in the case suggested by you, the proportion of such refunder chargeable against it should be deducted from the undivided tax distribution due it at the next settlement.

Answering your questions specifically, therefore, I advise that Mr. Armstrong, the representative of the Liggett & Myers Company, is not liable for the wholesale license tax of $30.00, under the facts as stated in your communication; and that the auditor should issue his refunding order, provided for in section 5896, against the general fund of the county treasury, and that such fund should be reimbursed by charging the amount of such refunder against the undivided proceeds of collections of cigarette assessments in the treasury to the credit of the state and county and the city, village or township to which the original assessment, on account of which the refunder was made, was distributed, and in the same proportions as such original distribution was made under the statute; and in the event that there are not sufficient of such proceeds of assessments to the credit of any of such beneficiaries, the amount chargeable against it should be deducted from the undivided tax distribution due it at the next settlement.

Respectfully,

EDWARD C. TURNER,

Attorney General.

625.

AUTOMOBILE—COUNTY COMMISSIONERS—REASONABLE AMOUNT MAY BE ALLOWED SHERIFF FOR USE OF AUTOMOBILE OWNED BY HIM AND USED FOR OFFICIAL DUTIES—JANITOR OR DEPUTY SEALER OF WEIGHTS AND MEASURES MAY FURNISH AUTOMOBILE FOR HIRE TO SHERIFF OR COUNTY SURVEYOR.

County commissioners may allow a sheriff a reasonable amount to cover the expense of maintaining and operating an automobile owned by him and used in the discharge of his official duties, having due regard to the extent of the use of the machine in public and private business.

A sheriff or county surveyor when it becomes necessary in the discharge of their duties to incur expense for livery hire may employ a janitor employed by the county, or the deputy sealer of weights and measures of the county, who owns an automobile, to perform such service, provided the rendition of such service does not interfere with the regular duties of such persons.

COLUMBUS, OHIO, July 20, 1915.

HON. MEEKER TERWILLIGER, *Prosecuting Attorney, Pickaway county, Circleville, Ohio.*

DEAR SIR:—Your letter of July 14, 1915, submitting for my opinion two questions, duly received. The first question is as follows:

> "Can the sheriff of a county be allowed the expense of maintaining his own automobile while using it in the proper administration of the duties of his office?
>
> "If so, what expense would be allowed? Would the expense be limited to the amount of gasoline and oil consumed on the trip or could an allowance at so much per mile be made the sheriff to cover gasoline, oil and wear and tear of tires and machine in general?"

Section 2997, G. C., provides in part as follows:

> "In addition to the compensation and salary herein provided, the county commissioners shall make allowance quarterly to each sheriff for * * * and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office."

In the case of State ex rel. Sartin, as sheriff of Franklin county, Ohio, v. Sayre, as auditor, etc., et al., Judge Rathmell of the court of common pleas of said county, held that the word "vehicles" as used in the above statute includes automobiles. While section 2997 contains the word "maintaining" and does not contain the word "operating" it would undoubtedly follow that said section authorizes the allowance of all expenses incident to the use of the automobile in public business, and would include oil and gasoline, as well as necessary repairs to tires and parts.

The county commissioners may, therefore, make an allowance to the sheriff for the expenses of maintaining and operating his automobile when used in the proper administration of the duties of his office. This allowance, however, should be made under the provisions of section 2997 above quoted, and not under other provisions of the same section which provide for livery hire.

Just what proportion of the expense may be charged against public funds will depend upon the facts in each particular case and is more a matter of policy

than of law. If the automobile were used exclusively in his work as sheriff, the reasonable and necessary expense of maintaining and operating the same might be allowed by the commissioners. Where, however, the automobile is not so exclusively used, but is used as well for private purposes, there should be some definite arrangement entered into between the sheriff and the county commissioners, I would suggest that this arrangement be made upon a mileage basis. For instance, if the automobile were run 300 miles in a month, 200 in official business and 100 for private purposes, it would be fair and equitable for the commissioners to allow two-thirds of the expenses of the upkeep for the month. If such an arrangement be not practical, the commissioners might agree to allow the sheriff a reasonable rate per mile covered by the automobile in public business as traveling expenses of the sheriff. These, however, are mere suggestions.

As to your second question, to wit:

> "Can a person regularly employed as janitor at the court house by the board of county commissioners, be paid from the county treasury for auto livery conveying the county sheriff or county engineer in the discharge of their respective official duties?
>
> "Can a person regularly employed as deputy sealer of weights and measures for any county be paid from the county treasury for auto livery conveying the county sheriff or county surveyor in the discharge of their respective official duties?"

There is no statutory prohibition against the employment of the janitor and deputy sealer of weights and measures in question and the only reason which could be assigned for the refusal of the commissioners to allow payment to be made for such services would be on the grounds of public policy.

The general assembly of the state has recognized the danger involved in transactions of this same general character by the enactment of sections 12910 to 12914, inclusive, of the General Code, but has not seen fit to include this particular kind of a transaction. This danger was also recognized in an opinion by this department under date of June 13, 1914, being opinion No. 978, in which it was held solely on the grounds of public policy that the sheriff could not pay his deputy livery hire for the use of an automobile owned by the deputy. However, the close relationship which exists between a sheriff and his deputy does not exist between a sheriff or county surveyor and a janitor or a deputy sealer of weights and measures.

I am, therefore, of the opinion that, while such an arrangement as you describe should not be encouraged, it is not illegal or prohibited either by statute or on the grounds of public policy, provided of course that the rendition of such service by the janitor or deputy sealer of weights and measures does not interfere with the regular duties of such persons.

Respectfully,
EDWARD C. TURNER,
Attorney General.

626.

"REGULAR HOSPITAL OTHER THAN A LYING IN HOSPITAL" NEED NOT BE LICENSED—CASES OF WOMEN CARED FOR DURING PARTURITION.

A regular hospital in which the number of cases of women cared for during parturition is small as compared with the number of cases cared for in the hospital in a given period of time, and in which such women are cared for by nurses under the direction of physicians, need not be licensed as a maternity boarding house or lying-in hospital under sections 6257, et seq., G. C.

COLUMBUS, OHIO, July 20, 1915.

HON. H.-H. SHIRER, *Secretary, Board of State Charities, Columbus, Ohio.*

DEAR SIR:—Under date of July 12th, you requested my opinion upon the following question:

> "A hospital incorporated for purposes commonly understood to be common to such institutions, i. e., care of the sick, performance of surgical operations, etc. In the pursuits of the work of such a hospital more than two women are received during a given period of six months for the purpose of parturition. This hospital was not incorporated for the *exclusive care of children.* Does such hospital, in which the maternity cases compose a very small percentage of the number of patients received, come under the requirements of section 6257, and is it subject to license by the state board of health and also subject to inspection, visitation and certification of the board of state charities after the manner described in sections 1352 and 1352-1 of the General Code?"

I have examined the previous opinions referred to by you in your letter, and while there are indications therein of what my predecessor's ruling would have been on the question which you now submit, it is true that no direct conclusion is expressed in any of them with respect thereto.

Section 6257 of the General Code, to which you refer, provides as follows:

> "Sec. 6257. Whoever receives for care or treatment within a period of six months, more than one woman during pregnancy, or during or after delivery, except women related by blood or marriage; or has in his custody or control, at any one time, two or more infants under the age of two years, unattended by parents or guardians, for the purpose of providing them with care, food and lodging, except infants related to him by blood or marriage, shall be deemed to maintain a maternity boarding house or lying-in hospital. The provisions of this section shall not apply to any county or district children's home, charitable organization, society or institution having the care of children under its control duly incorporated under the laws of Ohio or under the care of a juvenile court."

However, the last sentence of this section does not embody the only exception to the general rule of the first sentence thereof. Another exception is found in section 6258, G. C., which is as follows:

> "Sec. 6258. Nothing in this chapter shall prevent a nurse from practicing her profession under the direction of a physician in the home of a patient, *or in a regular hospital other than a lying-in hospital.*"

In my opinion, section 6258 furnishes the answer to your question. While the terms of its exception apply to the nurse, yet, in effect, it embraces the care and treatment by nurses under the direction of physicians in "a regular hospital other than a lying-in hospital."

Assuming that the women cared for and treated during the period described by you therein receive the care of a nurse under the direction of a physician, it is my opinion that the transactions are not such as to constitute the hospital, as such, "a maternity boarding house or lying-in hospital," subject to license under the remaining provisions of the chapter.

Respectfully,
EDWARD C. TURNER,
Attorney General.

627.

COUNTY COMMISSIONERS—BIDS FOR DEPOSIT OF PUBLIC FUNDS—ADVERTISEMENT FOR BIDS SHOULD BE PREPARED AND FOLLOWED IN ACCORDANCE WITH SECTIONS 2715 AND 744-12, G. C.—ACTIVE AND INACTIVE DEPOSITS REQUIRE SEPARATE SURETIES.

A board of county commissioners in its advertisement for bids for the deposit of public funds, should invite proposals under both sections 2715 and 744-12, G. C., If such advertisement is not so worded as to invite bids from the classes of banking concerns mentioned in both sections, either by appropriate language or by express reference to said sections, said advertisement is not sufficient in law. Where the same banking institution is awarded both active and inactive deposits, separate undertakings should be required and the same surety cannot be accepted on both undertakings.

COLUMBUS, OHIO, July 20, 1915.

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

GENTLEMEN:—In your letter of July 15, 1915, you request my opinion on the following questions:

> "(1) Should a board of county commissioners, in its advertisement for bids for the deposit of public funds, invite proposals under both section 2715, General Code, and section 744-12, General Code, as amended, 103 O. L., 384, and further amended by house bill No. 557 as passed by the last general assembly and which will become effective September 3, 1915?
>
> "(2) Would an advertisement for bids, inviting proposals under the former section only, be legal?
>
> "(3) Where the same banking institution is awarded both active and inactive deposits, can the same sureties be accepted as to both? See clause in section 2726, General Code, which reads: 'The same surety shall not be accepted on more than one undertaking as to any one depositary at the same time.'"

Section 2715, G. C., provides:

> "The commissioners in each county shall designate in the manner hereinafter provided a bank or banks or trust companies, situated in the county and duly incorporated under the laws of this state, or organized under

the laws of the United States, as inactive depositaries, and one or more of such banks or trust companies located in the county seat as active depositaries of the money of the county. In a county where such bank or trust company does not exist or fails to bid as provided herein, or to comply with the conditions of this chapter relating to county depositaries, the commissioners shall designate a private bank or banks located in the county as such inactive depositaries, and if in such county no such private bank exists or fails to bid as provided herein, or to comply with the conditions of this chapter relating to county depositaries, then the commissioners shall designate any other bank or banks incorporated under the laws of this state, or organized under the laws of the United States, as such inactive depositaries. If there be no such bank or trust company incorporated under the laws of the state, or organized under the laws of the United States, located at the county seat, then the commissioners shall designate a private bank, if there be one located therein, as such active depositary. No bank or trust company shall receive a larger deposit than one million dollars."

Under the provisions of this section the authority of the commissioners of a county, in designating inactive depositaries for the public funds of such county, is limited to banks and trust companies situated in said county and duly incorporated under the laws of this state or organized under the laws of the United States, if such there be. In designating active depositaries, said commissioners are limited to banks and trust companies of the above class, if such there be, located in the county seat of said county. If there is in fact no institution of this class located in such county, and eligible to bid as an inactive depositary and if there is no institution of said class located in the county seat and eligible to bids as an active depositary, said commissioners may call for proposals from private banks located in the county or the county seat, for inactive and active depositaries, respectively.

It is evident that under the provisions of section 2715, G. C., corporations, persons, partnerships or associations, coming within the purview of the act of the general assembly, as found in 103 O. L., 379-385, would not be eligible to bid for the public funds of a county, except in the case where no bank or trust company, organized under the laws of the state or the United States, is located in the county as to inactive depositaries and in the county seat as to active depositaries.

Section 744-12, G. C., 103 O. L., 384, being section 13 of the act above referred to, provides as follows:

"That whenever any of the funds of the state, or any of the political subdivisions of the state, shall be deposited under any of the depository laws of the state, every corporation, person, partnership, and association coming within the purview of this act shall be permitted to bid upon and be designated as depositories of such funds, upon furnishing such surety or securities therefor as is prescribed by the laws of the state of Ohio; provided, however, that there shall not be deposited with any such corporation, person, partnership or association by any such political subdivision an amount in excess of $500,000, nor in any event an amount in excess of fifty (50) per cent. of the amount of the funds of such political subdivision so at any time to be deposited."

The effect of the provisions of this section is to place banking concerns, coming within the purview of this act, on a par with banks and trust companies organized

under the laws of the state or of the United States, insofar as their eligiblity to bid for public funds of the state, or any political subdivision, is concerned. It follows, therefore, that those provisions of section 2715, G. C., limiting county commissioners in designating depositaries of public funds to banks and trust companies, organized under the laws of the state or of the United States, are repealed by implication by the provision of section 744-12, G. C.

I am of the opinion, therefore, in answer to your question, that a board of county commissioners in its advertisement for bids for the deposit of public funds, should invite proposals under both section 2715, G. C., and section 744-12, G. C.

Section 744-12, G. C., has been amended by the act of the general assembly, passed May 27, 1915, and known as house bill No. 557, which will become effective September 3, 1915. This section, as amended, provides as follows:

> *"Section* 744-12. That whenever any of the funds of the state, or any of the political subdivisions of the state, shall be deposited under any of the depositary laws of the state, every corporation, person, partnership and association coming within the purview of this act, shall be permitted to bid upon and be designated as depositaries of the state funds upon furnishing such surety or securities therefor as is prescribed by the laws of the state of Ohio; provided, however, that there shall not be deposited with any such corporation, person, partnership or association, by any such political subdivision, an amount in excess of $500,000."

It will be observed that the only change made by the legislature in amending said section 744-12, G. C., was to strike out of said section the following language:

> "Nor in any event an amount in excess of fifty (50) per cent. of the amount of the funds of such political subdivision so at any time to be deposited."

The effect of the amendment, therefore, is to remove the restriction contained in the provision of the section above amended, and the change made in said section, as amended, is not therefore material to your inquiry.

In answering your second question, I am of the opinion that, if the advertisement for bids for the public funds of the county is not so worded as to invite bids from the classes of banking concerns mentioned in both section 2715, G. C., and section 744-12, G. C., either by appropriate language or by express reference to said sections, said advertisement is not sufficient in law: An express reference to either of said sections, without referring to the other, would be misleading and would tend to defeat the plain provision of the law governing the deposit of public funds, viz., to secure full publicity and the greatest possible competition in bidding.

You next inquire as to whether, when the same banking institution is awarded both active and inactive deposits, the same surety can be accepted as to both deposits, in view of the provision of section 2726, G. C., to the effect that the same surety shall not be accepted on more than one undertaking as to any one depositary at the same time. It would seem that if the provision of section 2726, G. C., referred to above, is to be given any effect, that it must be held to apply to the situation presented by you. In fact, the only cases where a bank might be called upon to furnish more than one bond, except where additional security is required, would be where said bank is awarded both active and inactive deposits and where such bank is awarded two or more sums at different rates of interest. It is manifest that a bank bidding for both active and inactive deposits, would have to separately state its bids for the two classes of deposits. I am, therefore,

of the opinion, that where the same bank bids for and is awarded both active and inactive deposits, the bids and awards for the two classes of deposits are to be regarded as separate contracts, and separate undertakings should be required.

I am, therefore, of the opinion, in answer to your third question, that the provision of section 2726, G. C., referred to above, would apply to the situation presented by you, and that the same surety could not be accepted on both undertakings.

It is proper to observe, in connection with the matters covered by this opinion, that in the present state of the law the provision of section 2715, G. C., to the effect that no bank or trust company shall receive a larger deposit than one million dollars, applies to banking institutions incorporated under the laws of this state or organized under the laws of the United States. The provision of section 744-12, G. C., providing a limitation of five hundred thousand dollars on the amount to be deposited with any one banking institution, applies to the corporations, persons, partnerships and associations coming within the purview of the act found in 103 O. L., 384. The amendment of section 744-12, G. C., effected by house bill No. 557, and referred to above, which amendment removes the restriction that not more than fifty per cent. of the funds of a political subdivision may, at any time be deposited in any of the banking institutions coming within the purview of the act found in 103 O. L., 384, will not go into effect until September 3, 1915, and in the meantime this restrictive provision must be observed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

628.

INTERURBAN RAILROAD COMPANY—ARTICLES OF INCORPORATION —SECTIONS 8747 AND 8748, G. C., MUST BE COMPLIED WITH IN CHANGING ITS ROUTE OR ONE OF ITS TERMINI.

An interurban railroad company, in amending its articles of incorporation so as to authorize a change of route or one of its termini, must comply with sections 8747 and 8748, G. C.

COLUMBUS, OHIO, July 20, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of July 12th, transmitting a copy of a proposed certificate of amendment of the articles of incorporation of The Cleveland, Barberton, Coshocton & Zanesville Railway Company, and requesting my opinion as to whether or not the same should be received and filed by you.

The certificate is an entirety and must be accepted or rejected as such. It evidences the adoption by vote of the holders of more than three-fifths of the capital stock of the company, at a meeting called by a majority of its directors, after notice duly published, of two resolutions, one changing the name of the company and the other changing the route of the improvement to be constructed by the company and the termini thereof so as virtually to abandon the route originally provided for and one terminus thereof, and to authorize the construction of an entirely different and distinct improvement.

The procedure which has been followed is that provided by sections 8719 to 8723, inclusive, of the General Code. There is no question that this procedure

is appropriate as to the proposed change of name, but there is a question as to the application thereof to the change of route and termini, in view of the provisions of sections 8747 and 8748 of the General Code, which are as follows:

> "Section 8747. By resolution adopted by a majority of its board of directors, at a meeting thereof duly called for the purpose, with the written consent of three-fourths in interest of its stockholders, a company may change the line, or any part thereof, and either of the proposed termini, of its road. No change shall be made which will involve the abandonment of any part of the road, either partly or completely constructed. Any subscription of stock made upon the faith of the location of the road, or a part thereof, upon a line abandoned by the change, shall be cancelled at the written request of a subscriber who has not consented thereto, filed with the secretary or other chief officer of the company, within six months after such change.
>
> "Sec. 8748. When such change is made it shall be described in such resolution, a duly authenticated copy of which, under the seal of the company, shall be filed with the secretary of state, and by him recorded, with proper reference, on the record of the articles of incorporation of the company. When so filed, such change shall be considered as made, and be as valid and binding as if the changed line had been the line originally described in the articles."

These sections, which have never been amended or verbally changed save in process of codification since their original enactment, are now found in the chapter relating to the special powers of railroad companies, as such, and are appropriately placed therein because, in their original form, they applied to "railroad" companies. (See 73 O. L., 115). However, at that time there was no statutory law relative to street and interurban railroad companies, as such. Since that time numerous statutes have been enacted applying especially to the last named classes of railroad companies, and the question is as to whether or not the fact that there are such statutes is sufficient to enforce the conclusion that the acts originally passed for the organization and government of railroad companies, as such, do not apply to street and interurban railroad companies, as such; and particularly as to whether or not the above quoted sections, relative to the conditions and manner of procuring authority to change the line and either of the proposed termini of the proposed improvement, do not apply to street and interurban railroad companies.

The precise and limited question last stated has never been before the courts. Numerous questions have been before the courts as to the application of different provisions of the railroad statutes, as such, to street and interurban railroad companies. Some of these cases will be found cited in the briefs in Commissioners v. Traction Company, 75 O. S., 548, and the case itself is instructive on the question.

The general rule may be stated as follows:

Inasmuch as since the introduction of electric interurban railroads special statutes have been passed for the regulation of such railroad companies, the general legislative policy of the state must be deemed to be such as to provide especially for this class of railroad companies. So that unless a contrary intention clearly appears, a statute for the regulation of railroad companies generally will be deemed inapplicable to interurban railroad companies.

Most of these decisions, however, relate to regulatory provisions, as such, and none of them bears directly upon matters relating to the internal corporate organization of the different classes of companies and the interpretation of statutes providing therefor.

It will be observed in this connection that, with the exception of sections 9121,

9127 and 9129 of the chapter on street and interurban railroads, all of which apply to consolidation, the chapter contains no special provisions for the organization and corporate or internal management of street and interurban railroad companies, as such. There is, therefore, no such clearly discerned legislative policy to treat separately of street and interurban railroad companies for such purposes of organization and internal management as there is with respect to such street and interurban railroad companies as subjects of the exercise of the police power.

Accordingly, I do not think that there is any presumption against the application of a statute for the organization and internal management of a railroad company to the organization and internal management of a street and interurban railroad company as prevails with respect to the other class of statutes. On the other hand, I would not hold that there is a presumption to the contrary. In other words, there is no general legislative policy at all with respect to the question, and the meaning of each statute is to be determined by the evidences thereof apparent upon its face, without regard to any supposed general policy or presumption.

Now with respect to the particular matter under consideration, I call attention to the provisions of section 8625, of the General Code, which applies to all corporations of whatsoever kind or character. It is as follows:

> "Section 8625. Any number of persons, not less than five, a majority of whom are citizens of this state, desiring to become incorporated, shall subscribe and acknowledge articles of incorporation, which must contain:
>
> "1. The name of the corporation, which, unless it is not for profit, shall begin with the word 'the' and end with the word 'company,' except as otherwise provided by law.
>
> "2. The place where it is to be located, or its principal business transacted.
>
> "3. The purpose for which it is formed.
>
> "4. The amount of its capital stock, if it is to have capital stock, and the number of shares into which it is divided.
>
> "5. But, if the corporation is for a purpose which includes the construction of an improvement not to be located at a single place, the articles of incorporation must also set forth:
>
> "a. The kind of improvement intended to be constructed.
>
> "b. Its termini, and the counties in or through which it or its branches will pass."

It will be observed that the fifth paragraph of this section applies both to railroad companies and to interurban railroad companies. It does not apply to street railroad companies, it may be assumed, because ordinarily the improvement to be constructed by such company would be located in a single place. In other words, railroad companies and interurban railroad companies are in the same class for the purpose of section 8625, G. C., being corporations for a purpose which includes the construction of an improvement not to be located in a single place.

In my opinion, sections 8747 and 8748, G. C., are to be interpreted in the light of section 8625. This must necessarily be so because were it not for section 8625 there would be no requirement that the termini and the route of the proposed improvement be set forth in the articles of incorporation at all. These things being true, I think that the application of section 8747 is as broad as that of section 8625 in this particular. While section 8747 applied originally, and still applies, to "railroad companies" and not to other companies proposing to construct improvements located in more than one place, such as canal companies and turn-

pike companies, yet it applies, in my judgment, to all companies proposing to construct a railroad located at more than one place in any sense in which the word "railroad" might be used.

It is my opinion, therefore, that an amendment to the articles of incorporation of an interurban railroad company proposing to change the route and one of the termini of the contemplated improvement must be adopted with the written consent of three-fourths of the interests of the stockholders by the board of directors of the company; must recite that the change does not involve the abandonment of any part of the road, either partly or completely constructed, and must be filed with the secretary of state as provided in section 8748 of the General Code.

The amendment certificate in question, so far as it relates to change of route and terminus, does not comply with these requirements, and being an entirety cannot be separated by you for purpose of filing and record, and therefore must be wholly rejected.

Respectfully,
EDWARD C. TURNER,
Attorney General.

629.

SESTIONS 4534 AND 4387, G. C., ARE INOPERATIVE BECAUSE OF UNCERTAINTY IN SO FAR AS THEY PROVIDE THAT OFFICERS SHALL RECEIVE SAME FEES AS "SHERIFFS AND CONSTABLES IN SIMILAR CASES"—WHEN A CONSTABLE CAN AND CANNOT ALLOW FEE FOR AN ASSISTANT.

Following the decision of State ex rel. Ribble v. Kleinhoffer, 92 O. S.,----, sections 4534 and 4387, G. C., in so far as said sections provide that the officers shall receive the same fees as "sheriffs and constables in similar cases" are inoperative because of uncertainty.

A constable cannot be allowed a fee for an assistant, under section 5347, G. C., when such assistant is a member of a village or city police force, if such policeman is on duty at the time; otherwise, he can.

COLUMBUS, OHIO, July 20, 1915.

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

DEAR SIRS:—Under date of July 3rd you requested my opinion on two matters. Your first inquiry is as follows:

> (1) "Is a regular member of a village or city police force an assistant within the meaning of section 3347, General Code, when assisting a marshal or chief of police within the corporate limits of the city or village in which he is employed, to be allowed fees under sections 3016 and 3019, General Code, for such services, or to have said fee taxed in the cost bill to be paid by the defendant?"

In regard to a mayor's court in cities not having a police court, it is provided by section 4534, G. C., that the chief of police shall execute and return all writs and process to him directed by the mayor, and that "the fees of the chief of police, or his deputies, in all cases, except those arising out of violations of ordinances, shall be the same as those allowed sheriffs and constables in similar cases."

In regard to a mayor's court in villages, it is provided by section 4542, G. C., that the marshal shall execute and return all writs and process directed to him by the mayor, and, under section 4387, G. C., it is provided that in the discharge of his proper duties the marshal "shall receive the same fees as sheriffs and constables in similar cases for services actually performed by himself or his deputies, and such additional compensation as the council prescribes."

The fees of a constable are fixed by section 3347, G. C. Said section provides that

> "For services rendered, duly elected and qualified constables shall be entitled to receive the following fees: * * * assistants, in criminal causes, one dollar and fifty cents per day each."

Section 2845, G. C., fixes the fees of the sheriff, but nowhere in said section is there any provision made for "assistants in criminal causes."

In section 2485, G. C., it is provided that

> "The county commissioners shall audit and allow a reasonable compensation to any person who is summoned to aid a sheriff or constable, or other officer, in the execution of any writ or process in favor of the state, but such compensation shall not exceed one dollar per day, and shall be allowed only upon certificates of such officer."

If a sheriff should summon a person to aid him in the execution of a writ in favor of the state, his account would have to be audited by the county commissioners and the compensation could not exceed one dollar per day. It is true that said section likewise provides for constables, but section 3347, G. C., permits a constable to charge as a fee one dollar and fifty cents per day for assistants in criminal causes. However, it is clearly to be seen that should a constable employ an assistant in a criminal cause the said constable would be entitled to one dollar and fifty cents per day for such assistant, whereas if the sheriff provided himself with an assistant to aid him in the execution of a writ the greatest allowance that could be made him would be one dollar per day.

The supreme court, in the case of State ex rel. Ribble v. Kleinhoffer, Cause No. 14697, decided April, 1915, 92 O. S., ____, in considering what fees should be allowed to a humane officer under the provisions of section 10076, said provision being as follows:

> "For this service and for all services rendered in carrying out the provisions of this chapter, such officers, and the officers and agents of the association, shall be allowed and paid such fees as they are allowed for like services in other cases, which must be charged as costs, and reimbursed to the society by the person convicted."

used this language:

> "The latter section (section 10076) is the only one which mentions the subject of fees to be allowed and paid officers and agents of humane societies. The language used is, 'and the officers and agents of the association' referring to the humane society, 'shall be allowed and paid such fees as they are allowed for like services in other cases.' That is, humane officers are allowed such fees as *they* are allowed for like services in other cases not those which are allowed the other officers mentioned in the statute.

It is necessary to ascertain what fees, if any, are allowed humane officers in like cases. An examination of the statutes will disclose that no provision is made for fees to be paid to the humane officer in any other case. And again, if the pronoun 'they,' as used in section 10076, could be held to refer to officers other than humane officers, for example, to a sheriff or constable, it would be impossible to determine to which it does refer. *And it is important and necessary* that this be known, for the fees of a sheriff and those of a constable as fixed by sections 2845 and 3347 respectively, are different."

It seems, therefore, that the supreme court is of the opinion that a statute which undertakes to compensate a certain officer by the payment of the same fees as are allowed "sheriffs and constables in similar cases" would not be operative because of uncertainty.

Therefore, I am of the opinion that the statutes which undertake to allow a chief of police or a marshal fees for assistants in criminal causes is inoperative because of uncertainty.

Your second inquiry is as follows:

(2) "Can a member of a village or city police force be allowed an assistant's fee of $1.50 when assisting a constable in making an arrest to be paid under sections 3016 and 3019, General Code, or by the defendant if the defendant pays the costs?"

There is no duty devolving upon a member of a village or city police force as such to accompany a constable to assist him in making an arrest. The duties which devolve upon a policeman are to maintain order, to arrest one found violating the ordinances or statutory law, as to misdemeanors, and in felony cases a policeman may arrest a person whom he has reason to believe is guilty of a felony. There are also other duties which devolve upon policemen, as incidental to the performance of their regular duties. If a policeman while on duty undertakes to accompany a constable to help him in making an arrest, the policeman would not be entitled to any fee, for the reason that his time is being fully paid for by his compensation as policeman. If however a policeman while not on duty should accompany a constable for the purpose of aiding him in making an arrest, the policeman would be an "assistant" under section 3347, G. C., and the constable would therefore under such circumstances be entitled to charge as fees in such case the sum of one dollar and fifty cents.

Section 3016, G. C., provides that in felonies when the defendant is convicted, the costs of the constable shall be paid from the county treasury. This provision as to the costs of the constable would include the amount that is to be paid for an assistant to the constable.

Section 3019, G. C., provides as follows:

"In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at any regular session, may make an allowance to any such officers in place of fees, but in any year the aggregate allowances to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

The words "any such officers" as used in section 3019 must undoubtedly refer back to the officers mentioned in section 3016, for the reason that section 3017 refers to the same officers, and section 3018 simply refers to the fees of witnesses.

It is therefore my opinion that if the member of a village or city police force was on duty at the time services were rendered by him as assistant to a constable, no fee can be allowed and paid under sections 3016 to 3019, G. C., by reason of such services on the part of the policeman and no fee can be included in the costs and collected from the defendant by reason of such services. If the policeman was not on duty at the time the services were rendered, then the opposite rule would prevail and the policeman would be entitled to an assistant's fee of one dollar and fifty cents to be collected from the defendant or allowed and paid under sections 3016 to 3019, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney General.

630.

MUNICIPAL CORPORATION—AN APPROPRIATION FOR "PAY ROLL OF LABORERS" MAY NOT BE EXPENDED FOR RENTAL OF STREET ROLLER—DUTY OF CITY AUDITOR IN SUCH CASES.

In the absence of special facts an appropriation for "pay roll of laborers" of a municipal corporation may not be expended for the rental of a street roller, and the city auditor may not lawfully certify, under section 3806, G. C., against a balance in such an appropriation for such purpose.

COLUMBUS, OHIO, July 20, 1915.

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

GENTLEMEN:—With your letter of July 14, 1915, you enclosed a letter from the city auditor of Urbana, Ohio, who inquires whether he is authorized to certify that the necessary funds for a certain contract for the rental of a street roller at twenty ($20.00) dollars per day for not to exceed twenty-five days is in the proper fund and not appropriated to any other purpose when the appropriation, which has been made for the semi-annual period for "tools, implements, etc.," has been exhausted, and the only appropriation account in which there is any money is "pay roll of laborers."

There may be some specific facts which would alter the conclusion at which I have arrived, such as, for example, the possible fact that the street roller is to be rented with its operator, so to speak, or putting it more accurately, the operator is to be paid as a laborer for his services and the use of the roller, but like teamsters are sometimes paid by the day for their services as drivers and the use of their teams. In the absence of such a state of facts, however, I am clearly of the opinion that the certificate which the auditor is asked to issue may not be issued. Section 3806 provides

> "No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor or clerk thereof, first certifies to council or to the proper board, as the case may be, that the money required for such contract, agreement or other obligation, or to pay such appropriation or expenditure, is in the treasury to the

credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force."

In the light of the requirements of sections 3796-3804, General Code, providing for appropriations, and the similar and subsequently enacted provisions of the Smith one per cent. law, so called, sections 5649-3b, et seq., it has been clearly assumed by the officials of the city of Urbana that although section 3806 speaks of a certificate that the money is in the treasury to the credit of the fund and not appropriated for any other purpose, the auditor is not authorized to issue such a certificate unless the money has been actually appropriated for the purpose of the proposed contract, agreement or other obligation. At any rate, this is the case if the detailed appropriations exhaust the amount in the fund, and the only money to the credit of the fund, not otherwise appropriated, is that for "pay roll of laborers," as I assume is the case from facts stated by the city auditor.

In short, I am of the opinion that if there is no unappropriated money in the service fund, and if the only appropriation account in which there is a balance is a balance is that for "pay roll of laborers," the certificate which the auditor was asked to issue may not lawfully be issued unless the facts are of a character such as I have alluded to in the first part of this opinion.

Respectfully,
EDWARD C. TURNER,
Attorney General.

'631.

TOWNSHIP TRUSTEES—TOWNSHIP PROPERTY NOT NEEDED FOR ANY TOWNSHIP PURPOSE MAY BE SOLD OR LEASED—AT PUBLIC AUCTION—BOARD OF EDUCATION MAY LEASE SITE FOR HIGH SCHOOL BUILDING.

Township trustees may not sell or lease township property by private arrangement, but must dispose of such property, if at all, at public auction.

A board of education may lease a site for a high school building.

COLUMBUS, OHIO, July 20, 1915.

HON. A. C. MCDOUGAL, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—Your letter of July 10, 1915, requests my opinion as follows:

"Wayne township, Monroe county, has authorized the building of a township high school and desire to build it on real estate belonging to the township, being the one-half acre tract on which the town-house stands, which tract was conveyed about forty years ago to the trustees of Wayne township, their successors and assigns forever, by a deed of general warranty without any exceptions, reservations or limitations, being a straight warranty deed in the usual form. The township trustees do not want to call an election for the purpose of authorizing the trustees to make a deed for a portion of said tract of land to the board of education of said township, but desire to execute a lease to the board of education

for a portion of said tract. Can such a lease be given for the purpose above noted and would the board of education have authority to build a township high school on such leased property?"

I do not find that township trustees are required to call an election for the purpose of securing authority to make a deed for a portion of such a tract of land. On the contrary section 3281 of the General Code, provides as follows:

"The trustees may receive on behalf of the township, any donation by bequest, devise, or deed of gift, or otherwise, of any property, real or personal, for any township use. When the township has real estate or buildings which it does not need for township purposes, the trustees may sell and convey any such real estate or buildings. Such sale must be by public auction and upon thirty days' notice thereof in a newspaper published, or of general circulation, in such township."

It thus appears that the township trustees, after due public notice as required in the above quoted section, may sell any real estate or buildings which the township does not need for township purposes. Such sale, however, must be at public auction and not at private sale. There is no authority of law whatever for the sale of township real estate at private sale. Therefore it appears that the trustees mentioned by you would not have authority to sell the tract in question at private sale to the board of education.

Nor do I find any authority for the township trustees to lease township real estate in the manner referred to by you. It might be argued that the authority to sell includes the lesser authority to lease, but if this be true it would nevertheless follow that the conditions attached to the making of a sale by section 3281, which would be the only source of authority to lease, would also attach to the making of the lease, and the lease would have to be offered at public auction after thirty days' notice, etc. In short, the township trustees are not authorized to make any bargain, sale, lease or other disposition of any lands belonging to the township otherwise than at public auction.

Of course these statements make unnecessary an answer to your question relative to the power of the board of education to build a school building on leased property. I might observe, however, that section 7620, General Code, which I need not quote, confers upon boards of education ample authority to lease sites for school houses.

Respectfully,
EDWARD C. TURNER,
Attorney General.

632.

MUNICIPAL CORPORATIONS—DELINQUENT STREET PAVING AND SEWER ASSESSMENTS—BONDS, NOTES AND CERTIFICATES OF INDEBTEDNESS ISSUED IN ANTICIPATION OF COLLECTION OF SUCH ASSESSMENTS—NO PENALTY ADDED FOR DEFAULT IN PAYMENT OF ASSESSMENT—IF BONDS, NOTES OR CERTIFICATES OF INDEBTEDNESS HAVE NOT BEEN ISSUED IN ANTICIPATION OF COLLECTION OF ASSESSMENTS, MUNICIPAL OFFICERS HAVE OPTION TO ADD PENALTY.

Where bonds, notes or certificates of indebtedness have been issued in anticipation of the collection of such assessments no penalty may be added or collected for default in payment of such assessments.

Where bonds, notes or certificates of indebtedness have not been issued in anticipation of the collection of such assessments, the municipal officers have the option, in the event such assessments are unpaid and delinquent, of collecting the same by suit together with interest and a penalty of 5 *per cent. added, as provided in section* 3898, *G. C., or of certifying the same to the county auditor for collection as taxes, with a penalty of* 10 *per cent. added to cover interest and the expenses of collection.*

COLUMBUS, OHIO, July 21, 1915.

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

GENTLEMEN:—I have your letter of June 29th, requesting my opinion as follows:

> "We would respectfully request your written opinion upon the following questions:
>
> "What, if any, penalty shall be added to delinquent installments of special assessments levied by council of a municipality for street paving and sewer improvements?
>
> "In what instance, is the penalty of five per cent. provided in section 3898, General Code, to be assessed; also, when shall the penalty of ten per cent., provided in section 3905, General Code, be imposed?"

I assume that both of your questions have reference to special assessments, levies for street paving and sewer improvements.

For convenience in considering the questions asked, such assessments may be divided in two classes or subdivisions: (a) special assessments for street paving and sewer improvements in anticipation of the collection of which bonds, notes or certificates of indebtedness are issued. (b) Special assessments for street construction and sewer improvements where no bonds, notes or certificates of indebtedness are issued in anticipation of the collection to be made. The two classes will be considered in the order named. The several sections of the General Code relative to the collection of special assessments, which are pertinent to your inquires, are as follows:

> "Section 3892. When any special assessment is made, has been confirmed by council, and bonds, notes or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, the clerk of the council, on or before the second Monday in September, each year, shall certify such assessment to the county auditor, stating the amounts and the time of payment. The county auditor shall place the assessment upon the tax list in accordance therewith and the county treasurer shall

collect it in the same manner as other taxes are collected, and when collected pay such assessment to the treasurer of the corporation, to be by him applied to the payment of such bonds, notes or certificates of indebtedness and interest thereon, and for no other purpose. For the purpose of enforcing such collection, the county treasurer shall have the same power and authority as allowed by law for the collection of state and county taxes.

"Section 3893. In all other cases, such assessment shall be paid to and collected by the treasurer of the municipality, and in any event the clerk of the council, when the receipt is presented to him by the owner, showing the payment of an assessment on his property, shall enter such receipt on the margin of the record of the assessment.

"Section 3898. If payment is not made by the time stipulated, the amount assessed together with interest, and a penalty of five per cent. thereon, may be recovered by suit before a justice of the peace, or other court of competent jurisdiction, in the name of the corporation, against the owner or owners, but the owner shall not be liable, under any circumstances, beyond his interest in the property assessed, at the time of the passage of the ordinance or resolution to improve.

"Section 3905. The council may order the clerk or other proper officer of the corporation to certify any unpaid assessment or tax to the auditor of the county in which the corporation is situated, and the amount of such assessment or tax so certified, shall be placed upon the tax list by the county auditor, and shall, with ten per cent. penalty to cover interest and cost of collection, be collected with and in the same manner as state and county taxes, and credited to the corporation. Such ten per cent. penalty shall in no case be added unless at least thirty days intervene between the date of the publication of the ordinance making the levy and the time of certifying it to the county auditor for collection."

Section 3892 of the General Code, quoted above, applies exclusively to the first class of assessments under consideration, and apparently no other method has been provided for enforcing the payments of assessments in anticipation of the collection of which bonds, notes or other certificates of indebtedness have been issued. No discretion is given council or its clerk in the matter. The statute is mandatory, and the clerk of council, "on or before the second Monday in September, each year, shall certify such assessment to the county auditor, stating the amount and the time of payment." When this action is taken by the clerk, the authority of the municipal officers is apparently exhausted and the further burden of collecting such assessments is shifted to the county officials. Full power and authority to that end is given to the county treasurer in the last paragraph of section 3892 of the General Code, supra. It will be observed, however, that no authority is conferred upon either municipal or county officers to impose a penalty in case of non-payment of this class of assessments.

It has been asserted that the county auditor, under the provisions of section 3852 of the General Code, must add to each assessment certified to him, to be collected by the county treasurer, such per cent. as he deems sufficient to defray the expenses of collecting it. Said section 3852, of the General Code, is as follows:

"In placing such assessment on the tax list, the county auditor is required to add to each assessment such per cent. as he deems necessary to defray the expenses of collecting it."

Upon tracing the history of this last section, however, I find that it was originally section 438 of the Municipal Code of 1869 (66 O. L., 222), and applies

only to street sprinkling assessments. There has been no material change in this section since its passage, and it will be observed that it does not govern the auditor in placing *any* assessment on the tax list, but only in placing *"such"* assessment thereon. The application of the section, therefore, depends upon the antecedent of the word "such." In the Municipal Code of 1869, the antecedent of "such" was the street sprinkling assessment. The section was one of four sections contained in chapter 33 of the Municipal Code of 1869 pertaining to street sprinkling. Nothing in the Municipal Code of 1869 preceding this chapter related in any way to the subject of assessments, excepting chapter 32 which provided for lighting bridges and railways. The general provisions respecting improvements and the levy and collection of assessments therefor were found in chapters 48, 49 and 50, which were subsequent provisions.

Section 3851 of the General Code provides:

> "Every such assessment shall be a lien on the lands charged from the time the council determines the amount assessed against each parcel of land."

This, too, was a part of the street sprinkling provisions of the Municipal Code of 1869, being section 437 thereof.

The other two sections of the chapter on street sprinkling of the Municipal Code of 1869 were amended a few years later so as to be extended in certain grades and classes of cities to street improvements generally. Accordingly, when in 1902 the present Municipal Code was drafted these sections were re-written, and sections 65, 66 and 67 of the Municipal Code were substituted therefor. (See 96 O. L., 43.) At that time, however, the two sections above referred to and now constituting sections 3851 and 3852 of the General Code were left unrepealed, although sections of the Revised Statutes on both sides of them, so to speak, were repealed.

When the publishers of Bates' Revised Statutes got out their next edition after the passage of the Municipal Code 1902, they put the provisions respecting the method of assessing according to benefits (now sections 3847 and 3850 of the General Code) in between what was section 67 of the Municipal Code and these two old sections which should have followed section 67 in order to make the text clear. This order was adhered to by the codifiers of 1910, except that they also inserted section 3849 pertaining to equalizing assessments.

Accordingly, if any change has been effected in the meaning of the phrase "such assessment" since the section was originally adopted, that change has been brought about merely by inserting sections pertaining to another subject-matter out of their proper order in revisions and codes. This, in my judgment, does not change the substantial meaning of the section, which in my opinion, still is limited to assessments for street sprinkling, and such assessments only.

I therefore conclude that said section 3852 of the General Code does not apply to assessments of the character under consideration and that no duty is imposed upon or authority granted to the county auditor to add a per cent. for the expenses of collection in such cases.

In this connection also, attention is called to section 3817 of the General Code, which is as follows:

> "When bonds are issued in anticipation of the collection of the assessment, the interest thereon shall be treated as part of the cost of the improvement for which assessment may be made. If such assessment or any installment thereof is not paid when due, it shall bear interest until the

payment thereof at the same rate as the bonds issued in anticipation of the collection thereof, and the county auditor shall annually place upon the tax duplicate the penalty and interest as *therein* provided."

The word *"therein"* in the last line above quoted must be taken to refer to the resolution of necessity provided for in section 3814 and section 3815 of the General Code, otherwise it is meaningless. Section 3815 of the General Code provides what shall be contained in such resolution of necessity, as follows:

"Such resolution shall determine the general nature of the improvement, what shall be the grade of the street, alley, or other public place to be improved, the grade or elevation of the curbs, and shall approve the plans, specifications, estimates and profiles for the proposed improvement. In such resolution council shall also determine the method of the assessment, the mode of payment, and whether or not bonds shall be issued in anticipation of the collection thereof. Assessments for any improvement may be payable in one to ten installments at such time as council prescribes."

No authority is conferred upon a municipality by the above quoted language to impose a penalty for the non-payment of assessments if not paid when due. Such power certainly cannot be implied unless necessity demands its exercise in order to properly accomplish the results aimed at by legislation. Section 3817 of the General Code was originally a part of section 51 of the Municipal Code of 1902 (96 O. L., 39) and the language there used was as follows:

"* * * if such assessments, or any installments thereof, shall not be paid when due, they shall bear interest until the payment thereof, at the same rate of the bonds issued in anticipation of the collection of the same, and the county auditor shall annually place upon the tax duplicate the penalty and interest *herein* provided for. * * *"

This section was amended in the following year (97 O. L., 21) and the word "herein" changed to "therein."

Since in no other section of the General Code is there a provision made for imposing a penalty for non-payment of such assessments or authority conferred upon a municipal corporation to make such charge, it is immaterial whether the word "herein" or "therein" is used. In either case the word refers to a penalty which is unauthorized and which, therefore, cannot be imposed.

Section 3893 of the General Code, above quoted, directs that in all other cases such assessments shall be paid to and collected by the treasurer of the municipality. It is clear that the term "all other cases" refers to assessments for improvements where no bonds, notes or certificates of indebtedness have been issued in anticipation of the collection of such assessments by virtue of sections 3889 and 3905 of the General Code. The municipality is given the option of two remedies in case this second class of assessments is not paid when due: They may be collected either by suit at law with interest and a five per cent. penalty added; or they may be certified to the county auditor and by him placed upon the tax duplicate and collected with a penalty of ten per cent. added to cover interest and cost of collection.

Specifically answering your inquiries, therefore, first, as to assessments for street paving and sewer improvements where bonds, notes or certificates of indebtedness have been issued in anticipation of their collection, no penalty can be charged or collected for default in payment. Second, as to assessments for street

paving and sewer improvements where no bonds, notes or certificates of indebtedness have been issued in anticipation of their collection, the municipal officers have the option of collecting by suit, with interest and a 5 per cent. penalty added, as provided in section 3898, or of certifying the same to the county auditor for collection as taxes, with a penalty of ten per cent. added to cover interest and the expenses of collection.

As I have been orally informed by Mr. Tracy that your request for my opinion was not intended to raise any question as to the right or duty of the county treasurer to collect a penalty on delinquent assessments under authority of any law relative to the collection of delinquent taxes, I have given that matter no consideration.

Respectfully,
EDWARD C. TURNER,
Attorney General.

633.

APPROVAL OF RESOLUTION FOR IMPROVEMENT OF MANSFIELD-WOOSTER ROAD IN RICHLAND COUNTY, OHIO.

COLUMBUS, OHIO, July 21, 1915.

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

DEAR SIR:—I have your communication of July 17, 1915, transmitting to me for my examination final resolution as to the Mansfield-Wooster road in Richland county, petition 1136, I. C. H. No. 146.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

634.

STATE HIGHWAY COMMISSIONER—IMPROVEMENT OF INTER-COUNTY HIGHWAY TO WIDTH GREATER THAN TWENTY FEET—HOW PAID AND REASON FOR SAME—COMMISSION MAY IMPROVE TO WIDTH GREATER THAN TWENTY FEET BY AGREEMENT WITH COUNTY COMMISSIONERS, ABUTTING PROPERTY OWNERS AND TOWNSHIP TRUSTEES.

Under section 1192, *G. C.,* 103 *O. L.,* 453, *the state highway commissioner may improve an inter-county highway to a width greater than twenty feet and pay from the inter-county highway funds apportioned to the county in which such highway is located not more than one-half the cost of improving such highway to the width determined upon by the highway commissioner, provided special reasons exist which in the judgment of the highway commissioner require that the roadway be improved to a width greater than twenty feet. The highway commissioner may also improve an inter-county highway to a width greater than twenty feet provided a proper agreement is first made to pay the added cost due to the increased width, such agreement to be made either by* (1) *the county commissioners, or* (2) *the abutting property owners, or* (3) *the county commissioners, township trustees and abutting property owners.*

COLUMBUS, OHIO, July 21, 1915.

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

DEAR SIR:—I have your communication of July 15, 1915, in which you state that the county commissioners of Franklin county desire to improve a section of North High street to a width of 50 feet. I understand that the section of roadway referred to lies immediately north of the north corporation line of the city of Columbus and is not within the limits of any municipal corporation and is a part of an inter-county highway. The county commissioners of Franklin county desire that inter-county highway funds apportioned to Franklin county be applied by you toward the payment of a part of the cost and expense of the improvement referred to above and you ask my opinion as to whether or not the state highway department may comply with the request of the county commissioners and participate in the making of this improvement, using inter-county highway funds apportioned to Franklin county in the payment of the state's proportion of the cost and expense of the improvement. You further state that the attitude of your department is to co-operate in this matter and to pay not more than half of the cost of a 20-foot road. Your inquiry is answered by the provisions of section 1192, G. C., as amended in 103 O. L., 453, which section reads as follows:

> "The improved permanent roadway of such highway shall not be less than ten nor more than twenty feet in width unless for special reasons the state highway commissioner requires a greater width. The highway may be improved to a greater width than twenty feet if there is a stipulation in the application that abutting property owners will pay the added cost and expense of such improvement. The state highway commissioner may also improve a highway to a greater width than herein specified if the county commissioners therefore agree to pay such added cost, or such county commissioners, township trustees and abutting property owners may join in an application for an increase of width of an improvement by jointly

agreeing to pay the added cost and expense thereof. All highways improved under the provisions of this chapter, shall conform to the standard prescribed by the state highway department."

Under the provisions of the above quoted section, the improved permanent roadway of an inter-county highway cannot exceed twenty feet in width unless for special reasons the state highway commissioner requires a greater width. In the improvement of an inter-county highway, the state highway commissioner cannot, therefore, expend from the inter-county highway fund an amount in excess of one-half of the cost of improving the highway to a width of twenty feet, unless special reasons exist which, in the judgment of the state highway commissioner, warrant a greater width. If such reasons do exist, then the state highway commissioner may pay from inter-county highway funds not more than one-half of the cost of improving the highway to such width as he determines to be proper. If in the judgment of the state highway commissioner there are no special reasons warranting or demanding the improvement of the highway to a width greater than 20 feet, the state highway department may, nevertheless, participate in the improvement and improve the highway to a width greater than twenty feet, if there is a stipulation in the application that the abutting property owners will pay the added cost and expense of such improvement due to the increased width of the improvement. The state highway commissioner may also improve a highway to a greater width than 20 feet if the county commissioners agree to pay such added cost or if the county commissioners, township trustees and abutting property owners join in the application for an increase of width of the improvement and jointly agree to pay the added cost and expense thereof.

Under the above provisions of section 1192, G. C., it will be within the power and authority of the state highway commissioner to improve the highway in question to a width of fifty feet and to pay from any inter-county highway funds apportioned to Franklin county, and not appropriated to any other improvement, not more than one-half of the cost of improving the highway to a width of twenty feet, provided a proper agreement is first made to pay the added cost due to improving the road to a width of fifty feet instead of twenty feet, such agreement to be made either by (1) the county commissioners, or (2) the abutting property owners, or (3) the county commissioners, township trustees and abutting property owners.

Respectfully,
EDWARD C. TURNER,
Attorney General.

635.

TAXATION OF PROPERTY BELONGING TO INSTITUTIONS OF PUBLIC CHARITY—ONLY REAL ESTATE AND THE INCOME OF PERSONAL PROPERTY USED EXCLUSIVELY FOR MAINTENANCE AND ADMINISTRATION OF INSTITUTIONS OF PURELY PUBLIC CHARITY, EXEMPT FROM TAXATION—SECTION 5365-1, G. C., UNCONSTITUTIONAL.

Such provisions of sections 5353, 5364, 5365 *and* 5365-1, *G. C., as were in contravention of section* 2 *of article* 12 *of the constitution, prior to the amendment thereof adopted September* 3, 1912, *continue to be unconstitutional and void notwithstanding that such provisions if reenacted since the amendment of constitution referred to would not be in contravention of the constitution as so amended.*

Under the provisions of section 5364, *G. C., and the phrase of section* 5353, *G. C., as amended,* 103 *O. L.,* 548, *"and property belonging to institutions of public charity only shall be exempt from taxation," only such bonds as come within the terms of section* 2 *of article* 12 *of the constitution, as amended September* 3, 1912, *and all personal property, or the income from which, and such real estate as is itself appropriated and devoted to the maintenance and permanent administration of institutions of purely public charity may be exempted from taxation.*

Section 5365-1, *G. C., being in contravention of section* 2 *of article* 12, *of the constitution at the time of its enactment, is unconstitutional, null and void.*

COLUMBUS, OHIO July 21, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of June 22, 1915, you request my opinion as follows:

"Under date of April 13, 1914, this commission submitted to Hon. T. S. Hogan, then attorney general, the question as to whether or not the amendment of section 2, article 12, of the constitution, by changing the words 'Institution of Public Charity' to 'Institution used exclusively for charitable purposes' had the effect of making the provision of sections 5364, 5365 and 5365-1 constitutional. In his reply he held that any of the provisions of the above named sections which were in contravention of section 2, article 12, prior to its amendment were still in contravention of that section. In other words, that the amendment to the constitution did not have the effect of making constitutional the provisions of these sections which have heretofore been held to be unconstitutional.

"The commission desires to be advised whether or not you concur in the former attorney general's opinion in this regard, and in connection therewith requests your opinion upon the following:

"Is the real estate, personal property, moneys, credits, investments in bonds, stocks, joint stock companies, annuities, or otherwise belonging to a grand lodge of Free and Accepted Masons, a grand lodge of the Independent Order of Odd Fellows, a grand lodge of Knights of Pythias, a religious or secret benevolent organization maintaining a lodge system, or an incorporated association of traveling men, subject to taxation?

"Are the funds of a fraternal benefit society organized or licensed under the act passed May 31, 1911, 102 O. L., 533, exempt from taxation as seems to be provided in section 5365-1 of the General Code?"

Sections 5364, 5365 and 5365-1, G. C., as stated by you, were enacted prior to the adoption of the amendment of section 2 of article 12, of the constitution, September 3, 1912, and provided as follows:

> "Section 5364. Real or personal property belonging to an incorporated post of the Grand Army of the Republic, union veterans' union, grand lodge of Free and Accepted Masons, grand lodge of the Independent Order of Odd Fellows, grand lodge of the Knights of Pythias, association for the exclusive benefit, use and care of aged, infirm and dependent women, a religious or secret benevolent organization maintaining a lodge system, an incorporated association of ministers of any church, or incorporated association of commercial traveling men, an association which is intended to create a fund or is used or intended to be used for the care and maintenance of indigent soldiers of the late war, indigent members of said organizations, and the widows, orphans and beneficiaries of the deceased members of such organizations, and not operated with a view to profit or having as their principal object the issuance of insurance certificates of membership, and the interest or income derived therefrom, shall not be taxable, and the trustees of any such organizations shall not be required to return or list such property for taxation.
>
> "Section 5365. Moneys, funds or credits belonging to the representative body of Indiana meeting of friends or the religious society known as the German Baptist or Dunkers, in this state, which moneys, funds or credits or the income therefrom are exclusively used for the support of the poor of such denomination, society or congregation, shall be exempt from taxation. The person or persons having the care and supervision of such moneys, funds or credits, shall not be required to return or list them for taxation.
>
> "Section 5365-1. Every fraternal benefit society organized or licensed under this act is hereby declared to be a charitable and benevolent institution, and all of its funds shall be exempt from all and every state, county, district, municipal and school tax, other than taxes on real estate and office equipment."

Section 2 of article 12 of the constitution, prior to the amendment in 1912, provided that:

> "Institutions of purely public charity---------- may, by general laws, be exempted from taxation."

This particular provision as amended in 1912, is as follows:

> "Institutions used exclusively for charitable purposes, ---------- may, by general laws, be exempted from taxation."

Your first inquiry is whether or not I concur in an opinion of my predecessor, Hon. Timothy S. Hogan, to the effect that any provision of the above quoted statutes which was in contravention of the above constitutional provision prior to its amendment, is unconstitutional and void, notwithstanding that such statutory provision is not in contravention of that constitutional provision as amended. Stated in its simplest form, the question is: May a previously enacted unconstitutional statute be rendered valid by constitutional amendment?

In the case of Fenetenet v. Young, 128 La., 20, it was held that where a statute which is attacked as unconstitutional has been ratified and confirmed by

an amendment to the constitution, whereby it has been made in effect a part of that instrument itself, there is no longer ground upon which claim of unconstitutionality may be based.

In Hutchinson v. Patching, 126 S. W., 1107, Texas case, it was held that the unconstitutionality of a statute creating a school district and authorizing the collection of taxes, was cured by subsequent constitutional amendment, declaring lawful all school districts theretofore created, and validating the bonds issued and authorizing an annual tax levy for their redemption.

Hammond v. Clark, 136 Ga., 213, holds that where an act of the legislature was declared to be unconstitutional and thereupon the legislature proposed an amendment to the constitution curing the defect and also ratifying the act as of the date of passage, and such amendment was adopted by the people, the same will not be held void for the reason that it did not sect out in terms the act sought to be validated. In each of these cases it is manifest upon the face of the constitutional amendment that it was intended to be retroactive in its operation and express reference is made to the statutes, the defects of which were intended to be cured, and by reason thereof it was held so long as such constitutional amendments were within the limitations of the Federal constitution, the validity is sustained.

In the case of Dewar v. People, 40 Mich., 401, it is said by Cooley, Judge:

> "The removal of the constitutional prohibition against licensing the sale of liquor, does not authorize a town council to license drinking saloons under a municipal charter granted before a constitutional amendment."

Similar rule was laid down in the case of Village v. Vansice, 43 Mich., 573.

In Mining Company v. Osmun, 82 Mich., 573, at page 576 of the opinion, the court says:

> "If the law-making power is prohibited from enacting a law and in disregard of such prohibition it goes through the forms of enacting a law, such enactment is of no more force than a blank piece of paper and is utterly void, and power subsequently conferred upon the legislature by amendment of the constitution does not have a retroactive effect and give validity to such void law."

The case of Dullman v. Willson, 53 Mich., 392, was an action in quo warranto against an officer who had been removed by the governor under the statute enacted prior to the adoption of a constitutional amendment in 1862. In the opinion the court says:

> "I am satisfied that the statute furnishes no valid basis for the power of removal because repugnant to the constitution of 1835, which vested no judicial power in the governor. The statute, being void, was not validated by the amendment of 1862, and the question (of the power of removal) depends solely upon the constitutional amendment of 1862."

Thus it was held that while authority for removal might be found within the constitutional amendment adopted prior to the action taken by the governor, that no authority for such action on the part of the governor could be sustained under a statute enacted prior to such constitutional amendment in contravention of the constitution in force at the time of the enactment of the statute.

The supreme court of the United States, in the case of Shreveport v. Cole, 129 U. S., 36, in the third branch of the syllabus, say:

"Constitutions operate prospectively only, unless on their face the contrary intention is manifest beyond reasonable question."

This principle is also laid down in Cooley on Constitutional Limitations, at page 77.

From an examination of the above cases, it will be observed that the constitutional amendments there under consideration were merely grants of legislative authority, without any reference whatever to any pre-existing legislation, and in that respect are clearly distinguishable from class of amendments considered in the cases previously referred to. That is, the constitutional amendments in the latter cases referred to were analogous to the amendment of section 2 of article 12, of the constitution of the state of Ohio, in that they were enabling only or a mere grant of power and authority. It therefore appears upon ample authority that the rule is stated in 8 Cyc., 768, as follows:

"An unconstitutional statute is absolutely null and void *ab initio,* having no binding force; and cannot be validated by a subsequent constitutional amendment removing the legislative restriction by which its enactment was prohibited. * * * Validating constitutional provisions do not operate retrospectively unless they are intended to so operate; and therefore unconstitutional legislation is not validated by the subsequent adoption of constitutional amendments or other provisions merely authorizing the enactment of such legislation and without expressing any intent to validate it."

And in the 6 Am. and Eng. Enc., 917 (2nd Ed.).

"Constitutions are construed to operate prospectively only unless on the face of the instrument a contrary intention is manifest beyond a reasonable question."

To determine then whether the amendment of section 2 of article 12, of the constitution, adopted September 3, 1912, is retroactive in its operation, it is necessary only to determine whether or not there is manifest upon its face, beyond reasonable question, an intent that it should be retroactive in its operation, and if such intent is so manifest, that it is not in contravention of the Federal constitution. The force and purpose of this amendment is solely to confer a power upon the legislature theretofore denied it, by a provision which is in no sense self-executing and without any reference to any previous attempt of the legislative authority to exercise such extended power, and nothing appears in connection with such amendment that would sustain a contention that it was the intent, beyond a reasonable question, of either the constitutional convention or the electorate in its adoption, that it would be retroactive in its operation, and is hence clearly distinguishable from that class of amendments under consideration in the cases herein first referred to. It is, as above stated, solely enabling in character and comes clearly within the rule prohibiting its retroactive operation. In arriving at this conclusion I am not unmindful of the schedule to the constitutional amendments adopted September 3, 1912, which provides:

"The several amendments passed and submitted by this convention when adopted at the election, shall take effect on the first day of January,

1913, except as otherwise specifically provided by the schedule attached to any of said amendments. All *laws* then *in force* not inconsistent *therewith* shall *continue* in force until amended or repealed. ----------."

It will be observed that this provision in so far as it is material to the present consideration is applicable only to *"laws then in force"* as distinguished from acts passed by the legislature.

It is sufficient here to say that an act of the legislature which is in contravention of constitutional authority never becomes a "law," and from this it follows of necessity that it cannot be said in a legal sense to be at any time in force.

Mining Co. v. Osman, 82 Mich., 573.

In the case of State ex rel. v. Vail et al., 84 O. S., 399, at page 405 of the opinion, it is said,

"No controversy exists respecting the proposition that an unconstitutional law is in legal contemplation inoperative as though it had not been passed."

While this statement has not the force of a decision, it is significant that no controversy arose upon that proposition in so important a case if it were not the settled law of the state, that an unconstitutional act of the legislature is as inoperative as though it had not been passed.

While an observation of a wholly unconstitutional act of the legislature may give rise to equitable rights between parties (Mt. Vernon v. State, 71 O. S., 428), such rights have their foundation in the fundamental principles of justice and are based upon the conduct and altered status of the parties rather than upon any authority or force found in the legislative enactment and in no case will it be found to be held that such unconstitutional act has any force or is in any sense operative.

In Railway Co. v. Commissioners, 1 O. S., 77, it is said:

"The general assembly, like the other departments of government, exercise only delegated authority; and any act passed by it, not falling fairly within the scope of 'legislative authority' is as clearly void as though expressly prohibited."

That which is void cannot be a law and neither can it have any force. Since such unauthorized act is a nullity and of no force or effect whatever, it cannot be given vitality by constitutional mandate which is applicable only to valid and subsisting *laws*. That is to say, such parts of legislative enactments as are in contravention of the constitution are not given validity by a provision of the schedule continuing in force and operation valid laws. I therefore concur in the opinion of my predecessor, Hon. Timothy S. Hogan, and hold that since sections 5364, 5365 and 5365-1, G. C., were enacted prior to the amendments of the constitution in 1912, any additional power thereby conferred has no application thereto and the validity of these statutes can be sustained only in so far as within the power conferred by the constitution at the time of their enactment, and such further restrictions thereof as may be found in constitutional provisions subsequently adopted.

Before entering upon a further consideration of your second inquiry, it is

noted that mention is therein made of investments in bonds, and relative thereto attention is called to that provision of section 2 of article 12, as amended in September, 1912, which is as follows:

> "* * * all bonds at present outstanding of the state of Ohio or of any city, village, hamlet, county or township in this state, or which have been issued in behalf of the public schools in Ohio and the means of instruction in connection therewith, which bonds so at present outstanding shall be exempt from taxation;"

This provision, although having been adopted since the enactment of the statutes above referred to, is restrictive in its operation and self-executing, hence all bonds within this classification are exempt from taxation, regardless of their ownership.

All the other classes of property enumerated in your second question come within the terms of that part of section 2 of article 12, of the constitution, which is as follows:

> "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property according to its true value in money. * *"

Such property must then be liable to taxation unless it be found to come within one or more of those classes of property which the constitution at the time of the enactment of the statute conferred authority upon the legislature to exempt by general law, viz., "burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose," and further that the legislature in the exercise of such power has, by statutory enactment, exempted the same.

It will be observed that ownership is not made the basis of exemption of any of those classes of property last above referred to, as enumerated in section 2 of article 12, of the constitution, prior to the amendment in 1912, but that the authority for exemption is, in each case, referable to the use to which the property is appropriated or applied, and that in so far as any exemption attempted is based upon ownership alone, it must be wholly void. So that the ownersip of property is immaterial to the present consideration, except in so far as it may be indicative of the use to which the property in question is put. In short, the constitutional authority for a statutory exemption of any of those classes of property referred to by you, except certain bonds already alluded to, must be founded solely upon the use to which that property is put, regardless of any statutory reference or declaration as to ownership. (Watterson v. Halliday, 77 O. S., 180.)

In Gerke v. Purcell, 25 O. S., 242, it is said:

> "The exemption of 'burying grounds,' 'houses used exclusively for public worship' 'and institutions of purely public charity,' does not depend upon the ownership of the property. The uses that such property subserved, constitute the grounds for its exemption."

It is assumed that it would be conceded that none of these classes of property enumerated by you fall within either "burying grounds," "houses used exclusively for public worship" or "public property used exclusively for any public purpose," so that any claim for authority in the legislature to exempt the same, must be based upon the power to exempt "institutions of purely public charity." That is

to say, before there was any authority for statutory exemption of any or all of those classes of property enumerated in your inquiry, at the time of the enactment of the statutes under consideration, it must be found as a matter of fact, to come within the meaning of the phrase of the constitution—"institutions of purely public charity."

In the case of Humphreys v. Little Sisters, 29 O. S., 201, at page 206 of the opinion, it is said:

> "By the term institution is to be understood as an organization which is permanent in its nature, as contra distinguished from an undertaking which is transient and temporary."

The Century dictionary defines the term "institution" as "an establishment for the promotion of some object; an organized society or body of persons, usually with a fixed place of assemblage and operation, devoted to a special pursuit or purpose."

In the case of Gerke v. Purcell, 25 O. S., 229, at page 244 of the opinion, it is said:

> "The term 'institution' is sometimes used as descriptive of the establishment or place where the business or operation of a society or association is carried on; at other times it is used to designate the organized body * * * as used in the constitutional provision, the term may be applied in either sense; but in whichever sense it may be used, its only operation, as respects taxation, will be its effect upon property."

On the same page of the opinion it is further said:

> "It is to be observed that the duty to tax as well as the authority to exempt from taxation, has reference to property. It is property alone that is required to be taxed, and property also is the object of authorized exemptions."

See also State ex rel. v. Edmondson, 89 O. S., 361; Little v. Seminary, 12 O. S., 427.

In the case of Benjamin Rose Institution v. Myers, Treas., et al., not yet published, No. 13882, recently decided by the supreme court of this state, the court uses the following language:

> "We gather from these two cases, as well as from the several Ohio cases, these two general and controlling rules of interpretation:
>
> "1. It is the use of the property which renders it exempt or non-exempt, not the use of the income derived from it.
>
> "2. The exemption is not a release in *personam* but a release in *rem*, and the *res* to which the release applies must be found and identified by the officer or no exemption can be recognized.

From this it follows that at least for the purpose of our present consideration, the term "institution" in the last analysis has reference to property only and, as above stated, the constitutional authority for the exemption of such property must be determined solely from the uses to which that property is appropriated or applied, and without regard to ownership thereof. That is to say, the constitutional authority for statutory exemption is limited by this particular phrase to

establishments devoted to purely public charity, and to property of associations or organizations, the activities of which are confined to the administration of a purely public charity.

The term "institution" in this sense is held in County v. Church, 27 Minn., 460, and State v. Hospital, 95 Minn., 489, to comprehend "not only a building and ground covered by it, but adjacent ground which is reasonably necessary or proper to the purposes and objects in view, and which is used directly for the promotion and accomplishment of the same."

Whether or not a charity is public depends upon the particular facts in each case. The nature of the charity and the manner and extent of its administration and distribution will determine whether or not it is public in its character. In Gerke v. Purcell, supra, at page 244 of the opinion, the court said:

> "For the purpose of determining the public nature of the charity, it is not material through what particular forms the charity may be administered. If it is established and maintained for the use and benefit of the public, and so conducted that the public may make it available, that is all that is required."

The term "public" here has reference to the object of the charity rather than to its ownership, or is descriptive of the use to which the property is devoted.

In the case of Gerke v. Purcell, supra, it is said also that:

> "When the charity is public, the exclusion of all idea of private gain or profit is equivalent in effect to the force of 'purely' as applied to public charity in the constitution."

A purely public charity may then be said to be one conducted exclusively for public benefit and without any idea of private gain or profit.

In the case of Morning Star Lodge v. Hayslip, 23 O. S., 144, it was held:

> "A charitable or benevolent association which extends relief only to its own sick and needy members, and to the widows and orphans of its deceased members, is not 'an institution of purely public charity;' and its moneys held and invested for the aforesaid purposes are not exempt from taxation."

See also Newport v. Association, 49 L. R. A., 252, and cases there cited.

The Morning Star Lodge case, supra, leaves little to be said in answer to your second question, in so far as it relates to that class of property, and the purpose to which it was devoted involved in that case.

A charity is said to include not only gifts to the poor, but endowments for the advancement of learning and for any other useful and public purposes. Schools, colleges and hospitals are charities in the legal sense of the term as well as homes and asylums for indigent and afflicted persons. So an asylum for destitute men and women and the incurable sick and blind, irrespective of their nationality, is held to be an institution of purely public charity in the case of Humphreys v. Little Sisters of the Poor, 20 O. S., 201. In Library Association v. Pelton, 36 O. S., 253, it was held that, "a library association incorporated under the law of this state, whose objects and purposes are 'the diffusion of useful knowledge and the acquirement of arts and science, by the establishment of a library of scientific and miscellaneous books for general circulation, and a reading

room, lectures and cabinets, open to all persons without distinction, upon equal terms, and the income and revenues of which are devoted exclusively to such objects and purposes,' is an institution of purely public charity."

It will be noted, however, that in this case it was further held that although this library association was an institution of purely public charity, it was only such property of such association as was devoted exclusively to the purposes of charity that might be exempted from taxation. That is to say, whatever may be the ostensible purpose of the organization or association, it is only that property of such institution as is devoted exclusively to the purpose of public charity that is authorized to be exempted from taxation. So in the case of Watterson v. Halliday, 77 O. S., 150, it was held that parish houses used as residences of bishops were not exempt from taxation, although used for the discharge of any duties of a charitable and religious nature.

See also Gerke v. Purcell, 25 O. S., 229;
Cincinnati Club v. Edmondson, 13 C. C. (n. s.), 489;
Gilmour v. Pelton, 2 W. L. B., 159;
Davis v. Campmeeting Assn., 57 O. S., 257;
Little v. Seminary, 72 O. S., 427.

In the case of Gymnasium v. Edmondson, 13 C. C., (n. s.) 491, the court said:

> "What is meant in law, by the use of the word public? Public does not mean free; but rather that which is open to a class or kind on equal conditions, or rather where all may go who can comply with certain necessary and reasonable requirements—restrictions."

In Gilmour v. Pelton, 2 W. L. B., 159, it was held that Catholic schools which were open to the public without distinction were purely public, although it is assumed that only youth of school age might attend.

In the case of Burd Asylum v. School District, 90 Pa. St., 21, under the same constitutional provision as found in Ohio, prior to the amendment of 1912, it was held that an asylum whose object should be the maintenance and education of white female orphan children of not less than four years nor more than eight, making certain further restrictions as to preference, was an institution of purely public charity, within the constitutional limitations on the power to exempt from taxation.

To constitute a public charity, it is then not essential that the bounty be available to all the public, but it is sufficient that the benefit be available to a class, the membership of which is indefinite, continuing and involuntary. A public charity comprehends then not that which is available to each individual member of the public alone, but as well that class of charity from which a substantial public benefit is derived, as for instance a relief from public taxes, a moral and intellectual advancement of society, and improvement of public health or substantially conducive to the general public welfare.

I therefore conclude that under authority of the provision of the constitution, under which the sections under consideration were enacted, exemptions from taxation may be extended only to property of substantial permanence, devoted exclusively to charitable purposes of such nature as to be available to a class of indefinite number and involuntary membership, administered without any idea to private gain or profit and not limited to the membership of a secret organization and their widows and orphans, which results in a substantial public benefit.

In this particular, neither of the constitutional provisions under consideration are self-executing. They are, with respect to the particular provision under con-

sideration, on the contrary, only a grant of power to the legislature, and we have yet to determine what exemptions have been effected by the legislature in the exercise of the authority so conferred and within its limits relative to those classes of property enumerated in your second inquiry. By the provisions of section 5353, G. C., as amended in 103 O. L., 548, property of institutions of public charity is exempt from taxation, in addition to the provision of section 5364, G. C., as above quoted.

Your inquiry has reference only to enumerated secret orders, religious or benevolent organizations maintaining a lodge system, and incorporated associations of traveling men. As I have heretofore determined that the sole basis of exemption under the constitutional authority therefor, is the use to which the property is devoted, it is immaterial, as above stated, that the legislature has chosen to refer to the ownership of property undertaken to be exempted from taxation. (Gerke v. Purcell, 25 O. S., 229, seventh branch of syllabus; and Humphreys v. Little Sisters, 29 O. S., 226; Cincinnati Club v. Edmondson, 13 C. C. [n. s.] 489.) As heretofore repeatedly stated, unless the use of the property comes within the contemplation of the constitutional authority granted, a statutory exemption thereof will be null, void and of no effect whatever. The question of the use of the property is a matter of fact which cannot be controlled by a mere declaration of the legislature. That is to say, property may not become a purely public charity by simple legislative fiat.

Your inquiry makes particular reference to personal property as well as to moneys, credits and other classes of property. In the case of Myers, Treas., v. Rose Institute, No. 13883, which was decided by the supreme court of this state June 4, 1915, it was held:

> "Section 5353, General Code, when enacted and when this suit was brought, was within the authority granted to the general assembly by section 2, article 12, of the constitution, as then in force, and exempted from taxation the personal property of institutions of purely public charity, including endowment funds which belong exclusively to them and which with the income arising therefrom are devoted solely to their support."

And in the opinion the court says:

> "It is thus shown, by the history of the legislative treatment of the subject and by the adjudications of this court, that for a period of more than fifty years after the adoption of the constitution of 1851 it was the settled law of the state; first, that land and the buildings thereon actually occupied by institutions of purely public charity were exempt from taxation; second, that the real estate of such institutions, which was leased or otherwise used with a view to profit, was not exempt from taxation, and; third, that the monies and credits of such institutions, including their endowment funds which were devoted solely to deriving an income for their support, were exempt. This was the situation until the adoption of the General Code, which was in effect when this suit was brought.
>
> "The codifying commission, pursuing its usual course, divided section 2732, Revised Statutes, which had consisted of ten subdivisions, into twelve separate sections, to wit, numbers 5349 to 5360, of the General Code. The portions pertinent here are sections 5353 and 5354, General Code, which read:
>
> " 'Sec. 5353. Lands, houses and other buildings belonging to a county,

township, city or village, used exclusively for the accommodation or support of the poor, and property belonging to *institutions of public charity* only, shall be exempt from taxation.'

"'Sec. 5354. Buildings belonging to and used exclusively for armory purposes * * * and the land owned and used as sites for the armory buildings of such military organizations, not leased or otherwise used with a view to profit and moneys and credits appropriated solely to sustain, and belonging exclusively to, such organizations, shall be exempt from taxation.'

"It will thus be seen that the only reference to institutions of purely public charity is included in section 5353, viz., 'and property belonging to institutions of public charity only shall be exempt from taxation.' It would seem to be clear that this language is sufficiently broad to include every exemption which had theretofore been provided in favor of the institutions referred to, and that the word 'property' which replaced the word 'buildings' was used in the act of 1908 with the intention of broadening rather than restricting the operation of the statute so far as personal property is concerned, and to include not only moneys and credits but all other personal property of such institution. This would of course be equally clear as to the provision in the General Code. Prior to the act of 1908, the only reference of personality was as to 'monies and credits.' Therefore, it might well have been doubted whether chattels, such as live stock, etc., or stock in foreign corporations which belonged to the institution by bequest, or otherwise, were exempt. By changing the word 'buildings' to the word 'property' that doubt was removed. The word 'building' and the phrase 'moneys and credits' are retained in section 5354, General Code, relating to armories, while the word 'property' is retained in section 5353, which is the only section that relates to institutions of public charity only."

While the subject-matter involved in this case was presumably confined to moneys and credits, it seems from the language of the court to be clearly determined that under the provisions of section 5353, G. C., all personal property of sufficient permanence to be properly termed an institution which is devoted solely to the purposes of purely public charity within the constitutional limitation, was, by the legislature, intended to be exempted. This was an action brought to enjoin the collection of taxes upon personal property held in trust, as alleged in the amended petition, for the charitable use set forth in the petition, and the supreme court affirmed the judgment of the court of appeals in overruling the demurrer to the amended petition. So that all these classes of personal property enumerated by you, except that class of bonds herein referred to, were by statutory provision exempted from taxation, when, but only when, appropriated and applied exclusively to purposes of purely public charity.

In the case of Rose Institute v. Myers, No. 13882, supra, it was held:

"The real estate belonging to an institution of purely public charity is exempt from taxation only when used exclusively for charitable purposes, and if such real estate is rented for commercial and residence purposes, it is not exempt although the income arising from such use is devoted wholly to the purpose of the charity."

So that while no facts are submitted in the inquiry from which it may be determined as to whether or not the classes of property, or any of them, are

devoted exclusively to purposes of purely public charity, it may be again stated that only such class, classes or part of such property, as are in fact so exclusively and directly devoted and appropriated to sustaining a purely public charity or administering the same, could have been at the time of the enactment of sections 5353, 5354, 5365 and 5365-1, G. C., lawfully exempted from taxation, and all the other property of the organizations, orders and associations mentioned in your second inquiry is, therefore, subject to taxation. (Library Assn. v. Pelton, 36 O. S., 253; College v. State, 19 Ohio, 111; Kenyon College v. Schnebly, 12 C. C., [n. s. 1].)

Section 5365-1, G. C., was enacted as section 30 of the act of May 31, 1911, 102 O. L., 533, and hence no question can arise as to the legislative purpose to exempt from all taxes the funds of every fraternal benefit society, organized or licensed under the act referred to. The only question then involved in your third inquiry is whether or not the exemptions attempted to be made by section 5365-1, G. C., were within the constitutional authority of the legislature at the time of the enactment of this section.

The act referred to is of such length as to render it impracticable that it be set out in this opinion, but a cursory examination of the same will readily disclose its nature and primary purpose. In section 1 of the act it is provided that any corporation, society, order or voluntary association, without capital stock, organized and carried on *solely for the mutual benefit* of its members and their beneficiaries, is declared to be a fraternal benefit society.

Elaborate provision is made for the organization, government and control of these societies, and in section 7 thereof the membership is limited to persons not less than sixteen and not more than sixty years of age, who have been examined by a legally qualified physician, and whose examination has been supervised and approved in accordance with the laws of the society. Benefits may be paid in case of death of a member only to certain enumerated relatives, or to persons dependent upon the deceased member. Benefits for physical disability, either as a result of disease, accident or old age, may be paid. Certificates of membership are declared to constitute a contract. Provision is made for the investment, disbursement and application of the funds of the organization. It is subject to examination by the superintendent of insurance and indeed has many, if not all, of the attributes of insurance, notwithstanding that it is provided by section 4 of the act (section 9565, G. C.), that such society shall be exempt from the insurance laws of the state except as otherwise provided in the act. The society may invest its funds only in securities permitted by the laws of this state for the investment of the assets of life insurance companies. Section 29 of the act (section 9491, G. C.) provides that nothing in the act shall be construed to apply to certain enumerated secret orders, exclusive of the insurance departments thereof or to societies which limit their membership to any one hazardous occupation, nor to similar societies which do *not issue insurance certificates.*

It will not be contended that authority for the exemption of the funds of such societies will be found in the constitution as it stood at the time of the enactment of the act in question except that the same come within the meaning of the phrase "institutions of purely public charity."

While it is provided in section 12 of the act (section 9473, G. C.) that any lawful social, intellectual, educational, charitable, benevolent, moral or religious advantage may be set forth among the purposes of the society, and in section 21 of the act (section 9482, G. C.) it is provided that no money or "charity" to be paid by the society shall be liable to attachment, it will be remembered that the provisions for the investment, disbursement and application of the funds include no purpose which may be said to be charitable.

I fail to find anything in the act upon which a claim that those organizations are in any sense charitable institutions may with any show of reason be based and much less are they public in their nature. The benefits which they are required to or may pay are limited to the members, and certain of their relatives, or to a person or persons dependent upon a member, and the membership is restricted to certain classes of persons. I am unable to conceive how any of the funds of an organization under this act may be lawfully appropriated to a purpose that may be said to be a purely public charity, and except that such funds are so appropriated and applied, no authority rested in the legislature at the time of the enactment of section 5365-1, G. C., to make such exemption; and in so far as any funds of such society which are not devoted to the purposes of a purely public charity are thereby attempted to be exempted from taxation, that section of the statute is unconstitutional, null and void.

I am therefore of opinion that the funds of a fraternal benefit society, organized or licensed under the act of May 31, 1911, 102 O. L., 533, are not exempt from taxation.

It may be further observed, however, that by the amendment of section 2 of article 12, of the constitution of the state in 1912, there is eliminated from the constitutional restriction upon the power of the legislature to exempt from taxation the word "public" and that provision is made to read "institutions used exclusively for charitable purposes * * * may be made by general laws to be exempt from taxation." So that, if the same provisions as are now upon the statute books of the state were re-enacted by the legislature under the present constitution, it is conceived that certain property of those orders, associations or organizations mentioned by you, which are not now exempt from taxation, would become so. For instance, homes for widows of members, orphans of members, aged and indigent members of these organizations maintained by them, are clearly charitable and the property dedicated to the uses and purposes of those homes may be exclusively charitable; or, in other words, used exclusively for charitable purposes, although not a public charity, and it is therefore deemed competent for the legislature, under the present form of the constitutional provision, to exempt property of such character which is now, or may hereafter be, used exclusively for charitable purposes; and perhaps to effectively do so by the same language as is at present in the statute, notwithstanding the force and effect of that same language attempted to be enacted into the law prior to the constitutional amendment, may not now effect an exemption of that class of property.

This opinion has been delayed awaiting the opinion of the supreme court in the Rose Institute cases above referred to, which was available only last week.

Respectfully,
EDWARD C. TURNER,
Attorney General.

636.

UNDER THE SMITH ONE PER CENT. LAW, SECTIONS 5649-1 TO 5649-5b, G. C., A COUNTY AS A "TAXING DISTRICT" IS NOT LIMITED IN AMOUNT OF LEVY BY AMOUNT LEVIED IN ANY PRECEDING YEAR—TAXES AND TAXATION—TEN MILL LIMITATION—FIFTEEN MILL LIMITATION.

A county, as a "taxing district," under sections 5649-1 *to* 5649-5b, *G. C., the Smith one per cent. law, is not limited in the amount of its levy by the amount levied in any preceding year.*

COLUMBUS, OHIO, July 22, 1915.

HON. JOHN H. SCHRIDER, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of July 17, 1915, in which you request my opinion as follows:

> "Under sections 5649-1 to 5649-3c, General Code, does a 'county' constitute a taxing district?
>
> "Under the above named sections can a county which raises about $90,000.00 for general purposes for the year 1911, increase that amount to $120,000.00 in 1915, even though the rate is within the three mill limitation?"

I think both of your questions are founded upon a misapprehension as to the present force and effect of the Smith one per cent. law. What was known as the 1910 limitation or the amount that might be levied in any year in any taxing district, was eliminated from the original measure by what was known as the Kilpatrick law, 103 O. L., 552. As the law now stands no taxing district is explicitly limited to the amount levied by it in any preceding year, but the only limitations now in force are the limitations of ten mills plus the interest and sinking fund levies of a certain class provided by section 5649-2, as amended; three mills (as to counties) upon the rate which a taxing district may levy for its own purposes, subject to the other limitations as provided for by section 5649-3a, G. C., and fifteen mills for all except certain specific purposes provided by section 5649-5b, as amended, 103 O. L., 57.

Accordingly, answering your second question first I beg to advise that if none of the three limitations to which I referred is operative in any territory in the county requires the reduction of the county levy, that levy may be such as to represent an amount in excess of the amount raised for general purposes in the year 1911, and the budget commission would have no authority to reduce the county levy solely upon the ground that it was in excess in amount of that for the year 1911.

Answering your first question, which, I suppose, in view of the answer to your second question, may be regarded as academic for your purposes, I beg to advise that in my opinion the county is a taxing district for some of the purposes of the Smith one per cent. law, but that though apparently called a taxing district for the purposes of the ten mill limitation, yet it is obvious that in the nature of things it cannot be treated as such, for there is no one uniform aggregate rate throughout the county, and section 5649-2 (together with section 5649-5b relative to the fifteen mill limitation to which these remarks also apply), relates to the aggregate rate for all except certain designated purposes.

That a county did constitute a separate taxing district may be assumed for the purposes of the original Smith law in its application to the amount of limitation. But, as previously observed, that limitation is no longer found in the law.

Respectfully,
EDWARD C. TURNER,
Attorney General.

637.

STATE HIGHWAY COMMISSIONER—HAS AUTHORITY TO LET CONTRACT FOR CONSTRUCTION OF INTER-COUNTY HIGHWAY IMPROVEMENT, IF ORIGINAL CONTRACTOR HAS NOT PERFORMED HIS PART OF CONTRACT—CONTRACT RELET—FORMER CONTRACTOR'S MATERIAL CANNOT BE USED UNLESS HE CONSENTS.

Where the state highway commissioner, acting under authority of section 1203-1, *G. C., determines to relet the work of constructing an inter-county highway improvement, for the reason that the original contractor has not carried forward with reasonable progress, or is improperly performing, or has abandoned, or fails or refuses to complete his contract; material delivered on the site of the improvement but not yet used and upon which no estimate has been allowed, remains the property of the original contractor and may not be used in completing the contract unless the original contractor so agrees.*

COLUMBUS, OHIO, July 23, 1915.

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

DEAR SIR:—Under date of July 16, 1915, I have a communication from Mr. H. M. Sharp, deputy of construction in the state highway department, in which he states that it is your purpose to relet the work of constructing the Cincinnati-Batavia road in Clermont county. The contract for this improvement was originally awarded to Thurber & Company, August 4, 1914, and the date set for completion was August 1, 1915. Very unsatisfactory progress has been made by the contractor and only about one-third of the work required by the contract has been completed. The contractor has practically abandoned work and it is proposed to relet the work of construction on August 6, 1915.

It is stated that Thurber & Company now have stored in piles along this road coarse limestone quarried and ready to be crushed for use in the construction of the road and that the estimated quantity of stone thus stored along the road is about two thousand cubic yards. The inquiry now is as to whether this stone belongs to Thurber & Company or whether the state highway department can regard the stone as available material to be used by the successful contractor who might be awarded the contract at the letting on August 6th, it being the intention of the state highway commissioner to complete the road by contract rather than force account. It is also inquired as to whether Thurber & Company will be entitled to any compensation for this stone or any other materials delivered on the site of the proposed improvement and designed to be used in the work of construction but not actually placed in the road.

Section 1203-1, G. C., as amended in 103 O. L., 456, defines the authority of the state highway commissioner under the circumstances set forth in Mr. Sharp's communication, and this section reads as follows:

"If the contractor has not commenced or carried forward with reasonable progress or is improperly performing or has abandoned, or fails or refuses to complete a contract under the provisions of this chapter, the state highway commissioner shall have full power and authority to enter upon and construct, either by contract, force account or in such manner as he may deem for the best interests of the public, paying the full cost and expense thereof from any moneys that may be due or become due such contractor, and in case there is not sufficient moneys due the contractor to pay for said work, the highway commissioner shall require the contractor or his bondsman to pay for it. It is the duty of the attorney general or any prosecuting attorney of the county in which said highway is situated, to collect the same from the contractor and his bondsman."

It will be noted that this section contains no authorization for the state highway commissioner to use any materials delivered on the site of the improvement and not yet incorporated therein and that the section further provides for the payment of the full cost and expense of completing the improvement from any moneys that may be due or become due the contractor and any deficit is to be supplied by the contractor or his bondsman.

Section 1211, G. C., as amended in 103 O. L., 457, reads as follows:

"Payment of the cost of construction of such improvement shall be made as the work of construction progresses, upon estimates made by the engineer in charge of the work when approved by the state highway commissioner. No payment made by the state or county on a contract for such work before its completion shall be in excess of eighty-five per cent. of the value of the work performed. Fifteen per cent. of the value of the work performed shall be held until the completion of the contract in accordance with the plans and specifications."

It will be noted that the section above quoted contains no express authorization for the state highway commissioner to allow and pay estimates on account of materials delivered on the site of the proposed improvement and not yet used in the work of construction. I understand that the state highway department has assumed that it has implied authority to allow and pay estimates on account of material so delivered and the contract between the state and Thurber & Company contains a provision that the commissioner may at his discretion allow a partial estimate for material delivered on the improvement. The question of whether under section 1211, G. C., authority exists in the state highway commissioner to allow and pay estimates on account of material delivered and not yet used is however not directly involved in the present inquiry even in view of the provision above referred to and contained in the contract between the state and Thurber & Company, for the reason that I am informed that in this particular instance no estimate has been allowed and paid to Thurber & Company on account of the delivery upon the site of the improvement of the stone in question.

In view of the absence of any express statutory provision authorizing the use of material delivered on the site of the improvement and in view of the express provision of section 1203-1, G. C., to the effect that the state highway commissioner shall pay the *full cost and expense* of completing the improvement from any moneys that may be due or become due the contractor and that the contractor or his bondsman shall supply any deficit, I conclude in answer to the first inquiry that the stone delivered on the road and not yet incorporated in the improvement remains the property of Thurber & Company, and that such stone can not be regarded as available material to be used by the successful contractor who might

be awarded the contract at the letting on August 6th, unless Thurber & Company so agree. The original contractor is of course interested in seeing the road completed as cheaply as possible, in order that a deficit may be avoided and something saved from the unexpended portion of the original contract price. An agreement between Thurber & Company and the state highway commissioner to the effect that the stone in question might be used by the successful bidder at the letting on August 6, 1915, in completing the road, might therefore be properly made. If such agreement is made then the remaining work should be estimated and bids invited accordingly. As previously indicated, the stone remains the property of Thurber & Company and in the absence of an agreement along the line above indicated cannot be used in completing the work.

This conclusion as to the first inquiry disposes in a measure of the second. The disposition to be made of the stone in question rests entirely with Thurber & Company, who may remove the same or dispose of it to the successful bidder at the new letting, or agree with the highway commissioner that it may be used in completing the improvement.

The state highway commissioner having elected to enter upon and complete the improvement under the provisions of section 1201-1, G. C., rather than to extend the time of completion and afford further opportunity to Thurber & Company to complete the work, it follows that by force of the further provisions of section 1203-1, G. C., it becomes the duty of the state highway commissioner to retain any sums now due to Thurber & Company as well as any sums that may hereafter become due such company, applying the same toward the completion of the work and that Thurber & Company will not be entitled to any further compensation on account of their contract unless the total amount now due and hereafter becoming due to such company is more than sufficient to complete the work, in which case the residue after fully completing the work would be due and payable to Thurber & Company, the original contractors.

Respectfully,
EDWARD C. TURNER,
Attorney General.

638.

BOARD OF EDUCATION—BONDS—SUCH AUTHORIZED BOND ISSUE INCLUDED IN BUDGET—DUTY OF BUDGET COMMISSIONERS TO ALLOW LEVY, ALTHOUGH BONDS HAD NOT BEEN ISSUED WHEN BUDGET SUBMITTED—SAME RULE, IF BONDS ARE NOT ISSUED AT TIME OF FINAL CONSIDERATION BY COUNTY BUDGET COMMISSION.

Where a board of education, prior to the first Monday in June, legally authorizes an issue of bonds and includes in its annual budget submitted to the county auditor on the first Monday of June a levy for interest and sinking fund purposes in connection with such authorized bond issue, it is the duty of the budget commissioners to allow such levy, although the bonds had not been issued when the budget was submitted, and the rule is the same even where such bonds have not yet been issued at the time final consideration is given to the budget by the county budget commissioners.

COLUMBUS, OHIO, July 22, 1915.

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

GENTLEMEN:—I have your communication of July 9, 1915, which reads as follows:

"Where the board of education of a school district determines to issue bonds for the purpose authorized by law, and all the proceedings preliminary to said issue have been in compliance with the requirements of the statutes governing same, but said bonds have not been actually issued at the time said board submits its annual budget to the county auditor, if in said budget, said board of education requests the allowance of an amount which it estimates will be necessary to pay the interest on said bonds and to provide a sinking fund for their retirement at maturity, (question) has the board of education a right to correct said budget, prior to the date when the county budget commissioners meet to consider the budget of the various taxing districts of the county, or at the time when the particular budget is being considered by said budget commissioners, to show the date of the issue of said bonds, or have the budget commissioners a right to ignore the request for said levy because the budget, at the time it was submitted to the county auditor, did not show the date of said issue?

"If on the final consideration of the budget by the county budget commission it does not appear that the bonds have been issued, what is the duty of the budget commission with reference to the levy for interest and sinking fund?"

An answer to your inquiry involves a consideration, in the first instance, of section 11 of article XII of the constitution of Ohio, adopted September 3, 1912, and which reads as follows:

"No bonded indebtedness of the state, or any political subdivision thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

In the case of Link v. Karb, 89 O. S., 326, decided February 3, 1914, the court construed the above quoted constitutional provision and held that the same requires the taxing authority of any political subdivision of the state proposing to issue bonds, to provide at the time the issue of bonds is authorized, for levying and collecting annually, by taxation, an amount sufficient to pay the interest on the bonds proposed to be issued, and to provide for their final redemption at maturity. This provision, made at the time the issue of bonds is authorized, was held to be mandatory on all subsequent taxing officials of that political subdivision during the term of the bonds. It was further held that this provision does not require that at the time the issue of bonds is authorized, there shall then be levied any specific amount or any specific rate, but it does require that provision shall then be made for an annual levy during the term of the bonds in a sufficient amount to pay the interest on the bonds proposed to be issued and to provide for their final redemption at maturity, which levy must be made annually in pursuance of the provisions of the original ordinance or resolution requiring the same, and the amount necessary to be levied for the purposes specified, is to be determined by the taxing officials at the time the levy is made.

It is provided by section 5649-3a that the annual budget required by said section shall be submitted to the county auditor on or before the first Monday of June each year. It appears from your letter quoted above, that prior to the first Monday in June a board of education of a school district determined to issue bonds for a lawful purpose and enacted all the legislation looking to said issue of

bonds and required by law, but that said bonds had not been actually issued prior to the first Monday in June. In its budget submitted to the county auditor, the board of education requested the allowance of an amount which it estimated would be necessary to pay the interest on said bonds and to provide a sinking fund for their final redemption at maturity. You now inquire as to the right of the board of education to correct its budget prior to the date when the county budget commissioners meet to consider the budget of the various taxing districts of the county, or at the time when the particular budget is being considered by the budget commissioners, said correction to show the date of the issue of the bonds, and you further inquire as to the right of the budget commissioners to ignore the request for said levy because the budget, at the time it was submitted to the county auditor, did not show the date of said issue.

It is provided by section 5649-3a that the annual budgets required by said section, shall specifically set forth, among other things, the following:

> "The amount of bonded indebtedness setting out each issue and the purpose for which issued, the date of issue and the date of maturity, the original amount issued and the amount outstanding, the rate of interest, the sum necessary for interest and sinking fund purposes, and the amount required for all interest and sinking fund purposes for the incoming year."

Under the above quoted provision of section 5649-3a, passed by the legislature May 31, 1911, it would seem to be clear that it was the intention of the legislature that boards and officers authorized by law to levy taxes, were authorized to include in their budgets sinking fund and interest items for only those bonds that had been actually issued at the time the budgets were prepared and submitted, inasmuch as such boards and officers were required to set forth in their budgets not only the amount of the bonded indebtedness, but also the date of issue and the date of maturity. However, by the adoption of section 11 of article XII of the constitution, it is made mandatory upon the taxing authorities of any political subdivision of the state, proposing to issue bonds, to provide at the time the issue of bonds is authorized, for levying and collecting annually by taxation, an amount sufficient to pay the interest on the bonds proposed to be issued and to provide for their final redemption at maturity, and this provision made at the time the issue of bonds is authorized, is mandatory on all subsequent taxing officials.

I therefore conclude, in view of the provision of the constitution referred to above, that the provision of section 5649-3a, above quoted, is so far modified that it is now necessary for boards and officers authorized by law to levy taxes to furnish only so much of said required information as is available; that where bonds have been duly authorized prior to the first Monday in June of any year, but have not been actually issued at that time, it is nevertheless the duty of the taxing authority proposing to issue said bonds, to include in its budget an item sufficient to pay the interest on said bonds and to provide a sinking fund for their final redemption at maturity, and that in cases where said bonds have been authorized but not actually issued, the taxing authority is excused from setting forth in its budget any information other than the amount of the authorized bonded indebtedness, the purpose for which said bonded indebtedness has been authorized, the rate of interest and the sum estimated to be necessary during the incoming year for interest and sinking fund purposes, in connection with said authorized bond issue. It is my opinion that when the budget required by section 5649-3a has been prepared along the line above suggested, said budget does not require any subsequent correction or addition, setting forth the date of the issue of said bonds, and that in view of the mandatory provisions of section 11 of article XII of the

constitution, the budget commissioners have no right to ignore the request for said levy on the ground and for the reason that the budget, at the time it was submitted to the county auditor, did not show the date of said issue.

For the reasons above set forth, I am also of the opinion that if, on the final consideration of the budget by the budget commissioners, it does not appear that the bonds have been issued at that time, even this fact is insufficient to avoid the mandatory provision of the constitution referred to above, and under this state of facts it would still be the duty of the budget commissioners to allow a levy for interest and sinking fund purposes in connection with the bonds authorized previous to the first Monday in June of the year in question, but not yet issued. It would be entirely proper, however, for the budget commissioners, at the time when they are considering the particular budget in question, to obtain from the board of education information as to whether or not said bonds have been issued and if so as to the date of issue, said information to be used by the budget commissioners in determining the correctness of the estimate made by the board of education as to the amount required during the incoming year, to pay the interest on said bonds and to provide a sinking fund for their final redemption at maturity.

Respectfully,
EDWARD C. TURNER,
Attorney General.

639.

DISAPPROVAL OF FORM OF RESOLUTIONS FOR ROAD IMPROVEMENTS IN HIGHLAND, MONROE AND MUSKINGUM COUNTIES, OHIO.

COLUMBUS, OHIO, July 23, 1915.

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

DEAR SIR:—I have your communication of July 20, 1915, transmitting to me for examination final resolutions as to the following roads:

Milford-Hillsboro, Highland county, petition No. 1406, I. C. H. No. 9.
Woodsfield-Marietta, Monroe county, petition No. 1027, I. C. H. No. 389.
Zanesville-Caldwell, Muskingum county, petition 1379, I. C. H. No. 348.

As to the resolution relating to the proposed improvements in Highland and Monroe counties, it appears upon the face of the resolutions that the proposed improvements are less than one mile in length and it does not appear either upon the face of the resolutions or by an attached certificate, that the proposed improvements are extensions of or connected with permanently improved roads, streets or highways of approved construction. See section 1197, G. C., as amended in 103 O. L., 454. If it be a fact that the proposed improvements are extensions of or connected with permanently improved roads, streets or highways of approved construction, and you attached to the resolutions certificates to that effect, then the resolutions will be in regular form and entitled to the approval of this department.

As to the final resolution relating to the proposed improvement in Muskingum county, the resolution recites on its face that it was adopted on the 28th day of June, 1915, whereas the certificate of the clerk of the board of commissioners of Muskingum county recites that the resolution was adopted on the 29th day of

December, 1913. The resolution should be returned to the clerk of the board of commissioners for the purpose of having him correct either the resolution or his certificate to correspond with the fact. When this correction is made, the final resolution will be in regular form and entitled to approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

640.

APPROVAL OF RESOLUTIONS FOR CERTAIN ROAD IMPROVEMENTS.

COLUMBUS, OHIO, July 23, 1915.

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

DEAR SIR:—I have your communication of July 20, 1915, transmitting to me for examination final resolutions as to the following roads:

Ashland County, Ashland-Loudonville, I. C. H. No. 143.
Belmont County, Barnesville-Hendrysburg, I. C. H. No. 101.
Crawford County, Columbus-Sandusky, I. C. H. No. 4.
Harrison County, Steubenville-Cambridge, I. C. H. No. 26.
Highland County, Hillsboro-Piketon, I. C. H. No. 261.
Highland County, Hillsboro-Greenfield, I. C. H. No. 260.
Highland County, Hillsboro-Washington C. H., I. C. H. No. 259.
Highland County, Cincinnati-Chillicothe, I. C. H. No. 8.
Lawrence County, Ohio River Road, I. C. H. No. 7.
Mahoning County, Canfield-Poland, I. C. H. No. 486.
Meigs County, Middleport-McArthur, I. C. H. No. 163.
Miami County, Piqua-Urbana, I. C. H. No. 190.
Montgomery County, Cincinnati-Dayton, I. C. H. No. 19.
Morgan County, McConnellsville-Athens, I. C. H. No. 162.
Pickaway County, Lancaster-Circleville-Northern, I. C. H. No. 463.
Portage County, Cleveland-East Liverpool, I. C. H. No. 12.
Portage County, Ravenna-Painesville, I. C. H. No. 324.
Preble County, Eaton-Richmond, I. C. H. No. 249.
Scioto County, Jackson-Portsmouth, I. C. H. No. 403.
Union County, Urbana-Marysville, I. C. H. No. 191.
Vinton County, McArthur-Logan, I. C. H. No. 397.
Vinton County, Chillicothe-McArthur, I. C. H. No. 365.
Williams County, Bryan-Pioneer, I. C. H. No. 306.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

641.

DEED PROVIDED FOR BY HOUSE BILL NO. 324 TO BE EXECUTED BY THE STATE CARRIES A RESERVATION OF ALL MINERALS—SECTION 3210, G. C., APPLIES—PENNSYLVANIA RAILROAD COMPANY —GNADENHUTTEN SCHOOL TRACT.

The reservations provided for in section 3210, G. C., should be made in the deed provided for by house bill No. 324.

COLUMBUS, OHIO, July 23, 1915.

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

DEAR SIR:—Under date of April 14th you inquire as follows:

> "H. B. No. 324 providing for settlement with the Pennsylvania railroad company for the appropriation to that company of a right of way through the Gnadenhutten tract school lot No. 2, provides that the auditor of state shall prepare a deed 'conveying in fee *simple*' said right of way.
>
> "The amendment of section 3210, G. C., carried in the act of July 20, 1914, provides that all deeds thereafter executed by the state shall carry a reservation of all minerals.
>
> "Will you kindly advise us whether such reservation is required to be carried in the deed provided for in the above mentioned H. B. 324, which was enacted into law April 6th, 1915?"

Section 3210, G. C., as amended 105 O. L., 8, relating to the sale of school lands, provides as follows:

> "Sec. 3210. Section sixteen and all lands instead thereof, granted for school purposes, may be sold, and such sales shall be according to the regulations hereinafter prescribed. The proceedings for the sale of such lands for which a deed has been duly executed and delivered by the state to the purchaser thereof at such sale, or his assigns, shall be conclusively presumed to be regular and according to law, but this provision shall not apply to, or affect, pending litigation. Provided, that such sales shall exclude all oil, gas, coal, or other minerals on or under such lands, and all deeds executed and delivered by the state shall expressly reserve to the state all gas, oil, coal, or other minerals, on or under such lands, with the right of entry in and upon said premises for the purpose of selling or leasing the same, or prospecting, developing or operating the same, and this latter provision shall affect and apply to pending actions."

House bill No. 324, referred to in your communication, is one that was passed at the present session of the legislature and is entitled "A bill to authorize a settlement with the Pittsburg, Cincinnati, Chicago and St. Louis Railway Company for a right of way heretofore appropriated through lot number two of the Gnadenhutten tract, Tuscarawas county, and for earth removed from said lot."

After various recitals showing the reasons for the legislation, there is enacted the following:

> "Section 1. That the auditor of state shall prepare a deed conveying

in fee simple to the said the Pittsburg, Cincinnati, Chicago and St. Louis Railway Company, its successors and assigns, the following described tract or parcel of land, to wit: (Description of land.)

"Section 4. That said railway company first paying the sum of fifteen hundred dollars to the auditor of state, in full satisfaction of the claim of the state for the earth so removed, and in full payment for the land so conveyed, the auditor of state shall deliver said deed to said railway company."

The amendment of section 3210, G. C., referred to by you in your letter transmitting the question, is found in senate bill No. 3, passed at the second extraordinary session of the 80th general assembly on July 20, 1914. It is to be observed that said section 3210 is an amendment of a prior section 3210 which fits in a scheme of legislation that has been on the statute books for years, and which provides the entire procedure for the sale of school lands by the trustees of the original surveyed townships to which such lands belong, and has no reference whatever to a case such as the one in question, where the legislature undertakes directly to authorize a deed to be made by the auditor of state for school lands.

I am therefore of the opinion that section 3210 cannot be considered as having any bearing whatsoever on the question submitted by you.

However, section 4 of the act referred to (senate bill No. 3) provides as follows:

"Section 4. All sales or leases of canal, public or other state land shall exclude all oil, gas, coal or other minerals on or under such lands, and all deeds executed and delivered by the state shall expressly reserve to the state all gas, oil, coal or other minerals on or under such lands with the right of entry in and upon said premises for the purpose of selling or leasing the same, or prosecuting, developing or operating the same and this provision shall affect and apply to pending actions."

Under early legislation by congress of the United States, the title to the school lands was vested in the legislature of Ohio for the use and benefit of the inhabitants of original surveyed townships, or of particular districts. For instance, a certain part of Gnadenhutten tract was set aside for the benefit of the schools of such Gnadenhutten tract, and the state was made trustee in order to carry out the purposes of such trust. The lands were so granted by the United States to the state for the benefit of the inhabitants of the Gnadenhutten tract, and would, therefore, as I view it, be considered as "public lands" within the meaning of section 4 of senate bill No. 3, hereinbefore referred to. The said section refers to canal, public or other state land. The only reasonable definition that I can conceive of as to what would be "public land" would be such land as is embraced within the grant of the United States to the legislature of the state of Ohio for the use of the public schools within a certain particular tract of land.

I am, therefore, of the opinion that the tract in question is to be considered within the purview of section 4 of senate bill No. 3.

There is nothing in house bill No. 324 which undertakes in any way to restrict the quantity of the estate described in said act, but it does undertake to designate the quality of the estate, in that the auditor of state shall prepare a deed conveying in fee simple the tract or parcel of land.

A "fee" is defined by Blackstone (2 Blackstone, 105) as

"The right which the vassal or tenant hath in lands to use the same, and

take the profits thereof to him and his heirs, rendering to the lord his due service; the mere allodial property of the soil always remaining in the lord."

Blackstone (2 Blackstone, 105) defines a "tenant in fee simple" as

"He that hath lands, tenements or hereditaments, to hold to him and his heirs forever, generally, absolutely and simply, without mentioning what heirs, but referring that to his own pleasure or to the disposition of the law."

It will therefore be seen that the only meaning that can be given to the words "conveying in fee simple" is the quality of the estate which is to be granted.

Coal and minerals in place are "land," as has been decided in the case of Caldwell v. Fulton, 31 Pa. St., 475, 483; and gas and oil are "minerals"—Gas Co. v. Ullery, 68 O. S., 259; Kelley v. Oil Co., 57 O. S., 317.

In the case referred to from Pennsylvania it is distinctly held that the surface of the land may be held by one party and the coal or other minerals under the land by another party, and that the mere ownership of the surface of the land would not entitle the party so holding the same to all that is beneath said land. In other words, that the quantity of the estate of the party may be divided, the surface belonging to one and the sub-strata of coal and minerals to another.

If the coal and minerals under the land may be considered as "land" and may be held separately from the surface of the land, and would pass in accordance with the laws governing real estate, coal and minerals may be held in fee simple separate and apart from the surface of the land.

Therefore, I do not believe that the mere recital that the auditor of state shall prepare a deed conveying a particular tract of land in fee simple would have any bearing upon the question of whether or not in the deed so prepared a reservation should be made of coal and other minerals.

We have therefore an expression of the legislature generally as contained in section 4 of senate bill No. 3, hereinbefore referred to, that all sales of public land shall contain a reservation of the oil, gas, coal or other minerals, and a subsequent bill of the legislature authorizing the conveying of a certain tract of land to the Pennsylvania Railroad, which land is embraced within the general terms of section 4 of senate bill No. 3.

To my mind, the two bills can be read together, as there is no apparent conflict between the provisions of the same. House bill No. 324 authorizes the sale and conveyance of a certain tract, and section 4 of senate bill No. 3, states what shall happen when the public lands of the state are sold.

I am, therefore, of the opinion that house bill No. 324 must be read in the light of section 4 of senate bill No. 3, and that the auditor in preparing the deed in fee simple conveying the tract should insert therein the reservation called for by said section 4 of senate bill No. 3.

It has been suggested that since, as is shown from the preamble in house bill No. 324, the predecessor of the Pennsylvania Railroad Company had been in possession of the right of way across the property in question since about 1852, that, therefore, it had appropriated such right of way at that time and consequently the provisions of amended section 3210, G. C., or section 4 of senate bill No. 3, passed on July 20, 1914, would not be applicable. However, while section 8759 of the General Code, now in force, provides that a railroad company may enter upon any land and appropriate so much thereof as it deems necessary, yet under the

provisions of section 8760 the appropriation of private property provided for in the next preceding section shall not be made until full compensation therefor is made in money, or secured to the owner by deposit of money for him.

In view of the fact that section 8760 refers to "private property" it may well be doubted whether under the provisions of section 8759 a railroad company would be authorized to appropriate public property for its use. But assuming that it is authorized so to do, nevertheless in order so to do it must before appropriating the same make full compensation therefor in money, or secure full compensation by a deposit of money. Neither of these things has been done in this case. Consequently, I do not believe that the suggestion made has any force or effect in the matter under consideration.

Respectfully,
EDWARD C. TURNER,
Attorney General.

642.

COUNTY BOARD OF EDUCATION—WHEN AVERAGE DAILY ATTENDANCE FALLS BELOW TEN, BOARD HAS DISCRETION TO SUSPEND A SCHOOL—SECTION 7730, G. C., AS AMENDED BY SENATE BILL NO. 282.

Under the provisions of section 7730, G. C., as amended by senate bill No. 282, effective July 27, 1915, it is discretionary with the county board of education whether a school shall be suspended when the average daily attendance falls below ten.

COLUMBUS, OHIO, July 23, 1915.

HON. FRED W. MCCOY, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—Your letter of July 19, 1915, requesting my opinion, received and is as follows:

> "Is it mandatory or not that the county board of education suspend a school when the average daily attendance for the preceding year has been below ten, and shall said county board transfer said pupils to another school or schools? Sec. 7730, of the Ohio Laws, enacted by the 81st general assembly."

Section 7730, G. C., as amended by senate bill No. 282, which was filed in the office of the secretary or state May 28th, and which will go into effect July 27, 1915, is as follows:

> "The board of education of any rural or village school district may suspend any or all schools in such village or rural school district. Upon such suspension the board in such village school district may provide, and in such rural school district shall provide, for the conveyance of pupils attending such schools, to a public school in the rural or village district, or to a public school in another district. When the average daily attendance of any school for the preceding year has been below ten, such school shall be suspended and the pupils transferred to another school or schools when directed to do so by the county board of education. No school

of any rural district shall be suspended until ten days' notice has been given by the board of education of such district. Such notice shall be posted in five conspicuous places within such village or rural school district; provided, however, that any suspended school as herein provided, may be re-established by the suspending authority upon its own initiative, or upon a petition asking for re-establishment, signed by a majority of the voters of the suspended district, at any time the school enrollment of the said suspended district shows twelve or more pupils of lawful school age."

The portion of the section applicable to your question is the provision that, "When the average daily attendance of any school for the preceding year has been below ten, such school shall be suspended and the pupils transferred to another school or schools when directed to do so by the county board of education." The words "when directed to do so by the county board of education" undoubtedly confer upon the county board of education the exercise of certain discretion and the only question is the extent of such discretion; that is, whether it is within the discretion of the county board of education to determine whether or not the school shall be suspended or whether the discretion only goes to the matter of transferring pupils to another school or schools.

While the sentence is not so formed as to give it the utmost clearness, it would hardly be urged that the legislature intended to lodge any discretion in the county board as to whether or not the pupils attending the school which is suspended should be transferred to another school or schools, in view of the fact that the entire theory of public education is that schools shall be provided for all children of school age. Therefore, the discretion which the county board is to exercise must be limited to determining whether or not the school shall be suspended when the average attendance falls below ten.

In determining the intention of the legislature, as expressed in section 7730 above quoted, it is helpful to note the change made by the provisions contained in senate bill No. 282. The particular part of section 7730 under consideration as it appeared in 104, O. L., page 139, was as follows:

"When the average daily attendance of any school for the preceding year has been below twelve, such school shall be suspended and the pupils transferred to such other school or schools as the local board may direct."

A comparison of this provision with the similar provision of section 7730 as amended by senate bill No. 282, indicates very clearly that the legislature intended to remove the mandatory provision that the school should be suspended when the average attendance fell below twelve, and place the discretion in the county board of education to suspend such a school when the average attendance fell below ten.

I am therefore of the opinion that under the provision of section 7730, G. C., as amended by senate bill No. 282, it is not mandatory that a school be suspended by the county board of education when the average daily attendance for the preceding year has been below ten, but that it is within the discretion of the county board of education to determine whether or not in such case such school shall be suspended.

Respectfully,
EDWARD C. TURNER,
Attorney General.

643.

INTERPRETATION OF SECTION 1442, G. C.—RIGHT OF FISH COMPANIES TO SELL CERTAIN FISH—MINIMUM SIZE OF CERTAIN VARIETIES PRESCRIBED.

Section 1442, *G. C., prohibits the catching and retaining of white fish, cat fish, sturgeon, carp, buffalo fish, white bass, perch and bull head, of a less size or weight than the respective minimums therein prescribed, in excess of three per cent. in weight of each variety of such fish, respectively, and of pike of a less size than the minimum prescribed in excess of ten per cent of the pike, in each boat load or catch brought into port, except the catching of such fish with hook and line and not for profit. The catching and retaining of such fish, not in excess of the three per cent. and ten per cent. respectively, as provided in the section, is not prohibited except that the catching of all buffalo fish in the Lake Erie district, before March* 15, 1916, *is prohibited.*

By section 1443, *G. C., the buying, selling, etc., of all such fish unlawfully caught, as above determined, is prohibited and subjects all offenders to the penalty of section* 1445, *G. C.*

COLUMBUS, OHIO, July 23, 1915.

HON. C. F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I have yours of June 29, 1915, requesting my written opinion as follows:

> "I desire your interpretation of section 1442, General Code, with respect to the right of fish companies to sell the three and ten per cent. of fish excepted by this section.
>
> "I would be very pleased to receive your answer at your earliest convenience in view of the fact that some of our wardens are of the opinion that the fish companies are continuously violating this section all along the north shore."

Section 1442, G. C., to which you refer, as amended in 103 O. L., page 523, provides as follows:

> "It shall be unlawful for any person to take or catch a buffalo fish in the Lake Erie fishing district before March 15, 1916, nor after that date such fish less than sixteen inches in length. No person shall have in his possession a white fish less than one and three-quarters pounds in the round, a cat fish less than fifteen inches in length, a sturgeon less than four feet in length, a carp less than sixteen inches, white bass less than ten inches, or a perch, bull head or pike less than nine inches in length. All such fish caught of a less length or weight than herein described shall be immediately released alive while the nets are being lifted in such a manner as not to injure them. No cat fish or sturgeon shall be brought ashore with its head or tail removed or in such condition that its length cannot be measured. Nothing herein shall prohibit the catching of such fish with hook and line and not for profit; and the having in possession or failing to return to the water alive in the manner provided of a quantity of such undersized white fish, cat fish, sturgeon, carp, buffalo fish, white bass, perch or bull head not exceeding in weight three per cent. and all such

pike not exceeding in weight ten per cent. of each boat load or part thereof, lot, catch or haul, brought into port of each variety of fish shall not be deemed a violation of this section."

By section 1442, G. C., supra, the having in possession fish of the kind specified in such section, of a less length or weight than the minimum therein prescribed, is made unlawful and is in violation of the section, rendering the person so offending liable to the penalty prescribed by section 1445, G. C., subject, however, to the limitation of the proviso contained in the last clause of said section, to wit: "Nothing herein shall prohibit the catching of such fish with hook and line and not for profit; and the having in possession or failing to return to the water alive in the manner provided of a quantity of such undersized white fish, cat fish, sturgeon, carp, buffalo fish, white bass, perch or bull head not exceeding in weight three per cent., and all such pike not exceeding in weight ten per cent. of each boat load or part thereof, lot, catch or haul, brought into port of each variety of fish shall not be deemed a violation of this section." That is to say, the prohibition against having in possession fish of the kinds stipulated, of a less size or weight than the minimum prescribed in section 1442, G. C., is operative only to the excess of such undersized fish over the said three per cent. and ten per cent. in weight of such varieties of fish, respectively, of each boat load or part thereof, catch or haul, brought into port, and caught otherwise than with hook and line, and not for profit; and the section does not purport to impose a restriction against the taking or having in possession any such undersized fish when the quantity of such undersized fish of each variety, to wit: white fish, cat fish, sturgeon, carp, buffalo fish, white bass, perch or bull head, does not exceed in weight three per cent. of the whole quantity of each such variety, respectively; or where the quantity of undersized pike does not exceed, in weight, ten per cent. of the whole quantity of such pike of each boat load, etc., brought into port; nor, of course, does the section restrict the taking of such fish with hook and line and not for profit.

While the language of the section is "no person shall have in possession" the various kinds of fish under the minimum size therein prescribed, it is clear from the context that this legislation has for its primary object the regulation of the taking or catching of the several varieties of fish therein enumerated, and from the further fact that the taking or catching of such fish, and the failure to release them alive as required in said section, involves and constitutes a having of such fish in possession, the conclusion is unavoidable that the taking or catching, with a failure to release such undersized fish of the varieties mentioned, in excess of the three per cent. and the ten per cent. In weight of the said varieties, respectively, of each boat load, etc., constitutes a having of such fish in possession within the meaning of said section 1442, G. C., and is prohibited.

Having determined, therefore, that the undersized fish in excess of the three per cent. and ten per cent. of the several varieties, respectively, taken and not released, as required in said section, except fish caught with hook and line, and not for profit, were caught in a manner prohibited and in violation of section 1442, G. C., the application of the provisions of section 1443, G. C., becomes comparatively easy, and the buying, selling, offering for sale or having in possession any of such fish so unlawfully caught, would be a violation of said latter section, subjecting the offender to the penalty prescribed by section 1445, G. C.

Section 1443, G. C., reads as follows:

"No person shall buy, sell offer for sale or have in his possession a fish caught out of season or in any manner prohibited, or a fish caught unlawfully outside the state of Ohio."

It may be observed, however, that in the very nature of the case, prosecutions under the last named section would often be fraught with difficulty in respect to the tracing of the identity of the fish, constituting the basis of the prosecution, for the purpose of establishing the unlawful catching under the provision of section 1442.

To sum up, therefore, I interpret sections 1442, G. C., and 1443, G. C., as prohibiting the taking or catching of any buffalo fish in the Lake Erie fishing district before the 15th day of March, 1916—section 1442; and the buying, selling, offering for sale or having in possession any of such fish so taken,—section 1443, G. C.; the taking or catching of any white fish, cat fish, sturgeon, carp, white bass, perch, bull head or pike, or any buffalo fish not caught in Lake Erie, of a less size or weight than the minimum prescribed in section 1442, G. C., and the failure to release same alive so as to not injure them, as prescribed therein, in excess of the three per cent. and ten per cent. of each variety of such fish, respectively, in each boat load, haul or catch brought to port, except the catching of such fish with hook and line and not for profit, constitutes a having of such fish in possession within the meaning of section 1442, G. C., and is prohibited; the buying, selling, offering for sale or having in possession any of such fish so unlawfully caught, is prohibited by section 1443, G. C., rendering the offender liable to the penalty of section 1445, G. C.; the catching and retaining of such undersized fish of the several varieties enumerated in section 1442, G. C., not in excess of the three per cent. and ten per cent. in weight of each variety, respectively, including buffalo fish caught in Lake Erie after March 15, 1916, of each boat load or catch, etc., is not prohibited by the provision of section 1442, and there is no other section dealing with this subject-matter or prohibiting the catching of such fish; hence the buying, selling, offering for sale or having in possession of such undersized fish, not in excess of the three per cent. and ten per cent., respectively, of the several varieties, as provided in section 1442, is not unlawful.

Respectfully,
EDWARD C. TURNER,
Attorney General.

644.

RIGHT OF ALIENS TO HOLD AND INHERIT REAL PROPERTY IN OHIO.

COLUMBUS, OHIO, July 23, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—I am in receipt of your request of July 19, 1915, reading as follows:

> "The enclosed communication from Secretary of State Lansing is self-explanatory. I very respectfully request that you give me a statement of the law touching the matters inquired into by him. Also appropriate citations so that I may inform him fully as to what Ohio has done relative to the subject-matter of the treaty of 1853."

Also enclosing a letter under date of July 13, 1915, from Hon. Robert Lansing, secretary of state, reading as follows:

"I have the honor to advise you of the receipt by this department of a note from the French ambassador at Washington wherein he requests definite information concerning the laws of the several states of the Union with regard to the right of aliens to hold and inherit real property in such states.

"As you are doubtless aware, there was concluded between the United States and France on February 23, 1853, a convention by the provisions of article VII of which the French government extended to American citizens in France the same rights with respect to real and personal property and to inheritance as those enjoyed by French citizens; the government of the United States agreed that, in all those states whose then existing laws permitted, French citizens should stand on the same footing with respect to similar rights as citizens of the United States; and the president of the United States engaged to recommend to those states, by whose then existing laws aliens were not permitted to hold real estate, the passage of laws conferring this right. The French government, however, made reservation in this treaty 'of the ulterior right to establish reciprocity in the matter of possession and inheritance.'

"The French ambassador gives expression in the above-mentioned note to his belief that French citizens are permitted to possess and inherit real property in a lesser number of states at the present time than at the date of the conclusion of this treaty and intimates that the information requested by him is to be taken into consideration by the French government in connection with the question as to the advisability of the enactment of retaliatory legislation.

"I have the honor to solicit your co-operation in the matter of complying with this request of the French ambassador to the extent of furnishing the department with a copy of any provision of the constitution of the state of Ohio relating to the ownership of land by aliens, together with copies of all existing laws on the subject which have been enacted by the state legislature and also copies of such similar laws, constitutional and legislative, as were in force in your state on February 23, 1853.

"I shall appreciate it if you will accord to this matter your very early consideration."

I beg to advise you that aliens may acquire, hold, alienate, devise, bequeath and inherit or receive real and personal property in this state under exactly the same conditions as those applying to native born citizens.

Section 8589 of the General Code of Ohio provides:

"Section 8589. No person who is capable of inheriting shall be deprived of the inheritance by reason of any of his ancestors having been aliens. Aliens may hold, possess and enjoy lands, tenements, and hereditaments, within this state, either by descent, devise, gift, or purchase, as fully and completely as any citizen of the United States or this state can do."

Section 10537 of the General Code of Ohio provides as follows:

"Section 10537. A will executed, proved, and allowed in a country other than the United States and territories thereof, according to the laws of such foreign state or country, may be allowed and admitted to record in this state in the manner and for the purposes mentioned in the following sections."

Section 10538 of the General Code of Ohio provides as follows:

"Section 10538. A copy of the will and probate thereof, duly authenticated, must be produced by the executor, or by a person interested therein, to the probate judge of the county in which there is any estate upon which the will may operate, whereupon such judge shall continue the motion to admit it to probate for two months. Notice of the filing of such application must be given to all persons interested, in some public newspaper printed or in general circulation in the county where the motion is made, at least three weeks consecutively. The first publication shall be at least forty days before the time set for the final hearing of the motion."

Section 10539 of the General Code of Ohio provides as follows:

"Section 10539. If, on such hearing, it appears to the court that the instrument ought to be allowed in this state, it shall order the copy to be filed and recorded. The will, and the probate and record thereof, then shall have the same force and effect as if the will originally had been proved and allowed in that court, in the usual manner. Nothing herein contained shall give any operation or effect to the will of an alien, different from what it would have had if originally proved and allowed in this state."

Section 10540 of the General Code of Ohio provides as follows:

"Section 10540. After allowing and admitting to record a will, pursuant to either of the next four preceding sections, the court may grant letters testamentary thereon, or letters of administration with the will annexed, and must proceed in the settlement of the estate found in this state. The executor taking out letters, or the administrator with the will annexed, shall have the same power to sell and convey the real or personal estate, by virtue of the will or the law, as other executors or administrators with the will annexed."

The substance of section 8589 of the General Code, above referred to, was originally enacted on February 3, 1804, to be found in the codification in 29 O. L., 463. The section at that time provided:

"That it shall be lawful for any and all aliens that now may have, or that hereafter shall be entitled to have, within this state, any lands, tenements or hereditaments, either by purchase, gift, device or descent, to hold possess and enjoy the same, as fully and completely as any citizen of the United States or this state can do, subject to the same laws and regulations, and not otherwise."

In 1860, this section was carried verbatim in Swan & Critchfield's revision of the statutes and appears in vol. 1, page 69. Later this was carried into the Revised Statutes as section 4173.

On February 24, 1831, there was enacted a law, section 12 of which provided:

"That in making title by descent it shall be no bar to a party that an ancestor through whom he or she derives his or her estate from the intestate is or hath been an alien. 29 O. L., 254."

This was amended by the act of March 14, 1853, to read:

"No person who shall be capable of inheriting shall be deprived of the inheritance by reason of any of his or her ancestors having been aliens."

This section was carried verbatim into Swan & Critchfield's revision of the statutes of 1860, as found in section 14, page 504, volume I, and later merged into section 4173 of the Revised Statutes.

Sections 10537 to 10540 of the General Code, above quoted, were enacted on March 23, 1840, in almost the identical language as now appears in the General Code. See sections 29, 30 and 31 of the act of March 23, 1840, 38 O. L., 124.

On May 3, 1852, for the purpose of changing the jurisdiction from the common pleas to the probate court, these sections were re-enacted as sections 27, 28, 29 and 30 of the act of May 3, 1852, 50 O. L., 301-302.

I am returning herewith Secretary of State Lansing's letter of July 13, 1915, together with the government franks.

Respectfully,
EDWARD C. TURNER,
Attorney General.

645.

STATE BOARD OF EMBALMING EXAMINERS—VOUCHER NO. 33—SAME IS FOR A DEFICIENCY—CANNOT BE PAID UNTIL LEGISLATURE AUTHORIZES EXPENDITURE.

Voucher No. 33 of the state board of embalming examiners cannot be paid without authority of the legislature, the same being for a deficiency and having been already presented to the legislature and not allowed.

COLUMBUS, OHIO, July 24, 1915.

HON. GEORGE BILLOW, *Secretary, The Ohio State Board of Embalming Examiners, Akron, Ohio.*

DEAR SIR:—I am in receipt of your letter of July 8, 1915, wherein you request:

"In what manner and upon whose authority is the herewith enclosed department voucher No. 33 to be paid? For explanation of same see State Auditor Donahey's letter, enclosed."

From your letter it appears that the Ohio state board of embalming examiners, prior to the amendment of section 24, 104 O. L., page 178, was in full control of the funds paid to it as fees, and from such fund paid all its expenses and placed its surplus, well secured, out to bear four per cent. interest. Said board, through its secretary, paid the amount of money which it had on hand into the state treasury, in pursuance of said section 24 as amended in 104 O. L., 178, but that the legislature had failed to make any appropriation to meet the expenses of the board, notwithstanding the passage of the act amending said section 24; that such being the fact an emergency appropriation was made by the emergency board which proved insufficient, whereupon another allowance was made by said board, which was intended to last until February 15, 1915; that said allowances made by the emergency

board were not sufficient to pay all the expenses of said board, leaving a number of bills unpaid; that said bills were, each and every one of them, submitted to the house finance committee of the general assembly, but said committee failed to include all of said bills in the sundry appropriation bill which was passed at the last session of the legislature, leaving voucher No. 33 unpaid.

The said voucher No. 33 is a voucher presented by the board, on behalf of its secretary, for salary, railroad fares and expenses, amounting to $132.25.

The letter of the state auditor referred to is as follows:

"June 16, 1915.

"Hon. George Billow, Secretary, State Embalming Board, Akron, Ohio.

"My Dear Mr. Billow:—I have your favor of June 13th, with relation to the appropriation to pay hotel and other bills which were left in our charge.

"We certified to the general assembly the claims that were left with us by you, but the general assembly only appropriated $112.60. I do not know for what reason they cut these bills, but that is what they did. Therefore we can only pay from the state treasury the amount that was appropriated. We have paid all the bills except one made payable to you in the sum of $132.25, which we are enclosing with this letter.

"I would suggest that you write me a statement of fact concerning this bill, together with the amount of funds that you have placed in the treasury to the credit of the embalming board, and that the last emergency board had promised to take care of you if you paid your money into the treasury, and I will bring it to the attention of the emergency board and try to have the amount appropriated to you.

"I am not responsible for the law or for the action of the general assembly, but you can rest assured that I will do what I can to carry out my agreement to you sometime ago, to have the expenses of the board taken care of when your money was turned into the treasury.

"Very truly yours,
"A. V. DONAHEY,
"Auditor of State."

It is to be noted that the expenses incurred and salary earned were incurred and earned prior to February 15, 1915. In house bill No. 314 an appropriation was duly made to the state board of embalming examiners for salary of secretary and maintenance of office, but such appropriation was not available for liabilities incurred prior to February 16, 1915, nor incurred subsequent to June 30, 1915. Appropriations were also made to said board in house bill No. 701, one under section 2 thereof and one under section 3 thereof, but the appropriation made under section 2 thereof cannot be expended to pay liabilities existing prior to July 1, 1915, nor under section 3 thereof existing prior to July 1, 1916.

Sections 2312, et seq., G. C., 103 O. L., 444, provides for an emergency board, and section 2313 provides as follows:

"In case of any deficiency in any of the appropriations for the expenses of an institution, department or commission of the state for any biennial period, which may lawfully and by any unforeseen emergency happen when the general assembly is not in session, the trustees, managers, directors or superintendent of such institution, or the officers of such de-

partment or commission, may make application to the board for authority to create obligations within the scope of the purpose for which such appropriations were made."

In the case in question there is no claim that there is any deficiency in the appropriation made by house bill No. 314, nor by house bill No. 701. Therefore, the emergency board is without authority to appropriate for the unpaid voucher in question.

Section 2312, et seq., G. C., was amended at the recent session of the legislature, 106 O. L., page 182, and said act will become effective on July 30, 1915.

Section 2313, as amended therein, states:

"In case of any deficiency in any of the appropriations for the expenses of an institution, department or commission of the state for any biennial period, or in case of an emergency, requiring the expenditure of money not specifically provided by law, the trustees, managers, directors or superintendent of such institution, or the officers of such department or commission, may make application to the emergency board for authority to create obligations within the scope of the purpose for which such appropriations were made or to expend money not specifically provided for by law."

This act, when it becomes effective, will not cover the situation for the reason, first: that there is no deficiency in the appropriations for the period covered by such appropriations, nor could it be considered as a case of emergency requiring the expenditure of money not specifically provided by law. These are the only provisions of law which would relieve, without appeal to the legislature, and the said provisions, not covering the payment of money such as is shown by the voucher in question, I am of the opinion that the only way in which said voucher can be paid is by an appeal to the legislature.

Respectfully,
EDWARD C. TURNER,
Attorney General.

646.

STATE ARMORY BOARD—LANCASTER ARMORY—ARRANGEMENT MADE WITH CREDITORS OF GENERAL CONTRACTOR FOR AN ARMORY COMPROMISING SAID CLAIMS WITH CONSENT OF SAID CONTRACTOR, APPROVED.

Arrangement made by state armory board with creditors of general contractor for an armory, compromising said claims with consent of said contractor, approved.

COLUMBUS, OHIO, July 24, 1915.

HON. BYRON L. BARGAR, *Secretary, Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—Under date of July 12, 1915, you wrote me as follows:

"After completion of the Lancaster armory, it was found that several of the creditors of the contractor had presented orders on the state; that the contractor's indebtedness arising from construction of armory amounted

to more than the amount due by the state to the contractor; that the creditors have not been paid by uniform ratio, the largest one having never been paid anything.

"In order to take care of the contractor's creditors it became necessary to secure the co-operation of contractor's banker, to whom he claimed he owed over $3,600.00, borrowed by contractor on work at Lancaster armory.

"Under these circumstances, the armory board has taken the action indicated by the enclosed extract from its minutes. The board's idea was to take care of the creditors and not to burden your office with unnecessary details. Of course our proposed action is subject to your approval and we, therefore, request same. If the proposed action is not the right method of adjustment, please indicate what we should do in the premises."

Enclosed with said letter was an extract from the minutes of a meeting of your board relative to the matter, and is as follows:

"EXTRACT FROM THE MINUTES OF THE MEETING OF SUNDAY, JULY 11, 1915, RELATIVE TO LANCASTER ARMORY.

"LANCASTER ARMORY. The committee on settlement of the Lancaster armory creditors' claims to wit: Colonel Bryant and Colonel Bargar submitted the following report:

"'After several conferences with contractor and his creditors; the principal creditor, The Bank of Leipsic, agreed that the board might accept orders if the contractor accomplish payments and compromise with all other creditors relating to construction of Lancaster armory, and that thereupon, said Bank of Leipsic would accept an order from contractors, Meyers Bros. for the balance remaining due by the state to said contractors, and thereafter rely upon Meyers Bros, solely for payment of remainder of bank's claim. Thereafter all of the creditors signed statements specifying the exact amount which they would accept in full satisfaction of their claims as subcontractors, material men or for labor, and these signed statements were found to be as follows:

The J. E. Payne Co., Columbus	$48 23
C. R. Carling, Lancaster	85 10
W. T. Shrieve & Son, Lancaster	75 00
Alten's Foundry & Mch. Works, Lancaster	15 00
The National Roofing Tile Co., Lima	200 00
Lancaster Builders Supply Co., Lancaster	**31 12**
The Waller Bros. Stone Co., McDermott	403 52
F. O. Schoedinger, Columbus	512 80
The S. H. Thomson Mfg. Co., Dayton	97 00
The Martens Hardware Co., Lancaster	36 31
J. D. Van Gundy, Lancaster	34 00
Bockway Plumbing & Supply Co., Huntington	2,795 73
Louis J. Snyder, Lancaster	112 91
H. Newhouse & Co., Columbus	126 62
Jos. H. Goldcamp & Co., Lancaster	378 67
Central Marble & Tile Co., Columbus	639 65
Herbert D. Pearce, Lancaster	145 50
J. B. Orman & Bros., Lancaster	218 94

"'The amount found due to contractors by the state is $7,070.07. Therefore the allowance to said bank under foregoing agreement is found to be as follows:

Amount due contractors by state	$7,070 07
Amount claimed by other creditors	5,956 10
Balance claimed by bank	$1,113 97

"'The committee further reports that all of the uncompleted details of the construction work of said armory as reported in the minutes of June 26, 1915, have been completed except as to the tablet to be furnished by creditor, The S. H. Thomson Mfg. Co., of Dayton, Ohio.'

"After consideration of the report, it was unanimously

"RESOLVED, That the total amount due on construction contract on Lancaster armory and remaining unpaid is $7,070.07. That the contractor has complied with the excepted details mentioned in minutes of June 26, 1915, except as to the tablet to be furnished by one subcontractor, that said general contractors, Meyers Bros., through their authorized attorney, J. M. Sheets, have presented orders directing a distribution among their armory creditors of the balance due by the state to Meyers Bros. That the sums so directed to be paid are due to general contractors and are hereby allowed to their assignees pursuant to the schedule shown in the foregoing report of two members of this board. That the action taken today is subject to the approval of the attorney general before payments are made."

At my request you subsequently certified that the tablet referred to in the foregoing minutes had been furnished and the work of construction of the armory completed. Said certificate is as follows:

"SUPPLEMENT TO THE ARMORY BOARD PROCEEDINGS OF JULY 11, 1915, RELATIVE TO SETTLEMENT FOR THE LANCASTER ARMORY.

"We hereby certify that the tablet referred to in said minutes has been furnished by The S. H. Thomson Mfg. Co., of Dayton, Ohio, thereby completing the last detail of the construction work of said armory to be performed by general contractors, Meyers Brothers.

"We further certify that said Lancaster armory has been inspected and accepted by the board for and on behalf of the state of Ohio from general contractors, Meyers Brothers.

"At the same time you submitted a form of the assignment which has been taken from each of the creditors of the contractors for said building which is in the form following:

"'_____1915.

"'To Meyers Brothers as General Contractors on Lancaster Armory:

"'The following compromise is proposed solely on condition that payment thereof be made directly by the state of Ohio from the existing balance of construction fund for said armory; on said condition _____ hereby agree to accept the sum of $_____ in full satisfaction and payment of the attached itemized claim which includes all claims of every kind due _____ from Meyers Bros., contractors, because of the con-

struction of the Sherman Memorial Armory at Lancaster, Ohio. This proposition for compromise will be rescinded as soon as it is ascertained that payment will not be made by state from said balance.

"'(Signed by creditor)----------

"'I hereby assign to ---------- such part of the compensation coming to me for the construction of the Sherman Memorial Armory at Lancaster, pursuant to contract with the Ohio state armory board as amounts to $----------, and authorize and direct the said board to pay said sum to ----------, and charge the same to my account as a payment to me.

"'(Signed by contractor)----------'"

Section 243, G. C., provides as follows:

"The auditor of state shall examine each claim presented for payment from the state treasury, and, if he finds it legally due and that there is money in the treasury duly appropriated to pay it, he shall issue to the person entitled to receive the money thereon a warrant on the treasurer of state for the amount found due, take a receipt on the face of the claim for the warrant so issued, and file and preserve the claim in his office. He shall draw no warrant on the treasurer of state for any claim unless he finds it legal, and that there is money in the treasury which has been duly appropriated to pay it."

I can see no reason why the aforesaid agreement of the creditors with the contractor should not be carried out and warrants issued directly to each creditor. Section 243 provides that the auditor of state shall issue his warrant "to the person entitled to receive the money thereon." The assignment, a copy of which was hereinbefore set out, was that the contractor has duly assigned to each of his creditors a proportionate part of the claim due to him from the state of Ohio, and if the auditor of state is satisfied that the money is legally due to the original contractor and that the assignment has been properly made to the contractor's creditors, he would be authorized to draw his warrant upon the treasurer of state for the proportionate share of the amount still due the contractor to which each of the several creditors would be entitled, provided, of course, that there is money in the treasury which has been duly appropriated to pay the same.

I am herewith returning to you the copy of the assignment which was signed by the various creditors.

Respectfully,
EDWARD C. TURNER,
Attorney General.

647.

OFFICES COMPATIBLE—MEMBER OF GENERAL ASSEMBLY—JUSTICE OF PEACE.

A member of the general assembly may legally serve as justice of the peace.

COLUMBUS, OHIO, July 24, 1915.

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

GENTLEMEN:—I have your communication of July 21, 1915, which reads as follows:

> "May a member of the general assembly, viz.: a member of the senate of said body, legally serve as justice of the peace, or does his act of qualification and entering upon service as member of the general assembly work a forfeiture of his office as justice of the peace?"

Section 4 of article II of the constitution of Ohio reads as follows:

> "No person holding office under the authority of the United States, or any lucrative office under the authority of this state, shall be eligible to, or have a seat in the general assembly; but this provision shall not extend to township officers, justices of the peace, notaries public, or officers of the militia."

From the language of the above quoted section it appears that the constitution does not prohibit a person from being a member of the general assembly and holding the office of justice of the peace at the same time. While the language of the section does not in terms declare that a person may be a member of the general assembly and at the same time hold the office of justice of the peace, yet that is a fair inference from the language used. In the absence of constitutional or statutory inhibition, the same person may hold two or more offices at the same time unless they are in law incompatible. There is no statutory inhibition against a member of the general assembly holding the office of justice of the peace, and I am unable to say that the two offices are in law incompatible. The constitutional provision referred to does not prohibit, and in fact impliedly sanctions the holding of the office of justice of the peace by a member of the general assembly, and I therefore conclude that a member of the general assembly may legally serve as justice of the peace, and that the act of a member of the general assembly in qualifying and entering upon his service as such member does not work a forfeiture of the office of justice of the peace held by him.

Respectfully,
EDWARD C. TURNER,
Attorney General.

648.

DESIGNATION OF THOSE REQUIRED TO REPORT CONVICTIONS OF VIOLATION OF LIQUOR LAWS TO STATE LIQUOR LICENSING BOARD—ALL CONVICTIONS OF LICENSEES FOR OFFENSES UNDER LAWS RELATING TO SALE OF INTOXICATING LIQUORS, REGARDLESS OF WHERE LAWS ARE FOUND IN GENERAL CODE—REPORT ALL CONVICTIONS OF LICENSEES OF FELONIES.

Clerks of courts, mayors, justices of the peace and judges of courts having no clerks are required by the provisions of section 57 of the liquor licensing law of 1913, section 1261-72, G. C., to report to the state board all convictions of licensees for offenses under laws relating to the sale of intoxicating liquors regardless of where such laws may be found in the General Code and to so report all convictions of licensees of felonies.

COLUMBUS, OHIO, July 24, 1915.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—Under date of July 22, 1915, I received a request for an opinion, which is deemed to be of general public interest, from Hon. August Kirbert, municipal court clerk, of Cincinnati, Ohio, and am therefore directing an opinion on the same to you.

The request referred to is as follows:

"Section 57 of the act to provide for license to traffic in intoxicating liquors (103 O. L., 216) found on page 241, provides 'that it shall be the duty of the clerk of every court in the state to notify the state board (state liquor board) of any conviction of any licensee before said court of an offense under the laws "relating to the sale of intoxicating liquors," or of a felony and the state board shall forthwith notify every county board to that effect.'

"In the General Code, part 4, title I, chapter 17, sets out offenses relating to intoxicating liquors and are sections 13194 to 13249 of the General Code.

"Part 4, title I, chapter 13, sets out offenses of 'Sabbath desecration' and are sections 13044 and 13053. Under this chapter section 13050 provides for closing of saloons on Sunday.

"Now it occurs to me that where a defendant is prosecuted under section 13050, it is not the duty of the clerk to notify the state board as provided in section 57 of the liquor license act, and that the clerk is only required to notify of convictions under sections in part 4, title I, chapter 17 and of any conviction of the penal sections of the act itself.

"It appears to me that prosecutions and convictions under section 13050 are against Sabbath desecration as shown by the caption to the chapter and are not against the laws relating to the sale of intoxicating liquors which it seems to me are enumerated in chapter 17 of the same part and title of the Code."

Section 57 of the liquor licensing law, being section 1261-72 of the General Code, provides as follows:

"It shall be the duty of the clerk of every court in this state, and every mayor, justice of the peace and judge of a court having no clerk

to notify the state board of any conviction of any licensee before said court of an offense under the laws relating to the sale of intoxicating liquors, or of a felony, and the state board shall forthwith notify every county board of that fact."

This section, it seems, should be read in connection with section 34 of the liquor license law, being section 1261-49, G. C., which is as follows:

"If any licensee within the jurisdiction of a county licensing board has been once convicted during the license year of an offense under laws or ordinances concerning the sale of intoxicating liquors, and if said board with due notice to the licensee and after a full hearing granted to him finds that the said licensee has, during said license year and after said conviction, violated the said laws or ordinances, the said board may suspend the license of the said licensee once for a period not to exceed ten days.

"If, after such conviction and suspension offenses are, during the said license year, again repeated, the said board may, with due personal notice to the licensee, served not less than five days before the hearing, and after a full hearing granted to said licensee, revoke the said license of said licensee; and notice of such revocation shall forthwith be served upon the person whose license is so revoked.

"Upon a conviction under said laws and ordinances as for a second offense as provided for in section 54 hereinafter the county board may, if error proceedings are taken to the judgment of the court in which conviction is had, suspend the license of the licensee so convicted for the remainder of the license year. Should, however, the judgment of conviction be reversed prior to the termination of said license year then such suspension shall immediately terminate. During such suspension no new license shall be granted to take the place of the license so suspended."

Reading these two sections together, bearing in mind that the members of the state liquor licensing board are sworn to enforce the spirit of the license law as well as its letter, it would seem quite clear that the purpose of section 57 is to better enable the state liquor licensing board to see that section 34 is properly administered and should, therefore, be given such construction as would as fully accomplish the purpose sought as its terms will fairly admit.

I am, therefore, of opinion that it is the duty of the clerk of every court in this state, every mayor, justice of the peace and judge of a court having no clerk, to make report to the state liquor licensing board of every conviction of a licensee for any offense under any statute of this state relating to the sale of intoxicating liquors regardless of where such statute may be found in the General Code, and to report all convictions of licensees for felonies.

It will be further noted that section 13050, G. C., to which reference is made, was originally enacted as a part of section 11 of the act of May 14, 1886, 83 O. L., 160, which is entitled "An act providing against the evils resulting from the traffic in intoxicating liquors" and was subsequently amended in 85 O. L., 260 and 95 O. L., 87. From this it conclusively appears that this section of the General Code is a law relating to the sale of intoxicating liquors within the meaning of section 1261-72, G. C., supra, notwithstanding the action of the codifying commission in placing it under the heading of "Sabbath desecration."

Respectfully,

EDWARD C. TURNER,

Attorney General.

649.

APPOINTING BOARD FOR DISTRICT LIQUOR LICENSING BOARD—WHERE AND WHEN SUCH BOARD SHOULD MEET.

The appointing board provided for in section 1261-22b, G. C., 106 O. L., 562 will be required to meet at the court house of the most populous county of the district at twelve o'clock noon on Thursday, September 9, 1915, and will then consist of those persons lawfully holding the offices of county clerk, recorder and president of the board of county commissioners of the several counties of the district.

COLUMBUS, OHIO, July 24, 1915.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I am in receipt of a number of inquiries relative to amended senate bill No. 307, and am taking the liberty of directing an opinion thereon to you.

The above act provides that the state shall be divided into thirty-four licensing districts therein designated, in each of which districts there is created an appointing board.

Section 3 of the act, section 1261-22b, G. C., 106 O. L., 562, is as follows:

> "For the purposes of this act the county clerks, recorders, and presidents of boards of county commissioners shall constitute the appointing board."

Section 4 of the act, section 1261-22c, G. C., 106 O. L., 562, provides in part as follows:

> "Five days after this act becomes effective the said appointing boards shall meet at the court house in the most populous county of their respective district at twelve o'clock, noon, at which time and place such boards shall organize by selecting a president and secretary, to wit:"

The first inquiry to be considered is, who will constitute the appointing boards of the several districts?

Amended senate bill No. 307 was filed in the office of the secretary of state June 5, 1915, and if no referendum petition thereon is filed will go into effect September 4, 1915.

By the provisions of section 1261-22b, G. C., supra, county clerks, recorders and presidents of the boards of county commissioners are made ex officio members of the district appointing boards. It may be now observed that it is the particularly designated officers who are so made members of the appointing boards during their continuance as such, rather than the person holding such offices, at the time amended senate bill No. 307 goes into effect. That is to say, no person may be a member of the appointing board unless he is at the same time lawfully holding one of the enumerated offices and on the contrary when any particular individual for any reason ceases to hold one of the offices enumerated, he likewise ceases to be a member of the appointing board. So that by force of law, on September 4, 1915, all those persons holding the offices of county clerk, recorder and president of the board of county commissioners will automatically become members of the district appointing boards and upon the expiration of their terms

of office as county clerk, recorder or president of the board of county commissioners, they will also automaticaly cease to be members of the district appointing board.

Under the provisions of sections 2395 and 2400, G. C., the current terms of members of the board of county commissioners will expire at 12 o'clock midnight on the day preceding the third Monday of September, 1915, when their successors are required to organize. Under section 2750, G. C., the current term of the county recorders will expire at 12 o'clock midnight on September 5, 1915, and by the provisions of section 2867, G. C., the current term of the clerk of courts will expire at 12 o'clock midnight on the day preceding the first Monday of August, 1915.

From this it conclusively appears that those persons who succeed to the office of county clerk on the first Monday of August, 1915, and those persons at present holding the offices of county recorder and president of the board of commissioners in the absence of death, resignation or removal from office will, on September 4, 1915, automatically become members of the district appointing board, and that on September 6, 1915, the county recorder will be succeeded as a member of the appointing board by his successor as county recorder.

Further inquiry has been made as to when, under amended senate bill No. 307, liquor traffic supervisors may be appointed.

Assuming that there will be no referendum petition filed upon this law, this question involves a consideration of section 29 of amended senate bill No. 307, in connection with that part of section 4 thereof above quoted. The provisions of section 29 (106 O. L., 570) are as follows:

> "If the taking effect of this act is delayed by referendum, or other cause, beyond the first day of September, 1915, then, upon the taking effect of this act the state liquor traffic inspector shall be appointed by the governor, and within five days after the official result is announced, the appointing boards shall meet and appoint liquor traffic supervisors in the manner provided herein. Their term of office shall expire on the tenth day of September, 1917, or when their successors are appointed. As far as applicable all dates shall be modified to conform to the time of this act taking effect, provided, however, that any license granted under this act shall expire in May, 1917, as provided herein."

Since this law does not go into effect until after September 1, 1915, section 29 is apparently in conflict with section 4, in that section 4 provides that "five days after this act becomes effective," and section 29 provides that "within five days after the official result is announced" the appointing board shall meet, etc.

It seems quite clear, however, from an examination of the whole of section 29, that it was intended to apply only to the condition of the law taking effect after a referendum thereon, or upon some contingency other than the expiration of the constitutional ninety-day period.

It will be noted that in section 4 the day, the place and the hour of the meeting is definitely fixed, thus avoiding all necessity of further notice thereof to any member of the appointing board, and that nowhere is there found any provision for notice of the time of holding this first meeting of the appointing board except as fixed in that section, and that no authority is conferred in the bill upon any member, members or other person to fix any other time or to call a meeting of such board. I am therefore inclined to the view that these two sections in this particular have substantially the same meaning, and that the plain intent of the legislature was that the appointing board should meet at 12 o'clock

noon five days after the law becomes effective. Any other construction of section 29 might give rise to much confusion for no substantial purpose, if it did not render it so indefinite and uncertain as to make it inoperative.

I am therefore of opinion that if no petition for a referendum of this law is filed, the district appointing boards will be thereby required to meet at twelve o'clock noon on Thursday, September 9, 1915, at the court house in the most populous county of the district, that no notice or further arrangement for such meeting is in any way required, that the appointing boards will then consist of those persons who are on that day lawfully holding the offices of county clerk, recorder and president of the board of county commissioners, of the several counties of the district.

Respectfully,
EDWARD C. TURNER,
Attorney General.

650.

UNDER SECTION 4738, G. C., 106 O. L., 396, COUNTY BOARD OF EDUCATION WITHOUT AUTHORITYY TO CREATE A SUPERVISION DISTRICT IN WHICH LESS THAN THIRTY TEACHERS ARE EMPLOYED.

Under section 4738, G. C., as amended, 106 O. L., 396, the county board of education will be without authority to create a supervision district in which less than thirty teachers are employed.

COLUMBUS, OHIO, July 26, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—I have your communication of July 21, 1915, which reads as follows:

> "Oregon and Jerusalem townships in Lucas county are separated from the main body of the county by the Maumee river and the city of Toledo. This territory, containing twenty-four schools, is not contiguous to any other part of the county school district. The district superintendent would have to travel ten miles from this territory to reach the outer limit of the nearest school in Washington, the nearest township, and to take six schools from Washington township would destroy a natural unit of thirty-one schools, which would cause confusion and great inconvenience.
>
> "Query: Because of a lack of compact and contiguous territory sufficient for thirty schools, could these two townships with twenty-four schools be recognized by the state as a supervision district, and would such district be entitled to state funds for supervision purposes. This opinion is desired at your earliest convenience, since action must be taken July 27, 1915."

Your inquiry involves an interpretation of the language of section 4738, G. C., as amended by amended senate bill No. 282, passed by the general assembly May

27, 1915, approved by the governor on the same date and filed in the office of the secretary of state May 28, 1915, and which will become effective August 27, 1915. This act is found in 106 O. L., 396, and section 4738 as amended reads as follows:

> "Section 4738: The county board of education shall divide the county school district, any year, to take effect the first day of the following September, into supervision districts, each to contain one or more village or rural school districts. The territory of such supervision districts shall be contiguous and compact. In the formation of the supervision districts consideration shall be given to the number of teachers employed, the amount of consolidation and centralization, the condition of the roads and general topography. The territory in the different districts shall be as nearly equal as practicable and the number of teachers employed in any one supervision district shall not be less than thirty. The county board of education shall, upon application of three-fourths of the presidents of the village and rural district boards of the county, redistrict the county into supervision districts. The county board of education may at their discretion, require the county superintendent to personally supervise not to exceed forty teachers of the village or rural schools of the county. This shall supersede the necessity of the district supervision of these schools."

As the above quoted section, in its amended form, will not go into effect until August 27, 1915, no action can be taken under the same until on or after that date. It will then become mandatory upon the county board of education to divide the county school districts into supervision districts, each to contain one or more village or rural school districts, and it is provided that the action of the county board shall take effect on the first day of the following September. In the year 1915, this action will have to be taken between August 27th and 31st, inclusive, and will be effective on September 1st, of this year.

The statute prescribes a number of restrictions under which the county board must act in making this division. It is provided that the territory of a supervision district shall be contiguous, but the word "contiguous" is not always used in the sense of "adjoining." In the Standard dictionary the word "contiguous" is defined as follows:

> "Touching or joining at the edge or boundary; close together; adjacent; adjoining."

The word "adjacent" is given as a synonym for the word "contiguous," and the word "adjacent" is defined as follows:

> "Lying near or close at hand; adjoining; bordering;"

and in a note under the word "adjacent," it is observed that adjacent farms may not be connected; if adjoining they meet at the boundary line; and that "contiguous" may be used for either "adjacent" or "adjoining." It is also observed that "near" is a relative word. I conclude that the word "contiguous" as found in the section now under consideration, must have been used by the legislature in the sense of "near" or "close together" and that under the provisions of this section it is not necessary that all parts of a supervision district should adjoin each other if it is impossible to arrange a supervision district which will meet all the other conditions of the section and which will, at the same time, be made up of adjoining parts. The provisions that a district shall be compact and that consideration shall be given to the amount of consolidation and centralization and the condition

of the roads and general topography, are evidently intended to mean that a district shall be made as compact as possible without violating any of the other specific provisions of the section, and that while the amount of consolidation and centralization and the condition of the roads and general topography are to be taken into consideration, such conditions are not to have such weight as to excuse compliance with any other plain provision of the section. The above observation is also applicable to the provision of the section that the territory of the different districts shall be as nearly equal as practicable, but the provision that the number of teachers in any one supervision district shall not be less than thirty, is one which is definite and certain in its character and capable of being met in all instances.

I therefore conclude that the county board of education, under this section, will be without authority to create a supervision district in which less than thirty teachers are employed, and that the rule will be the same, even where compliance with this provision will necessitate creating a district, all parts of which are not adjoining, and even if the result is to create a situation involving some inconvenience to the district superintendent, and that if a board of education should attempt to create a supervision district in which less than thirty teachers are employed, such district could not be recognized by the state as a supervision district and would not be entitled to state funds for supervision purposes.

While this may work some inconvenience in the particular case presented by you, I am unable to reach any other conclusion in view of the language of the section, and can only suggest one remedy for the situation in question.

It is provided by the section now under consideration that the county board of education may, at their discretion, require the county superintendent to personally supervise not to exceed forty teachers of the village or rural schools of the county, and that such action shall supersede the necessity of the district supervision of these schools. It might be possible under this authorization, if the other work of the county superintendent is such as to warrant such action, to require the county superintendent to personally supervise the schools of Oregon and Jeruselum townships in Lucas county, and if such action should be taken, it would supersede the necessity of district supervision for the schools of the two townships in question.

Respectfully,
EDWARD C. TURNER,
Attorney General.

651.

MUNICIPAL CORPORATION—DIRECTOR OF PUBLIC SERVICE—MAY REFUSE USE OF CITY HALL IN CITY BUILDING FOR RELIGIOUS SERVICES WHEN MANAGEMENT UNDER HIS CONTROL—NO DISCRIMINATION.

A director of public service, given by ordinance the management of a public hall in a city building, may, unless otherwise provided in the ordinance, by rule refuse the use of such hall to religious denominations for the purpose of holding religious services, provided the rule does not discriminate against particular denominations.

COLUMBUS, OHIO, July 26, 1915.

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

GENTLEMEN:—Hon. R. Clint Cole, city solicitor of Findlay, Ohio, has submitted to me a question as to whether a director of service, who is given by law, and in

this instance by ordinance, the control and management of a public hall in a city building, may refuse to permit the use of said hall by religious denominations for the purpose of holding religious services. I have determined to direct an opinion in this matter to the bureau.

Section 3638, G. C., gives every municipal corporation power to "establish, erect, maintain, protect, and regulate public halls * * *." Section 4326 of the General Code, provides as to the director of public service, that:

> "* * * He shall supervise the construction and have charge of the maintenance of public buildings and other property of the corporation not otherwise provided for in this title. He shall have the management of all other matters provided by the council in connection with the public service of the city."

Under these statutes and under ordinances of the character described by the solicitor, the director of public service has full authority to manage the public hall in question and may make such rules with respect to its use as may be reasonable and proper, and consistent with the ordinance.

Assuming that the ordinance merely grants him the management of the hall and does not itself provide a different rule in the matter, a director would, in my judgment, be authorized to make and enforce a rule refusing the use of a public hall for the purpose of holding religious services, provided such rule were enforced impartially and without discrimination against particular religious sects or denominations.

Respectfully,
EDWARD C. TURNER,
Attorney General.

652.

CHARTER—CITY OF TOLEDO—WHETHER OR NOT PRIMARY ELECTION IS REQUIRED UNDER STATUTES OR UNDER PROVISION OF CHARTER FOR NOMINATION OF CANDIDATES FOR ANY OFFICE —ASSESSOR, CONSTABLE AND CLERK OF POLICE COURT, DISCUSSED.

In charter municipalities wherein a provision is made for the nomination of all municipal officers in the charter, candidates for assessor may be nominated in the same manner and at the same time as city, ward, district or village officers. If there is no charter provision for the nomination of city, ward, district or village officers, candidates must be nominated under the statutes of the state at the primary election on August 10, 1915, *in municipalities with a population of two thousand or more, and may be nominated by petition under the provisions of section* 4999, *G. C. If the charter city is not divided into wards, a candidate for assessor in the municipality may be nominated under the charter provision, if such there be, for the nomination of municipal officers. If the city is not divided into wards and no provision is made in the charter for the nomination and election of municipal officers, then an assessor shall be nominated at the primary August* 10, 1915, *under the statutes. If the city is divided into wards and the charter provides for the nomination of ward officers, assessors shall be nominated as other ward officers under the charter. A nomination of a candidate for assessor of a city made either under the charter or at the primary held in August,* 1915, *in a city which is not divided into wards, will be of no effect if the board of deputy state supervisors and inspectors of elections shall thereafter divide the city into assessment districts.*

Candidates for constable may be nominated at a primary election in municipalities, the limits of which coincide with the limits of the township only when a primary election for the nomination of township officers is petitioned for by a majority of the electors of the township and municipality.

A primary election is required to be held in the city of Toledo on August 10, 1915, *for the nomination of candidates for clerk of the police court.*

COLUMBUS, OHIO, July 26, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of June 18, 1915, making inquiry as to whether or not under the statutes of the state and the provisions of the municipal charter of the city of Toledo, a primary election is required to be held for the nomination of candidates for any office in that city on August 10, 1915.

By section 7 of article 5 of the constitution of the state, as adopted September 3, 1912, it is provided, in so far as the same may be applicable to your inquiry, that:

> "All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law. * * *"

In accordance with this constitutional requirement, it is provided in section 4963, G. C., as amended in 103 O. L., 481, as a part of the general statutory plan for nomination of candidates for the offices above named, that:

> "Primaries under this chapter to nominate candidates for township

and municipal offices, justices of the peace and members of the board of education, shall be held in each county at the usual polling places on the second Tuesday in August of the odd numbered years."

Hence, except as it may be found to be otherwise provided, it is required that a primary election be held on the second Tuesday of August, 1915, for the nomination of candidates for all municipal offices in all municipalities with a population of two thousand or more, municipalities of less than two thousand population being excepted from the provisions of section 7 of article 5 of the constitution unless a primary election is petitioned for by a majority of the electors thereof.

It is provided however by section 3, article 18 of the constitution, that:

"Municipalities shall have authority to exercise all powers of local self government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

"Article 18, section 7. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

It is stated in your communication and the accompanying correspondence that the city of Toledo has heretofore adopted a charter for its government pursuant to the constitutional provisions above set forth, which charter, in so far as it relates to the election of officers and the enactment of preliminary legislation, became effective January 1, 1915.

In the case of the State ex rel. v. Lynch, 88 O. S., 71, it was held:

"The provisions of the eighteenth article of the constitution as amended in September, 1912, continue in force the general laws for the government of cities and villages until the 15th day of November following, and thereafter until changed in one of the three modes following: (1) By the enactment of general laws for their amendment, (2) by additional laws to be ratified by the electors of the municipality to be affected thereby, (3) by the adoption of a charter by the electors of a municipality in the mode pointed out in the article."

From this it follows that except in so far as the same may have been changed by the adoption of the charter of the city of Toledo, the general laws of the state relative to the nomination of candidates for municipal offices continues to govern in that city, and unless provision therefor is found in the charter to the contrary, nomination of candidates for municipal offices in the city of Toledo are required to be made on the second Tuesday of August, 1915, in accordance with the general statutes of the state governing primary elections for the nomination of municipal officers.

It may be further observed that in the case of Fitzgerald v. Board of Deputy State Supervisors of Elections, 88 O. S., 338, it was held:

"Under sections 3 and 7, article 18, as so amended, municipalities are authorized to determine what officers shall administer their government, which shall be appointed and which elected, that the nomination of elective

officers shall be made by petition by a method prescribed, and elections shall be conducted by the election authorities prescribed by general laws."

It then having been determined that it is within the power of a municipality, through the adoption of a charter, to assume full and absolute control of the number, character, functions and authority of all local officers as well as the time and method of their selection to the exclusion of all control or regulation thereof by the general statutes of the state, your inquiry may be answered generally, to the effect that in so far as the nomination and election of municipal officers of the city of Toledo is provided for in the charter, those provisions will govern to the exclusion of the statutory provision relative to the nomination of such officers and if the charter makes provision for such nominations to be made at a different time or in a different manner from that provided by the statutes of the state, the charter provisions will control. If on the other hand the charter fails to make provision for the time and manner of making nomination of candidates for any or all of the municipal offices of the city of Toledo, then under the rule laid down in the case of State ex rel. v. Lynch, supra, the nomination of candidates for all such municipal offices of that city, as are not provided for in the charter, are required to be made at a primary election to be held on the second Tuesday of August, 1915, in accordance with the general statutes of the state governing the conduct of primary elections for the nomination of candidates for municipal offices.

You make further inquiry whether assessors are required by law to be nominated at a primary to be held on the second Tuesday of August in charter cities wherein provision is made in the charter for the nomination of candidates for municipal offices at another date and in a manner differing from that provided by the statutes of the state.

Section 17 of house bill No. 29, passed May 7, 1915, and which will become effective on August 9, 1915, in so far as applicable to the question under consideration, provides:

"Section 17. At the regular election to be held in November, 1915, and biennially thereafter, assessors shall be elected in the manner provided by law for the election of ward, district, city, village and township officers. * * *"

It is true that the term "elected" alone is here used, and that there is not found any express reference to the nomination of assessors if the term "elected" is to be construed strictly or in a technical sense. It will be noted, however, that it is here required that assessors shall be elected *in the manner provided by law* for the election of ward, district, city, village and township officers.

In the case of Fitzgerald v. Cleveland, supra, the supreme court in construing the phrase "as provided by law" as found in section 7, article 5 of the constitution, supra, said:

"The provision of a charter which is passed within the limits of the constitutional grant of authority to the city is as much the law as a statute passed by the general assembly."

This case was decided prior to the enactment of house bill No. 29, and the above provision of that act must be presumed to have been so framed in contemplation of the rule there established.

It then follows that it was in contemplation and must be presumed to have

been the intent of the legislature that assessors in charter cities, should be elected in the manner provided by the charters of such cities as distinguished from the manner provided by statute.

It would hardly be argued, in view of the fact that assessors in charter cities are to be elected under the charter provisions, that the legislature intended that nominations of candidates for such offices should be made otherwise than in the manner provided for the nomination of other ward and municipal officers in such cities. In other words, it seems clear that the term "elected" as used in the provision of section 17 of house bill No. 29, supra, comprehends the whole scheme of selecting municipal officers that is to say, includes their nomination as well as their election, as used in a more restricted and technical sense.

I am therefore of opinion that in charter cities where provision is made in the charter for the nomination of all municipal officers to be elected at the election to be held in November, 1915, candidates for assessors, under house bill No. 29, supra, should be nominated in the same manner and at the same time as candidates for other ward, district, village and city officers.

Attention is directed to the further provisions of section 17 of house bill No. 29, (section 3349, G. C., 106 O. L., 250) for the election of assessors in municipalities, as follows:

> "In municipal corporations divided into wards, one assessor shall be elected in each ward; in villages one assessor shall be elected; in cities not divided into wards, the board of deputy state supervisors of elections or the board of deputy state supervisors and inspectors of elections, as the case may be, shall, acting in conjunction with the county auditor, within ten days after this act shall become effective, divide such cities, or such part or parts thereof as may be located in their county, into such number of assessment districts as in the judgment of the county auditor may be necessary in order to provide for the assessment of all the property therein; a division so fixed shall remain in effect for a period of four years, at the expiration of which, and quadrennially thereafter, a like division shall be made in the same manner and by the same authority. One assessor shall, at the time specified in this section, be elected in each assessment district so created; provided, however, that nothing therein shall be so construed as to require a division of any municipal corporation or part thereof into assessment districts when, in the judgment of the county auditor, such division is not necessary, in which event no assessor shall be elected in the entire municipal corporation or in that part thereof which may be located in one county as the case may be."

From this it will be observed that in municipalities not divided into wards, except in such municipalities where, in the judgment of the county auditor it is not deemed necessary so to do, the board of elections, acting in conjunction with the county auditor, is required to divide such city or such part thereof as may be located within their county, into such number of assessment districts as the county auditor may deem necessary, within ten days after house bill No. 29 shall become effective. This bill, however, as stated above, will not become effective until such time as to render it practically impossible that such action of the deputy state supervisors of elections, as above referred to, be taken before the primary to be held on August 10, 1915. It then being utterly impracticable that the assessment districts in such municipalities as are not now divided into wards, but which the county auditor of the county shall determine after house bill No. 29 becomes effective to be necessary to be divided into districts, be established as

authorized and required by law, it results that in those cities no assessors for such districts may be nominated on August 10, 1915, at the primary, although such primary is held in such city on that date for the nomination of other municipal officers. In cities which are not divided into wards, and in which the charter does not provide for the nomination of municipal officers, a candidate for assessor should be nominated at the August primary. This nomination, however, would prove of no effect if the city should, thereafter, be divided into assessment districts according to law. Candidates for assessor in assessment districts, in cities which are not divided into wards and which shall, after house bill No. 29 becomes effective, be deemed necessary to be divided into districts by the county auditor, may then be nominated only by petition signed and filed in accordance with the provisions of section 4999, G. C., as amended in 103 O. L., 844, except in those municipalities wherein the charter provides for holding a primary or the nomination of candidates by petition for district officers, after such municipality shall have been divided into assessment districts.

Reference is also made in your inquiry to the nominations of constables in the city of Toledo, the corporate limits of the city being identical with those of the township. Section 3512, G. C., to which you refer, provides:

> "When the corporate limits of a city or village become identical with those of a township, all township offices shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of the city or village, except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers, and employes. Such justices and constables shall be elected at municipal elections. All property, moneys, credits, books, records and documents of such township shall be delivered to the council of such city or village. All rights, interests or claims in favor of or against the township may be enforced by or against the corporation."

Notwithstanding it is provided that constables shall be elected at municipal elections, they do not solely for that reason cease to be township officers.

In an opinion of this department under date of April 30, 1915, No. 303, it was held that under section 7, article 5 of the constitution, and section 4951, G. C., as amended in 103 O. L., 426, primary elections may not be held for the nomination of township officers unless petitioned for by a majority of the electors of the township. It therefore follows that unless a constable, under the facts stated, ceases to be a township officer, a primary election may not be held for the nomination of candidates for such office, except upon petition therefor by a majority of the electors of the township.

I am therefore of the opinion that a candidate for constable may not be nominated at the primary election to be held August 10, 1915, unless a primary election for the nomination of township officers is petitioned for by a majority of the electors of the township.

It is further stated in your communication that the city of Toledo is a city in which a clerk of police court is provided by law and inquiry is made as to whether candidates for the office of the clerk of the police court of that city are required to be nominated at a primary election to be held August 10, 1915.

The police court of Toledo is established under state law and is given jurisdiction of subject-matter which may not be said to be that of purely local government. This court among other matters which are not purely local in their nature, is by the provisions of section 4577, G. C., given final jurisdiction of all misde-

meanors committed in violation of the criminal statutes of the state, and while it may be within the power of a municipality to create a court and confer upon it jurisdiction of offenses against local ordinances, it is not conceived to be within the power of a municipality by any action to abolish a state court or to deprive a court established under general law of jurisdiction over offenses in violation of the criminal statutes of the state or of such civil jurisdiction as it may exercise under authority of the state. The municipal court of Toledo, together with the clerk thereof, which is an essential incident thereto, is a branch of the state government which may not be abolished or deprived of jurisdiction of matters of state concern by charter authority. The clerk of the police court may not then be said to be a municipal officer in the full sense of the term, but on the contrary the clerk and other officers of such court are, in the exercise of that jurisdiction which may be derived solely from state authority under the constitution and statutes thereof, exercising functions of the state government as distinguished from local government and are hence not within the purview of the constitutional provision conferring upon municipalities authority to exercise the powers of local self government and by reason thereof not subject to control or in any way affected by charter provisions or municipal action taken thereunder. That is to say, that in so far as the police court of Toledo is in the exercise of jurisdiction over matters of purely state concern, it may not be in any way effected by the charter provisions and that the nomination and election of the clerk of that court must, therefore, be made at a primary election which is required to be held on August 10, 1915, or by petition under the general law of the state.

Summing up the foregoing, it may then be said that in charter municipalities wherein provision is made for the nomination of all municipal officers in the charter, candidates for assessor may be nominated in the same manner and at the same time as city, ward, district or village officers. If there is no charter provision for the nomination of city, ward, district or village officers, candidates must be nominated under the statutes of the state at the primary election on August 10, 1915, in municipalities with a population of two thousand or more, and may be nominated by petition under the provisions of section 4999, G. C., supra.

If the charter city is not divided into wards, a candidate for assessor in the municipality may be nominated under the charter provision, if such there be, for the nomination of municipal officers. If the city is not divided into wards and no provision is made in the charter for the nomination of municipal officers, then an assessor shall be nominated at the primary, August 10, 1915, under the statutes. If the city is divided into wards and the charter provides for the nomination of ward officers, assessors shall be nominated as other ward officers, under the charter. It may be observed that a nomination of a candidate for assessor of a city, may either under the charter or at the primary held in August, 1915, in a city which is not divided into wards, would be of no effect if the board of deputy state supervisors and inspectors of elections shall thereafter divide the city into assessment districts according to law; that candidates for constable may be nominated at a primary election in municipalities, the limits of which coincide with the limits of the township only when a primary election for the nomination of township officers is petitioned for by a majority of the electors of the township and municipality, and that a primary election is required to be held in the city of Toledo on August 10, 1915, for the nomination of candidates for clerk of the police court.

Respectfully,

EDWARD C. TURNER,

Attorney General.

653.

BONDS OF SUBORDINATES OF COMMISSIONER OF LABOR STATISTICS AND CHIEF INSPECTOR OF STEAM ENGINEERS ARE OF NO EFFECT — POSITIONS ABOLISHED BY INDUSTRIAL COMMISSION ACT.

The amendment in 103 *O. L.*, 531-532 *of sections* 881 *and* 1058-15, *G. C., relating to the bonds of subordinates of the commissioner of labor statistics and the chief inspector of steam engineers, respectively, is of no effect for the reason that these positions were abolished by the industrial commission act,* 103 *O. L.*, 109, *and the duties formerly performed by such officers and employes are now to be performed by the industrial commission, its deputies and employes, whose bonds are provided for by section* 4 *of said industrial commission act.*

COLUMBUS, OHIO, July 27, 1915.

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

GENTLEMEN:—I acknowledge receipt of your letter of July 22, 1915, in which you request my opinion upon the following:

> "The act of March 12, 1913, section 46 volume 103 Ohio Laws, page 109, repealed sections 881 and 1058-15 of the General Code, and attempted to cover the matter thus repealed by the latter part of section 4 of said act.
>
> "The act of April 14, 1913, amended said sections 881 and 1058-15 of the General Code, which have been repealed by the former act to which we have called attention. See vol. 103 Ohio Laws, pages 531 and 532.
>
> "The question now arises—What law controls the bonds enumerated in sections 881 and 1058-15 of the act of April 14, 1913—the sections just cited or section 871-4 of the act of April 12, 1913, as found at page 96 volume 103 Ohio Laws? If the last enactment controls the bonds, kindly state who is the proper approving authority in section 1058-15, General Code."

The first act referred to by you is the act creating the industrial commission of Ohio, and as evidenced by the title "abolishing the departments of commissioner of labor statistics, * * * chief examiner of steam engineers, and certain other designated departments, and "merging certain powers and duties of said departments in and transferring certain powers and duties of said departments to said industrial commission of Ohio."

Section 4 thereof, to which you refer, contemplates general provisions for the salaries, official oaths and bonds of the members of the industrial commission and contains the following provision, which is pertinent to your inquiry:

> "All employes or deputies of the commission receiving or disbursing funds of the state shall give bond to the state in amounts and with surety to be approved by the commission."

As you point out this act, conformably to the declared purpose of the abolition of the departments named, repeals many of the sections of the General Code relative to the departments of labor statistics and the chief examiner of steam engineers and the board of boiler rules, among them sections 881 and 1058-15, General Code. Moreover, section 11 of the industrial commission act designated as section 871-11, provides as follows:

"On and after the first day of September, 1913, the following departments of the state of Ohio, to wit: commissioner of labor statistics, chief inspector of mines, chief inspector of workshops and factories, chief examiner of steam engineers, board of boiler rules, and the state board of arbitration and conciliation, shall have no further legal existence, except that the heads of the said departments, and said boards, shall within ten days after the said date submit to the governor their reports of their respective departments for the portion of the year 1913, during which they were in existence, and on and after the first day of September, 1913, the industrial commission of Ohio shall have all the powers and enter upon the performance of all the duties conferred by law upon the said departments."

Subsequently to the passage of the act hereinbefore referred to, the general assembly passed the act found in 103 O. L., 528, amending numerous unrelated sections relative to the official bonds of different state officers so as to require the deposit of all bonds, with certain limited exceptions, in the office of the secretary of state. In enacting this law the legislature, by clear inadvertence, assumed to "amend" section 881 and section 1058-15 so as to read as follows:

"Sec. 881. Each special agent and district superintendent may be required by the commissioner of labor statistics to give a bond to the state in such an amount not exceeding two thousand dollars with such sureties as the commissioner approves. Said bond shall be deposited with the secretary of state and kept in his office.

"Sec. 1058-15. The chief inspector of steam boilers shall give a bond payable to the state in the sum of five thousand dollars, with surety to be approved by the governor, conditioned upon the faithful performance of his duty. Like bonds shall be given in the sum of two thousand dollars to be approved in the same manner by the assistant chief inspector and by each general inspector. Such bonds, with the approval of each general inspector of steam boilers and of the assistant chief inspector of steam boilers, shall be deposited with the secretary of state and kept in his office."

The discussion of the technical effect of expressly "amending" a section which has been previously repealed is unnecessary in this instance. It may be assumed that sections 881 and 1058-15, G. C., as "amended" in 103 O. L., 531, are in a technical sense "law." Even if this be true, however, they are of no effect because there no longer is any such officer as "the commission of labor statistics," as referred to in section 881, or as the "chief inspector of steam boilers," as referred to in section 1058-15. The industrial commission may, in fact, have retained these names for certain of their deputies or employes, as referred to in section 4, but the reference in the other sections is obviously to officers or positions which have been abolished.

I advise you, therefore, that section 881 and section 1058-15 are of no effect whatsoever, and may be entirely disregarded by the industrial commission and its deputies and employes. So that section 4 of the industrial commission act is the only provision in any way relating to the bonds of such deputies and employes.

I think this statement answers all the questions submitted by you.

Respectfully,

EDWARD C. TURNER,

Attorney General.

654.

TAXES AND TAXATION—DOG TAX FUND—COUNTY COMMISSIONERS MAY TRANSFER SURPLUS TO SOCIETY FOR PREVENTION OF CRUELTY TO CHILDREN AND ANIMALS—REMAINDER NOT SO TRANSFERRED GOES TO BOARD OF EDUCATION FUND.

Section 5653, *G. C., as amended,* 104 *O. L.,* 145, *is mandatory and exclusive with respect to the transfer of the surplus found at the June session in the dog tax fund. Such surplus or part thereof may be transferred by the commissioners and paid to a society for the prevention of cruelty to children and animals, if deemed necessary for the uses and purposes of such society; any part of such surplus not so transferred must be transferred to the board of education fund as therein provided.*

COLUMBUS, OHIO, July 27, 1915.

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

GENTLEMEN:—I have your communication of July 19, 1915, requesting my opinion as follows:

> "Are the provisions of section 5653, General Code, as amended, 104 O. L., 145, mandatory in requiring the county commissioners to direct a transfer of the surplus in the dog fund to either a society for the prevention of cruelty to children and animals, or to the county board of education fund?
>
> "Since this amendment became effective, could the county commissioners in their discretion transfer any of this surplus to any other funds than those mentioned? Are we correct in our view that the county commissioners must either transfer this surplus to the society mentioned therein, or to the county board of education fund, or to both in such proportion as they may determine?"

In reply I beg to call attention to an opinion of my predecessor, Hon. Timothy S. Hogan, rendered September 12, 1914, to Hon. F. L. Johnson, prosecuting attorney of Greene county, intimating parenthetically that the county commissioners could not be compelled to transfer the surplus in the dog tax fund to the county board of education fund. This conclusion is correct, but Mr. Hogan did not have before him a question as specific as those which you now ask, and in the light of your questions, I am convinced that such conclusion requires some qualification.

The section referred to is as follows:

> "*Section* 5653. After paying all such sheep claims, at the June session of the county commissioners, if there remain more than one thousand dollars of such fund, the excess at such June session, shall be transferred and disposed as follows: In a county in which there is a society for the prevention of cruelty to children and animals, incorporated and organized as provided by law, which has one or more agents appointed in pursuance of law, all such excess as the county commissioners deem necessary for the uses and purposes of such society by order of the commissioners and upon the warrant of the county auditor shall be paid to the treasurer of such society, and any surplus not so transferred shall be transferred to the county board of education fund at the direction of the county commissioners."

County commissioners are, under the above quoted section, obliged to make a transfer from the dog tax fund to the county board of education fund unless, in the exercise of the discretion in them vested thereby, the commissioners deem the whole surplus in the fund necessary for the uses and purposes of a society for the prevention of cruelty to children and animals; and if there is no such society in the county or if the surplus found to exist at the June session is not wholly paid to such society, then all the remainder must be transferred to the county board of education fund.

It is true that the statute still contains the language "at the direction of the county commissioners," from which it might be argued that the commissioners still have discretion as to whether or not they will transfer the surplus not transferred to the society for the prevention of cruelty to children and animals, to the county board of education fund. I am of the opinion that the word "direction" refers merely to the machinery by which transfer is to be effected and has the effect of requiring the commissioners to act in the premises instead of authorizing the auditor to make the transfer on his books without the authority of the commissioners. The duty of the commissioners in the premises, however, is mandatory.

I might add that the presence in the section of the phrase "at the direction of the county commissioners" is explained by consulting original section 5653, G. C., which provides in part that the surplus not so transferred to the society for the prevention of cruelty to children and animals, "*may* be transferred to the school fund, the poor fund or the road or bridge fund, at the direction of the county commissioners." Comparison shows that the language was changed to "*shall* be transferred to the county board of education fund at the direction of the county commissioners. Such comparison makes the legislative intention very clear and furnishes, moreover, an answer to the more specific questions in the second paragraph in your letter, as I have quoted it.

While there are other provisions of law authorizing county commissioners to make transfers of funds under their supervision, such provisions, in my opinion, do not apply to or authorize the transfer of moneys from the dog tax fund. The specific provision of section 5653, as amended, is to be regarded as an exception to the general rules of the other sections referred to, and the dog tax fund cannot be transferred in any way other than as provided in section 5653, as amended.

Specifically answering your questions then, I advise that section 5653 is mandatory and requires the county commissioners to direct a transfer of the surplus in the dog tax fund to the county board of education fund, unless all or a part thereof is paid to a society for the prevention of cruelty to children and animals; that the commissioners have no power to transfer any of the surplus to any funds other than those mentioned; and that you are correct in your view that the commissioners must either transfer the surplus to the society mentioned therein or to the county board of education fund, or to both in such proportion as they may determine; in fact, for the sake of accuracy, I must add that the commissioners must transfer the fund in one of the two manners provided in section 5653, and have no authority to leave the surplus in the dog tax fund without transferring it to either of the other funds therein mentioned.

Respectfully,
EDWARD C. TURNER,
Attorney General.

655.

MUNCIPAL COURT OF CINCINNATI—HOW FEES OF WITNESSES SUBPOENAED BY SUCH COURT IN FELONY CASES ARE TO BE PAID WHEN STATE FAILS IN PROSECUTION.

Fees of witnesses subpoenaed by the municipal court of the city of Cincinnati in felony cases to be paid under the provisions of section 3018, *G. C., when the state fails in the prosecution.*

COLUMBUS, OHIO, July 27, 1915.

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

GENTLEMEN:—Permit me to acknowledge recepit of your request for an opinion which is as follows:

> "We would respectfully request your written opinion upon the following question:
>
> "May the fees of witnesses, subpoenaed by the municipal court of the city of Cincinnati, Ohio, in felony cases wherein the defendant, or defendants, are dismissed, be paid from the city treasury? We find no specific authorization of such payments in the law creating said court, as found in 103 Ohio Laws, page 279."

Section 1558-6 of the General Code is section 6 of the act "providing for enlarging and extending the jurisdiction of the police court in the city of Cincinnati, and changing the name of such court to the municipal court of Cincinnati," (page 280 of 103 O. L.) is as follows:

> "The municipal court shall have the same jurisdiction in criminal matters and prosecutions for misdemeanors or violations of ordinances as heretofore had by the police court of Cincinnati and in addition thereto shall have ordinary civil jurisdiction within the limits of said city of Cincinnati in the following cases. * * *"

Sections 1558-8, 1558-9 and 1558-13 of the General Code, which are sections 8, 9 and 13 respectively of the aforesaid act (pp. 281- 283, of 103 O. L.) are as follows:

> "Section 8. The municipal court shall have jurisdiction of all misdemeanors and of all violations of city ordinances of which police courts in municipalities now have or may hereafter be given jurisdiction. In felonies the municipal court shall have the powers which police courts in municipalities now have or may hereafter be given.
>
> "Section 9. In the actions and proceedings of which the municipal court has jurisdiction, all laws conferring jurisdictions upon a court of common pleas, a police judge or a justice of the peace, given such court or officer power to hear and determine such causes, prescribing the force and effect of their judgments, orders or decrees, and authorizing or directing the execution or enforcement thereof, shall be held to extend to the municipal court, unless inconsistent with this act or plainly inapplicable.
>
> "Section 13. In all criminal cases and proceedings the practice and procedure and mode of bringing and conducting prosecutions for offenses,

and the powers of the court in relation thereto, shall be the same as those which are now, or may hereafter be, possessed by police courts in municipalities unless otherwise provided herein."

In section 1558-4 of the General Code, which is section 4 of the act, (103 O. L., 280) fixing the salaries of the presiding judge and the judges of the municipal court of Cincinnati, it is provided that in the case of the presiding judge $2,000 of his salary shall be paid out of the treasury of Hamilton county in quarterly installments, and in the case of the judges $1,000 of the salary of each shall be paid out of the treasury of Hamilton county.

Section 3018 of the General Code is as follows:

"In felonies, fees of witnesses before justices of the peace, mayors and police justices, shall be paid upon the allowance of the commissioners from the county treasury, on the certificate of such officer, notwithstanding the state has failed."

Nowhere in the act is there to be found any provision for the payment of witness fees in felony cases wherein the state has failed, and in view of the provisions of sections 6, 8, 9 and 13 of the act quoted above paralleling the jurisdiction and proceedings of the municipal court in criminal matters with the common pleas, police, and justice of the peace courts, it is my opinion that the fees of witnesses subpoenaed by the municipal court of Cincinnati, Ohio, in felony cases wherein the state has failed, should be paid under the provisions of section 3018 of the General Code, above quoted.

Respectfully,
EDWARD C. TURNER,
Attorney General.

656.

BOARD OF EDUCATION — DEPOSITORY HAVING BEEN PROVIDED FOR ITS SCHOOL MONEYS, IT IS DIRECTORY, ONLY, FOR BOARD TO DISPENSE WITH TREASURER OF SUCH MONEYS — WHERE THERE IS NO TREASURER IN A DISTRICT, THERE CAN BE NO DEPOSITORY.

Section 4782, G. C., as amended, 104 O. L., 159, requiring the board of education of a school district, when a depository has been provided for its school moneys, to dispense with a treasurer of such moneys, is directory only. There can be no such treasurer, however, in a district in which there is no depository nor after the first organization of a board of education, under the amendments to the school code.

COLUMBUS, OHIO, July 27, 1915.

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

GENTLEMEN:—Your letter of July 16, 1915, requesting my written opinion, received and is as follows:

"Does the language of section 4782, General Code, as amended 104 O. L., 159, automatically in itself dispense with the treasurer of school moneys

when a depository has been provided for as authorized by law, even though a majority of the board of education does not pass a resolution dispensing with said official; and if so, at what time?"

Section 4782 of the General Code, as amended in 104 O. L., 159, provides:

"When a depository has been provided for the school moneys of a district, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members, shall dispense with a treasurer of the school moneys, belonging to such school district. In such case, the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school districts."

By comparing this section in its present form with the form thereof as it existed prior to the amendment referred to, it is discovered that the only change made therein by the general assembly in 1914, was to substitute the word "shall" before the word "dispense" for the word "may." This change, together with some of the other provisions of the act in which the amendment is found, 104 O. L., 158, makes it seem as if the intention of the legislature was to make section 4782 mandatory instead of permissive merely, as it had formerly been. But whatever may have been the latent intention of the legislature, it is clear that in order that its enactment might have the effect of imposing a mandatory duty, such intention must have been effectively expressed. The test of whether or not a statute is mandatory is furnished by considering whether or not compliance with it may be effectively enforced by mandamus. The character of the writ of mandamus is such as that it will not issue except where the right thereto is clear, nor in a case where the issuance would not accomplish any practical result.

It is manifest that mandamus would not lie to compel *individual members* of a board of education to act under section 4782 of the General Code, because the action therein referred to is to be "by resolution adopted by a vote of a majority of its members," from which it clearly follows that the right of the individual members to vote as they see fit, is preserved.

It might be argued that because a board of education is a quasi corporation, capable of suing and being sued as a board, mandamus would lie against the board as such, but the sanction for the enforcement of the mandate of the court in such a case would have to be by proceedings in contempt against the individual members thereof; and because the statute preserves the right of each individual member to vote either affirmatively or negatively, as he may see fit, I do not see how contempt could be predicated upon the refusal of a majority of the members to vote affirmatively even after a mandate had been issued to the board as such.

I, therefore, reach, somewhat relunctantly, the conclusion that section 4782 is not mandatory and am compelled, therefore, to disagree with my predecessor, Hon. Timothy S. Hogan, who held that it is mandatory.

It occurs to me that a statute like section 4782 may logically have any one of four different effects, viz.:

(1) It may be self-executing.
(2) It may be mandatory.
(3) It may be directory.
(4) It may be permissive.

Section 4782 was once permissive and has been amended as to make it clear that it is no longer so. The above discussion demonstrates, I think, that it cannot be regarded as mandatory. Its effect, therefore, is either self-executing or directory.

I do not think that section 4782 can be regarded as self-executing. The way in which you have framed your question suggests one reason for so holding; for if the statute is self-executing, then there must be a time certain at which, under given circumstances, it will go into execution. If the statute is to be regarded as self-executing, then the statute will go into execution, in a given case, "when a depository has been provided for the school moneys of the district." But if this be true, then the provision of the statute to the effect "that the board of education of the district, by resolution adopted by a vote of a majority of its members, shall dispense with the treasurer," etc., is of no effect whatever. It cannot be deemed the intention of the legislature to strike this language out of the statute, because the only amendment which the legislature made was inserted in this very phrase. It is manifest, therefore, that the legislature intended that the board of education should act, and did not intend that the treasurer should be dispensed with and the clerk should commence to perform the services formerly devolving upon the treasurer, when and as soon as a depository had been provided. In other words, the statute is not self-executing, but must be carried into execution by the board of education, acting by resolution adopted by a vote of a majority of its members.

These considerations all tend to dictate the choice of that interpretation of section 4782 which regards it as directory. It is true that section 4782 does not fall within any of the well recognized classes of directory provisions. In this case, however, the conclusion that the statute is directory is enforced by the necessary consequences of attempting to hold it mandatory or self-executing. It being the intention of the legislature that the thing contemplated by section 4782 shall be done, but the legislature not having made it possible to compel that thing to be done, it necessarily follows that it could only be regarded as directory; and while it is the duty of the board of education, when it provides for a depository for the moneys of the district, to dispense with the office of treasurer, such duty is one that can be enforced by political action only and not by the courts.

In order, however, that my opinion may not be misinterpreted, beg leave to call attention to the fact that section 4747, G. C., as amended in 104 O. L., 139, which provides for the organization of all boards of education and for the officers which they shall have, does not authorize the election of a treasurer. This section becomes operative upon the occasion of the first organization of a city, village or rural school district after its amendment, and except as to new districts, this will be on the first Monday of January, 1916. Until that time present officers will continue to serve unless their positions are otherwise abolished under favor of section 4735 of the General Code, as amended in 104 O. L., 138. Therefore, it follows that between the enactment of the amendments of 1914 and the first organization of a city, village or rural school district board of education thereafter, it is possible for a district treasurer to be lawfully in office unless his position had been "dispensed with" as provided in section 4782 of the General Code, 104 O. L., 159, or unless no depository had been provided for the moneys of the district, in which event, under the provisions of section 4763, G. C., as amended in 104 O. L., 159, the county treasurer would, ipso facto, become the treasurer of the moneys of the district, thus dispensing with the office of treasurer without any action of the board. To be specific, then, in districts in which depositories have been provided, and in those districts only, and during the period of time intervening between the going into effect of the amendments of 1914 and the first organization of a board of education, under such amendments, and during that period of time only, the conclusions of the above opinion apply.

Your question does not require me to consider whose duty it will be, after the first organization of the board of education under the new amendments, to

perform the services and discharge the duties and be subject to all the obligations required by law of the treasurer of a school district, in the event a depository has been provided for the moneys thereof. In view of the fact, however, that there is no authority to elect a treasurer at such first organization, and in view of the obvious policy of section 4782, as amended, I am of the opinion that after such first organization it will be the duty of the clerk of the board of education to perform such services, when a depository has been provided for the school moneys of the district.

Respectfully,
EDWARD C. TURNER,
Attorney General.

657.

HUTSON COAL COMPANY—WORKMEN'S COMPENSATION ACT— SUPPLEMENTAL OPINION TO NO. 555—ADDITIONAL FACTS FURNISHED PLACE COMPANY IN GOOD STANDING WITH COMMISSION.

The Hutson Coal Company having been placed in good standing under the workmen's compensation act by the acceptance of part of the premium due for the six months' period ending May 31, 1915, *entitled to protection and the benefits under the workmen's compensation act during said period.*

COLUMBUS, OHIO, July 27, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Under date of June 29, 1915, in opinion No. 555 addressed to your commission and based upon the facts given by you in your letter of June 16, 1915, I held that The Hutson Coal Company was not protected under the workmen's compensation act during the period from December 1, 1914, to June 1, 1915, it appearing that said company had not paid its premium into the state insurance fund. Subsequently, upon investigation by this department of the records of your department, it developed that there were two payments made by The Hutson Coal Company which had not been credited to said company by your department, to wit, one made on November 19, 1914, in the sum of ---------- $198.75 and the other under date of December 19, 1914, in the sum of ---------- $601.00, and that with such payments added to the other payments made by The Hutson Coal Company there was paid during the period from December 1, 1914, to June 1, 1915, the sum of ---------- $499.75 on account of the premium for said period, leaving a balance due of ---------- $222.80.

In view of the fact that The Hutson Coal Company had paid, on account of its premium charged against it, from December 1, 1914, to June 1, 1915, the sum of ---------- $499.75, which amount has been accepted by your commission and placed in the state insurance fund, instead of being delinquent for the entire amount of the premium for the second six months' period which ended on May 31, 1915, and upon which statement my former opinion was based, I am of the opinion that The Hutson Coal Company should be given the protection of the workmen's compensation act for the period ending at midnight on May 31, 1915.

I might further state that The Hutson Coal Company, through its representative, has tendered to this department the sum of ---------- $967.80 covering the payment of all premiums due up to and including November 30, 1915.

A strict adherence to the rules recently adopted by your commission covering the time of payments of premiums, which became operative on July 1, 1915, as stated by Mr. Yaple of your commission, will obviate situations of this kind in the future.

Respectfully,
EDWARD C. TURNER,
Attorney General.

658.

HOSPITAL FOR INSANE—NOT REQUIRED TO ACCEPT PERSONS DEFINED BY STATUTE AS IDIOTS.

Superintendents of general hospitals for the insane in the state of Ohio cannot be compelled to accept persons who come within the statutory definition of an idiot, to wit: "A person foolish from birth, or supposed to be naturally without a mind."

COLUMBUS, OHIO, July 28, 1915.

HON. HENRY W. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—Your letter of July 17, 1915, requesting my written opinion received, and is as follows:

> "Can an idiot, that is to say a person without a mind from birth, be confined in any of the institutions for insane in the state of Ohio?
>
> "We have asked the Athens Insane Hospital authorities to accept a man from this county, 23 years of age, who comes within the meaning of the statutory definition of an idiot. Gallia county has not her full quota at Athens Institution and under the law, I see no reason why this man should not be accepted."

An examination of sections 1947 to 1983, inclusive, of the General Code, which contain the provisions for the admission of patients to hospitals for the insane, the Athens hospital being among those covered thereby, will show that only those patients which can be properly classed as "insane" may be admitted thereto, and section 1983 of the General Code defines "insane" as used therein and differentiates between an insane person and an idiot in the following language:

> "The terms 'insane' and 'lunatic,' as used in this chapter, include every species of insanity or mental derangement; the term 'idiot' is restricted to a person foolish from birth, or supposed to be naturally without a mind."

While it is true that the word "idiot" does not appear at any other place in the laws governing admission to hospitals for the insane, and while it is true that specific reason for the enactment of the definition of the words "insane" and "idiot" was removed by the omission in the amendment found in 75 O. L., page 64, of the provision theretofore in the law and which was in the law at the time of the enactment of the definition above mentioned, that no idiot should be confined in any hospital for the insane, yet the legislature has seen fit to retain in the law the definition and distinction above quoted. This definition and distinction must

be given effect unless there is clear evidence of an intention on the part of the legislature that it should be inoperative. No such intention appears from the chapter in which the definition is found and good reason may be found in other sections of the General Code for the conclusion that it retains its force. I refer to the provisions of sections 1895, et seq., of the General Code, applicable to the institution for the feeble-minded. Section 1895 is as follows:

> "Section 1895. The custodial department shall be entirely and especially devoted to the reception, detention, care and training of idiotic and feeble-minded children and adults, regardless of sex or color, and shall be so planned as to provide separate classifications of the numerous groups embraced under the terms idiotic and imbecile or feeble-minded. Cases afflicted with paralysis shall have a due proportion of space and care in the custodial department."

The legislature, therefore, has provided that only insane persons can be committed to the hospitals for the insane and has defined what is meant by the word "insane" as distinguished from "idiot" and has provided a place for the reception, detention, care and training of idiotic children and adults.

Your letter states that the man about whom you inquire comes within the definition of the term "idiot," and the institution for the feeble-minded is the only state institution in which provision is made for the reception of persons of the general class under consideration.

I am, therefore, of the opinion that none of the superintendents of the general hospitals for the insane in the state of Ohio can be compelled to accept an idiot, that is to say, "a person foolish from birth or supposed to be naturally without a mind."

Respectfully,
EDWARD C. TURNER,
Attorney General.

659.

MINES—USE OF GASOLINE MOTOR FOR HAULAGE PURPOSES THROUGH TUNNEL TO MINE SWITCH NOT PROHIBITED BY LAW.

The use of a gasoline motor for haulage purposes through a tunnel to a mine switch, is not prohibited by law, notwithstanding the tunnel formerly constituted mine entry through a mine now worked out and abandoned.

COLUMBUS, OHIO, July 28, 1915.

The Industrial Commission of Ohio, Department of Mine Inspection, Columbus, O.

GENTLEMEN:—I have your communication of July 13, 1915, which is as follows:

> "The question has come up whether or not it is permissible to use a gasoline motor for haulage purposes in a mine that has been abandoned or worked out with the exception of the main entry which is converted into a tunnel, the motor starting on the outside at the tipple and running through the hill to a switch which is built between the hills.

"The motor does not enter the main workings of the mine where men are employed—only passes back and forth through the tunnel.

"Will you kindly advise if in your opinion section 946 of the Ohio Mining Laws prohibits the use of this motor?"

The enactment is a police regulation having for its purpose the safe-guarding of the lives and the safety and protection of the health of the employes working in mines.

In my opinion these regulatory provisions are only applicable to mines in which men are employed. Interpret your inquiry as relating to the main entry of a worked out and abandoned mine, which entry or tunnel is now used solely as a passageway through the hill, for the purpose of transporting coal from a mine in an adjoining hill to the tipple; that the hill through which the gasoline engine is operated is separated from the hill in which the mine is being worked by a depression or stretch of lowland and that the engine is only to be operated to a switch in such a depression between the hills; and that the motor does not enter workings where men are employed.

Under such state of facts, I am of the opinion that such use of the gasoline engine is not within the prohibition of section 946, since the tunnel of the abandoned mine in which no persons are employed, may not now be properly regarded as a mine within the purview of the regulatory provisions of said sections relating to mines.

Section 911, G. C., provides:

"Each inspector shall exercise discretion in the enforcement of the provisions of this act. If he finds that any matter, thing or practice, connected with any mine, and not prohibited by law, is dangerous or defective, (or that from a rigid enforcement of any of the express provisions of this act such matter, thing or practice would become dangerous or defective), so as in his opinion to tend to the bodily injury of any person, such inspector shall give notice in writing to the owner, lessee, or agent of the mine, of the particulars in which such mine or any any matter, thing, or practice connected therewith is dangerous or defective, and require it to be remedied by making such changes as the conditions may require. Provided, however, that in the exercise of the foregoing provisions relating to the application of electricity or electric wires, the judgment of the chief inspector of mines and the district inspector of mines, jointly, shall be required."

Under the provisions of the foregoing section, discretion is vested in the inspectors to regulate such matters, things or practices connected with any mine, even though not expressly prohibited by the statute, when such matter or practice is dangerous or jeopardizes the life, health or safety of those employed in such mine. In view of the statements made in the letter of the chief deputy and safety commissioner of mines, quoted above, and his verbal statement to me that the tunnel in question is not a mine and that there would be no danger arising from the use of the gasoline motor in the tunnel which might be regarded as being connected with the mine, I am of the opinion that the use of the gasoline motor in the manner indicated is not prohibited by the provisions of section 946 of the General Code. Cases of this kind require the exercise of sound discretion on the part of the inspectors in the discharge of their duties.

Respectfully,

EDWARD C. TURNER,

Attorney General.

660.

ORDINANCES AND RESOLUTIONS—PUBLICATION IN NEWSPAPER IN VILLAGE MANDATORY—CIRCULATION MUST BE GENERAL AND ONE SIDE OF NEWSPAPER PRINTED IN SUCH VILLAGE—POSTING NOT SUFFICIENT.

It is mandatory to publish ordinances and resolutions in a newspaper that is published in a village, there being in the village but the one newspaper, having a small circulation, if such circulation is general and if one side of the newspaper is printed in such village. In such event posting of the ordinances and resolutions in five public places designated by council would not be sufficient.

COLUMBUS, OHIO, July 29, 1915.

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

GENTLEMEN:—Mr. J. H. C. Lyon, attorney for the village of Struthers, Mahoning county, has requested my opinion upon the following question:

> "Is it mandatory to publish ordinances and resolutions in a newspaper that is published in a village, there being but one newspaper in the village and with a small circulation, or would the posting in five public places, designated by council, be sufficient?"

The question being a doubtful one with respect to which previous opinions of this department had been given to the bureau of inspection and supervision of public offices, should, in my judgment, be answered again in view of the recent decision of the supreme court in the case of Village of Elmwood Place v. Schanzle, a tax payer, No. 14836, recently rendered but not yet officially reported, Accordingly, I am directing this opinion to the bureau and am sending a copy thereof to the village attorney.

In the case cited an injunction against the issuance of certain bonds was sought on the ground that the ordinance authorizing their issuance had been published in but one newspaper, which was the only newspaper printed and published in the village issuing the bonds. The court therefore did not have to answer the question which the village attorney now raises, but only the question as to whether publication in one newspaper, under the circumstances named, was *sufficient.* On this point the syllabus is as follows:

> "In a municipality in which there is only one newspaper published and of general circulation, the publication in that paper of ordinances of a general nature, in the manner and for the period required by sections 4227 et seq., General Code, is a compliance with the requirements of those sections."

However, in the opinion of the court, an interpretation of sections 4227, 4228, 4229, 4232 and 6255, G. C., was expressed, and such interpretation was necessary in order to answer the question actually before the court. In the course of the opinion Johnson J. uses the following language:

> "It is contended by the defendant in error that under the present law there is but one way in which to publish ordinances in a municipality where there is but one newspaper published and of general circulation,

and that is that the ordinance should be posted as required by section 4232, General Code. We cannot assent to this contention. The language in that section is:

" 'In municipal corporations in which *no* newspaper is published, it shall be sufficient to post up copies.'

"From the face of the petition in this case it appears that there *is* a newspaper published in the village. Therefore, the condition which the statute provides must exist before 'it shall be sufficient to post up copies' does not exist in this case. *The natural inference from that plain provision would be that in a village in which a newspaper is published the publication would be required to be made in that paper if it was the only one.*"

From a reading of the whole opinion it is very clear that the court, in order to harmonize all the sections as they stand at present, found it necessary to restore in what is now section 4227, G. C., language which had been dropped therefrom in process of codification which, if it were present, would have answered the question of the village attorney.

This was the view of this department as expressed in previous opinions to the bureau of inspection and supervision of public offices, and the purposes of this opinion is mainly to call the attention of the bureau to the fact that the court has adopted the same view.

This being the case I advise that in the light of the decision above cited it is mandatory to publish ordinances and resolutions in a newspaper that is published in the village, there being but one newspaper with a small circulation in the village provided that such circulation is general, and provided that at least one side of such newspaper is printed in the municipality and the whole newspaper is first put into circulation therein, these being the requirements of section 6255 and 4227, as interpreted by the court, respectively. I further advise that the posting of such ordinances and resolutions in five public places designated by council would not be sufficient for the reason that such posting is sufficient only when *no* newspaper is published in the municipality.

For the full information of the bureau I may add that while the decision of the court is consistent with the reasoning of previous opinions of this department, there is one statement, in the opinion given to the bureau by my predecessor on September 2, 1914, being opinion No. 1132 of that year, which in the light of the decision must be modified. I refer to the following paragraphs of said opinion:

"If there are not two such newspapers as fulfill the requirements stated in the preceding paragraph, then publication must be made in any newspaper of general circulation in the municipality one side of which newspaper at least is printed in said municipality; section 6255 requiring printing, and section 4676 permitting publication in the one newspaper, unless posting is resorted to; section 4232. A reading of sections 4676 and 4232 will show that publication may be made under either section.

"If there are no newspapers one side of which is printed in the municipality, then publication must be made in any newspaper of general circulation in the municipality; section 4676, unless posting is resorted to; section 4232. It is to be understood that where a publisher refuses to publish, the same situation arises as if no such newspaper were published. Section 4676.

"If there are newspapers which meet the requirements of the two preceding paragraphs, it is optional then to publish in such newspapers or to post; section 4232."

The reasoning of Judge Johnson makes it clear that if there is a newspaper which meets the requirements of the first of the above quoted paragraphs, it is not optional to publish in such newspaer or to post, as held by my predecessor; for that is precisely the case with which this opinion treats.

Mr. Hogan's opinion must, therefore be modified in this one particular.

Respectfully,
EDWARD C. TURNER,
Attorney General.

661.

DISAPPROVAL OF LEASES OF CERTAIN LANDS AT LORAMIE RESERVOIR AND ST. MARYS RESERVOIR.

COLUMBUS, OHIO, July 29, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communications of July 24 and July 26, 1915, transmitting to me for examination a lease to Frank Lehmkuhl of certain lands at Loramie reservoir, valued at $1,000, and a lease to Ambrose B. Kohler of certain land at the St. Mary's reservoir for cottage and landing purposes, the land being valued at $150.00. Both leases refer on their face to a plat which is described as attached to and made a part of the lease, but as a matter of fact no plat is attached to either lease.

As to the Lehmkuhl lease, the property referred to in the lease is valued at $1,000, and the rent is fixed at $22.00 per year, whereas under the statutes it should be fixed at $60.00 per year. The clause in this lease reserving to the state oil, gas, coal and other minerals, is not drawn in accordance with the statute, and should be re-drafted so as to reserve to the state the right of entry not only for operating but also for prosecuting and developing.

As to the Kohler lease, the signature of the superintendent of public works should be attested by two witnesses.

For the reasons above indicated, I am returning these leases without my approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

662.

TAXES AND TAXATION—LEVY FOR COUNTY PURPOSES MUST BE SAME IN EACH TAXING DISTRICT THROUGHOUT COUNTY.

The levy for county purposes must be the same in each taxing district throughout the county.

COLUMBUS, OHIO, July 29, 1915.

HON. JOHN H. SCHRIDER, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of July 26, 1915, submitting for my opinion, supplementary to my opinion to you under date of July 22nd, a further inquiry which may be stated as follows:

'Must the levy for the county be the same in each taxing district throughout the county or can it be made lower in one taxing district than in another?"

You are advised that in my opinion the levy for county purposes must be the same in each taxing district throughout the county.

Respectfully,
EDWARD C. TURNER,
Attorney General.

663.

BOARD OF EDUCATION OF TOWNSHIP SCHOOL DISTRICT—FAILURE TO PREPARE AND FILE MAP AS PROVIDED IN SECTION 4724, G. C., WHEN TERRITORY IS ATTACHED—BOARD CANNOT RECOVER FROM BOARD RECEIVING SCHOOL TAX—CANNOT RECOVER ACTUAL EXPENSES OF FURNISHING SCHOOL FACILITIES TO YOUTH OF ATTACHED TERRITORY.

Where the board of education of a township school district to which territory in another township and belonging to a joint subdistrict was attached, by virtue of section 4723, G. C., now repealed, failed to file a map of such attached territory as required by section 4724, G. C., now repealed, such board of education cannot recover from the board of education actually receiving the school tax from such attached territory, either such tax or the tax the first named board might have received had it filed the proper map, or the actual expense of furnishing school facilities to the youth of the attached territory.

COLUMBUS, OHIO, July 29, 1915.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I have your communication of July 16, 1915, in which you call my attention to the provisions of sections 4723 and 4724 of the General Code. These sections were a part of section 3923, R. S., as amended by an act passed by the legislature April 14, 1908, and found in 99 O. L., 105. Both sections were repealed by an act passed by the legislature February 5, 1914, and found in 104 O. L., 133, 145. The language of the sections in question was as follows:

"*Section* 4723. Joint subdistricts are abolished and the territory of such districts situated in the township in which the school house of the joint district is not located shall be attached for school purposes to the township school district in which such school house is located. Such territory shall constitute a part of such township school district and the title of all school property located therein is vested in the board of education of the township to which the territory is attached.

"*Section* 4724. A map of such attached territory shall be prepared under the direction of the board of education of the township district to which the territory is attached and made a part of the records of the board. A copy of such map shall be filed with the auditor of the county in which such territory is situated, or, if the territory is in two or more counties, it shall be filed with the auditor of each county."

You further call attention to the provision of section 4735, G. C., 104 O. L., 138, to the effect that present existing township school districts shall constitute rural school districts until changed by the county board of education.

You then state that a board of education of a township district to which territory of a joint subdistrict was attached by virtue of section 4723, G. C., now repealed, failed and neglected, and ever since the passage of said section has failed and neglected to prepare a map of the attached territory and file the same with the county auditor; and that by reason of such failure while the board of education in question has been paying the expense of educating the youth residing in the attached territory, yet the school taxes levied on the property located in such attached territory and collected by the county treasurer has not been apportioned and paid to said board of education, but on the other hand such taxes have been paid to the board of education of the school district from which such territory was detached.

You now inquire as follows:

(1) Can the board of education which failed to prepare and file the map in question recover from the other board of education referred to, the taxes received by the latter and which the former would have received had it prepared and filed the proper map, and if such recovery may be had, then for how many years and in what way?

(2) If such recovery cannot be had, then can the first named board of education recover from the other board of education its actual expenses paid for educating the youth of the attached territory, and if such recovery may be had, then for how many years?

It may be observed in the first instance that the manifest purpose of the provision of section 4724, G. C., requiring the board of education of the township district to which territory was attached to prepare a map of such attached territory, and file a copy of the same with the auditor of the county in which such territory was situated was to furnish a guide in the preparation of the tax duplicates and advise the county auditor or other official upon whom his duties in this particular might be cast of the exact location of the boundary lines of the various school districts of the county. The situation now under consideration results from the failure of a board of education to comply with the plain provisions of the statutes and the township school district represented by the board of education which has negligently failed to comply with the statute is the district which has suffered a loss of revenue. The officials charged with the preparation of the tax duplicate have not committed any error, and until a proper map was filed with the county auditor would have had no authority to apply in the territory in one township and attached to another township for school purposes, the rate of taxation for school purposes applicable to the latter township, or to pay to the latter township taxes collected from territory included in the former. In other words, the situation is due to a failure to act on the part of the township board of education, and not to any mistake of the county auditor or other official charged with any duty in the making up of the tax duplicates or in the collection or distribution of taxes, so that it is impossible to invoke any of the rules of law relating to the recovery of money paid under a mistake of fact. There was no mistake of facts, but only a failure on the part of the township board of education to comply with the mandate of the statute, and perform the act necessary to be performed before it could levy upon and collect taxes from the attached territory. It could not even be assumed that the tax actually collected from the attached territory was the same as would have been collected had the map been filed, for to so assume that would be to also assume that the rate of taxation for school purposes in both school districts was identical.

It will be noted that while the filing of the map is by virtue of other statutes necessary before the board of education of the township district to which the territory is attached can levy upon and collect a tax from such attached territory, yet the filing of such map is not a prerequisite to the attaching of the territory. The territory is attached by virtue of the statute, and no action on the part of the board of education of the township district to which such territory is attached is necessary to absolutely charge such board of education with the duty of providing school facilities for the youth of school age residing in such attached territory.

In view of the above mentioned considerations, I am of the opinion that both of your questions must be answered in the negative, that the law will leave the boards of education referred to by you in the situation in which it finds them, and that the board of education to which the territory was attached cannot recover from the board of education receiving the tax levied on such attached territory, either the tax actually received or the tax the first named board might have levied and received had it filed the proper map, or the actual expense of furnishing school facilities to the youth of the attached territory.

Respectfully,
EDWARD C. TURNER,
Attorney General.

664.

DISAPPROVAL OF RESOLUTION FOR IMPROVEMENT OF NATIONAL ROAD IN LICKING COUNTY, OHIO.

COLUMBUS, OHIO, July 29, 1915.

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

DEAR SIR:—I have your communication of July 27, 1915, transmitting to me for examination final resolution as to the National road in Licking county, petition 807, I. C. H. No. 1.

It appears from this resolution that the contemplated improvement is less than one mile in length and it does not appear that such improvement is an extension of or connected with a permanently improved street, road or highway of approved construction. For this reason I am returning the resolution without my approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

665.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF ROADS IN LICKING AND DEFIANCE COUNTIES, OHIO.

COLUMBUS, OHIO, July 29, 1915.

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

DEAR SIR:—I have your communication of July 27, 1915, transmitting to me for examination final resolutions as to the following roads:

National Road, Licking county, petition No. 807, I. C. H. No. 1.
National Road, Licking County, petition No. 807, I. C. H. No. 1.
Hicksville-Defiance Road, Defiance County, I. C. H. No. 420.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

666.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF ROADS IN CERTAIN COUNTIES.

COLUMBUS, OHIO, July 29, 1915.

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

DEAR SIR:—I have your communication of July 26, 1915, transmitting to me for examination final resolutions as to the following roads:

Trumbull County, Warren-Sharon Road, I. C. H. No. 329.
Muskingum County, Zanesville-Caldwell Road, I. C. H. No. 348.
Highland County, Milford-Hillsboro Road, I. C. H. No. 9.
Monroe County, Woodsfield-Marietta Road, I. C. H. No. 389.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

667.

STATE HIGHWAY COMMISSIONER—FACILITIES FOR TESTING ROAD AND BRIDGE MATERIALS AVAILABLE ONLY FOR STATE HIGHWAY DEPARTMENT—NO AUTHORITY TO TEST ROAD MATERIALS FOR PRIVATE CONCERNS OR MUNICIPALITIES.

The facilities of the state highway department designed for the investigation of road and bridge materials and for the testing of the same, are available only for the examination and testing of materials intended or designed to be used in the construction of roads by the state highway department, and the state highway commissioner is without authority to test road materials for and at the request of private concerns or municipalities.

COLUMBUS, OHIO, July 30, 1915.

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

DEAR SIR:—I have your communication of July 24, 1915, which reads as follows:

"This department has recently received various communications from

private concerns and municipalities requesting that our testing laboratory test materials to be used by them in the paving of streets and roads over which the state highway department has no jurisdiction.

"I respectfully ask your opinion as to whether or not it is proper for the state highway department to test such materials and receive compensation therefor, and if it is proper so to do, what disposition should be made of such compensation?"

Section 1180, G. C., provides that the office of the state highway commissioner shall be furnished, among other things, with apparatus for testing materials. Section 1183, G. C., provides that the state highway commissioner shall, among other things, conduct investigations and experiments, either in person, by deputy or engineer, in regard to the best kinds of road and bridge materials, and examine the chemical and physical character of such materials. This section further provides that all expenses incurred by reason of the provisions of the chapter relating to the state highway department shall be paid out of any fund or funds available for the use of the department. None of the sections relating to the state highway department either fix or provide for the fixing of any fees to be charged private concerns or municipalities for testing materials to be used by them, and there is no statutory provision as to the disposition of any such fees, should the same be collected by the state highway commissioner. I find no provision in the laws relating to your department which would warrant the inference that your testing laboratory was intended by the legislature to be available to municipal corporations or private individuals. It cannot be assumed that a public official has jurisdiction or authority in a matter merely because it may seem wise or expedient that he should have such authority or jurisdiction.

It is, therefore, my opinion, that the facilities of your department designed for the investigation of road and bridge materials and for testing of the same, are available only for the examination and testing of materials intended or designed to be used in connection with the construction of roads by your department, and that you are without authority to test road materials for, and at the request of, private concerns or municipalities.

Respectfully,
EDWARD C. TURNER,
Attorney General.

668.

APPROVAL OF LEASES FOR LAND ADJACENT TO ST. MARY'S RESERVOIR TO AMBROSE B. KOHLER; ALSO LEASE OF ELEVEN ACRES OF LAND IN SHELBY COUNTY TO FRANK LEHMKUHL.

COLUMBUS, OHIO, July 30, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of July 29, 1915, transmitting to me for examination a lease to Ambrose B. Kohler, of St. Marys, Ohio, of certain land adjacent to St. Marys reservoir, and also a lease to Frank Lehmkuhl, of Minster, Ohio, of eleven acres of land in Shelby county.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

669.

JUSTICE OF PEACE—ONLY ENTITLED TO FOUR PER CENT. ON COLLECTIONS ACTUALLY MADE BY HIM UPON JUDGMENT—SECTION 1746, G. C., CONSTRUED.

Under the provisions of section 1746, G. C., a justice of the peace is only entitled to four per cent. on collections actually made by him upon judgment.

COLUMBUS, OHIO, July 31, 1915.

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

GENTLEMEN:—Under date of July 15, 1915, you submitted for my written opinion the following question:

> "We would respectfully request your written opinion upon the following question:
>
> "Section 1746, General Code, giving the fees that may be taxed by a justice of the peace, among other things provides as follows:
>
> "'* * * Collections made upon judgments, if not paid within ten days after rendition thereof, or within ten days after stay of execution, if such stay is taken, the same fees are allowed to constables for money paid on execution; * * *'
>
> which is four per cent. (4%). For instance, a judgment was rendered in justice's court on behalf of D against A for the sum of $125.00, and about twenty days after judgment was rendered A paid to D the full amount of the judgment and then desired to pay the justice the costs in the case and the justice insisted upon receiving four per cent. upon the amount of the judgment in addition to the other costs, under the provisions of the section just quoted, for making collections of the judgment, although as stated, the payments were made outside of the court and the justice did not handle the money. Is the justice of the peace entitled to the four per cent.?"

Section 10400 G. C., provides as follows:

> "If the case be not appealed, taken up on error, docketed in the common pleas, or bail has not been given for the stay of execution at the expiration of ten days from the entry of the judgment, the justice shall issue execution without a demand, and proceed to collect the judgment, unless otherwise directed by the judgment creditor."

It has been held (Galor v. Hunt, 23 O. S., 255) that for neglect of a justice to issue execution when required by law, he and his sureties are liable on his official bond. So that, under the provisions of section 10400 it seems clear that it is the duty of the justice, at the expiration of ten days, provided the case be not appealed or stay of execution had, to issue execution without demand.

However, section 1746 cited by you in your request grants fees to the justice on "collections made on judgments" if not paid within ten days after rendition thereof or within ten days after stay of execution. If such stay is taken, the fees being the same as those allowed constables for money paid on execution, which is four per cent. (See section 3347, G. C.)

In the case submitted by you, however, wherein the judgment debtor pays the

judgment creditor direct, there could be no collection made upon the said judgment, and consequently the justice of the peace would not be entitled to four per cent. of the judgment as if collected by him.

Respectfully,
EDWARD C. TURNER,
Attorney General.

670.

DEED OF LOVINA H. SILVUS AND EBER G. SILVUS TO STATE OF OHIO—SUPPLEMENT TO OPINION NO. 517—CLERICAL ERROR IN APPROPRIATION BILL IN SPELLING NAME.

COLUMBUS, OHIO, July 31, 1915.

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

DEAR SIR:—Under date of July 3, 1915, you sent to this department for my approval a certain deed which had been sent to you by the board of administration, which deed grants certain property located in Athens county, Athens township, Ohio, said deed being dated May 27, 1915, to the state of Ohio, the grantors being Lovina H. Silvus, a widow, and Eber G. Silvus and wife, Rosetta Silvus, and under date of July 16th there was likewise transmitted by the board of administration to us a deed between the same parties covering two tracts of land that were excepted in the former deed, the deed hereinbefore referred to.

Under date of June 21, 1915, in opinion No. 517, to the Ohio board of administration, I passed upon the abstract of title to said real estate and found, from the examination made, that on the 13th day of April, 1915, Lovina H. Silvus and Eber G. Silvus were seized of an estate in fee simple to said premises, subject only to the following:

1. The taxes for the last half of the year 1914, due June, 1915, amounting to $43.95;
2. The taxes for the year 1915, the amount of which are as yet undetermined.
3. The right of William P. Wyatt to cut and remove timber from said premises until February 1, 1916, under and by virtue of a contract entered into by and between Eber G. Silvus and said William P. Wyatt, dated January 10, 1914.

Immediately upon receipt of the first deed sent to me for approval, I took up the matter with the board of administration as to whether or not the matters hereinbefore referred to had been straightened out and under date of July 12, 1915, I received a letter from the Ohio board of administration to the following effect.

"In compliance with instructions contained in your letter of July 9th, I beg to hand you, herewith, deed by Lovina H. Silvus et al., to the state of Ohio; also contract or right of Wm. P. Wyatt to cut timber, etc., with cancellation endorsement properly signed thereon; also tax receipt for the last half 1914, and contract signed by Eber G. Silvus and Dr. O. O. Fordyce, guaranteeing the payment of the taxes for the year 1915.

"Mr. E. G. Silvus has deposited with Dr. O. O. Fordyce his check for $90.00 which is held in the safe of the Athens State Hospital for the payment of the 1915 taxes that are yet undetermined.

"I also enclose voucher No. 847 for $11,025.00, drawn in favor of E. G. Silvus for 245 acres of land purchased by the state.

"Upon the approval of the deed by your department, will you please to hand same, together with the voucher enclosed, to the auditor of state?"

The deed submitted carries an exception in the warranty clause to the effect that the grantors will warrant and defend the title against all claim or claims, of all persons whomsoever, except as to the right of William P. Wyatt to cut and remove timber from said premises till February 1, 1916.

It appears, therefore, that:

1. The taxes due June 20, 1915, were paid on June 28, 1915, in the sum of $43.95;

2. That a contract was entered into on June 29, 1915, between Eber G. Silvus and O. O. Fordyce, superintendent of the Athens State Hospital, whereby said Eber G. Silvus agrees to pay the taxes due for the year 1915;

3. That the original contract entered into in duplicate between Eber G. Silvus and William P. Wyatt bears the following endorsement:

"Athens, Ohio, June 28, 1915.

"In consideration of payment this day received I hereby cancel and release above contract.

"(Signed) Wm. P. Wyatt."

It therefore appears that all of the objections to the title, heretofore made in the opinion hereinbefore referred to, have been cleared up.

In regard to the deed that was transmitted to us by you the board of administration, on July 16th, asked the following question:

"Please refer to the communication from this department under date of July 12th, with which was enclosed deed by Lovina H. Silvus et al., to the state of Ohio, together with other matters in connection therewith.

"The state auditor's department has raised the question as to their authority to issue a warrant in settlement for this land, inasmuch as there seems to be a typographical error in the name 'Silvus.' In the short budget appropriation it reads as follows: 'To purchase the E. G. Silvers' farm, 245 acres, $11,025,' while it should have read, 'To purchase the E. G. Silvus farm.'

"Will you please advise whether, because of this typographical error, the auditor of state is justified in refusing to issue his warrant?"

And in regard to the deed transmitted by the board of administration to this department covering real estate excepted in the former deed, the board of administration stated as follows:

"Enclosed, herewith, please find deed by Lovina H. Silvus et al., to the state of Ohio, covering two tracts of land transferred to the state of Ohio in consideration of $1,464.30.

"Voucher covering same, together with this deed, was forwarded to

the state auditor's department but returned with the information that warrant could not be issued until you had approved of this deed and also calling our attention to the fact that the deed has not been recorded.

"Is it possible to have the deed recorded until warrant has been delivered to the grantors?

"Your attention is also called to the typographical error in the appropriation, which reads, 'To purchase remainder E. G. Silvers' farm, Athens, $1,464.34.' This should have read 'E. G. Silvus' instead of 'E. G. Silvers.'

"Will you please advise whether, because of this typographical error, the auditor of state is justified in refusing to issue his warrant?"

The questions raised by the two letters may be stated as follows:

1. Is it possible to have the deed recorded until warrant has been delivered to the grantors?

2. The appropriation for the payment of the property described in the deed submitted by your department is as follows:

"To purchase the 'E. G. Silvers farm,' 245 acres, $11,025.00."

The appropriation to cover the purchase of the piece of property, the deed for which was submitted to this department by the board of administration, reads as follows:

"To purchase remainder E. G. Silvers farm, Athens, $1,464.00."

Because of the discrepancy between the spelling of the name in the appropriation and the correct spelling of the name of the owner of the real estate, is the auditor of state justified in refusing to issue his warrants in payment of the real estate upon tender of proper deeds of the owners of the lands and the approval of the titles thereof by this department?

As to your first question as to whether or not it is possible to have a deed recorded until a warrant has been delivered to the grantors, I am of the opinion that it is possible so to do provided, of course, that the grantors are willing to take the risk of the delivery of the deed and the recording of the same before receiving the warrant in payment of the land so conveyed. Under the provisions of section 267, G. C., the deeds in question must be recorded in Athens county before they can be filed permanently by the auditor of state and recorded by him in his office.

In respect to your second question I beg to advise that the situation presents an instance of a manifest clerical error in the appropriation bills. There is no difficulty about identifying the land for the purchase of which the appropriations are made, in view of the identity of the sound of the two names and the fact, which is I assume undoubtedly true, that there is no property known as "The E. G. Silvers farm" in the vicinity of the institution for which the purchases are to be made.

For the above reasons I advise that the auditor of state would not be justified in refusing his warrants to the present owners of the E. G. Silvus farm, under the appropriations above referred to.

In view of the foregoing I am of the opinion that the two deeds tendered by Lovina H. Silvus, a widow, and Eber G. Silvus and wife, Rosetta Silvus, to the state of Ohio for the premises, a description of which is contained in opinion No. 572, herein referred to, will convey to the state of Ohio a good and sufficient title

to the premises described, and that the auditor of state is authorized to pay, from the appropriations hereinbefore referred to, to the grantors the purchase price thereof.

I am herewith handing you the deed of Lovina H. Silvus, a widow, and E. G. Silvus and wife, Rosetta, to the state of Ohio dated May 27, 1915, and the deed from the same parties to the state of Ohio under date of July 2, 1915; the tax bill paid June 28, 1915; a copy of the contract between Eber G. Silvus and O. O. Fordyce, superintendent of Athens State Hospital; a contract between E. G. Silvus and Wm. P. Wyatt, containing endorsement of Wyatt as to the cancellation, and the abstract of title to the land in question examined by me and reported on in opinion No. 517 hereinbefore referred to; also a copy of opinion No. 517.

The voucher which accompanied the letter of July 12th, from the board of administration, has been returned to said board for correction. The said voucher was made out in the name of E. G. Silvus and should be made out in the names of Lovina H. Silvus and Eber G. Silvus.

Respectfully,
EDWARD C. TURNER,
Attorney General.

671.

APPROVAL OF LEASE FOR PART OF ABANDONED HOCKING CANAL TO THOMAS J. LEYSHON.

COLUMBUS, OHIO, August 1, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of July 30, 1915, transmitting to me for examination a lease to Thos. J. Leyshon, for a part of the abandoned Hocking canal valued at $1,000.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

672.

COUNTY EXPERIMENT FARMS—LAW RELATING TO SUCH FARMS FOUND IN HOUSE BILL NO. 163, 106 O. L., 122.

The law relating to county experiment farms is now to be found in house bill No. 163, 106 O. L., 122.

COLUMBUS, OHIO, August 2, 1915.

HON. W. H. KRAMER, *Bursar, Ohio Agricultural Experiment Station, Wooster, O.*

DEAR SIR:—I have your communication of July 22, 1915, in which you refer to an opinion of this department rendered to the agricultural commission of

Ohio, regarding the disbursement of funds for the purchase and equipment of county experiment farms, as provided for under sections 1165-6, 1165-7 and 1165-8, G. C. You now inquire as to whether the ruling set forth in the opinion referred to above will also apply to the disbursing of the funds appropriated by the county commissioners for the payment of wages and purchase of supplies and materials for county experiment farms, as provided for under section 1177-4, G. C., as found in house bill No. 163, 106 O. L., 122.

In answering your inquiry I deem it proper to first refer to an opinion of this department rendered on February 20, 1915, to the agricultural commission of Ohio, in which opinion it was held that the law applicable to county experiment farms was to be found in sections 97, 98, 99, 100, 101, 105, 106, 108, and 109 of the agricultural commission act, being sections 1174, 1175, 1176, 1177, 1177-1, 1177-5, 1177-6, 1177-8, and 1177-9, of the General Code, and in sections 1165-6, 1165-7, 1165-8 and 1165-11, of the General Code, as amended in 103 O. L., 436, with the proviso that the four amended sections last referred to must be read in the light of the provision of the agricultural commission act found in section 11 of said act, being section 1089 of the General Code, to the effect that the agricultural commission should succeed to and be possessed of the rights, authority and powers previously exercised by the board of control of the said agricultural experiment station, and that in reading said sections 1165-6, 1165-7, 1165-8 and 1165-11, as amended in 103 O. L., 436, the expression "board of control of the Ohio agricultural experiment station," where it occurred in said sections, must, therefore, be read "agricultural commission."

The opinion of this department to which you evidently refer, was rendered on April 6, 1915, to the agricultural commission of Ohio, and in that opinion it was held that in the purchase of a county experiment farm and equipment therefor, the purchase price of the farm and of the equipment was to be paid upon the warrant of the county auditor upon the proper certificate of the agricultural commission. Upon the same date on which the opinion last referred to was issued by this department, to wit, April 6, 1915, the legislature passed house bill No. 163, being an act to create a board of control for the Ohio experiment station, to stipulate its duties and powers and to amend sections 1174 to 1177 inclusive, and 1177-1 to 1177-11 inclusive, of the General Code. This act was approved by the governor and filed in the office of the secretary of state on the 8th day of April, 1915, and is therefore now in effect.

The act expressly amends sections 1174, 1175, 1176, 1177, 1177-1, 1177-5, 1177-6, 1177-8 and 1177-9 of the General Code, and in the act there are also to be found four sections designated as sections 1177-2, 1177-3, 1177-4 and 1177-7 of the General Code. These four sections cover the identical subject-matter covered by sections 1165-6, 1165-7, 1165-8 and 1165-11 of the General Code, as amended in 103 O. L., 436, and it must be held that said sections 1165-6, 1165-7, 1165-8 and 1165-11 are impliedly repealed by the enactment of said sections 1177-2, 1177-3, 1177-4 and 1177-7. The law, and all the law, relating to county experiment farms is, therefore, now to be found in sections 1174 to 1177 inclusive, of the General Code, and sections 1177-1 to 1177-11, inclusive, of the General Code, is found in house bill No. 163, 106 O. L., 122, and any opinion of this department which placed a construction upon the law relating to county experiment farms, which construction is inconsistent with the aforesaid provisions of house bill No. 163, is therefore to be disregarded in the administration of the county experiment farm law from and after the 8th day of July, 1915, upon which date house bill No. 163 became effective.

It will be observed upon an examination of sections 1177-2, 1177-3, 1177-4 and

1177-7, as found in 106 O. L., 122, that said sections in their present form are practically identical with sections 1165-6, 1165-7, 1165-8 and 1165-11, G. C., as originally enacted in 101 O. L., 124.

Specifically answering your inquiry, the opinion of this department issued to the agricultural commission of Ohio on the 6th day of April, 1915, which opinion construed sections 1165-6, 1165-7, 1165-8 and 1165-11 of the General Code, as amended in 103 O. L., 436, now has no application whatever either to the purchase of a county experiment farm and the original equipment therefor, or to the purchase of supplies and materials for county experiment farms for the reason that said sections 1165-6, 1165-7, 1165-8 and 1165-11 of the General Code, as amended in 103 O. L., 436, have been impliedly repealed by house bill No. 163, as found in 106 O. L., 122. As previously indicated, all the activities of county experiment farms are now to be governed by the appropriate sections of said house bill No. 163, and if upon an examination of that act you have any question as to the meaning of any of its provisions, I will be very glad to answer your inquiries in regard to the same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

673.

SURETY COMPANY BOND—SUIT MAY BE BROUGHT AT ANY TIME WITHIN TEN YEARS AFTER CAUSE OF ACTION THEREON ACCRUES—SUCH BOND COVERING ALL OFFICIAL ACTS OF OFFICER DURING HIS TERM OF OFFICE SHOULD NOT BE CANCELLED AT EXPIRATION OF SUCH TERM.

Bond given by surety company on behalf of officer covering all official acts of officer during his term should not be cancelled at expiration of such term. Suit on bond may be brought at any time within ten years after cause of action thereon accrues.

COLUMBUS, OHIO, August 2, 1915.

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

DEAR SIR:—Under date of July 9, 1915, you submitted an inquiry to me for official opinion as follows:

"We have received and have on file for reply the following letter:

"'Columbus, Ohio, July 8, 1915.

"'Re:—0159853 Matthew Brown Hammond, Member of Industrial Commission of Ohio.

"'Mr. A. V. Donahey, Auditor of State, Columbus, Ohio.

'"Dear Sir:—Under date of June 30, 1913, we executed the above bond covering the term of office ending on June 30, 1915. Would you be good enough to advise us if the bond still continues in force, or if it should be cancelled? If the bond has served its purpose please give us the date upon which the liability of the American Surety Company terminated.

"'Thanking you for this favor, we remain,

"'Very truly yours,

"'AMERICAN SURETY COMPANY OF NEW YORK.

"'By (signed) J. S. Mossgrove, Manager for Middle Ohio.'

"Your opinion on the following questions relative thereto is respectfully requested:

"How long does the bond of an official continue in force and when should it be cancelled?

"When has a bond of an official served its purpose and when does the liability terminate?"

From the fact that you incorporate in your letter a letter received by you from the American Surety Company of New York, it appears that the bond to which you refer is a surety company bond. I assume, for the purposes of answering your inquiry, that the premiums due to the surety company for the bond have been duly paid and therefore that the rule of law laid down in the case of Bryant v. American Bonding Company, 77 O. S., 90, is not to be taken into consideration.

Your first question is as to how long does the bond of an official continue in force and when should it be cancelled.

Since the question is asked relative to a member of the Industrial Commission of Ohio, the term of such commissioner is not only for the term for which he was appointed but likewise until his successor is appointed and qualified. In the case of State ex rel. v. Howe, 25 O. S., 588, the first branch of the syllabus is as follows:

"Where an officer appointed by the governor by and with the advice and consent of the senate, is authorized by law to hold his office for a term of three years, and until his successor is appointed and qualified, and no appointment of a successor is made by the regular appointing power at the expiration of his term of three years, the office does not become vacant; but the incumbent holds over as a *de jure* officer until his successor is duly appointed and qualified."

The bond given by a surety company covers the official acts of an officer during his term of office, and for any default made during the term of such officer a cause of action will accrue in favor of the state.

Section 11226, G. C., being the statute of limitations relative to official bonds, provides as follows:

"An action on the official bond, or undertaking of an officer, assignee, trustee, executor, administrator, or guardian, or on a bond or undertaking given in pursuance of statute, shall be brought within ten years after the cause thereof accrued."

I shall not undertake to state, in this opinion, the question being general, when a cause of action on the bond would accrue. Since the bond covers the acts of the official, as such, during his term, and the statute of limitation allows ten years upon which to bring an action thereon, I am of the opinion that the bond itself should not be cancelled at all. It should be held, in case it should subsequently develop, after the officer has ceased to act as such, that there is liability on such bond. The bond, of course, will only cover the official acts of the officer during his term of office.

You next inquire when has a bond of an official served its purpose, and when does the liability terminate?

I have practically answered your second question by answering your first

question. I am of the opinion that the bond of an official is liable for the actions of such official during his incumbency of the office, and that the liability will not terminate thereon until the statute of limitations has run.

Respectfully,
EDWARD C. TURNER,
Attorney General.

674.

PROBATE JUDGE—MUST SUPPLY EACH PATIENT SENT TO HOSPITAL FOR INSANE WITH PROPER CLOTHING, IF SAME IS NOT OTHERWISE FURNISHED—KIND AND QUALITY OF CLOTHING—NO EXAMINATION BY PHYSICIANS REQUIRED IN CASE OF TRANSFER OF PATIENTS IN INSANE HOSPITALS TO LIMA STATE HOSPITAL.

The probate judge should supply each patient committed to the hospital for the insane with proper clothing, as provided in section 1963, *G. C., if same is not otherwise furnished to the superintendent of the hospital. Clothing to be furnished should be substantial rather than stylish or expensive.*

No examination by physicians is required in case of application of transfer of patients in insane hospitals to the Lima State Hospital, section 1993, *G. C.,* 103 *O. L.,* 448.

COLUMBUS, OHIO, August 2, 1915.

HON. SAMUEL L. BLACK, *Probate Judge, Columbus, Ohio.*

MY DEAR JUDGE:—Permit me to acknowledge receipt of your letter of July 26th, in which you request an opinion as follows:

> "I would appreciate it greatly if you will give me an opinion as to my duty under section 1962 of the General Code of Ohio. I have been buying clothing for indigent insane patients, distributing the orders around among the best clothing firms in the city. I have been criticised for doing so by the bureau of accounting, when I believed I was following the plain, simple and express provisions of the section above quoted. The bureau of accounting give as a justification for their criticism of this office the fact that other judges of this district do not comply with section 1962 of the General Code. I want to be right. The superintendent of the state hospital refuses to receive patients unless they are accompanied with the clothing as provided for by section 1962. My judgment is that I am required to furnish this clothing, and that all I can be required to do is to buy it in the open market, that I am not required to go personally to the clothing store in each case and be the judge of the quality of the goods. I tried to deal with the most reliable firms of the city, beyond that I do not see how I can do anything more. I cannot allow these patients, many of whom are sick and desperately in need of immediate treatment, to lie in jail while the question of clothing is being settled, and I am therefore begging your department for an opinion.
>
> "Again, under section 2216 of the Revised Statutes, an enquiry must be held on all patients confined in the state hospital and who are to be transferred to the Lima hospital.
>
> "QUAERE. Shall I, under section 2216, allow the physicians at the

state hospital to make the examination and certificate for those who are to be transferred, or shall I appoint physicians to make the examination and certificate under the general provisions of the Code?

"My reason for making this inquiry is this:

"Several years ago patients were transferred from the county infirmary to the state hospital under the law, and I appointed physicians to make the examination, and I was severely criticised for doing so on account of the expense.

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

Sections 1962 and 1963 of the General Code are as follows:

"1962. If not otherwise furnished, the probate judge shall supply each patient sent to a hospital for the insane with *proper* clothing, which shall be paid for on his certificate and the order of the county auditor from the county treasury. Such clothing shall be new or as good as new, the woolens of dark color, and with such patient be delivered in good order to the superintendent. The superintendent will not be bound to receive the patient without such clothing.

"1963. The clothing required by the preceding section is as follows:

"For a male patient, a coat, vest, and two pairs of pantaloons, all of woolen cloth, two pairs of woolen socks, two pocket handkerchiefs, two cravats, one hat or cap, a pair of shoes or boots, a pair of slippers, three cotton shirts, two pairs of drawers, two undershirts and an over coat or other outside garment sufficient to protect him in severe weather.

"For a female patient, two substantial gowns or dresses, two flannel petticoats, two pairs of woolen stockings, one pair of shoes, one pair of slippers, two handkerchiefs, a good bonnet, two cotton chemises, and a large shawl or cloak."

Under section 1962 of the General Code quoted above it is made the duty of the probate judge to supply each patient sent to the hospital for the insane with *proper clothing, if not otherwise furnished.* For the purpose of arriving at the kind and quantity of clothing to be furnished it is necessary to look to the provisions of section 1963 of the General Code, supra. In determining as to the necessity for furnishing clothing under the provisions of section 1962, discretion must be exercised by the probate judge who sits in a lunacy inquest, the condition laid down in that section being that *the clothing shall be new, or as good as new, the woolens to be dark in color, and to be delivered to the superintendent* of the hospital in good order. The necessity for the furnishing of clothing enumerated in section 1963 of the General Code, supra, would only arise when the clothing was not otherwise furnished, and it would appear that the judge having the patient before him would be able to determine readily whether the clothing worn by the patient at the time of his appearance in court, or any that might be furnished otherwise, would be such as is comprehended under the provisions of section 1963 of the General Code. From the very nature of things it is quite apparent that it is contemplated that the clothing to be furnished will be of a substantial rather than of a stylish or expensive character.

It is my opinion therefore that under the provisions of section 1962 of the General Code, supra, it is the duty of the probate judge to supply each patient committed by him to the hospital for the insane with clothing as enumerated in section 1963 when, in the opinion of the probate judge, the clothing worn by the patient or otherwise furnished to the superintendent of the hospital for the insane is not of the character set out in section 1963 of the General Code.

In the exercise of the discretion residing in the judge, regard should be had for the comfort and convenience of the patient, which should not be overlooked at any hazard, and it should naturally follow that the probate judge, in the discharge of his duties, would regard the interests of his county to the end that the service rendered should be as economical as possible without sacrificing its efficiency.

Coming to the second question propounded by you relative to the transfer of patients from the state hospital for the insane to the Lima State Hospital, which is as follows:

> "Shall I, under section 2216, allow the physicians at the state hospital to make the examination and certificate for those who are to be transferred, or shall I appoint physicians to make the examination and certificate under the general provisions of the Code?"

Section 2216 of the General Code has no application whatever to the transfer of patients confined in the state hospital for the insane to the Lima State Hospital, that section relating to the transfer of insane prisoners from the penitentiary or the reformatory to the Lima State Hospital, and under its provisions it is necessary that there be an examination of the prisoner made by two physicians, etc. Section 1993 of the General Code (103 O. L., 448), which provides for the transfer of certain patients from the state hospital for the insane, is as follows:

> "The superintendent of a state hospital for insane may make application to the Ohio board of administration for an order of transfer to the Lima State Hospital of any or all inmates thereof that exhibit dangerous or homicidal tendencies, rendering their presence a source of danger to others. The board, upon satisfaction that such order is advisable, may order the transfer of such persons to the Lima State Hospital."

In case of the transfer of patients of the state hospitals referred to in section 1993, supra, it is not necessary that further examination may be had, nor is there a provision for the payment of any fees for such examination. The superintendent of the state hospital who is in charge of the patients from day to day and who is familiar with their condition would in all probability be better able to determine as to the need and advisability of transferring to the Lima State Hospital than anyone else.

It is my opinion, therefore, in answer to your second question, that there is no provision of law for the appointment of physicians to examine patients who are recommended for transfer from the state hospitals for the insane to the Lima State Hospital.

Respectfully,
EDWARD C. TURNER,
Attorney General.

675.

BOARD OF EDUCATION—WHERE NO HIGH SCHOOL IS MAINTAINED —NO AGREEMENT MADE WITH ANY OTHER BOARD TO FURNISH HIGH SCHOOL FACILITIES FOR PUPILS OF SAID DISTRICT—SUCH BOARD NOT REQUIRED TO PAY TUITION OF SUCH PUPILS UNLESS NOTICE IN WRITING FILED WITH BOARD.

The board of education of a school district, which does not maintain a high school and which has not entered into an agreement with any other board or boards of education for the furnishing of high school facilities to the pupils residing in said district, and entitled to high school facilities, cannot be charged with the payment of the tuition of such pupils unless the notice in writing required by the provision of section 7750, G. C., be filed with the clerk of said board of education not less than five days previous to the beginning of the high school attendance of such pupils, setting forth the name of the school to be attended and the date the attendance is to begin.

COLUMBUS, OHIO, August 2, 1915.

HON. HUGH F. NEUHART, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—I have your communication of July 27, 1915, in which you inquire as to whether a board of education of a rural district in which no high school is maintained is liable under section 7747, G. C., 104 O. L., 125, for the tuition of pupils having a legal school residence in such district, attending high school without the certificate of the county superintendent, when such pupils are the holders of a Boxwell diploma, and such rural board has no agreement for the schooling of its high school pupils, and such pupils so attending high school did not give the clerk the five-day notice required by section 7750, G. C., previous to the beginning of the attendance.

Section 7747, G. C., as amended, 104 O. L., 125, reads as follows:

> "The tuition of pupils who are eligible for admission to high school and who reside in rural districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part of the month shall create a liability for the entire month. No more shall be charged per capita than the amount ascertained by dividing the total expenses of conducting the high school of the district attended, exclusive of permanent improvements and repair, by the average monthly enrollment in the high school of the district. The district superintendent shall certify to the county superintendent each year the names of all pupils in his supervision district who have completed the elementary school work, and are eligible for admission to high school. The county superintendent shall thereupon issue to each pupil so certified a certificate of promotion which shall entitle the holder to admission to any high school. Such certificates shall be furnished by the superintendent of public instruction."

Section 7750, G. C., to which you refer, reads as follows:

> "A board of education not having a high school may enter into an agreement with one or more boards of education maintaining such school

for the schooling of all its high school pupils. When such agreement is made the board making it shall be exempt from the payment of tuition at other high school of pupils living within three miles of the school designated in the agreement, if the school or schools selected by the board are located in the same civil township, as that of the board making it, or some adjoining township. In case no such agreement is entered into, the school to be attended can be selected by the pupil holding a diploma, if due notice in writing is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, such notice to be filed not less than five days previous to the beginning of attendance."

You state that the board of education in question does not maintain any high school and that such board of education has not entered into any agreement with any other board or boards of education maintaining high schools for the schooling of its high school pupils as authorized by section 7750, G. C. No high school being maintained by the board of education in question and said board not having entered into any agreement with any other board or boards of education for the furnishing of high school facilities to its pupils, it is clear that under the language of section 7750, G. C., the school to be attended can be selected by the pupils entitled to high school facilities, but it seems equally clear that in order to charge the board of education of the district of the pupils' residence, with the payment of the tuition, notice in writing must be given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, such notice to be filed not less than five days previous to the beginning of the attendance.

Such was the conclusion of the court as to the legal effect of the language used in this section in the case of New Madison Special School District (Bd. of Ed.) v. Harrison Township (Bd. of Ed.) 14 O. D., N. P., 62. The above cited case was decided by Judge Allread of the court of common pleas of Darke county in 1903, and was affirmed by the circuit court without report on November 25th of the same year. The language of the statute at that time was practically the same as at the present. The court expressed its conclusion in the following language:

"Where no high school is maintained by the township board of education and no agreement has been made by such township board with one or more boards of education of the same adjoining townships for the schooling of high school pupils of such township, the high school pupils resident in such township may attend any high school in the state and tuition in such case shall be chargeable to such township board of education, *providing written notice thereof is given to the clerk of the board of education before the attendance begins.*"

An examination of the above cited case will show that the court intended to be taken as holding that under the conditions set forth in the portion of the opinion above quoted, written notice to the clerk in accordance with the terms of the statute was necessary to charge the school district of the pupils' residence with the payment of the tuition.

It is, therefore, my opinion that under the facts stated by you, the board of education referred to by you is not liable for the payment of tuition for the pupils in question.

Respectfully,
EDWARD C. TURNER,
Attorney General.

676.

COUNTY FUNDS—BANKS AND BANKING—A BANK WHICH HAS BEEN AWARDED FUNDS OF COUNTY AS ACTIVE AND INACTIVE DEPOSITORY MAY NOT DIVIDE FUNDS WITH OTHER BANKS OF COUNTY, SUCH OTHER BANKS TO BE RECOGNIZED AS DEPOSITORIES.

Neither the county commissioners nor the county treasurer may lawfully enter into an arrangement whereby a bank which has been regularly awarded the funds of the county on its bid as active and inactive depositary may divide the funds so awarded to it with other banks of the county not bidding; such other banks to be recognized as depositaries and to pay the rate of interest offered by the regularly designated depositary.

COLUMBUS, OHIO, August 3, 1915.

HON. HENRY W. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of July 28, 1915, wherein you request my advice upon the following state of facts:

> "The First National Bank, The Ohio Valley Bank Company, The Commercial & Savings Bank Company, all of Gallipolis, and The Vinton Banking Company of Vinton, have been designated as depositaries for the active and inactive funds of this county. The First National Bank was the only bank that bid for the county funds. This bank bid one per cent. for the active funds and two per cent. for the inactive funds. Whereupon their bid was accepted, and on July 17, 1915, The First National Bank gave bond and became the depositary of the county funds.
>
> "It seems now that The First National Bank does not want all the county money, and they are before the county commissioners with this proposition: that the inactive funds be divided between the four banks in the county, and the active funds be divided among the three local banks. There is no practical objection to this proposition as all the banks are sound, and all will give bond as required by law. It is my belief that the commissioners desire to make this arrangement, and they have put it up to me. I have examined the law as to county depositaries and can find no authority for it. Of course, if the funds were divided, the rate of interest paid would remain the same, to wit, the minimum, but the county would have the advantage of the resources of four banks as security, instead of one, as the matter now stands."

I interpret the first sentence of your letter as meaning that the banks therein named were formerly designated as depositaries, for the remaining statements in your letter make it clear that the only bank now designated as a depository is the First National Bank.

It is obvious that in depositing the funds of the county the commissioners must proceed strictly in accordance with the statutes applicable to the subject. If authority to take a given course is not therein conferred, such authority does not exist and it is not sufficient to authorize such course that the same is merely not prohibited by the statutes.

Section 2716, G. C., provides in effect that when the commissioners provide a depositary they shall advertise for bids.

Section 2717, G. C., provides for opening the bids and stipulates that when the

bids are opened the commissioners "shall award the use of such money to the bank or banks * * * that offer the highest rate of interest therefor on the average daily balance, provided proper sureties, securities or both, are tendered in the proposal."

Section 2718 provides that:

> "If, on account of the large amount of money to be deposited, the highest bidder is not entitled to all the funds of the county, the commissioners, after according to the highest bidder all to which it is entitled, shall award the balance to the next highest bidder or bidders respectively."

Section 2721, G. C., provides as follows:

> "If no proposals are received offering the rate of interest hereinafter prescribed, the commissioners shall at once again advertise in the same manner until acceptable proposals are received. Each subsequent advertisement shall also state whether any proposal was received under the preceding advertisement, and, if any, the bank or banks or trust companies and the rate of interest offered."

It is clear from the provisions of the foregoing sections that in the first instance at least the only legal method of awarding the funds of the county to depositaries when any bids are received, offering the prescribed rates of interest, is to award the same to bidding banks.

Section 2728, G. C., provides as follows:

> "If a bank or trust company to which an award is so made fails to execute an undertaking or to hypothecate bonds, as herein provided, within thirty days of the time the award is made, the commissioners may award the use of the money to any other bank or banks or trust companies whose written proposal offers the same rate of interest, as in the proposal of such defaulting bank or trust company. If no other bank or trust company offers such rate of interest in its proposal, the commissioners may award the use of such money to a bank or banks or trust companies whose written proposal offers therefor the next highest rate of interest. In either case, the undertaking and hypothecation shall be required to be executed. In case of such default, the commissioners shall advertise for others in the manner provided."

This section might be so interpreted as to authorize the commissioners, in the event therein described, to award the use of the money to banks other than the successful bidder without a readvertisement, though I do not so hold. However it is apparent from your letter that the contingency upon which section 2728 operates does not exist in the case stated by you.

I am unable to find any other provisions of the county depositary law which shed any light upon the question which you submit. Those which I have quoted and to which I have referred do not authorize the commissioners to enter into any such arrangements as those which you describe.

Under the circumstances stated by you, The First National Bank is the only bank which may be treated as a depositary by the commissioners and treasurer. If that bank desires to enter into an arrangement with the other banks named, whereby such other banks may receive certain portions of the money of the county deposited with the depositary bank, such money however being, so far as the

county is concerned, on deposit with The First National Bank and for which said bank and the securities or surety furnished by it is liable, that would be a matter of private arrangement among the several banks with which the commissioners and treasurer would have nothing to do.

You mention the fact that the county, under the proposed arrangement, would have the advantage of the resources of four banks as security instead of one. This fact, however, is not material because presumably the deposits which are to be made with The First National Bank are fully protected by the surety or securities furnished by that bank. At any rate it is the duty of the commissioners, under sections 2732 and 2733, General Code, to see that this is the case.

It is my opinion, accordingly, that the arrangement proposed by The First National Bank may not lawfully be entered into.

Respectfully,
EDWARD C. TURNER,
Attorney General.

677.

BOARD OF STATE CHARITIES—WARD OF CHILDREN'S HOME—WHEN SUCH WARD IS BROUGHT INTO JUVENILE COURT, SAID COURT HAS CONTROL UNTIL THE AGE OF TWENTY-ONE YEARS IS REACHED.

A ward of a children's home who is brought into juvenile court under the juvenile law becomes a ward of the court under the provisions of section 1643, *G. C., and remains under the control of the court until reaching the age of twenty-one years.*

COLUMBUS, OHIO, August 4, 1915.

MR. H. H. SHIRER, *Secretary of Board of State Charities, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for an opinion as follows:

> "A ward of a certain county children's home of this state was placed about five years ago in another county. The authorities of the home did not exercise supervision. The girl, who is now about sixteen years of age, was taken into the juvenile court of the county where she resided and the judge of that court committed her to the Crittendon Home, at Columbus, where she has given birth to a child.
>
> "The question arises as to whether the trustees of the children's home are still responsible for this girl's welfare, or has she become the exclusive ward of the juvenile court?"

Section 1643 of the General Code, as amended in 103 Ohio Laws, 869, is as follows:

> "When a child under the age of eighteen years comes into the custody of the court under the provisions of this chapter, such child shall continue for all necessary purposes of discipline and protection, a ward of the court, until he or she attain the age of twenty-one years. The power of the court over such child shall continue until the child attains such age."

Under the provisions of section 1643, General Code, supra, it is my opinion

that the girl under 18 years of age is and will remain a ward of the juvenile court for all necessary purposes of discipline and protection until she attains the age of 21 years, and will be subject to the orders of that court.

Respectfully,
EDWARD C. TURNER,
Attorney General.

678.

NOTARY PUBLIC—NECESSARY QUALIFICATIONS OF APPLICANTS FOR COMMISSION—POSTOFFICE ADDRESS MUST BE A CITY OR AN INCORPORATED VILLAGE FOR AN APPLICANT IN TWO OR MORE COUNTIES—CERTIFICATE OF JUDGE SUFFICIENT AS TO QUALIFICATIONS.

Under section 119, *G. C., a person may only be commissioned as notary public in more than one county when his postoffice address is a city or an incorporated village situated in two or more counties in the state.*

The certificate of a judge under section 120, *General Code,* 103 *O. L.,* 405, *as to qualifications of an applicant for a commission as notary public is sufficient to justify the issuance of such commission by the governor without further investigation.*

COLUMBUS, OHIO, August 4, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—Your letter of July 23, 1915, requesting my opinion, received and is as follows:

> "Can a notary public be authorized to act officially as such, under the provisions of section 119 of the General Code of Ohio, in more than one county, whose postoffice address is an unincorporated city or village situated in more than one county?
>
> "Can a notary public be authorized to act officially as such in more than one county, whose postoffice address is a postoffice actually located in a building, entirely isolated from any other building, residence, city or village, on a county line; said postoffice being designated by the postoffice department as a legally established office under a proper title or name?
>
> "In the issuing of a commission to a notary public, is the certificate of the judge as to the qualifications of the applicant all that is required; or should the governor make investigations respecting such applicant's qualifications?"

Section 119 of the General Code provides as follows:

> "The governor may appoint and commission as notaries public as many persons as he may deem necessary who are citizens of this state, of the age of twenty-one years or over, and residents of the counties for which they are appointed; but citizens of this state of the age of twenty-one years or over, whose postoffice address is a city or village, situated in two or

more counties of the state, may be appointed and commissioned for all of the counties within which such city or village is situated. The governor may revoke a commission issued to a notary public upon presentation of satisfactory evidence of official misconduct or incapacity."

Section 120 of the General Code (103 O. L., 405) provides as follows:

"Before the appointment is made, the applicant shall produce to the governor a certificate from a judge of the common pleas court, court of appeals, or supreme court, that he is of good moral character, a citizen of the county in which he resides, and possessed of sufficient qualifications and ability to discharge the duties of the office of notary public. No judge shall issue such certificate until he is satisfied from his personal knowledge that the applicant possesses the qualifications necessary to a proper discharge of the duties of the office, or until the applicant has passed an examination under such rules and regulations as the judge may prescribe."

The legislature recognizing the inconvenience, needless expense and confusion that would be brought about by the necessity of the appointment of a notary public to act only in one county where the city or village in which he resided was partly in one county and partly in another county or counties, has seen fit to provide that in such cases the same man might be commissioned as a notary public in more than one county and in so doing has used the words : "Whose postoffice address is a city or village situated in two or more counties of the state."

The legislature might have provided that a man who resided on a county line or within a certain distance of a county line might be appointed as notary public in more than one county, or they might have arrived at the same result in various ways, but they have seen fit to achieve the desired result by the use of the above quoted language, and your question must therefore depend upon the proper interpretation of the language used.

There are many provisions in the statutory laws of this state referring to cities and villages and the legislature acting in pursuance of authority conferred upon them by the constitution has enacted laws applying to cities as such and to villages as such. An examination of these provisions will show that the meaning of the word "village" as used in the statute of the state is well defined, and that the use of the word "village" in the statutory laws of the state can only include municipal corporations, and at no place will it be found that an unincorporated community is recognized in any sense as a village. There is a very practical reason for this conclusion, in that there are no prescribed limits of communities unless they are incorporated, and it would always be a question of fact, difficult to ascertain, whether a given community was in more than one county.

I am of the opinion, in answer to your first question, that the word "village" as used in section 119, above quoted, means an incorporated village only and that a person whose postoffice address is not in a municipal corporation situated in more than one county, may not legally be appointed as notary public in more than one county.

The answer to your first question disposes of your second question.

As to your third question, to wit, whether the certificate of the judge as to the qualifications of the applicant is all that is required, or whether the governor should make investigations respecting such qualifications; I am of the opinion that the governor would be justified in relying upon the certificate of the judge. However, the appointment of notaries public being permissive only, the governor might exercise his own discretion in the matter if he so chooses, and make any independent

investigation that he desires. Statements made under oath by the applicant in his application would also be competent to be considered by the governor in determining whether the commission should be issued.

Respectfully,
EDWARD C. TURNER,
Attorney General.

679.

COUNTY BOARD OF SCHOOL EXAMINERS—MEMBERSHIP—COUNTY SUPERINTENDENT OF SCHOOLS, DISTRICT SUPERINTENDENT AND ONE TEACHER.

Under the provisions of section 7811, *G. C., as amended in* 104 *O. L.,* 102, *the membership of the county board of school examiners is limited to the superintendent of the schoods of the county district, one district superintendent and one teacher, other than a district superintendent having the qualifications prescribed by said section* 7811, *G. C., as amended.*

COLUMBUS, OHIO, August 4, 1915.

HON. ADDISON P. MINSHALL, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—In your letter of July 29th you request my opinion on the following question:

> "Under section 7811 of the General Code of Ohio, can more than one district superintendent be appointed as members of the county board of school examiners? Or, in other words, can the teacher provided for in said section be one of the district superintendents?"

Section 7811, G. C., prior to its amendment in 104 O. L., 102, provided:

> "There shall be a county board of school examiners for each county, consisting of three competent persons to be appointed by the probate judge. Two of such persons must have had at least two years' experience as teachers or superintendents, and have been within five years, actual teachers in the public schools. Each person so appointed shall be a legal resident of the county for which appointed. Should he remove from the county during his term, his office thereby shall be vacated and his successor be appointed."

This section as amended provides:

> "There shall be a county board of school examiners for each county, consisting of the county superintendent, one district superintendent and one other competent teacher, the latter two to be appointed by the county board of education. The teacher so appointed must have had at least two years' experience as teacher or superintendent, and be a teacher or supervisor

in the public schools of the county school district or of an exempted village school district. Should he remove from the county during his term, his office thereby shall be vacated and his successor appointed."

It will be observed that under the provision of section 7811, G. C., prior to its amendment only two of the three members of the county board of school examiners had to have experience as a teacher or superintendent with the further qualification that within five years of the date of their appointment as school examiners they have been actual teachers in the public schools.

It was evidently the intention of the legislature in amending said section to confine the membership of the board of county school examiners to persons actually engaged in public school work. Under the above provision of the statutes as amended, the superintendent of the schools of the county district is, ex-officio, a member of the board of county school examiners. The authority to select the other two members of said board is vested in the county board of education and is limited by the terms of the statute, as amended, to one district superintendent and one *other* competent teacher. The district superintendent, appointed by the county board of education, as a member of said board of county school examiners, at the time of said appointment must have been elected in the manner provided by section 4739, G. C., as amended in 104 O. L., 140, and must have the qualifications required by the provisions of section 4744-5, G. C., as found in 104 O. L., 143.

While section 7811, G. C., as amended, provides that the teacher so appointed by the county board of education as a member of the county board of school examiners must have had at least two years' experience as a teacher or superintendent, and at the time of such appointment be a teacher or supervisor in the public schools of the county school district or of an exempted village school district, I do not think that the term "supervisor" as above used includes the district superintendents of the county school district, and in view of the plain provision of the statute limiting the appointive power of the county board of education to one district superintendent and one other competent teacher having the qualifications therein prescribed, I am of the opinion in answer to your question that, under the provisions of said section 7811, G. C., as amended, the membership of the county board of school examiners is limited to the superintendent of the schools of the county district, one district superintendent elected in the manner provided by section 4739, G. C., as amended, and having the qualifications prescribed by section 4744-5, G. C., as amended, and one teacher, other than a district superintendent, having the qualifications prescribed by said section 7811, G. C., as amended.

Respectfully,

EDWARD C. TURNER,

Attorney General.

680.

COUNTY BOARD OF EDUCATION—DISTRICT SUPERINTENDENT—CONTRACT OF EMPLOYMENT ENTERED INTO, ON OR AFTER MAY 27, 1915, IS MADE IN CONTEMPLATION OF PROBABLE GOING INTO EFFECT OF NEW LAW.

A contract of employment of a district superintendent under authority of section 4739, G. C., as amended in 104 O. L., 140, entered into on or after May 27, 1915, the date of the passage by the general assembly of amended senate bill No. 282, amending section 4738, G. C., as amended in 104 O. L., 140, is made in contemplation of the probable going into effect of said amended senate bill and the carrying out of its requirement that the county board of education shall re-district the county school district for district supervision purposes into districts containing not less than thirty teachers and the obligation of such contract would not be impaired by the action of the county board of education as required by the provision of said amended statute, even though such action might result in materially changing the duties of the district superintendent or in abolishing his district and position.

COLUMBUS, OHIO, August 4, 1915.

HON. JOSEPH W. HORNER, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—In your letter of July 29, 1915, you request my opinion as follows:

> "On May 29, 1915, a meeting was held for the purpose of electing a district supervisor in the districts composed of Madison, Newark and Hanover townships and Hanover special district, and at that meeting Mr. J. S. Mason was employed as district supervisor for two years at a salary of $1,500.00 per year. Mr. Mason has 31 teachers under him.
>
> "The question has come to me whether or not the board at that date could legally hire Mr. Mason for this position. It is my opinion that the proceedings are illegal, and I am asking you for your opinion.
>
> "I am herewith submitting a copy of the minutes of their meeting."

From your statement of facts I understand that the rural school districts of Madison, Newark and Hanover townships and Hanover special district (now a rural school district under provision of section 4735, G. C., as amended in 104 O. L., 138), comprise a district for supervision purposes, said supervision district having been formed by the board of education of Licking county school district under authority of section 4738, G. C., as amended, 104 O. L., 140, which provides:

> "The county board of education shall within thirty days after organizing divide the county school district into supervision districts, each to contain one or more village or rural school districts. The territory of such supervision districts shall be contiguous and compact. In the formation of the supervision districts consideration shall be given to the number of teachers employed, the amount of consolidation and centralization, the condition of the roads and general topography. The territory in the different districts shall be as nearly equal as practicable and the number of teachers employed in any one supervision district shall not be less than twenty nor more than sixty.
>
> "The county board of education shall, upon application of three-fourths of the presidents of the village and rural district boards of the county, redistrict the county into supervision districts."

The resolution of the presidents of the boards of education of said rural school districts, at their meeting on May 29, 1915, employing a district superintendent for said supervision district, was passed under authority of section 4739, G. C., as amended 104 O. L., 140, which provides:

> "Each supervision district shall be under the direction of a district superintendent. Such district superintendent shall be elected by the presidents of the village and rural boards of education within such district, except that where such supervision district contains three or less rural or village school districts the boards of education of such school districts in joint session shall elect such superintendent. The district superintendent shall be employed upon the nomination of the county superintendent but the board electing such district superintendent may, by a majority vote, elect a district superintendent not so nominated."

Section 4738, G. C., as amended in 104 O. L., has been further amended by amended senate bill No. 282, passed by the general assembly and approved by the governor May 27, 1915. Said amended senate bill will become effective August 26, 1915, unless a petition for the referendum be filed prior to said date.

Section 4738, G. C., as amended by said amended senate bill, provides as follows:

> "The county board of education shall divide the county school district, any year, to take effect the first day of the following September, into supervision districts, each to contain one or more village or rural school districts. The territory of such supervision districts shall be contiguous and compact. In the formation of the supervision districts consideration shall be given to the number of teachers employed, the amount of consolidation and centralization, the condition of the roads and general topography. The territory in the different districts shall be as nearly equal as practicable and the number of teachers employed in any one supervision district shall not be less than thirty. The county board of education shall, upon application of three-fourths of the presidents of the village and rural district boards of the county, re-district the county into supervision districts. The county board of education may at their discretion, require the county superintendent to personally supervise not to exceed forty teachers of the village or rural schools of the county. This shall supersede the necessity of the district supervision of these schools."

In view of this amendment you inquire whether, on said date of May 29, 1915, the presidents of said boards of education could legally employ a district superintendent for a term of two years.

I call your attention to opinion No. 463 of this department, rendered to Hon. Frank W. Miller, superintendent of public instruction, under date of June 8, 1915.

The opinion holds that the provisions of section 4738, G. C., as amended by said amended senate bill No. 282, are mandatory and that when said amendment takes effect it will be the duty of the county board of education to divide the county school districts into proper supervision districts in accordance with the terms of said amended statute.

The opinion further holds that where district superintendents were employed on or after May 27, 1915, such contracts of employment were made in contemplation of the probable going into effect of said amended senate bill No. 282, and the carrying out of its requirements that the county board of education shall redistrict

the county school district for district supervision purposes into districts containing not less than thirty teachers, and that the obligation of such a contract would not be impaired by the action of the county board of education as required by the provisions of said amended statute, even though such action might result in materially changing the duties of the district superintendent or in abolishing his district and position.

Replying to your question I am of the opinion that, while the presidents of the boards of education of the districts referred to in your inquiry, had authority, under the provisions of section 4739, G. C., as amended, to employ a district superintendent on said date of May 29, 1915, said contract of employment was made in contemplation of the probable going into effect of said amended senate bill No. 282, and the carrying out of the requirements of the amended statute.

Inasmuch as said rural school districts have thirty-one teachers, the county board of education, in re-districting said county school district for district supervision purposes could, in its discretion, continue said rural school district as a supervision district and, in the event they determine to do this, the contract of employment of said district superintendent would not be affected and would continue in force.

On the other hand if said county board of education should determine that, for the best interests of the schools of said county school district, it will be necessary to materially change the duties of said district superintendent or abolish his district and position, the action of said county board of education cannot be enjoined on the ground that the obligation of the contract, made on said date of May 28, 1915, would be impaired.

I enclose herewith copy of the opinion above referred to.

Respectfully,
EDWARD C. TURNER,
Attorney General.

681.

COMPETITIVE BIDS REQUIRED UNDER SECTION 6 OF GENERAL APPROPRIATION BILL—UNLESS IMPRACTICABLE TO SECURE BIDS—PAINTING AT STATE FAIR GROUNDS—WHEN BUILDING CODE REGULATIONS APPLY.

Competitive bids are required under the general language of section 6 of the general appropriation bill, unless otherwise provided by law or unless the board referred to in said section is satisfied that it is impracticable to secure such bids or that an emergency exists. Therefore, such bids must be secured even in cases to which the building regulations provided in sections 2314 et seq., G. C., do not apply. It is sufficient, however, if the competition is substantial and no particular formalities in securing such competition are required.

COLUMBUS, OHIO, August 5, 1915.

HON. R. W. DUNLAP, *Secretary Ohio State Board of Agriculture, Columbus, Ohio.*

DEAR SIR:—In your letter of August 3rd, receipt whereof is acknowledged, you request my opinion as follows:

> "Please advise me as to whether or not it is necessary to submit bids for painting or any other work on the state fair grounds, if the amount of the contract is less than three thousand ($3,000.00) dollars."

There are no special provisions in the act providing for the organization, powers and duties of the board of agriculture relative to the procedure to be followed by that board in letting contracts for work of the kind mentioned by you.

The provisions of what is sometimes called the "State Building Code," sections 2314 et seq., of the General Code, do not apply to the case stated by you if the entire work or improvement contemplated involves the expenditure of three thousand dollars or less, but if the improvement is a constructive one and involves in the aggregate a cost exceeding three thousand dollars, then, though such improvement might necessitate the letting of several different contracts, the state building code must be complied with and competitive bids secured in accordance therewith; for it is the "aggregate cost" of the improvement which determines the application of the building code regulations and not the amount of each particular contract necessary to effect the entire improvement.

Assuming, however, that you have in mind miscellaneous and disconnected improvements at the state fair grounds, no one of which involves an expenditure of more than three thousand dollars, I may say that the general provisions above referred to do not apply. But if the work is to be paid for out of the current general appropriation bill, competitive bids must be secured, unless it is impracticable, in the judgment of the board created by the appropriation bill for the making of transfers and divisions of appropriation accounts and the discharge of other administrative functions in connection therewith, to invite competitive bids; or unless, in the judgment of such board, the situation presents an instance of emergency requiring purchase without competitive bids; or unless the general provisions of the law directly require or authorize entering into a contract without competitive bids (which is not the case in this instance). In other words, as a condition to the expenditure of the appropriations made in house bill No. 701, it is required that all work involving the letting of contracts shall be done after competitive bids are secured.

In the securing of such competitive bids, however, no particular formalities are required and no particular advertisement is necessary. It is enough if substantial competition is secured in any proper way.

Respectfully,
EDWARD C. TURNER,
Attorney General.

682.

APPROVAL OF RESOLUTIONS FOR SALE OF PORTIONS OF ABANDONED OHIO CANAL AT WAVERLY, PIKE COUNTY AND MAUMEE, LUCAS COUNTY, OHIO.

COLUMBUS, OHIO, August 5, 1915.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communications of July 22, 1915, and July 27, 1916, transmitting to me triplicate copies of resolutions providing for the sale of certain portions of the abandoned Ohio canal in Waverly, Pike county, Ohio, to Albert Foster and Philip Lorbach, and triplicate copies of a resolution providing for the sale of certain canal lands in the village of Maumee, Lucas county, Ohio, to Hubert Pierre, all of which resolutions have been signed by you.

I find that these resolutions have been drawn in accordance with the suggestions made to you in an opinion of this department rendered to you under date

of July 14, 1915. I therefore join with you in the adoption of the resolutions above referred to, and have signed the triplicate copies of the same, which copies are returned to you herewith.

Respectfully,
EDWARD C. TURNER,
Attorney General.

683.

ARTICLES OF INCORPORATION OF MUTUAL BENEFIT ASSOCIATIONS—DEATH BENEFITS MUST BE STIPULATED—ASSESSMENTS.

The articles of incorporation of mutual benefit associations organized under section 9427, G. C., may not authorize such association to pay as death benefits such sums of money as may be derived from making assessments under the by-laws of the association; the death benefits must be stipulated, though contingent upon the ability of the association to pay the stipulated sum from the assessments made on members.

COLUMBUS, OHIO, August 5, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am unable to approve the proposed articles of incorporation of the Schweizer-Verein of Cleveland, Ohio, returned herewith, for the reason that the articles show by explicit statement that the association is formed under section 9427, G. C. This section defines the particular purpose for which the association is formed as follows:

> "For the purpose of mutual protection and relief of its members and for the payment of *stipulated* sums of money to the families, heirs, executors, administrators or assigns of the deceased members of such company or association, as the member may direct, in the manner provided in the by-laws."

The articles of incorporation omit the word "stipulated" and substitute for the phraseology of the statute the following:

> "Such sum of money as is derived from assessing its members in a manner provided in the by-laws of said society."

It is true that section 9427 provides further that:

> "No company or association shall issue a certificate for a greater amount than it is able to pay from the proceeds of one assessment."

And it is clear that the business of a mutual protective association is to be conducted on the assessment plan. However, as I interpret the statute an association organized under it is required to issue certificates calling for the *payment of stipulated sums,* conditioned however upon the realization of such fixed amount from the assessments made to meet the same in the event the accumulations of the company are not sufficient for such purpose.

Section 9432, G. C., provides in this connection as follows:

> "No such corporation, company, or association issuing endowments, certificates or policies, or undertakings, or promising to pay to members during life any sum of money, or thing of value, or certificate, or policy guaranteeing any fixed amount to be paid at death, except such fixed amounts or endowments be conditioned upon their being realized from the assessments made on members to meet them, shall be permitted to do business in this state, until they comply with the laws regulating regular mutual life insurance companies."

The exact phraseology of the articles of incorporation would permit the association to provide in its by-laws for paying to the families, heirs, executors, administrators or assigns of deceased members an *indefinite* amount dependent upon, for example, the assessment of the then members of the association in a certain amount per member. This would make the death benefits purely speculative, which is I think intended to be guarded against by the language of the statute.

Respectfully,
EDWARD C. TURNER,
Attorney General.

684.

WITNESSES AND JURORS IN MAYOR'S COURT—SAME FEES AS WITNESSES BEFORE JUSTICE OF PEACE—FEES PAYABLE FROM COUNTY TREASURY IN STATE CASES.

Witnesses and jurors in the mayor's court are entitled to the same fees as witnesses before justices of the peace, which fees are fixed by section 3011, *G. C.*

In all state cases, whether prosecuted to conviction or not, such fees are payable from the county treasury on the certificate of the mayor and the warrant of the county auditor.

COLUMBUS, OHIO, August 5, 1915.

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

GENTLEMEN:—Under date of July 18, 1915, you submitted an inquiry to me for official opinion, as follows:

> "We are enclosing letter form M. R. Talbot, mayor of Urbana, Ohio, which presents some new questions.
>
> "In this particular instances the mayor summoned a jury in a misdemeanor case and the defendant was acquitted. The charge in this case was filed by a chief of police, and under section 13499, General Code, a chief of police is not required to give security for costs. We are of the opinion, as there was no conviction in this case, that neither the mayor nor chief of police is entitled to any fees allowed to them by the commissioners under section 3019, General Code, but we are in doubt as to how the jurors and witnesses may be paid. See opinion of Attorney General T. S. Hogan, No. 986, rendered this department June 17, 1914."

The letter of the mayor of Urbana, enclosesd with your letter, is as follows:

"Will you kindly inform me how to proceed in the following case?

"An affidavit was filed in the mayor's court under section 12423 of the General Code. The mayor elected to try the case under section 4532 of the General Code.

"An ordinance has been duly and regularly passed under section 4552 of the General Code providing for a list of jurors and the same were properly filed at the time designated.

"Section 4534 provides as follows:

"'* * * Except as herein otherwise provided, witnesses and jurors shall receive the same compensation as witnesses before justices of the peace.'

"Section 4555 reads as follows:

"'In cases for the violation of ordinances, the fees of witnesses and jurors shall be paid, on the certificate of the officer presiding at the trial, from the corporation treasury, and in state cases on like certificate from the county treasury.'

"Section 4556 provides for city cases only.

"The above sections are the only authority found covering this class of cases.

"The officers come within the section governing state failure cases and we must look to the county commissioners for our fees.

"The above case was tried to a jury and the defendant was acquitted. The charge was filed by the chief of police and the arrest was made upon a legally issued warrant.

"I can find no authority under which I can certify the witness and jury fees to the county commissioners.

"The law seems to contemplate the same proceedings before a mayor as those followed in the court of common pleas.

"To what amount are witnesses and jurors each entitled as per diem?"

So far as I am able to find there is no specific provision of the statute relative to the fees to be paid in criminal cases before a justice of the peace, but section 3011, G. C., provides as follows:

"In all cases not specified in this chapter, each person summoned as a witness shall be allowed fifty cents for each day's attendance, and the mileage herein specified. When not summoned, each person called upon to testify in a cause shall receive twenty-five cents."

I believe the above section to be ample authority for the fixing of the fees in a criminal case for a witness at fifty cents and mileage.

Section 13499, G. C., cited by you provides as follows:

"When the offense charged is a misdemeanor the magistrate, before issuing the warrant, may require the complainant, or, if he considers the complainant irresponsible, may require that he procure a person to become liable for the costs if the complaint be dismissed, and the complainant or other person shall acknowledge himself so liable and such magistrate shall enter such acknowledgment on his docket. Such bond shall not be required of a sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or police officer, when in the discharge of his official duty."

Therefore, the mayor was unauthorized to require security for costs in the particular prosecution under consideration.

The opinion to which you refer as having been rendered by my predecessor, Mr. Hogan, contains two questions. The second question is the one which is pertinent to your inquiry. The said second question is as follows:

> "2. In view of the provisions of sections 3016, 3017 and 3018, G. C., it appears that fees of witnesses in misdemeanor cases are *not* payable from the county treasury when testifying before justices of the peace, mayors and police justices, yet section 4555, G. C., seems to authorize a mayor to certify such fees out of the county treasury. Because of these apparent conflictions this department requests your ruling or opinion upon the questions herein set forth."

The answer thereto is as follows:

> "Answering your second question. Sections 3016 and 3018 of the General Code are as follows:
>
> "'Section 3016. In felonies, when the defendant is convicted the costs of the justice of the peace, police judge, or justice, mayor, marshal, chief of police, constable and witnesses, shall be paid from the county treasury and inserted in the judgment of conviction so that such costs may be paid to the county from the state treasury. In all cases, when recognizances are taken, forfeited and collected and no conviction is had, such costs shall be paid from county treasury.'
>
> "'Section 3018. In felonies, fees of witnesses before justices of the peace, mayors, and police justices, shall be paid upon the allowance of the commissioners from the county treasury, on the certificate of such officer, notwithstanding the state has failed.'
>
> "Under these sections payment of witness fees from the county treasury in criminal cases is authorized in all cases of felony, and in misdemeanors only when recognizances are taken, forfeited and collected upon failure of conviction.
>
> "Section 4555, General Code, to which you refer, is as follows:
>
> "'In cases for the violation of ordinances, the fees of witnesses and jurors shall be paid, on the certificate of the officer presiding at the trial, from the corporation treasury, and in state cases on like certificate from the county treasury.'
>
> "This statute requires fees of witnesses in state cases to be paid from the county treasury upon the certificate of the presiding officer at the trial.
>
> "I am of the opinion that the effect of this statute is not to authorize the payment of fees, but rather to specify the mode of procedure requisite for the payment of such fees as are authorized by sections 3016 and 3018 above quoted. The effect of section 4555, General Code, therefore, is to require a certificate of the mayor as a condition precedent to the payment of such fees as are authorized by the above sections, to wit: Those that accrue in the prosecution of felonies before a mayor, and in those misdemeanors only where recognizances are taken, forfeited and collected and no conviction had."

I am unable to agree with the opinion of Mr. Hogan for the reason that as

I view it sections 3016 and 3018, G. C., are only applicable to felony cases. Section 3016 of the General Code is a codification of section 1306, R. S. In 78 O. L., page 201 section 1306 was amended to read as follows:

> "In all felonies, when the defendant is convicted, the costs of the justice of the peace, police judge, or justice, mayor, marshal, constable and witnesses, shall be paid out of the county treasury and inserted in the judgment of conviction, so that, except in capital cases, the same may be paid to the county out of the state treasury; provided, in all such cases, when recognizances are taken, forfeited and collected, and in which there is no conviction, said costs shall be paid out of the county treasury."

It is to be noted that in the act found in 75 O. L., the language is "in all *such* cases." The words "in all cases," as used in the General Code, were originally "in all *such* cases," referring of course to the language "in all felonies" used at the beginning of the act. In 96 O. L., this act was amended so as to include "chief of police," and at that time the word "such," as used in the proviso, was left out. However, I do not believe that the mere omission of the word "such" would broaden the section so as to make it apply to other than felonies.

Furthermore, in the opinion of Mr. Hogan, he states that the effect of section 4555, G. C., is not to authorize the payment of fees, but rather to specify the mode of procedure of the payment of all such fees as are authorized by sections 3016 and 3018. Said sections only apply to felony cases, and since there would be no jurors in a felony case before a magistrate, the said section must undoubtedly refer to misdemeanors.

Section 4554, G. C., referred to by the mayor of Urbana in his letter, provides in part as follows:

> "* * * Except as herein otherwise provided, witnesses and jurors shall receive the same compensation as witnesses before justices of the peace."

Section 4555, G. C., provides as follows:

> "In cases for the violation of ordinances, the fees of witnesses and jurors shall be paid, on the certificate of the officer presiding at the trial, from the corporation treasury, and in state cases on like certificate from the county treasury."

It appears, therefore, that witnesses and jurors in a mayor's court are to receive the same compensation as witnesses before a justice of the peace which, under the provisions of section 3011 is fixed at 50 cents for each day's attendance and the mileage specified.

Section 4555 states that the fees of witnesses and jurors *shall be paid,* upon the certificate of the officer presiding at the trial in state cases, from the county treasury. There is no doubt, therefore, in my mind that the fees of both witnesses and jurors are to be paid, upon a certificate of the mayor, in state cases from the county treasury. Nor do I believe that it is necessary that the said fees should be allowed by the county commissioners before being paid.

Section 2460, G. C., provides in part as follows:

> "No claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal, in which case

it shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the claim. * * *"

Since section 4555, G. C., directs that payments shall be made from the county treasury upon the certificate of the mayor in state cases, and since the amount thereof is fixed by law, I am of the opinion that the amount so certified shall be paid upon the warrant of the county auditor without the intervention of the county commissioners.

Respectfully,
EDWARD C. TURNER,
Attorney General.

685.

PRISONERS BECOMING INSANE IN PENITENTIARY OR REFORMATORY AND SENT TO COLUMBUS STATE HOSPITAL REMAIN CONSTRUCTIVELY IN FIRST NAMED INSTITUTION—SUBJECT TO TRANSFER TO LIMA STATE HOSPITAL—EXAMINATION OF SUCH CONVICTS MAY BE MADE AT PENITENTIARY OR REFORMATORY —PROBATE JUDGE MAY HOLD INQUEST AT INSTITUTION SHELTERING INSANE PERSON.

Prisoners becoming insane in the penitentiary or reformatory and sent to the Columbus state hospital for treatment, under the provisions of sections 2222, et seq., G. C., remain constructively in the penitentiary or reformatory and are subject to transfer to the Lima state hospital under the provisions of sections 2216, et seq., G. C.

Examination prescribed under section 2216, G. C., may be made at the Columbus state hospital or Ohio hospital for epileptics, thereby obviating the necessity of returning the convicts to the penitentiary or reformatory for such examination. Probate judge may hold the inquest at the institution sheltering the insane prisoner.

COLUMBUS, OHIO, August 5, 1915.

DR. C. F. GILLIAM, *Superintendent of Columbus State Hospital, Columbus, Ohio.*

MY DEAR DOCTOR:—Permit me to acknowledge receipt of your request for an opinion under date of July 28, relative to the transfer of patients in your hospital to the Lima state hospital, which request is as follows:

"The Lima state hospital being now open for the reception of patients I am trying to make arrangements for the transfer of a number of patients from the Columbus state hospital to the Lima state hospital.

"Under section 1985 of the General Code is defined the classes of patients to be received at that institution. All of these classes can without question be transferred on the application of the superintendent of any state hospital in Ohio upon approval of the Ohio board of administration to the Lima institution with the exception of insane convicts who have been received at the Columbus State Hospital from the Ohio penitentiary and the Mansfield reformatory.

"Under section 2216 it is provided that before a convict can be sent to the Lima state hospital he shall be probated from the court in the county in which the institution is located by two physicians not connected with the institution in which the convict is an inmate. It is this question which is giving us bother in reference to the transfer. Under section 1993, page 448, volume 103 of the year book 1913, the board of administration

is empowered, upon the request of the superintendent, to transfer to Lima all dangerous and homicidal cases. Some authorities have put the construction upon this section that it gives the power of transfer of all classes of patients, while others feel that this does not repeal that section or apply to that section which requires an inquest of convicts to be held by a regular probate court.

"It is this latter phase of the question that I would like to have an opinion from you in regard to. Whether these convicts who are now in my custody, and who were sent to me from the Ohio penitentiary and the Mansfield reformatory, and who have never had a regular inquest of lunacy by a regular court will have to be subjected to such an inquest or not. As this matter has been held in abeyance for some time past, awaiting a decision of this question, early action from your office will be very greatly appreciated, and greatly facilitate the transfer of the patients.

"Hoping for an early reply, and that I have put this matter in such a way that you will understand the question at issue, I am * * *."

Sections 1985, 2216, 2221, 2222 and 2223 of the General Code, are as follows:

"Section 1985. The Lima state hospital shall be used for the custody, care and special treatment of insane persons of the following classes:

"1. Persons who become insane while in the state reformatory or the penitentiary.

"2. Dangerous insane persons in other state hospitals.

"3. Persons accused of crime, but not indicted because of insanity.

"4. Persons indicted, but found to be insane.

"5. Persons acquitted because of insanity.

"6. Persons adjudged to be insane who were previously convicted of crime.

"7. Such other insane persons as may be directed by law.

"Section 2216. When the physician of the penitentiary or reformatory reports in writing to the warden or officer in charge thereof, that in his opinion a convict confined therein is insane, such warden or officer shall apply to the probate court of the county in which the institution is located, for an examination to be made of such convict by two physicians of at least three years' practice in the state, not connected with the penitentiary or reformatory, and to be designated by the court. If satisfied after a personal examination that the convict is insane, they shall so certify in the form and manner prescribed for the commitment of insane persons to state hospitals.

"Section 2221. When an insane convict confined in the Lima state hospital, whose term of sentence has not expired, has been restored to reason, and the superintendent of the hospital so certifies in writing, he shall be transferred forthwith to the penitentiary or reformatory from which he came. The officer in charge shall receive such convict into the penitentiary or reformatory.

"Section 2222. When a convict in the penitentiary or the reformatory becomes insane, the warden of the penitentiary or the superintendent of the reformatory shall give notice to the physician thereof, who shall forthwith examine the convict. If upon examination he is of the opinion that the convict is insane, the physician shall so certify to the warden, or superintendent. If the Lima state hospital is not then open to receive such convict, the warden shall forthwith confine the convict in the insane department of the penitentiary. The superintendent shall present to the

board of managers of the reformatory the certificate of such physician. In such case the board of managers may order the superintendent to remove the convict to the Columbus state hospital, and the superintendent of such hospital shall set apart a portion of the hospital wherein such convict shall be confined.

"Section 2223. Should it be necessary after a convict is so confined in the insane department of the penitentiary, evidenced by the certificate of the superintendent of the Columbus state hospital and the physician of the penitentiary, the board of managers of the penitentiary may order the warden to remove such insane convict to the Columbus state hospital and the superintendent shall set apart a portion of the hospital wherein such insane convict shall be confined."

In the second paragraph of your letter you state that under section 1985 all of the classes of patients therein defined can, without any question, be transferred to the Lima state hospital on the application of the superintendent of any state hospital in Ohio, and upon the approval of the board of administration, with the exception of insane convicts who have been received at the Columbus state hospital from the Ohio penitentiary and the Mansfield reformatory, and in support of your contention you refer to the provisions of section 1993 of the General Code as amended, page 448, Vol. 103 Ohio Laws, and which is as follows:

"The superintendent of a state hospital for insane may make application to the Ohio board of administration for an order of transfer to the Lima state hospital of any or all inmates thereof that exhibit dangerous or homicidal tendencies, rendering their presence a source of danger to others. The board, upon satisfaction that such order is advisable, may order the transfer of such persons to the Lima state hospital."

Under the provisions of the section just quoted there are only two classes of patients which may be transferred from a state hospital for the insane to the Lima state hospital, namely: dangerous insane persons, or insane persons exhibiting dangerous or homicidal tendencies, rendering their presence a source of danger to others.

With reference to the transfer of the insane of the Columbus state hospital who have become inmates thereof through the operation of section 2222 of the General Code, by reason of their becoming insane while imprisoned in the state reformatory or penitentiary, the question arises as to the status of such inmates, that is as to whether or not they are in reality *inmates* of the Columbus state hospital for the insane, or are they simply being cared for there temporarily on account of their physical or mental condition, owing to the lack of provision for such care or treatment at the reformatory or penitentiary and to be regarded as being constructively in the penitentiary or reformatory and, if so, under what conditions and circumstances may they be transferred to the Lima state hospital, if at all?

Unless such patients are constructively inmates of either the penitentiary or reformatory, there is no provision for transferring them to the Lima state hospital, unless they exhibit "dangerous or homicidal tendencies rendering their presence a source of danger to others," as provided for in section 1993 of the General Code, as amended, supra.

Without setting out all of the related statutes, I am of the opinion that insane prisoners transferred from either the penitentiary or the state reformatory remain inmates of the respective penal institutions and are still constructively in those penal institutions.

That the Lima state hospital was primarily intended as a place for the care, custody and control of the criminal insane and insane criminals is made apparent from the fact that under the provisions of the original act, which is to be found on pages 236 to 241, inclusive, of the 98 Ohio Laws, it is the clear intention of the legislature to relieve the penitentiary and the reformatory from the care of such of its inmates as might become insane while in the penitentiary and the state reformatory, and to afford necessary medical attention to such inmates at the earliest possible date, in view of the provisions of section 25 of the act, to be found on page 241 of Vol. 98 of the Ohio Laws, which section is as follows:

> "This act shall go into effect on and after its passage, except that the provisions of sections twelve (12) to fifteen (15) inclusive shall not have the force of law until the Lima state hospital is ready for the reception of inmates, which fact shall then be certified to the courts by the governor and secretary of state."

Under the provisions of the section quoted the two classes of patients to be received at the Lima state hospital before its final completion were designated in section 2 of the act in the language as follows:

> "1. Persons who become insane while in the penitentiary and state reformatory.
> "2. Dangerous insane persons now in other state hospitals."

The reception of the other classifications of patients to be received at the Lima state hospital was, under the provisions of section 25, deferred or postponed until the fact that the Lima state hospital was ready for the reception of inmates was certified to the courts by the governor and the secretary of state.

Section 8 of the act, page 237 of 98 Ohio Laws, is as follows:

> "Admission of inmates during the period of construction. Inmates may be admitted to the Lima state hospital after the work of construction has progressed to such an extent that they may be safely and properly kept. Said inmates are to be admitted as hereinafter provided, but preference shall first be given to insane criminals."

From a reading of section 8 it is seen that it is clearly expressed that preference shall first be given to insane criminals. Assuming, then, that inmates of the Columbus state hospital who have been sent there under the provisions of sections 2222 and 2223 of the General Code, quoted above, are constructively in the penitentiary or reformatory by reason of the fact that they have the status of prisoners serving sentences for crime and have been temporarily placed in the Columbus state hospital for the insane for treatment, resort must be had to the provisions of section 2216 of the General Code, to provide the manner of procedure under which they may be transferred to the Lima state hospital.

Section 2216, quoted above, provides for an examination to be made of the convicts who become insane while in the penitentiary or reformatory by two physicians of at least three years' practice in the state, not connected with the penitentiary or reformatory and to be designated by the probate court of the county in which the institution is located, which, in the case under consideration, the convict or convicts being constructively in the penitentiary, located at Columbus, in the county of Franklin, or in the reformatory, located at Mansfield, in the county of Richland, would be in the counties of Franklin and Richland. No

particular trouble should be experienced here, as the respective probate courts of Franklin and Richland counties have the power and authority to designate physicians located in the same county as the state hospital, if desirable.

Further, the insane persons need not be returned actually to the respective penal institutions for examination, as the necessary examinations may be made at the Columbus state hospital for the insane, or, in the case of insane prisoners who have been sent to the Ohio hospital for epileptics under the provisions of sections 2222 and 2223 of the General Code, the examinations may be made at that institution by the designated physician and their report made to the respective probate courts by which they were appointed.

Section 1955 of the General Code, which relates to an examination by the probate court of an insane person out of court, is as follows:

> "If, by reason of the character of the affliction or insanity, it is deemed unsuitable to bring such person into such probate court, the probate judge shall personally visit such person and certify that he has so ascertained the condition of the person by actual inspection, and all proceedings as herein required may then be had in the absence of such person."

Under the section quoted above the probate judge of either Franklin or Richland county, if necessary or desirable, might personally visit the Columbus state hospital or the Ohio hospital for epileptics for the consideration of the cases under their jurisdiction and then make appropriate findings in their respective counties.

In so far as section 1993 of the General Code, as amended, page 448 of 103 Ohio Laws, is concerned, it would not have the effect of repealing or modifying the provisions of sections 2216, et seq., of the General Code, as it relates specifically to hospital patients as distinguished from penitentiary or reformatory inmates, and the transfer of such hospital patients is not attended with the formalities prescribed for the transfer of the inmates of the penitentiary or reformatory coming under the provisions of section 2216 and succeeding sections, of the General Code.

Taking the view, therefore, that the inmates of the Columbus state hospital who have been placed there under the operation of sections 2222 and 2223 of the General Code, are constructive in the penitentiary or in the reformatory, it is my opinion that before such persons may be transferred to the Lima state hospital the formalities provided in sections 2216, et seq., must be complied with, and the transfer may only be made on the order of the probate court of the county in which the institution in which the convict is an inmate is located.

The status of the inmates of the Lima state hospital who may be sent there under the provisions of sections 2216, et seq., of the General Code, is that of prisoners receiving treatment on account of insanity as distinguished from the other inmates of the Lima state hospital who may be committed other than under the provisions of section 2216, et seq., of the General Code, and this view is supported by the provisions of sections 1995 and 1996 of the General Code, which provide for an examination by the probate court of Allen county to determine the question of sanity or insanity of an inmate of the Lima state hospital serving sentence if an application is made by the superintendent of the Lima state hospital for the further detention of the prisoner on the ground that the prisoner is still insane at the expiration of his sentence.

Respectfully,
EDWARD C. TURNER,
Attorney General.

686.

COUNTY COMMISSIONERS—WITHOUT AUTHORITY TO PAY FEES OF MAYOR OR MAGISTRATE UNDER SECTION 12384, G. C.—SECTION 4132, G. C., NOT ENTIRELY INCONSISTENT WITH SECTION 12384, G. C.—FEES IN EVENT OF SENTENCE TO WORKHOUSE OF PRISONERS FOR MISDEMEANORS—AMOUNT OF MILEAGE ALLOWED FOR TRANSPORTATION OF PRISONERS TO WORKHOUSE—SECTION 12385, G. C., APPLIES ONLY WHEN WORKHOUSE IS SITUATED IN COUNTY OTHER THAN THAT IN WHICH SENTENCE IS IMPOSED—HOW OTHER FEES ARE PAID—MARSHAL AND CHIEF OF POLICE NOT ENTITLED TO FEES UNDER SECTION 4132, G. C.

Section 12384, *G. C., affords no authority to county commissioners to pay any fees of officers concerned in the prosecution of a person sentenced to a workhouse under the terms therein contemplated.*

Section 4132, *G. C., relating to the payment of certain fees in the event of sentence to a workhouse, is not wholly inconsistent with section* 12385, *G. C., relating to transportation fees in cases wherein the workhouse is located in a county other than one in which the sentence is imposed. Therefore the latter, which was of later enactment, did not repeal the former by implication and affects the former only in so far as the mileage which might be allowed and paid thereunder for the transportation of prisoners to the workhouse is concerned. The special fees provided for by section* 12385, *G. C., are a substitute for such mileage but not for other fees which might lawfully be charged by the officers charged with the execution of the sentence of imprisonment in the workhouse; moreover section* 12385, *G. C., applies only when the workhouse is situated in a county other than that in which the sentence is imposed.*

Section 4132, *G. C., is not to be so interpreted as to provide a special method of payment of all fees of all officers concerned in the prosecution of a case in which a sentence to a workhouse is imposed, but its provisions relate only to the fees of the officer charged with the execution of the sentence, for services in connection with the conveyance of the convict to the workhouse.*

Other fees of the officers concerned in a prosecution for a misdemeanor which terminates in a workhouse sentence may be allowed and paid from a public treasury only by virtue of section 3019, *G. C., and under the conditions and restrictions therein imposed.*

No fees may be lawfully taxed or paid to a marshal or chief of police under section 4132, *G. C., for services in conveying a prisoner sentenced in a mayor's court for a misdemeanor to a workhouse in the execution of a sentence of such mayor.*

COLUMBUS, OHIO, August 5, 1915.

HON. S. W. ENNIS, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of July 15, 1915, requesting my opinion as follows:

> "Where a prisoner is sentenced to the workhouse by a mayor or magistrate for a misdemeanor not in violation of a village ordinance, can the county commissioners, under section 12384, pay the mayor's or magistrate's fees, or does this section relate only to the maintenance of the prisoner while in the workhouse?

"In the opinion of Attorney General Hogan, number 21, of the date of January 6, 1913, he holds that section 4132 is repealed by implication.

"Section 12385 provides means for the payment of the transportation of a prisoner to the workhouse, but makes no provisions for the payment of the other fees of a constable or marshal.

"Is section 4132 repealed by implication so far as it relates to the fees of the justice, mayor, marshal or constable, or so much thereof as only relates to the transportation of the prisoner?

"Can the county commissioners allow the fees of a mayor, magistrate, constable and marshal in cases where a party has been convicted before their courts and sentenced to the workhouse under provisions of section 3019 of the General Code of Ohio, or will they have to be allowed in the manner provided by section 4132 of the General Code of Ohio? How shall their fees be paid in such cases?"

The sections of the General Code necessary to be considered in answering your several questions are as follows:

"Sec. 3019. In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at any regular session, may make an allowance to any such officers in place of fees, but in any year the aggregate allowances to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars.

"Sec. 4132. The officer having the execution of the final sentence of a court, magistrate or mayor, shall cause the convict to be conveyed to the workhouse as soon as practicable after the sentence is pronounced, and all officers shall be paid the fees therefor allowed by law for similar services in other cases. Such fees shall be paid, when the sentence is by the court, from the county treasury, and when by the magistrate, from the township treasury.

"Sec. 12384. The commissioners of a county, or the council of a municipality, wherein there is no workhouse, may agree with the city council, or other authority having control of the workhouse of a city in any other county, or with the board of district workhouses having a workhouse, upon what terms and conditions persons convicted of misdemeanors, or of the violation of an ordinance of such municipality having no workhouse, may be received into such workhouse under sentence thereto. The county commissioners, or the council of a municipality, are authorized to pay the expenses incurred under such agreement out of the general fund of the county or municipality, upon the certificate of the proper officer of such workhouse.

"Sec. 12385. The sheriff, or other officer, transporting a person to such workhouse shall have the following fees therefor: six cents per mile for himself, going and returning, and five cents per mile for transporting each convict, and five cents per mile going and coming for the services of each guard, to be allowed as in penitentiary cases, the number of miles to be computed by the usual routes of travel, to be paid in state cases out of the general revenue fund of the county on the allowance of the county commissioners, and, in cases for the violation of the ordinances of a municipality, by such municipality on the order of the council thereof."

The answer to your first question seems clear to me. I am of the opinion that section 12384, which relates to arrangements between counties and municipalities not having workhouses and counties and municipalities having workhouses,

for the keeping of prisoners convicted in the former of misdemeanors, does not apply to the subject-matter of fees of officers at all. Whatever the word "expenses" as used in section 12384 contemplates, it includes only disbursements by the management of the workhouses which are to be reimbursed by the municipality or county whose prisoners are being cared for therein.

In stating your second question you refer to the opinion of my predecessor, Mr. Hogan, which is found in the report of this department for the year 1913 at page 189, volume 1 thereof. I am compelled to disagree with Mr. Hogan who holds therein that what is now section 4132, G. C., is, in subject-matter, entirely covered by section 12385, G. C., a statute of later enactment, so that the former is repealed by implication. That this is incorrect is fully established by the case of Ketter v. Commissioners, 8 C. C., (n. s.) 73, wherein the relation between these two sections, then R. S. sections 2101 and 6801-a, respectively, was considered. The court, per Cherrington, J., points out in the opinion that section 6801a, now sections 12384 and 12385, G. C., has special application to the imprisonment of persons convicted under arrangements such as those contemplated in section 12384, G. C. Under such circumstances the general assembly deemed it expedient to make special provision for the fees of the transporting officers, which would not be necessary in cases wherein the workhouse was located in the same municipality or county in which the conviction was had. In the language of the court "it will be observed that that section (section 6801a R. S., now section 12385, G. C.) provides for the transportation of such persons where it is done under an agreement between the commissioners of the county where the conviction took place, and where it has no workhouse, and the proper authority in another county where a workhouse is located. And it seems to provide simply for the transportation and nothing further."

On the other hand what was then section 2101, R. S., and is now section 4132, G. C., was regarded by the court as a general statute applicable to the execution of all sentences of imprisonment to workhouses. It is manifest, therefore, that section 12385 does not cover the whole ground covered by section 4132, but that it relates only to the transportation service, as such, and affords a substitute for the *mileage* which might be charged under the other section in cases in which the workhouse is in the same county, and therefore does not work a partial repeal or amendment of the former by implication.

Accordingly I advise, in answer to your second question, that section 4132, G. C., is not repealed by implication. The effect of section 12385 may be best described as follows:

> "The special fees for transportation, provided in section 12385, are in lieu of the mileage which a sheriff, constable or other officer charged with the execution of a sentence of a court or magistrate, might otherwise lawfully charge upon the service in return of a writ of mittimus. The section applies only when the workhouse to which the convict is transported is in a county other than the one in which the sentence is imposed; so that section 4132 operates without reservation when the sentence contemplates the transportation of the convict to a workhouse in the county in which it is imposed. But as to the separate fee for service in return of writs exclusive of mileage, the sheriff, constable or other officer is entitled to the allowance in payment thereof under section 4132, G. C., for services in connection with the transportation of a convict other than travel itself, such as the service and return of a writ of mittimus in all cases, as well when he is entitled to the fee provided by section 12385 as when he is not entitled to such fee."

In so answering I must reserve the statement, to be more fully developed in answering your third question, that it does not follow that section 4132 provides for fees of the justice and mayor or for all fees of the marshal or constable.

This statement brings me to your third question which involves primarily an interpretation of section 4132. It is true that this section provides that "all officers shall be paid the fees therefor allowed by law for similar services in other cases," and provides how "such fees" shall be paid. It is quite natural to suppose that the intention of the legislature was to make special provision for the fees of "all officers" performing services in connection with the prosecution. The context, however, indicates a narrower meaning. The word "therefor" is significant. The antecedent of this word, in my opinion, is indicated by the first part of the sentence, namely, the service of conveying the convict to the workhouse and the service of all process in connection therewith for which fees are allowed in other cases for like services (other than the specific fee for transportation provided for by section 12385). Any other interpretation of this section would make the county or township, as the case may be, liable for all fees of officers earned in the prosecution of misdemeanor cases where a workhouse sentence is imposed, and would make the section inconsistent with section 3014, G. C., in part at least, and inconsistent with the general policy of the state relative to the recovery of costs in criminal cases. I think a clearer view of section 4132 may be had by examining its phraseology as originally enacted in 66 O. L., 196, (the section never having been amended since its original enactment save in process of codification). In such original form it read as follows:

> "It shall be the duty of *all officers* having the execution of the final sentence of any court, magistrate or mayor, sentencing convicted persons to such workhouse, to cause such convicts to be conveyed to the same as soon as practicable after the sentence is pronounced; and all officers shall be paid the fees therefor allowed by law for similar services in other cases, such fees to be paid, when the sentence is by the court, out of the county treasury, and when by the magistrate, out of the township treasury."

It will be observed that in codification the phrase "all officers," as it first occurs, has been changed to "the officers," but that the same phrase, as it occurs the second time in the sentence, has been left unchanged. In my opinion the phrase "all officers," in its second use in the original statute, meant "all officers having the execution of the final sentence of any court, magistrate or mayor sentencing such convicted person to such workhouse," and this meaning is preserved in present section 4132, G. C. The section, therefore, applies only to the sheriff, constable or marshal in the execution of a sentence of imprisonment in the workhouse and other fees for services in causing "the convict to be conveyed to the workhouse." In Ketter v. Commissioners, supra, this section was held to authorize the sheriff to charge the statutory fee (other than mileage) for making service and return of writ in conveying prisoners from Scioto county to the Cincinnati workhouse.

But for payment of fees for services other than those in connection with conveying prisoners to the workhouse out of the public treasury, recourse must be had, in my opinion, to section 3019, G. C., which permits the allowance to justices of the peace, police judges or justices, mayors, marshals, chiefs of police and constables, of the fees earned and lost by them in misdemeanor cases by reason of the insolvency of the defendant, not exceeding in the aggregate one hundred dollars ($100.00) in any one year for any one officer. The antecedent of "such officers," in section 3019, is evidently the officers mentioned in section 3016, G. C.

There is no provision for the allowance of fees to the officers referred to in section 3019 in misdemeanor cases wherein the prosecution fails. However, your

question relates only to cases in which convictions have been had, and as to such cases I advise, in accordance with the foregoing discussion, that all fees of officers, excepting those of the officer executing the sentence of imprisonment to the workhouse, for services in connection with conveying the prisoner to such workhouse, can be paid from the public treasury only under section 3019, G. C.

Your question is general, but you mention mayors and marshals in stating the same. In order to cover your question fully, therefore, it is necessary to deal further with one peculiarity of section 4132 which has not thus far been mentioned. This section is placed in the Municipal Code and properly so because though originally one of the Revised Statutes of general application, it has always been found in a group of sections relating to the powers and duties of municipal officers. Section 4132 itself begins by referring to "the officer having the execution of the final sentence of a *court, magistrate or mayor.*" There is an evident discrimination here among the court, the magistrate and the mayor, so that a mayor is, in this connection at least, not regarded as either a court or a magistrate. Yet when the section comes to provide for the payment of fees, there is provision for the method of payment when the sentence is by the court and provision when the sentence is by the magistrate, but if the mayor be, for the purposes of the section, neither a "court" nor a "magistrate" then there is no provision for the payment of fees when the sentence is by the mayor. I am informed that the practice has been to regard the mayor as a "court" and in misdemeanor cases, at least, to allow fees to be paid out of the county treasury. The above cited case of Ketter v. Commissioners, does not afford any assistance in this connection because that was a case involving the fees of the sheriff, and evidently the convictions had been had in the common pleas court.

The exact question thus raised is as to the fees of the marshal and chief of police for execution of a sentence of the mayor's court in misdemeanor cases. These fees are fixed, if at all, by section 4387 with respect to the marshal and by section 4534 with respect to the chief of police, respectively. Both provide that in the one case the marshal and in the other case the chief of police shall receive "the same fees as sheriffs and constables in similar cases." The fee of the sheriff for serving writs is seventy-five cents for the first name on the writ and twenty-five cents for each additional name and in addition thereto eight cents per mile going and returning. (Section 2845, G. C.) The fees of the constable for similar services are different. (See section 3347, G. C.) Therefore, the sections which attempt to prescribe the fees of the marshal and chief of police as the same as those allowed to sheriffs and constables for similar services are meaningless. In the case of State ex rel. Ribble v. Kleinhoffer, recently decided by the supreme court, analagous language in the statutes relative to the fees of agents of a humane society was held void for uncertainty, and in view of this decision I am of the opinion that no fees are legally taxable to a chief of police or to a marshal in a misdemeanor case, for the services referred to in section 4132, G. C. It seems therefore unnecessary to consider the significance of the omission of the word "mayor" from the last clause of the section in the face of its inclusion in the first clause thereof. Were it necessary to do so, however, I would be of the opinion that such omission would make it impossible to pay any fees thereunder out of the county or township treasury when the conviction has been had in a mayor's court.

Respectfully,
EDWARD C. TURNER,
Attorney General.

687.

BONDS ISSUED BY TOWNSHIP TRUSTEES UNDER SECTION 7004, G. C., ARE WITHIN ALL LIMITATIONS OF SMITH ONE PER CENT. LAW—EXCEPTION—BONDS ISSUED PRIOR TO JUNE 2, 1911.

Bonds issued by township trustees under section 7004, G. C., do not constitute an indebtedness incurred by a vote of the people within the meaning of the Smith one per cent. law, section 5649-2, G. C., and the journal entry in State ex rel. v. Sanzenbacher, 84 O. S., unreported. Levies to pay such bonds are levies for township purposes. Accordingly, such levies are within all the limitations of the Smith law, except as to levies on account of bonds issued prior to June 2, 1911.

COLUMBUS, OHIO, August 5, 1915.

HON. HUGH F. NEUHART, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of July 27, 1915, which is as follows:

> "Under section 6977 two townships of this county by a majority vote carried the proposition for, 'road improvement by general taxation;' one township on July 23, 1910, and one township on February 19, 1912.
>
> "Both townships have issued bonds for the purpose of providing the money necessary to meet the expenses of improving such roads under section 7004.
>
> "The amount of bonds issued by each township is well within the limitations of sections 7005 and 3954 of the General Code, and sections 5649-1 and 5649-1a passed February 16, 1914, volume 104, page 12, seems to take care of any levy for the interest and principal of said bonds within the 15 mill limitation.
>
> "First. May the trustees of these townships issue bonds herafter under authority of section 6977 and section 7004 and levy for sinking fund and interest over the one per cent. limitation under section 5649-2 volume 103, page 552?
>
> "Second. May the trustees of these townships issue bonds hereafter under section 7004 and levy a tax in excess of the two mill limitation under section 5649-3a, volume 102, page 271?"

My predecessor, Mr. Hogan, held in an opinion rendered under date of May 13, 1912, to Hon. Don J. Young, prosecuting attorney, Norwalk, Ohio, found in vol. II of the annual report of the attorney general for that year, at page 1335, that bonds issued under section 7004, G. C., do not constitute "indebtedness incurred by a vote of the people," although their issuance is dependent upon the favorable vote of the electors of the township upon the question of "road improvement by general taxation"for the reason that the electors do not vote upon any particular indebtedness, nor does the issuance of bonds necessarily follow a favorable vote under the related statutes. On the contrary the vote merely fixes the policy of the township with respect to the improvement of its public roads by authorizing such improvement to be made by general taxation rather than by special proceedings involving the assessment of benefited property. Such a vote determines the policy of the township for an indefinite period of time, and such policy remains effective until an election for the reversal thereof is successfully held under sections 7001, et seq., G. C.

These considerations induced my predecessor to adopt the conclusion that

levies for sinking fund and interest purposes on account of the bonds issued under section 7004, G. C., are not exempted from the ten mill limitation of the Smith one per cent. law by the last clause of section 5649-2, G. C.

In like manner, Mr. Hogan reached the conclusion that the decision in State ex rel. v. Sanzenbacher, 84 O. S. unreported, did not apply to such levies so as to make them exempt from the limitation of two mills on levies for township purposes.

Mr. Hogan further held that inasmuch as all the proceedings under sections 6976-7008, G. C., are taken by the township as such and administered by the trustees of the township in their official capacity, the levies in question could not be regarded as levies in special districts created for road improvements, within the meaning of section 5649-3a, G. C.

I agree with Mr. Hogan's opinion, and in addition thereto may state that none of the amendments of the Smith one per cent. law, enacted subsequently to the rendition of his opinion, would affect the application of his conclusions to the facts stated by you.

My answer to both of your questions is, therefore, generally in the negative.

An exception must, however, be made with respect to so much of the levy for interest and sinking fund purposes as represents the retirement of bonds issued prior to June 2, 1911, if such there be. You state that one township voted on the proposition on July 23, 1910, and it is possible that in that township bonds may have been issued prior to the date above named. If that is the case, levies on account of these bonds are outside of the ten mill limitation of section 5649-2 and the two mill limitation of section 5649-3a of the General Code, but are within the fifteen mill limitation of the law.

Respectfully,
EDWARD C. TURNER,
Attorney General.

688.

LONGVIEW HOSPITAL—NOT A STATE HOSPITAL—PATIENTS CANNOT BE TRANSFERRED TO LIMA STATE HOSPITAL.

Longview hospital is not a state hospital, and patients cannot be transferred to Lima state hospital.

COLUMBUS, OHIO, August 5, 1915.

Board of Directors of Longview Hospital, Cincinnati, Ohio.

GENTLEMEN:—I am in receipt of a letter under date of July 16, 1915, from Mr. Herman P. Goebel, Cincinnati, Ohio, requesting my opinion. This letter is in part as follows:

> "I am a member of the board of directors of Longview hospital and write at the instance and request of that board. You are aware that the Ohio state board of administration is about to arrange for the transfer of the insane criminals and criminal insane from the various state insane institutions to the Lima institution. Some question has arisen as to whether such patients now confined at Longview hospital can be transferred by the Ohio state board of administration to the Lima institution."

Section 1985 of the General Code provides who may be admitted to the Lima state hospital and is as follows:

> "The Lima state hospital shall be used for the custody, care and special treatment of insane persons of the following classes:
> "1. Persons who become insane while in the state reformatory or the penitentiary.
> "2. Dangerous insane persons in other state hospitals.
> "3. Persons accused of crime, but not indicted because of insanity.
> "4. Persons indicted, but found to be insane.
> "5. Persons acquitted because of insanity.
> "6. Persons adjudged to be insane who were previously convicted of crime.
> "7. Such other insane persons as may be directed by law."

It will be noted that paragraphs one and two of section 1985, above quoted, are the only provisions for the transfer of patients from other institutions to the Lima state hospital, and inasmuch as paragraph one applies solely to the state reformatory and the pentitentiary, any transfers made from Longview hospital to the Lima state hospital would have to be by virtue of paragraph two. Attention is called to the wording of paragraph two, to wit: "Dangerous insane persons in other *state* hospitals." The answer to your question, therefore, depends upon whether or not the Longview hospital is a "state" hospital.

It is true that appropriations are made by the state of Ohio for the partial maintenance of the Longview hospital and the validity of such appropriations was upheld in the case of State ex rel. v. Oglevee, 36 O. S., 211, on the ground that Longview hospital was a public institution and could therefore be supported by state funds. It is equally true, however, that the directors of the Longview hospital are not appointed by the governor and this was upheld in the case of Chalfant v. The State, 37 O. S., 60, the court holding that Longview hospital, while it was a public institution thus recognizing the distinction made in 36 O. S., supra, was not a "state" institution. The following is quoted from the opinion of White, J., page 62:

> "There is no constitutional inhibition against authorizing a county, or the municipalities of the state establishing such institutions. All institutions for these purposes are not required to be state institutions; but when state institutions are created for the purpose, the constitution requires the trustees to be appointed in the mode therein provided.
> "The provision has no application to institutions for these purposes founded by individuals, or particular localities, under authority granted for the purpose. Nor do such institutions become state institutions from the fact that they are subject to legislative government and control. All institutions and corporations created for public purposes are subject to be thus governed.
> "Nor is the character of the institution affected by the fact that the legislature has contributed to its support. The institution was created to administer in a particular county a public charity, which the state is enjoined to foster, and there is no inhibition against the general assembly giving it such aid as it may deem just."

Under date of December 12, 1911, my predecessor, Hon Timothy S. Hogan, rendered an opinion addressed to the Ohio board of administration, which opinion

is found in vol. II of the annual report of the attorney general for 1911-1912, at page 944, in which he held: "The Longview hospital is not a state institution." The following is also quoted from the foregoing opinion:

> "It is evident that the legislature in passing the act creating your board (102 O. L., 211) recognized the fact that said asylum is not a state institution under the then existing laws and said decision, for in section 4 which provided for your board's assuming the management and control of the institutions of the state it did not include the Longview hospital, and I am of the legal opinion that your board has nothing to do with the management or control of said institution either as to officers, employes or rules and regulations governing the same."

I concur in the conclusion reached in the foregoing opinion and hold that the Longview hospital is not a "state institution" and therefore does not come within the provisions of paragraph two of section 1985 supra, providing for the transfer of "dangerous insane persons now in other state hospitals" to the Lima state hospital.

This conclusion is further supported by the provisions of house bill No. 532 passed by the general assembly April 28, 1913, and approved by the governor May 6, 1913, found in 103 O. L., page 754, which provides that the Ohio board of administration and the county commissioners of Hamilton county are authorized and empowered to contract for the rental and use and provide for the ultimate purchase by the state for a hospital for the insane of the property occupied and used as the Longview hospital for the insane, and providing that during negotiations for the purchase of the property the same might be leased by the state. Section 6 of the act in question provides as follows:

> "Said property when rented or acquired by the state of Ohio shall be used and maintained as a hospital for the insane to be known as "The Longview State Hospital" and the Ohio board of administration shall have all the powers with respect thereto conferred as to the institutions named in section 1835 of the General Code and by title 5, division 1, chapter 2 of the General Code."

It is therefore clear that the legislature at the time of the enactment of house bill No. 532 did not consider the Longview hospital to be a state hospital and I am advised by the Ohio board of administration that neither the leasing nor purchase of the Longview hospital by the state has been consummated.

Specifically answering your question, therefore, I am of the opinion that there is no authority for the transfer of patients from the Longview hospital to the Lima state hospital.

Respectfully,
EDWARD C. TURNER,
Attorney General.

689.

TOWNSHIP TRUSTEES—WITHOUT AUTHORITY TO EMPLOY DETECTIVES TO POLICE THEIR TOWNSHIP—IT IS SHERIFF'S DUTY—EXPENSES OF SPECIAL ELECTION SMALLER THAN COUNTY ARE PAYABLE FROM COUNTY TREASURY AND ARE NOT A CHARGE AGAINST THE SUBDIVISION IN WHICH ELECTION IS HELD—SEE SUPPLEMENTAL OPINION NO. 705, AUGUST 7, 1915.

Township trustees may not lawfully employ detectives or police officers to police their townships with a view to apprehending and discovering criminals and enforcing police laws and regulations. Such functions are to be discharged by the sheriff and his deputies, and societies may be organized for this purpose under sections 10199 *and* 10200 *et seq., G. C.*

The expenses of special elections held in townships, municipal corporations and other subdivisions smaller than the county are payable from the county treasury, and are not a charge against the subdivision in which the election is held.

COLUMBUS, OHIO, August 5, 1915.

HON. C. H. CURTISS, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of July 27th, requesting my opinion on the following questions:

> "First. Can township trustees lawfully employ a detective, and pay him from the township funds, and if so, from what fund, to police their township with a view to apprehend and discover burglars or other crimes committed in such territory?
>
> "Second. Can this be done by township trustees to enforce the speed laws applicable to motor vehicles, and if so, from what fund should it be paid?"

These questions may be considered and answered together.

The general powers of township trustees are prescribed by statute—sections 3268 to 3298, inclusive, of the General Code. In addition to the powers therein conferred, the trustees have certain other powers under other statutes, such as the road laws.

While section 3244, of the General Code, constitutes each civil township "a body politic and corporate, for the purpose of enjoying and exercising the rights and privileges conferred upon it by law," yet it is clear that the township, as such, is not a municipal corporation in the complete sense and that the officers of townships have only such powers as are expressly conferred upon them by law or result by necessary implication from powers expressly conferred.

I can find no authority of law for the employment of detectives in the policing of townships excepting sections 14688 et seq., of the Appendix to the General Code. I quote these sections in toto:

> "Sec. 14688. That in any county in this state having a population of not less than 130,000, nor more than 130,500, the board of trustees of any township in addition to the powers and duties now conferred upon them by the general statutes, shall constitute a board of officers to be known and designated as the police board of their respective townships.
>
> "Sec. 14689. The duties of said board shall be to keep the peace in such township, to protect persons, churches, Sunday schools and religious

and literary societies from violence, interference or disturbance, and to enforce all laws now enacted or hereafter enacted regulating the sale of intoxicating liquors and to suppress all road houses or houses of ill-fame in said townships.

"Sec. 14690. To enable said board to perform the duties specified in section 2 of this act they are hereby empowered to appoint at any time as occasion may warrant and for such time as they may deem necessary, any person resident of such township or as many as they may deem necessary to act as special police for said board. Said special police shall have the power to make arrests upon view without warrant in all causes mentioned in section two of this act.

"Sec. 14691. Said board shall pay such police for such services as they may perform from the general funds of the township, such amount as they may deem fair and reasonable and also for expenses actually incurred in the performance of such duties upon the filing of an itemized statement of the number of days employed and the amount of expenses incurred.

"Sec. 14692. The jurisdiction of such police board shall extend only to such parts territorially of each township not included within the limits of any corporated town or village in such township."

I believe the foregoing sections were intended to be applicable to Montgomery county. However that may be, they are clearly unconstitutional. The fact that the legisature found it necessary to pass such laws for Montgomery county in order to authorize the employment of special policemen by township trustees supports the conclusion already suggested that in the absence of such statutes, valid and of general operation, township trustees have no such power.

Both of your first two questions must, therefore, be answered in the negative.

It does not follow, however, that rural communities are without police protection. Section 2833 of the General Code, as amended, 103 O. L., 419, makes the sheriff the conservator of the public peace throughout the county, and section 2830 authorizes him to appoint deputies who shall have and exercise the same functions as the sheriff in this particular. In addition to such protection as is thus accorded to rural communities there are special means whereby citizens may organize themselves for the purpose of detecting and preventing crime. I refer you to section 10199 of the General Code, which provides for township societies for the detection and arrest of criminals, and to sections 10200 et seq., a separate and distinct scheme, authorizing the incorporation of associations for the purpose of apprehending and convicting persons accused of crime.

You also inquire as to how the expense of conducting special elections held in townships, school districts or municipalities is to be paid.

There is no provision of law other than those of sections 5052 to 5054 of the General Code, which in any way effects the question as to the payment of expenses of holding elections. These sections provide that all expenses of elections shall, in the first instance, be paid from the county treasury as other county expenses, and as to November elections held in odd numbered years that such expenses shall be charged against the township, city, village or political subdivision in which the election is held; but they fail to make similar provision for the expense of holding special elections.

The conclusion is, therefore, irresistible that the expense of such special elections must be borne by the county.

My predecessor gave an opinion to this effect to the bureau of inspection and supervision of public offices on February 27, 1912, to be found in the report of the department for that year at pages 200-208 thereof. I agree with this conclu-

sion. In this connection, however, I am informed that the constitutionality of these sections has been questioned. Until, however, they are declared unconstitutional they should, in my opinion, be followed, especially since the effect of a declaration of unconstitutionality would be merely to destroy all means of paying the expenses of conducting elections; no such judgment could have the effect of authorizing the local subdivision to pay the expenses of such election.

Respectfully,
EDWARD C. TURNER,
Attorney General.

690.

STATE CIVIL SERVICE LAW—AMENDED SENATE BILL NO. 3—DISCREPANCY BETWEEN PRINTED JOURNALS AND ENROLLED BILL —ENROLLED BILL IS THE LAW.

The report of the joint conference committee, to which was referred amended senate bill No. 3, the civil service act of 1915, as spread upon the official journals of the house and senate, adopted by reference a previous report of the same committee, as printed in the daily printed journals of the house and senate. By consulting such printed journals it is possible to show a discrepancy in a few words between one of the sections of the bill as so printed in the daily printed journals and the same section as embodied in the enrolled bill, which was signed by the respective presiding officers of the two houses and by the governor, and was filed in the office of the secretary of state. Upon the facts thus appearing, It is HELD:

That the information capable of disclosure through the original and printed journals, in the manner described, is not evidence which is admissible to show the contents of the measure, but that under the circumstances the enrolled bill is the best and conclusive evidence of such contents.

The enrolled bill is for all purposes the law.

COLUMBUS, OHIO, August 5, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—You have asked me to advise you as to the effect of a discrepancy which has been discovered between certain phraseology in enrolled amended senate bill No. 3, as the same was signed by the presiding officers of the two houses of the general assembly and approved by yourself and by you filed in the office of the secretary of state, on the one hand, and the phraseology of the same context as it appears in the report of the joint conference committee to which said bill was referred, which said report was concurred in by a yea and nay vote by both houses of the general assembly.

The record of amended senate bill No. 3, as it progressed through the two houses of the general assembly, is as follows:

The bill was passed in one form by the senate, in which it originated; in the house it was referred to a committee which reported a substitute bill; the house adopted the report of its committee and passed the bill as so amended. The bill was thereupon returned to the senate, which refused to concur in the house amendments. This action being reported to the house, that body insisted upon its amendments and asked for a conference committee. This was agreed to by the

senate, and such committee was appointed. The joint conference committee thus appointed reported to both houses what might be termed a substitute for both the senate and the house measure, the bill, however, still bearing the same number and title as the bill originally introduced in the senate. Such conference substitute was reported in its entirety as an amendment to the bill which had been referred to the committee, and being so reported, was in its entirety (except, of course, the heading and title of the bill) recorded in the respective journals and printed and published in the printed copies thereof. Through a manifest clerical error occurring at this time, the official senate journal failed to conform in the phraseology of one of the sections to the official house journal and the daily printed journals of both houses. It so happened that the report of the committee was printed in the senate journal of the particular date at page 30 thereof, and in the house journal of said date, at page 21 thereof. These printed journals, as has been stated, were in accord.

No action was taken by the house of representatives on this report of the joint conference committee, but the senate subsequently re-committed the bill to said committee. On such re-commitment the conference committee reported the bill to the respective houses, with certain amendments of the amendments recommended by its former report, and with recommendation that the bill with the amendments and the amendments thereof reported by it in its second report be passed. In stating or defining the amendments to the conference substitute bill, the conference committee, in this its second report, referred to its former report as "recorded in the journal of the house on pages 21 to 37, inclusive and in the journal of the senate on pages 30 to 46, inclusive, of that date."

Comparison of the references thus made with the original house and senate journals and the printed copies thereof, respectively shows that the amendments or changes intended to be made and recommended by the conference committee in its second report cannot be fitted into the first report of the committee as recorded on the respective original journals of the two houses; but that the pages mentioned in said second report are evidently the pages of the daily printed house and senate journals of a given date, respectively. In fact, it may be said to be fairly apparent on the face of the second report of the conference committee, which is itself recorded in the journal, that the references therein are to pages of the daily printed journal, and not to pages of the original journal, although the word "recorded" instead of the word "printed" is used.

This final report of the conference committee was adopted and the yeas and nays thereon were recorded in both houses. The bill was then enrolled, and, in accordance with the established practice, the *original* senate journal was used to compile the enrolled bill, which, as will be observed, had to be made up, so to speak, from the amendments which were spread upon the journal after committee reports and adopted as such. In this way the clerical error which had occurred in making up the original senate journal of the day on which the first conference report was made was carried into the enrolled bill, which corresponds, so far as the discrepancy now under consideration is concerned, with said original senate journal.

The bill, as so enrolled, was signed by the presiding officers of the senate and house, respectively, in the presence of the houses over which they presided, while said houses were in session and capable of transacting business. After being so signed, it was presented to the governor, approved by him and filed in the office of the secretary of state.

These facts, as I interpret them, present the following question of law:

> "Where the report of a joint conference committee, as spread upon the official journals of the house and senate, adopts by reference another

conference committee report, as printed in the daily printed journals of the house and senate, by consulting which printed journals it is possible to show that the phraseology of the amendment, incorporated in the bill through the approval of the committee's second report, was in a given form of words and phrases, and there is a variance between the phraseology of the enrolled bill and the phraseology thus susceptible of proof through the journals and the other sources of information referred to therein, is it competent to show, by the journals and other documents, that the bill, as concurred in by the house and senate, differs in several words in one section thereof from the enrolled bill which was signed by the respective presiding officers of the respective houses and by the governor, or is the enrolled bill thus duly authenticated and approved the best and, therefore, the conclusive evidence of the contents of the measure? And if it is possible to show the contents of the measure by the use of the journals under the circumstances named, is it to be concluded that the bill as enrolled, signed and approved is not the bill which passed the house and senate, and that the bill which passed the house and senate was not signed and approved, so that the whole legislative act is a nullity?"

This question involves an interpretation of the constitution and of certain statutes.

The constitutional provisions involved are these:

Article II, section 9:

"Each house shall keep a correct journal of its proceedings, which shall be published. At the desire of any two members, the yeas and nays shall be entered upon the journal; and, on the passage of every bill, in either house, the vote shall be taken by yeas and nays, and entered upon the journal; and no law shall be passed in either house, without the concurrence of a majority of all the members elected thereto."

Article II, section 15:

"Bills may originate in either house; but may be altered, amended or rejected in the other."

Article II, section 16, provides in part that every bill passed by both houses of the general assembly shall be presented to the governor, etc.

Article II, section 17:

"The presiding officer of each house shall sign, publicly in the presence of the house over which he presides, while the same is in session, and capable of transacting business, all bills and joint resolutions passed by the general assembly."

The following statutes may be involved:

Section 66 of the general Code:

"Sec. 66. After passage and before enrollment, five copies of each bill shall be printed on heavy linen ledger paper and from the same type five thousand copies shall be printed on number one white book paper. Of the five copies, one shall be used for enrolling purposes, and of the five thousand copies, thirty-three hundred shall be delivered promptly to the secre-

tary of state, ten shall be delivered to each senator and representative and one to each state department. Such printing shall be done under the supervision of the clerk of the house in which the bills originated.

"Sec. 68. The clerk of each house of the general assembly shall keep a daily journal of the proceedings of such house, which shall be read and corrected in its presence. After the reading and approval of the journal, it shall be attested by the proper clerk, and recorded in books furnished by the secretary of state. The recorded journals shall be deposited with the secretary of state, and be the true and authentic journals. The original daily journal, as kept, corrected, approved, and attested, shall be delivered by the respective clerks to the printer of the journals for his use in printing them. Each clerk shall read and correct the proof sheets of the journal kept by himself, carefully compare them with the record herein provided for, and correct errors therein.

"Sec. 69. No executive message, address, communication of a state officer or board, report of the superintendent or other officers of a state institution or building, petition or memorial, argumentative or voluminous report of a standing or select committee or a joint committee of both houses, special report of an officer or board in reply to a resolution of either house or to a joint resolution, or other voluminous document, *except amendments to the constitution or to bills and resolutions,* and protests of members of either house against an act or resolution thereof, shall be entered upon the journals or recorded in the books provided for in the preceding sections."

While section 66, General Code, speaks of the use of one of the printed copies of the bill for "enrolling purposes," the constitution does not contain the word "enrollment" or the words "enrolled bill." An examination into numerous decisions shows, however, that it may safely be accepted as the settled law in all jurisdictions that the constitutional provisions respecting the method of passing and authenticating bills are to be interpreted in the light of the common law and parliamentary usage which obtained when the constitution was adopted. "Enrollment" is an established and well understood process, and was so at the time the constitution was adopted.

For present purposes it is sufficient to define the "enrolled bill" as the "bill," or perhaps, the "copy of the bill" which receives the signature of the presiding officers, is submitted to the governor and filed in the office of the secretary of state. It is of itself a record—in fact the only single and attested record of what the bill is.

The journal is also a record, but, primarily at least, it is a record of proceedings and not a record of contents.

In other words, when the constitution requires the signing "of all bills and joint resolutions" by the respective presiding officers and the presentation of "every bill" to the governor, it necessarily requires that some tangible paper writing, capable of signature and delivery, shall be the "bill," and this tangible thing is what is known as the "enrolled bill."

Looking a little further into the constitution and its necessary implications, it appears that the enrolled bill, having the characteristics above defined, is evidence of the result of legislative action, but not necessarily of the fact that there has been legislation.

Section 17 of article II provided that the presiding officer of each house shall sign, etc., all bills passed by the general assembly. The purpose of such signature is well understood to be authentication or attestation, and it is for the benefit not

only of the members of the house and senate, respectively, but also of the governor and the public, so that the governor and the public may know by this evidence that what is signed is the bill. But the presiding officers have authority merely to sign such bills as have been "passed by the general assembly," and by their signature they authenticate, not the passage, but the identity and contents of the bill. This is because of the language of section 17 itself, and also because another record is required to be kept which the public may consult to ascertain whether a given bill has been passed, namely, the journal of proceedings which is required to be kept and published by section 9 of the same article. So that any person desirous of ascertaining what the legislature has done would naturally look to the journals to ascertain whether or not a given measure had been passed, and to the enrolled bill filed in the office of the secretary of state for the purpose of ascertaining what the law passed was.

The present instance affords a very apt example of one of the practical reasons for this distinction. If the journal were intended to constitute, and did constitute, evidence of the contents of the law, then those contents could only be ascertained by laborious search through the records of the house and senate and by piecing together different distinct acts or proceedings. Indeed, had the bill not been amended, and had it been passed as originally introduced, there would have been no record on the journal of either house tending to show its contents.

Summing up, then, I think that on the face of the constitution it appears that two records are provided for: one the bill as attested by the signatures of the respective presiding officers; the other the journals of the house and senate; and the one is a record of what the bill is, and the other is a record of the proceedings of the two houses with respect to the passage of the bill and the votes of the members thereon.

This being true, these two records constitute, respectively, the best evidence of the things which they are intended to establish. The enrolled bill, when properly signed, is the best and only evidence of what the law is; the journals are the best and only admissible evidence of the proceedings of the legislature and the votes of the members of each house with respect thereto.

I have made this distinction because it serves to simplify what would otherwise, in view of a great mass of decisions from this and other states relative to the general question of the finality of the enrolled bill as evidence, appear to be a complicated and doubtful question.

Both the text writers and the courts have had occasion to determine what the general rule is in this particular, and, as exemplified by the exhaustive discussion in sections 27 to 53, inclusive of Lewis & Sutherland's Statutory Construction, 2nd Ed., and the cases therein cited, no very satisfactory general rule has been laid down. That is to say, in many of the cases the question has been treated as if it were, in the language of Lewis & Sutherland, section 44,

> whether or not "the enrolled act may be impeached by a resort to the journals."

As I see it, the question here is not so broad as that, but is narrowed to this:

> Whether or not the *contents* of the enrolled act may be impeached by a resort to the journals; or, stating it in another way: when the journals show that an act having a given title has been passed, and when there is an enrolled bill of that title, duly attested by the signatures of the presiding officers and approved by the governor and filed in the office of

the secretary of state, is it competent to show that because of verbal discrepancies the act so enrolled, attested, approved and filed was not the act which was passed by the general assembly?

In some of the states, having constitutional provisions not greatly different from those of Ohio, it has been held that the enrolled act is not subject to impeachment at all, and that if such an act be found duly attested and filed in the proper archives it is not competent to show by the journals or otherwise even that such act did not receive the votes of a majority of the members elected to both houses, or otherwise receive the proper legislative assent.

Ohio, however, does not follow this rule, but in this respect our supreme court is in line with the courts which hold that the enrolled bill is not conclusive evidence of the existence of a given law, but that insofar as it is evidence that such a law has been passed it may be impeached by the journals.

This was the decision in Fordyce v. Godman, 20 O. S., 1, although the decision in that case was complicated by the application of another constitutional provision which has no bearing upon the present question. The question in the case was as to whether or not certain claims against the state not authorized by pre-existing law had been allowed by the general assembly. Article II, section 29, of the constitution then, as now, provided that no money should be paid on any claim the subject-matter of which should not have been provided for by pre-existing law, "unless such compensation or claim be allowed by two-thirds of the members elected to each branch of the general assembly."

It appeared that the general assembly had apparently passed an act allowing the claims in question; that is, such an act was found properly attested by the signatures of the presiding officers of the two houses. The journals of the respective houses, however, showed that the bill did not receive the votes of two-thirds of the members elected to each house.

In the opinion, per Scott, J., appears the following language:

> "Were we to hold otherwise, we would in effect hold that a bill *may* become a law without receiving the number of votes required by the constitution; that a single presiding officer may by his signature give the force of law to a bill which the journal of the body over which he presides, and which is kept under the supervision of the whole body, shows not to have been voted for by the constitutional number of members. The plain provisions of the constitution are not to be thus nullified, and the evidence which it requires to be kept under the supervision of the collective body, must control, *when a question arises as to the due passage of a bill.*"

This decision was based upon the dictum in Miller & Gibbon v. The State, 3 O. S., 475, in which it was said:

> "No bill can become a law without receiving the number of votes required by the constitution. And if it were found, by an inspection of the legislative journals, that what purports to be a law upon the statute book was not passed by the requisite number of votes, it might possibly be the duty of the courts to treat it as a nullity."

Subsequently, in State ex rel. v. Smith, 44 O. S., 348, the question was raised as to whether or not a bill duly attested as such by the signatures of the presiding officers, and shown by the journals of the two houses to have been passed by the

requisite vote in each, could be held ineffective upon tender of proof that four of the members of the senate, whose votes were necesarry to give to the measure the constitutional majority, were not properly elected thereto, but had been fraudulently seated by a minority of the members of the senate in the absence of a quorum of that body.

The court held, in effect, that it would go so far as to examine the journals in order to impeach the enrolled bill, insofar as the latter might import due passage, but that it would not hear parol testimony to impeach the journal itself. In this case, of course, there was no conflict between the journals and the enrolled bill. It was in this connection, then, that Minshall, J., used the language found on page 363 of the opinion:

> "But in many of the states, and without doubt in our own, the journals are to be regarded. They are required by the constitution to be kept. **The language is: 'Each house shall keep a correct journal of its proceedings, which shall be published, * * * and on the passage of any bill the vote shall be taken by yeas and nays and entered upon the journal; and no law shall be passed in either house without the concurrence of a majority of all the members elected thereto.'** Section 9, article 2. Now in the time of Hobart the journals were not regarded as records; they were 'remembrances for forms of proceedings to the record,' that is to say, the enrolled bill.
>
> "In this state what appears on the journals affecting the passage of a law has been noticed by this court, but in no instance has attention been given to anything not appearing upon the journals, though it be the omission of a requirement of the constitution."

The reference in the early part of this opinion is to the line of decisions which hold that the enrolled bill cannot be impeached in any respect by reference to the journals.

But while these cases evidence the rule in Ohio to be that recourse will be had to the journals to determine the facts in issue therein, they are not authority for the conclusion that the journal may be consulted for the purpose of impeaching the contents of the enrolled bill, and if, as I believe, the distinction which I have drawn in the earlier part of this opinion is valid, no inference from these decisions can be drawn in support of such a rule.

On the contrary, although there are no cases in Ohio upon the exact point, there are dicta in some of the decided cases which indicate clearly to my mind the trend of judicial opinion. For example, the case of Miller & Gibson v. The State, previously referred to, presented the following facts:

The bill there in question was referred to a committee and the committee reported amendments thereto which consisted of striking out all after the enacting clause, and recommending the passage of a new or substitute bill—exactly, it will be seen, what occurred in connection with amended senate bill No. 3. Because of the apparently radical nature of the amendment it was argued that the substitute bill should have been read three times after the technical amendment was incorporated in the bill, and that it did not affirmatively appear on the face of the journal that more than one reading had been given to the amended bill.

Chief Justice Thurman first arrived at the conclusion that unless the bill had been substantially changed by the amendments offered, the constitution did not require that it be read three times—even assuming that the constitutional requirement for three separate readings is mandatory and cannot be done away

with. But having arrived at this point the chief justice dismissed the question as to whether or not the amendment was of a character requiring three separate readings in any view of the constitution, with the following language:

> "Now in the case before us, we have no means of knowing what was the change effected by the amendment in question. Neither bill nor amendment is spread upon the journal, and unless we were to run into the absurdity of receiving parol proof and trying the validity of a statute upon the testimony of witnesses, we could not say that any substantial change was made. For aught that we have before us, or can properly look at, the 'new bill' may have been, with the exception of a single word, and that not material, identical with the matter stricken out.
>
> "Nor is it to be forgotten that every reasonable intendment is to be made in favor of the proceedings of the legislature. It is not to be presumed that the assembly, or either house of it, has violated the constitution; when, therefore, it appears by the journals that a bill was amended by striking out all after the enacting clause and inserting a 'new bill,' so called, and but one reading after the amendment is recorded, it cannot be presumed that the matter inserted was upon a different subject from that stricken out, especially when the matter inserted is consistent with the title borne by the bill before the amendment. This is the more obvious and reasonable since the constitution provides that, 'No bill shall contain more than one subject, which shall be clearly expressed in its title.'
>
> "On the whole, we find nothing in the journal that would warrant us in holding that the amendment in question was of a character requiring it to be read three times."

From this it is quite apparent that at that time it was not the parliamentary practice to spread the phraseology of committee amendments on the journal, and it may be remarked that this is the most natural interpretation of the constitution itself, standing alone; so that unless section 68 of the General Code requires a different rule the contents of amendments are not a part of the journal. At any rate, it is fair to assume that within the intendment of the constitution itself the journal is not to be a record of the phraseology of amendments, but only of the action or votes thereon.

Again, in State v. Kiesewetter, 45 O. S., 254, the court considered for the first and only time the effect of section 17 of article II, requiring the signatures of the presiding officers. In holding that a bill not so signed did not become a law, notwithstanding the fact that the journals showed the passage of such a bill and the copies of the bills filed in the state library showed the contents thereof, the court, per Spear, J., says (at page 258):

> "It is entirely clear that section 17 cannot be treated as a mere guide to the action of the general assembly in order to the more full enlightenment of the members in the performance of their duties, or as a check upon them, as the signing of a bill by the presiding officer in no substantial way affects the action of the members, or relates to the passage of the bill through either body. The members, as such, have performed every duty regarding a bill prior to the time when the duty of signing by the presiding officers may be performed. This signing in open session may, incidentally, serve to fix the attention of members to the bill signed, but it has a much more important purpose. It authenticates a bill, and affords a sure means of identification. No official copy is required of a

bill introduced, nor is it required to be copied on the journal, and a legal standard of comparison is wanting. The signatures of the presiding officers, therefore, furnish the evidence that that which the journals show, by title and number, passed the general assembly, is this identical measure. The act thus authenticated is to be given the force of law, is to be treated as such, and to prove itself upon inspection; and this verification by the officers designated by the constitution is the conclusive evidence to the secretary of state that the act so signed is a law, and entitled to be filed as such in the office of that officer, and, under his direction to be published, duly certified by him, for the information and guidance of all the people of the state. The signing is, therefore, for the benefit of the people in their examination to ascertain what is, and what is not law. It is apparent that the reasoning which led this court to declare section 16 to be directory, does not apply to section 17, and that the cases referred to are not authority in the case at bar.

"Were there a provision requiring that all bills introduced should be spread at length upon the journal, and were this bill to be found copied on the journal of either house, it is probable, that, following former holdings of this court, resort might be had to that mode of identification. But no such record exists, and reliance upon title, number, and designation, for identification of contests, would, we think, be inadmissible."

It will be observed that Judge Spear says that the journals can be consulted to show contents only where "there is a provision requiring that all bills shall be spread at length upon the journals" and where a given bill can be found so copied on the journal.

The inference at least is that the mere fact that part or all of the provisions of a given bill might appear on the journal would not be sufficient to make the journal evidence of the contents of the bill unless such record was ***required*** to be kept. In other words, the mere fact that the journal may afford information as to what the contents of a bill are does not make the journal the best evidence of such contents, unless the journal is *required* to contain such information.

As I have stated, the contents of bills are not required to be spread upon the journals. In fact, there is very striking evidence to the contrary, in that in section 1 of article XVI, as originally adopted in 1851 (which it is, of course, fair to read in connection with the sections under examination, even though the same has been since amended) it is distinctly provided as to proposed amendments to the constitution that

> "If the same shall be agreed to by three-fifths of the members elected to each house, such proposed *amendments shall be entered on the journals,* with the yeas and nays, and shall be published, etc."

I am of the opinion in view of the apt comparison which I have suggested that the contents of bills or even those of amendments to bills, are not required in a constitutional sense at least to appear upon the journals. Therefore, if in a given case what purports to be the contents of a given bill, or amendment, do appear upon the journal, such entries in the journal would not be the best evidence of such contents by which the enrolled bill, duly authenticated, approved and filed in the office of the secretary of state, which is itself intended to be evidence of the contents, may be impeached.

Nor is the above conclusion, in my opinion, in any way altered by the somewhat equivocal provision of section 69 of the General Code. Although this section

in terms states that no voluminous report shall be entered upon the journals, "except amendments to the constitution or to bills and resolutions," this provision cannot be regarded as having more than permissive effect. In fact, insofar as it is a regulation for the keeping of the journal in addition to those specifically provided for in the constitution itself, it is a mere rule by which neither house of any session of the general assembly is bound, if it chooses to adopt a different rule; for section 8 of article II of the constitution, provides that

> "Each house, except as otherwise provided in this constitution, shall choose its own officers, may determine its own rules of procedure, punish its members for disorderly conduct and * * * expel a member."

But however this may be, I do not think that it is competent for the legislature by law to change the character and function of the two records required to be kept by the constitution itself. If in the absence of section 69 of the General Code, the journal cannot be used to impeach the enrolled bill in the respect under consideration, then I do not think that section 69 of the General Code, by merely providing that the journal may contain matter which the constitution does not *require* it to contain, can reverse the rule and make the journal evidence of a higher character than the enrolled bill.

I have examined many cases from other states, in addition to the Ohio cases above cited and discussed. Numerous authorities, directly in point, will be found to sustain the position which I have taken. At the same time it must be admitted that other authorities, equally as directly in point, may be found opposed to this contention. But the weight of authority, in my judgment, is in accord with the view which I have expressed, and, as stated in Lewis & Sutherland's Statutory Construction, section 44, the current of judicial decision in recent years is strongly in this direction.

The supreme court of the United States is committed to this view under the federal constitution, which requires, in section 5 of article I, that "each house shall keep a journal of its proceedings and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy * * *"; but does not require the authentication of laws by the signatures of the presiding officers of the respective houses of congress.

In Field v. Clark, 143 U. S., 649, and in the opinion of Mr. Justice Harlan (at page 671) is found the following significant language:

> "In regard to certain matters, the constitution expressly requires that they shall be entered on the journal. To what extent the validity of legislative action may be affected by the failure to have those matters entered on the journal, we need not inquire. No such question is presented for determination. But it is clear that, in respect to the particular mode in which, or with what fullness, shall be kept the proceedings of either house relating to matters not expressly required to be entered on the journals; whether bills, orders, resolutions, reports, and amendments shall be entered at large on the journal, or only referred to and designated by their titles or by numbers; these and like matters were left to the discretion of the respective houses of congress. Nor does any clause of that instrument, either expressly or by necessary implication, prescribe the mode in which the fact of the original passage of a bill by the house of representatives and the senate shall be authenticated, or preclude congress from adopting any mode to that end which its wisdom suggests. Although the constitution does not expressly require bills that have passed congress to be

attested by the signatures of the presiding officers of the two houses, usage, the orderly conduct of legislative proceedings, and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication.

"The signing by the speaker of the house of representatives, and, by the president of the senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed congress. It is a declaration by the two houses, through their presiding officers, to the president, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass congress shall be presented to him. And when a bill thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed congress should be deemed complete and unimpeachable. As the president has no authority to approve a bill not passed by congress, an enrolled act in the custody of the secretary of state, and having the official attestations of the speaker of the house of representatives, of the president of the senate, and of the president of the United States, carries, on its face a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed congress, all bills authenticated in the manner stated: leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the constitution.

"It is admitted that an enrolled act, thus authenticated, is sufficient evidence of itself—nothing to the contrary appearing upon its face—that it passed congress. But the contention is, that it cannot be regarded as a law of the United States if the journal of either house fails to show that it passed in the precise form in which it was signed by the presiding officers of the two houses, and approved by the president. It is said that, under any other view, it becomes possible for the speaker of the house of representatives and the president of the senate to impose upon the people as a law a bill that was never passed by congress. But this possibility is too remote to be seriously considered in the present inquiry. It suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the constitution. Judicial action based upon such a suggestion is forbidden by the respect due to a co-ordinate branch of the government. The evils that may result from the recognition of the principle that an enrolled act, in the custody of the secretary of state, attested by the signatures of the presiding officers of the two houses of congress, and the approval of the president, is conclusive evidence that it was passed by congress, according to the forms of the constitution, would be far less than those that would certainly result from a rule making the validity of congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them."

The court in this case held that although the authenticated and enrolled bill,

as signed by the president, omitted a section, which was shown by the reports of the conference committee to have been incorporated in the original bill as passed by both houses of congress, and although such conference committee reports were shown on the journal, such facts could not be considered to nullify the law itself nor to impeach the authenticity of its contents as enrolled.

This case was followed in Lyons v. Woods, 153 U. S., 649; and Harwood v. Wentworth, 162 U. S., 547.

Of course, if an enrolled bill, attested by a mode not required by the constitution, imports verity as against conflicting information which may be obtained from the journals, then *a fortiori,* when the constitution requires, as does our constitution in article II, section 17 thereof, that all bills be signed in the presence of the respective houses by the presiding officer thereof, etc., the same result follows.

In the particular case under consideration the official journals themselves are in disagreement. It is only by resorting to indirect evidence depending upon the identity of certain pages of the daily printed journal with the pages referred to in the second conference committee report that we are able to arrive at the conclusion that the bill as passed by the two houses was not verbally identical with the bill as enrolled, signed and approved. Being of opinion, however, that even the most direct evidence appearing on the face of the journal would not be competent to impeach the contents of the enrolled bill, I have disregarded this feature of the present situation.

It is also to be remarked that the verbal change in the bill is apparantly a slight one, affecting but two or three words in one of the sections and producing no very material change in the substantial meaning thereof. If the case were an aggravated one, and if the discrepancy vitally affected the application of the whole law, perhaps a different result would follow; but as it is, I feel that should the actual facts be submitted to an Ohio court the decision would sustain the enrolled law, both as to validity and as to contents.

Thus far in the opinion I have treated of the question which is presented from the standpoint of the public exclusively. There is, however, another point of view: While the authentication required by section 17 of article II of the constitution is perhaps primarily for the benefit of the public, yet, in a sense, it is also for the benefit of the members of the respective houses of the general assembly. That is to say, the presiding officers are not merely required to sign the laws, but also to sign them in the presence of the houses over which they respectively preside, while the latter are in session and capable of doing business. I think that in a very real sense these requirements make the attestations of the officers the acts of the respective houses as a whole. The requirement that the signatures be attached in the presence of the houses, while the latter are in session and capable of doing business, can be for no other purpose than to offer an opportunity to any member to examine the enrolled bill which is presented to the presiding officer for signature and to enter timely objection thereto, even after the committee on enrollment has reported.

When, therefore, an enrolled bill is signed after a favorable report of the committee on enrollment, and with the acquiescence of the members of the house or senate, while in session and capable of doing business, the signature is binding upon the entire house and becomes its act. The presiding officers sign as agents of the houses over which they preside, and their action in compliance with article II, section 17, is the final and conclusive certification as to the identity and contents of the bill.

The necessity and wisdom of such a rule is well illustrated by the present case. The original journals of the two houses differ on a matter that is not required by the constitution to be recorded in the journals. One agrees with the wording

of the bill, which under the constitution must be and had been duly signed by the presiding officers of each house, while the other differs from it. It certainly cannot be said that the one journal which differs from the signed bill is better evidence of the contents of the bill than the other journal which agrees with it.

Even if it were true that the journals show that each house, at a time prior to the signing of the bill by the respective presiding officers, voted on a different wording, it would not alter the case. When the journals show that a bill of a certain number or designation received the constitutional majority, the bill itself, as signed by the presiding officers of each house while the respective houses were in session capable of transacting business, is the only evidence that may be looked to to determine the final contents of the bill.

For the reasons above stated, I am of the opinion that amended senate bill No. 3, as enrolled, signed by the presiding officers of the house and senate, approved by yourself as governor, and by you filed in the office of the secretary of state, is the law of the state, and that such enrolled bill is conclusive evidence of the phraseology of the legislative act which it represents.

Respectfully,
EDWARD C. TURNER,
Attorney General.

691.

JOINT CITY AND COUNTY WORKHOUSE—MUSKINGUM COUNTY MUST CONTRIBUTE TO MAINTENANCE OF SAME—NO PROVISION OF LAW TO RELIEVE A COUNTY FROM SUCH MAINTENANCE.

There is no provision of law to relieve Muskingum county from its obligation to contribute to the maintenance of the joint city and county workhouse instituted under the provisions of sections 14548, *et seq., the appendix to the General Code.*

COLUMBUS, OHIO, August 5, 1915.

HON. PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—Permit me to acknowledge your request for an opinion, dated July 28th, which is as follows:

> "In preparing the budget for the workhouse of Zanesville, Ohio, we have investigated that last year the county of Muskingum appropriated $3,500.00. From January 4th up until July 1st of this year they collected $1,240.00 in fines that should have been paid to the clerk of the court and used. They figure that it will cost about $5,000.00 in round numbers to run the workhouse.
>
> "Personally I feel as though if there is any way by which we could turn this workhouse over to the city of Zanesville and relieve the commissioners from any responsibility or levy, we could better pay for all inmates that the county sends to the institution.
>
> "Under section 14548 of the General Code up to and including 14570 which gives the history of this workhouse, I wish you would give me the law in which we could refuse to make a levy for the workhouse and turn the same over to the city of Zanesville. If there is any way by which we can refuse to make a levy, we surely will do it."

The joint workhouse conducted by the city of Zanesville and the county of Muskingum, which is authorized under the provisions of sections 14548, et seq., of the appendix to the General Code, is an established institution and in connection with the maintenance of the same permit me to invite your attention to the provisions of section 14562 of the appendix to the General Code, which is as follows:

> "Section 14562. The costs of maintaining such joint city and county workhouse over and above the proceeds arising from the sale of the products thereof, shall be borne by such city and county jointly, and such expenses shall be paid quarterly by such city and county out of the respective treasuries thereof, upon the certificate of the secretary of such joint city and county workhouse on the approval of the council of such city, and the commissioners of such county. And the board of county commissioners of any county having such joint city and county workhouse, are hereby authorized and required to levy upon the general tax duplicate of the county outside of the corporate limits of such city, such sum as may be necessary, not exceeding five-tenths of one mill on the dollar valuation; and the city council of such city are hereby authorized and required to levy upon the general tax duplicate of such city, such sum as may be necessary, but not exceeding one mill on the dollar valuation for the aforesaid maintenance; and the board of such joint city and county workhouse directors, the city council of such city and the county commissioners of such county, in ascertaining and determining, at the end of each quarter the amount to be paid to such board to meet any deficiency in the products of such joint workhouse to maintain the same, shall take into account and be governed by the number of convicts furnished by such city and such county, the number of days' labor performed by the convicts from each, the value of such labor, and the relative costs and expenses of taking care of, managing, and disciplining the convicts of each, and giving to such city and county each full credit for the value of the products of such workhouse produced by the labor, skill and diligence of the convicts from each, and charge to the account of each (city and county) the costs to such institution of working, managing, maintaining, taking care of, and disciplining its convicts, and make assessments upon such city and county for the maintenance of such institution accordingly."

Under the provisions of the section quoted above it is made the duty of the board of county commissioners and the city council to levy upon the general tax duplicate of the county outside of the corporate limits of such city and upon the general tax duplicate of such city such sum as may be necessary, not exceeding in the case of the county five-tenths of one mill on the dollar valuation, and in the case of the city not exceeding one mill on the dollar valuation for the maintenance of the joint city and county workhouse.

It is my opinion, therefore, that, having adopted the policy of operating a joint city and county workhouse under the provisions of the special act embraced in sections 14548 to 14570, inclusive, of the General Code, the county is without authority to abandon the project and must adhere to and carry out the policy adopted, at least until relieved by some subsequent legislation.

Respectfully,
EDWARD C. TURNER,
Attorney General.

692.

APPROVAL OF ORDER OF STATE BOARD OF HEALTH FOR INSTALLATION OF NEW WATER PURIFICATION PLANT FOR CAMBRIDGE, OHIO.

COLUMBUS, OHIO, August 5, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Enclosed herewith find amended order of the state board of health relative to the installation of a new water supply or a water purification plant for the city of Cambridge.

I have examined the order, which is issued under section 1254 of the General Code of Ohio, find the same regular and it is my opinion that it should be approved.

Having approved the same under the provisions of section 1254 of the General Code, I am transmitting the order to you for your approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

693.

APPROVAL OF ORDER OF STATE BOARD OF HEALTH RELATIVE TO POLLUTION OF CUYAHOGA RIVER BY SEWAGE FROM CLEVELAND, OHIO.

COLUMBUS, OHIO, August 5, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Enclosed herewith find amended order of the state board of health relative to the pollution of the Cuyahoga river by sewage and other wastes from the city of Celeveland.

I have examined the order, which is issued under section 1251 of the General Code of Ohio, find the same regular and it is my opinion that it should be approved.

Having approved the same under the provisions of section 1251 of the General Code, I am transmitting the order to you for your approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

694.

DEPUTY STATE SUPERVISORS OF ELECTION — ADDITIONAL COMPENSATION FOR SERVICES IN CONDUCTING PRIMARY ELECTION —PART OF SERVICE PERFORMED BY NEW AND OLD MEMBERS —COMPENSATION SHOULD BE APPORTIONED—HOW DIVISION SHOULD BE MADE.

Section 4990, G. C., provides for additional compensation to deputy state supervisors of elections for services in conducting a primary election, and where a member who has performed a part of such services and for any reason ceases to be such officer before the services are completed, such compensation should be apportioned between such member and his successor, but since there is no authority in the county auditor, or the board of elections to make such apportionment, the warrant for the payment of such compensation should be withheld until the persons entitled thereto agree as to the division thereof or the same is otherwise determined according to law.

COLUMBUS, OHIO, August 5, 1915.

HON. C. A. WILMOT, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of July 14, 1915, in which you inquire:

> "Is a deputy state supervisor of elections, whose term expired on August 3, 1914, entitled to compensation for conducting the primary election which was held August 11, 1914, and if so in what amount?"

Your communication states that the total compensation to which each of the several deputy state supervisors of elections of Geauga county, under the provisions of section 4990, G. C., is entitled, is $38.00; that the term of F. expired on August 3, 1914, and that the primary election to which you refer was held on August 11, 1914; that on August 3, 1914, F. was succeeded by W. who had theretofore been duly appointed and qualified, and you inquire whether F. is entitled to any portion of such $38.00 and if so how much.

Section 4990, G. C., to which you refer, a consideration of which is involved in answering your inquiry, provides as follows:

> "For their services in conducting primary elections, members of boards of deputy state supervisors shall each receive for his services the sum of two dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of three dollars for each election precinct in his county, and judges and clerks of election shall receive the same compensation as is provided by law for such officers at general elections."

It will be here noted that the compensation provided is for "services in *conducting primary elections* and that no compensation is provided for any other service. A fixed and determinate sum is in every instance provided for the whole service and no authority rests in any officer, agent or representative of the public to make any division of the same. No authority therefor will be found nor any machinery provided for making any division or apportionment of the sum total of compensation allowed for this service, nor is any basis upon which such apportionment may be made prescribed.

It will be further noted that under the provisions of 4991, G. C., all expenses of primary elections, including compensation of members and clerks of boards of deputy state supervisors of elections shall be paid in the manner provided by law for the payment of similar expenses of general elections.

The payment of similar expense of general elections to that here under consideration is provided for by section 4822, G. C., as follows:

> "Each deputy state supervisor shall receive for his services the sum of three dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of four dollars for each election precinct in his respective county. The compensation so allowed such officers during any year shall be determined by the number of precincts in such county at the November election of the next preceding year. The compensation paid to each of such deputy state supervisors under this section shall in no case be less than one hundred dollars each year and the compensation paid to the clerk shall in no case be less than one hundred and twenty-five dollars each year. Such compensation shall be paid quarterly from the general revenue fund of the county upon vouchers of the board, made and certified by the chief deputy and the clerk thereof. Upon presentation of any such voucher, the county auditor shall issue his warrant upon the county treasurer for the amount thereof, and the treasurer shall pay it."

From this it is conclusive that the compensation of the deputy state supervisors of elections for conducting a primary on August 11, 1914, was not payable until the end of the quarter next succeeding such election and after F. ceased to be a member of the board, yet it is required that the same be paid to "each such deputy state supervisor." Not some definite or indefinite portion of, but the whole compensation is required to be paid to the member of the board of deputy state supervisors.

It appears from your statement that of necessity a part of the service of conducting the primary election on August 11, 1914, was rendered by F. prior to August 3rd, and that the remainder of such service required to be performed after August 3rd was lawfully performed by W., the compensation for all of which service was payable only at the end of the quarter in which the primary was held, and it is solely upon these facts that this opinion is based since a different state of fact is conceivable to which a different rule might apply.

It will be borne in mind that in an opinion of this department under date of February 10, 1915, it was held that a person who attempts to hold over after the expiration of the term for which he was appointed as deputy state supervisor of elections and after the appointment and qualification of his successor, is entitled to no compensation for services rendered after the beginning of the term of such successor, in this particular instance August 3, 1914.

In an opinion of my predecessor Hon. Timothy S. Hogan, under date of November 2, 1911, found at page 1423 of the report of the attorney general for that year, it is held that where a deputy state supervisor of elections resigns after having performed a part of the services of holding a primary election and before such services are completed, that such member and his successor should, as a matter of law and justice, equitably divide the compensation.

In the absence of power or authority of the board of elections or the county auditor, under the facts set forth by you, to make apportionment of the compensation allowable for the services of members of the board of deputy state

supervisors of elections, I am of opinion and therefore advise that the county auditor should withhold his warrant in this particular case until F. and W. agree as to its division, or that matter is otherwise lawfully determined.

If the holder of the voucher should mandamus the auditor, the auditor should implead the other party and ask the court's direction as to the division of the funds, which division will depend upon the amount of work done by each as shown by the evidence.

Respectfully,
EDWARD C. TURNER,
Attorney General.

695.

BLIND RELIEF LAWS—RELIEF CAN ONLY BE GRANTED BY COUNTY CHARGED WITH SUPPORT OF APPLICANT UNDER POOR LAWS OF STATE—WHEN APPLICANT MOVES INTO ANOTHER COUNTY, THIS DOES NOT RELIEVE THE COUNTY WHERE RESIDENCE HAS BEEN ESTABLISHED OF SUCH "PUBLIC CHARGE."

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

COLUMBUS, OHIO, August 5, 1915.

HON JOHN C. D'ALTON, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Your letter of July 3, 1915, requesting my opinion as well as your letter of July 12, 1915, containing additional facts asked for by me, both received. These letter are as follows:

"July 3, 1915.

"Henry J. Smith, a blind pensioner of Crawford county up until April 1, 1915, has made application in this county for blind relief. Upon investigation we find that he has been residing here with one of his children and while drawing relief, as hereinbefore stated, from Crawford county.

"Upon advice of this office, Smith's application has been refused on the ground that by reason of his age and physical condition, he being past eighty years of age and blind, and wholly unable to support himself, he has obtained, and can obtain, no residence in this county for the purpose of blind relief.

"Under section 3477 of the General Code, Smith unquestionably is unable to obtain a legal settlement in this county for the purpose of poor relief, and as the blind relief provided by law shall be in place of all other relief of a public nature, we hold that Smith cannot acquire a residence or legal settlement in this county for the purpose of obtaining blind relief. He is admittedly unable to support himself, and has been in such condition for several years, and it further appears that his children are also unable to make proper provision for him, and unless granted blind relief, he will become a charge upon the public, or upon those not required by law to support him.

"Will you not kindly give us your opinion as to the right of Smith to obtain blind relief in this county under the circumstances set forth, and oblige?"

"July 12, 1915.

"Supplementing my letter to you of July 3, 1915, on question of blind relief for one Henry J. Smith, I beg leave to advise that Mr. Smith was eighty years of age in November, last; that he became blind while a resident of Cranberry township, Crawford county, Ohio, during the winter of 1899, or the spring of 1900. He was born and has always lived in Ohio, and it appears that he had been living with a daughter at the time he became blind, and that he resided with her until January of 1914, when he came to Toledo to visit a son. He returned to Crawford county on or about the first of April, 1914, for the purpose of making his application for blind relief for the coming year. His daughter becoming ill and unable longer to take care of him, he returned to Toledo shortly after the first of April, 1914, and has since resided here with his son."

The sections of the General Code applicable to your question are as follows:

"Sec. 2965. Any person of either sex who, by reason of loss of eyesight, is unable to provide himself with the necessities of life, who has not sufficient means of his own to maintain himself, and who, unless relieved as authorized by these provisions would become a charge upon the public or upon those not required by law to support him, shall be deemed a needy blind person.

"Sec. 2966. In order to receive relief under those provisions a needy blind person must become blind while a resident of this state, and shall be a resident of the county for one year.

"Sec. 2967. (103 O. L., 60.) At least ten days prior to action on any claim for relief hereunder, the person claiming shall file with the board of county commissioners a duly verified statement of the facts bringing him within these provisions. The list of claims shall be filed in a book kept for that purpose in the order of filing, which record shall be open to the public. No certificate of qualification of drawing money hereunder shall be granted until the board of county commissioners shall be satisfied from the evidence of at least two reputable residents of the county, one of whom shall be a registered physician, that they know the applicant to be blind and that he has the residential qualifications to entitle him to the relief asked. Such evidence shall be in writing, subscribed to by such witnesses, and be subject to the right of cross examination by the board of county commissioners or other person. If the board of county commissioners be satisfied upon such testimony that the applicant is entitled to relief hereunder, said board shall issue an order therefor in such sum as said board finds needed, not to exceed one hundred and fifty dollars per annum, to be paid quarterly from the funds herein provided on the warrant of the county auditor, and such relief shall be in place of all other relief of a public nature."

From these sections it will be seen that the requirements for the allowance of blind relief therefore may be stated as follows:

"1. Blindness.
"2. Residence in the state at the time the blindness occurred.
"3. Residence in the county for one year.
"4. Inability by reason of such blindness to support himself.
"5. Insufficient means of his own to support himself.

"6. Inability of those charged by law to support him to do so.
"7. That the applicant will become a charge upon the public unless granted such relief."

An analysis of the sections of the General Code above quoted will show that the facts pertaining to the blindness and to the residence are jurisdictional and must be shown before any discretion as to the granting of relief may be exercised by the commissioners; and in accordance with the provisions of section 2967, G. C., supra, must be shown

"from the evidence of at least two reputable residents of the county, one of whom shall be a registered physician."

From your letter it is apparent that your difficulty is to determine whether or not the residential qualifications of this applicant are such as to entitle him to the relief from Lucas county.

While the term "resident" is apparently used in these sections in an unlimited and unqualified manner and apparently without any of the limitations thrown around the obtaining of a "legal settlement" under the laws providing for support of the poor, yet from the provisions of the sections above quoted, the history of the legislation providing for relief of needy blind persons, together with the interpretation placed upon the legislation by the supreme court make it necessary to interpret this law in the light of other provisions of the General Code with reference to the support of the poor.

The particular provisions of the blind relief law, to which I refer are:

"And who, unless relieved as authorized by these provisions, would become a charge upon the public or upon those not required by law to support him;"

and

"such relief shall be in place of all other relief of a public nature."

The history and interpretation of the legislation above noted may be briefly stated as follows:

The legislature of the state on April 25, 1904, passed an act entitled "An act to provide relief for worthy blind" (see 97 O. L., 392), which provided that all male blind persons over the age of twenty-one years and all female blind persons over the age of eighteen years, who had been residents of the state for five years and of the county for one year, and had no property or means with which to support themselves, should be entitled to and receive not more than twenty-five dollars ($25.00) per capita, quarterly, from the county treasury. The supreme court, in the case of Auditor of Lucas County v. State, 75 O. S., 114, held this act to be unconstitutional for the reason that it required the expenditure for a private purpose of public funds raised by taxation. The legislature then enacted the provisions above quoted.

The supreme court in the case of State ex rel. Grant v. Sayre, Auditor, 89 O. S., 351, held this latter act to be constitutional upon the ground that it was for the relief of a certain class of the poor and therefore a valid legislative enactment. The following is quoted from the opinion:

"In the law, which is included in sections 2962 to 2969, General Code, whose validity is here in question, the creation of a blind relief com-

mission is provided for, whose powers have, by amendment, passed February 18, 1913, been conferred upon the commissioners of the several counties. Under this law any person of either sex, who, by reason of loss of eyesight, is unable to provide himself with the necessities of life, who has not sufficient means of his own to maintain himself, and who, unless relieved as authorized by these provisions, would become a charge upon the public or upon those not required by law to support him, is entitled to its benefit, if he has become blind while a resident of the state and has been a resident of the county for one year. The law further provides for the surgical removal of blindness, where it is possible. Section 2967 provides that if the commission is satisfied upon testimony that the applicant is entitled to relief thereunder it shall issue an order therefor, in such sum as it finds needed, not to exeecd $150 per annum, and 'such relief shall be in place of all other relief of a public nature.'

"Section 2968 provides that the commissioners may at any time during the year inquire into the qualifications, examine as to the disability and needs of any person theretofore placed on such blind list, and increase or decrease the amount within the limits prescribed; and in case the board finds that any person is not qualified to draw further relief, or that such disability has been removed, in whole or in part, then the board may, at any time thereafter during such year, modify or change the amount theretofore found necessary for such relief, or remove such person from the list of those qualified to draw any money for relief. It will, therefore, be seen that this statute seems to have been drawn for the purpose of carefully avoiding the defects in the statute of 1904 pointed out by the court in Lucas County v. State, supra. The relief provided for in the later statute is limited to those who are, or will become, charges upon the public or upon those not required by law to support them, and is the only public relief that may be given to them. The provision for surgical removal of blindness, where possible, is one to prevent the person from becoming such charge. The entire matter is left to the continuing and imperative supervision of the board of county commissioners. Every safeguard has been adopted to secure the application of the money to the support of the individual and to prevent him from becoming a public charge. It is not an indeterminate annuity, unlimited in time or uncertain in its application.

"The express object, and the practical provision, of the enactment is to furnish relief to the blind who are poor and needy, and to avoid the public burden.

"It is not questioned that the relief of the poor is a proper public purpose."

It therefore becomes apparent that the intention of the legislature, in the enactment of the blind relief law, was to provide for the blind poor of the state in a different manner and under different qualifications from those who were poor but not blind. That this law is for the relief of the poor is apparent from the fact that under section 2965, supra, a person must have all of the qualifications necessary to entitle him to relief under the poor laws of the state, except those peculiar qualifications essential to acquiring a "legal settlement" in the county.

Much care is exhibited in the poor relief laws to place the burden of the support of the poor upon the proper county, and a pauper cannot transfer the liability for his support from one county to another by moving to the other county, because of the provisions of section 3482, G. C., which are as follows:

"When it has been so ascertained that a person requiring relief has a legal settlement in some other county of the state, such trustees or officers shall immediately notify the infirmary directors of the county in which the person is found, who, if his health permits, shall immediately remove the person to the infirmary of the county of his legal settlement. If such person refuses to be removed, on the complaint being made by one of the infirmary directors, the probate judge of the county in which the person is found shall issue a warrant for such removal, and the county wherein the legal settlement of the person is, shall pay all expenses of such removal and the necessary charges for relief and in case of death the expense of burial if a written notice is given the infirmary directors thereof within twenty days after such legal settlement has been ascertained."

It seems quite clear that the legislature in providing a different qualification as to residence for a needy blind person than that required for other needy persons, did not intend to change the existing laws as to the county which should bear the burden of the support. This conclusion follows from the provisions of the blind relief law iself, and the decision of the court in the case of State ex rel. Grant v. Sayre, Auditor, supra, showing as they do the close relation existing between blind relief and poor relief. It follows, therefore, if this applicant is not and could not become a public charge upon Lucas county, then Lucas county, under the provisions of section 2966, supra, would have no authority to grant him blind relief. On the other hand, to be entitled to blind relief he must be a pauper, and therefore a charge upon the county in which he has a legal settlement, which said county must discharge its duty to support him by granting him blind relief. His living in Lucas county does not relieve Crawford county of the duty to support him, and that county should continue to furnish him the relief even if he may now live in another county. If Crawford county fails to furnish the relief and he thereby becomes a public charge, Lucas county can only follow the provisions of section 3482, supra, and send him back to Crawford county.

I am therefore of the opinion that under the facts stated by you the applicant, Henry J. Smith, is not eligible to be given relief, under the blind relief law, by Lucas county.

Respectfully,
EDWARD C. TURNER,
Attorney General.

696.

MUNICIPAL CORPORATION—MAYOR MUST PRONOUNCE SENTENCE UPON CONVICTION OR PLEA OF GUILTY—MAY SUSPEND EXECUTION OF SENTENCE—SECTION 197 OF ORDINANCES, CITY OF STEUBENVILLE. DISCUSSED—DEFENDANT, IF CONVICTED UNDER SECTION 13409, G. C., MAY BE SENTENCED TO WORK UNDER SECTION 12387, G. C.—NO STATUTORY AUTHORITY FOR PUNISHMENT OF MAYOR WHO EXCEEDS MAXIMUM PENALTY IN IMPOSING FINES, ETC.—ORDINANCE—PUNISHMENT FOR CARRYING CONCEALED WEAPONS, VALID—ORDINANCE—FOR PUNISHMENT OF INTOXICATED PERSON FOUND IN PUBLIC PLACE—VALID.

1. *It is obligatory upon a mayor, upon a conviction or plea of guilty, to pronounce sentence.*

2. *A mayor may suspend the execution of a sentence.*

2a. *It is not obligatory upon a mayor, under section* 197 *of the codifying ordinance of the city of Steubenville, to place defendant at work on city improvements if fine and costs are not paid at the expiration of twenty-four hours after commitment.*

3. *A defendant may be sentenced to work, under section* 12387, *G. C., if convicted under section* 13409, *G. C.*

4. *There is no statutory authority for punishment of mayor who exceeds maximum penalty in imposing fine or committing to workhouse for a specific number of days. The judgment may, however, be reversed on error.*

5. *An ordinance providing for punishment of persons carrying concealed weapons is valid.*

6. *A municipality has the right to enact an ordinance for punishment of persons found in a public place in a state of intoxication, within corporate limits, when such intoxication is a disturbance of the good order and quiet of the corporation.*

COLUMBUS, OHIO, August 5, 1915.

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

GENTLEMEN:—Under date of June 22, 1915, you requested my written opinion on certain questions which I shall take up in the order submitted:

> "(1) The ordinances of the city of Steubenville, Ohio, provide that upon conviction the defendant shall be fined a certain amount therein stated and the costs of prosecution.
>
> "QUERY. Under these provisions, upon conviction or a plea of guilty, is it obligatory upon the mayor to assess a fine within the provisions of the ordinance which has been violated and the costs of prosecution, or may he use his discretion in the matter?
>
> "Note. In 852 cases the following entry appears on the docket: 'Plead guilty; nothing paid; released.'
>
> "There is nothing on the docket to indicate that any fine or costs were assessed in the above cases."

The jurisdiction of the mayor of a city in the trial of a violation of the ordinances and of the statutes of Ohio is found in sections 4527, et seq., of the General Code. He is given jurisdiction under section 4527 for the violation of

the ordinances of the municipality; under section 4528 for the violation of the statutes relative to misdemeanors, and under section 4534 is made an examining court in felonies. Section 4531 provides that if the charge is the violation of an ordinance for which imprisonment is a part of the punishment, the case shall be tried in the same manner as misdemeanors are tried in the court of common pleas on indictment.

There is a distinction made in some cases between the violation of an ordinance and the violation of the statutes of Ohio, the former being considered more in the nature of a quasi criminal prosecution; but I do not think that it is necessary to consider this distinction, since the cases themselves do not carry out the distinction in full, but consider that both are criminal prosecutions.

Practically all of the ordinances of the city of Steubenville which I have examined provide that upon conviction the offender *shall* be fined and, in certain instances, *shall* be imprisoned.

In your question you state that in 852 cases the only entry that appears on the docket as to each such case is that the defendant pleaded guilty; that nothing was paid and that he was released. The ordinances of the city, as before stated, provided that upon conviction the defendant shall be fined or imprisoned. Therefore a mere entry on the docket that he was released does not carry out the provision of the ordinance so that therefore the "release" of the defendant could not be considered as a final judgment in the matter. The most that could be said of such an action on the part of the mayor was that he determined that the judgment against the defendant should be indefinitely postponed, and the question therefore arises as to whether or not in Ohio a court may suspend the pronouncement of a sentence, or, in other words, suspend rendering judgment; or whether it is necessary that the court proceed upon conviction or a plea of guilty to pronounce the sentence, although such court may, under the decisions in this state, (see Lee v. State, 32 O. S., 113; Weber v. State, 58 O. S., 616; Ex Parte Lee, 16 O. D. [n. p.] 259; Shaefer v. State, 7 O. C. C. [n. s.] 292), after pronouncing such sentence suspend the execution thereof.

It is laid down by the text writers as follows:

> "After the verdict has been accepted and recorded, and a motion in arrest or for a new trial overruled, it becomes the duty of the court to render judgment and pronounce sentence. Clark's criminal procedure, page 494.
>
> "Upon a conviction or plea of guilty, it is the duty of the court to sentence the accused and pronounce judgment at that time, unless, upon motion for a new trial, in arrest of judgment or for other cause, the case is continued for further adjudication. The court cannot suspend sentence indefinitely. Hughes criminal law, section 2569."

The courts of states other than Ohio are in disagreement as to whether or not a court can indefinitely suspend the pronouncing of a judgment. There is no authority that I have been able to find in Ohio on the subject.

While it is true that the supreme court in this state has held in the case of Weber v. State "that the power to stay the execution of a sentence, in whole or in part, in a criminal case, is inherent in every court having final jurisdiction in such cases, unless otherwise provided by statute," nevertheless in view of the mandatory provisions of the statutes defining crimes and of the ordinances of the city of Steubenville that upon conviction the defendant shall be fined or imprisoned, I am of the opinion that it is the duty of the court to proceed to pronounce judg-

ment immediately upon a plea of guilty or upon a conviction unless the case be continued for further adjudication upon motion for a new trial, in arrest of judgment or for other cause.

Specifically answering your question I am therefore of the opinion that upon conviction or a plea of guilty it is obligatory upon the mayor to pronounce sentence, within the provisions of the ordinance which has been violated, although had he sentenced the defendant he might have suspended the execution thereof. I do not believe, however, that in those cases which have already been heard by the court and the defendant released, as is shown by the docket, the court could now order the defendant in for pronouncement of sentence. Although the mayor has no statutory term of court, nevertheless a considerable length of time having elapsed since the conviction or plea of guilty a dismissal has resulted and the mayor has lost jurisdiction.

Your second inquiry is as follows:

> "Sec. 197 of the codified ordinances of the city of Steubenville reads as follows:
>
> "'Sec. 197. Whenever a fine is imposed for the violation of any ordinance, section or part of any section or ordinance of the city, providing for the punishment of any person for any of the offenses enumerated in section 2108 (1536-318) of Revised Statutes of Ohio, and the same is not paid the mayor shall order the person convicted to be committed until such fine and costs of prosecution are paid, or until such person is discharged by due process of law; provided, that after commitment for twenty-four hours and failure to pay such fine and costs, the mayor may order such male person to be placed at work on the streets, or any public improvement of the city, under the direction and control of the chief of police or city commission, or other city officer, there to be kept at hard labor, until, at the rate of seventy-five cents a day, said person shall have earned an amount equal to such fine and costs.'
>
> "QUERY (a). Under the provisions of this ordinance and section 4563, G. C., is it obligatory upon the mayor to commit the defendant if he does not pay the fine and costs, or may he suspend or remit the same?"

Section 4563 of the General Code, to which you refer, provides as follows:

> "Section 4563. When a fine, imposed for the violation of an ordinance of the corporation, is not paid, the party convicted shall, by order of the mayor, or other proper authority, or on process issued for the purpose, be committed until such fine and the costs of prosecution are paid, or the party is discharged by due process of law."

The right of a mayor of a municipality to remit fines was considered in an opinion by this department rendered to the industrial commission of Ohio on May 8, 1915. In such opinion it was held that the mayor may suspend the execution of a sentence upon the payment of costs, "but in no case can he remit a fine due to the state of Ohio. Neither can the magistrate, or mayor, impose or collect a fine less in amount than the minimum fine fixed by the statutes. The magistrate or mayor has no authority to disregard the express provisions of the statutes as to the amount of the fines he shall impose."

I do not see any difference between the fines as fixed by the statutes and fines as fixed by ordinances of the municipality. Therefore, I would advise that

the mayor is without authority to remit a fine. As to whether or not the mayor can suspend the execution of a sentence, either in whole or in part, the opinion referred to states as follows:

> "As to your second inquiry, I know of no provision of law that would prevent the magistrate or mayor from assessing a fine and costs and then proceeding to suspend both the fine and costs, or fine only."

Specifically answering your question, therefore, I am of the opinion that it is not obligatory upon the mayor to commit the defendant if he does not pay the fine and costs, but that he may, after pronouncing the sentence, suspend the execution thereof.

Referring again to section 197 of the codified ordinances of the city of Steubenville, hereinbefore set out in full, you inquire:

> "QUERY (b). If the fine and costs are not paid at the expiration of twenty-four hours after commitment, is it obligatory upon the mayor to place the defendant at work on city improvements, or, in this matter, may he use his discretion?"

The particular part of section 197 of the codified ordinances of the city of Steubenville to which you refer provides:

> "provided, that after commitment for twenty-four hours and failure to pay such fine and costs, the mayor may order such male person to be placed at work on the streets, or any public improvement of the city, etc."

I am clearly of the opinion that the word "may" as used in the above ordinance, makes it discretionary with the mayor to order a male person to be placed at work on a public improvement, and that it is not obligatory upon him so to do.

You next inquire:

> "(3) If a conviction is had under the provisions of section 13409, G. C., may the defendant be sentenced to the work house under the provisions of section 12387, G. C.?"

Section 13409 of the General Code provides as follows:

> "Section 13409. Whoever, being a male person able to perform manual labor, has not made reasonable effort to procure employment or has refused to labor at reasonable prices, is a vagrant or common beggar and shall be fined not more than fifty dollars and sentenced to hard labor in jail until the fine and costs are paid. For such labor he shall receive credit upon such fine and costs at the rate of seventy-five cents per day."

Section 12387 of the General Code provides as follows:

> "Section 12387. In cases where a fine may be imposed in whole or in part in punishment of an offense, or for a violation of an ordinance of a municipality, and such court or magistrate could order that such person stand committed to the jail of the county or municipality until the fine and the costs of prosecution are paid, the court or magistrate may order that such person stand committed to such workhouse until such fine and

costs are paid, or until he is discharged therefrom by allowing a credit of sixty cents per day on the fine and costs for each day of confinement in the workhouse, or until he is otherwise legally discharged."

Before proceeding to the determination of the question which you ask, I would call your attention to the case of In re Smith, 13 O. N. P. (n. s.) 278, wherein the court of common pleas of Hamilton county decided that section 13409, G. C., was void for uncertainty. I shall not express any opinion herein as to the correctness of the decision of Judge Dickson, in the Smith case, but shall proceed on the assumption that section 13409 is constitutional and operative.

The original of section 12387 was passed subsequently to the original of section 13409. While section 13409 provides that if the defendant be committed to jail he shall work out his sentence therein at the rate of seventy-five cents a day, whereas under the provisions of section 12387 if he is sent to the workhouse he works out his sentence at the rate of only sixty cents a day; nevertheless, it seems to me that the two provisions can both stand, with this result; that if the defendant is sentenced to jail, his term of imprisonment therein is to be computed on the basis of seventy-five cents per day; whereas, if under the authority granted in section 12387 the defendant is committed to the workhouse, his sentence therein is computed at the rate of sixty cents a day.

Answering your question specifically, therefore, I am of the opinion that if conviction is had under the provisions of section 13409 of the General Code, the defendant may be sentenced to the workhouse under the provisions of section 12387 of the General Code.

You next inquire:

"Is there any statutory authority for the punishment of a mayor who exceeds the maximum penalty in imposing a fine or in committing to the workhouse for a specific number of days?"

There is no statutory authority of which I am aware for the punishment of a mayor who exceeds his authority as above set out, the only remedy being the right of defendant to prosecute error from the sentence so imposed, section 12916 of the General Code, being the statute on extortions, not reaching such a matter.

You next inquire:

"(5) During the period from August 7, 1913, up to and including February 28, 1915, the mayor of Steubenville finally disposed of twenty-four cases in which the defendants were charged with carrying concealed weapons.

"Six of these actions were brought under the state laws and 18 of them under a city ordinance. The date above cited is the time at which this offense became a felony.

"The mayor finally disposed of these cases by assessing and collecting fines or by suspending the operation of the same.

"QUERY. Is an ordinance providing for the punishment of this offense valid, and if not what is the status of the defendants thus disposed of?"

The exact question is as to whether or not a municipality has the power by ordinance to punish for the carrying of concealed weapons within the municipality.

On August 7, 1913, the date to which you refer, house bill No. 33, being "an act to amend section 12819 of the General Code relative to carrying concealed

weapons," went into effect. This act amended section 12819 so as to make the carrying of concealed weapons a felony, whereas prior thereto the same has been a misdemeanor.

There is no doubt that a municipality under authority granted by the legislature may enact ordinances for the punishment of certain acts within such municipality, but the power so to enact the same only exists by virtue of the statute.

Section 3658 of the General Code grants to a municipality power to enact ordinances

> "To prevent riot, gambling, noise and disturbance, indecent and disorderly conduct or assemblages, and to preserve the peace and good order, and to protect the property of the corporation and its inhabitants."

And section 3664 of the General Code (103 O. L., 168) grants the municipality power

> "To provide for the punishment of persons disturbing the good order and quiet of the corporation by clamors and noise in the night season, by intoxication, drunkenness, fighting, committing assault, assault and battery, using obscene or profane language in the streets or other public places to the annoyance of the citizens, or otherwise violating the public peace by indecent and disorderly conduct, or by lewd and lascivious behavior. In like manner to provide for the punishment of any vagrant, common street beggar, common prostitute, habitual disturber of the peace, known pickpocket, gambler, burglar, thief, watch stuffer, ball game player, a person who practices any trick, game or device with intent to swindle, a person who abuses his family, and any suspicious person who cannot give a reasonable account of himself."

Section 3658, G. C., permits a municipality to pass ordinances to *preserve* the peace and good order, and section 3664, G. C., undertakes to define the manner in which the good order and quiet of a corporation may be disturbed.

The carrying of concealed weapons tends to disturb the peace and good order of a community and under the provisions of section 3658 a municipality is authorized to enact ordinances "to preserve the peace and good order." Therefore, I am of the opinion that an ordinance may be passed making the carrying of concealed weapons punishable. This, however, will not in any way restrict or infringe upon the state statutes which make the carrying of concealed weapons a felony, and a conviction under said ordinance will not in any way operate as a bar to prosecution under the statutory law of the state for the carrying of concealed weapons.

In your question you state that six of the prosecutions were brought under state laws and that the mayor finally disposed of those cases. This, of course, he was without authority to do and should have bound the parties so charged upon examination over to the grand jury. He had no jurisdiction to finally dispose of such cases in his court and therefore the parties who were fined under the state prosecution, as if the same were under a city prosecution, cannot now plead former jeopardy as a defense to being bound over to the grand jury.

You next inquire:

> "(6) Has a municipality the right to enact an ordinance for the punishment of a person found in a state of intoxication within the corporate limits when he is not creating any disturbance? See sec. 3664."

The ordinance of the city of Steubenville in regard to the punishment of a person found in a state of intoxication reads as follows:

> "Sec. 146. If any person shall be found in a state of intoxication upon any street, public alley or other public place, he or she shall, on conviction thereof, pay a fine of not more than five dollars, and pay the costs of prosecution; and the chief of police and police shall see that this section is enforced."

Section 3664, G. C., hereinbefore referred to, authorizes a municipality to enact ordinances to provide for the punishment of persons disturbing the good order and peace of the corporation "by intoxication." While I am of the opinion that intoxication in a public place *per se* is a disturbance of the good order and quiet of that particular locality, yet under the provisions of section 3664, G. C., aforesaid, it seems to have been the intention of the legislature to permit municipalities by ordinance to punish for a disturbance of the peace and good order of a municipality by intoxication, thus making the disturbance an essential element of the offense.

It has been repeatedly held by different courts of this state that intoxication can only be made an offense under municipal legislation when the ordinance covering it makes it a disturbance of the good order and quiet of the municipality.

In re Bridget Fitzsimmons, 13 O. N. P. (n. s.) 104;
Hughes v. Cincinnati, 23 O. D. (N. P.) 251;
Jefferies et al. v. Defiance, 25 W. L. B. 68.

In view of the foregoing authorities I am constrained to hold that the ordinance in question is invalid in that it does not include the necessary averments as required by section 3664, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney General.

697.

TAXES AND TAXATION—WARNES LAW—DEDUCTIONS FROM TAX VALUATIONS ON ACCOUNT OF INJURY OR DESTRUCTION OF BUILDINGS OR STRUCTURES AFTER TAX LISTING DAY MUST BE MADE UNDER SECTION 5590, G. C.—SUCH DEDUCTIONS AS MAY BE MADE ARE LIMITED TO LOSS NOT COVERED BY INSURANCE.

The act found in 103 *O. L.,* 562, *purporting to amend section* 2591, *G. C., is wholly inconsistent with the administrative scheme of the Warnes law,* 103 *O. L.,* 786, *passed on the same day but by its own terms not effective until October,* 1913. *Said section* 2591 *as so amended is incapable of execution as an independent statute. It pertains to a subject-matter covered by the Warnes law, which makes different provisions with respect thereto and expressly repeals section* 2591, *G. C. Under these circumstances, it will be deemed to have been the intention of the general assembly in enacting the two laws that the amendment of section* 2591 *should not become the law unless the Warnes law should, by reason of the possibility of a successful referendum, fail to become the law.*

Deductions from tax valuations on account of the injury or destruction of buildings or structures after tax listing day must be made under section 12 *of the Warnes law, section* 5590, *G. C. Under said section the injury for which a deduction may be made must have occurred prior to the first day of October following the date as of which the property was listed, and the affidavit for a deduction must be filed prior to said first day of October. Where said affidavit is not so filed or where the injury or destruction does not occur within such time there is no authority to make any deduction.*

Such deductions as may be made under the statute are limited to loss not covered by insurance.

COLUMBUS, OHIO, August 6, 1915.

HON. CLARK GOOD, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—Your letter of July 19, 1915, requesting my opinion received and is as follows:

> "A farmer of this county carried an insurance on his barn of $400.00, and the same was assessed for taxation at $500.00, he carried an insurance of $250.00 on his horses and they were assessed for taxation at $500.00 making the assessment for taxation on horses and barn $1,000.00 and insurance $750.00. He had a total loss by fire.
>
> "Please let me have an opinion on the question involved at your earliest convenience as the gentlemen has not yet paid his taxes and wants to pay them before the auditor makes his annual settlement, in order that he may save any penalty on same."

The answer to your question involves the consideration of two acts of the general assembly, to wit: House bill No. 571, passed by the general assembly April 18, 1913, being the so-called Warnes law, found in 103 O. L., 786, and house bill No. 123 passed by the general assembly April 28, 1913, and found in 103 O. L., 562. In order to arrive at the intention of the legislature as evinced by these sections, it is necessary to examine the legislation which preceded the enactment of these two laws.

Section 2591 of the General Code provided as follows:

"When after the second Monday in April and before the first day of October in any year it is made to appear by the oath of the owner or one of the owners of a building or structure and by the affidavit of two disinterested persons, resident of the city or township in which the building or structure is or was situated, that such building or structure has been injured or destroyed by fire, flood, tornado or otherwise, since the second Monday in April of the current year, the county auditor shall deduct from the tax list and duplicate the value of such building or structure or such part of the value thereof as shall correspond to the extent of the injury."

Section 5572 of the General Code provided as follows:

"A county auditor shall correct the valuation of any parcel of real property on which any new structure of over one hundred dollars in value has been erected, or on which any structure of like value has been destroyed, agreeably to the return thereof made in accordance with the provisions of this title by the assessor."

Section 5578 of the General Code provided as follows:

"In case of the destruction by fire, flood, cyclone, storm or otherwise, of a new structure, or of orchards, timber, ornamental trees or groves, over one hundred dollars in value, the value of which had been included in a former valuation of the tract on which they stood, such assessor shall determine, as near as practicable, how much less valuable such tract or lot is in consequence of such destruction and make return thereof. If the assessor fails or neglects so to do, the county or city board of equalization shall perform such duty and the auditor shall deduct the losses from the value of such property as it stands on the tax list."

The legislature in house bill No. 571 above mentioned repealed all of the foregoing sections and in section 12 of said house bill No. 571 combined all of them into one section and added thereto a provision for reduction in case of the loss or destruction of personal property. Said section 12 was designated as section 5590 of the General Code by the attorney general and is as follows:

"Whenever, after the first Monday of February and before the first day of October, in any year, it is made to appear to the district assessor, by the oath of the owner, or one of the owners of a building or structure, land, orchard, timber, ornamental trees or groves, or tangible personal property, or by the affidavit of two disinterested persons, residents of the township, city or village in which the same is or was situated, that such building, structure, land, orchard, timber, ornamental trees or groves, or tangible personal property is listed for taxation for the current year, and has been destroyed or injured by fire, flood, tornado, or otherwise, after the first Monday of February of the current year, he shall investigate the matter, and deduct from the valuation of the property of the owner of such destroyed property, on the tax list for the current year, an amount which, in his judgment, fairly represents the extent of the injury or destruction; provided, however that no such deduction shall be made in the case of an injury to, or destruction of, a building, structure, land, orchard, timber,

ornamental trees or groves resulting in damage of less than one hundred dollars, nor shall any deduction be made for or on account of any damage or loss which is covered by insurance, nor on account of any sheep killed by dogs. The district assessor shall certify the deductions made by him under the provisions of this section to the county auditor, who shall correct his tax list and the treasurer's duplicate in accordance therewith."

This bill was passed April 18, 1913, approved by the governor May 6, 1913, and filed in the office of the secretary of state May 10, 1913.

Section 69 of that act provided as follows:

"The repeal of sections 5542-9a, 5542-9b, 5542-9c and 5618 to 5624, inclusive, of the General Code shall not take effect until the first day of March, 1914. This act shall in all other respects take effect and be in force from and after the second Monday of October, 1913."

Ten days after the passage of house bill No. 571, to wit: April 28, 1913, the legislature passed house bill No. 123 amending section 2591 to read as follows:

"Sec. 2591. When after the second Monday in April and before the first day of October in any year it is made to appear by the oath of the owner or one of the owners of a building or structure and by the affidavit of two disinterested persons, resident of the city, village or township in which the building or structure has been injured or destroyed by fire, flood, tornado or otherwise, since the second Monday in April of the current year, the county auditor shall deduct from the tax list and duplicate the value of such building or structure or such part of the value thereof as shall correspond to the extent of the injury; and when it is made to appear in the manner herein provided that said building or structure has been so injured or destroyed since the first day of October of any year and prior to the first day of April of the succeeding year, the following deductions shall be made upon the taxes due in the following June, being the second one-half of the taxes due for the current year, to wit: when such injury or destruction occurs during the month of October of any year, the second one-half of the taxes on the amount deducted for such injury for the current tax year shall be entirely remitted; if in the month of November of any year, five-sixths of the second one-half of the taxes on the amount deducted for such injury for the current tax year shall be remitted; if in the month of December of any year, four-sixths of the second one-half of the taxes on the amount deducted for such injury for the current tax year shall be remitted; if in the month of January, three-sixths of the second one-half of the taxes for the current tax year shall be remitted; if in the month of February, two-sixths of the second one-half of the taxes on the amount deducted for such injury for the current tax year shall be remitted; if in the month of March, one-sixth of the second one-half of the taxes on the amount deducted for such injury for the current tax year shall be remitted."

This bill was likewise approved by the governor May 6, 1913, and was filed in the office of the secretary of state May 9, 1913.

Section 16 of article II of the constitution of Ohio provides as follows:

"Every bill passed by the general assembly shall before it becomes

a law be presented to the governor for his approval. If he approves he shall sign it and thereupon it shall become a law and be filed with the secretary of state."

Technically, therefore, both of the bills above referred to "became laws" on the same day. It being manifest that there is a partial conflict between them, the present state of the law which your inquiry requires me to define is, therefore, to be ascertained in the light of the familiar principle to the effect that contemporaneous legislative acts are, if possible, to be construed together and made to harmonize. That is to say, if it is at all possible to do so, a direct conflict between such contemporaneously enacted laws will be avoided, and the doctrine of "implied repeal" can certainly have no application in such a case.

But where an inconsistency can not be avoided and is irreconcilable, as may conceivably happen, the laws themselves, as well as the surrounding circumstances of which a court might take judicial notice, must be examined in an effort to determine which of them the legislature intended to be the law. And if some reason appears for the enacting of the two conflicting laws which indicates the probable legislative choice as between them, that choice will be presumed and the intention thus gathered will be given effect.

Of course, every intendment is against such an interpretation as will find two laws so passed to be irreconcilably inconsistent. Often one can be regarded as an exception to the other, as where the one is special and the other applies to a class, naturally inclusive of the former. The thought suggests itself in connection with your question that what is designated as section 2591 of the General Code as amended may be regarded as an exception to what is designated as section 5590 of the General Code; that is, section 5590 may be regarded as laying down the general rule for reduction in tax valuation on account of the contingencies therein mentioned, whereas section 2591 may be regarded as the special rule for buildings and structures to which alone it relates, and as an exception to the general rule of section 5590.

Upon careful study, however, it will appear that this hypothesis is untenable. What is called section 5590 is just as specific as what is called section 2591; that is, section 5590 does not use general and descriptive terms to designate what kinds of property are subject to it. On the contrary, the language in this particular is *"a building or structure,* land, orchard, timber, ornamental trees or groves, or tangible personal property." Section 2591 is limited in its application to "a building or structure;" but it is not any more specific than section 5590; it is merely more restricted in its application.

Both section 2591 and section 5590 prescribe rules governing reduction in the taxable valuation of buildings and structures on account of an injury thereto by fire, flood, tornado or otherwise, and the rules thus prescribed by these two sections, respectively, are inconsistent.

I find difficulty, therefore, in applying the general rule above stated to the present case.

It is true that the rule as I have stated it may sometimes be applied even in cases much like the one now under consideration, i. e., where specific language in an act of broad application is inconsistent with equally specific language in an act of narrower application; and that in some such cases the act of narrower application is read as an exception to the act of broader application. This is the case, however, only where the intention of the legislature can not be arrived at in any other way; whereas in the case now under consideration I think there are certain clues to the intention of the legislature which point in another direction.

I invite attention for the moment to the provisions of section 2591 as amended.

In the first place, this section down to the semicolon is word for word the same as old section 2591 as it existed prior to 1913. To this language there has been added the clause providing for deductions from taxes in the event of injury or destruction of buildings or structures between the first day of October and the first day of April. In other words, the first significant thing about section 2591 is that the legislature has not only in form, but in substance also amended a statute that was a part of what may be termed the old order of things.

In this connection I call attention to the fact that the first date mentioned in section 2591 is the second Monday in April. This was the date as of which under the law as it existed prior to the enactment of the Warnes law all property was listed and valued for taxation; it was, in my opinion, the date as of which the lien of the state for taxes assessed upon real estate attached even after the enactment of the Warnes law; but it was not the date as of which the assessment was made under the Warnes law. That date under the original Warnes law was the day preceding the first Monday of February, changed by the amendments in 104 O. L., 253 to the day preceding the first Monday of April.

In the second place, it is to be observed that all corrections to be made under section 2591 are to be made by the county auditor, who is to make the deduction "from the tax list and duplicate." This is, of course, consistent with the old scheme of things, as naturally would be the case when the language of the old statute was merely re-enacted. Formerly the county auditor made up the tax list and one copy thereof known as the "duplicate," which on the first Monday in October he delivered to the treasurer for the collection of taxes thereon. Under the Warnes law, however, the county auditor has nothing to do with the making up of the duplicate. This duty devolves upon the district assessor, and that official makes not two but three copies, one, the original tax list, being kept in his own office, and the two called the "duplicate" and "triplicate," respectively, being transmitted in the month of September to the county auditor for the extension of the taxes and the delivery of the triplicate to the treasurer for collection in the month of October.

Section 2591, therefore, is perfectly consistent with the statutes as they existed prior to the adoption of the Warnes law, but is inconsistent in almost every respect with the scheme of the Warnes law.

Recapitulating, these inconsistencies are:

(1) The dates correspond with those of the old law, and differ from those of the Warnes law.

(2) The official who is to make the correction or deduction is the official charged with making up the tax list and duplicate by the provisions of the old law, but is not the official charged with such duty by the provisions of the Warnes law.

(3) Section 2591 is inconsistent with the corresponding provision of section 5590 as found in the Warnes law, which does not afford any relief when the destruction takes place after the first day of October and which denies a deduction for or on account of any damage or loss which is covered by insurance.

In view of all these circumstances, it seems to me to be impossible to hold that the legislature intended that section 2591 should operate as a part of the Warnes law. Now the Warnes law was a comprehensive scheme for the assessment of property for taxation. It was a revision, in substance at least, of all the law on that subject. For example, it made another change in the scheme of things as it existed when original section 2591, General Code, was adopted and the language found in the first paragraph thereof first came into the law. At that time real estate was assessed periodically for taxation—first, every ten years, and then every four years, and new buildings were valued and returned by the

personal property assessor in the intermediate years, and when so returned were added to the value of the tract on which they stood. Under the Warnes law, however, real property was valued annually. This difference between the two systems is indicative of the fundamental change in the administration of the tax laws which was brought about by the enactment of the Warnes law. I think, therefore, that the problem is deeper than merely reconciling section 2591 as amended with section 5590 of the Warnes law; rather, if the former section is to be given operation and effect it must be fitted into or regarded as an exception to the whole scheme of the Warnes law, with which it is inconsistent in several particulars.

Did, then, the legislature intend that section 2591 should be the law, notwithstanding the enactment of the Warnes law; or did it inadvertently amend the wrong section, and are we to conclude that the new matter which is found in section 2591 is to be regarded as expressive of a legislative idea which is to be fitted into the Warnes law, giving to the latter law controlling effect as to dates and methods of administration, such as the identity of the officer who is to make the deductions, etc., and to section 2591 controlling effect with respect to additional deductions on account of injury or destruction occurring after the first day of October?

Before answering these questions, which are decisive of the general question submitted, I think I ought to point out that the new matter in section 2591, standing by itself, at least, is incapable of being carried into operation. It provides that when the injury or destruction occurs after the first day of October and prior to the first of April certain "deductions shall be made upon the taxes due in the following June." I observe that there is no requirement that any deduction shall be made from the value of the property as listed on the duplicate, nor is there any authority to make such a deduction, but there is to be a deduction in the amount of the taxes payable.

Coming now to the specific deductions which are to be made, and using one provision which is typical as an instance, we find the following:

> "When such injury or destruction occurs during the month of October of any year, the second one-half of the taxes *on the amount deducted for such injury* shall be entirely remitted."

Now there is no authority to deduct anything on account of an injury occurring after the first day of October, and yet the statute provides that there shall be a remission of the June half tax on the amount so deducted. It is to be further remarked that after the first day of October the treasurer's triplicate under the Warnes law is in the hands of the treasurer for collection, and that any deduction at that time would have to be made on the treasurer's triplicate, on the auditor's duplicate and on the assessor's tax list, each of which books is in the custody of a different officer. There is no adequate machinery for relieving the treasurer of the duty to collect the entire tax. There is no adequate machinery for making a correction of the original tax list which is in the hands of the district assessor, if the auditor be regarded as the proper authority to make the deduction. In short, unless much is read into the statute in order to give it effect, the latter or new portion of section 2591 would have to be regarded as inoperative for lack of essential machinery. Section 5590, on the other hand, does contain the necessary machinery, as the last sentence thereof as I have quoted it shows.

Were it not for the other circumstances which I have mentioned, I should incline strongly to the view that the defects in section 2591 might be supplied and the legislative idea therein embodied might be given effect; but in order to make

this section operative it is necessary to confer by implication upon some officer the authority to exercise the power of assessment; for a reduction in an assessed valuation on account of the destruction of a building or structure necessarily involves the exercise of judgment and discretion of exactly the same kind and character as that committed to assessing officers. The necessary act is in every sense an assessment, or at least a reassessment. Authority to exercise such judgment and discretion will not be implied except where necessity absolutely requires it; and in view of the inconsistencies between the Warnes law and section 2591 as amended, I do not believe that it could be held that the deficiencies of section 2591 could be thus supplied with any certainty; for if we are required to determine that some officer has authority to make the deduction referred to in section 2591 when the injury or destruction occurs after the first day of October, what officer shall exercise the assessing power, the county auditor, who is otherwise referred to in the statute, or the district assessor, who under the general provisions of the Warnes law is to exercise all the powers formerly conferred upon the auditor with respect to the making up of the duplicate and the making of changes and corrections therein and is to be the assessor of real and personal property throughout the county constituting his taxing district?

I have said that the two measures technically became laws on the same day. However, they did not become *effective* laws at the same time. The Warnes law, with certain exceptions not necessary to be noted in this connection, was by its own terms to take effect on the second Monday of October, 1913, whereas section 2591 went into effect as soon as under the constitution it could become effective. When the Warnes law became effective on October 13, 1913, it repealed section 2591 of the General Code, together with a group of sections like section 2591, in that they were parts of and together constituted the scheme of administration of the tax laws which was intended to be done away with when the Warnes law was passed. Section 2591 as amended fits into the old scheme, and does not fit into the Warnes law. It seems to me that the legislative intention is made clear by the circumstances last above referred to.

All laws passed by the legislature with certain exceptions are now subject to a referendum and, accordingly, may never go into effect. That being the case, it is perfectly conceivable that the legislature might adopt an entirely new scheme of legislation on a given subject and at the same time amend the old statutes on that subject in minor particulars, entertaining the intention that if the new scheme of legislation should not be referred to the electors, or, being referred to them, should be approved by them it should prevail; but if the people should reject the revision the old law should stand as amended.

I think it is clear from all the circumstances that the legislature did not intend that section 2591 should be an amendment of the Warnes law. Rather it was an amendment of the law as it existed before the Warnes law was enacted. Therefore, it is clear to me that the general assembly intended that the Warnes law should be a substitute not only for the law technically in effect when it was adopted, but also for all the body of laws pertaining to the subject-matter, in force on October 13, 1913. The fact that the Warnes law did not go into effect until October, 1913, leaves reason for technical argument to the effect that the legislature intended that section 2591 as amended should be the law between the date of its going into effect and October 13, 1913, at which time the express repeal of section 2591 embodied in the repealing clause of the Warnes law would put an end to the former section. The force of this technical argument is, however, destroyed by consideration of the fact that the new matter in section 2591 would only be operative for thirteen days under such an interpretation, whereas the section provides for a system of progressive deductions on account of injuries taking place between the

first of October and the first of April (although, of course, if the Warnes law had been submitted to a referendum and defeated, the force of section 2591 would have been permanent, as already pointed out).

Therefore, I have not given any weight to this argument, and I prefer to base my conclusion upon the broader ground, as above worked out, that section 2591 is wholly inconsistent with the administrative scheme embodied in the Warnes law and can not be fitted into it; that standing by itself as an exception to the Warnes law it lacks essential machinery necessary to give it operation; and that, therefore, not being capable of adjustment to the Warnes law and not being capable of enforcement as an independent statute it must be rejected altogether, and the conclusion must be that the legislature did not intend that section 2591 should be the law unless the Warnes law should fail to become the law.

It is my opinion, therefore, that section 2591, General Code, must be regarded as wholly inapplicable to the facts stated by you. This conclusion is strengthened, to some extent at least, by consideration of the fact that section 5590 of the General Code was amended in 104 O. L., 253, so as to change the date therein mentioned from the first Monday of February to the first Monday of April. The act last referred to is an amendment of three sections of the Warnes law, adopted with a view to changing the assessment date from the first Monday of February to the first Monday of April. If the legislature had regarded section 2591 as in force at the time it would have changed the date therein from the second Monday in April to the first Monday in April.

In another view of the case, if sections 5590 and 2591 are inconsistent, then by reason of the subsequent amendment and re-enactment of section 5590 that section can no longer be regarded as a law of contemporaneous enactment as compared with section 2591, but, being later in point of adoption and inconsistent in provisions, must be regarded as having repealed section 2591 by implication. This latter view, however, is a technical one, upon which I do not rely. Moreover, it can not be adopted for the purposes of this case, because it is apparent that your question involves the taxes for the year 1914, and the act found in 104 O. L., 253, would not affect such taxes.

Coming now to your specific question, beg to advise that the same must be answered in the light of section 5590 of the General Code as I have quoted it.

You do not state when the loss referred to occurred, nor whether or not the gentleman who has sustained the loss has filed the necessary affidavit under section 5590. Such affidavit must under the provisions of the section have been filed before the first day of October, 1914. If filed thereafter it is, in my opinion, too late to make the deduction provided for in section 5590, even though the loss had occurred between February and October, 1914. There is a strong inference from the facts stated in your letter that this was not done, and if that is the case then no relief whatever can be had by the gentleman of whom you speak. If, however, the proper affidavit was filed prior to the first Monday of October and the loss occurred prior thereto and subsequently to the first Monday of February, 1914, then the gentleman in question was entitled to have a deduction made on the duplicate in an amount representing the difference between the actual deduction in value of the real and personal property destroyed and the amount of such loss covered by insurance.

It is clear from your letter that the question involves the taxes for the year 1914, and the same has been answered on this assumption.

Respectfully,
EDWARD C. TURNER,
Attorney General.

698.

BLIND RELIEF—PENSION PAYABLE QUARTERLY IN ADVANCE TO COVER QUARTER NEXT SUCCEEDING PAYMENT—IF NOT SO PAID AND BENEFICIARY DIES, SAME SHOULD BE PAID TO HIS PERSONAL REPRESENTATIVE.

Relief granted to needy blind persons is payable under section 2967, G. C., quarterly in advance, to cover the quarter next succeeding the payment.

If not so paid and a beneficiary dies while any part of the relief allowed him remains unpaid, same should be paid to his personal representatives.

COLUMBUS, OHIO, August 6, 1915.

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

GENTLEMEN:—Your letter of July 16, 1915, requesting my opinion, received, and is as follows:

> "We would respectfully request your written opinion upon the following question:
>
> "(1) Is the relief, known as the relief of needy blind persons, payable quarterly in advance, or payable at the end of the quarter? See section 2967, General Code.
>
> "(2) If payable at the end of the quarter, if a blind person should die before that time, would the entire amount be payable to his family or legal representatives, or only such part as was due him up to the time of his death?"

In reply to your first question, section 2967, G. C., (103 O. L., 60) being a part of the blind relief law, provides as follows:

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

It will be noted that this section provides for the payment of the allowance made by the county commissioners quarterly from the fund provided for that purpose on the warrant of the county auditor. The section, however, does not

undertake to provide the date of the quarterly payment, therefore the only effect of this provision is that the allowance shall be divided into four payments equally distributed through the year. These payments being for the relief of a needy blind person and to provide for his support, it is not necessary that any time elapse between the order of the commissioners and the payment of the first quarterly installment, but upon the presentation of the order to the county auditor he should issue a warrant for the first quarterly payment, and the effect of this would be that the installments would be for the succeeding quarter. These payments stand on a different basis from a payment for services rendered, which of course could not be paid in advance, but by reason of the use to which the money is to be put, to wit, the support of a blind person, it seems clear that the legislature intended that it should be paid in advance so that he would have the use of the money during the quarter rather than that it should be paid at the end of the quarter by way of reimbursement for expenditures made for his support.

In answer to your first question therefore I am of the opinion that, under section 2967, G. C., above quoted, the quarterly payments should be made at the beginning of the quarter and cover the succeeding quarterly periods.

If the foregoing method of payment has been adopted uniformly over the state there would be no necessity for answering your second question, for the reason that if a pensioner died any time during the quarter he would have received all the money due him and his personal representatives would have no claim against the county. It is conceivable, however, that there might be a period of time between the date of the issuance of the order by the commissioners and the payment of the first installment, and there might be cases where the county officials have assumed that payment should not be made until the end of the quarter. On this assumption I will proceed to a consideration of your second question.

The last sentence of section 2967, above quoted, is the one particularly applicable in answering this question. This sentence gives to the commissioners full discretion in the amount of the allowance which may be made to a needy blind person, the only limitation thereon being that such allowance shall not exceed one hundred and fifty dollars per annum. The words "paid quarterly from the fund herein provided on the warrant of the county auditor" merely directs the manner of the payment of the allowance and the fund from which it shall be paid, and cannot be construed to in any way increase or decrease the amount allowed by the commissioners.

The discretion lodged in the commissioners as to the amount of the allowance is broad enough probably to permit them, if they so desired, to specify a time when the allowance should begin, and section 2968 of the General Code, provides for the discontinuance of such allowance by the commissioners if they should thereafter decide that the pensioner is not entitled to the relief, but in the absence of any such specific language in the order of the commissioners, it can only be said that the relief is granted from the date of order allowing the same until the death of the beneficiary, unless theretofore terminated by the commissioners.

The allowance made by the commissioners constitutes a valid claim of the beneficiary against the county and one which could be enforced by him and, in case of his death, by his personal representatives. This is not at all out of harmony with the intention of the legislature in providing for such relief for the reason that the relief itself is based on the idea that the person had no other means out of which he could have been supported during the period of time for which he had not been paid and would naturally have incurred indebtedness for that purpose which would be a claim against his estate.

Applying these principles it then becomes a question of fact in each particular case upon the death of a beneficiary as to whether or not he has received the

allowance at the rate fixed by the commissioners from the date of the order until the day of his death, and if he has not so received the same, his personal representatives would be entitled to receive the difference.

The fact that any unpaid balance could not be paid until the next quarterly payment time would not operate to defeat the right to collect the same, but as stated before merely directs the time when it can be paid.

I am therefore of the opinion, in answer to your second question, that if at the time of the death of the person to whom an allowance has been made under the blind relief laws, any part of the allowance at the rate fixed by the commissioners, based upon the time which has elapsed from the date of the allowance until the date of his death, remains unpaid, it should be paid to his personal representatives.

Respectfully,
EDWARD C. TURNER,
Attorney General.

699.

WHEN A FOREIGN CORPORATION INCREASES ITS CAPITAL STOCK SO TOTAL AUTHORIZED CAPITAL STOCK, REPRESENTED BY ITS PROPERTY AND BUSINESS IN OHIO IS INCREASED, IT MUST COMPLY WITH SECTION 185, G. C., NOTWITHSTANDING PAYMENT OF ANNUAL FEES UNDER WILLIS LAW AND SECTION 192, G. C., EVEN THOUGH PERCENTAGE OF ITS PROPERTY AND BUSINESS IN OHIO HAS NOT INCREASED SINCE ITS ORIGINAL COMPLIANCE.

Whenever a foreign corporation increases its authorized capital stock so that the amount of its total authorized capital stock, represented by its property and business in Ohio is increased, it must comply with section 185, *G. C., notwithstanding the payment of annual fees under the Willis law and section* 192, *G. C., and notwithstanding the percentage of its property and business in Ohio, has not increased since its original compliance, or may even have decreased.*

COLUMBUS, OHIO, August 6, 1915.

HON. C. Q. HILDEBRANDT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have requested my opinion regarding a question raised by counsel for a certain foreign corporation involving the interpretation of section 185 of the General Code. The question may be stated as follows:

When a foreign corporation which has complied in the first instance with the Ohio laws including the provisions of section 184 of the General Code, and is paying an annual franchise tax according to the rule permitted by section 192, G. C., increases its total authorized capital stock without changing or at least increasing the relative amount of business done and the relative amount of property owned by it in Ohio as compared with the total business and property of said company outside of Ohio, is it required to file the additional statement provided for in section 185 aforesaid?

Two points are made by counsel for said foreign corporation in connection with the question thus submitted as follows:

(1) The company should not be required, under the facts assumed, to file

an additional statement with the secretary of state and otherwise to comply with section 185, G. C., because the word used in section 185 is "proportioned" and there has been no increase in "proportion."

(2) The company should not be required to comply with section 185 because it is annually filing reports and paying fees under what is known as the Willis law, which discloses from year to year such increases of capital stock, etc., as may have taken place within the year and because further, as in this case, the corporation in question has chosen to exercise the option which it has under section 192, G. C., and has paid franchise taxes upon its entire authorized capital stock regardless of the proportion thereof represented by property and business in Ohio.

The first contention of counsel requires not only an interpretation of section 185, but also a consideration of the two sections which precede it. I deem it proper, therefore, to quote the provisions of all these sections, or so much thereof as is applicable to the question under consideration.

> "Sec. 183. Before doing business in this state, a foreign corporation organized for profit and owning or using a part or all of its capital or plant in this state shall make and file with the secretary of state, in such form as he may prescribe, a statement under oath of its president, secretary, treasurer, superintendent or managing agent in this state, containing the following facts: * * *
>
> "4. The proportion of the capital stock of the corporation represented by property owned and used and by business transacted in Ohio.
>
> "Sec. 184. From the facts thus reported and any other facts coming to his knowledge, the secretary of state shall determine the proportion of the capital stock of the corporation represented by its property and business in this state and shall charge and collect from such corporation for the privilege of exercising its franchise in this state, one-tenth of one per cent. upon the proportion of its authorized capital stock represented by property owned and used and business transacted in this state, but not less than ten dollars in any case. Upon the payment of such fee the secretary of state shall make and deliver to such foreign corporation a certificate that it has complied with the laws of Ohio and is authorized to do business therein, stating the amount of its authorized capital stock and the proportion of such authorized capital stock represented in this state.
>
> "Sec. 185. A corporation which has filed its statement and paid the fee prescribed by the preceding two sections and which thereafter shall increase the proportion of its capital stock, represented by property used and business done in this state, shall file within thirty days after such increase an additional statement with the secretary of state, and pay a fee of one-tenth of one per cent. upon the increase of its authorized capital stock represented by property owned and business transacted in this state."

Under the provisions of the first two sections quoted it is made the duty of the corporation to file with the secretary of state a statement of the proportion of its capital stock represented by property owned and used and by business transacted in Ohio. The secretary of state must then determine from the report so made, and from any other facts coming to his knowledge, what proportion of the capital stock of said corporation is represented by business and property in this state as compared with its business and property outside of the state. The

proportion thus determined by the secretary of state forms the basis upon which the fee of one-tenth of one per cent. is paid. It certainly is clear from these provisions that the term "proportion" as therein used means simply the part, portion or share of the capital stock represented by property owned and used and by business transacted in this state. In other words, the secretary of state must determine what portion of the capital stock is represented by the property owned and business transacted by the corporation in this state and assess thereon the tax of one-tenth of one per cent.

It doubtless occurred to the legislature that in the natural course of events a foreign corporation might increase and grow and that it would become necessary for it to increase its capital stock, and it therefore provided in section 185 that when the proportion of its capital stock, represented by property used and business done in this state, was increased an additional statement thereof should be made to the secretary of state. That means that whenever that portion or part of the capital stock of a corporation which is represented by property used and business done in this state is increased, an additional statement must be filed.

In the particular case submitted the authorized capital stock has been increased. Assuming the percentage of property owned and business transacted in Ohio by the company as compared with its total property and business to have remained the same, the result of such increase in the authorized capital stock would be that the sum which constitutes the proportion of such authorized capital stock as increased, represented by property used and business transacted in Ohio, is increased. Under these circumstances, an additional statement must be filed.

To illustrate, let it be assumed that the authorized capital stock of the company was originally $1,000,000.00, and that half of its property used and business transacted was in Ohio; the "proportion" on which the initial fee would be based would be $500.000.00. Then let it be assumed that the company increased its authorized capital stock to $2,000,000.00, its property and business remaining the same both in Ohio and elsewhere; the sum which constitutes the "proportion" would then, after such increase, be $1,000,000.00 instead of $500,000.00 as in the first instance. But suppose that prior to the increase of the authorized capital stock the company's business outside of Ohio and the value of its property there located had gradually increased, without a corresponding increase in volume and value inside of Ohio, so that immediately prior to the increase of the authorized capital, stock, had the initial computation been made, it would have resulted in a "proportion" amounting to $300,000.00 instead of $500,000.00, as was the case in the first instance; yet in such event, where the capital stock was increased to $2,000,000.00 the resultant "proportion" would be $600,000.00, an increase of $100,-000.00 as compared with the "proportion" on which the initial fee was based. Under such circumstances, the company should, within thirty days after such increase, file the additional statement required by section 185, G. C., and pay a fee based on $100,000.00.

In other words, it is immaterial whether or not the increase in this state is in proportion to the increase made elsewhere, unless the result is such that the "proportion" ascertained at the time the increase of authorized capital stock is made is smaller or at least no greater, than the amount constituting the "proportion" at the time of the original compliance and the payment of the initial fee.

I am of the opinion, therefore, that the first point suggested by counsel for the corporation is not well taken.

With respect to the second question I may say that I am impressed with the seeming injustice, at least, of requiring a foreign corporation to make annual reports and to pay annual fees thereon for the privilege of continuing in business

in the state and exercising corporate franchises therein and at the same time requiring such corporation, whenever it increases the proportionate amount of its capital stock represented by property and business in this state, to file a report required by section 185; and while I would also lean strongly toward the conclusion that if the so-called Willis law were a subsequently enacted statute, its reports and fees would be effective substitutes for the reports and fees required under section 185, so that a repeal of the latter section, by implication, could be worked out; yet such considerations, after all, are founded upon the policy of the law rather than directed toward its meaning.

Section 192, G. C., is referred to. It provides as follows:

> "No person shall be required to list for taxation a share of the capital stock of an Ohio corporation; or a share of the capital stock of a foreign corporation, the property of which is taxed in Ohio in the name of such corporation; or a share of the capital stock of any other foreign corporation, if the holder thereof furnishes satisfactory proof to the taxing authorities that at least two-thirds of the property of such corporation is taxed in Ohio and the remainder is taxed in another state or states, provided such corporation, as a fee for the privilege of exercising its franchise in Ohio, pays annually the same percentage upon its entire authorized capital stock that is required by law to be paid by a domestic corporation on its subscribed or issued capital stock."

This provision was incorporated in section 148c R. S., at the time the Willis law was passed, and is a part of what is apparently a single scheme of legislation, although it was not in the act known as the Willis law, itself. I think it is obvious, however, that the proviso therein refers to the Willis law. In other words corporations do not pay fees for the purpose of exercising franchises in Ohio, under section 192, but rather under the other sections which require the payment of such fees, although section 192 permits the payment thereof according to a rule different from that provided by such other sections.

Now the sections thus referred to are at the present time sections 5499 et seq., General Code. I quote some of the material provisions thereof:

> "Section 5499. Annually, during the month of July, each foreign corporation for profit, doing business in this state, and owning or using a part or all of its capital or plant in this state, and subject to compliance with all other provisions of law, and *in addition to all other statements required by law,* shall make a report in writing to the commission in such form as the commission may prescribe.
>
> "Section 5503. On or before October fifteenth, the auditor of state shall charge for collection, as herein provided, annually, from such company *in addition to the intitial fees otherwise provided for by law,* for the privilege of exercising its franchises in this state, a fee of three-twentieths of one per cent. upon the proportion of the authorized capital stock of the corporation represented by the property owned and used and business transacted in this state, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the treasurer of state on or before the first day of the following December."

The italicized portions of the above quoted provisions were found in the original Willis law, 95 O. L., 137. I think it is clear that the fee required under section 185, G. C., is an initial fee as to what may be termed the increased extent

to which the franchise is being exercised in the state. At any rate there is no escape from the very explicit provisions of the section last above cited to the effect that the annual report shall be made in addition to all other reports required by law.

When the statutes are examined, then, it is clear that section 185 was not regarded by the legislature as inconsistent with the Willis law. So far as the legislative intent is concerned, then, it was not repealed by implication. This conclusion is strengthened by the fact that section 148c, R. S., has been amended with the language now found in section 185, G. C., since the enactment of the Willis law. (See 97 O. L., 496.)

These considerations leave but one question; namely, as to whether or not it is competent for the general assembly to provide for the assessment and collection of two taxes on what may be regarded, in part at least, as the same subject of taxation. This is a constitutional question which I cannot adequately discuss within the limits of this opinion. It is sufficient to say that while we have always had in Ohio an initial fee and an annual franchise tax as well, and while in Southern Gum Company v. Laylin, 66 O. S., 578, it was strongly intimated, if not decided, by the supreme court that the subject of the initial tax is the same as that of the annual tax except that the one is on the privilege originally conferred and the other on the continued annual value thereof, yet the court, in that case, did distinguish between the original conferring of a privilege and the continued existence thereof as occasions for the exercise of the taxing power. So in the Willis law, and particularly in present section 5519, G. C., the imposition of the annual fee is permitted and required if the initial fee has been paid more than six months preceding the time when the annual report is due. This is a matter of grace only. As a matter of fact, when the initial fee is exacted there is no principle, contractual or otherwise, upon which it might be said that the corporation thereby acquires the right to exercise its corporate powers in the state for any particular length of time without further exaction; nor, on the contrary, could it be said that when the annual fee is paid the corporation thereby acquires the right to exercise its franchise to any possible extent in the state of Ohio until the next annual fee is paid, but only that it acquires the right perhaps to exercise its corporate franchise in the state, to the extent shown by its annual report, until such succeeding annual payment.

For all these reasons I conclude that the original conferring of the privilege of exercising the corporate franchise in Ohio is a separate and distinct occasion for the exercise of taxing powers as compared with the continuing existence of the franchise thus conferred. That being the case, it follows that there is no constitutional incompatibility between the payment of the annual tax or fee and the exaction of the initial tax or fee on account of an increase in the proportion of the authorized capital stock represented by property owned and business transacted in the state.

For these reasons, then, the second point urged by counsel is, I think, not well taken.

I am therefore of the opinion that under the circumstances named by counsel, a foreign corporation would be liable to compliance with section 185, G. C., if the *amount* produced by taking such percentage of its capital stock at a given time, as may be then represented by its property and business in Ohio as compared with its total property and business, is shown to have increased whether the percentage itself has increased or not.

Respectfully,
EDWARD C. TURNER,
Attorney General.

700.

PROSECUTING ATTORNEY—NOT AUTHORIZED TO ADVISE DIRECTORS OF A COUNTY AGRICULTURAL SOCIETY—CANNOT ACCEPT SUCH EMPLOYMENT—DIRECTORS OF SAID SOCIETY MAY NOT EXPEND MONEY RAISED FROM TAX LEVY TO EMPLOY AN ATTORNEY WHEN MONEY IS APPROPRIATED TO ASSIST SOCIETY AS AUTHORIZED BY LAW.

The prosecuting attorney of a county is neither authorized nor required to act as the legal adviser of the directors of the agricultural society of such county and cannot accept employment from said directors.

The directors of said society may not expend the money realized from the tax levy made by the county commissioners of such county and appropriated for the purpose of assisting said agricultural society as authorized by law, for the purpose of employing an attorney to advise them in matters pertaining to encumbering the real estate which said society owns in fee.

COLUMBUS, OHIO, August 6, 1915.

HON. S. W. ENNIS, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—In your letter of July 30, 1915, you request my opinion as follows:

> "Where the commissioners of a county have paid money out of the county treasury, under section 9903, of the General Code of Ohio, for the purchase of real estate as a site for an agricultural society whereon to hold its fairs, and when it becomes necessary by the consent of the county commissioners to encumber said real estate, has the board of directors of said agricultural society any authority to employ an attorney to assist and advise them relative thereto and in getting the consent of the county commissioners to make said loan, other than the prosecuting attorney of the county?"

Section 9887, G. C., authorizes the commissioners of a county, under the conditions therein prescribed, to assist the agricultural society of such county in the purchase or lease and improvement of a site on which to hold county fairs, and to levy a tax for this purpose on all of the taxable property of said county.

This section has been supplemented by house bill No. 717, which was passed by the general assembly May 27, 1915, and will become effective September 3, 1915. Said house bill confers additional authority on the commissioners of the county to assist the county agricultural society in the improvement of grounds, the title to which is vested in fee in said society, and to levy a tax for this purpose.

Section 9900, G. C., provides for the sale, lease or purchase of lands by a county agricultural society, and section 9901, G. C., taken in connection with section 9900, G. C., prescribes the conditions under which the commissioners of the county may complete and carry into effect any contract or contracts made for the purchase or lease of a new site.

Section 9902, G. C., provides in part as follows:

> "Payment for the purchase or lease of the land included in such site, and the improvements thereon, may be made by the county commissioners from any unappropriated funds in the county treasury at the time it is to be made. If no such funds are then in the treasury, the commis-

sioners may issue the bonds of the county for such amounts as are necessary for the purchase or lease of the land and the improvements thereon."

Section 9903, G. C., provides for the levy of a tax by the county commissioners to pay the interest on said bonds and to provide a sinking fund for their final redemption at maturity. The question of the issue of bonds must first be submitted to a vote of the electors of the county at the next general election for county officers held not less than thirty days after receiving from the agricultural society the notice provided for in section 9900, G. C., under authority and in compliance with the requirements of sections 9904 and 9905, G. C.

Section 9908, G. C., as amended in 103 O. L., 360, provides:

"When the commissioners of a county have paid, or pay, money out of the county treasury for the purchase of real estate as a site for an agricultural society whereon to hold its fairs, the society shall not encumber such real estate with any debt, by mortgage or otherwise, without the consent of the commissioners duly entered upon their journal.

"When such consent is obtained the society may encumber such real estate in order to pay the cost of necessary repairs and improvements to an amount not exceeding fifty per cent. of its value. In order to ascertain the value of such real estate the commissioners shall appoint three disinterested free-holder residents of the county to appraise such real estates. The appraisers so appointed shall, within ten days after their appointment, upon actual view of such premises, appraise such real estate and return such appraisement under oath to the board of county commissioners. And the appraisement so made shall be considered the value of such real estate for the purpose of mortgage or other encumbrance."

Where the commissioners of a county, acting under authority and in compliance with the provisions of the statutes above referred to, have assisted the county agricultural society in the purchase of real estate as a site on which to hold county fairs, and it becomes necessary to encumber said real estate, with the consent of said county commissioners, duly entered on their journal, to pay the cost and expense of making the necessary repairs and improvements to an amount not to exceed twenty per cent. of the value of said real estate, you inquire whether the board of directors of said agricultural society may employ an attorney, other than the prosecuting attorney, to assist and advise them in such proceedings.

Section 2917 provides in part:

"The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties."

Inasmuch as the directors of the county agricultural society are not county officers and said board of directors is not a county board, within the meaning of the above provision of section 2917, G. C., the prosecuting attorney is neither required nor authorized to act as the legal adviser of said directors. Furthermore, I am of the opinion that the prosecuting attorney of the county in the proper discharge of his official duties can not accept employment from the directors of said agricultural society.

Under provision of section 9885, G. C., said society is declared to be a body

corporate and politic and as such capable of suing and being sued and of holding in fee simple real estate purchased by said society as a site whereon to hold its fairs.

Under provision of section 9908, G. C., as above quoted, the directors of said society, with the consent of the county commissioners, may encumber the real estate which said society owns in fee.

Inasmuch as the prosecuting attorney of the county cannot act as the legal adviser of said directors and in view of the above provision of the statute authorizing said directors, with the consent of the county commissioners, to encumber the real estate owned by said society, it might seem that this authority carries with it authority to employ an attorney to advise them in said proceedings .

I call your attention, however, to section 9893, G. C., which provides:

> "When money has been raised by taxation in a county for the purpose of leasing lands for county fairs, or of erecting buildings for county fair purposes, or for making improvements on county fair grounds, or any purpose connected with the use of county fair grounds or the management thereof by a county agricultural society, it shall be used for such purpose only, notwithstanding the law under which the money was so raised has expired by limitation. Such moneys shall be used for the purposes intended by the act under which they were levied and collected by taxation."

In view of the provisions of this statute and in the absence of an express provision of the statute authorizing such expenditure, I am of the opinion, in answer to your question, that said directors may not expend, for said employment, money realized from the tax levy made by the county commissioners and appropriated for the purposes authorized by the above provisions of the statutes. On the other hand, the expenditure for said employment of funds derived from sources other than taxation would be of no concern to the public and would be clearly within the powers of said society.

Respectfully,
EDWARD C. TURNER,
Attorney General.

701.

FORM OF BOND TO COMPLY WITH LOAN REGULATION ACT—AMENDED SUBSTITUTE SENATE BILL NO. 7—BANKS AND BANKING.

COLUMBUS, OHIO, August 6, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Under date of July 26, 1915, your department requested me to furnish a proper form of bond to comply with the provisions of section 6346-2 of the recent loan regulation act. That is to say, in accordance with said section as found in amended substitute senate bill No. 7, passed at the recent session of the legislature.

Section 6346-2 provides that every applicant for license under the provisions

of said section shall "execute and file a bond to the state of Ohio in the penal sum of two thousand dollars ($2,000.00) with the superintendent of banks, to be approved by him, for the faithful observance of all provisions of this act."

In accordance with your request I herewith submit the following:

"KNOW ALL MEN BY THESE PRESENTS:

"That _____ of the _____ of _____, in the county of _____, state of _____ doing business as _____, as principal, and _____, of _____, and _____, of _____, as suret _____, are held and firmly bound unto the state of Ohio in the penal sum of two thousand dollars ($2,000.00), for the payment of which, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, administrators, assigns and successors firmly by these presents.

"Signed by the said _____ as principal, and by the said _____ and _____, as suret _____, and their seals attached this _____ day of _____, 19____.

"The condition of the above obligation is such that if the said _____, licensee, under an act passed by the general assembly of Ohio on May 7, 1915, and entitled:

"'AN ACT

"'To amend sections 6346-1, 6346-2, 6346-3, 6346-4, 6346-5, 6346-6 and 6346-7, inclusive, of the General Code, and add supplemental sections 6346-8, 6346-9 and 6346-10, inclusive, providing for the regulation and licensing of the loaning of money without security upon personal property, and of purchasing or making loans upon salaries or wage earnings,'

"his officers, agents or employes shall faithfully observe and comply with all of the provisions of the aforesaid act, then this obligation shall be void; otherwise to be and remain in full force and virtue in law.

_____

_____

_____

"Principal.

_____

"Surety.

_____

"Surety.

"I hereby certify that the security of the above bond is, in my opinion, sufficient for the amount specified, and that the signatures thereto are genuine.

_____

"Auditor _____ County.

"The above bond is hereby approved.

_____

"Superintendent of Banks.

"NOTE.—If the applicant is a corporation, the corporate name must be used at the beginning of the bond describing the principal, and the corporate name must be signed and the seal affixed by the president and secretary and a certified copy of the resolution authorizing them to sign

on behalf of the corporation submitted with the bond. If the application be a copartnership the names and addresses of all partners must be signed.

"If personal bond is given at least two sureties should sign the bond and the same should be approved by the auditor of the county wherein executed.

"If a surety bond is given the authority of the agent to sign such bond should be attached thereto, together with the last financial statement of the surety company, and if necessary a statement from the superintendent of insurance that the surety company is legally authorized to do business in Ohio."

Respectfully,
EDWARD C. TURNER,
Attorney General.

702.

INDUSTRIAL COMMISSION—FORM OF BOND FOR EMPLOYES AND DEPUTIES—SECTIONS 4 AND 871-4, G. C., CONSTRUED.

Uniform form of bond should be adopted by Industrial Commission of Ohio to comply with provisions of sections 871-4 *and* 4, *G. C. Approved form prescribed.*

COLUMBUS, OHIO, August 6, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge receipt of your favor of July 30th, which is as follows:

"This commission desires to adopt a form of bond to be used by such employes as are required to furnish bonds. By so doing we can easily comply with the provisions of section 4 of the General Code.

"Will you kindly submit a form which meets with your approval?"

Under the provisions of section 871-4 of the General Code. (103 O. L., 96) which is section 4 of the act creating the Industrial Commission of Ohio, it is provided, among other things, as follows:

"All employes or deputies of the commission receiving or disbursing funds of the state shall give bond to the state in amounts and with surety to be approved by the commission."

Section 4 of the General Code, is as follows:

"Every officer, on receiving an official bond which by law is required to be filed or deposited with him, shall, on receiving bond, record it in a book to be kept for that purpose. A certified transcript of the record of such bond shall be conclusive evidence of such record, and prima facie evidence of the execution and existence of such bond."

A form of bond which will meet the requirements of section 871-4 of the General Code, relating to the bonds of employes or deputies of the commission, may be prepared as follows:

OFFICIAL BOND.

STATE OF OHIO.

KNOW ALL MEN BY THESE PRESENTS:

That we, _____,
of _____ County, Ohio, as principal, and
_____,
of _____,
as surety, are held and firmly bound unto the STATE OF OHIO in the sum of _____Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, assigns and successors, jointly and severally, firmly by these presents.

The condition of the above obligation is such that, whereas, the said _____ has been {appointed / employed} by the Industrial Commission of Ohio.

Now, if the said _____ shall, during his service under such {appointment / employment} faithfully discharge the duties imposed upon him by law and the orders of the Industrial Commission of Ohio, then this obligation shall be void, otherwise it shall remain in full force and effect.

WITNESS, our hands and seals, this _____day of _____, 19__.

_____
_____
_____
_____
_____
_____
_____

_____
_____

I hereby certify that the security of the above bond is, in my opinion, sufficient for the amount specified, and that the signatures thereto are genuine.

_____
Auditor_____County.

OATH.

THE STATE OF OHIO} ss.
_____COUNTY}

I do solemnly swear that I will support the Constitution of the United States of America and the Constitution of the State of Ohio, and that I will faithfully discharge the duties imposed upon me by law and the

orders of the Industrial Commission of Ohio, in the service of the Industrial commission of Ohio, and otherwise, according to the best of my ability, promote the interest of the state, so far as the same may be lawfully in my power.

Sworn to and subscribed before me, a ---------- in and for the county aforesaid, this ----------day of ----------, 19__.

The within bond is hereby approved as to amount and as to the surety herein.

THE INDUSTRIAL COMMISSION OF OHIO
By----------
Chairman.

The within bond is approved as to its form.

EDWARD C. TURNER,
Attorney General State of Ohio.

AUTHORITY TO EXECUTE AND FINANCIAL STATEMENT.

If executed by a surety company, bond should be accompanied by an authorization to the agent signing for the company and the last financial statement of the surety company.

CERTIFICATE OF AUDITOR.

The certificate of the auditor provided for in the bond need only be used when a personal bond is given instead of a surety bond.

In my opinion, the above form of bond will meet the requirements of section 871-4 of the General Code, above referred to, and the adoption of a uniform bond will make it convenient for your commission to make the record provided for in section 4 of the General Code, supra.

Respectfully,
EDWARD C. TURNER,
Attorney General.

703.

JUSTICES OF PEACE—RECOVERY MAY BE MADE OF MONEY PAID FROM TOWNSHIP TREASURY FOR OFFICE RENT UNDER AUTHORITY OF SECTION 1750, G. C.—SAID STATUTE IS UNCONSTITUTIONAL.

Section 1750, G. C., being unconstitutional, money paid to justices of the peace thereunder may be recovered back.

COLUMBUS, OHIO, August 7, 1915.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—On account of pressure of business we have not sooner answered your letter of June 25th, written in answer to a letter from us of February 11th, relative to the refunding of amounts found due by state examiners.

Your letter is as follows:

"Complying with your request of February 11th, we have taken up with various justices of the peace in this county the matter of refunding to the township treasurer amounts allowed to them out of the township fund for office rent, as reported in the summary of findings for recovery by State Examiner Godfrey.

"The contention of these officers is that the amounts referred to were allowed by virtue of section 1750, of the General Code. While it is apparent that this section is unconstitutional, it is our opinion that until it has been so declared by a court, a justice of the peace would be protected by its provisions. The following cases which bear in a way upon this question are respectfully submitted for your consideration:

"State ex rel. v. Carlisle, 2 Ohio N. P., (n. s.) 637.

"State ex rel. v. Beacon, 66 Ohio St., 491.

"State v. Gardner, 54 Ohio St., p. 24, at page 48 (obiter).

"Heck v. Glass Company, 16 Ohio C. C., 111.

"State ex rel. v. Bingham, 14 Ohio C. C., 245.

"We would appreciate an opinion from you on this subject in order that we may take the necessary steps toward adjustment of these items."

The report of the state examiner on Colerain township, Hamilton county, in an examination made in 1914, contains the following:

"Payments of rent for justices of the peace have been as follows:

"1912, Dec. 30, Wm. Steinreide, J. P.----------$50.00

"1912, Dec. 30, Samuel Ruby, J. P.---------- 50.00

"1913, Dec. 22, Wm. Steinreide, J. P.---------- 50.00

"1913, Dec. 22, Samuel Ruby, J. P.---------- 50.00

"The only authority for these payments was section 1750, G. C. This states that where there is, in any township in Hamilton county, no township hall or other public building belonging to the township, office rent not exceeding $50.00 a year may be paid from the township treasury for each justice of the peace. All laws of this special nature had been declared unconstitutional by the supreme court. Therefore, the payments were illegal, and the amounts must be returned to the treasury by the officials named. It may be added, that for a number of years the township has been renting for township purposes a building that belongs to the township school district."

Section 1750, G. C., provides as follows:

"In any township in Hamilton county in which there is no township hall or other public building belonging to the township, each justice of the peace may provide himself with a suitable office at an annual rental not to exceed fifty dollars, which shall be paid from the general township fund by the township treasurer upon the certificate of the justice, countersigned by the township clerk."

From your letter it appears that there is no doubt in your mind, nor is there any doubt in our minds, that the above quoted section is unconstitutional. The question arises, however, as to whether or not moneys paid under such unconstitutional act may be recovered.

In your letter you cite various cases as bearing upon the subject.

The case of State v. Gardner, 54 O. S., 24, cited by you, has been carefully considered. This case, however, simply goes to the question, as we see it, of whether or not there can be a *de facto* officer without a *de jure* office, and does not cover the matter in controversy.

The case of State ex rel. v. Beacon, 66 O. S., 491, cited by you, while holding that the statute is unconstitutional, nevertheless declares on the ground of public policy that the officers should continue to discharge their duty thereunder until the judgment of ouster became effective, the execution of which judgment was suspended in order to give time to provide for a proper *de jure* organization. And we do not see that this case in any way bears upon our question.

The case of State ex rel. v. Bingham, 14 O. C. C., 245, cited by you, is to the effect that the official acts of officers acting in an office created by an unconstitutional law are acts of a *de facto* officer until the statute has been declared unconstitutional by competent judicial authority.

The case of Heck v. Glass Company, 16 O. C. C., 111, is to the effect that the official acts of one who performs the duties of an office created by an unconstitutional statute are, until the statute which creates the office and enjoins the duties is declared invalid by a court of competent jurisdiction, the acts of a *de facto* officer.

All of these cases involve the question of the acts of a *de facto* officer, and on the ground of public policy it has always been held that the acts of a *de facto* officer are valid until such *de facto* officer is ousted from his position, and that the moneys paid to him as compensation relieves the state from paying the same amount to the *de jure* officer, whose office has been usurped by the *de facto* officer.

The case of State ex rel. v. Carlisle, 2 N. P., (n. s.) 637, is, however, a case that is very nearly in point in this matter. On page 638 the court states the case as follows:

> "The petition sets forth six separate causes of action. It seeks to have certain sections of the statutes, pertaining to the compensation and expense account of county commissioners, held unconstitutional, and also seeks to require defendant to cover back into the county treasury certain money which, it is claimed, he was paid as one of the county commissioners, and which payment, it is claimed, was unauthorized by law.
>
> "It is conceded that the laws in question, under which the defendant has been paid his salary and expenses, are objectional on constitutional grounds, and consequently invalid. But, notwithstanding that, one of the questions here made, is whether an officer, who discharges a duty enjoined upon him by an unconstitutional act before a court of competent jurisdiction declares the act to be unconstitutional, is protected in the discharge of that duty by the law under which he acted. In other words, can an action be maintained to recover back into the treasury the salary and expenses of such officer, paid to him under an unconstitutional law, but before it is so declared by a court of competent jurisdiction?
>
> "Counsel have cited no authorities directly in point on this question. The question has certainly not been decided directly in this state, and so far as I have investigated, I have been unable to discover elsewhere any case directly decisive of the question."

On page 640 the court says, relative to the acts of a *de facto* officer under an unconstitutional act:

> "If the acts of such an officer, under such a law, are valid and effective, then the fact that he demanded and was paid for his services the

salary or compensation provided by the act would necessarily be valid. I cannot comprehend how that part of the act which concerns his official duties can be upheld, and the part thereof which provides for his salary denied."

The court in the above case was primarily considering the question of the compensation to be allowed to the county commissioners, and as he held that section 897, R. S., was void because of unconstitutionality, insofar as it related to the county in question, the county commissioners would therefore have been entitled to no remuneration for the services rendered. It is true that in the same section the expenses of the county commissioners were provided for and, therefore, in a sense the court passed upon the question of whether or not expenses could be allowed to a *de jure* officer, which expenses were provided for by a statute which was unconstitutional.

As was said in the opinion of the court, he was unable to discover any case directly decisive of the question. So far as I can ascertain the case was not taken further than the court of common pleas. I am unable to give my full assent to the conclusion reached by the court in the case foregoing mentioned. If the office is created and the salary fixed by an unconstitutional act, it may be that since the courts hold that the person occupying such unconstitutional office was an officer *de facto* and therefore that his acts were valid, he should receive the compensation provided for in said act. But in the matter under consideration there is no question of a *de facto* officer nor of the fees to be received by such *de facto* officer, but solely that section 1750 undertakes to allow, by way of expenses, a certain sum to the justices of the peace of Hamilton county that were not allowed to any of the other justices of the peace throughout the state. The money paid out under section 1750, the act being unconstitutional, but not having as yet been declared so by a court, would be money that was paid under a mistake of law.

"Money paid under an unconstitutional or invalid statute, without any circumstances of compulsion, is paid under a mistake of law and cannot be recovered back, except in so far as governed by the rule adopted in some states that illegal payments made by public officers to public officers by mistake of law are recoverable."
(30 Cyc. 1315.)

The rule is laid down in 30 Cyc., at page 1313, as follows:

"Except where it is otherwise provided by statute, the general rule is that a voluntary payment made under a mistake or in ignorance of the law, but with full knowledge of all the facts, and not induced by any fraud or improper conduct on the part of the payee, cannot be recovered back. And in so far as this rule is concerned, there is no difference between ignorance and mistake of law."

However, as a limitation to such rule, it is given on page 1314 of 30 Cyc.:

"The rule that money paid under a mistake of law cannot be recovered should be confined to cases falling strictly within it."

A further limitation to such rule is stated at page 1315 of 30 Cyc.:

"Although there are cases holding the contrary, the better rule seems to be that payments by a public officer by mistake of law, especially where made to another officer, may be recovered back."

This foregoing rule is recognized in the case of State ex rel. v. Weaver, 12 O. N. P., (n. s.) 41, the third branch of the syllabus in that case being as follows:

"The rule that money voluntarily paid cannot be recovered does not apply to the case of one public officer dealing with another public officer with reference to their compensation as such officers."

In the above case an action was brought by the prosecuting attorney of Hamilton county to recover for the county, under the authority vested in him by section 1277, Revised Statutes, a certain sum of money from the defendant, Weaver, for fees and mileage alleged to have been illegally drawn from the county treasury by said Weaver while acting as coroner. The second defense averred that the defendant drew from the county treasury, during said period, as salary and expenses a certain sum under a law which was declared unconstitutional about the close of his term, and upon being requested by the county auditor and county commissioners to repay said salary so drawn and his refusal so to do, the whole matter was compromised and settled by the commissioners and himself by agreement. A demurrer was pleaded to this answer.

The court, in its opinion, on page 42, says:

"The money drawn from the county treasury as salary by the defendant was under an unconstitutional law and the prosecutor might have brought suit to recover the entire amount thus paid because no act under that law was valid, or as was said by the supreme court in the case of Findlay v. Pendleton, 62 O. S. 80, on p. 88:

"'It (the unconstitutional law) was void, not only from the time it was declared unconstitutional, but it never had any validity and could not be invoked as a foundation of a right to be enforced in a court of justice.'

"Therefore, there could have been no defense interposed to an action by the prosecuting attorney against the defendant to recover the entire salary drawn by him under said unconstitutional law."

On page 44 the court says:

"The cases of voluntary payment cited by counsel for defendant in his brief mostly relate to individuals or private corporations dealing with one another or with public corporations, and not transactions of one public servant dealing with another public servant in reference to their compensation or salaries. Note what Judge Spear says in Jones, Auditor, v. Commissioners, supra, (57 O. S., 2189) on pages 211 and 212:

"'It is urged that as a condition of avoiding the conclusive effect of the commissioners' allowance there must be found either fraud or mistake, and neither is averred. This claim seems to rest on the idea that the board of commissioners is practically the county and that its official acts necessarily conclude the county. The assumption is fallacious.'"

The court concludes on page 45, as follows:

"The county has nothing of defendant's to pay back or tender back. The salary did not belong to defendant. He had no right to draw it. It was the county's money illegally drawn from the treasury by the defendant, and even if the defendant had actually repaid it and had not been

allowed any fees he could by no legal claim ask the county to turn his salary over to him before calling upon him to return to the county illegal fees and mileage in his possession."

This opinion was affirmed in the 13th C. C., (n. s.) page 40. The conclusion of the opinion of the circuit court in this case is as follows:

"The basis of the case at bar is the payment to a county officer by the county commissioners of fees in conducting his office for which there is no statutory provision. The payment was contrary to law. The county commissioners, therefore, could not authorize such a payment, and if consummated and the money paid, the amount so paid can be recovered back. We think the case of Lewis v. State, 57 O. S., 189, is decisive of the case at bar."

The case was carried to the supreme court and affirmed without report.

The case of Printing Company v. State, 68 O. S., 362, was a case involving the publication of the sheriff's election proclamation, the number of times for which was fixed by statute, and the sheriff of Mahoning county caused the same to be published a greater number of times. An action was brought against the newspaper for the money received in excess of the amount which it should have received for publishing the said proclamation the number of times fixed by statute. In the said case, on page 372 of the opinion, the court says:

"If the rule of voluntary payment is to have application it disposes of all payments prior to those of the year 1898, for, as before stated, prior to the statute of April 25, 1898, there was no law which as to claims of this character enabled a prosecuting attorney to maintain an action. That act (present sections 1277 and 1278, Revised Statutes, now sections 2921 and 2922, General Code, provides, among other things, that:

"'The prosecuting attorneys of the several counties of the state, upon being satisfied that the funds of the county * * * have been misapplied, or that any such public moneys have been illegally drawn out of * * * the country treasury, * * * may apply by civil action in the name of the state to a court of competent jurisdiction to * * * recover back for the use of the county all such public moneys so misapplied or so illegally drawn out * * * from the county treasury.'

"Manifestly it is the purpose of this statute to reimburse the treasury for unauthorized payments from it not otherwise provided for. It is in one sense a remedial statute, and yet it gives a right of action which before its enactment did not exist, and could not, we think, apply to past transactions."

Section 286, G. C., in effect at the time that the payments were made in this case to the justice of the peace under section 1750, G. C., provides in part as follows:

"If the report discloses malfeasance, misfeasance, or neglect of duty on the part of an officer or an employe, upon the receipt of such copy of said report it shall be the duty of the proper legal officer and he is hereby authorized and required, to institute in the proper court within ninety days from the receipt thereof civil actions in behalf of the state or the political divisions thereof to which the right of action has accrued, and promptly

prosecute the same to final determination to recover any fees or public funds misappropriated or to otherwise determine the rights of the parties in the premises. * * *"

This section, as we see it, stands in the same position as the sections under consideration in the case of Printing Company v. State, and gives a right of action to the prosecuting attorney to recover moneys misappropriated from township treasuries.

In view of the decisions I am of the opinion that, first: moneys paid under an unconstitutional act are in the same position as moneys paid under a mistake of law; that moneys paid from one public officer to another does not come within the rule that moneys paid under mistake of law cannot be recovered back; and, furthermore, that under the provisions of section 286, G. C., a right of action has been created in the prosecuting attorney to recover back this money in accordance with the finding of the bureau.

I am therefore of the opinion that suit should be instituted for the recovery of such money, and that the right to the recovery thereof is clear.

Respectfully,
EDWARD C. TURNER,
Attorney General.

704.

INDUSTRIAL COMMISSION—SEPARATE ACCOUNT SHOWING PREMIUMS PAID INTO INSURANCE FUND BY STATE AND ITS POLITICAL SUBDIVISIONS—RECORD OF DISBURSEMENTS TO PUBLIC EMPLOYES—AUDITOR OF STATE TO PRESCRIBE FORM.

The industrial commission is to keep separate account showing premiums paid into state insurance fund by the state and its political subdivisions, also record of disbursements made from fund on account of injuries to public employes. In making such record the county is to be regarded as the unit.

Auditor of state to prescribe form and manner of keeping the account.

COLUMBUS, OHIO, August 7, 1915.

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

GENTLEMEN:—Permit me to acknowledge receipt of your request for an opinion under date of July 26, 1915, relative to the keeping of accounts in the industrial commission, which request is as follows:

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

"Referring to the last paragraph of section 1465-67, as amended vol. 103 O. L., page 79, kindly state what kind of ledger accounts must be kept by the industrial commission of the funds received from the state, counties, municipalities, school districts, and other taxing subdivisions.

"The practice is to keep a separate account of all moneys received from the state and separate accounts of the money received from each county, including various subdivisions thereof.

"What we desire to know is, whether this method of keeping the ac-

counts is in compliance with the requirements of the law or whether a separate account should be kept with each taxing district enumerated in said section. * * *"

In your letter you refer to the provisions of the last paragraph of section 1465-67, as amended 103 O. L., 79, which provision is as follows:

"The state liability board of awards shall keep a separate account of the money paid into the state insurance fund by the state and its political subdivisions as hereinbefore provided and the disbursements made therefrom on account of injuries to public employes."

The particular question in which you are interested is as to the form of the accounts which should be kept by the industrial commission covering its transactions with the counties and the taxing districts therein.

Section 1465-65 of the General Code, as amended 105 O. L., 4, is as follows:

"In the month of December of each year, the auditor of state shall prepare a list for each county of the state, showing the amount of money expended by each township, city, village, school district or other taxing district therein for the service of persons described in subdivision one of section fourteen hereof, during the fiscal year last preceding the time of preparing such lists; and shall file a copy of each such list with the auditor of the county for which such list was made, and copies of all such lists with the treasurer of state. Such lists shall also show the amount of money due from the county itself, and from each city, township, village, school district and other taxing district thereof, as its proper contribution to the state insurance fund, and the aggregate sum due from the county and such taxing districts located therein.

"Provided, however, that should the industrial commission of Ohio on or before the first day of December in any year certify to the auditor of state that sufficient money is in the state insurance fund to the credit of any county or counties to provide for the payment of compensation to the injured and to the dependents of killed employes of such county or counties and the several taxing districts therein for the ensuing year, the auditor of state shall not prepare and file with the county auditors and the treasurer of state said list or lists for such county or counties specified in such certificate; and it shall be the duty of the industrial commission of Ohio to make and file such certificate with the auditor of state whenever in its judgment there is sufficient money in the state insurance fund to the credit of any county or counties to provide for the probable disbursements required to be made to the injured and to the dependents of killed employes of such county or counties and the several taxing districts therein for the ensuing year."

Section 1465-66 of the General Code (103 O. L., page 78) is as follows:

"In January of each year following the filing with him of the lists mentioned in the last preceding section hereof, beginning with January, 1914, the auditor of each county shall issue his warrant in favor of the treasurer of state of Ohio on the county treasurer of his county, for the aggregate amount due from such county and from the taxing districts

> therein, to the state insurance fund, and the county treasurer shall pay the amount called for by such warrant from the county treasury, and the county auditor shall charge the amount so paid to the county itself and the several taxing districts therein as shown by such lists; and the treasurer of state shall immediately upon receiving such money, convert the same into the state insurance fund."

I find upon examination of the records of the industrial commission that with the remittances made by the auditors of the counties under the provisions of section 1465-66, supra, there is filed a list of the various taxing districts of the county, the amount of the payroll, the amount of premium due on account of said payroll for the various taxing districs, and that said list is posted by the industrial commission in its ledger account with the particular county.

Under the provisions of the last paragraph of section 1465-67, supra, it is made the duty of the industrial commission to keep a separate account of moneys paid into the state insurance fund by the state and its political subdivisions as therein provided, and the disbursements made therefrom on account of injuries to public employes.

As pointed out by the examiner who is now at work on the books of the industrial commission, there is no provision on the ledger for an entry showing the disbursements on account of injuries to public employes and it has been suggested that such a form should be adopted, in order that a complete, compact record showing the payments of premiums and disbursements would be readily accessible.

The supreme court of the state considered the provisions contained in the last paragraph of section 1465-67, supra, in the cases of:

> Porter et al., Trustees v. Hopkins, Treas. et al.
> Board of Education v. Hopkins, Treas. et al.
> State ex rel. Pogue, Pros. Atty. v. Hopkins, Treas, et al.
> City of Cincinnati v. Hopkins, Treas. et al.

which cases will be reported in volume 91 of the supreme court reports, not yet issued, and in referring to the question made this observation:

> "Section 20 of the law provides that the board shall keep a separate account of the money paid into the state insurance fund by the state and its subdivisions, and the disbursements therefrom on account of injuries to public employes. The board is further required by section 17 to communicate to the general assembly on the first day of each regular session an estimate of the amount necessary to be contributed to the fund during the next two years. These provisions are obviously for the purpose of enabling the legislature to provide such an insurance fund for the employes of the state and its subdivisions as would be sufficient to maintain the separate account above indicated."

From the statement in the opinion just quoted it will be noted that it is desired to keep the account of moneys received from the state and political subdivisions separate from the other accounts, with a view of creating a separate and distinct fund from which employes of the state and its subdivisions may be compensated for injuries sustained while in the employment of the public. A reading of the

provisions of the last paragraph of section 1465-65, supra, shows further that in its transactions with the subdivisions of the state the industrial commission is to regard the county as the unit.

It is my opinion that the industrial commission should keep a separate account showing the payments made by the state and its political subdivisions and as to the form in which the account shall be kept I have to invite your attention to the provisions of section 274 of the General Code, as amended page 26 of volume 106 Ohio Laws, and to section 277 of the General Code, which are as follows:

"Sec. 274. There shall be a bureau of inspection and supervision of public offices in the department of auditor of state which shall have power as hereinafter provided in sections two hundred and seventy-five to two hundred and eighty-nine, inclusive, to inspect and supervise the accounts and reports of all state offices, including every state educational, benevolent, penal and reformatory institution, public institution and the offices of each taxing district or public institution in the state of Ohio. Said bureau shall have the power to examine the accounts of every private institution, association, board or corporation receiving public money for its use and purpose, and may require of them annual reports in such form as it may prescribe. The expenses of such examination shall be borne by the taxing district providing such public money. By virtue of his office the auditor of state shall be the chief inspector and supervisor of public offices, and as such appoint not exceeding two deputy inspectors and supervisors, and a clerk. No more than one deputy inspector and supervisor shall belong to the same political party.

"Sec. 277. The auditor of state, as chief inspector and supervisor, shall prescribe and require the installation of a system of accounting and reporting for the public offices, named in section two hundred and seventy-four. Such system shall be uniform in its application to offices of the same grade and accounts of the same class, and shall prescribe the form of receipt, vouchers and documents, required to separate and verify each transaction, and forms of reports and statements required for the administration of such offices or for the information of the public."

From a perusal of the sections quoted the powers and duties of your office will be at once apparent.

Respectfully,
EDWARD C. TURNER,
Attorney General.

705.

TOWNSHIP TRUSTEES—NO AUTHORITY TO HIRE DETECTIVE TO POLICE TOWNSHIP—DECIDED IN FORMER OPINION NO 689, AUGUST 5, 1915—TRUSTEES MAY PROVIDE FOR POLICING OF TOWNSHIP BY CONSTABLE—SEE SECTION 3348, G. C.

COLUMBUS, OHIO, August 7, 1915.

HON. C. H. CURTISS, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—Since mailing you my opinion of August 5, 1915, in which I held that township trustees may not lawfully hire a detective and pay him from township

funds to police a township and discover burglars or the perpetrators of other crimes committed in a township and to enforce the speed laws applicable to motor vehicles, my attention has been called to the provisions of section 3348, G. C., which is as follows:

> "The trustees of a township may designate any duly elected and qualified constable as police constable. The trustees may pay such police constable from the general funds of the township not to exceed one dollar and fifty cents per day for the time actually spent in keeping the peace, protecting property and performing his duties as police constable as required by law. Such police constable shall not be paid under this section for services for which the statute elsewhere provides a fee, and he shall file an itemized bill of his expenses and services with the trustees before they may be allowed and paid."

This section, of course, does not alter the conclusion which I expressed in my former opinion with respect to the exact question then submitted by you. It furnishes, however, a means whereby the trustees may provide for the policing of the township, and in my opinion the services which may be exacted of a police constable under a designation made under section 3348 cover all those which you enumerate. The choice of the trustees is, however, limited to duly elected and qualified constables of the county.

Respectfully,
EDWARD C. TURNER,
Attorney General.

706.

DEPUTY STATE FIRE MARSHALS—CONFIDENTIAL POSITIONS—COMMISSION MUST DETERMINE WHETHER IT IS PRACTICABLE TO DETERMINE MERIT AND FITNESS OF APPLICANTS BY COMPETITIVE EXAMINATIONS—PERSONS IN CLASSIFIED SERVICE BY VIRTUE OF NON-COMPETITIVE EXAMINATION WILL HAVE TO BE APPOINTED AS PROVIDED IN SECTION 486-21, G. C.—CERTAIN EXCEPTIONS.

Assistant fire marshals are not "deputies" within the meaning of paragraph 8 *of section* 8 *of the civil service law of* 1913; *nor are the so-called "deputy state fire marshals," except the "first deputy." Such positions are, however, confidential and the civil service commission must determine whether, being such, it is practicable to determine the merit and fitness of applicants therefor by competitive examination.*

Persons holding positions in the classified service of the state and its subdivisions, as defined by the civil service act of 1915, 106 *O. L.*, 400, *by virtue of non-competitive examinations will, when that law goes into effect, have to be appointed as provided in section* 486-21 *thereof, in order to be entitled to continue in the service and be paid compensation, unless there is no eligible list, in which event they may be retained provisionally, or unless they have served the state or one of its subdivisions continuously and satisfactorily for seven years prior to January* 1, 1915, *in which event they are considered as appointees under the new law.*

COLUMBUS, OHIO, August 7, 1915.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of August 2nd, requesting my opinion upon two questions, the first of which was submitted to the commission by the state fire marshal. The questions are as follows:

"(1) Under the present civil service law (103 O. L., 702) are the assistant fire marshals in the classified or in the unclassified service?

"(2) What will be the status of employes who are holding positions in the classified service of the state by virtue of non-competitive examinations when what is known as the 'Barnes-Moore law' (106 O. L., 400) goes into effect, as determined by section 486-21 of the General Code as therein amended? Will their services terminate automatically when the new law becomes effective?"

The first question, as the fire marshal correctly states, involves consideration of section 486-8 of the General Code, as found in 103 O. L., 702, and in particular paragraph 8 thereof defining one of the groups of positions in the unclassified services. Said paragraph 8 is as follows:

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

The contention is made by the state fire marshal that what are designated as "assistant fire marshals" satisfy the requirements of this paragraph and that their positions are therefore in the unclassefied service. If this contention is correct, then no other provision of the present civil service law need be consulted their positions are therefore in the unclassified service. If this contention is incorrect and assistant fire marshals do not satisfy the description of "deputies" as embodied in said paragraph 8, then another question will arise in view of the statutes relating to the powers and duties of such assistants as I shall hereafter quote them, namely, as to whether or not, in spite of the fact that such assistants are not embraced within any of the specifically enumerated kinds of positions in the unclassified service, they are, nevertheless, in the unclassified service by reason of not being in the competitive class or the classified service because it is impracticable to ascertain the merit and fitness of applicants for such positions by competitive examinations.

Both of these questions as to the application of the state civil service law require me to consider the provisions of the law relative to the office of the state fire marshal.

Section 821 of the chapter relating to this department provides as follows:

"The state fire marshal shall appoint a first deputy fire marshal, a second deputy fire marshal, and a chief assistant, each of whom he may remove for cause. He may employ such clerks and assistants, and incur such other expenses as are necessary in the performance of the duties of his office."

Section 823 provides as follows:

"The deputy fire marshal and the chief assistant shall assist the state fire marshal in the discharge of his duties. During the absence or disability of the state fire marshal, the first deputy fire marshal shall perform the duties of the office."

Other sections of the chapter make it the duty of the state fire marshal to investigate the cause, origin and circumstances of each fire occurring in the state by which property has been destroyed or damaged, to determine whether the fire was

the result of carelessness or of design, and in the event that it is determined that there is evidence sufficient to charge a person with arson or similar crime to cause such person to be arrested and charged with such offense, and to furnish the prosecuting attorney the evidence gathered in the investigation, with the names of witnesses and a copy of material testimony taken in the case.

The specific duties of the marshal, his deputies and assistants in the premises are described as follows:

In the first place, section 824, which creates the duty to investigate, mentions "the state fire marshal, the chief of the fire department of each city or village in which a fire department is established, the mayor of each incorporated village in which no fire department exists, and the township clerk of each organized township without the limits of a village or city."

Attention is called to the fact that in this section, which is the operative section on which all others depend, no mention is made of the deputies or assistants of the fire marshal. The local officers charged with duties under this section are, by section 825 of the General Code, required to notify the state fire marshal of all fires and to furnish him a written statement of all facts relating to their cause and origin. Thereupon it is provided in section 827 that,

> "If in his opinion further investigation is necessary, the state fire marshal, a deputy state fire marshal or an assistant fire marshal, shall take or cause to be taken the testimony on oath of all persons supposed to be cognizant of any facts, or to have means of knowledge in relation to the matter concerning which an examination is required by law to be made, and cause such testimony to be reduced to writing."

Section 828 provides as follows:

> "If the state fire marshal, or a deputy or assistant fire marshal, is of the opinion that there is evidence sufficient to charge a person with arson or a similar crime, he shall arrest him or cause him to be arrested and charged with such offense. He shall furnish the prosecuting attorney such evidence, with the names of witnesses, and a copy of material testimony taken in the case."

Section 830 confers the power to compel the attendance of witnesses in the following language:

> "The state fire marshal, a deputy state fire marshal or an assistant fire marshal, may summon and compel the attendance of witnesses before him to testify in relation to any matter which by law is a subject of inquiry and investigation, and require the production of any book, paper or document he deems pertinent."

Section 831 confers authority to administer oaths in the following language:

> "The state fire marshal, a deputy state fire marshal or an assistant fire marshal shall have authority to administer an oath to any person appearing as a witness before him. * * *"

There are other related provisions of the statutes of the same tenor, but their quotation is not necessary in this connection.

Section 835 confers a different kind of power, namely, the power to condemn dilapidated and defectively constructed buildings especially liable to fire and so

situated as to endanger other buildings. This power is conferred upon "the state fire marshal, a deputy state fire marshal, or assistant fire marshal, or any officer mentioned in the preceding section" (including the fire chiefs, the mayors and clerks referred to in section 834 of the General Code).

Section 836 is very important in this connection. It provides for an appeal by the owner of a building so condemned from the order of a subordinate officer or of the fire marshal himself to the state fire marshal, who may "affirm, modify, revoke or vacate said order." This power is manifestly one which may be exercised only by the state fire marshal.

Section 838 of the General Code provides as follows:

> "The state fire marshal shall keep in his office a record of all fires occurring in the state, the origin of such fires and all facts, statistics and circumstances relating thereto which have been determined by investigations under the provisions of this chapter. Except the testimony given upon an investigation, such record shall be open at all times to public inspection and such portions thereof as the superintendent of insurance deems necessary shall be transcribed and forwarded to him within fifteen days from the first of January each year."

In my opinion, the assistant fire marshals do not satisfy the description of "deputies" in paragraph 8 of section 8 of the original civil service law, for the reason that although they are, of course, under the supervision of the state fire marshal and subject presumably to his orders, the powers and duties which the statutes devolve upon them are conferred upon them in an independent capacity. In such investigations as an assistant may make and in making such orders as an assistant may issue, such assistant acts in his own right and not "for and in place of his principal." It is different with respect to the first deputy fire marshal, as under section 823 of the General Code he may act, under certain circumstances, in place of his principal. He is in every sense of the word a "deputy" as the term is used in paragraph 8 of section 8 of the civil service law.

But, as already suggested, the conclusion that assistant fire marshals are not "deputies" does not suffice to keep them in the competitive class or the classified service, if it is impracticable to ascertain the merit and fitness of applicants therefor by competitive examinations.

That the petition of assistant fire marshal is a confidential one abundantly appears. They are to make investigations which are to be secret. They are to co-operate with prosecuting attorneys and assist them in the preparation of the trial of criminal cases. Like every investigation which precedes an indictment, their investigations partake of the character of secret service. As the state fire marshal points out in his letter, incendiarism is one of the most difficult crimes to detect. It is difficult not only to determine who has committed the crime, but even to determine whether or not a crime has been committed. It is necessary, therefore, that the proceedings of the assistant fire marshals, as well as the deputy fire marshals, be surrounded by absolute secrecy. The information which they acquire is absolutely confidential, to be imparted only to their superior officer, the state fire marshal, or to the prosecuting attorney. It would be difficult to imagine a plainer instance of a confidential position than the one now under consideration.

For the sake of clearness I may say that the fire marshal is correct in his contention that there is no practical distinction between the position of assistant fire marshal and deputy state fire marshal, except with respect to the first deputy. I should have to advise that "deputy fire marshals" are not within the description of paragraph 8 of section 8 of the present civil service law (except as to the first

deputy) any more than are the assistant fire marshals, but such deputy fire marshals are the incumbents of confidential positions, just as are the assistant fire marshals, and the civil service commission may determine whether it is practicable to ascertain the merit and fitness of applicants therefor by competitive examinations.

Your second question involves consideration of section 486-31 of the General Code, as amended 106 O. L., 418. That section, which is entitled and in substance is a schedule, the office of which is to determine the effect of the new law upon the existing conditions, provides as follows:

> "All officers, employes and subordinates in the classified service of the state, the several counties, cities and city school districts thereof, holding their positions under existing civil service laws, and who are holding such positions by virtue of having taken a regular competitive examination as provided by law, shall, when this act takes effect, be deemed appointees within the provisions of this act; but no person holding a position in the classified service by virtue of having taken a non-competitive examination shall be deemed to have been appointed or to be an appointee in conformity with the provisions of this act; provided, however, that all persons who have served the state or any political subdivision thereof continuously and satisfactorily for a period of not less than seven years next preceding January 1, 1915, shall be deemed appointees within the provisions of this act.
>
> "The name of each officer, employe and subordinate holding a position in the classified service of the state, the counties, cities and city school districts thereof at the time this act takes effect, who has not passed a regular competitive examination and who has not been in the service seven years as herein provided shall, within ten days after this act becomes effective, be reported by the appointing authority to the commission and shall be certified to the appointing authority in addition to the three candidates for appointment to such position. If any such person is reappointed, he shall be deemed to have been appointed under the provisions of this act. If no eligible list exists such person may be retained as a provisional employe until such time, consistent with reasonable diligence, as the commission can prepare eligible lists when such position shall be filled as prescribed in this act; provided that nothing contained in this section shall be deemed to vacate the office of existing chiefs of police departments or chiefs of fire departments of municipalities. All existing eligible lists of persons who have taken regular competitive examinations shall continue in force for the term of eligibility to be fixed by the commission as provided herein. All property of the existing state commission shall become the property of the commission to be appointed hereunder."

Under the provisions of this section it is clear that unless no eligible list exists, a person holding a position in the classified service at the time the act goes into effect by virtue of a non-competitive examination ceases to have any right to continue to perform his duties and receive his compensation. It is not necessary that such person be removed by the appointing authority, but section 486-31 of itself has the effect of removing him (unless, of course, he has continuously and satisfactorily served the state or any political subdivision thereof for a period of not less than seven years next preceding January 1, 1915). Even if no eligible list exists, such person has, strictly speaking, no right to continue to serve the state or one of its political subdivisions until removed, but in such event

his retention may be deemed to be in the capacity of a provisional employe only and may last until such time only as the commission may, consistent with reasonable diligence, prepare eligible lists.

The name of each person holding a position in the classified service by virtue of a non-competitive examination must, within the time specified in the section, be reported by the appointing authority to the commission, and it shall thereupon be certified on the eligible list for appointment to such position. At such time there is, technically at least, a vacancy in the position which it is the duty of the appointing officer to fill. This duty must be discharged in accordance with the provisions of the new law, and particularly in accordance with section 486-13 as therein amended. This section provides in part:

> "Each appointing officer shall report to the proper civil service commission the name of such appointee or employe, the title and character of his office, the duties of same, the date of the commencement of same, and the salary or compensation thereof, and such other information as the commission requires in order to keep the roster herein mentioned."

Under section 486-31, "if any such person is reappointed, he shall be deemed to have been appointed under the provisions of this act."

So that, technically, the only proper way in which the services of a person now holding a position in the classified service of the state, as defined by the new law, under and by virtue of a non-competitive examination may be continued in such position after the new act goes into effect, when there is an eligible list, is for the appointing officer, acting in accordance with section 486-13, to report his appointment to the civil service commission. It is clear at least that some positive and unequivocal act on the part of the appointing authority is necessary in order to constitute an "appointment," and that such persons under the circumstances named may not continue to occupy their positions without such an appointment.

Your question does not require me to go so far as to determine what would constitute an "appointment." I incline to the view that section 486-13, above quoted, is directory merely, except as enforced by section 286-21 of the new law, which authorizes the proper civil service commission to refuse to certify to a pay roll containing the names of persons not employed in pursuance of the law and the rules adopted thereunder. By virtue of this provision a proper civil service commission has it in its power to prevent such a person from receiving compensation for services rendered after the act goes into effect when not appointed under the new act. But in my judgment the civil service commission may, in cases where substantial justice requires it, waive some of the technical requirements of section 486-13, if satisfied that the appointing authority by some unequivocal act has indicated an intention to reappoint the incumbent who has theretofore held under and by virtue of a non-competitive examination, and may certify to a pay roll containing the name of such person on account of services rendered after the new law goes into effect.

I should prefer, however, not to express any positive opinion with respect to this type of questions, for I apprehend that when the new law goes into effect there may be a large number of such questions and each one of them would have to be answered according to its own peculiar facts.

Unless, however, a reappointment is made, or unless the incumbent has continuously and satisfactorily served the state or one of its political subdivisions for the prescribed period prior to January 1, 1915, or unless the retention of the incumbent is provisional as authorized in section 486-13 as amended by the new act, the persons in the class concerning which you inquire will, when the new law

goes into effect, no longer be entitled to act as officers or employes of the state or any of its political subdivisions unless they are brought into the unclassified service by the provisions of the new law. Under such circumstances, it will be the duty of the proper civil service commission to refuse to approve the pay roll on which the name of such a person appears, for and on account of services rendered after the new law goes into effect.

Respectfully,
EDWARD C. TURNER,
Attorney General.

707.

BOARD OF ADMINISTRATION—APPROPRIATION FOR SALARIES "MINOR OFFICERS AND EMPLOYES"—AVAILABLE ONLY FOR COMPENSATION OF MINOR OFFICERS AND EMPLOYES IN STATE INSTITUTIONS—CANNOT PAY SALARY OF CLERK IN ADMINISTRATIVE OFFICES OF BOARD.

The appropriation account for salaries of "minor officers and employes" in the list of appropriations for the board of administration is available only for the compensation of minor officers and employes in the state institutions under the management of said board, and may not be expended in the payment of the salary of a clerk in the administrative offices of the board.

COLUMBUS, OHIO, August 9, 1915.

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

DEAR SIR:—In your letter of August 3rd, you request my opinion as follows:

> "In house bill No. 701, page 2, under the appropriations made to the Ohio board of administration, appears the following:
> "'Minor officers and employes, $1,305,100.00'
> "1. Define what constitutes 'minor officers.'
> "2. Could the board of administration employ a clerk in the administrative offices and pay him from this appropriation?"

The appropriation bill, insofar as it applies to the Ohio board of administration, follows the budgetary form used throughout the measure. In accordance with that form there are specific appropriations for "salaries, A 1," a lump sum appropriation for "wages, A 2," and a lump sum appropriation for "unclassified personal service, A 3;" but this last item is limited in this instance to "prisoners' compensation."

The appropriation of which you speak is the only exception to the rule of specific salaries. Thus there is an appropriation for the salaries of the four members of the board, one for that of the fiscal supervisor and secretary, one for that of the consulting engineer, etc. I find also appropriations for the salaries of "chief clerk fiscal department," "chief clerk purchasing department," "2 voucher clerks," "9 clerk-stenographers," "filing clerk," and two separate specific appropriations for the salary of a "clerk" without any modifying adjective.

Obviously, all the items for salaries of positions such as those just referred to are appropriations for the administrative offices of the board of administration.

After some twenty-three such items, including the two for "clerk" above referred to, however, come, in the list of appropriations, the following two items which are in the order named:

"19 managing officers ---------- $46,100 00
"Minor officers and employes----------1,305,100 00"

Following these two items in the bill are specific appropriations for salaries of the department of juvenile research, headed as such.

Having regard to the powers and duties of the board of administration, and particularly to the fact that its principal, if not its only function, is to act as a central board of trustees or managers for all state institutions, with certain specific exceptions, it is very clear that the item for "19 managing officers" is intended to pay the salaries of superintendents and wardens of the various institutions.

The meaning of the phrase "minor officers and employes" is suggested by the connection in which it appears in the bill, and by the fact that there is nowhere in the appropriation bill any appropriation for the services of the great army of minor officers and employes in the various institutions, such as deputy wardens, assistant superintendents, matrons, physicians, chaplains, attendants, laborers, etc. Unless the appropriation account covers the personal service of such persons, there is no provision in the bill therefor.

On the contrary, the intention of the legislature to refer to such "minor officers and employes" in connection with the institutions of the state as such is reasonably clear. In my opinion, the words "minor officers and employes" mean the minor officers and employes of the several state institutions under the control and management of the board of administration.

It is true that the legislature might have been more specific in the use of language than it has been. However, it has made specific appropriations for the "minor officers and employes" of the central offices of the board. It has expressed its will as to the salaries of clerks who shall be employed by the board of administration in its general offices, and has gone into great detail in doing so. It will not be presumed that the legislature did specifically enumerate and separately set up the appropriation accounts for the salaries of such officers and employes in the central offices and at the same time make a lump sum appropriation even partially available for similar purposes, if another application of its language in making such lump sum appropriation is suggested.

Summarizing then: For the reason that there are numerous specific appropriations for salaries in the central offices; for the reason that the item for "minor officers and employes" is found in juxtaposition with the item "19 managing officers" and has obvious reference to the institutions; and for the reason that "minor officers and employes" standing by itself has primary application at least to the minor officers and employes of the institutions, as distinguished from the minor officers and employes of the board; and for one additional reason not yet mentioned, namely, because the statutes relative to the powers and duties of the board of administration provide for but one "minor officer" of the board, namely, the fiscal supervisor and secretary, whose salary is otherwise provided for, whereas there are numerous "minor officers" of the institutions as such, which indicates the exclusive application of the term to the institutional officers and employes, I am of the opinion that a "minor officer," within the meaning of the item of the appropriation bill referred to by you, is an officer of one of the state institutions under the control and management of the board of administration.

The same rule applies to the definition of the word "employes" as used in the same appropriation account, from which it follows that your second question must be answered in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney General.

708.

OFFICES INCOMPATIBLE—COUNTY SURVEYOR—MEMBER OF CITY BOARD OF EDUCATION AND CLERK THEREOF.

The offices of county surveyor and member of city board of education and clerk thereof are incompatible and cannot legally be held by the same person.

COLUMBUS, OHIO, August 9, 1915.

HON. DONALD F. MELHORN, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—Your letter of July 28, 1915, requesting my written opinion, received and is as follows:

> "The surveyor-elect of Hardin county is a member of the board of education of the city school district of Kenton, Ohio. He desires to know whether there is any legal barrier to his holding both offices."

Also your letter of August 3, 1915, as follows:

> "I desire to supplement my letter to you of July 28, 1915, with the information that the surveyor-elect of Hardin county is not only a member of the board of education of the city school district of Kenton, Ohio, but he is also the clerk of said board."

The answer to your question depends, first, upon whether or not there is any statutory inhibition against one person holding the two offices mentioned and, second, whether there is any relation existing between the duties of the two offices which would make the holding of both by the same person incompatible.

The only statutory inhibition of this character relative to county surveyors is section 2783, G. C., which provides as follows:

> "No person holding the office of clerk of court, sheriff, county treasurer or county recorder, shall be eligible to the office of county surveyor."

There is no such express provision with reference to members or clerks of boards of education.

There being no statutory inhibition against the holding of the two offices by the same person, an examination of their duties must be made to ascertain whether they come within the rule of incompatibility. This rule is laid down in 28 Cyc., 1381, as follows:

> "It may be laid down as a rule of the common law that the holding of one office does not in and of itself disqualify the incumbent from

holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But at common law two offices whose functions are inconsistent are regarded as incompatible."

Also Dillon on Municipal Corporations, page 166 (note):

"Incompatibility in office exists where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one incumbent to retain both."

Section 2792 of the General Code, prescribes the duties of the county surveyor as follows:

"The county surveyor shall perform all duties for the county now or hereafter authorized or declared by law to be done by a civil engineer or surveyor. He shall prepare all plans, specifications, details, estimates of cost, and submit forms of contracts for the construction or repair of all bridges, culverts, roads, drains, ditches and other public improvements, except buildings, constructed under the authority of any board within and for the county. When required by the county commissioners, he shall inspect all bridges and culverts, and on or before the first day of June of each year report their condition to the commissioners. Such report shall be made oftener if the commissioners so require."

Section 4736 of the General Code, (104 O. L., 138) prescribes additional duties of the county surveyor. Said section authorizes the county board of education to make certain changes in boundary lines and further provides:

"In changing boundary lines and other work of a like nature the county board shall ask the assistance of the county surveyor and the latter is hereby required to give the services of his office at the formal request of the county board."

Section 6510, of the General Code, with reference to construction of county ditches, provides as follows:

"The board of education of a district interested in land granted by congress for the support of common schools, unless such lands have been permanently leased, and of a district owning or holding other land for school purposes, when an assessment is made upon such land, or part thereof, under the provisions of this chapter, shall pay such assessment out of the contingent fund of the district, and if necessary for that purpose, may increase the levy for such fund otherwise authorized by law."

And section 6455, G. C., prescribes duties of county surveyor regarding same as follows:

"The county commissioners, by such order, shall direct the county surveyor or engineer to make and return a schedule of the lots and lands, and public or corporate roads or railroads that will be benefited, with an apportionment of the cost of location, and the labor of constructing the improvement, in money, according to the benefits which will result to each. In apportioning the costs of such improvement, the benefits to any lots or

lands by diking them, in whole or in part, shall be considered with other benefits, and a specification of the manner in which the improvement shall be made and completed, the number of flood-gates, waterways, farm crossings and bridges necessary, including kinds and dimensions thereof, and all county and township lines and railway crossings."

Section 4680 of the General Code, provides as follows:

"Each city, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, shall constitute a city school district."

County surveyors, therefore, have duties to perform with reference to the establishment of county ditches and under section 6510, supra, a portion of the cost thereof may be assessed against and paid by a school district. County surveyors also have certain duties to perform in the establishment of boundary lines of certain school districts. Inasmuch as a city school district may be partly outside the limits of a municipal corporation, such school district may become interested in the establishment of a county ditch, or the boundary line of a school district, in a manner adverse to the county or the county board of education, in either of which cases the county surveyor in his official capacity as a county officer has certain duties to perform. The possible conflict between the duties of the two offices brings them within the rule of inconsistency above laid down and it would be against public policy for a county surveyor to act as a member or clerk of a city school district.

I also call your attention to senate bill No. 125, which will become effective September 4, 1915, section 138, of which provides:

"The county surveyor shall be the county highway superintendent. The county surveyor shall give his entire time and attention to the duties of his office."

as an additional reason why the county surveyor should not be either a member or clerk of a city school district for it would be manifestly impossible for him to discharge the duties of either of those offices without interference with the duties placed upon him as county surveyor.

I am therefore of the opinion that the offices of county surveyor and member of the board of education of a city school district, or clerk of such board, are incompatible and may not legally be held by one and the same person.

Respectfully,
EDWARD C. TURNER,
Attorney General.

709.

MUNICIPAL CORPORATION—COUNCIL OF VILLAGE—MEMBER THEREOF CANNOT LEGALLY BE PAID FOR SERVICES IN FUMIGATING QUARANTINED PREMISES.

A member of the council of a village cannot legally be paid for services in fumigating quarantined premises.

COLUMBUS, OHIO, August 10, 1915.

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

GENTLEMEN:—Your letter of July 3, 1915, requesting my opinion, received and is as follows:

> "May a member of the council of a village be legally paid for services in fumigating quarantined premises, or would such payment be in contravention of law as found in sections 3808, 4218 and 12912, General Code, or either of said sections? Attorneys for claimant cite 2 O. C. C., (N. S.) 167, as authorizing said payment."

Section 3808, G. C., provides:

> "No member of the council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, or if in office he shall be dismissed therefrom."

Section 12912, G. C., provides:

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

Both of the foregoing sections by their express terms apply to a member of council of a municipal corporation, one of them providing that no member of council shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation and the other providing that no member of council shall be interested in the profits of any contract, job, work or services for such corporation.

Section 4209, G. C., (106 O. L., 114) fixes the compensation of members of council of cities and section 4219, G. C., fixes the compensation of members of council of a village. Therefore any payment to a member of council for services

rendered to a municipal corporation would be other than his fixed compensation and is prohibited by section 3808, supra, and would subject him to the penalties therein prescribed. Such payment would also constitute an interest in the profits of services for the corporation and would render the member of council liable to prosecution under section 12912, supra.

Section 4218, G. C., to which you call attention, provides as follows:

> "Each member of council shall have resided in the village one year next preceding his election, and shall be an elector thereof. No member of the council shall hold any other public office or employment, except that of notary public or member of the state militia, or be interested in any contract with the village. Any member who ceases to possess any of the qualifications herein required or removes from the village shall forfeit his office."

This section applies to villages and section 4207, G. C., contains a similar provision with reference to cities. Clearly the facts submitted by you would constitute such an interest in a contract with the city or village as is prohibited by these sections.

You call attention to the case of State ex rel. Miller v. Council of Massillon, 2 O. C. C., (n. s.) 167, claimed by the councilman in question to be authority for payment by the council for these services. An examination of that case will show that while it is authority for the proposition that it is mandatory upon the council to create a board of health, upon the board of health to appoint a health officer and fix his salary, and upon the council to appropriate money to pay such officer, the question of whether a member of council could perform the duties of a health officer and receive compensation therefor was not involved.

Section 4404 of the General Code, provides for the establishment by council of boards of health and appointment of the members thereof by the mayor and in villages a health officer may be appointed by council. Clearly it would be not only a violation of the provisions of sections 4207 and 4218 supra, but also against public policy for a member of council, the body which creates the board of health or in villages having no board of health appoints the health officer, to be appointed as such health officer. The holding of the position of health officer by a member of council is prohibited by these sections whether it be an office or whether it be a mere employment. The claim, therefore, not being in favor of a duly appointed health officer cannot be within the holding of the case of State ex rel. Miller v. Council of Massillon, supra.

I am therefore of the opinion that a member of council cannot legally be paid for services in fumigating quarantined premises.

Respectfully,
EDWARD C. TURNER,
Attorney General.

710.

MUNICIPAL CORPORATION—TEMPORARY POSITION ON POLICE FORCE TO TAKE THE PLACE OF MEN UNDER CIVIL SERVICE—PAINE LAW—MAYOR HAS NO AUTHORITY TO APPOINT OFFICER OUTSIDE OF CLASSIFIED SERVICE TO TAKE PLACE OF REGULAR POLICEMEN ON VACATIONS.

S was appointed from time to time to a so-called temporary position on the police force of a certain city, where the civil service provisions of the municipal code as they existed prior to January 1, 1914, *were in force. S served in place of regular members who were on their vacations. He was appointed by the mayor outside of the civil service rules and regulations. Such appointment was void; S received no pay for fifteen days of such service and he has no legal claim therefor.*

COLUMBUS, OHIO, August 10, 1915.

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

GENTLEMEN:—In two letters, one under date of July 16th, and the other under date of July 29th, Hon. A. A. Porter, solicitor of the city of Zanesville, has requested my advice upon facts therein stated. Deeming the questions involved of sufficient general importance, I have determined to address an opinion thereon to the bureau of inspection and supervision of public offices.

The facts involved are as follows:

One S was repeatedly (though not, so far as the statement shows, so as that his service was continuous at all times) appointed by the mayor of Zanesville to a temporary position on the police force to take the place of men under civil service, who were sick or on their annual vacations. At the times at which such appointments were made there was an eligible list from which regular appointments might have been made. The name of S was not on such eligible list, although he had passed the examination. There was at no time any exigency or emergency requiring the appointment of a special patrolman. The statement of the solicitor is that there are twenty-three regular patrolmen and each are entitled under the ordinance to two weeks' vacation; and that whenever one was absent on his vacation S was appointed to take his place; so that while the statement is not made that the service of S had been continuous, it is evident that it had been practically so, and that in substance, if not in form, he was the occupant of a regular position under successive temporary appointments.

The last appointment of S under the circumstances named was made on February 1, 1913. He performed services under such appointment for a period of fifteen days, when the auditor refused to issue him a warrant for his semi-monthly pay. He thereupon quitted the service of the city and did not offer to perform any further services. Now, however, he threatens to bring suit against the city for the recovery of his pay for the fifteen days for which he has not been paid, relying upon a decision of the court of common pleas of Muskingum county, a copy of which is attached to the city solicitor's letter.

The question is as to whether or not under the circumstances named S has a claim against the city of Zanesville which the solicitor or the council would be justified in allowing without suit.

Ordinarily I would decline to express an opinion in respect to a question that is in litigation or is likely to be litigated. In this case, however, the administrative authorities of the city must determine what course to pursue. I therefore do not regard it as within the rule which would restrain me from an expression of opinion.

The first question which arises is as to the validity of the appointment under which S was serving when he performed the services for which he demands compensation. For if that appointment was valid, then as a matter of course he is entitled to his pay.

It will be observed that the question arises under the civil service provisions of the municipal code, familiarly designated as the "Paine Law," and not under the present civil service law of the state, which, on January 1, 1914, supplanted the Paine law.

The sections of the General Code which are involved are as follows:

> "Sec. 4382. The director of public safety shall classify the service in the police and fire departments in conformity with the ordinance of council determining the number of persons to be employed therein, and shall make all rules for the regulation and discipline of such departments, except as otherwise provided in this subdivision.
>
> "Sec. 4481. Appointments (to positions in the classified service) shall be made in the following manner: The appointing board or officer shall notify the commission of any vacancy to be filled. The commission shall thereupon certify to such board or officer the three candidates graded highest in the respective lists as shown by the result of such examination. Such board or officer shall thereupon appoint one of the three so certified. Grades and standings so established shall remain the grades for a period of six months, or longer if the commission so determines, and in succeeding notifications of vacancies, candidates not selected may be dropped by the commission after having been certified a total of three times.
>
> "Sec. 4488. To prevent the stoppage of public business or to meet extraordinary exigencies, as provided in this title, the mayor may make temporary appointments.
>
> "Sec. 4373. In case of riot or other like emergency, the mayor may appoint additional patrolmen and officers for temporary service, who need not be in the classified list of such department. Such additional officers or patrolmen shall be employed only for the time during which the emergency exists."

Upon consideration of the foregoing sections the following conclusions are suggested:

First, council is to determine the number of persons to be employed in the department of public safety, including the police department. No executive officer of the city has any right to enlarge, upon any pretext whatsoever, the regular force of the police department. If that force is insufficient the remedy lies with council. An appointment of an additional member of the police force made upon the plea that more members are necessary than the regular staff is illegal.

In the second place, all appointments in the regular service, as classified by the director, must be made from the eligible lists. An appointment to a position in the classified service otherwise made is void. This was the decision in State ex rel. v. Lea, 10 N. P., (n. s.) 364, affirmed, 15 C. C., 28, and this decision is not altered in my opinion by the case of State v. Keefer, 16 N. P., (n. s.) 145, affirmed, 20 C. C., (n. s.) 474, because that case presented an instance of an appointment

to a regular position in the classified service made by the mayor under his power to make such appointments to prevent the stoppage of public business, *when there was no eligible list from which a regular appointment could have been made.* In the case submitted by the solictor of Zanesville there was an eligible list from which a regular appointment could have been made.

But appointments may be made, or rather could have been made under the law in force at the time the facts stated by the solicitor occurred outside of the civil service regulations by the mayor, under two conditions or circumstances, viz.:

(1) In case of riot or other like emergency. (Sec. 4373, G. C.)

(2) To prevent the stoppage of public business or to meet extraordinary exigencies "as provided in this title." (Sec. 4488, G. C.)

The two statutory provisions last above referred to overlap in part, for the phrase "to meet extraordinary exigencies as provided in this title" manifestly refers to the provisions of section 4375, and does not enlarge the effect of the latter provisions.

It follows therefore that the only contingencies upon which a mayor might make an appointment outside of the regular civil service regulations to a position in the police or fire department, under the laws as they existed at the time, were the existence of a riot *or other emergency like a riot,* or to prevent the stoppage of public business.

The facts clearly show an absence of the existence of either of these contingencies. There is no claim that there was any riot or any emergency like a riot justifying the appointment of S by the mayor. The only claim which could be made was that the appointment of S was necessary in order to prevent the stoppage of public business. This claim, however, cannot be sustained upon the facts stated by the solicitor, for it is my opinion that an insufficiency in the number of regular patrolmen provided by the ordinance of council will not justify successive temporary appointments so made as to call for services practically, if not actually, continuous, on the plea that the public business will be stopped if such appointments are not made. It is manifest that public business would not have been stopped had S not served. Moreover, the appointments of S, while temporary in form, were such as to make his service substantially regular. If the necessities of the city of Zanesville required that because of the vacations allowed to partolmen another position should be added to the force, that, as I have pointed out, could have been lawfully accomplished only by action of council in increasing the number of regular patrolmen.

I am of the opinion, therefore, that the appointment under which S was serving in February, 1913, was void.

This conclusion raises the further question as to whether or not S is entitled to compensation for services actually rendered. The answer to this question is dependent, in a way at least, upon the question as to whether S was appointed as an officer or as an employe. This question, however, is determined by the decision of the supreme court in the case of State v. Baldwin, 77 O. S., 532, wherein it is held in substance that a member of the police department is an officer of the city. The same conclusion has been arrived at in other cases decided by inferior courts of this state.

It is the general rule which is followed in Ohio that a *de facto* officer cannot recover compensation pertaining to the office for services rendered by him. That is to say, the rule in full is that the disbursing officer will be protected if he pays compensation to the *de facto* officer for services actually rendered, but that if he refuses to pay he cannot be compelled to do so. I refer to the case of State

ex rel. v. Newark, 6 N. P., 523 Ermston v. Cincinnati, 7 N. P., 635. Both of these cases refer to numerous authorities, and I am satisfied that they lay down the rule which must be followed in Ohio.

It is clear, of course, that S was a *de facto* officer, and his acts as such were valid; but he was not a *de jure* officer, because his appointment was void and he had no title to the office. Payment of compensation for services rendered by him as such *de facto* officer having been refused, the same cannot be compelled and he cannot, in my opinion, recover a judgment against the city on that behalf.

The case decided by the common pleas court of Muskingum county and referred to by the solicitor is, in my opinion, clearly distinguishable from the case about which the solicitor now inquires. In that case, the plaintiff was an employe in the department of service under the street superintendent. It appeared that *the street superintendent* had been unlawfully appointed, and on that ground payment of wages and other compensation of persons employed by him while acting as street superintendent was refused. It also appeared that the plaintiff had taken a civil service examination given by a civil service board which was subsequently held to have been illegally appointed.

The plaintiff in the case mentioned recovered judgment against the city of Zanesville, and such judgment was undoubtedly proper, for the relation sustained by him toward the city was that of an employe thereof, and not an officer. His contract of employment with the city and his qualification to make such a contract by satisfying the requirements of the civil service law were both valid as against the city, because the city had acted in the premises through *de facto* officers, the illegally appointed civil service commission and the illegally appointed street superintendent. The acts of these illegally appointed officers were binding upon the city and in favor of third parties sustaining a contractual relation to the city and dealing with such officers. This is the most familiar feature of what is known as the "*de facto* doctrine."

In the case which I have considered, however, the claimant himself was a *de facto* officer, and his right to recover compensation is measured by the rules applicable to *de facto* officers. He was not relying upon the action of some other *de facto* officer, and did not sustain any contractual relation to the city as the result of such reliance.

For all of the above reasons, it is my opinion that the officials of the city of Zanesville should resist the claim of S.

Respectfully,
EDWARD C. TURNER,
Attorney General.

711.

BANKS AND BANKING—STATE BANK MAY MAKE CONTRIBUTIONS OR DONATIONS TO PROMOTE CORPORATE PURPOSES—BOARD OF DIRECTORS MUST SO AUTHORIZE UNLESS OTHERWISE PROVIDED.

A corporation, by action of its proper officers, may make contributions or donations of corporate funds for lawful purposes when the primary object of making such contributions and donations is to advance and promote the corporate purposes.

Unless regulations to the contrary have been adopted by stockholders of an incorporated bank, under section 9714, G. C., such contributions and donations must be authorized by action of the board of directors.

COLUMBUS, OHIO, August 10, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of July 10, 1915, requesting my opinion as follows:

> "We have been asked a number of times as to whether or not a state bank can legally make contributions or donations without a resolution of its board of directors.
>
> "Kindly advise us."

From the language of your letter I assume that your question refers only to incorporated banks.

Your inquiry suggests a broader and more important question which must first be answered, i. e., have the directors, or any or all of the officers, of an incorporated bank authority to make contributions or donations of its corporate funds and assets; in other words, is such an act the exercise of a proper corporate function or is it unauthorized and ultra vires?

The funds and assets of a corporation are held and managed by its proper officers in trust and such officers may disburse the corporate funds only to advance and promote lawful corporate purposes and objects. The courts of the several states are divided upon the question, but the greater and better weight of authority seems to hold that contributions and donations made by a corporation, through its officers, not to advance the corporate interests, but purely for public or charitable purposes, and with no other end or object in view, are unauthorized and ultra vires, and the officers making the same may be required to make restoration to the corporate funds.

If, however, the purpose of the contributions or donations is lawful, and the primary object in making the same is to advance and promote the corporate purposes, either directly, so that immediate return may reasonably be anticipated, or indirectly, through the creation of favorable public sentiment, such contributions or donations are authorized as being in the nature of an expenditure for advertising purposes.

Hotel Company v. Military Encampment, 140 Ill., 248:

> "A subscription by an incorporated hotel company to a contemplated corporation for the purpose of establishing and holding in or near a city in which the hotel company is located and transacts its business, an international military encampment which might bring large numbers of

strangers to the city and thus largely increase the business of all the hotels therein, is not so foreign to the business of keeping hotel as to call for the application of the doctrine of ultra vires."

Greene v. Blodgett, 55 Ill., App. 568:

"Effort to attract public attention and thus secure additional trade, has become a legitimate part of the business of tradesmen and corporations, in nearly all lines of trades and business. A contract made by the general manager of a business corporation with a public newspaper to advertise the business of the firm, or with a signwriter to paint or post signs in conspicuous places, to bring its business prominently before the public, would be regarded as properly within the scope of his authority and power as an agent of the company.

"A contract of subscription by a corporation to pay a sum named as an inducement to the selection of a site for a postoffice adjoining its place of business, where such selection and location would be of direct financial and business advantage and benefit to it, is within the scope of its authority and will be binding in law."

At page 562 of the opinion the court uses this language:

"It is believed that efforts to attract public attention and thus secure additional trade have become a legitimate part of the business of tradesmen and corporations in nearly all lines of business. Large sums of money are devoted to this purpose annually by firms and managers of corporations. Such outlays are now regarded as part of the legitimate expenses of a firm or corporation engaged in selling wares to the public as fully as the cost of advertising in the newspapers, of rent, insurance, clerk hire, taxes, etc."

Steinway v. Steinway & Sons, 40 N. Y., Supp., 718:

"1. It is not ultra vires for a manufacturing corporation to purchase a large tract of land for the purpose of erecting thereon its factory and residences for its employes, and to contribute toward the establishment there of a church, a school, a free library, and a free bath for its employes.

"2. It is not ultra vires for a manufacturing corporation to give away some of its manufactured goods for the purpose of extending the reputation thereof."

See, also:

Whetstone v. Ottawa University, 13 Kan., 320;
"Ft. Worth City Co. v. Smith Bridge Co., 151 U. S., 294;
Holt v. Winfield Bank, 25 Fed., 812.

Coming now to the specific question asked by you, and assuming that the contributions and donations referred to are made for the purpose of promoting the corporate objects, I call your attention to sections 9709 and 9714 of the General Code, found in the chapter relating to the organization and powers of banks, which are as follows:

"Sec. 9709. Regulations of the corporation may be adopted or changed by the assent thereto, in writing, of two-thirds of the stockholders, in number and amount or by a majority of the stockholders, in number and amount, at a meeting held for that purpose, notice of which has been given for that purpose by the president or secretary or any two directors personally or by written notice to each stockholder, or by publication, for thirty days, in some newspaper of general circulation in the county in which the corporation is located."

"Sec. 9714. In all other respects, such corporation shall be created, organized, governed and conducted in the manner provided by law for other corporations insofar as not inconsistent with the provisions of this chapter."

Section 8660 of the General Code, relative to corporations generally, is as follows:

"The corporate powers, business and property of corporations formed under this title shall be exercised, conducted, and controlled by the board of directors; or, if there is no capital stock, by the board of trustees."

Under the provisions of sections 9714 and 8660, quoted above, the directors of a banking corporation have full control of its business and property unless the stockholders themselves, by regulations adopted under section 9709, have otherwise provided. If regulations to the contrary have not been adopted by its stockholders, subscriptions and donations made by a banking corporation should be authorized by action of its board of directors. This authorization may be by general resolution conferring such authority upon some one or more of the executive officers of the bank, or by special resolution adopted in each particular instance.

In arriving at the conclusions above expressed, I have assumed that the contributions and donations referred to in your letter were such as might lawfully be made by a corporation. I think it proper, therefore, to call your attention to the provisions of section 13320 of the General Code, making it unlawful for a corporation to make contributions and donations to a political party, committee or organization, or in aid of a candidate, or to use money or property for any political purpose. Contributions and donations for such purposes cannot, of course, be lawfully made by a corporation through any of its officers.

Respectfully,
EDWARD C. TURNER,
Attorney General.

712.

FOREIGN BREWING COMPANY—MAY NOT SHIP TO COLD STORAGE WAREHOUSE IN THIS STATE FROM WHICH SALES ARE MADE BY MANAGING AGENT OF COMPANY IN THIS STATE—BEER SO MANUFACTURED CANNOT BE SOLD FROM WAGONS OWNED BY SUCH FOREIGN BREWING COMPANY, WITHOUT OBTAINING STATE LICENSE.

A non-resident brewing company which operates a brewery in another state may not ship the product of the same to a cold storage warehouse in the state of Ohio from which sales of beer are made by a managing agent of the company in this state nor may such company make sales of the beer, so manufactured in another state, from wagons owned by such foreign brewing company in this state without first procuring a license to engage in the business of trafficking in intoxicating liquors and paying the Dow-Aiken tax.

COLUMBUS, OHIO, August 10, 1915.

HON. BEN A. BICKLEY, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—Your letter of July 21, 1915, requesting my opinion, received and is as follows:

> "Can a brewing company non-resident of the state of Ohio and whose brewery is located in a sister state, and who ships its beer from its brewery to a cold storage warehouse in the state of Ohio, said cold storage warehouse being the property of, owned, and controlled by the foreign brewing company and in charge of a person designated as a 'managing agent' of said foreign company, sell beer from said cold storage warehouse in quantities of one gallon or more or from wagons owned by said foreign brewing company and operated from said cold storage warehouse, to customers who are duly licensed to retail intoxicating liquor, without securing a wholesale liquor license and paying the Dow tax?"

Your inquiry insofar as it relates to sales from a cold storage warehouse was considered in an opinion of my predecessor, Hon. Timothy S. Hogan, which may be found at page 781 of the report of the attorney general for the year 1913, a copy of which is herewith enclosed, the conclusion of which was as follows:

> "It is my opinion, therefore, that a managing agent of and for a foreign brewery could not deliver beer from its storehouse in this state on orders previously solicited by said agent from customers within this state, without said brewery having a license authorizing such sale of intoxicating liquors in the particular county in which, and at the place the business was being conducted. Further, it is my opinion that such foreign brewery could only have a license to do business at one place within the state, and could not be interested, directly or indirectly in any other place where intoxicating liquors were sold as a beverage."

In this opinion and the reasons upon which the conclusion is founded I concur.

Since the terms of the exception found in the definition of the phrase "trafficking in intoxicating liquors," section 6065, G. C., 103 O. L., 241, and applicable to the Dow-Aiken tax as provided in section 6071, G. C., 103 O. L., 241, et seq., are

substantially the same as that of section 1261-63, G. C., 103 O. L., 237, in respect to the manufacture of intoxicating liquors from the raw material and the sale thereof at the factory, it would therefore follow that such foreign brewery would also be liable for the tax provided in section 6071, G. C., above referred to, upon sales made from the warehouse located in this state.

Under the provisions of sections 6065 and 1261-63 supra, there is made a further exception from the operation of both the license law and the Dow-Aiken law of sales of intoxicating liquors in quantities of one gallon or more from the wagon or other vehicle of the manufacturer to the holder of a liquor license or to individual consumers where the liquors are delivered to the homes of such consumers in territory wherein the sale of intoxicating liquors is not prohibited by law.

There then remains to be considered the other provision of sections 6065 and 1261-63, G. C., supra, as to sales from wagons, it being settled that sales made from the warehouse under the conditions outlined in your letter are "trafficking in intoxicating liquors." Can it be said that loading the beer on wagons at the warehouse and then selling from the wagons changes the character of the business so as to avoid the payment of the tax and the necessity of license? It is hardly to be considered that the legislature intended arbitrarily to do a thing for which there would be so little foundation in reason. It would seem that the legislature having in mind the existing state of the law, which permitted a manufacturer to sell under certain limitations without license and without tax at the factory, intended to provide that the liquor which could be so sold at the factory might be sold from wagons without the necessity of the order being actually transmitted to the factory before delivery.

With this apparent intention of the legislature in mind it remains to be seen whether they have used words to carry that intention into effect. An analysis of section 6065 supra, will, I believe, show that the language used is susceptible of such an interpretation. The first thing excepted by that section is the manufacture of intoxicating liquors from the raw material. The state has no authority to legislate for the purpose of imposing or exempting from a tax or license the manufacture of intoxicating liquors from the raw material in another state, hence it must be said that this particular part of the section applies only to intoxicating liquor manufactured in Ohio. With this in view the following phrase which provides: "and the sale *thereof* by the manufacturer *thereof*" can only mean the sale of intoxicating liquor manufactured in Ohio, and the additional phrase "or the sale *thereof* in said quantities from the wagon or other vehicle of the manufacturer" can likewise only mean a sale of intoxicating liquors manufactured in Ohio. The word *thereof* as used in this subsequent phrase can only refer to the intoxicating liquor mentioned in the first phrase of the sentence and if that phrase means intoxicating liquor manufactured in Ohio, then the subsequent phrase can only mean the same thing.

This interpretation suggests another view of this case. In enforcing its laws regulating the sale of intoxicating liquors is the state to look at the business in which the company is engaged in some other state, an activity over which the state has no control, or only at the business conducted within the state and over which the state does have control? Here is a company engaged in a certain business in this state, to wit: the sale of intoxicating liquors, and that business is being conducted in the same manner as any wholesale liquor dealer would conduct his business. Is it not proper for the state to place such a company in the same class as other corporations or persons engaged in the same kind of business in the state and apply the laws accordingly? Why should the state inquire as to what other kind of business the corporation or person might be doing in another state?

This particular company is clearly doing a wholesale liquor business in the state of Ohio and as such is subject to the laws governing such business, and the situation is not changed by the fact that such a company may be doing a manufacturing business in another state.

For all of the foregoing reasons I am of the opinion that the brewing company in question is not such a manufacturer of intoxicating liquor as is contemplated by the definition contained in section 6065 supra, and the business being carried on by the company in this state is trafficking in intoxicating liquors and such company is subject to the payment of the Dow-Aiken tax.

The same reasoning applies in the interpretation of section 1261-63, the exemption provisions therein being substantially the same as those of section 6065, G. C., and I am of the opinion that such a company must secure a license.

Respectfully,
EDWARD C. TURNER,
Attorney General.

713.

STATE BOARD OF HEALTH—APPROVAL OF ORDER RELATIVE TO POLLUTION OF COUNTY INFIRMARY DITCH, SUMMIT COUNTY, SEWAGE FROM CITY OF AKRON.

COLUMBUS, OHIO, August 10, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Enclosed herewith please find order of the state board of health relative to the pollution of the county infirmary lateral ditch, Portage township, Summit county, Ohio, by improperly treated sewage from the city of Akron.

I have examined the order, which is issued under section 1251 of the General Code of Ohio, find the same regular, and it is my opinion that it should be approved, having myself approved the same under the provisions of section 1251, G. C., I am transmitting to you the order for your approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

714.

BOWLING GREEN STATE NORMAL COLLEGE—CONTRACT BETWEEN BOARD OF TRUSTEES AND THE LAKE ERIE, BOWLING GREEN AND NAPOLEON RAILWAY COMPANY, FOR ELECTRIC LIGHT AND POWER FOR COLLEGE, APPROVED.

COLUMBUS, OHIO, August 11, 1915.

HON. J. E. SHATZEL, *Secretary, Board of Trustees, Bowling Green State Normal College, Bowling Green, Ohio.*

DEAR SIR:—I return herewith the draft of the proposed contract between the board of trustees of the Bowling Green State Normal College and The Lake

Erie, Bowling Green and Napoleon Railway Company for electric light and power, together with a certified copy of the order of Judge Killits, of the district court of the United States for the northern district of Ohio, western division, authorizing the receiver of the railway company to enter into the contract and ordering that in case the receivership is terminated prior to the termination of the contract, the purchaser of the power house and lighting plant now in charge of the receiver shall be required to fulfill the contract as fully as the receiver would had he remained in control of the property.

The contract is very well drawn indeed, and I hereby approve its form.

There is, however, one contingency that is not providing against and, though it be a remote one, in my judgment it should be provided against in the contract. The eight article of agreement provides generally that upon the termination of the contract the board of trustees of the normal college shall have the option to purchase the property of the receiver furnished in accordance with certain other articles of agreement, at the fair replacement value thereof, which is to be ascertained in case the parties can not agree upon it by arbitrators, one of whom shall be appointed by each party and the third of whom shall be selected by the two thus appointed. If these arbitrators are to receive compensation, then a method of paying their compensation should be provided in the contract; otherwise some question may arise with respect to this detail.

Respectfully,
EDWARD C. TURNER,
Attorney General.

715.

COUNTY COMMISSIONERS—COUNTY ROAD ESTABLISHED UNDER SECTION 6860, G. C., ET SEQ.—IF TOWNSHIP TRUSTEES FAIL TO OPEN ROAD AS ORDERED, PROPERTY OWNERS UNDER AUTHORITY OF SAID COUNTY COMMISSIONERS, MAY OPEN SUCH ROAD AND REMOVE ALL OBSTRUCTIONS—COUNTY OR TOWNSHIP PAYS NO PART OF EXPENSE.

Where a county road has been laid out and established by the commissioners of such county, under authority and in compliance with the requirements of section 6860, et seq., G. C., and the trustees of the township in which said road is located, having been ordered to open the same, fail to do so, the owner or owners of property along the line of said road, acting under authority of said county commissioners may open said road and remove all obstructions therefrom, providing the same is done without expense to the county or to said township.

COLUMBUS, OHIO, August 12, 1915.

HON. C. ELLIS MOORE, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—I have your letter of August 3, 1915, which is as follows:

"I am requested to secure from you an opinion concerning a road in this county of which the following is a statement of the facts relating thereto.

"This road is in Jefferson township, Guernsey county, which road was allowed and established by the county commissioners, July 6, 1909; September 21, 1909, the county auditor issued an order to the trustees of Jefferson township to open the road, and the trustees refused to do so; suit in mandamus brought against the trustees November 13, 1909,

and peremptory writ of mandamus decreed against them July 7, 1910, to open the road; petition in error was taken to the circuit court and on November 18, 1910, the judgment of the common pleas court was reversed for error, in that the record failed to show that the clerk of Jefferson township made a certificate as required by law, that there were no funds of the township on hand, unappropriated with which to open the road in question.

"On May 21, 1912, the Guernsey county commissioners passed the following resolution:

" 'Office of board of county commissioners, Guernsey county, Ohio.

" 'Cambridge, Ohio, May 21, 1912.

" 'In the matter of the opening of the county road in Jefferson township, Guernsey county, Ohio, petitioned for by Perry Ford, et al., which road has heretofore been established and ordered opened by this board, Perry Ford principal petitioner, W. L. Ford, George Steel, Charlie Johnson, et al., are hereby granted permission and given authority to proceed to open said road and do such work thereon at they may desire free gratis and without charge or expense therefor to either Guernsey county or Jefferson township, and said persons are hereby authorized to enter upon the premises over which said road is established for the purpose of doing said work and to remove or cause to remove any obstruction thereon and any fences thereon to the road boundaries as established.

" 'Given under our hands this 21 day of May, 1912.

" 'W. B. JOHNSTON,

" 'E. D. STONE,

" 'Board of County Commissioners,

" 'Guernsey County, Ohio.'

"Under this resolution, the parties herein mentioned proceeded to open said road after a fashion and did do so and is open at the present time to the public, but is not in very good condition.

"QUESTION. Do you consider this a lawful opening of the road as provided by section 6917 of the General Code?"

You state that the road in question was allowed and established by the commissioners of Guernsey county on July 6, 1909, and I assume that all the requirements of the statutes relative to such establishment, as provided for in section 6860, et seq., of the General Code, were complied with by said commissioners.

You further state that the county auditor issued an order to the trustees of Jefferson township in said county to open said road and that said trustees refused to do so.

Section 6881, G. C., relates to the status of a county road after the county commissioners have received the report of the viewers and have caused the report and the survey and plat of said road to be recorded, and provides in part as follows:

"Thenceforth such road shall be a public highway, and the county commissioners shall issue their order to the trustees of the proper township or townships directing it to be opened."

I take it therefore that the above mentioned order was not from the county auditor, but that said county auditor as clerk of said board of county commissioners, directed the order of said board to said township trustees.

The circuit court having reversed the judgment of the court of common pleas awarding a peremptory writ of mandamus in the action against said trustees requiring said trustees to open said road, on the ground that the record failed to show the certificate of available funds from the clerk of said township to said trustees as required by section 5660, G. C., the status of said road remained the same on May 21, 1912, the date of the passage of the above resolution, as it was on September 21, 1909, the date when said order of the county commissioners was issued to said trustees.

The persons mentioned and referred to in said resolution, acting under authority thereof, having proceeded in the manner set forth in your letter, you inquire whether said road may by considered lawfully opened under authority of section 6917, G. C., which provides in part as follows:

> "After two years from the date of an order establishing a county road, if it, or part thereof, remains unopened, and a petition setting forth such facts is presented to the county commissioners, signed by three or more of the original petitioners, or freeholders resident along the line of the road, the county commissioners may cause said road or part thereof, to be opened by contract."

At the time of the passage of said resolution by said county commissioners, more than two years after the order of said commissioners establishing the road in question, said road remained unopened. If, therefore, a petition setting forth such facts was presented to said commissioners, signed by three or more of the original petitioners or freeholders residing along the line of said road, the commissioners were authorized by the above provision of section 6917, G. C., to cause said road to be opened by contract.

You do not state that such a petition was presented to the county commissioners and, in view of the facts submitted by you I do not consider that this was necessary. The aforesaid resolution of said commissioners permitted the persons mentioned and referred to therein to open said road and authorized said persons to enter upon the premises over which said road is established for the purpose of doing said work and to remove any obstructions therefrom to the road boundaries as established. Said persons acting under the authority so conferred upon them by said county commissioners performed said work without expense to the county or to Jefferson township.

I am of the opinion therefore that there has been a substantial compliance with the requirements of section 6917, G. C., providing such road has in fact been opened to the established width and all obstructions have been removed therefrom.

The statutes nowhere define what constitutes an unimproved county road. As stated by my predecessor, Hon. Timothy S. Hogan, in an opinion found in the annual report of the attorney general for the year 1912, at page 1170, "it consists of little more than a strip of land with a raised portion in the middle properly graded to each side and drainage ditches running parallel thereto."

The order of the county commissioners to the trustees of Jefferson township to open said road was not affected by the decisions of the courts above referred to and was in force at the time of the passage of the aforesaid resolution of said county commissioners. Under section 7137, G. C., it is the duty of the road superintendent to open or cause to be opened and kept in repair the public roads and highways which are laid out and established in his road district, and to remove or cause to be removed, all encroachments, by fences or otherwise, and obstructions that are found thereon.

If, therefore, the road in question has not been opened to the proper width and any obstructions have not been removed therefrom, it is still the duty of

the township trustees, under the order of the county commissioners, to direct the road superintendent of their district to perform the duties required of him by the above provisions of section 7137, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney General.

716.

TAXES AND TAXATION—COMPLAINT FILED WITH BOARD OF COMPLAINTS IS BAR TO RELIEF BY DISTRICT ASSESSOR—CHANGES MADE IN ORIGINAL VALUATIONS OF PERSONAL PROPERTY AS FIXED BY DEPUTY ASSESSOR OR TAX PAYER PRIOR TO MAKING UP DUPLICATE ARE NOT "ADDITIONS AND CORRECTIONS"—MAY NOT BE MADE BASIS OF COMPLAINT TO BOARD OF COMPLAINTS FOLLOWING YEAR—COMPLAINTS IN 1914 MAY NOT BE HEARD BY DISTRICT BOARD OF COMPLAINTS AT ITS 1915 SESSION—OWNERS OF REAL PROPERTY WHO DID NOT SEEK RELIEF AGAINST ASSESSMENTS IN 1914 CANNOT SECURE RELIEF IN 1915 FROM BOARD OF COMPLAINTS—SUCH BOARD MAY EXTEND RELIEF AS TO 1915 ASSESSMENT.

If a complaint is filed with the board of complaints, which fails to afford relief which the taxpayer considers adequate, the circumstances constitute a bar to any relief by the district assessor under section 5401, *G. C.*

Changes made in original valuations of personal property as fixed by the deputy assessor or the taxpayer prior to the making up of the duplicate, so that the same appear upon the tax list and duplicate itself (such changes being referable to the power of the district assessor under section 9 *of the Warnes Law), are not "additions and corrections made * * * to the tax lists of previous years" within the meaning of section* 18 *of the Warnes Law; so that if such action is taken by the district assessor in one year it may not be made the basis of a complaint to the board of complaints at its session in the following year.*

Complaints filed in 1914 *as to valuations of that year and not acted upon by the district board of complaints at its* 1914 *session may not be heard by said board at its* 1915 *session.*

Owners of real property who failed in 1914 *to apply to the board of complaints for relief against assessments of which they had actual notice in that year may not secure relief as to the* 1914 *valuation by appealing to the board of complaints at its* 1915 *session. Such board may extend relief only as to the* 1915 *assessment.*

COLUMBUS, OHIO, August 12, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of August 4th, requesting my opinion upon the following questions:

"1. If a complaint is filed with the board of complaints and said board fails to afford relief which the taxpayer considers adequate, would that be a bar to any relief by the district assessor under section 5401?

"2. If additions and corrections are made by the district assessor in 1914, before the completion of his tax list, without notice to the tax-

payer and without his knowledge, may the district board of complaints in 1915 entertain a complaint as to such valuations from a taxpayer who filed no complaint?

"3. May the district board of complaints, at its session in 1915, hear complaints as to valuations of personal property for the year 1914, as to which no additions or corrections were made by the district assessor, and as to which no complaints were filed because of the fact that the owners did not learn of the increase in their valuations until after the said board had adjourned, or because of any other reason?

"4. If complaints filed in 1914 as to valuations of that year were not heard or were not dismissed by the district board of complaints, may such complaints be heard by said board at its session in 1915?

"5. Where changes in the valuation of real property were made in 1914 and the notices of such changes were duly mailed to the owners thereof as provided by law, and no complaints were filed, what, if any, remedy have such owners now against over-valuations for 1914?"

I call your attention to an opinion of my predecessor, Hon. Timothy S. Hogan, given to the commission under date of December 14, 1914, No. 1295. In that opinion all the provisions of the Warnes law which require interpretation in answering your questions are quoted and analyzed. It will shorten this opinion for me to say that I agree with the interpretation placed upon the related statutes by my predecessor and with the reasons given by him therefor. In this way, much general discussion which otherwise would necessarily underlie the consideration of your specific questions may be eliminated.

Your first question was specifically dealt with by my predecessor in the following language:

"Certainly, such relief cannot be obtained through the district assessor acting under section 5401, General Code, for the reason that his function under that section extends only to the correction of the returns, and when the returns have been supplanted by the determination of the board of complaints any proceedings on the part of the district assessor, under section 5401, would be in reality a correction of the work of the board of complaints. So that, while I have declined to pass, as a general proposition, upon the question as to whether or not a mere appeal to the board precludes action under section 5401, I do not hesitate to express an opinion that, where the board has actually acted on complaint made to it, the right of the district assessor to act under section 5401 in the matter of the assessment thus made by the board of complaints is destroyed."

I agree with this conclusion. If your question is to be interpreted as meaning that the board of complaints has taken some action upon the complaint filed with it, in my opinion, the district assessor would have no authority to exercise the powers formerly possessed by the county auditor under section 5401 of the General Code, to act with respect to the particular assessment. If, on the contrary, your first question is to be interpreted as meaning that the board of complaints has simply ignored the complaint and has not acted upon it at all, then the case is one with which my predecessor did not deal.

In my opinion, the district assessor may not act in such a matter. The complaint is before the board. The board is a tribunal exercising quasi judicial power. Its jurisdiction has attached. Whatever jurisdiction may be exercised under section 5401, G. C., in the reduction of assessed value is plainly no more than concurrent

with the jurisdiction which the board of complaints may exercise under the statutory provisions quoted by my predecessor and applicable to it. The familiar rule applicable to the exercise of concurrent jurisdiction is that when the jurisdiction of one of the tribunals attaches it becomes exclusive. If the board of complaints has simply ignored the complaint, or failed to act upon it, the remedy of the taxpayer is by mandamus to compel the board to act. If the board has acted, but the taxpayer is not satisfied, his further administrative remedy is by appeal to the tax commission, as expressly provided in the statute. In neither event may the district assessor lawfully intermeddle and take any action with respect to the particular assessment.

I may add that I have interpreted your first question as referring to personal property only, because section 5401 relates only to such property.

I interpret your second and third questions as substantially the same in purport, because while you say that in one case additions and corrections have been made by the district assessor, and in the other case no additions and corrections have been so made, yet in your second question you say that such additions and corrections were made "before the completion of his tax list." Additions and corrections so made are not "additions and corrections to the tax list" within the meaning of section 18 of the Warnes law. Therefore, it is apparent that what you have designated as "additions and corrections" in your second question are exactly the same as what you designate as "increase in valuations" in your third question; and I am assuming that the reference is to the exercise by the district assessor of power under section 9 of the Warnes law, (103, O. L., 787) which is as follows:

> "Before making out and compiling the tax lists and duplicate, the assessor shall examine and revise the statements and returns of all property, both real and personal, to see that the valuations thereof are equal and uniform throughout the assessment district, and that all property, and each and every class, kind or description thereof, is valued for taxation through his district at its full and true value in money. If he finds any statement or return to be erroneous, either in the amount of property listed in the name of any person, company, firm, partnership, association or corporation, or in the valuation of any item or items thereof, he shall correct such statement or return."

It will be observed that the additions and deductions thus made are made on the statement or return and not on the tax list and duplicates. They are additions of which every taxpayer has constructive notice, because they appear on the duplicate, which is kept in a certain designated place and is open to public inspection on and after a certain designated date. Moreover, it is provided by section 21 of the Warnes law, that public notice shall be given by advertisement in newspapers of the completion of the tax lists, that the same are open for public inspection and that complaints may be filed with the board of complaints. This notice is really not necessary in a constitutional sense. It has been held in several cases by the supreme court of the United States that where the taxpayer has notice of the commencement of a proceeding, as he has in this instance when he makes his return, and where the law creates power in a public official to act in such proceeding and prescribes when and where the action shall be taken, due process of law does not require that the taxpayer shall have further notice of what may be done.

As a matter of policy merely it was formerly provided in this state by statute that no addition should be made to a return or statement under oath except upon notice, and when exercising the power under section 5401 of the General Code, the

district assessor is obliged to give notice and afford an opportunity for a hearing; but the first of these was a matter of policy and not of right. I may mention to indicate that the policy even in this state prior to the enactment of the Warnes law was not such as to require notice in all cases, that the statutes governing the tax commission in the assessment of property of public utilities do not require that the utilities be given notice of the amount of the assessments made on the basis of their reports, although as a matter of grace and administrative policy the commission, as I understand it, has always given notice of its tentative valuations. The fact that the statute provides for the initiation of a proceeding in a way which gives actual notice to the taxpayer that the proceeding is under way, and then prescribes when and where the commission shall take such action as it is authorized to take, is sufficient to afford due process of law to the taxpayer.

Now the jurisdiction of the board of complaints is limited to hearing such complaints as may be filed with the county auditor prior to its session or during its session, and the length of its session is determined by the tax commission of Ohio. (See sections 24 and 19 of the Warnes Law.) These are the limitations upon the jurisdiction of the board determined by the time when the complaint is filed. The limitations thereon determined with reference to subject-matter are those of section 18 of the Warnes law, which provides in part as follows:

> "The power of the board shall extend to all cases in which real estate or personal property has been assessed for taxation for the current year, and to additions and corrections made during the next preceding year to the tax lists of previous years."

The term "year" as used in this section obviously refers to the year for which the tax list and duplicates made up in the fall are prepared. That is to say, the valuations of which the board has jurisdiction under the first part of this sentence are those which have just been made, so to speak, by the district assessor and by him entered upon the tax list and duplicates. Once the jurisdiction of the board attaches, as I shall hereafter point out, it may be exercised at any time; but at the time the complaint is made it must refer to a valuation on the then current duplicate so far as the first part of the above quoted sentence is concerned.

The second part of the above quoted provision does not apply to cases like those of which you speak, because the additions and corrections mentioned by you were not made to the "tax list," but were additions and corrections made under section 9 of the Warnes law to the statements and returns themselves, so that the tax lists showed the changed valuations.

It follows from what has been said that a board of complaints at its 1915 session would not have jurisdiction of a complaint not filed with it until its 1915 session relating to a valuation made in 1914 by the district assessor involving an addition to or correction of a statement or return of personal property, such addition and correction entering into the final assessment which appears on the face of the tax list and duplicates.

Your fourth question is one with respect to which the opinion of my predecessor does not expressly deal. In the case as stated by you the jurisdiction of the board of complaints properly attached, but the board, presumably because unable to do so within the limitations of time laid down for it by the tax commission, failed to act. In my opinion, the board at its 1915 session may not lawfully act upon these complaints.

The provision which authorizes the tax commission to fix the time within which the work of the board of complaints shall be completed is, in my opinion, to be interpreted as destroying the *jurisdiction* of the board to act when the same

has once attached. It is true that much could be said in favor of a holding that when such jurisdiction has attached it cannot be destroyed except by being exercised; it is true also that the Warnes law itself contains no express provision furnishing a direct answer to the question thus presented; but the provisions of said law relating to the board of complaints and the appellate power of the tax commission must be read in connection with sections 12075, et seq., of the General Code, which have been interpreted as affording a judicial remedy for over-valuation. There is no intention on the face of the Warnes law to amend or in part repeal these sections of the General Code by implication, and no such amendment or repeal will be assumed. The conclusion is, therefore, that the administrative remedies which the Warnes law, in common with the law which existed prior thereto, afford are to be extended in such a way as to leave the judicial remedies available after the administrative remedies are exhausted. If the mere filing of a complaint with the board of complaints gives that board such jurisdiction as remains exclusive until it is exercised, and if such jurisdiction continues from year to year, then by the time the taxpayer would have exhausted, in an extreme case, such a remedy and a further remedy by appeal to the tax commission the taxes would either have been paid or the charge would have become delinquent, and the Warnes law does not afford any means of dealing with such a situation.

Rather than to give to the law an interpretation which might in a given case produce such a result, it seems to me there should be given to it, and in particular to the provision which authorizes the tax commission to fix the time within which the work of the board of complaints shall be completed, such an interpretation as will limit the power of the board of complaints to act upon complaints made in a given year to such action as may be taken thereon during that session. This is by no means a strained construction of the statute. It merely gives effect to a legislative intention which must have existed either in the one direction or the other, and which is rather conclusively shown to have been in the one direction by considering the consequences of each.

It is, therefore, my opinion that the board of complaints at its 1915 session may not act upon complaints made prior to or during its 1914 session, but not disposed of at that session.

In dealing with your fifth question it will be observed that the assessment of real property stands upon a different foundation from that of personal property insofar as the statute is concerned, because it is required by section 22 that a printed list showing all changes made in the assessment of any real estate shall be mailed to each owner whose assessment has been changed, etc.

However, in stating your fifth question you say that such notices were properly mailed in the instances which you have in mind, but that no complaints were filed by the taxpayers. I assume that in inquiring as to the remedy of the taxpayers you have in mind primarily an administrative remedy.

If this be your meaning, my answer must be that there is no such remedy. As previously pointed out, the taxpayer must file a complaint at least during the session of the board of complaints for the current year. A change in the assessment of real estate is not an "addition or correction to the tax list" within the meaning of section 18 of the Warnes law, but is an original assessment, not only appearing upon the tax list but of which the owner has actual notice. If the owner of real estate sleeps on his rights during the entire session of the board of complaints, he certainly cannot appeal to the board of complaints at its next session. Nor is there any equitable reason why he should be permitted to do so. There is no other remedy which is afforded to a taxpayer in such a situation. The district assessor has no power in the premises, as section 5401, G. C., as construed by my predecessor in his opinion, applies solely to personal property. The tax com-

mission no longer has independent power as formerly to raise or lower the value of any real or personal property. It may act with respect to specific property only upon appeal from the board of complaints.

For all of these reasons, then, I am of the opinion in answer to your fifth question that the owners of real property, who had both actual and constructive notice of the changes made by the district assessor in the year 1914 in the assessed valuation thereof, and who failed during the entire session of the board of complaints in the year 1914 to file complaints with such board, have lost by their laches whatever rights to administrative remedies they may have had in the premises with respect to the 1914 valuation.

However, under the general scheme of the Warnes law real property is in theory reassessed every year. The aggrieved taxpayers referred to in your fifth question may, therefore, by timely action secure a proper assessment in the year 1915. This remark applies, of course, to all of the cases in which I have held that the board of complaints may not now act with respect to 1914 valuations.

Respectfully,
EDWARD C. TURNER,
Attorney General.

717.

JOINT CEMETERIES—TWO OR MORE MUNICIPAL CORPORATIONS—MANAGEMENT AND CONTROL IS CONFERRED UPON COUNCIL OF MUNICIPAL CORPORATION AND TOWNSHIP TRUSTEES.

The authority to manage and control cemeteries owned in common by two or more municipal corporations, or a municipal corporation or corporations and a township or townships is, by the provisions of section 4189, *G. C.,* 103 *O. L., 272, conferred upon the council of the municipal corporation or corporations and the trustees of the township or townships to be exercised by the joint action of such bodies pursuant to the provisions of sections* 4192, 4193 *and* 4194, *G. C.*

COLUMBUS, OHIO, August 12, 1915.

HON. DONALD F. MELHORN, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—I acknowledge receipt of your request for an opinion under date of August 9, 1915, which is as follows:

> "The trustees of Buck, Goshen and Pleasant townships, and the council of the city of Kenton, Ohio, several years ago united in establishing a joint cemetery district, which district is still existing. Grove cemetery situated outside the corporate limits of the city of Kenton in said Pleasant township, is owned in common by said townships and the city of Kenton. Prior to the enactment of section 4189, G. C., (103 O. L., 272) repealing sections 4184-4185 and 4189, G. C., and prior to the present time, said union cemetery has been under the control and management of three trustees who are presumably elected under authority of section 4184, G. C., now repealed.
>
> "What I wish to ask is: What statute now provides for the management and control of union cemeteries?
>
> "(A) Is it the duty of the director of service of the city of Kenton to manage and control said cemetery under authority of sections 4161 to

4172, etc., or (B) does 4193, G. C., authorize said bodies, acting jointly, to delegate authority to trustees selected by said joint board to manage and control said cemetery, and by joint resolutions define their powers, provide for officers and employes and fix their salary in a manner similar to the provisions of sections 4184 and 4185, G. C., now repealed?"

The ownership, management and control of cemeteries owned in common by two or more municipal corporations, by two or more townships, or by a municipal corporation or corporations and a township or townships are governed by the provisions of sections 4183 to 4201, G. C., inclusive as amended and repealed by the act of April 18, 1913, 103 O. L., 272.

Prior to said last mentioned act the management and control of cemeteries so owned in common was under the provisions of sections 4184, 4185 and 4189, G. C., imposed upon a board of cemetery trustees therein authorized to be elected.

Upon the repeal of sections 4184 and 4185, G. C., 103 O. L., 272-3 supra, section 4189, G. C., was amended to read as follows:

> "The cemetery so owned in common, shall be under the control and management of the trustees of the township or townships and the council of the municipal corporation or corporations and their authority over it and their duties in relation thereto shall be the same as where the cemetery is the exclusive property of a single corporation."

Thus the control and management of such cemeteries was transferred from the board of trustees above mentioned to the trustees of the township or townships and the council of the municipal corporation or corporations jointly, provision for their joint action in relation thereto being found in sections 4192, 4193 and 4194, G. C.

It will be further observed that under section 4189 as amended, the trustees and council so acting jointly have conferred upon them all the authority and duties in relation to such cemetery as are conferred and imposed upon a municipal corporation relative to a cemetery of which it is sole owner.

Thus by reference the authority of the director of public service, as found in section 4162, G. C., is conferred upon the trustees and council in respect to cemeteries owned by them in common. Said section is as follows:

> "The director shall direct all the improvements and embellishments of the grounds and lots, protect and preserve them, and, subject to the approval of the council, appoint necessary superintendents, employes, and agents, determine their term of office and the amount of their compensation."

Coming then to answer your inquiry specifically I am of opinion that the director of public service of Kenton as such is without authority to in any way manage or control a cemetery which is owned in common by that city, and, Buck, Goshen and Pleasant townships. By virtue of section 4189, G. C., 103 O. L., 272, the trustees and council by joint action pursuant to the provisions of sections 4192, 4193 and 4194, G. C., may appoint necessary superintendents, employes and agents, determine their term of office and the amount of their compensation as provided in section 4162, G. C., supra.

Respectfully,
EDWARD C. TURNER,
Attorney General.

718.

LIQUOR LICENSE—DISTRICT APPOINTING BOARDS—SECRETARY OF SAID BOARD SHOULD BE CHOSEN FROM ITS MEMBERS—BOARD MEMBERS ARE ENTITLED TO RECEIVE ACTUAL AND NECESSARY TRAVELING EXPENSES—HOW PAID.

The secretary of the district appointing board as provided in sections 1261-22b *and* 1261-22, *G. C., 106 O. L., 562, should be chosen from the members of such board.*

Under the provisions of section 1261-20, *G. C., 106 O. L., 566, and section* 1261-61, *G. C., 103 O. L., 236, the members of the district appointing boards are entitled to receive their actual and necessary traveling expenses incurred in the attendance of lawfully authorized meetings of such board and the same are authorized to be paid as prescribed in said section* 1261-61, *G. C.*

COLUMBUS, OHIO, August 12, 1915.

HON. JOSEPH W. HORNER, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—I am in receipt of yours under date of August 10, 1915, as follows:

> "In re Liquor License Board.
>
> "'The county clerks, recorders and presidents of the boards of county commissioners shall constitute the appointing board.'
>
> "The question has been asked of me whether or not the secretary of such board must be one of the three above mentioned officials or can he be a person selected entirely outside of this board? It is my opinion that he must be one of the three members of the board.
>
> "A second question is whether or not any means have been provided to defray the traveling expenses of the members of this board, as the law says they meet at the court house of the district that has the largest population.
>
> "Your opinion upon these two questions will be appreciated by me."

Section 1261-22b, G. C., 106 O. L., 562, provides:

> "For the purpose of this act the county clerks, recorders and presidents of boards of county commissioners shall constitute the appointing board."

Section 1261-22c, G. C., 106 O. L., 562, provides in part:

> "Five days after this act becomes effective the said appointing boards shall meet at the court house in the most populous county of their respective districts at twelve o'clock, noon, at which time and place such boards shall organize by selecting a president and secretary, * * *"

By virtue of section 1261-22b, G. C., supra, the county clerk, recorder and president of the board of county commissioners are made ex officio members of the appointing boards of the liquor licensing district in which their respective counties are located. The exercise of the functions of the appointing board is imposed as an additional duty upon the enumerated officers as such, and it will be observed that for the performance of these duties no payment of any fees,

salary or compensation is authorized to be made either to the members or officers of the board. From this alone it seems reasonably clear that it was contemplated that the president and secretary of the appointing board should be chosen from its members. The selection of one who would assume the responsibilities and perform the duties of secretary of such board without any expectation of compensation or pay for such public service might involve some unnecessary difficulties. Besides, unless it be otherwise specifically provided it is a well established rule that the officers of a public board or commission for whom no compensation for their services as such officers is provided are chosen from its members. I therefore concur in your opinion that the secretary of the district appointing board must be chosen from its members.

Coming to consider your second inquiry relative to the traveling expenses of members of the appointing boards, attention is called to section 1261-20, G. C., 106 O. L., 566, which provides that the members of the appointing boards shall be entitled to receive their actual and necessary expenses while traveling on the business of the state, and that such expense accounts shall be itemized and sworn to by the person who incurred the same, approved by the state budget commissioner, and paid as other expenses are paid.

Section 1261-61, G. C., 103 O. L., 236, provides in part:

> "All fees and other moneys received by the state board shall be paid to and accounted for by the secretary, and by him paid into the state treasury, daily, to the credit of a special fund for the use of said board to be known as the 'State Liquor License Fund.' A detailed verified statement of such receipts shall be filed with the auditor of state at the time of making such deposit.
>
> "All expenses of the state board, including salaries, and all expenses, including salaries, certified by the various county boards to the state board, and approved by the state board, shall be paid by the treasurer of state on warrant of the auditor of state. Before the auditor of state shall issue his warrant a voucher, signed by at least two members of the state board, with a detailed statement attached thereto, shall be filed with the auditor of state."

Under Maintenance F-6, 106 O. L., 706, there is appropriated for transportation the sum of $29,800.00 to the use of the liquor licensing board, and by force of the provisions of section 8 of the general appropriation bill, 106 O. L., 827, this appropriation will become available for the payment of such traveling expenses as are above referred to upon the taking effect of the McDermott bill, 106 O. L., 560.

I am therefore of opinion that ample means have been provided for the payment of the traveling expenses of the members of the district appointing boards and that the same will be available therefor on and after September 4, 1915.

Respectfully,

EDWARD C. TURNER,

Attorney General.

719.

COUNTY COMMISSIONERS—MAY CONTRACT FOR PIKE REPAIR WORK UNTIL CASS HIGHWAY LAW BECOMES EFFECTIVE—WHEN SECTION 5649-4, G. C., APPLIES, LEVY MAY BE MADE UNDER SECTION 7419, G. C.

Until an act to provide a system of highway laws for the state of Ohio, 105-106 *O. L., 574-666, becomes effective, county commissioners may contract for pike repair work regardless of its provisions.*

When the provisions of section 5649-4, *G. C., apply, a levy may be made under section* 7419, *G. C., limited only by the provisions of the latter section.*

COLUMBUS, OHIO, August 12, 1915.

HON. FORREST G. LONG, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—Your letter of August 5, 1915, and your supplemental letter of August 9, 1915, present two inquiries, viz.:

(1) May the county commissioners now make contracts for pike repair work, which said contracts would be performed after September 5th, this year?

(2) May the levy provided in section 7419, G. C., be made in addition to the fifteen mill levy as provided in the Smith act?

Referring to your first question, there is no statutory inhibition against the county commissioners making such contracts as you name, regardless of the fact that the same may not be performed or completed until after the new highway act, as found in vol. 105-106 O. L., page 574, becomes effective. This observation is made, of course, with the limitation that said contracts must be made and entered into in full compliance with the present law. Should any of the provisions of the highway act, after it becomes effective, conflict in any way with the performance or completion of said contracts, all the rights and obligations in and under said contracts of the parties thereto are saved by the provisions of sections 302 and 303 of said act, to which your attention is respectfully invited.

Section 7419 of the General Code, which is the basis of your second question, provides as follows:

> "When one or more of the principal highways of a county, or part thereof, have been destroyed or damaged by freshet, land-slide, wear of water-courses, or other casualty, or, by reason of the large amount of traffic thereon or from neglect or inattention to the repair thereof, have become unfit for travel thereon, difficulty, danger or delay to teams passing thereon, and the commissioners of such county are satisfied that the ordinary levies authorized by law for such purposes will be inadequate to provide money necessary to repair such damages or to remove obstructions from, or to make the changes or repairs in, such road or roads as are rendered necessary from the causes herein enumerated, they may annually thereafter levy a tax at their June session, not exceeding five mills upon the dollar upon all taxable property of the county, to be expended under their direction or by the employment of labor and the purchase of materials in such manner as may seem to them most advantageous to the interest of the county, for the construction, reconstruction or repair and maintenance of such road or roads or part thereof."

This section is commonly known as an emergency statute intended only to cover conditions coming within its express terms, and not as a subterfuge by which

increasing levies can be made. It holds a very important place in the scheme of our highway legislation and is one of the few statutes which has not been repealed by the highway act above referred to. When conditions exist under which the provisions of section 5649-4 are invoked, the levy so made is limited only by the terms of section 7419 itself, as section 5649-4, G. C., or section 4 of the Smith act as it is commonly known, expressly excepts such levies under section 7419 supra from the provisions of said Smith act limiting the rate of taxation, which provides for limitation on tax rates and to which you refer.

Respectfully,
EDWARD C. TURNER,
Attorney General.

720.

STATE LIQUOR LICENSING BOARD—WITHOUT AUTHORITY TO ORDER DISTRICT BOARDS TO REFUSE TO RECEIVE APPLICATIONS FOR SALOON LICENSES FROM AUGUST 31 TO SEPTEMBER 4, 1915.

The state liquor licensing board is without authority to order the district boards to refuse to receive applications for saloon licenses from August 31, to September 4, 1915.

COLUMBUS, OHIO, August 13, 1915.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of yours under date of August 3, 1915, as follows:

> "The present licensing act provides for the filing of applications for licenses and for renewals of existing licenses between the 1st and 15th of September. The McDermott act makes different provisions for the applications and issuance of licenses. As the change in the law takes effect on September 3rd, it would be possible for the 5700 licensees now in the state to make application between the 1st and 3rd of September to the present county licensing boards who would not have authority to pass upon their applications and it would therefore seem that such action should not be taken. Will you, therefore, please advise this board whether it could issue an order to the present county licensing boards to receive no applications between the 1st and 3rd of September of this year?"

Section 1261-35, G. C., 103 O. L., 223, provides among other things that, "no *applicant* for a saloon license filed with said county board before the first day of September preceding said license year and after the fifteenth day of September preceding the said license year may be considered by the board until after the beginning of the said license year." The force of this provision is to compel the consideration of only such applications as are filed within these dates previous to the beginning of the license year.

This provision will continue in force and operation until 12 o'clock p. m. on Friday, September 3, 1915, when it will be repealed and become of no effect by operation of the provisions of section 1261-40, G. C., 106 O. L., 568, which will be effective on September 4, 1915.

There is no authority in the district boards to refuse to accept applications present prior to the repeal of section 1261-35 supra, nor in the state board to order them so to do.

It may be observed however that after amended senate bill No. 307, 106 O. L., 560, goes into effect on September 4, 1915, there will be no authority in any official to consider any application filed prior thereto and it would therefore be idle to file an application within the period from August 31st to September 4, 1914, for a license for the license period beginning on the fourth Monday of November, 1915. (Sec. 1261-33, G. C., 106 O. L., 567.)

Respectfully,
EDWARD C. TURNER,
Attorney General.

721.

COUNTY COMMISSIONERS—ATTEMPT TO DESIGNATE A BANK AS BOTH ACTIVE AND INACTIVE DEPOSITORY OF COUNTY FUNDS —STATUTES NOT COMPLIED WITH AND ACT ILLEGAL—FINDING FOR ADDITIONAL INTEREST DUE COUNTY SHOULD BE MADE AGAINST BANK—NOT COUNTY TREASURER.

Where the commissioners of a county attempt to designate a bank in said county as both the active and inactive depositary of the funds of said county, but, owing to the failure of said officials to comply with the requirements of the statutes relative to such designation, the same is illegal and said bank receives the deposits of said funds made by the county treasurer from time to time and has the use of said funds, a finding for any additional interest due the county should be made against the bank and not against said county treasurer.

COLUMBUS, OHIO, August 13, 1915.

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

GENTLEMEN:—I have your letter of August 3, 1915, in which you enclose a letter from State Examiner T. W. Jones, concerning the designation, by the commissioners of Fayette county, of a bank at Washington C. H. as both the active and inactive depositary of the money of said county. You also enclose copy of a resolution of said commissioners designating the said bank as such depositaries, also a copy of the bond given by said bank.

You require my opinion on the questions asked by Mr. Jones.

The letter of Mr. Jones is as follows:

"Mr. E. N. Halbedel, Columbus, Ohio.

"Dear Sir:—I desire to submit for your consideration the proposition as to how we shall treat the question of interest on the county funds here. The Midland National Bank to which was awarded the contract for carrying the county deposits, bid 3.66 per cent. on the inactive funds and 3.26 per cent. on the active funds.

"From checking the monthly statements, we ascertain that the interest for each and every month for the time we are covering has been computed at the active rate of 3.26 per cent.

"June 11, 1915, shows the lowest balance in this bank for any day during the last eighteen months, being $45,935.82.

"The month of February, 1914, shows the heaviest balances of any one month, and the lowest balance for any one day in this month was February 28th, $154,786.29, and the highest balance for any one day this month was on February 4th, $204,971.08.

"There is nothing of record to show that the treasurer was advised to deposit so much in the inactive, and so much in the active, but it strikes me that the provisions of section 2736 contemplates the deposit of the major portion of this fund in an *inactive account.* This bank was the depository under the former contract, and the treasurer kept right on depositing pending the award of the contract to some bank, and never ceased deposits therein. I send you herewith copies of the award and bond filed by the bank. At what rate should the interest be computed?

"Against whom should the findings be made, the bank, or the bank and the county treasurer?

"An early reply would be appreciated.

"Very truly,
"T. W. Jones, Examiner."

The resolution of said commissioners of Fayette county, under date of November 12, 1912, is as follows:

"The board of county commissioners met this day, for the purpose of considering bids for the deposits of the county funds, as invited by advertisements, all members present.

Resolution:

"The following resolution was adopted by unanimous vote of the board:

"Whereas, under the advertisement heretofore made in compliance with the resolution of the board of county commissioners of Fayette county, Ohio, calling for bids for the deposits of the funds of said county in *active* and *inactive* depositories. The following named banks and trust companies have bid for the deposit of said funds as *inactive* depositories at the rate per cent. set opposite their names, respectively:

"The Midland National Bank, Washington C. H., O.---------- 3.66%

"The Washington Savings Bank & Trust Co., Wash. C. H., O--- 2.80%

"And the following named banks and trust companies have bid for the deposit of said funds as *active* depositories at the rate per cent. set opposite their names respectively:

"The Midland National Bank, Washington C. H., O---------- 3.26%

"The Washington Savings Bank & Trust Co., Wash. C. H., O--- 1.80%

"Therefore, be it resolved, by said board of commissioners that The Midland National Bank be designated as *inactive* depository for said funds, at 3.66 per cent. and that The Midland National Bank be designated as *active* depository for said funds, at 3.26 per cent.

"Be it further resolved, that said bank, herein so designated as depository complying with the terms of the resolution heretofore herein adopted and qualifying according to the laws relating to the deposit of county funds, be and they are herein designated as depository of the funds of said county until twelve o'clock noon on the 1st day of December, 1915, and that written notice of the naming of such bank as depository be given to the treasurer of this county.

"James Ford, President,
"Attest: A. E. Henkle. "Harry F. Brown,
"Edwin Weaver."

The bond given by The Midland National Bank, to which the said commissioners attempted to award the contract for carrying county deposits, after reciting the proceedings of said county commissioners relative thereto, contains the following provisions:

> "Now, therefore, the undersigned hereby obligate ourselves to the county of Fayette, state of Ohio, for the receipt, safe-keeping and repayment of deposits made or to be made by the county treasurer of said Fayette county, with interest, in The Midland National Bank of Washington C. H., Ohio, to the amount of two hundred thousand dollars ($200,000.00) and interest, and the performance of all duties required by law."

Said bond is under date of December 1, 1912.

Section 2715, G. C., was amended and supplemented by section 2715-1, G. C., and sections 2716 and 2736 of the General Code were amended by an act of the general assembly passed March 30, 1911, approved by the governor April 11, 1911, and found in 102 O. L., 59.

Section 2715, G. C., as amended, provides:

> "The commissioners in each county shall designate in the manner hereinafter provided a bank or banks or trust companies, situated in the county and duly incorporated under the laws of this state, or organized under the laws of the United States, as inactive depositaries, and one or more of such banks or trust companies located in the county seat as active depositaries of the money of the county. In a county where such bank or trust company does not exist or fails to bid as provided herein, or to comply with the conditions of this chapter relating to county depositaries, the commissioners shall designate a private bank or banks, located in the county as such inactive depositaries, and if in such county no such private bank exists or fails to bid as provided herein, or to comply with the conditions of this chapter relating to county depositaries, then the commissioners shall designate any other bank or banks incorporated under the laws of this state, or organized under the laws of the United States, as such inactive depositaries. If there be no such bank or trust company incorporated under the laws of the state, or organized under the laws of the United States, located at the county seat, then the commissioners shall designate a private bank, if there be one located therein, as such active depositary. No bank or trust company shall receive a larger deposit than one million dollars."

Section 2715-1 provides:

> "The deposits in active depositaries, as provided for in the next preceding section shall at all times be subject to draft for the purpose of meeting the current expenses of the county. The deposits in inactive depositaries shall remain until such time as the county treasurer is obliged to withdraw a portion or all of same and place it in the active depositary or depositaries for current use. Each bank or trust company, when submitting proposals as provided in section 2716 for the inactive deposits, *shall stipulate the amount of money desired by such bank or trust company;* and when the aggregate amount placed with all the banks and trust companies, qualifying for same, in any county, does not equal the amount that may be placed into inactive depositaries the county commissioners shall,

upon securing sufficient additional security from any or all of such inactive depositaries, authorize the county treasurer to increase the deposits therein; or such county commissioners shall in the manner therein provided designate a bank or banks or trust companies, located outside of the county in which the county treasurer shall deposit such excess funds."

Section 2716, G. C., as amended, provides:

"When the commissioners of a county provide such depositary or depositaries, they shall publish for two consecutive weeks in two newspapers of opposite politics and of general circulation in the county a notice which shall invite sealed proposals from all banks or trust companies within the provisions of the next two preceding sections, which proposals shall stipulate the rate of interest, not less than two per cent. per annum on the average daily balance, on inactive deposits, and not less than one per cent. per annum on the average daily balance on active deposits, that will be paid for the use of the money of the county, as herein provided. Each proposal shall contain the names of the sureties or securities, or both, that will be offered to the county in case the proposal is accepted."

Section 2736, G. C., as amended, provides:

"Upon the receipt by the county treasurer of a written notice from the commissioners that a depositary, or depositaries, have been selected in pursuance of law, and naming the bank or banks or trust companies so selected, *such treasurer shall deposit in such bank or banks or trust companies as directed by the commissioners, and designated as inactive depositaries to the credit of the county all money in his possession, except such amount as is necessary to meet current demands, which shall be deposited by such treasurer in the active depositary or depositaries.* Thereafter before noon of each business day, he shall deposit therein all money received by him the preceding business day except as hereinbefore provided. Such money shall be payable only on the check of the treasurer."

From Mr. Jones' statement of facts and from the enclosed memoranda it appears that The Midland National Bank at Washington C. H., in submitting its proposal for the inactive deposits of said county, did not stipulate the amount of money desired, as required by the above provision of section 2715-1, G. C. The bid of said bank, to be designated as an inactive depositary, was therefore illegal and should not have been accepted by the commissioners of Fayette county.

It further appears, that in designating said bank as an active and inactive depositary, said commissioners fixed no maximum amounts to be deposited in said depositaries, respectively, and consequently never advised the treasurer of said county as to such maximum amounts to be held by said bank.

The requirements of section 2736, G. C., as amended and above quoted, were clearly ignored. The bond given by said bank was in the amount of two hundred thousand dollars. Mr. Jones' statement shows that the lowest daily balance in said bank for the month of February, 1914, was $154,786.29 while the highest daily balance in said bank in said month was $204,971.08. This latter amount was in excess of the amount of said bond and the county treasurer, in depositing such excess amount, violated section 2722, G. C., which provides that the undertaking given by the bank must be in an amount not less than the sum that shall be deposited in said depositary at any one time.

Moreover, section 2726, G. C., provides that the same surety shall not be accepted to more than one undertaking as to any one depositary at the same time.

In opinion No. 627 of this department rendered to your bureau under date of July 20, 1915, I have held that where the same bank bids for and is awarded both active and inactive deposits the bids and awards for the two classes of deposits are to be regarded as separate contracts and separate undertakings should be required, and the same surety could not be accepted on both undertakings.

Said commissioners could not, therefore, accept the same sureties on both of the undertakings of said The Midland National Bank.

In view of the foregoing, I am of the opinion that the proceedings of the county commissioners in attempting to award the contract for the deposit of public funds to said The Midland National Bank and in notifying the county treasurer of such attempted award, as well as the action of said county treasurer in depositing said funds in said bank, were without authority in law and in plain violation of the express provisions of the statutes.

In view of the provisions of section 2737, G. C., relative to the computing of interest on daily balances, and the apportionment of interest on deposits, I am unable to understand how the various county officials of Fayette county concerned with the deposit of the public funds of said county could unintentionally ignore said statutory provisions.

However, it is clear that the commissioners of said county should proceed at once, in the manner provided by sections 2715, et seq., of the General Code and in conformity with the requirements of said sections, to designate active and inactive depositaries for the money of said county.

Inasmuch as The Midland National Bank was not legally designated as an active and as an inactive depositary and the county treasurer did not comply with the requirements of section 2736, G. C., governing the deposits of active and inactive funds, and in view of the fact that separate accounts of said deposits were not kept by said bank, Mr. Jones asks to be advised as to the rate at which interest shall be computed in making a finding and against whom such finding shall be made.

Although not legally designated as an active and as an inactive depositary for the funds of Fayette county, said bank has received the deposits made by the county treasurer from time to time and has had the use of said funds.

If said bank had been legally designated as an active and as an inactive depositary of all the funds of said county it would have been the duty of the county treasurer upon receiving notice from the county commissioners of such designation and of the maximum amount to be deposited in said bank as an inactive depositary, to deposit in said inactive depositary to the credit of the county all money in his possession except such an amount as would be necessary to meet current demands, and it would have been the duty of said county treasurer to deposit this amount in said bank as an active depositary.

The difference between the amount of interest actually received by the county from said bank and the amount which said county would have received had said designation been legal, may be approximately determined by computing the interest on the daily balances at the rate of .4 per cent. for the time said funds have been deposited in said bank.

As a fair basis of settlement I am of the opinion that a finding should be made against said bank for said additional amount of interest so determined.

Respectfully,

EDWARD C. TURNER,

Attorney General.

722.

APPROVAL OF ORDER OF STATE BOARD OF HEALTH, EXTENDING TIME TO CITY OF LAKEWOOD, OHIO, TO PROVIDE SEWAGE TREATMENT WORKS.

COLUMBUS, OHIO, August 13, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Enclosed herewith please find order of the state board of health extending the time limit of a former order of the state board of health directed to the city of Lakewood, Ohio, ordering said city to provide sewage treatment works, which order was approved by the governor of Ohio and the attorney general of Ohio on the 28th day of October, 1915.

I have examined said order, which is issued under section 1251 of the General Code of Ohio. I find the same to be regular and it is my opinion that it should be approved. Having myself approved the same, under the provisions of section 1251, G. C. I am transmitting the order to you for your approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

723.

RAILROAD POLICEMEN—REQUIRED TO GIVE BUT ONE BOND—SAID BOND TO BE APPROVED BY CLERK OF COMMON PLEAS COURT OF COUNTY IN WHICH SUCH OFFICER RESIDES—CERTIFIED COPY SHOULD BE FILED IN CLERK'S OFFICE IN OTHER COUNTIES THROUGH WHICH RAILROAD RUNS.

Policemen appointed under authority of section 9150, *G. C., are subject to the provisions of section* 12819, *G. C., as amended,* 103 *O. L.,* 553, *and are thereby required to give but one bond which shall be approved by the clerk of the court of common pleas of the county in which such officer resides.*

COLUMBUS, OHIO, August 14, 1915.

HON. J. H. MUSSER, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of August 6, 1915, as follows:

> "Are policemen appointed under General Code, section 9150, subject to the provisions of General Code, section 12819, as amended, 103 O. L., 553?
>
> "Your attention is called to section 9151, a part of which reads as follows:
>
> " 'Policemen so appointed and commissioned severally shall possess and exercise their powers, and be subject to the liabilities of policemen of cities in the several counties in which they are authorized to act while discharging the duties for which they are appointed.'

And also to that part of amended section 12819, reading as follows:

> "'Provided, however, that this act shall not affect the rights of sheriffs, regularly appointed police officers of incorporated cities and villages, regularly elected constables, and special officers as provided by sections 2833, 4373, 10070, 10108 and 12857 of the General Code to go armed when on duty.'
>
> "If such policemen are subject to amended section 12819, then is it necessary for them to give an original bond in *each* county in which they may be called upon to perform duty, or is it sufficient if one original bond is given and filed in the county of their residence and certified copies filed in the other counties through or into which the railroad runs for which such policemen are appointed and intended to act?"

In reference to your first inquiry your attention is directed to an opinion of my predecessor under date of September 10, 1913, which will be found at page 1547 of the report of the attorney general for that year, to which it is assumed you have access, and which holds that:

> "Railroad policemen do not have the right given to the particular officers designated in section 12819, G. C., in reference to carrying concealed weapons. Their right to carry concealed weapons is conditioned upon their giving bond, provided for in the second provision of this statute."

Section 9150, G. C., to which you refer, authorizes the appointment of persons to act as policemen for and on the premises of a railroad or elsewhere when directly in the discharge of their duties for such railroad, by the governor and in relation thereto section 9151, G. C., contains the provision as above quoted by you.

Section 12819, G. C., as amended in 103 O. L., 553, provides as follows:

> "Sec. 12819. Whoever carries a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person shall be fined not to exceed five hundred dollars, or imprisoned in the penitentiary not less than one year nor more than three years. Provided, however, that this act shall not affect the right of sheriffs, regularly appointed police officers of incorporated cities and villages, regularly elected constables, and special officers as provided by sections 2833, 4373, 10070, 10108, and 12857 of the General Code to go armed when on duty. Provided, further, that it shall be lawful for deputy sheriffs and specially appointed police officers, except as are appointed or called into service by virtue of the authority of said sections 2833, 4373, 10070, 10108 and 12857 of the General Code, to go armed if they first give bond to the state of Ohio, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them; and any person injured by such improper use may have recourse on said bond."

By the first sentence of this section it is made a felony for any person to carry concealed upon his person any pistol, bowie knife, dirk, or other dangerous weapon. This general, and within itself unqualified, provision is followed by certain specific, definite and enumerated exceptions so that from the plain and

unequivocal terms of this statute no person except they come within such specific exceptions may lawfully carry concealed on or about his person any pistol, bowie knife, dirk, or other dangerous weapon.

It is sufficient to say that an examination of these statutes will readily disclose that persons appointed under the provisions of section 9150, G. C., do not come within the terms of the first proviso of section 12819, G. C., quoted by you, nor of sections 2833, 4373, 10070, 10108 or 12857, G. C., therein referred to, and are therefore subject to the first provision of section 12819, G. C., and unless they come within the second proviso granting immunity from the general provisions of this section to deputy sheriffs and specially appointed police officers not called into service under sections 2833, 4373, 10070, 10108 and 12857, G. C., upon certain conditions therein prescribed, they are then subject to the provisions of the first sentence of that section. This is true notwithstanding the provision of section 9151, G. C., as set forth in your inquiry.

Section 12819, G. C., supra, it will be observed confers no power upon policemen of cities, but rather grants to them only immunity from the general provisions thereof as distinguished from power or authority to exercise any official function, and it therefore seems clear that the same does not come at all within the meaning of the term power as used in section 9151, G. C.

It then being determined that persons so appointed are not within the terms of the first proviso of section 12819, G. C., it follows of necessity that immunity from the provisions of this section may be had only by compliance with the terms of the second proviso and since to my mind persons appointed under the provision of section 9150, G. C., are manifestly "specially appointed police officers" within the meaning of the second proviso of section 12819, G. C., the provisions thereof are available to a person so appointed.

I am therefore of the opinion that persons appointed under authority of section 5190, G. C., are subject to the provisions of section 12819, G. C., 103 O. L., 553.

As to your second inquiry it will be observed that such specially appointed police officer is required to give only one bond, and that, to the state of Ohio, and that the same shall be conditioned to save the public harmless, etc. There is nothing here found which would indicate an intention that this bond should be available only to residents of a particular county. On the contrary it seems clear that the bond is required and conditioned for the protection of every other individual of the state against the unlawful use of such weapons by such officer, and that the legislature therefore deemed the same sufficient.

It will be observed that it is provided that any person injured by the unlawful use of such weapons by such officer may have recourse on said bond, thus clearly including every individual so injured within the state.

There is no provision made in section 12819, G. C., for the filing or custody of such bond when given or approved, and I am unaware of any statutory provision elsewhere to be found relative or applicable thereto. However, it is manifestly contrary to the whole purpose and policy of the law that the same remain in the possession or control of such police officer and such course would, at least in many instances, defeat the very object sought by the enactment of the provision of law relative thereto.

The primary purpose of giving such bond by such officer is the procurement of the right by the officer under the law to carry concealed weapons, an act which would otherwise be prohibited. That is, except for those persons who might be injured by the unlawful use of such weapons, it is in the interest and for the protection of the officer alone that he give the bond and for the purpose of securing to him immunity from the penal provision of the statute rather than in the interest of the public. It is therefore a matter of primary concern to the officer himself that he give the bond, and that it be in full compliance with all

the statutory provisions therefor rather than to the public. It is a familiar rule of contract law that a writing obligatory, however formal in its character and execution, has no binding force upon the obligor until the same shall have been delivered. Hence, to avail himself of the protection sought to be procured thereby, it is essential that the bond be delivered by the officer to an agency or representative of the obligee.

In the absence of statutory designation of a custodian or depository of such bond as representative of the state, if the maker thereof should deliver the same without qualification or reserve to a custodian who represents the state, or even to one whom he himself should choose to designate as such representative, for the sole purpose of making the same binding on the obligors, he would not thereafter be heard to say that such bond was not of binding force upon the obligors by reason of the absence of a statutory designation of a custodian thereof.

I am therefore of opinion that if a specially appointed police officer shall give a bond to the state of Ohio, which is duly approved by the clerk of the court of common pleas of the county in which he resides, in the sum of one thousand dollars, conditioned according to law, and shall file the same in the office of such clerk, and shall file also a certified copy thereof in the office of the clerk of such court in each of the other counties through which or into which the railroad for which such officer is appointed runs, it will then, under the provisions of section 12819, G. C., supra, be lawful for such officer to go armed when on duty.

Respectfully,
EDWARD C. TURNER,
Attorney General.

724.

PHARMACIST—STATE BOARD CANNOT ALLOW CREDIT FOR STORE EXPERIENCE DURING ATTENDANCE IN SCHOOL—FEES REQUIRED FROM APPLICANTS UNCONDITIONAL—NO REFUND IF ENTRANCE CERTIFICATE NOT GRANTED.

1. *The provisions of section* 1302, *G. C., as amended,* 106, *O. L.,* 329, *require four years of actual preparation as therein prescribed and the conditions imposed in said statute cannot be discharged contemporaneously.*

2. *The fee of three dollars required from an applicant under the provisions of section* 1303-1, *G. C., as amended,* 106 *O. L.,* 330, *is unconditional and not dependent upon the granting of a certificate.*

COLUMBUS, OHIO, August 17, 1915.

MR. M. N. FORD, *Secretary State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—I have your letter of August 5, 1915, in which you ask for an opinion on the following inquiries:

> "First. Section 1302 provides in part that an applicant for examination for registration as a pharmacist shall be a graduate from a school of pharmacy in good standing as defined in section 1303-2, and shall have had at least two years of practical experience in a drug store, etc.; the question is, can the applicant work in a drug store during the time he is attending pharmacy school and receive credit for store experience when he is already receiving credit for the same time by being graduated?

"Can the board legally rule that the applicant is not entitled to receive credit for drug store experience had during the time spent in graduating from a recognized school or college of pharmacy?

"Second. Section 1303-1 provides that an entrance examiner shall determine the sufficiency of the preliminary education of applicants for admission to a school of pharmacy, and for such the applicant must pay to the board of pharmacy a fee of three dollars; the question is, is the applicant entitled to a refund of the three dollars in case he does not meet the requirements entitling him to an entrance certificate?"

Section 1302 as amended and founded in 106 O. L., at page 329, provides as follows:

"An applicant for certificate as pharmacist shall be not less than twenty-one years of age, shall be a graduate from a school of pharmacy in good standing as defined in section 1303-2, of the General Code, shall have completed at least a two years' course in such school as defined in section 1303-2 of the General Code, and shall have had at least two years of practical experience in a drug store where physicians' prescriptions are compounded; provided, however, that if the applicant has taken a longer course in a school of pharmacy in good standing, each additional year successfully passed shall be counted as one year of practical experience."

Under the provisions of the foregoing statute a two years' course in a school of pharmacy in good standing and two years of practical experience in a drug store where physicians' prescriptions are compounded are required of all applicants for certificates as pharmacists in this state, with the further provision that each additional year spent in school shall be counted as a year of practical experience. The plain provisions of this statute make four years of preparation a requisite for a certificate as pharmacist. Time as well as instruction is required. In other words, a devotion and dedication of four years of the applicant's time to the work of preparing himself for his profession is prescribed by this statute, and it is not contemplated therein that these two requirements, viz.: two years in school and two years in a drug store, can be worked out contemporaneously.

I am of the opinion therefore that the board cannot allow for store experience acquired during attendance in school.

Section 1303-1, as amended 106 O. L., page 330, provides as follows:

"The state board of pharmacy shall appoint an entrance examiner who shall not be directly or indirectly connected with a school of pharmacy, and who shall have received the degree of B. A. or B. Sc., and who shall determine the sufficiency of the preliminary education of the applicants for admission to a school of pharmacy in good standing as defined in section 1303-2, of the General Code, and to whom all applicants shall submit credentials.

"The following preliminary educational credentials shall be sufficient; The equivalent of eight units as given in a high school of the state of Ohio; provided, however, that in the absence of the foregoing qualifications, the entrance examiner shall examine the applicant in such branches as are required to obtain them. Applicants desiring to enter a school of pharmacy in good standing as defined in section 1303-2 of the General Code, must submit certificates to the entrance examiner from their school authorities describing in full the work completed: provided, that in the

absence of all or any part of the foregoing qualifications, the applicant must present himself before the entrance examiner for the scheduled examination: Provided further, that the applicants upon presentation of certificates from their school authorities or in case of examination, must pay in advance to the board of pharmacy a fee of three dollars. If the entrance examiner finds that the preliminary education of the applicant is sufficient, he shall issue to the applicant a certificate therefor. The compensation of the entrance examiner shall be fixed by the state board of pharmacy."

The precise language of the statute is that the applicants upon presentation of certificates from their school authorities or in case of examination, must pay in advance to the board of pharmacy a fee of three dollars. There are no qualifications as to this payment dependent upon any subsequent event. Indeed, the requirement that this fee shall be *paid in advance* seems to preclude any intention of the legislature to connect the transaction with any subsequent matter or thing and indicates clearly that upon the payment of the fee the transaction is to be regarded as closed.

Permit me to observe in closing that the provisions of the statutes above referred to do not become effective until August 26, 1915.

Respectfully,
EDWARD C. TURNER,
Attorney General.

725.

REFERENDUM PETITION—WHEN PETITION MUST BE FILED—REFERENDUM TO AMENDMENT OF FORMER LAW ON MOTION PICTURE FILMS DOES NOT AFFECT THE FORMER LAW EXCEPT AS TO PROVISIONS OF AMENDMENT.

Referendum petition must be filed in the office of the secretary of state within ninety (90) days after the law to be voted on has been filed in that office by the governor.

Referendum to an amendment to a former law does not affect the former law except insofar as former law may be affected by provisions of amendment becoming effective through its approval by the electors on referendum vote.

COLUMBUS, OHIO, August 17, 1915.

The Industrial Commission of Ohio, Department of Film Censorship, Columbus, O.

GENTLEMEN:—Permit me to acknowledge receipt of your letter of August 9th, requesting my opinion as follows:

"On May 19, 1915, the legislature passed an act known as the Besaw Act, which was approved by the governor May 25, 1915, said act amending the law relating to the censorship of motion pictures. On July 13, 1915, you rendered an official opinion certifying that a certain referendum petition which had been presented to you and which contained the following synopsis:

"'An act to amend sections 871-48, 871-49 and 871-52 of the General Code, was passed May 25, 1915, approved May 25, 1915, and filed in the office of the secretary of state May 27, 1915; it amends the foregoing sections of the law relating to the censoring of motion picture films, as found in 103 O. L., 400 and 401,'

"was a truthful statement regarding the title of said law.

"Because of the complications of this department, it is essential that we be advised as to v hether or not, if the referendum should prevail, the original law would be repealed or only the said Besaw act. The opinion seems to be prevalent throughout the state that a referendum as contemplated in the petition referred to would repeal the entire censorship law, and we are receiving many inquiries on this point from citizens interested in the law.

"We will appreciate it if you will advise us as to this matter at your earliest convenience."

Your attention is called to the provisions of section 1c of article II of the constitution of the state, adopted September 3, 1912, which is as follows:

"The second aforestated power reserved by the people is designated the referendum, and the signatures of six per centum of the electors shall be required upon a petition to order the submission to the electors of the state for their approval or rejection, of any law, section of any law or any item in any law appropriating money passed by the general assembly. No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided. When a petition, signed by six per centum of the electors of the state and verified as herein provided, shall have been filed with the secretary of state within ninety days after any law shall have been filed by the governor in the office of the secretary of state, ordering that such law, section of such law or any item in such law appropriating money be submitted to the electors of the state for their approval or rejection, the secretary of state shall submit to the electors of the state for their approval or rejection such law, section or item, in the manner herein provided, at the next succeeding regular or general election in any year occurring subsequent to sixty days after the filing of such petition, and no such law, section or item shall go into effect until and unless approved by a majority of those voting upon the same. If, however, a referendum petition is filed against any such section or item, the remainder of the law shall not thereby be prevented or delayed from going into effect."

From a reading of the above constitutional provision it will be observed that a resort to the referendum provisions can only be had within the period of ninety (90) days after a law passed by the general assembly shall have been filed by the governor in the office of the secretary of state or, in other words, the petition for referendum must be filed in the office of the secretary of state *within* ninety (90) days after the law has been filed in that office.

The original law, to be found on pages 399 to 401, inclusive, of the 103 Ohio Laws, was filed in the office of the secretary of state May 7, 1913, hence the period within which a referendum petition might have been filed with reference to its going into effect expired ninety days after the filing of the law in the office of the secretary of state.

The act to amend the original law and which is referred by you as the "Besaw Act," to be found on pages 325 to 327, inclusive, of the 106 Ohio Laws, was passed on May 19, 1915, approved by the governor May 25, 1915, and filed in the offices of the secretary of state May 27, 1915. The ninety-day period within which a referendum petition may be filed to submit it to the electors of the state for approval or rejection has not as yet expired.

It is therefore my opinion that the result of the referendum referred to in your letter will not affect the repeal of the original law, as it would only operate directly on the amendment known as the "Besaw Act." However, if the referendum petition should be filed in the office of the secretary of state within the ninety-day period the operation of the amendment known as the "Besaw Act" would be postponed and it would not become effective, if at all, until after the result of the referendum was known. In other words, the original act would remain in operation as before the passage of the amendment and not be affected by it until after its approval by the electors on the referendum vote.

The contemplated referendum would have no other nor further effect on the original law.

Respectfully,
EDWARD C. TURNER,
Attorney General.

726.

DISAPPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS IN CUYAHOGA AND HOCKING COUNTIES.

COLUMBUS, OHIO, August 17, 1915.

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

DEAR SIR:—I have your communication of August 3, 1915, transmitting to me for examination final resolutions relating to the following roads:

Cleveland-East Liverpool Cuyahoga county, petition No. 1389, I. C. H. No. 12;
Logan-Athens, Hocking county, petition No. 1005, I. C. H. No. 155.

As to the resolution relating to the road improvement in Cuyahoga county, it appears from the certificate of the county auditor not that the money required for the payment of the county's portion of the cost of the improvement is in the treasury to the credit of or has been levied, placed on the duplicate and in process of collection for the state and county road improvement fund, but merely that bonds have been advertised for sale for the purpose of raising the county's portion of the cost. Such a certificate is insufficient in law, and as the date for the sale of the bonds has passed, the resolution should be returned to the county auditor of Cuyahoga county, to the end that if bonds have been actually sold and delivered, the proper certificate may be made.

As to the resolution relating to the road improvement in Hocking county, reference is made in the first paragraph of the resolution to a preliminary application, which it is recited was made by the board of commissioners of Hocking

county to the state highway department on the 20th day of December, 1915. This is a manifest clerical error and the resolution should be returned to the clerk of the board of commissioners of Hocking county for correction.

For the reasons above set forth, I am returning these resolutions without my approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

727.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS.

COLUMBUS, OHIO, August 17, 1915.

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

DEAR SIR:—I have your communications of August 3 and 4, 1915, transmitting to be for examination final resolutions as to the following roads:

Columbus-Lancaster, Fairfield county, petition No. 1334, I. C. H. No. 49;
National Road, Licking county, petition No. 807, I. C. H. No. 1;
Columbus-Millersburg, Licking county, petition No. 865, I. C. H. No. 23;
Milan-Elyria, Lorain county, petition No. 1584, I. C. H. No. 288;
National Road, Muskingum county, petition No. 806, I. C. H. No. 1;
Youngstown-Sharon, Trumbull county, petition No. 1563, I. C. H. No. 331;
Logan-New Lexington, Perry county, petition No. 892, I. C. H. No. 355;

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

728.

APPROVAL OF RESOLUTIONS FOR SALE OF CERTAIN PORTIONS OF ABANDONED OHIO CANAL IN WAVERLY, PIKE COUNTY, MAUMEE, LUCAS COUNTY AND ALSO IN CITY OF AKRON.

COLUMBUS, OHIO, August 17, 1915.

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

DEAR SIR:—I have your communication of August 16, 1915, transmitting to me duplicate copies of resolutions providing for the sale of certain portions of the abandoned Ohio canal in Waverly, Pike county, Ohio, to Albert Foster and Philip

Lorbach, duplicate copies of a resolution providing for the sale of certain canal lands in the village of Maumee, Lucas county, Ohio, to Hubert Pierre, and duplicate copies of a resolution providing for the sale of a certain portion of the Ohio canal lands in the city of Akron to The Billow Sons Company, all of which resolutions have been signed by you.

I find that these resolutions have been drawn in accordance with the provisions of the statutes of Ohio and therefore join with you in the adoption of the resolutions above referred to, and have signed the duplicate copies of the same, which copies are returned to you herewith.

Respectfully,
EDWARD C. TURNER,
Attorney General.

729.

COUNTY EXPERIMENT FARMS—INITIAL COST PAID FROM ISSUE OF NOTES OR BONDS UPON WARRANT OF COUNTY AUDITOR AND ALLOWED BY COUNTY COMMISSIONERS—LABORERS EMPLOYED AND EXPENSE OF SUPPLIES AND MATERIALS NECESSARY TO CONDUCT FARM, PAID BY COUNTY TREASURER UPON CERTIFICATE OF DIRECTOR OF OHIO AGRICULTURAL EXPERIMENT STATION.

Funds arising from the issue of notes or bonds for the purchase and equipment of county experiment farms, should be deposited in the county treasury and payment of the purchase price of the farm and expenses of the initial equipment thereof as defined in section 1177-4, *G. C.,* 106 *O. L.,* 125, *should be made therefrom upon the warrant of the county auditor and upon the allowance thereof by the county commissioners.*

After the initial equipment of the farm has been completed, the payment of laborers employed and the expense of supplies and materials necessary to the conduct of the farm should be paid by the county treasurer upon the warrant of the county auditor upon the certificate and allowance of the directors of the Ohio agricultural experiment station.

COLUMBUS, OHIO, August 17, 1915.

HON. W. H. KRAMER, *Bursar, Ohio Agricultural Experiment Station, Wooster, O.*

DEAR SIR:—I acknowledge receipt of your under date of August 7, 1915, as follows:

> "We wish to thank you for your opinion of August 2nd.
>
> "Inasmuch as you state that your opinion given to the agricultural commission regarding the county experiment farms has no application to house bill No. 163, we would thank you for an opinion as to the proper manner of disbursing the funds arising from the bond issue for the purchase and equipment of county experiment farms and funds appropriated by the county commissioners for the payment of wages and purchase of supplies and material as provided for by sections 1174 to 1177, and 1177-1 to 1177-11 of house bill 163.
>
> "The prosecuting attorneys in five of the counties in which county farms are located have instructed the county commissioners to turn over

the maintenance funds, for the payment of wages and purchase of supplies and materials, to the governing board of this institution to be disbursed by the financial officer of the institution.

"In one of the counties having a county farm the maintenance fund is being disbursed by the county auditor on the approval of the bills by the representative of the governing board of this station.

"Inasmuch as this maintenance fund is being provided by the several counties having county experiment farms, we thought probably the funds should be disbursed by the county officers.

"We feel that a uniform system should be followed in all the county farms, and we therefore ask for your opinion in the matter."

In opinion No. 672, under date of August 2, 1915, to which you refer, it was held that the law of this state relative to county experiment farms is now to be found in sections 1174 to 1177, inclusive, of the General Code, and sections 1177-1 to 1177-11, inclusive, of the General Code, as found in house bill No. 163, 106 O. L., 122.

Sections 1176 and 1177, G. C., 106 O. L., 124, provide for the submission of the question of the proposition to establish an experiment farm and to issue bonds or notes for the purchase and equipment thereof to the qualified voters of the county. If such proposition shall be approved by a majority of the electors voting thereon, then under the provisions of sections 1177-1 and 1177-2, G. C., 106 O. L., 124-5, the county commissioners are required to levy a tax for the above purpose and to issue and sell bonds or notes of the county and to deposit the proceeds thereof in the county treasury to be applied by the county commissioners to the purchase and equipment of an experiment farm. When these funds are so deposited in the county treasury, the county commissioners are required to notify the state board of control of their action, which board is required thereupon to visit the county and assist in the selection of a farm to be purchased by the county commissioners, as required by section 1177-3, G. C., 106 O. L., 125.

Sections 1177-4 and 1177-5, G. C., 106 O. L., 125, provide as follows:

"Section 1177-4. The equipment of an experiment farm shall consist of such buildings, drains, fences, implements, live stock, stock feed and teams as shall be deemed necessary by the board of control for the successful work of such farm, and the initial equipment shall be provided by the county in which the farm is established, together with a sufficient fund to pay the wages of the laborers required to conduct the work of such farm during the first season. The county commissioners shall appropriate for the payment of the wages of laborers employed in the management of such farms as may be established under this act, and for the purpose of supplies and materials necessary to the proper conduct of such farms such sums not exceeding two thousand dollars annually for any farm, as may be agreed upon between such county commissioners and the board of control.

"Section 1177-5. The management of all county experiment farms established under authority of this act shall be vested in the director of the Ohio agricultural experiment station, who shall appoint all employes and plan and execute the work to be carried on, in such manner as in his judgment will most effectively serve the agricultural interests of the county in which such farm may be located, the director and all employes being governed by the general rules and regulations of the board of control."

From this it appears that the county commissioners are required, in addition to purchasing the farm, to provide for the initial equipment of the same with all

such buildings, drains, fences, implements, live stock, stock feed and teams as shall be deemed necessary by the board of control of the Ohio agricultural experiment station, together with sufficient funds to pay the wages of laborers required during the first season. That is to say, it is the duty of the county commissioners to provide such equipment of the character above named as such board of control may deem necessary and direct to be provided. The contract or contracts for such equipment as well as for the purchase of the farm should then be entered into by the commissioners according to law and payment therefor made upon the allowance of the commissioners and warrant of the county auditor by the county treasurer from the proceeds of the notes and bonds in the county treasury above referred to.

When the farm is purchased and the initial equipment thereof so provided, then by force of section 1177-5, supra, the management and control thereof devolves upon the director of the Ohio agricultural experiment station, who is authorized to appoint all employes and to plan and execute the work to be carried on. To carry on this work effectively and with substantial accomplishment of the purpose thereof, it is essential that sufficient and proper employes, supplies and incidentals necessary thereto be provided, and the power of management conferred upon the director of the Ohio agricultural experiment station carries with it by necessary implication the authority to purchase such supplies and to fix the compensation of employes by him appointed within the limits of the funds appropriated therefor.

Provision for the payment of claims against a county is found in section 2460, G. C., as follows:

> "No claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal, in which case it shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the claim. No public money shall be disbursed by the county commissioners, or any of them, but shall be disbursed by the county treasurer, upon the warrant of the county auditor, specifying the name of the party entitled thereto, on what account, and upon whose allowance, if not fixed by law."

Since then the amount due for wages, supplies and materials necessary to a proper execution of the work to be carried on in the conduct of county experiment farms is to be fixed by the director of the Ohio agricultural experiment station, payment of claims therefor should be made upon the warrant of the county auditor from the county treasury, upon the certificate of allowance thereof by the director of the Ohio agricultural experiment station.

Respectfully,
EDWARD C. TURNER,
Attorney General.

730.

THE COPPER WORLD EXTENSION MINING COMPANY—FOREIGN CORPORATION—SALE OF CAPITAL STOCK IN OHIO TO ITS STOCKHOLDERS—MUST SECURE LICENSE AS "DEALER" UNDER "BLUE SKY" LAW.

The Copper World Extension Mining Company, a foreign corporation, desirous of selling a limited amount of its capital stock in Ohio to its own stockholders, must secure a license as a dealer, under the provisions of the Ohio "blue sky" law.

COLUMBUS, OHIO, August 17, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of August 10, 1915, requesting my opinion as follows:

> "A mining corporation, organized under the laws of the state of Washington—The Copper World Extension Mining Company—desires to sell some of its stock remaining unsold to its present stockholders.
>
> "The announced intention of the officials of the company is to raise about six hundred dollars for the purpose of paying the taxes now due on the property. The officers assert that there will be no stock offered for sale except the amount above mentioned and then only to present stockholders.
>
> "The offer to sell is to be made by the company to residents of the state of Ohio and in Ohio.
>
> "Will the company, under the above facts, require a dealer's license under the Ohio blue sky law?"

The term "dealer," as used in the blue sky law, is defined in section 6373-2 of the General Code (103 O. L., 744) as follows:

> "Section 6373-2. * * *
>
> "The term 'dealer,' as used in this act, shall be deemed to include any person or company, except national banks, disposing, or offering to dispose, of any security, through agents or otherwise, and *any company engaged in the marketing or flotation of its own securities either directly or through agents or underwriters or any stock promotion scheme whatsoever; except:* * * *"

Following the above quoted paragraph of section 6373-2, G. C. (103 O. L., 744) is a descriptive list of persons or companies disposing, or offering to dispose, of securities who are excepted from the definition of the term "dealer."

The facts stated in your inquiry are not such as bring The Copper World Extionsion Mining Company within any one of the exceptions to the general definition of the term "dealer." The company desires to sell its stock, or at least some of its stock, in Ohio to its present stockholders. The purpose for which such stock is sold, or the limited amount which it expects to sell, or the fact that it expects to sell such stock to its own stockholders, are not sufficient to except the company from the requirements of the statute.

I am therefore of the opinion that The Copper World Extension Mining Company should be required to take out a license under the Ohio blue sky law before making sales of its stock as set forth in your letter.

Respectfully,
EDWARD C. TURNER,
Attorney General.

731.

LOAN REGULATION ACT—ONLY ONE LICENSE REQUIRED TO ENGAGE IN ALL OF SEVERAL CLASSES OF BUSINESS MENTIONED IN SECTION 6346-1, G. C., OF AMENDING ACT—APPLICANT WHO HAS PAID TWO FEES PRIOR TO AMENDMENT IN 106 O. L., TO ENGAGE IN "CHATTEL MORTGAGE BUSINESS" AND "SALARY LOAN BUSINESS" IS ENTITLED TO A CREDIT UPON LICENSE FEE REQUIRED UNDER AMENDED ACT.

Under the provisions of sections 6346-1 *to* 6346-7, *G. C., as amended* 106 *O. L.,* 281, *only one license is required to engage in all of the several classes of business mentioned in section* 6346-1, *of the amending act.*

An applicant for a license under said act who has paid two fees and taken out two licenses under the provisions of sections 6346-1 *to* 6346-7, *G. C., prior to the amendment of said sections in* 106 *O. L., one of which license was for authority to engage in "salary loan business," is entitled to a credit of* $20.00 *(being the amount paid for both licenses) upon the license fee required under the amended act.*

COLUMBUS, OHIO, August 17, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of August 11, 1915, requesting my opinion as follows:

> "Section 6346-10 amended senate bill number 7 (Lloyd loan regulation act) provides:
>
> "'Any licensee, or licensees, who holds a license under the provisions of sections 6346-1, 6346-2, 6346-3, 6346-4, 6346-5, 6346-6 and 6346-7, of the General Code, inclusive, which has not yet expired and who shall present his license for cancellation to the superintendent of banks herein, shall receive therefor a credit in the amount of ten dollars and the superintendent of banks shall credit the same upon the license herein.'
>
> "We have had some inquiries as to the question of rebates on licenses now held by persons who have been operating chattel and salary loan companies; some of these persons and companies have been holding two licenses under the provisions 6346-1 to 6346-7, inclusive, of the General Code, one license being for salary loans and another license for chattel loans. The question now arises as to whether or not parties holding two licenses under the old law are entitled to a rebate of $10.00 or $20.00 on the fee for a license under the new act.
>
> "Your early opinion on this matter will be highly appreciated."

Section 6346-2 of the General Code, prior to its amendment by the act referred to in your letter, was as follows:

"Sec. 6346-2. Applications for license to conduct such business must be made in writing to the secretary of state and shall contain the full names and addresses of applicants, if natural person, and in case of firms or incorporated companies, the full names and addresses of the officers and directors thereof and under what law or laws incorporated, the kind of business which is to be conducted, whether chattel mortgage or salary loan; the place where such business is to be conducted and such other information as the secretary of state may require. The fee to be charged for said license shall be ten dollars ($10.00) per annum and such amount must accompany the application. * * *"

From the statement in your letter it appears that the secretary of state has required applicants for authority to engage in the "chattel mortgage and salary loan" business to take out two licenses, one for each class of business. This requirement was evidently made under authority of the provision of said section above quoted requiring such application to state "the kind of business which is to be conducted, whether chattel mortgage or salary loan." Whether the secretary of state was authorized, under this language, to require an applicant desiring to engage in both classes of business to pay two fees and secure two licenses is at this time immaterial. The fact remains, as stated in your letter, that a number of applicants were required to and did take out two licenses, for each of which they paid the required fee of $10.00.

Section 6346-3, as amended by the act in 106 Ohio Laws, page 281, provides as follows:

"Sec. 6346-3. Application for a license shall state fully the name or names, and address, of the person or corporation, and of every member of the firm, partnership, or association authorized to do business thereunder, and the location of the office or place of business in which the business is conducted; and in the case of a corporation, shall also state the date and place of its incorporation, the name and address of its manager for the period for which the license is issued, and the names and addresses of its directors for the period for which the license is issued, and the name and address of the agent as provided in section 6346-2 of this act. * * *"

It will be observed that the language of old section 6346-2, which required the application to state "the kind of business which is to be conducted, whether chattel mortgage or salary loan," under authority of which two license fees were exacted, is not found in the amended section above quoted, nor does it appear in any other part of the act, and it is clearly apparent that the amended law contemplates the creation or, rather, segregation of a single class, members of which may be authorized upon paying the required fee and securing one license to engage, under favored circumstances and with enlarged authority, in any one, or more, or all of the businesses sought to be regulated by the act.

Section 6346-10 of the act, as amended in 106 Ohio Laws, page 281, which is quoted in full in your letter, makes provisions for rebating to an applicant for a license, or, rather, for allowing him as a credit upon the license fee required under the amended act, the amount of any license fee paid by him to the secretary of state for a license under the provisions of the loan law prior to its amendment, in the event such old license has not expired.

It was clearly the intention of the legislature to allow an applicant for a license under the amended act credit for the amount paid by him for any un-

expired license or licenses then held by such applicant under the provisions of the law before its amendment, upon presentation by him of such a license or licenses for cancellation.

I am of the opinion, therefore, that an applicant for a license under the provisions of 6346-10 of the amended law (106 O. L., 281), who presents for cancellation two licenses taken out under the old law, one for chattel mortgage loans and one for salary loans, for each of which he was required to pay a license fee of $10.00 by the secretary of state, is entitled to receive a credit of $20.00 upon the license fee required under the law as now amended.

Respectfully,
EDWARD C. TURNER,
Attorney General.

732.

SUPERINTENDENT OF PUBLIC WORKS—LEASE TO THE SCIOTO VALLEY TRACTION COMPANY OF RIGHT-OF-WAY FOR ELECTRIC RAILWAY PURPOSES OVER ABANDONED OHIO CANAL NEAR LOCKBOURNE, OHIO, APPROVED.

COLUMBUS, OHIO, August 17, 1915.

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

DEAR SIR:—I acknowledge receipt from you on August 9, 1915, of a lease executed by your predecessor in office, Hon. John I. Miller, to The Scioto Valley Traction Company, of a right-of-way for electric railway purposes over the abandoned Ohio canal near Lockbourne, Ohio, the lease being forwarded to me for examination.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

733.

STATE BUILDING CODE—EXIT DOORS OF THEATER SEATING OVER THREE HUNDRED PERSONS—MUST BE ON EACH SIDE—INDUSTRIAL COMMISSION WITHOUT AUTHORITY TO PERMIT USE OF THEATER UNLESS STATUTE COMPLIED WITH—DISCRETION IN CERTAIN AUTHORITIES FOR USE OR SUBSTITUTION OF OTHER "FIXTURE, DEVICE, OR CONSTRUCTION" DOES NOT EMBRACE CHANGE IN LOCATION OF EXIT DOORS.

Exit doors must be provided on each side of theater seating over 300 *persons as provided in section* 12600-20, *G. C.*

Industrial commission has no authority to permit use of theater not provided with exit doors as required in section 12600-20, *G. C.*

Discretion which may be exercised by state and municipal authorities jointly for the use or substitution of other "fixture, device or construction" does not contemplate change in location of exist doors.

COLUMBUS, OHIO, August 18, 1915.

The Industrial Commission of Ohio, Division of Workshops, Factories and Public Buildings, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge receipt of your request for an opinion, which is as follows:

"We will be pleased to have your opinion upon a matter of law arising from the following facts:

"A theater was recently built in Canal Dover, Ohio, which fronts on one street, has an alley on the north side and a street on the rear or west end of the building. This theater is ninety feet long, twenty-six feet and nine inches wide and seats four hundred and thirty-five people.

"A question has arisen between this commission and the owner of the building relative to the location of the exists. The provisions of the state building code pertaining to exists reads as follows:

"'Section 19. (Means of Egress) Theaters. The means of egress from theaters shall not be less than the following, and shall be provided in addition to the usual means of ingress. From main or auditorium floor level, one six ft. wide door shall be provided on each side of the auditorium to each five hundred (500) persons, or fraction thereof.

"'Where one exit door is required on each side, the same shall be placed midway between the front and rear walls of the auditorium.'

"You will note that when one exit door is required on each side the same must be placed midway between the front and rear of the theater. In the case referred to the owner claims that he is unable to make this arrangement with the property owners on the south side of the building and for that reason it is impossible for him to place an exit on that side. The building has been provided with exits as follows:

"On the north or alley side of the building two six foot doors, one near the front, the other midway between the front and rear, and one three foot six inch door in the end or west wall near the south side of the building, which is three feet and six inches more exit space than the statute requires, although these openings are not located as required by section 19 above quoted.

"The owner of this building offers to put one or more additional exits in the north side so that the actual width of exit space would be much greater than that required by the statute, and which he claims would enable the people to get out much quicker than they could if there were no openings except the two required by the statute and the usual means of ingress.

"We are of the opinion that we are not given sufficient discretionary power in the enforcement of this law to accept this arrangement of exits in lieu of that prescribed by the code, while the owner of the building and his attorney claim that we are given this power under the provisions of section 5 of the administrative section of the code, which reads as follows:

" 'Section 5. Nothing herein contained shall be construed to limit the council of municipalities from making further and additional regulations, not in conflict with any of the provisions of this act contained nor shall the provisions of this act be construed to modify or repeal any portions of any building code adopted by a municipal corporation and now in force which are not in direct conflict with the provisions of this act. Where the use of another fixture, device or construction is desired at variance with what is described in the statute, plans, specifications and details shall be furnished to the proper state and municipal authorities mentioned in section 1 for examination and approval and if required actual tests shall be made to the complete satisfaction of said state and municipal authorities that the fixture, device or construction proposed answers to all intent and purposes the fixture, device or construction hereafter described in this statute, instead of actual tests satisfactory evidence of such tests may be presented for approval with full particulars of the results and containing the names of witnesses of said tests.'

"We would like to be advised whether or not in your opinion the words 'fixture, device or construction' as used in this section could be made to apply to the arrangement of exits, and whether or not, even though the proposed exits would afford equal or better means of egress from the building, we would have the power to accept this arrangement and permit the theater to operate without an exit located midway between front and rear of one of the side walls as prescribed by the code."

Section 19 of the Building Code, which is section 12600-20 of the General Code, among other things provides as quoted in your letter as to the means of egress from theaters, as follows:

"From the main or auditorium floor level one six (6) foot wide exit door shall be provided on each side of the auditorium to each five hundred (500) persons or fraction thereof.

"Where one exit door is required on each side, the same shall be placed midway between the front and rear walls of the auditorium.

"Where two exit doors are required on each side, one shall be located near the front and the other near the rear wall of the auditorium.

"Where more than two exit doors are required on each side, one shall be located near the front wall, one near the rear wall, and the others equally spaced between the two.

"If these exit doors are above or below the grade line the same shall be provided with stone, cement or iron steps leading to the grade line. Steps shall be not less than six (6) feet wide."

In the case under consideration the theater referred to, which is 90 ft. long by 26 ft. 9 in. wide, with a seating capacity of 435 people, has been erected with two exit doors located on one side of the building, said doors being 6 ft. wide and one additional door 3 ft. 6 in. wide located in the end or west wall, the latter door affording exit space of 3 ft. 6 in. in addition to that prescribed by the law for a theater of the capacity of the one under consideration.

Section 5 of the Building Code, which is section 12600-277 of the General Code, is quoted in your letter and you inquire whether the use of the words "fixture, device or construction" would clothe your department with authority to substitute exit doors as described in the case under consideration in place of the exits provided for by law, to be located on each side of the building as provided in section 12600-20 of the General Code.

In the case of Scharff v. Southern Illinois Construction Co., 92 S. W., 126; 115 Mo. App., 157, the word "construction was defined as follows:

> "The term 'construction' with reference to a building, means the putting together of the materials used therein."

I am at a loss to find any authority which would enable your commission, in the exercise of its discretion, to substitute exit doors all on one side of an auditorium seating over three hundred persons, in face of the plain provisions of the law that such exit doors shall be located on each side of the building and midway between the front and rear walls of the auditorium, and especially in view of the exceptions relating to this point, made in the same section of the General Code, which is as follows:

> "Theaters from twenty-five (25) to thirty (30) feet wide, not over one hundred (100) feet long and seating not over three hundred (300) persons, shall have one six (6) foot wide exit door from the main auditorium to the side or rear street, alley or open court, and one three feet and four inches (3 ft. 4 in.) wide exit door from the balcony leading to B, C or D standard fire escape."

I am informed that when the theater building referred to was constructed its plans were approved by your commission, with the distinct understanding that proper exits would be arranged and later, when complications arose as to the securing of the facilities for exits on one side of the building, representations concerning the use of the theater were to the effect that less than three hundred seats would be placed in the theater until after all of the requirements of the law had been met.

It is to be observed that the industrial commission of Ohio is, under all circumstances, powerless to act of itself towards the substitution of any fixture, device or construction, as the provisions of the law are plain and equivocal with respect to the requirement that any use or substitution can only be made when there is a joint action on the part of the state and municipal authorities permitting such use or substitution, and if the owner of the building could, under an interpretation of the law, have been regarded as having the means of relief afforded to him through the operation of section 12600-277 of the General Code, there is no question that it is too late now to assert that claim, as no effort was made to secure the use or substitution of any fixture, device or construction as provided for in section 12600-277, but, on the contrary, there was an expressed intention to comply with the expressed law governing the matter.

It is my opinion, therefore, that the provisions of the law requiring exits to be on each side of the building are plain and that section 5 of the Building Code,

quoted in your letter, and which is section 12600-277 of the General Code, does not vest in your commission any discretionary power such as would enable you to eliminate the exit door or doors from one side of the building and provide the same, or additional exit space, all on the other side of the building, in view of the fact that an exit door is not embraced under the terms of "fixture, device or construction."

Respectfully,
EDWARD C. TURNER,
Attorney General.

734.

MUNICIPAL CORPORATION—PRESIDENT PRO TEM OF COUNCIL DOES NOT SUCCEED TO OFFICE OF PRESIDENT OF COUNCIL ON DEATH OF PRESIDING OFFICER—MAYOR HAS AUTHORITY TO APPOINT—FAILURE OF MAYOR TO APPOINT, OR HIS RECOGNITION OF PRESIDENT PRO TEM OF COUNCIL IN PERFORMANCE OF DUTIES OF OFFICE, AMOUNT TO AN APPOINTMENT—IF A PERSON UNDER SUCH CIRCUMSTANCES SUCCEEDS TO OFFICE OF MAYOR BECAUSE OF A VACANCY, HE IS ENTITLED TO OFFICE AND HIS OFFICIAL ACTS ARE LEGAL.

President pro tem of council does not as a matter of law succeed to office of president of council on death of that officer.

Mayor has authority to appoint. Failure of mayor to exercise power of appointment or recognition of president pro tem of council who assumes office of president of council and co-operation with him in the performance of the duties of the office amounts to an appointment to such office.

President of council acquiring that office under foregoing circumstances who succeeds to office of mayor to fill vacancy caused by resignation is entitled to hold the office of mayor and his acts and the acts of his subordinates or appointees are legal and valid.

COLUMBUS, OHIO, August 18, 1915.

MR. ROY N. MERRYMAN, *City Solicitor, Steubenville, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your letter asking for an opinion on a question embraced in a statement of facts as follows:

> "Under date of July 17, 1915, I received the following enquiry for an opinion from Charles R. Wells, city auditor of Steubenville:
>
> " 'The question has been asked me on several different occasions if Lon W. Ralston is the legal mayor of the city of Steubenville, Ohio, and if he is not, are any of his appointments legal and have they the power to approve contracts or vouchers? Mr. Merryman, please look this matter up at once and give me your opinion on the same. The only interest I have in this is to protect the city, my bondsmen and myself.'
>
> "While I am aware that under the statutes it is not incumbent upon you to render legal opinions to city solicitors, yet, in view of the work done here by Mr. Ballard, your first assistant, in connection with our recent municipal investigation, and of my association with him at that time, I

feel I should extend to you the courtesy of a request for this opinion, and I also would appreciate the consideration of this question by your department and an opinion thereon to me as a favor.

"I will briefly state to you the facts that will probably be necessary for you to consider in arriving at an opinion on the questions submitted in the inquiry of City Auditor Wells.

"The minutes of the city council show that something more than a year ago Harry Woods, the duly elected, qualified and acting president of council, died. At that time Lon W. Ralston, now serving as mayor, was president pro tem of council. The minutes of the next meeting of council are signed by Mr. Ralston as president pro tem, while the minutes of the meeting next thereafter are signed by him as president of council. In other words, the minutes disclose the fact that Mr. Ralston succeeded to the office of president of council by virtue of being president pro tem. Since that time, and within the past few months, George W. McLeish resigned as mayor of the city, and Mr. Ralston took the oath as mayor by virtue of serving as president of the council. Raymond W. Teaff, the then president pro tem of council, succeeded to the office of the president of council.

"If Mr. Ralston was president of council then he is properly in the office of mayor, but the question that arises in my mind, in considering this enquiry, is as to whether or not he ever was president of council.

"In connection with this enquiry, I cite you to an opinion of Hon. Timothy S. Hogan, formerly attorney general, at page 1882 of volume 2, of the annual report of the attorney general for 1912; and to another opinion of Mr. Hogan contained in volume 2 of the annual report of the attorney general for 1913, at page 1519.

"I call your attention to section 4210 of the General Code, which provides regarding election of a president pro tem in cities. I also call your attention to section 4274 of the General Code, which provides for the succession of the president of council to the office of mayor in case of death, resignation and removal of the mayor, as well as the succession of the president pro tem of council to the office of president under such circumstances. I also call your attention to section 4252 of the General Code, providing for the filling of vacancies in office, not otherwise provided for.

"Of course, the real question raised under the city auditor's enquiry is with reference to the office of mayor. If Mr. Ralston is not the duly authorized and acting mayor, then his appointees could derive from him no power or authority, as I take it.

"If you see your way clear and will be kind enough to render me an opinion on this enquiry, I shall appreciate the same, and, if your opinion should be that Mr. Ralston is not the duly authorized and acting mayor of this city, then I would be glad for you to give me your opinion as to how the office of mayor, under the circumstances stated, should be filled."

At the time when Harry Woods, the duly elected, qualified and acting president of the city council died, the then mayor of the city would have had authority to fill the vacancy in that office caused by the death of the incumbent. However, as stated in your letter, Mr. Lon W. Ralston, who was then president pro tem of the council, assumed the duties of the office of president of the council, and from the fact that he continued in that office until reecently, when he assumed the office of mayor on account of the resignation of Mr. George W. McLeish it

may be assumed, at least, that while the mayor who had the power to appoint the successor to Mr. Woods did not make an appointment in so many words, his acquiescence in the holding of the position by Mr. Ralston, who was a de facto officer, amounted almost to an appointment.

In addition to the information contained in your original request for an opinion you state in your letter of August 11th as follows:

> "I might add, however, that all other officers and persons treated Mr. Ralston as president of council; that on one occasion when Mayor McLeish was out of the city he wired Mr. Ralston to look after matters connected with the office, and that on one or two other occasions Mr. Ralston performed one or two duties of the office as acting mayor."

From your statement it would appear that Mr. McLeish not only acquiesced in Mr. Ralston holding the office of president of the council, but actually assigned to him some specific duties incident to that office, during the mayor's absence from the city.

In the case of State v. Nield, court of appeals of Kansas, northern department, C. D., decided July 9, 1896, 45 Pac. Rep., 623, it was held, at page 625, as follows:

> "'It is one of the exceptions to this general rule which requires the best evidence of which the point is susceptible, that proof that an individual has acted openly in a public office is prima facie evidence of his official character, without proving his election or producing his commission. 1 Greenl. Ev., Sec. 83. The plaintiff, therefore, was not obliged to produce the township book in order to prove the office of the defendant. It was enough for him to show that he had held himself out to the public as the incumbent of the office in question.' In Com. v. Kane, it is held 'The foundation of the rule of evidence, that a person acting as a public officer has been duly appointed to the office which he assumes to exercise, is that all acts done by what appears to be public authority are presumed to be rightly done, until the contrary is proved.' In Bank v. Dandridge, it is said: 'By the general rules of evidence, presumptions are continually made, in cases of private persons, of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances. In aid of this salutary principle, the law itself, for the purpose of strengthening the infirmity of evidence, and upholding transactions intimately connected with the public peace and the security of private property, indulges its own presumptions. It presumes that every man, in his private and official character, does his duty, until the contrary is proved. * * * It will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, 'Omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium.' Thus it will presume that a man acting in public office has been rightly appointed.' * * * This rule applies, not merely to the chief officers, but, also, to deputies and assistants who are specially provided for and recognized by law."

In the case of Delphi School District v. Wm. Murray, 53 Cal., at page 29, the court said:

> "To find that these persons were 'acting as trustees' was merely to embody the evidence or a portion of it adduced at the trial upon the

issues just referred to, and to add that 'there was no sufficient evidence of the election of Grupe,' etc., was merely to remark upon the condition of the case as presented. If it was proven at the trial that Grupe and others were 'acting as trustees,' a presumption thereby arose that these persons were officers de jure, but this presumption was, of course, disputable in its character, and might have been met and overcome by other evidence. (Code of Civil Procedure, Sec. 1963, Subdiv. 14.) If not so met and overcome the presumption would stand for proof, and would support a finding that these persons were de jure trustees.

"This was the rule at common law, and the statute has wrought no material change in that respect. That direct and primary proof of title to the office is dispensed with in such cases, is mentioned by Mr. Greenleaf, as constituting an exception to the general rule excluding secondary evidence, and as proceeding upon 'strong presumption arising from the undisturbed exercise of a public office, that the appointment of it is valid.'"

In the case of Carter, Paymaster, v. Sympson, 8 B. Monroe's Kentucky Reports, page 155, the court held:

"The rule rejecting secondary evidence, is subject to some exceptions, arising either out of the nature of the facts to be proved, or from a regard to public convenience. It is not, in general, necessary to prove the written appointments of public officers. All who are proved to have acted as such, are presumed to have been duly appointed to the office until the contrary appears. The undisturbed exercise of a public office, creates a strong presumption, that the appointment to it is valid; and where, as in the present instance, the office is held for the benefit of others, the acquiescence of those having an interest in its proper administration, fortifies this presumption. (Greenleaf on Evidence, pages 94 and 104.)"

In the case of Callison v. Hedrick, 15 Grattan's Reports, (Va.) page 244, it was held in the first branch of the syllabus as follows:

"1. In general it is not necessary to prove that written appointments of public officers. That one has acted as such officer and been recognized by the public as such, is sufficient evidence that he has been duly appointed until the contrary appears. And the case is still stronger where the official character has been recognized by the appointing power."

In 29 Cyc., under the head of Officers at page 1373, the author says:

"Where, however, the issue of a commission is not made by law a necessary part of the appointment, the appointment is complete when the choice of the appointing officer has been made, and no written evidence of the appointment is necessary. An oral appointment is valid. Indeed it has frequently been held that the fact that one has acted as an officer and has generally been recognized as such will create presumption of a valid appointment. Such presumption may, however, be overcome by evidence to the contrary."

The doctrine just announced is liberally supported by authorities, from a few of which I have quoted above.

It would appear from the foregoing that Mr. Ralston, having assumed the office of president of the council, and the performance of the duties of that office not only being acquiesced in but in a manner directed by the mayor, the action of the mayor could be construed to be an appointment, especially in view of the fact that Mr. Ralston was not disturbed in the exercise of the office of president of the council but was allowed to continue in such office until at the time of the resignation of Mayor McLeisch, when he assumed the office of mayor. Mr. Ralston assumed the office of mayor under the theory that as president of council he was rightly entitled to assume the office of mayor, under the provisions of section 4274 of the General Code, which is as follows:

> "In case of the death, resignation or removal of the mayor, the president of council shall become mayor and serve for the unexpired term, and until the successor is elected and qualified. Thereupon the president pro tem of council shall become president thereof, and shall have the same rights, duties and powers as his predecessor. The vacancy thus created in council shall be filled as other vacancies, and council shall elect another president pro tem."

Since assuming the office of mayor he has performed the duties incident thereto and under the facts and circumstances, there being no one at present who can assert a better title to the office, his status approaches, if, in fact, it does not partake entirely of that of de jure officer.

It is my opinion, therefore, that while the president pro tem of the council did not, as a matter of law, succeed to the office of president of the council upon the death of the incumbent of that office, the manner in which he succeeded to the office, the attendant facts and circumstances surrounding his occupancy of the office, the acquiescence and co-operation of the mayor with him in the performance of his duties as president of the council and as acting mayor constitute a condition of affairs amounting to an appointment of Lon W. Ralston as president of council, from which office he succeeded to the office of mayor, which office he is now filling, and his acts and the acts of his appointees are legal and valid.

In an opinion under date of August 31, 1914, to Hon. Irvine Dungan, city solicitor of Jackson, Ohio, by my predecessor, Mr. Hogan, the question of the filling of a vacancy in the office of president of council occurring through the resignation of the regularly elected incumbent was passed upon, and I am enclosing you a copy of that opinion for your information.

Respectfully,
EDWARD C. TURNER,
Attorney General.

735.

TAXES AND TAXATION—BOARD OF COMPLAINTS—NO AUTHORITY TO CALL DEPUTY ASSESSORS TO DEFEND THEIR ASSESSMENTS —NOT ENTITLED TO COMPENSATION OR EXPENSES IF SUCH DEPUTIES ATTEND—TAX COMMISSION HAS AUTHORITY TO REQUIRE ATTENDANCE OF DEPUTY ASSESSORS AT MEETINGS OF BOARD OF COMPLAINTS—ENTITLED TO COMPENSATION FOR SO ATTENDING.

The board of complaints has no authority to call deputy assessors, as such, before it to defend their assessments. If such deputy assessors voluntarily attend in response to such a call they are not entitled to compensation or expenses therefor.

The tax commission of Ohio, however, has authority to adopt rules requiring the attendance of deputy assessors at meetings of boards of complaints for this purpose upon the order of the board of complaints or the district assessor, and if this is done such deputy assessors would be entitled to compensation for so attending, but not to traveling expenses.

COLUMBUS, OHIO, August 18, 1915.

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

GENTLEMEN:—I have been asked by a member of the district board of assessors for Columbiana county to give my opinion upon the following question:

> "Are deputy assessors who may be called before the board of complaints to defend their assessments entitled to their expenses?"

The compensation of deputy assessors is provided for by section 5613 of the General Code, (103 O. L., 795) in the following language:

> "The salaries or compensations of deputy assessors and other employes of the district assessor shall be fixed by the district assessor, subject to the approval of the tax commission of Ohio. * * *"

The traveling expenses of such deputy assessors are provided for by section 5614 of the General Code, (103 O. L., 795) in the following language:

> "* * * The contingent expenses of the district assessor and district board of complaints, including postage and express charges, their actual and necessary traveling expenses and those of their deputies, assistants, experts, clerks or employes on official business outside of the district when required by orders issued by the tax commission of Ohio shall be allowed and paid as claims against the county; provided, however, that such salaries and compensation and such expenses when allowed shall constitute a charge against the county, regardless of the amount of money in the county treasury appropriated for such purposes and notwithstanding any failure of the county commissioners to levy or appropriate funds therefor."

It is clear from the foregoing that the salary or compensation of a deputy assessor must be so fixed as to cover all of his traveling expenses within the district. An allowance may be made for traveling expenses as such only when the traveling is outside of the district.

Regarding the service of the deputy assessor in attending before the board of complaints to defend his assessments as an official service, the conclusion would follow that if paid as deputy assessor on a per diem basis he would be entitled to an allowance of compensation at such prescribed rate for such services, but not to traveling expenses.

The board of complaints has no authority to compel the attendance of witnesses nor to pay witness fees. It is obvious, therefore, that if any charge can be made for the service mentioned it must be, as above stated, on the theory that it is an official service.

Section 28 of the Warnes law—section 5606 of the General Code, (103 O. L., 793)—provides as follows:

> "The district board of complaints may increase or decrease any valuation complained of and increase or reduce the listed amount of any taxable property, upon its own initiative or if the party affected thereby or his agent makes and files with the board a written application therefor, verified by his oath, showing the facts upon which it is claimed such increase or decrease or reduction should be made, but not without affording the district assessor an apportunity to be heard thereon."

Under favor of this provision the district assessor is entitled to defend his assessments before the board of complaints. It cannot, however, be argued that the right of the district assessor to appear and be heard with respect to a matter pending before the board of complaints devolves upon his deputy, for it is expressly provided by section 4 of the Warnes law—section 5582 of the General Code—that the deputy assessor shall *not* possess the powers of the district assessor under section 28 of the act.

But the district board of complaints has no authority to call upon a deputy assessor as such to appear before it. That is to say, in the absence of an affirmative regulation by the tax commission, no such power exists.

Section 46 of the Warnes law—section 5623 of the General Code, (103 O. L., 798) provides as follows:

> "In addition to the duties specifically imposed by law upon district assessors, deputy assessors and district boards of complaints, they and each of them shall perform such other duties as the tax commission of Ohio in the exercise of its powers may from time to time direct, and in the discharge of such duties they and each of them shall exercise all and singular the powers in them vested by this act."

Section 54 of the same act—section 5624-7 of the General Code, provides as follows:

> "The tax commission of Ohio shall, from time to time, prescribe such general and uniform rules and regulations and issue such orders and instructions, not inconsistent with any provision of law, as it may deem necessary respecting the manner of the exercise of the powers and the discharge of the duties of any and all officers, relating to the assessment of real and personal property and the levy and collection of taxes."

The matter about which the district assessor inquires is one, it seems to me, with respect to which the tax commission would have power to make an administrative rule. The commission would not have the power to authorize the payment of expenses as such, but the commission would have authority to make it the

duty of the deputy assessor to appear when called upon, either by the board of complaints or by the district assessor, and explain or defend his acts in a matter pending before the board of complaints. Such attendance thus being made his duty, it would follow that he would be entitled to his compensation for services rendered in the discharge thereof, though not, for reasons above stated, to his traveling expenses.

Respectfully,
EDWARD C. TURNER,
Attorney General.

736.

STREET ASSESSMENT IN VILLAGE—WHERE COUNTY AUDITOR'S OFFICE CHARGES AND COLLECTS AN EXCESSIVE AMOUNT THROUGH ERROR AND PROCEEDS ARE PAID INTO SINKING FUND—HOW REIMBURSEMENT CAN BE MADE OF EXCESSIVE ASSESSMENT—COUNTY DITCH ASSESSMENT—COLLECTED SIX MONTHS BEFORE DUE—NO REFUND.

Through a clerical error in the office of the county auditor an excessive amount was charged and collected as a street assessment and the proceeds thereof paid into the sinking fund of the assessing village.

The county auditor under favor of section 2589, G. C., on discovering the error must call the attention of the county commissioners thereto. The commissioners, on ascertaining the facts, should authorize the auditor to draw his warrants on any surplus or unexpended funds in the county treasury for the reimbursement of persons so paying such excessive assessment, and at the next semi-annual settlement an amount equivalent to the amount so refunded should be withheld by the county auditor from the amount due to the sinking fund of the assessing village.

The county ditch assessment was properly charged on the special duplicate, but through a clerical error in making out tax receipts was collected six months before it was due.

The county auditor and the county commissioners are without power under section 2589, G. C., to refund to the persons so erroneously paying such assessment an amount equal to the interest on the bonds issued in anticipation thereof for the six months' period.

COLUMBUS, OHIO, August 18, 1915.

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

GENTLEMEN:—I acknowledge receipt of two letters from you, one under date of August 6th and the other under date of August 7th, presenting two somewhat similar questions. In your letter of August 7th you request that I consider these questions together. I have done so, and in this opinion will deal with both of them.

The one question which is stated by the auditor of Stark county is, in his language, as follows:

> "The village of Minerva certified to the auditor's office some street assessments to be collected by the county, and which were to be collected in ten annual installments. Through an error of one of the clerks in bringing forward balance due on these assessments, practically all the

people were over-charged and paid one installment more than they should have paid. All the money collected on these street assessments has in the past been turned over to the village authorities at Minerva, and placed by them into the sinking fund. After I discovered this error I want to correct same, and I think the proper course to pursue is to have the county refund direct to the parties.

"Would it be proper for me to withhold from the money due the sinking fund of Minerva village from the tax levy a sufficient amount to take care of these refunders?"

The second question, which is stated by the auditor of Greene county, is in his language as follows:

"A county ditch was established, assessment made and certified to this office by the county board of commissioners. They certified the assessment due and payable June 20th, 1915, and we so entered it upon our special duplicate of 1914, and turned it over to the county treasurer with the balance of the specials.

"The treasurer in writing up his receipts for December, 1914, placed this assessment upon the receipt at that time, and the most of the taxes were paid for this ditch last December, but same was not due till this June.

"Bonds were sold for this ditch and the interest was charged up till June 20, 1915; now the property owners claim that they were charged interest up to June 20, 1915, and taxes demanded in December, 1914, which is true.

"The commissioners and myself feel that an injustice has been performed upon the (tax payers,) and it was not done intentionally, and we feel that they should be reimbursed to the amount of interest paid on bonds from December 20, 1914, to June 20, 1915, on the amount of special taxes paid on this ditch in December, 1914, that was not due till June, 1915."

Both these questions invite, I think, consideration of sections 2588 and 2589 of the General Code, which provide as follows:

"Sec. 2588. From time to time the county auditor shall correct all errors which he discovers in the tax list and duplicate, either in the name of the person charged with taxes or assessments, the description of lands or other property or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment. If the correction is made after the duplicate is delivered to the treasurer, it shall be made on the margin of such list and duplicate without changing any name, description or figure in the duplicate as delivered, or in the original tax list, which shall always correspond exactly with each other.

"Sec. 2589. After having delivered the duplicate to the county treasurer for collection, if the auditor is satisfied that any tax or assessment thereon or any part thereof has been erroneously charged, he may give the person so charged a certificate to that effect to be presented to the treasurer, who shall deduct the amount from such tax or assessment. If at any time the auditor discovers that erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto at a regular or special session of the board. If the commissioners find that taxes or assessments have been so erroneously charged and collected, they shall order the auditor

to draw his warrant on the county treasurer in favor of the person paying them for the full amount of the taxes or assessments so erroneously charged and collected. The county treasurer shall pay such warrant from any surplus or unexpended funds in the county treasury."

Preliminary to the discussion of the merits of these two questions I think I ought for accuracy's sake to call attention to the fact that there is some doubt as to whether the county auditor still possesses power to act under section 2588, supra, in view of the provisions of section 64 of the Warnes law (section 5624-17 of the General Code), which impose similar powers upon the district assessor. However, I am of the opinion that the county auditor is the proper officer to exercise the powers specifically granted to him by section 2589 of the General Code, because section 64 of the Warnes law, goes no further in its effect than section 2588 goes, viz.: applies to the correction of a living or current duplicate, and does not extend to the certification of errors through which taxes have actually been paid as provided in section 2589, of the General Code, as underlying the making of the refunders which are therein authorized.

Section 5 of the Warnes law (section 5583 of the General Code) may have some effect in this connection also, inasmuch as it provides that

"whenever the county auditor is by any existing provision of law charged with any duty or vested with any powers in making up the original tax list, * * * such duty shall devolve upon and be performed by the district assessor, and such power shall vest in him and be exercised by him; * * *"

But this provision also is limited in its effect to the making up of the tax list.

Without going into this feature of the two questions in further detail, I may say that I am of the opinion that whatever action may lawfully be taken must be initiated at least by the county auditor.

Coming now to the consideration of the separate questions submitted, I advise that, in my opinion, the first case above stated evidences a proper instance for the exercise of power under section 2589 of the General Code. There is no question that the charging and collection of the eleventh installment of the street assessments mentioned in the auditor's letter was "erroneous." The only limitations which apply to section 2589 of the General Code, are that the error must be a clerical one as distinguished from a fundamental one not apparent on the face of the record, and that where the taxes have been paid voluntarily they may not be refunded.

Manifestly, the error in question is purely clerical and is perfectly apparent on the face of the record. In my opinion, the question of voluntary payment does not enter into the case as stated, for the reason that this rule is but an application of the general doctrine that payments under a *mistake of law* may not be recovered, but payments under a *mistake of facts* may be recovered. In this instance there was a mistake of fact, and not a mistake of law.

The cases which deny the right to refund under section 2589, where the payments have been voluntary, are either based upon estoppel, i. e., where the parties had full knowledge of the circumstances and therefore could not be said to have paid under "mistake" at all, (State ex rel. v. Lewis, 20 C. C., 319) or where the mistake was a mistake of law. (Bridge Company v. Commissioners, 9 Bull., 16; Sandheger v. Commissioners, 9 Bull., 20.)

I do not think that it is necessary in order to justify the refunder of taxes

under section 2589, that there should have been actual distraint or other duress. I find that my predecessor was of this opinion and so stated in an opinion to the prosecuting attorney of Tuscarawas county, under date of April 24, 1913, found in the annual report for that year at pages 1213-1215.

It follows, therefore, that the county auditor, having discovered the mistake and the over-payment, *must* call the attention of the county commissioners to the circumstances (Hagerty v. State, 14 C. C., 95). If the commissioners find the facts to be as stated by the auditor, it is their duty to order the auditor to draw his warrants on the county treasurer in favor of the several persons paying the additional assessment, so erroneously charged, for the full amount so erroneously charged and collected. These warrants may be issued upon and by the treasurer paid from any surplus or unexpended funds in the county treasury. Then at the next semi-annual settlement it will be the duty of the auditor to deduct the amount so paid from the amounts due the sinking fund of the village of Minerva.

Section 2590, of the General Code, provides in this connection that

> "at the next semi-annual settlement with the auditor of state after the refunding of such taxes, the county auditor shall deduct from the amount of taxes due the state at such settlement the amount of such taxes that have been paid into the state treasury. No taxes or assessments shall be so refunded except as have been so erroneously charged or collected in the five years next prior to the discovery therof by the auditor. *No assessment shall be returned, except from the fund or funds created in whole or in part by the erroneous assessments.*"

It is true that this section lacks machinery which might be deemed essential. However, in view of its purpose I think it will be liberally construed and that the necessary machinery may be supplied.

While it is true that the sinking fund trustees of a municipal corporation are required to keep separate the proceeds of special assessments when bonds have been issued in anticipation of their collection, and when on that account the trustees are entitled to receive the assessments after they are collected; yet such excessive amounts as may have been paid into the sinking fund of the village in this instance must have merely enhanced the general sinking fund and inured to the benefit of the taxpayers generally. It is only equitable, therefore, and otherwise in strict accordance with the terms of the statute that the general sinking fund levies should be retained to make good the refunders.

In this connection it is to be observed that section 2590, *supra,* does not require that at the settlement the amount refunded shall be charged against a fund wholly created by the erroneous assessments, but it is sufficient in order to authorize such retention that the fund to which the retention is charged be "created in whole or in *part*" by the erroneous assessments. As above stated, the sinking fund of the village of Minerva in the case inquired about satisfies this description.

I have assumed in answering the first question that the excessive installments were collected within five years next prior to the discovery of the error by the auditor.

Upon this assumption and for the reasons above stated, I am of the opinion in answer to the first question that it is the duty of the county auditor to call the attention of the county commissioners to the discovery which he has made. The commissioners should then order the auditor to draw his warrants on the county treasurer against any surplus or unexpended funds therein for the reimbursement of the parties from which the excessive assessments have been erroneously col-

lected; thereupon, at the next semi-annual settlement the auditor should retain from the proceeds of sinking fund levies due to the village of Minerva an amount equal to the amount of such refunders.

The second question, while seemingly similar to the first, is in reality essentially different therefrom. In this case there was no erroneous charge and in only one sense was there an erroneous collection. The amounts charged for collection were proper so far as the auditor's letter shows. They were merely collected at the wrong time. Moreover, they were not, so far as the letter shows, charged for collection at such time, the error being not in the duplicate but in the making out of the tax receipts. It is customary, of course, for taxpayers to regard the unsigned receipts which are handed to them on request by the county treasurer as "bills" in the nature of a demand for the taxes. In contemplation of law, however, this is not so. The only legal charge which is made is that which appears on the face of the duplicate, and, in my opinion, the word "charged" as used in section 2589, G. C., necessarily refers to what appears on the face of the duplicate, and does not contemplate an error in a tax bill.

In substance, then, the transaction described in the second question amounts to this: Through a mutual mistake, shared by the county treasurer on the one hand and the owners of assessed property on the other hand, certain ditch assessments were collected before they were due. Therefore, it is urged that there was an erroneous collection to the extent of the interest on the assessment between the date of collection and the date when they should have been collected.

Upon reflection this claim appears to be unfounded. If the collection was erroneous at all, and even assuming that a refunder may be made where there is no erroneous charge and the only error occurs in the collection, the error in this case would affect the entire amount collected. In that event there should be a refunder of the entire amount, and in such case the next step would be the collection of the entire amount over again at the June collection of taxes. If the collection had been made at the proper time, the parties would have paid the exact sums which they actually did pay. It may be argued that the parties have been damaged by the mistake, because they have lost the use of their money for a period of six months, but they have paid nothing more than the county was entitled to, and if through a mistake of the county treasurer, in which they participated, they have lost the use of their money for a period of six months, this is not an injury of a character which can be remedied under section 2589. If the parties had been damaged without their fault and through the negligence of the county treasurer, their remedy would be against him as a wrong-doer, and not against the county, the profits of which from the transaction, while amounting to something perhaps, may be regarded as negligible.

In another view of the case, stress may be laid upon the fact that in order to sustain the exercise of power under section 2589, G. C., it must appear to the auditor and to the commissioners that the taxes or assessments have been erroneously charged *and* collected. Some force may be given to the use of the word "and," and I think it by no means illogical to argue that it is not in this context synonymous with "or"; but the reasons already stated are sufficient, in my opinion, to establish the conclusion at which I have arrived, and I do not find it necessary to consider the point last suggested.

Still another reason may be adduced in support of the conclusion that there is no authority to reimburse the parties who have paid their assessments under the circumstances stated in the letter of the auditor of Greene county. The assessments have been made and certified. The amount of each assessment appears on the duplicate and the treasurer is charged with collection of it. It is true that in computing the assessment interest is taken into consideration and charged to the

date when it is expected that the assessment will be collected, and the principal sum fixed accordingly. However, such interest does not separately appear on the duplicate.

The county ditch statutes provide in this connection as follows:

Section 6465, General Code:

> "The county commissioners shall direct the auditor to issue an order on the county treasurer to each of the several claimants to whom compensation or damages was allowed for the amount due, and enter on the ditch duplicate the amounts assessed against the several benefited landowners, for the payment of such compensation and damages, payable in the ratio and manner as other assessments, and to be collected as other taxes."

Section 6492, General Code:

> "If the county commissioners determine to issue bonds of the county for the money necessary to meet the expense of construction of a ditch, they shall make an assessment upon the lots, lands, public or corporate roads, or railroads, benefited by the improvement, in proportion to the apportionment provided in this chapter, sufficient to pay the costs of location and the first year's interest, and including the fees of the surveyor or engineer, made after locating, in superintending the construction of the improvement, and order it to be placed upon the duplicate for collection. They shall make such assessments thereafter as may be required to raise the money for the prompt payment of such bonds."

Section 6490, General Code:

> "When the county commissioners make an assessment they shall cause an entry to be made, directing the auditor to make and furnish to the treasurer of the county a special duplicate with the assessment arranged thereon, as required by their order. The auditor shall retain a copy thereof in his office, and all assessments shall be collected and accounted for by the treasurer as taxes. When an assessment remains unpaid for one year after it is placed upon the special duplicate, unless otherwise ordered by the commissioners, it shall be placed on the general duplicate for collection, together with a penalty of not less than six per cent. annually, as county ditch taxes, and the amount of delinquent tax thus placed on the general duplicate shall be charged respectively to the several ditches on account of which such assessment has been made as a transfer from the county ditch fund."

It will be seen from these provisions that charges on the ditch duplicate do not themselves draw interest prior to the date when they are legally payable. Therefore, it follows that the only thing which the treasurer may lawfully collect is the amount with the collection of which he is charged on the special duplicate. In the case presented the amount charged was correct—at least there was no clerical error therein, and the subsequently occurring error in the time of collection could not be construed as such a clerical error. Therefore, no correction could be made on the duplicate itself, which is still current, and no certificate could be issued releasing the treasurer from his obligation to settle for the year on the basis of the charges made against him.

For these several reasons, then, I am of the opinion that there is no authority to refund anything to the persons who have prematurely paid ditch assessments in the manner stated in the second question which I have considered.

Respectfully,
EDWARD C. TURNER,
Attorney General.

737.

OHIO STATE REFORMATORY—RECEIVES MALE CRIMINALS OF CERTAIN AGE—"IF THEY ARE NOT KNOWN TO HAVE BEEN PREVIOUSLY SENTENCED TO A STATE PRISON"—COURT SENTENCES ON THREE SEPARATE INDICTMENTS—SUPERINTENDENT CAN ONLY CERTIFY TO COST BILL IN FIRST SENTENCE.

Under the provisions of section 2131, *G. C., the superintendent of Ohio state reformatory is only authorized to receive male criminals of certain age "if they are not known to have been previously sentenced to a state prison." Therefore, if a court sentences a person to the reformatory on three separate indictments the superintendent of such reformatory is only authorized to receive him on the first sentence and can only certify cost bill of case in which person is first sentenced.*

COLUMBUS, OHIO, August 18, 1915.

HON. CHARLES H. JONES, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—Under date of July 8, 1915, you requested my opinion in the following matter:

> "One Brady Bailey committed three separate and distinct felonies, was indicted on each charge at the January term of court, was arraigned on each indictment and entered a plea of guilty to each. The court took up each indictment in its order and sentenced him on each to the Mansfield reformatory for an indeterminate term.
>
> "Commitment papers and cost bills were made out under each indictment and delivered with the prisoner to the superintendent at Mansfield. The officials of that institution certified to the state auditor the costs in one case only, and have refused to certify the costs in the other cases.
>
> "Your opinion is desired on the question as to whether or not the Mansfield authorities have acted within the law in refusing to certify the cost bills in the two cases above mentioned, and as to whether or not said cost bills should not be paid by the state auditor.
>
> "I herewith enclose you two letters written by W. A. McFadden, record clerk of the reformatory, relative to the above matter, one addressed to W. E. Davis, clerk of courts, and the other to me, together with copies of two letters which I wrote to Mr. McFadden, which may throw some additional light on the matter, and which set forth in a general way our respective contentions."

The letters to which you refer, as enclosed, are as follows:

"May 1, 1915.

"W. E. Davis, Clerk of Courts, Jackson, Ohio.

"Dear Sir:—Your letter of recent date received and I note what you say in regard to cost bills in the cases of Emory Ross and Brady Bailey,

Frank Howes, Charles Patten and Samuel Finley who were received at this institution February 18, 22, and March 15, respectively, and the cost has been certified in each case to the state auditor. However, in the case of Ross and Bailey which you state were committed on other charges concurrent with 52 and 56 will say that we only certified the cost in the case of 4552 and 4556 and I am herewith returning the other commitment papers and cost bills to you as there is no law sentencing men to the reformatory concurrently. Trusting this information will be satisfactory, I remain

"Yours very truly,
"W. A. McFADDEN,
"Record Clerk."

"May 4, 1915.

"Mr. W. A. McFadden, Record Clerk, Ohio State Reformatory, Mansfield, Ohio.

"Dear Sir:—Your letter of May 1st, addressed to W. E. Davis, clerk of courts, relative to the Ross and Bailey cost bills, has been referred by Mr. Davis to me for reply. He also turned over to me the cost bills which you returned to him.

"I am at a loss to understand your position in this matter, for Ross was charged with two separate and distinct offenses, was indicted on two charges, and entered a plea of guilty to each, and was sentenced on each to your institution. A like situation prevails in the Bailey case with this difference, that he was implicated in three different offenses.

"While it may be true that there is no law providing for concurrent sentences to the reformatory, on the other hand there is no law which permits us to refrain from sending them to the reformatory on each indictment when a plea of guilty has been duly entered, or a conviction had thereunder. A wide field would be opened to those criminally inclined if they felt that they could commit several crimes and the state would be compelled to proceed only on one.

"I hope that you will see the legality and justice of our position and certify these disputed costs to the state auditor. If you do not feel inclined to do so, please advise me at your earliest convenience so that I may take the question involved up with the attorney general for a ruling.

"Very truly yours,
"(Signed) Charles H. Jones, "Prosecuting Attorney."

"June 21, 1915.

"Mr. W. A. McFadden, Record Clerk, Ohio State Reformatory, Mansfield, Ohio.

"Dear Sir:—I wrote you on May 4th relative to the cost bill in the cases of Emory Ross and Brady Bailey, which you had returned to our clerk of courts, but have received no reply from you.

"Since you returned the cost bills to the clerk, the authorities of the Ohio penitentiary have certified to the state auditor cost bills exactly like those you have returned, and the same have been paid.

"I will ask you again to please certify these disputed costs to the state auditor, and again request that if you do not feel inclined to do so, that you advise me at once, so that we can proceed in another way.

"Very truly yours,
"(Signed) Chas. H. Jones, "Prosecuting Attorney."

"June 24, 1915.

"Chas. H. Jones, Prosecuting Attorney, Jackson, Ohio.

"Dear Sir:—Replying to your letter of June 21st, I wish to say in regard to the cost bills in the cases of Emory Ross and Brady Bailey which were returned to the clerk of courts at Jackson, O., without being certified to the state auditor, we have never in the history of this institution certified the costs in more than one case for a young man sentenced to this institution. I understand there is a law governing the penitentiary that a man can be sentenced there on two or three charges, and when he completes his first sentence enters upon his second sentence. However this does not apply to the reformatory. We have no objection to certifying costs if advised to do so by the proper authorities. Under the circumstances I think it would be well for you to present this case to the attorney general for a decision. Trusting this information will be satisfactory and thanking you for past favors, I remain,

"Yours very truly,
"W. A. McFADDEN,
"Record Clerk."

In opinion No. 304 rendered April 30, 1915, by this department it was held that the provisions of sections 13720, et seq., G. C., relative to "execution of sentence for felony" are applicable as well to the Ohio state reformatory as to the penitentiary, and that the cost bills certified under said sections by the superintendent of said reformatory should be paid in the same manner as cost bills certified by the warden of the penitentiary.

The Ohio state reformatory was originally provided for by an act found in 81 O. L., at page 206, establishing an intermediate penitentiary "for the incarceration of such persons convicted and sentenced under the laws of Ohio, as have not previously been sentenced to a state penitentiary in this or any other state or country."

I shall not undertake to give the various amendments to said act as the same occurred in succeeding years.

The sections relative to the Ohio state reformatory were incorporated in the Revised Statutes of Ohio, sections 7388-17, et seq., section 7388-24 being section 7 of the act found in 95 O. L., 251, provides as follows:

> "The said board of managers shall receive all male criminals between the ages of sixteen and thirty and not known to have been previously sentenced to a state prison in this or any other state who shall be legally sentenced to said Ohio state reformatory, on conviction of any criminal offense in any court having jurisdiction thereof; and it shall be incumbent upon any such court to sentence to the Ohio state reformatory any *such* male person between the ages of sixteen and twenty-one convicted of a crime punishable by imprisonment in the Ohio penitentiary, and any court in its discretion may sentence to the Ohio state reformatory any *such* male person between the ages of twenty-one and thirty, so convicted, whom said court may deem amenable to reformatory methods; provided, that no person convicted of murder in the first or second degree shall be sentenced or transferred to said Ohio state reformatory."

In the codification of the statutes of Ohio by the general assembly the language of said section 7388-24 was materially changed. Said section is now known as section 2131, G. C., and reads as follows:

> "The board of managers shall receive all male criminals between the ages of sixteen and thirty years sentenced to the reformatory if they are not known to have been previously sentenced to a state prison. Male persons between the ages of sixteen and twenty-one convicted of felony shall be sentenced to the reformatory instead of the penitentiary. Such persons between the ages of twenty-one and thirty years may be sentenced to the reformatory if the court passing sentence deems them amenable to reformatory methods. No person convicted of murder in the first or second degree shall be sentenced or transferred to the reformatory."

In 103 O. L., 885, said section 2131 was amended, but the only change made in said section as amended was to change the words "the board of managers" to read "the superintendent."

The Ohio state reformatory was established as an intermediate penitentiary for the incarceration of persons convicted and sentenced under the laws of Ohio who had not previously been sentenced to a state penitentiary, the word "penitentiary" being subsequently changed to "prison." Section 7388-24 R. S., provided who should be received in such penitentiary, to wit, "male criminals between the ages of sixteen and thirty and *not known to have been previously sentenced to a state prison in this or any other state,* and it was incumbent upon the court to sentence to *such* reformatory any such male persons between the ages of sixteen and twenty-one. *Such* is to be construed as a male criminal not having been previously sentenced to a state prison. The court is also, in its discretion, authorized to sentence any *such* male person between the ages of twenty-one and thirty to the reformatory. *Such,* in this instance, is likewise to be construed as a male criminal not having been previously known to have been sentenced to a state prison. The change of language found in the General Code does not change the meaning of said section. It is a well known principle of law that laws are presumed to have the same construction after codification as before unless it is clear that a change was intended. The slight amendment of said section in 103 O. L., does not, as I view it, change the import to be given to the language of said section 2131 prior to such amendment.

In your letter you state that one Brady Bailey committed three separate and distinct felonies, was indicted on such charge, was arraigned on each indictment and entered a plea of guilty to each; that the court took up each indictment and sentenced him on each to an indefinite term.

After the court had sentenced the said Bailey to the reformatory on the first indictment, the said Bailey was not then a person "not known to have been previously sentenced to a state prison." Therefore, when the court undertook to sentence the said Bailey on the second indictment, it was without authority to sentence him, on the second indictment, to the Ohio state reformatory, and for like reason was not authorized to sentence the said Bailey on the third indictment to the Ohio state reformatory, the said Bailey being at that time "previously sentenced to a state prison."

For the reasons above given I am of the opinion that the superintendent of the reformatory was only authorized to certify to the costs in the case upon which the court first sentenced the defendant.

Respectfully,
EDWARD C. TURNER,
Attorney General.

738.

BOARD OF STATE CHARITIES—BIENNIAL REPORT—STATUTE CHANGED.

Since the last biennial report of the board of state charities covered period ending November 15, 1913, *no further biennial report is due under section* 1358, *G. C., until after November* 15, 1915, *at which time said section, as well as section* 2270, *G. C., will stand repealed. There is, therefore, no authority for the board to make report for period from November* 15, 1913, *to June* 30, 1915, *except upon request of the governor, and such report is not the report required by section* 2270, *G. C., to be printed for distribution.*

COLUMBUS, OHIO, August 18, 1915.

HON. H. H. SHIRER, *Board of State Charities, Columbus, Ohio.*

DEAR SIR:—Your letter of July 23, 1915, requesting my opinion, received and is as follows:

> "I have before me an official copy of senate bill 158, which was enacted by the last general assembly and filed in the office of the secretary of state on June 4, 1915. I notice that section 173-1 states that the first issue of the general statistics shall be for the period from November 15, 1914, to June 30, 1915. I understand that this act will not become effective until September.
>
> "Section 1358 of the General Code as now in effect, provides that this board shall prepare a biennial report. Section 2270 provides for the publication of 2,000 copies of this biennial report. The last report issued covered the biennial period ending November 15, 1913. It seems to be a reasonable conclusion that the next report would be due for the year ending November 15, 1914, and for the next term ending with the close of the new fiscal year, June 30, 1915.
>
> "I wish to ascertain whether the biennial report shall be prepared for the purpose of publication under existing laws, or is it your opinion that the provisions of amended senate bill 158 can be made to apply."

Section 1358, G. C., provides as follows:

> "Biennially, the board of state charities shall make a report of its proceedings to the governor. The report shall contain in detail a statement of expenses incurred, officers and agents employed, the conditions of the state institutions under its control, and such suggestions as it deems proper."

Section 2270, G. C., provides as follows:

> "Biennial reports of the state benevolent and correctional institutions shall be printed as follows: five hundred copies of the report of each institution. Board of state charities, two thousand copies."

Inasmuch as your last biennial report was for the period ending November 15, 1913, there would not be another report due from you, under the provision of section 1358 supra, until November 15, 1915. Said sections 1358 and 2270, however, are repealed by senate bill No. 158, which will become effective September

3, 1915, before there would be any authority under these sections for your board to make a report and have the same printed. After that bill becomes effective there will be no longer any provision for the biennial report of your board and the only provision with reference to the making of reports by you will be found in sections 260-1 and 2264-1 as contained in senate bill No. 158 (106 O. L., 508) which provide as follows:

"Section 260-1. For all state officers, departments, commissions, boards and institutions of the state the fiscal year shall be and is hereby fixed to begin on the first day of June of the succeeding year."

"Section 2264-1. Each elective state officer, and the adjutant general, board of pardons, superintendent of public instruction, the state agricultural commission, the superintendent of public works, the public utilities commission, the superintendent of insurance, the state inspector of building and loan associations, the state superintendent of banks, the commissioners of public printing, the supervisor of public printing, the board of library commissioners, the state geologist, the state commissioner of soldiers' claims, the state fire marshal, the state inspector of oils, the state industrial commission, the state highway department, the state board of health, the state medical board, the state dental board, the state board of embalming examiners, the state board of charities, the Ohio commission for the blind, the state board of accountancy, the state board of uniform state law, the state civil service commission, the commissioners of the sinking fund, the state tax commission, the clerk of the supreme court, the state board of administration, the state liquor licensing board, the state armory board, the trustees of the Ohio State University, and every private or quasi-public institution, association, board or corporation receiving state money for its use and purpose, shall make annually, at the end of each fiscal year, in triplicate, a report of the transactions and proceedings of his office or department for such fiscal year excepting however receipts and disbursements unless otherwise specifically required by law. Such report shall contain a summary of the official acts of such officer, board or commission, institution, association or corporation, and such suggestions and recommendations as may be proper. On the first day of August of each year, one of said reports shall be filed with the governor of the state, one with the secretary of state and one shall be kept on file in the office of such officer, board, commission, institution, association or corporation."

Under these sections there will be no report due from your board until after July 1, 1916, and that report will be for the fiscal year ending June 30, 1916. The printing of that report will be governed by the provisions of section 173-2, G. C., as found in senate bill 158 (106 O. L., 514) which provides as follows:

"No officer, board or commission, shall print or cause to be printed at the public expense, any report, bulletin or pamphlet, unless such report, bulletin or pamphlet be first submitted to and the publication thereof approved by the commissioners of public printing. If such commission shall approve the publication thereof, it shall determine the form of such publication and the number of copies thereof, provided that in all cases the commissioners of public printing shall cause their action thereon to be entered upon the minutes of their proceedings.

"If such approval is given, the commissioners shall cause the same to be printed, and may authorize such printing to be done at any penal,

correctional or benevolent institution of the state having a printing department of sufficient equipment thereof; and when printed, such publications, other than the Ohio general statistics, shall be delivered to such officer, board or commission for distribution by him or it."

It is apparent that this will leave a period from November 13, 1913, to June 30, 1915, for which the sections above quoted do not make provisions for a report of your board. Section 2266, G. C., provides that the governor may at any time require to be filed with him a detailed report from any state officer, board or commission, and section 173, G. C., 106 O. L., 513, provides that the secretary of state shall prepare from reports filed with him and with the governor of the state the publication to be known as Ohio general statistics. This section will make it possible for you, upon request of the governor, to make a report to him covering the period from November 15, 1913, to June 30, 1915, and it would be proper for you to make the report in such form as would enable the secretary of state to secure therefrom the information needed in compiling and publishing the first volume of Ohio general statistics which, under the provisions of section 173-1, G. C., 106 O. L., 513, will cover the period from November 15, 1914, to June 30, 1915.

Section 260-4, G. C., 103 O. L., 661, and section 2 of senate bill 158, 106 O. L., 517, which require the making of reports by state officers, departments, boards and commissions for the period from the end of the former fiscal year to June 30, 1915, do not apply to your board because both of these sections apply expressly to such state officers, departments, boards, etc., as are required to make annual or semi-annual reports, whereas the report of your board, under section 1358 supra, is a biennial report.

I am, therefore, of the opinion that there is no authority for your board to make a report for the period from November 15, 1913, to June 30, 1915, except upon request of the governor, and such report is not the report required by section 2270 supra, to be printed for distribution.

Respectfully,
EDWARD C. TURNER,
Attorney General.

739.

ENROLLMENT—NOT NECESSARY THIS YEAR—FORM OF NOTICE TO COUNTY AUDITORS.

COLUMBUS, OHIO, August 18, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—I have your letter of August 7, 1915, wherein you enclose a communication from Hon. John A. Zangerle, auditor of Cuyahoga county, Ohio, in which he calls your attention to the provisions of section 5183, G. C., and suggests if you desire under the provisions of section 5185 to dispense with the enrollment provided in the former section, the order for the same be made at once. In your letter you state that in your opinion it is not necessary the enrollment referred to by him be made at this time, and you request an opinion as to whether, under the statute, it is your duty to so notify all the county auditors of the state, and if so you request a form of such notice.

Section 5183, G. C., above referred to, provides as follows:

> "Township, ward and precinct assessors of personal property, in the year 1911, and every fifth year thereafter, shall make two separate lists of persons liable to enrollment within their respective jurisdictions. One list shall comprise persons named in sections fifty-one hundred and eighty and fifty-one hundred and eighty-one, and the other list shall contain the names of all other persons subject to enrollment. Such assesors, at the time of making their assessment returns, shall return certified copies of such lists to the auditors of their respective counties."

Sections 5180 and 5181, G. C., referred to in this section, were repealed by the 81st general assembly, as shown by volume 105-106 O. L., page 473. As the law will stand in 1916, only one list will be required to be made of male persons subject to be enrolled in the militia of this state, the repeal of the above named sections having abolished the classes of persons therein excepted, which classes constituted the first list named in section 5183. If in your opinion it is unnecessary to make this enrollment, as provided in said section 5185, it would be proper for you to so notify the various county auditors of this state, although such method of notification would not be exclusive. Should you desire to avail yourself of that plan, I would suggest that you address to the various county auditors of this state a communication as follows:

> "Mr.----------
>
> "Auditor of ---------- County.
>
> "Under the authority vested in me by the provisions of section 5185, G. C., I hereby order that the enrollment provided for in section 5183, G. C., be dispensed with, the same being in my opinion unnecessary at this time, and you are directed to so notify all assessors under your control and within your jurisdiction."

The law does not require this enrollment to be made until the year 1916. It would therefore be improper to make the foregoing order before that time, as contingencies might arise under which it would not be considered advisable to dispense with the same.

Therefore, in reply to Mr. Zangerle's request that this order should be made at once, I would respectfully suggest that he be notified that it cannot be made until after the first of next year and between that date and the beginning of the work of the assessors.

Respectfully,
EDWARD C. TURNER,
Attorney General.

740.

DISAPPROVAL OF RESOLUTION FOR IMPROVEMENT OF CERTAIN ROADS IN GUERNSEY, MAHONING AND PORTAGE COUNTIES.

COLUMBUS, OHIO, August 19, 1915.

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

DEAR SIR:—I have your communication of August 17, 1915, transmitting to me for examination final resolutions as to the following roads;

Guernsey county, Cambridge-Caldwell road, Pet. No. 1549, I. C. H. No. 353.

Guernsey county, Cambridge-Caldwell road, Pet. No. 1549, I. C. H. No. 353.

"Mahoning county, Akron-Canfield road, Sec. "P", Pet. No. 1651, I. C. H. No. 87.

Portage county, Akron-Youngstown road, Pet. No. 948, I. C. H. No. 18.

As to the two resolutions relating to road improvements in Guernsey county, the county auditor has failed to attach his official seal to his certificate reciting that the money required for the payment of the county's portion of the improvement is in the treasury to the credit of or has been levied, placed on the duplicate and in process of collection for the state and county road improvement fund. These resolutions should be returned to the county auditor of Guernsey county with a request that he attach his official seal to the certificate in question.

As to the resolution relating to the proposed improvement in Mahoning county, the resolution recites on its face that it was passed on the 29th day of July, 1915, while the certificate of the clerk recites that the resolution was passed on the 29th day of July, 1913.

As to the resolution relating to the proposed improvement in Portage county, the resolution recites on its face that it was passed on the 2nd day of August, 1915, while the certificate of the clerk recites that the resolution was passed on the 2nd day of August, 1913.

These two resolutions should be returned to the clerks of the respective boards of county commissioners for the purpose of having either the resolutions or the certificates corrected to correspond with the facts.

For the reasons above stated, I am returning these resolutions without my approval.

Respectively,
EDWARD C. TURNER,
Attorney General.

741.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS IN DIFFERENT COUNTIES.

COLUMBUS, OHIO, August 19, 1915.

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

DEAR SIR:—I have your communication of August 17, 1915, transmitting to me for examination final resolutions as to the following roads:

Athens county—Logan Athens rd., Pet. No. 476, I. C. H. No. 155;
Clinton county—Cincinnati-Chillicothe rd., Pet. No. 1078, I. C. H. No. 8;
Clinton county—Cincinnati-Chillicothe rd., Pet. No. 1078, I. C. H. No. 8;
Fayette county—Springfield-Washington C. H. rd., Pet. No. 972, I. C. H. No. 197;
Fayette county—Hillsboro-Washington rd., Pet. No. 973, I. C. H. No. 259;

Fayette county—Washington-London rd., Pet. No. 802, I. C. H. No. 244;
Sandusky county—Fremont-Bellevue rd., Pet. No. 1169, I. C. H. No. 274;
Sandusky county—Fremont-Perrysburg rd., Pet. No. 1170, I. C. H. No. 275;
Sandusky county—Lima-Sandusky rd., Pet. No. 1164, I. C. H. No. 22;
Sandusky county—Lima-Sandusky rd., Pet. No. 1164, I. C. H. No. 22;
Seneca county—Findlay-Tiffin rd., Pet. No. 1045, I. C. H. No. 219;
Seneca county—Tiffin-Bellevue rd., Pet. No. 1052, I. C. H. No. 271;
Washington county—Hockingport-Powhatan rd., Pet. No. 1351, I. C. H. No. 7;
Williams county—Bryan-Pioneer rd., Pet. No. 1508, I. C. H. No. 306;
Williams county—Bryan-Pioneer rd., Pet. No. 1508, I. C. H. No. 306.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

742.

BOARD OF EDUCATION—MAY CONTRACT WITH BOARD OF ANOTHER DISTRICT FOR ADMISSION OF ITS PUPILS TO SCHOOLS OF SUCH DISTRICT—AMOUNT OF TUITION MAY BE FIXED BY TERMS OF CONTRACT.

The board of education of a school district may lawfully contract with the board of education of another school district for the admission of its pupils into one or more of the schools of such other district and the amount of tuition for such attendance may be fixed by the terms of said contract.

COLUMBUS, OHIO, August 19, 1915.

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

GENTLEMEN:—In your letter of August 9, 1915, your request my opinion on the following question:

> "Can a board of education legally contract with another board of education to pay a fixed amount per year for tuition of pupils, or must the amount be established by the actual attendance from month to month? In other words, would it be legal for a board of education, at the beginning of a school year, to contract with another board of education to pay $600.00 per year, foreign tuition fee, regardless of the number of pupils that attend and the number of months of attendance?"

Section 7734, G. C., provides:

> "The board of any district may contract with the board of another district for the admission of pupils into any school in such other district, *on terms agreed upon by such boards.* The expense so incurred shall be paid out of the school funds of the district sending such pupils."

This statute is general in its terms and confers authority on the board of education of *any* school district to contract with the board of education of another school district for the admission of its pupils into the schools of such other district, upon such terms as may be agreed upon in said contract between said boards.

It will be observed that the statute does not provide a method for computing the tuition for the attendance of such pupils in the schools of such other district, and in the absence of such provision the amount agreed upon between the boards of education of such districts to be paid for such attendance is not necessarily determined by the number of pupils in attendance or the number of months such pupils actually attend such schools.

While this might be a fair basis for such determination in a particular case, the added expense of maintaining the schools of a district on account of the admission of pupils from another district is not always in proportion to the number of such pupils in attendance and the time said pupils actually attend said schools.

The provisions of section 7734, G. C., conferring authority on the board of education of a school district to enter into such a contract, must be distinguished from those provisions of the statutes giving to certain pupils residing in a school district, under the conditions or having the qualifications therein prescribed, the right to attend an elementary school or high school in another district and to have their tuition paid by the board of education of the district in which they reside, without an agreement to that effect.

Section 7735, G. C., provides:

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

Section 7736, G. C., provides:

> "Such tuition shall be paid from either the tuition or the contingent funds and the amount per capita must be ascertained by dividing the total expenses of conducting the elementary schools of the district attended, exclusive of permanent improvements and repairs, by the total enrollment in the elementary schools of the district, such amount to be computed by the month. An attendance any part of a month will create a liability for the whole month."

Section 7747, G. C., as amended in 104 O. L., 125, relates to the tuition of pupils residing in rural districts and who are eligible to admission to high school, and provides as follows:

> "The tuition of pupils who are eligible for admission to high school and who reside in rural districts, in which no high school is maintained,

shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part of the month shall create a liability for the entire month. No more shall be charged per capita than the amount ascertained by dividing the total expenses of conducting the high school of the district attended, exclusive of permanent improvements and repair, by the average monthly enrollment in the high school of the district. The district superintendent shall certify to the county superintendent each year the names of all pupils in his supervision district who have completed the elementary school work and are eligible for admission to high school. The county superintendent shall thereupon issue to each pupil so certified a certificate of promotion which shall entitle the holder to admission to any high school. Such certificates shall be furnished by the superintendent of public instruction."

It will be observed that where pupils residing in one district attend the schools of another district, under the authority conferred and within the limitations prescribed by section 7735, G. C. and section 7747, G. C., as amended, the amount of tuition to be paid by the board of education of the district in which said pupils reside must be ascertained in the manner provided in said sections.

Under the provision of section 7750, G. C., a board of education not having a high school may enter into an agreement with one or more boards of education maintaining such high school, for the schooling of all of its high school pupils, and when such agreement is made the board of education making it shall be exempt from the payment of tuition at other high schools of pupils living within three miles of the schools designated in the agreement providing the school or schools selected by said board are located in the same civil township as that of the board making such agreement, or some adjoining township.

This section further provides:

"In case no such agreement is entered into, the school to be attended can be selected by the pupil holding a diploma, if due notice in writing is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, such notice to be filed not less than five days previous to the beginning of attendance."

Section 7752, G. C., as amended, 104 O. L., 225, provides:

"No board of education shall be entitled to collect tuition under this chapter unless it is maintaining a regularly organized high school with a course of study extending over not less than two years and consisting mainly of branches higher than those in which the pupil is examined. The standing or grade of all public high schools in the state shall be determined by the superintendent of public instruction and his finding in reference thereto shall be final."

In view of the above provisions of the statutes, it seems clear that, where one or more pupils residing in a school district have the right to attend an elementary school or high school in another school district and the board of education of the district in which such pupil or pupils reside is compelled to pay the tuition for such attendance, the amount of such tuition must be determined in the manner prescribed by the provisions of section 7736, G. C., or by the provisions of section 7747, G. C., as amended. On the other hand, it seems equally clear that, where

such attendance and the tuition therefor are determined by the terms of a contract made between the boards of education of such districts, the provisions of said section 7736, G. C., and section 7747, G. C., as amended, are not applicable.

I am of the opinion therefore, in answer to your question, that the board of education of a school district may lawfully contract with the board of education of another district for the admission of its pupils into one or more of the schools of such other districts, and that the amount of tuition for such attendance may be fixed by the terms of said contract and agreed upon by the parties thereto.

Respectfully,
EDWARD C. TURNER,
Attorney General.

743.

APPROVAL OF RESOLUTION FOR IMPROVEMENT OF LOGAN-ATHENS ROAD, HOCKING COUNTY, OHIO.

COLUMBUS, OHIO, August 19, 1915.

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

DEAR SIR:—I have your communication of August 18, 1915, transmitting to me for examination final resolution relating to the Logan-Athens road in Hocking county, petition No. 1005, I. C. H. No. 155.

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

Respectively,
EDWARD C. TURNER,
Attorney General.

744.

KENT STATE NORMAL SCHOOL—BOILERS AND STOKERS TO BE PLACED IN NEW BUILDING, BECOME PART OF SAID BUILDING—PUBLICATION OF NOTICE FOR BIDS MUST BE MADE IN ACCORDANCE WITH SECTION 2317, G. C.

Boilers and stokers to be placed in a new building being constructed become a part of the said building, and contracts therefor are within sections 2314, *et seq., G. C.*

Unless publication is made in accordance with section 2317, *G. C., it is not proper to award contracts on bids received thereunder.*

COLUMBUS, OHIO, August 19, 1915.

HON. JOHN E. MCGILVREY, *President, Kent State Normal School, Kent, Ohio.*

DEAR SIR:—Under date of July 19, 1915, Hon. J. A. McDowell, secretary of the board of trustees of Kent Normal School, enclosed, for my approval, a contract for the erection and installation of boilers and stokers for the heating and ventilating equipment of said school, and requested me to have same filed with the auditor of state and advise your board of trustees at the earliest possible moment of my action on the same. Mr. McDowell simply enclosed a copy of the minutes of the meeting of your board of trustees wherein it appears that the

bid of The Springfield Boiler & Manufacturing Company, of Springfield, Illinois, was, in the judgment of the board, the lowest and best bid, and that the contract was awarded to such concern. There were, however, no copies of the bids enclosed with said letter.

Under date of July 17, 1915, you furnished us the proposal and contract bond of The Springfield Boiler & Manufacturing Company and the affidavits of the legal advertising.

The advertisement under which bids were received is in the following language:

> "Sealed proposals will be received at this office until twelve o'clock noon, of Saturday, June 19, 1915, for furnishing the materials and performing the labor for the erection of:
>
> "That part of the heating plant and equipment at the Kent State Normal School, including the boilers and stokers, engines and generators, in accordance with plans and specifications prepared by George F. Hammond, architect, on file in the office of the auditor of state. * * *
>
> "The board of trustees reserves the right to reject any or all bids."

It appears, therefore, that bids were called for, for the erection of part of the heating plant and equipment, including the boilers and stokers, engines and generators, at the Kent State Normal School.

The first question to be determined is whether or not the erection of boilers and stokers in the power house building being erected at the Kent State Normal School is an erection, alteration or improvement of a state institution or building, or addition thereto within the meaning of sections 2314, et seq., G. C., being the chapter on building regulations.

Section 2314 provides as follows:

> "Before entering into contract for the erection, alteration or improvement of a state institution or building or addition thereto, excepting the penitentiary, or for the supply of materials therefor, the aggregate cost of which exceeds three thousand dollars, each officer, board, or other authority by law charged with the supervision thereof, shall make or cause to be made the following: full and accurate plans, showing all necessary details of the work, with working plans suitable for the use of mechanics and other builders in such construction, so drawn and represented as to be plain and easily understood; accurate bills showing the exact amount of different kinds of material necessary to the construction to accompany such plans; full and complete specifications of the work to be performed, showing the manner and style required with such directions as will enable a competent mechanic or other builder to carry them out and afford bidders all needful information; a full and accurate estimate of each item of expense and of the aggregate cost thereof."

Such question may be determined, as I view it, from a consideration of whether or not boilers and stokers, when placed in the power house building can be considered as fixtures and therefore a part of the realty. The case of Teaff v. Hewitt, 1 O. S., 511, lays down the rule for the determination of whether or not a certain chattel will become a fixture, and in the second branch of the syllabus states the rule as follows:

> "The true criterion of a fixture, is the united application of the following requisites, to wit: 1st. Actual annexation to the realty, or some-

thing appurtenant thereto. 2nd. Application to the use, or purpose, to which that part of the realty with which it is connected, is appropriated. 3rd. The intention of the party making the annexation, to make a permanent accession to the freehold."

This is one of the leading cases on the rule as to fixtures in the United States and has been followed by the supreme court in various decisions.

In the case of Fortman v. Goepper, 14 O. S., 558, which was a case between a real estate mortgagee and a chattel mortgagee, the court, on page 567 makes the following observation:

"The mode of annexation, alone, will not determine the character of the property annexed. The same mode may exist and yet the property be personal in the one case, and real in the other. * * * The general principle to be kept in view, underlying all questions of this kind, is the distinction between the business which is carried on in or upon the premises, and the premises, or *locus in quo*. The former is personal in its nature, and articles that are merely accessory to the business, and have been put on the premises for this purpose, and not as accessions to the real estate, retain the personal character of the principal to which they appropriately belong and are subservient. But articles which have been annexed to the premises as accessory to it, whatever business may be carried on upon it, and not peculiarly for the benefit of a present business which may be of a temporary duration, become subservient to the realty and acquire and retain its legal character."

In the case of Case Manufacturing Co. v. Garven, 45 O. S., 289, the second branch of the syllabus is as follows:

"The machinery of a manufactory that supplies the motive power, as the engine, boiler and their usual attachments, as contradistinguished from that propelled by it, where permanently annexed to foundations resting upon the freehold, is generally held to be a fixture, though susceptible of being removed without any material injury to the same or the freehold; and, whilst by the agreement of the parties, the property may be made to preserve the character of personalty, yet, when it is so attached, that, but for the agreement, it would be a fixture, such agreement will be of no avail against a subsequent mortgagee of the realty without notice of it; nor will the filing of a mortgage upon it as chattel property, duly executed and delivered as such, of itself constitute such notice."

There are various other decisions in Ohio as to whether or not certain chattel property are fixtures, but I shall not endeavor to go into the various cases. Suffice it to say that there can be no doubt that it is the intention of the trustees of the Kent State Normal School, in placing the boilers and stokers in the power house building in such school, that the same shall become a permanent accession to the realty, and therefore under the provisions of section 2314, supra, would be, within the language as used therein, an erection of a state building, it being a part of such erection. The contract submitted between The Springfield Boiler and Manufacturing Company and the Board of Trustees of the Kent State Normal School is, therefore, within the provisions of sections 2314, et seq., G. C.

In so answering I am not unmindful of an opinion rendered by this department on June 28, 1915, to the Honorable Carl E. Steeb, secretary board of trustees,

Ohio State University, being opinion No. 548, wherein I held that an automatic sprinkler system placed in a building already erected and used for many years, known as "Old University Hall," would not be within the provisions of sections 2314, et seq., General Code, for the reason, as stated in that opinion, that the building with said sprinkler system would not be made more convenient for use, but the sprinkler system was only a means of affording fire protection and could at any time be taken down without injury to the freehold. The engines and boilers in question, however, are to be set on foundations and bricked in, and are intended to be permanent, for the use of the building and to make the buildings suitable for use for the purposes for which intended.

Coming now to consider the advertisements which have been furnished upon which the bids were let:

Upon examination of the advertisements I find that the same were made in the newspapers and for the periods as follows:

Toledo News-Bee, Toledo, Ohio, May 25, June 1, 8 and 15.
Cleveland Leader, Cleveland, Ohio, May 26, June 2, 9 and 16.
Cincinnati Daily Times Star, Cincinnati, Ohio, May 25, June 1, 8 and 15.
Columbus, Dispatch, Columbus, Ohio, May 25, June 2, 9 and 16.
The Courier, Portage County, May 28, June 4, 11 and 18.

Section 2317, G. C., provides as follows:

"The notice shall be published weekly for four consecutive weeks next preceding the day named for awarding the contract, in the paper having the largest circulation in the county where the work is to be let, and in one or more daily papers having the largest circulation, and published in each of the cities of Cincinnati, Cleveland, Columbus and Toledo. Such notice shall state when and where the plans, descriptions, bills and specifications can be seen, and they shall be open to public inspection at all business hours between the date of the notice and the making of the contract."

Said section requires the notice for bids to be published weekly for four consecutive weeks next preceding the day named for awarding the contract. This has not been done in this case. The *earliest* advertisement made in this case was on the 25th day of May, which was on Tuesday, and called for the opening of bids on June 19th, or twenty-three days prior to the opening of the bids. If the word "weekly" is to be considered as a calendar week, four full weeks have not elapsed prior to the awarding of the contract. If the word "weekly" is to be considered as any period of seven consecutive days, the first insertion of the advertisement was not twenty-eight days prior to the opening of the bids. In either interpretation the law has not been complied with. Therefore, I am of the opinion that contracts cannot be awarded under the advertisements made in this matter.

Respectively,
EDWARD C. TURNER,
Attorney General.

745.

GOVERNOR—MAY APPOINT A WOMAN COMMISSIONER OF DEEDS FOR OHIO.

Under section 132, *G. C., the governor may appoint a woman as commissioner of deeds for Ohio.*

COLUMBUS, OHIO, August 19, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Your letter of August 16, 1915, bearing the following inquiry, is received.

> "Under the provisions of section 132 of the General Code of Ohio, can a female, residing in another state or territory of the United States or a foreign state, be appointed as a commissioner of the state of Ohio?"

Section 132 to which you refer has the following provision:

> "The governor is authorized to appoint as commissioners of the state of Ohio persons residing in any other state, or in any territory of the United States, or in any foreign state, on such evidence of qualification as he may require. * * *."

The foregoing provisions of this statute limit appointments thereunder to persons residing in any other state or in any territory of the United States, or in any foreign state. Manifestly, all the qualifications required for this appointment may be and are possessed by members of both sex, so that there is nothing in the section itself, or in any succeeding provisions of law governing the same subject-matter, which in any manner attempts to or limits these appointments to the male sex. Therefore it would seem that unless such appointment comes within the inhibition of section 4 of article XV and section 1 of article V of the constitution, there is no legal obstacle to the appointment of a female to this office.

In an opinion rendered by this department on April 24, 1901, and reported in 45 law bulletin, page 313, it was held a woman was eligible to this appointment, and subsequently on January 25, 1907, in an opinion reported in the attorney general's reports for 1903-1908, at page 47 thereof, a similar ruling was made. The foregoing opinions were based upon the ground chiefly that the office of the commissioner aforesaid was an office, the functions of which were to be performed wholly out of the state, and that the qualifications of being an elector, as required by section 4 of article XV and as defined by section 1 of article V, could not apply to an appointee in this position. If it did apply, and only electors of this state residing in other states or foreign countries could be appointed to this position, it would practically vitiate and destroy the whole statute.

While agreeing with my predecessors in the opinion that the question is not entirely free from doubt, I have, for the same reasons advanced by them, reached the same conclusion and therefore hold that a woman may be appointed to this position. I would observe further, however, as suggested by one of my predecessors, that if the courts should subsequently hold a woman was not eligible to this office, her official acts, when commissioned by you, would be valid as an act of a *de facto* officer, and that therefore no substantial injury could result from such appointment.

Respectively,

EDWARD C. TURNER,

Attorney General.

746.

BOARD OF EDUCATION—PERSON ELECTED TO FILL A VACANCY CAUSED BY RESIGNATION OF A MEMBER OF SUCH BOARD HOLDS OFFICE FOR UNEXPIRED TERM.

Under the provision of section 4748, G. C., a person elected by the board of education of a school district to fill a vacancy caused by the resignation of a member of such board, holds office for the unexpired term for which the member so resigning was elected, and until his successor is elected and qualified.

COLUMBUS, OHIO, August 19, 1915.

HON. D. M. CUPP, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR:—In your letter of August 9, 1915, you request my opinion as follows:

> "I hereby request of your department an opinion as to the proper construction to be placed on section 3748, General Code; that is does a member of the board of education appointed by the board to fill a vacancy hold such office for the full term to which the member causing such vacancy was elected, or only until it is possible to fill such vacancy by an election?
>
> "The facts are these that a member of one rural board of education whose term of office would expire in 1917 has resigned, and the board has appointed a member to fill such vacancy, and the question arises whether such an appointee holds until January, 1917, or only until January, 1916."

In reply to my request for additional information, I have your letter of August 16th, which is as follows:

> "In reply to yours of August 14, 1915, I beg leave to acknowledge that I was mistaken in my statement as to the time of expiration of the term of the member of rural board of education I had in mind when propounding my question; I meant to state that the terms expire with the years 1915 or 1917, and should have stated that they expired on the first Monday in January of the 1916, or of the year 1918."

From the statement of facts submitted in your two letters, I understand that a member of the board of education of one of the rural school districts in your county, whose term of office would expire on the first Monday of January, 1918, has resigned and that said board of education has elected a person to fill such vacancy.

You ask to be advised whether the person so elected holds office until the first Monday in January, 1916, or until the first Monday in January, 1918. Section 10 of the General Code, relates to the term of an appointee to an elective office, and provides as follows:

> "When an elective office becomes vacant and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is

vacant that occurs more than thirty days after the vacancy shall have occurred. This section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official term, or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy."

While the above provision of the statutes prescribes the general rule governing the term of an appointee to an elective office, it is not applicable to the appointment of a person to fill a vacancy in the board of education of a school district for the reason that the term of such appointee is governed by the provisions of section 4748 of the General Code, which provides:

"A vacancy in any board of education may be caused by death, nonresidence, resignation, removal from office, failure of a person elected or appointed to qualify within ten days after the organization of the board or of his appointment, removal from the district or absence from meetings of the board for a period of ninety days, if such absence is caused by reasons declared insufficient by a two-thirds vote of the remaining members of the board, which vote must be taken and entered upon the records of the board not less than thirty days after such absence. *Any such vacancy shall be filled by the board at its next regular or special meeting, or as soon thereafter as possible, by election for the unexpired term.* A majority vote of all the remaining members of the board may fill any such vacancy."

Under the above provisions of section 4748, G. C., the member in question will hold said office for the unexpired term of the member who has resigned.

Section 4745 of the General Code, provides that:

"The terms of office of members of each board of education shall begin on the first Monday in January after their election, and each such officer shall hold his office four years and until his successor is elected and qualified."

I am of the opinion, therefore, in answer to your question, that the person so elected by the board will hold said office until the first Monday in January, 1918, and until his successor is elected and qualified.

Respectfully,
EDWARD C. TURNER,
Attorney General.

747.

SYNOPSIS FOR REFERENDUM ON AMENDED SENATE BILL NO. 307, McDERMOTT ACT, TO REGULATE TRAFFICKING IN INTOXICATING LIQUORS.

COLUMBUS, OHIO, August 19, 1915.

MESSRS. McGHEE, DAVIS AND BOULGER, *Columbus, Ohio.*

GENTLEMEN:—You have submitted to me a synopsis of the so-called "McDermott Law," which you propose to submit for referendum. This synopsis is as follows:

"The act, known as amended senate bill No. 307 (the McDermott act) was passed May 27, 1915, approved June 5, 1915, and filed in the office of the secretary of state at Columbus, Ohio, June 5, 1915, being an act to provide for license to traffic in intoxicating liquors and to further regulate the traffic therein, and to amend sections 1261-16, 1261-17, 1261-18, 1261-19, 1261-20, 1261-21, 1261-24, 1261-33, 1261-40, 1261-41, 1261-43, 1261-46, 1261-47, of the General Code."

I hereby certify that the foregoing synopsis is a truthful statement regarding the above entitled law.

Respectfully,
EDWARD C. TURNER,
Attorney General.

748.

LAND REGISTRATION ACT—FILING OF NOTICE PROVIDED IN SECTION 8572-56, G. C.—WHETHER CITY OR COUNTY OFFICIALS SHOULD EXAMINE RECORDS TO SEE IF LANDS ARE REGISTERED WHEN CITY MAKES A LEVY FOR AN ASSESSMENT—SHOULD BE DESIGNATED BY TAXING DISTRICT MAKING LEVY.

In the filing of the notice provided for in section 8572-56, *G. C.,* 103 *O. L.,* 942-3, *which is section* 56 *of the land registration act known as the Torrens act, the registered lands affected by the levy should be designated by the taxing district making the levy.*

COLUMBUS, OHIO, August 19, 1915.

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

GENTLEMEN:—This office is in receipt of a communication from the Department of Law, of Cleveland, Ohio, asking for an opinion as to the provisions of section 56 of the Torrens act, which is section 8572-56, of the General Code, (103 O. L., 942 and 943) which communication is as follows:

"The city of Cleveland, and more particularly the division of finance, through this department, respectfully asks your opinion upon the following proposition, involving as it does the relative duties of state, county and local officials.

"Section 56 of the Torrens act, contained in 103 Ohio Laws, pages 914 to 960, provides as follows:

"'When in a city, village, township or county, an ordinance, resolution or order is passed or made by a council, board or other authority, to lay out, establish, alter, widen, grade, regrade, relocate or construct or repair a highway, road, street, sidewalk, drain or sewer, or to make any other public improvement or to do any work, the whole or a portion of the expense of which may be assessed or levied upon real estate, if any registered land or any land included in an application for registration then pending is affected by the act or proceeding, and liable to such assessment, or if an ordinance or resolution is passed making or levying any such

assessments on registered real estate or certifying to the auditor or other officer or board any such assessments to be made or levied on any registered land, the clerk of the board or council passing such ordinance, resolution or order or issuing such certificate, shall file in the recorder's office a notice of the passage or issuance thereof giving a list of the lands assessed and a memorial thereof shall thereupon be noted by the recorder on the register of each certificate of title for such land. Unless there is filed with the recorder such notice and list of lands, registered lands shall not be liable for such assessments. In case of the repeal or nullification otherwise of such ordinance, resolution or order, such clerk or officer or board shall within five days thereafter notify the recorder thereof who shall thereupon cancel such memorials.'

"It will be noted that when the city passes an ordinance levying a special assessment, if registered lands are affected it is required to file in the county recorder's office a copy of such ordinance before it may obtain a lien upon such property.

"QUERY: Whether the requirement of this section would be properly complied with by a notice to the county recorder of every ordinance which levies special assessments, together with a list of the lands assessed, description of the same and the names of the owners thereof. In other words, does the obligation rest upon the city to examine the county records after the passage of every resolution levying an assessment, to determine whether registered lands are affected, or does that duty rest upon the county recorder when a particular ordinance levying assessments is filed in his office? Section 56 is manifestly ambiguous and does not make clear where that duty rests.

"Section 94 makes it the duty of the attorney general to 'prepare and from time to time prescribe a uniform system of books, records, entries, blanks and forms for the use of the public officers required to perform duties under this act * * * and such books, blanks and forms so prepared and prescribed, so far as applicable, shall be used by such officers * * *'

"The effect of this section 94 is to empower the attorney general to require any information on the subject and to prescribe any form that he chooses so long as it is in no way inconsistent with the requirements of section 56 above quoted, and so long as it seems reasonably consistent with the purposes of the act. It is apparently true also that public officers are required to use these forms only so far as they are applicable.

"Your office has prepared blanks for the use of cities in making such notification, a copy of which is hereto attached. The result of a compliance with the form thus prescribed is to place upon the city the duty of determining what lands included in a particular levy are registered lands.

"It is difficult to interpret section 56 to mean that any such duty rests upon the city, for it says, 'shall file in the recorder's office a notice of the passage or the issuance thereof, giving a list of the lands assessed.' It does not say *'registered lands.'* Manifestly, the simplest method is for the city to file in the recorder's office a copy of every ordinance levying a special assessment and a list of all lands assessed. The county recorder could then check them over and if registered lands were affected, note the same as a memorial upon the register. If the city must determine this it means that it must practically keep a duplicate record to that kept in the recorder's office, and keep a man constantly stationed to note all changes in the records, as well as all applications for registration, for the duty arises when the application is made.

"It means an enormous burden to the city of Cleveland, for it is not unusual for as high as three hundred parcels of land to be affected by one ordinance levying an assessment. On the other hand it is a relatively simple proposition for the county recorder to check over the list of all lands assessed and determine from his records, of which he alone has the custody, whether lands registered with him are affected. Is not the gist of the whole matter that notification be given to the county recorder so that if lands registered with him are affected, he may properly protect them in the interest of the state?

"What the city is now asking is whether it is not properly complying with the law, as it appears in section 56, when it sends to the county recorder a certified copy of the assessing ordinance, together with a list of all lands assessed, including registered lands, the names of all owners and description of the property and its streets and front footage.

"If the city is correct in this contention I presume your permission will be given to modify to this extent the form which your office has drawn."

The purpose of the filing with the county recorder of the notice giving a list of the lands assessed for the purposes referred to in section 8572-56 of the General Code, supra, is to make effective a levy which only attaches to registered lands when the recorder has been served with a notice that such registered land is included in the land to be affected by the levy. The contention of the writer of the request for an opinion is that the duty of searching the records rests with the recorder rather than with the person serving the notice, and it is suggested that the filing with the recorder of the copies of all of the ordinances passed in the city of Cleveland would enable the recorder to secure the information necessary to make the required memorial on the certificate of title.

I am unable to view the matter in that light. The only lands referred to in section 8572-56 of the General Code, are registered lands, and the filing of the notice referred to in that section only becomes necessary when registered lands are affected. The burden of filing the notice is on the taxing district or subdivision to be credited with the lien to be attached to the registered land, and it is a prerequisite that the notice be filed with the recorder by the taxing subdivision before the lien shall attach.

It is therefore my opinion that the duty and responsibility of filing with the recorder of the notice "giving a list of the lands assessed or to be assessed" refers to the filing of a list of registered lands assessed or to be assessed, and that the duty to indicate the particular registered lands to be assessed rests upon the taxing subdivision making the levy.

A copy of this opinion has been sent to the department of law of the city of Cleveland, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.

749.

COUNTY BOARD OF EDUCATION—DISTRICT SUPERINTENDENT IS NOT ENTITLED TO PAY FOR ATTENDING TEACHERS' INSTITUTE —SECTION 7870, G. C., 104 O. L., CONSTRUED.

A district superintendent is not entitled to pay for attending a teachers' institute under authority of section 7870, G. C., as amended in 104 O. L., 157.

COLUMBUS, OHIO, August 20, 1915.

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

GENTLEMEN:—In your letter of August 12, 1915, you request my opinion on the following question:

> "Can a district superintendent be paid for attending a teachers' institute by the county board of education as provided by section 7870, General Code, as amended 104 O. L., 157? If so, is the amount he is entitled to to be prorated and allowed by the boards of education of the districts comprising his supervision district?"

Section 7870, G. C., as amended in 104 O. L., 157, provides:

> "When a teachers' institute has been authorized by the county board of education the boards of education of all school districts shall pay the teachers and superintendents of their respective districts their regular salary for the week they attend the institute upon the teachers or superintendents presenting certificates of full regular daily attendance, signed by the county superintendent. If the institute is held when the public schools are not in session, such teachers or superintendents shall be paid two dollars a day for actual daily attendance as certified by the county superintendent, for not more than five days of actual attendance, to be paid as an addition to the first month's salary after the institute, by the board of education by which such teacher or superintendent is then employed. In case he or she is unemployed at the time of the institute, such salary shall be paid by the board next employing such teacher or superintendent, if the term of employment begins within three months after the institute closes."

Under the above provisions of the statute, a teacher or a superintendent who is employed by the board of education of a school district in a county, at the time when a teachers' institute authorized by the board of education of such county is held in said county, or whose term of employment begins within three months after said institute closes, and who attends said institute and presents to said board of education a certificate of full, regular daily attendance, signed by the county superintendent, is entitled to his regular salary for the week he attends said institute, or if said institute is held when the public schools are not in session, said teacher or superintendent shall be paid by the board of education so employing him, for actual daily attendance as certified by said county superintendent, for not more than five days of actual attendance, to be paid as an addition to the first month's salary.

While the provisions of said statute are general in that they apply to a teacher or superintendent employed by the board of education of any school district in

the county, it will be observed that such teacher or superintendent must be employed by said board of education within the meaning of said provisions of said statute in order to be entitled to pay for attending said institute.

Section 7870, G. C., as amended, is a part of the new school law so called, and the act of the general assembly amending said section was passed on the same day as the act amending section 4739, G. C., as found in 104 O. L., 140, and the amendments to both of said sections became effective on the same day. Section 4739, G. C., as amended, provides for district supervision and prescribes the manner of electing district superintendents. Section 7870, G. C., prior to its amendment, could not have included district superintendents within the meaning of its provisions, and the legislature in amending said section did not change its provision determining the classes of persons who, under the conditions therein prescribed, are entitled to pay for attending a county teachers' institute.

It seems clear, therefore, that it was not the intention of the legislature in amending said section, to extend the meaning of said provision so as to include district superintendents.

I am of the opinion, therefore, in answer to your first question, that a district superintendent employed in the manner provided in section 4739, G. C., as amended, is not a superintendent within the meaning of section 7870, G. C., as amended, and would not be entitled to pay for attending a teachers' institute under authority of said section.

This answer to your first question disposes of your second question.

Respectively,
EDWARD C. TURNER,
Attorney General.

750.

COUNTY BOARD OF EDUCATION—MEMBER OF SUCH BOARD IS ENTITLED TO REIMBURSEMENT FOR EXPENSE INCURRED BY HIM IN OPERATING HIS AUTOMOBILE WHILE THE SAME IS BEING USED AS A CONVEYANCE IN ATTENDING MEETINGS OF SAID BOARD.

A member of a county board of education is entitled to reimbursement for the actual and necessary expense incurred by him in operating an automobile owned by him while used as a means of conveyance in attending a meeting of said board.

COLUMBUS, OHIO, August 20, 1915.

HON. A. L. DUFF, *Prosecuting Attorney, Port Clinton, Ohio.*

DEAR SIR:—I have your letter of August 4, 1915, which is as follows:

"A. O. Dehn, county school superintendent, has submitted the following facts to me and has asked a ruling on the same.

"The members of our county board of education all live at some distance either from interurban lines or railroads, and it is necessary for them to provide some means for getting to and from train. They are accustomed to using their own automobiles for this purpose, and Mr. Dehn

wishes to know whether such individual owner of an automobile is entitled to make a reasonable charge for the use of his own machine as a means of conveyance?"

Section 4734, G. C., as amended in 104 O. L., 137, provides:

"Each member of the county board of education shall be paid his actual and necessary expenses incurred during his attendance upon any meeting of the board. Such expenses, and the expenses of the county superintendent, itemized and verified shall be paid from the county board of education fund upon vouchers signed by the president of the board."

In opinion No. 618 of this department rendered to the bureau of inspection and supervision of public offices, under date of July 17, 1915, I have held that a county board of education may allow the county superintendent an amount sufficient to cover the actual and necessary expense incurred by him in maintaining and operating an automobile owned by him and used in the discharge of his duties, having due regard for the extent of such use in public and private business.

In conformity with the above holding, I am of the opinion, in answer to your question, that a member of a county board of education is entitled to reimbursement for the actual and necessary expense incurred by him in operating an automobile owned by him, while used as a means of conveyance in attending a meeting of said board.

A copy of the opinion above referred to is enclosed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

751.

DENTAL BOARD—EDUCATIONAL QUALIFICATIONS APPLICABLE TO THOSE DESIRING TO PRACTICE DENTISTRY IN OHIO—EDUCATIONAL QUALIFICATIONS PRESCRIBED BY SECTION 1321-1, G. C., SUPRA NOT ESSENTIAL FOR ENTRANCE TO DENTAL COLLEGE.

The educational qualifications prescribed by section 1321-1, *G. C., supra should not be exacted as a condition of matriculation in a dental college. Such qualifications apply only to applicants for license to practice dentistry.*

COLUMBUS, OHIO, August 21, 1915.

HON. R. H. VOLLMAYER, *Secretary, Ohio Dental Board, Toledo, Ohio.*

DEAR SIR:—I have your letter of the date of August 9, 1915, and quote therefrom as follows:

"I ask you to give us a ruling upon section 1321-1 on page 3.

"Firstly, as to whether the certificate mentioned in lines 3 and 16 must show that the fifteen high school units shall be possessed by the applicant at the time he presents his application for a certificate to the state superintendent of public instruction, which time is designated by the examining

board as subsequent to graduation; or whether he must have fifteen units of high school credit at the time he enters dental college, three years in advance of the above date.

"As we read the law, no mention is made of the time of matriculation, as a date for filing applications or for completing high school units.

"I understand also that in the universities of the state, the school laws governing such universities take precedence over any dental law which is passed. In these there is a provision by which a student may enter any department with less than fifteen high school units, and be allowed one year's time to complete the entrance requirements and while attending the freshman college course. If that is so, the dental department of the Ohio State University and the department of dentistry of Western Reserve University would have the privilege of allowing dental students to enter and make up certain units during their freshman dental course, and if a construction were placed upon this section requiring fifteen high school units to be possessed by the applicant at the time he enters dental college, the new dental law would not be of uniform application.

"The second question upon which I should like to have a ruling, is as to whether the state superintendent of public instruction is given power to examine and pass upon the preliminary educational credentials of other students than those presenting applications for examination to the Ohio state dental board. Many students come to the dental schools of this state with no intention of practicing in this state, and one-half of the graduates of this school probably will not take examination before the Ohio state board.

"Will you please rule as to whether or not the Ohio state dental board or the state superintendent of public instruction will have jurisdiction in any way over such students? * * *

"At the same time I wish you would also give me an opinion as to the proper interpretation of the last sentence in section 1321-1 which reads, 'this shall not apply to students already enrolled in accredited dental colleges.' Would a student who (as an example) matriculates in any dental college before the 18th of this month, but does not actually enter upon his studies until the fall term in October, be entitled to any consideration?

"Section 1329-1 forbids the practice of dentistry under a company, association or corporation name. Would it be lawful for a dentist to advertise by a sign in front of his office that he is doctor so and so, successor to The Red Cross Dental Parlors or Union Painless Dentist, etc., or could he advertise this fact by hand bill or newspaper?

"Section 1321-1 sets a standard of general education that is to be required of all applicants who wish to practice dentistry in Ohio. This law will affect the students who enter dental colleges this year. This section seems to conflict with section 7658 somewhat, and section 7659. Would it be proper for us to require the colleges to exact credentials according to section 1321-1? If a college should require this standard, could an applicant claim the privilege of entering the school provided he has the qualifications set forth in sections 7659 and 7658?"

The first two questions submitted in the foregoing communications may be properly considered together. and paraphrased may be stated as follows: Is the certificate of the state superintendent that an applicant is possessed of a general education equal to that required for graduation from a first grade high school in

this state, required before said applicant enters a dental college or before said applicant takes the examination required by the state dental board for a license to practice dentistry within this state, and

(2) Is the state superintendent of public instruction given power to examine and pass upon the preliminary educational credentials of students other than those presenting to the Ohio state dental board applications for said examination?

The statutes which refer to and cover examination for license to practice dentistry within this state are found in section 1321, G. C., and 1321-1 as found in vol. 105-106 O. L., at page 298.

Section 1321, G. C., provides:

> "Each person who desires to practice dentistry within this state shall file with the secretary of the state dental board a written application for a license and furnish satisfactory proof that he is at least twenty-one years of age, of good moral character, and present evidence satisfactory to the board that he is a graduate of a reputable dental college, as defined by the board. Such application must be upon the form prescribed by the board and certified by oath."

Section 1321-1 provides:

> "The applicant shall also present with his application a certificate of the state superintendent of public instruction, that he is possessed of a general education equal to that required for graduation from a first grade high school in this state. Said superintendent of public instruction shall issue a certificate without examining the applicant, provided said applicant presents to him one of the following credentials: A diploma from an approved college granting the degrees of A. B., B. S. or equivalent degree; a certificate showing graduation from a high school of the first grade, or from a normal or a preparatory school, legally constituted, after four years of study; a teacher's permanent or life high school certificate; a certificate of admittance by examination to the freshman class of an approved college granting the degree of A. B., B. S., or equivalent degree. In the absence of the foregoing credentials and before issuing such certificate the applicant shall be examined by said superintendent of public instruction, in such branches as are required from a first grade high school and to pass such examination shall be sufficient qualification to entitle such applicant to a certificate; provided, however, that the superintendent of public instruction may designate any county superintendent of schools to hold such examinations at such times and places as may be necessary or convenient. The fee for such examination shall be three dollars and the fee for certificate shall be one dollar, both payable to said superintendent of public instruction and by him paid into the state treasury to the credit of the general revenue fund. Granting of certificates by examination by said superintendent of public instruction, and acceptance by said superintendent of certificates of admittance by examinations to the freshman class of approved colleges granting the degree of A. B., B. S. or equivalent degree, shall cease after January first, 1919. This shall not apply to students already enrolled in accredited dental colleges."

It will be observed that the two foregoing sections relate solely to applicants for a license to practice dentistry within this state. No language can be found or reference made in either section that can be construed as connecting the provisions

of these sections with any requirements for admission to any dental college in this state. The educational certificate required by the last section from the state superintendent of public instruction applies only to an applicant for a license to practice dentistry and cannot be connected in any way with any requirements that any dental college may make for admission therein. These observations also answer the second inquiry regarding the power of the state superintendent of public instruction to examine and pass upon the preliminary educational credentials of students other than those presenting applications for examination to the state dental board.

As before observed, the provisions of these statutes are intended to apply only to applicants for license from the state dental board of this state and do not concern students who intend to take examination elsewhere and have no intention of practicing dentistry within this state.

Your next question refers to the provision contained in the last sentence of section 1321-1, which reads as follows: "This shall not apply to students already enrolled in accredited dental colleges." And the precise point of your question seems to be whether or not matriculation is enrollment. My conclusion is, from the sense in which this provision is placed in this statute, that it is not. Enrolled, as used in this paragraph, evidently is intended by the legislature to apply to those students who have actually taken some instruction in accredited dental colleges. The purpose of this provision is to give such students, who from some cause have been unable continuously to pursue their college course, the right at any time after January 1, 1919, when their course has been completed, to avail themselves of the privileges of this section.

I therefore conclude that in the case you mention the mere fact that the student matriculated without actually entering upon his studies will not avail to exclude him from the provisions of this section.

Your next inquiry involves an interpretation of section 1329-1 which provides as follows:

> "It shall be unlawful for any person or persons to practice or offer to practice dentistry or dental surgery, under the name of any company, association, or corporation, and any person or persons practicing or offering to practice dentistry or dental surgery shall do so under his name only; any person convicted of a violation of the provisions of this section shall be fined for the first offense not less than one hundred dollars, nor more than two hundred dollars, and upon a second conviction therefor, his license may be suspended or revoked as provided in section 1325 of this act."

This section makes it penal for any person or persons to practice or offer to practice under the name of any company, association or corporation. In the case submitted, the person described is practicing and offering to practice under his own name, and in compliance with the provisions of the statute above. The addition of the words "successor to, etc.," does not change his identity nor does it identify the company with him. These additional words are purely narrative and cannot be interpreted as denoting a continuation of a former condition or a declaration of a present situation.

Your last inquiry involves two questions which may be separately stated thus:

> "1. Would it be proper for us to require colleges to exact educational credentials for admission according to section 1321-1, supra?
>
> "2. If a college should require this standard, could an applicant claim

the privilege of entering the school provided he has the qualifications set forth in section 7659, G. C., and section 7658, G. C.?"

Referring to these questions in the order named, I am of the opinion it would not be proper for you to exact, as a condition of matriculation in a dental college, the educational qualifications prescribed by said section 1321-1, supra, which, as before observed, apply only to applicants for license to practice dentistry. I reach this conclusion for the reason that the legislature in enacting said section 1321-1 plainly intends it shall apply only *at the time of the examination* for a license to practice dentistry and then only to such persons who take said examination for license to practice in this state. The adoption of such requirements by your board would not be in harmony with the legislative plan, and doubtless would prevent many students, who are not expecting to practice in this state, from entering colleges here. It would also interfere with many home students who expect to take their professional and literary training contemporaneously in our state colleges.

The above observations apply with equal force to the voluntary adoption of such requirements by colleges, as suggested in your second question. A careful reading of the two sections 7658, G. C., and 7659, G. C., will show that the former section makes provisions for admission to a dental college without examination, if the applicant is the holder of a diploma from a high school of the first grade. This provision is identical with the requirement of section 1321-1, and there could be no conflict as between those two sections. Section 7659, G. C., however, provides for qualifications which will entitle an applicant to take an examination for admission to a dental college. It cannot be assumed that the legislature, in the enactment of section 7659, intended to fix a lower standard for admission to a dental college by examination than that required by the provisions of section 7658. The requirement of section 7659, as above observed, is to fix maximum qualifications to be required before an examination can be taken. If the examination itself requires such qualification as may be possessed by the applicant who is admitted without examination under section 7658, I see no reason for the applicant to complain. In other words, I do not construe section 7659 as in effect making a lower standard for admission to a dental college than section 7658, and as said last section observes the same standard as section 1321-1, it would appear that a college could voluntarily adopt the requirements of the last section as a standard of admission. Of course, these observations refer only to colleges coming under the provisions of said sections 7658 and 7659, G. C., and do not apply to colleges excepted under the provisions of these sections.

Respectively,
EDWARD C. TURNER,
Attorney General.

752.

APPROVAL OF RESOLUTIONS FOR ROAD IMPROVEMENTS, HENRY, MAHONING AND PORTAGE COUNTIES.

COLUMBUS, OHIO, August 21, 1915.

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

DEAR SIR:—I have your communication of August 19, 1915, transmitting to me for examination final resolutions as to the following roads:

Henry county—Wauseon-Napoleon rd., Pet. No. 1064, I. C. H. No. 296;
Mahoning county—Akron-Canfield rd., Sec. "P," Pet. No. 1651, I. C. H. No. 87;
Portage county—Akron-Youngstown rd., Pet. No. 948, I. C. H. No. 18.

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

EDWARD C. TURNER,
Attorney General.

753.

CONTRACTOR HAS RIGHT TO RELY UPON INFORMATION FURNISHED BY STATE HIGHWAY COMMISSIONER—SUCH INFORMATION MUST HARMONIZE WITH PLANS, ETC., ON FILE—NOTICE TO CONTRACTORS SHOULD CLEARLY STATE WHAT IS INTENDED TO BE IMPROVED—CORRESPOND WITH PLANS.

A contractor, in bidding for the work of improving a section of an inter-county highway, has a right to rely on the information furnished by the state highway commissioner in so far as the same is in keeping with the plans, profiles and specifications for said improvement on file in the office of the county commissioners and in the office of said state highway commissioner and, if it is intended that the bridges and culverts to be constructed are to cover a greater mileage than that of the roadway proper, it should be clearly stated in the notice to contractors and shown on said plans and profiles.

COLUMBUS, OHIO, August 21, 1915.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*
DEAR SIR:—I have your letter of July 31st, which is as follows:

"The State Highway Department received alternative bids on water-bound macadam and concrete for the Hicksville-Defiance road, I. C. H. 420, petition 574, in Hicksville and Mark townships, June 2, 1914.

"The bids for water-bound macadam were intended to cover 33,300 lineal feet, or 6.30 miles while concrete bids were for 26,723 lineal feet, or 5.06 miles. The estimates submitted to the bidders for bridges and culverts were exactly the same, both in respect to quantities and total cost for both macadam and concrete construction.

"Clemmer & Johnson, Hicksville, Ohio, were the low bidders on concrete and were awarded the contract for that type of construction. After the work of construction had begun, the contractors maintained that they were not to construct the bridges and culverts for more road than was covered by the concrete pavement, namely, 26.723 lineal feet, or 5.06 miles. They claim that was their understanding from the advertisement, as you will see by their letter of May 11, 1915. You will note copy of the advertisement as it appeared. They also say in this letter, that the profile is marked end of contract at station 267-23. Please note that the notation appearing at station 267-23 reads: "End Sec. No. 1 if concrete be adopted." As a matter of fact, the quantities appearing under bridges and culverts, covers a distance of 35,965 lineal feet of road, or 6.81 miles.

"At the time the plans and estimates were made the highway department contemplated building more road than they afterwards found they had funds to construct; consequently, the macadam was reduced to 6.30 miles, and the concrete to 5.06 miles, but the bridges and culverts remained the same, covering a distance of 6.81 miles.

"The intention of the highway department was to construct the bridges and culverts on more road than would be covered by either the macadam or the concrete road improvement.

"Under the form of advertisement, plans, specifications and estimates, can the contractors be required to construct bridges and culverts for more than 5.06 miles, the length of the concrete road?

"If so, can they be required to build these structures for a distance of 6.81 miles, as contemplated and represented by the quantities under "Bridges and Culverts?"

"The state highway department has asked the contractors, Clemmer & Johnson, to construct the structures, as represented by quantities under "Bridges and Culverts," of estimate sheet attached to the contract and specifications. They have constructed only those structures on the 5.06 miles covered by the concrete road, and advise us that they believe this is all that is covered by their contract.

"The files of the state highway department bearing on this matter are very voluminous, and if Mr. Duncan can conveniently call, I will gladly assist him in getting out such information as may be found in them.

"We respectfully ask your opinion in this matter at your earliest convenience."

You enclose a letter addressed to me, from the firm of Clemmer & Johnson, under date of July 30th, which is in part as follows:

"The plans for the above mentioned improvement were originally made to include 6.3 miles of water-bound macadam road and bridge work for that distance. Alternate bids were received by the state department for 5.06 miles of concrete road, and the approximate estimate for the concrete included the roadway for 5.06 miles and bridges for 6.3 miles, but the notice to contractors only included 5.06 miles of road and bridge work, and the profiles were marked by the state department 'End of Contract' at 5.06 miles. We were the successful bidders for the work in question and, believing that the state department had overlooked changing their approximate estimate to exclude the 1.24 miles of bridge work, relied on the notice to contractors and the profiles and completed the work accordingly with concrete road and bridge work for the distance of 5.06 miles, just as we supposed we had contracted to do. We did not consider the 1.24 miles of bridge work when making our bid nor at any other time, for we supposed that if this extra work was intended to be included it would have been plainly stated in the notice to contractors, and shown on the profiles, and it is very unusual to construct bridges beyond the end of the paved road, and this is especially true when it is understood that the Hicksville-Defiance road is being built in separate sections.

"We are sure that no other contractor for this work, who figured on the same, included the 1.24 miles of extra bridge work, and we are in a position to furnish affidavits from certain of these contractors to this effect."

Upon examination of the files in your department relating to the improvement of section No. 1 of the Hicksville-Defiance road, I find in file No. 142 a copy of the notice to contractors, a copy of the specifications for said improvement with concrete, a copy of the contract between the state and the firm of Clemmer & Johnson, a copy of the bond given by said firm and a copy of the approximate estimate of the state highway commissioner, of the cost of constructing the roadway proper and a separate estimate of said state highway commissioner of the cost of constructing bridges and culverts.

I understand that at the time the notice to contractors, inviting sealed proposals for grading and paving of the roadway and for constructing the bridges and culverts of said section No. 1 of the above described highway, was published, your department, in conformity with its rule of procedure, issued to all prospective bidders who made application therefor two folders, one containing the data found in file No. 142 as above set forth, the other containing practically the same data except that the notice to contractors and the specifications called for water-bound macadam instead of concrete, and the length of section No. 1, as described in said notice, was 6.30 miles instead of 5.06, the length of said section as described in the notice to contractors for concrete work, and that the estimated cost of construction was different.

The copy of the notice to contractors for proposals on concrete work is in part as follows:

> "Sealed proposals will be received at the office of the STATE HIGHWAY COMMISSIONER AT COLUMBUS, OHIO, until two o'clock p. m., June 2, 1914, for grading and paving the roadway and for constructing the bridges and culverts, as follows:
>
> "Defiance Co., Pet. 574, I. C. H. 420, paving with concrete Hicksville-Defiance road, Hicksville and Mark Twps. Length 26,723 feet or 5.06 miles. Width of paving 15 feet. Estimated cost of construction, $56,138.51."

The copy of the notice to contractors for proposals on water-bound macadam is in part as follows:

> "Sealed proposals will be received at the office of the STATE HIGHWAY COMMISSIONER AT COLUMBUS, OHIO, until two o'clock p. m., June 2, 1914, for grading and paving the roadway and for constructing the bridges and culverts, as follows:
>
> "Defiance Co. Pet. 574, I. C. H. 420, paving with w. b. macadam, Hicksville-Defiance road, Hicksville and Mark townships. Length 33,300 feet or 6.30 miles. Width of paving 15 feet. Estimated cost of construction $53,951.05."

There is nothing in said notices that would in any way lead a bidder to believe that the 5.06 miles, in case concrete should be adopted, or the 6.30 miles, in case water-bound macadam should be adopted, did not include all the bridges and culverts to be considered in bidding for the work.

Moreover, the Hicksville-Defiance road is being improved in separate sections and an examination of the profile shows the following notation appearing at station 267-23:

> "End of Sec. No. 1 if concrete be adopted."

While the approximate estimate of the state highway commissioner of the cost of constructing the bridges and culverts, issued to bidders for concrete was the same as that issued to bidders for water-bound macadam and, as stated by you, covered 6.81 miles, I note that said approximate estimate was prefaced by the following statement:

> "The estimates below are only approximate, although the result of calculations, and the contractor must be responsible for his own data on which to base his bid."

As stated by Mr. Clemmer, of said firm of Clemmer & Johnson, this statement to bidders, taken in connection with the fact that the notice to contractors for concrete work plainly limits the construction of bridges and culverts to 5.06 miles, and the further fact that the notation on the profile shows section No. 1 of said road as limited to said length of 5.06 miles, in case concrete should be adopted, caused said firm of Clemmer & Johnson in bidding for the work on said section No. 1, in response to the aforesaid notices and after having examined the plans, profiles and specifications for said work, to submit their bid for said construction work with the understanding that should the contract be awarded to their firm only such bridges and culverts were to be constructed as were included within the 5.06 miles, the length of said section No. 1.

Mr. Clemmer further states that the 1.24 miles of bridge work, the difference between the 5.06 miles, in case concrete should be used, and the 6.30 miles, in case water-bound macadam should be used, was not taken into consideration by them at the time they estimated the cost of the construction work, on which estimate they based their bid.

As stated by you, at the time the plans and estimates were made, the highway department contemplated building more road than they afterwards found they had funds to construct and the department determined to reduce the lengths of the section to be improved to 6.30 miles, for water-bound macadam, or 5.06 miles, for concrete. The bidders were not advised that the state highway department, in issuing its notices for sealed proposals for said construction work, intended that the construction of bridges and culverts should cover 6.81 miles as originally planned, and there is nothing on the plans and profiles that evidence such intent.

While the approximate estimates of the cost of constructing bridges and culverts, as issued to bidders, was the same for water-bound macadam as for concrete, and it might be argued that this was notice to said bidders that the state highway department intended that the construction of said bridges and culverts should cover a greater mileage than the respective lengths set forth in the aforesaid notices, in view of the fact that the bidder was required to secure his own data on which to base his bid, and the further fact that the mileage, on which the estimate of the state highway commissioner of the cost of constructing said bridges and culverts was based, was greater than that set forth in either of the aforesaid notices, I do not think that said estimate of the state highway commissioner, as furnished to the bidders, was a sufficient notice of said intention of the state highway department that the work of constructing said bridges and culverts should cover a greater mileage than the length of the roadway proper.

The firm of Clemmer & Johnson had a right to rely on the information furnished by the state highway commissioner, in so far as the same was in keeping with the plans, profiles and specifications for said improvement, and if the extra

work of constructing bridges and culverts was intended to be included in the contract it should have been clearly stated in the notices to contractors and should have been shown on the profiles.

I am of the opinion, therefore, that said firm cannot be required to construct bridges and culverts for more than 5.06 miles, the length of the concrete improvement designated as section No. 1 of the Hicksville-Defiance road.

Respectfully,
EDWARD C. TURNER,
Attorney General.

754.

MUNICIPAL CORPORATION—WHEN VILLAGE DESIRES TO ERECT A MUNICIPAL LIGHT PLANT AND THERE IS SUCH A PLANT ERECTED BY "ANY PERSON, COMPANY OR PERSONS OR CORPORATION," WHICH "IS WILLING TO SELL," VILLAGE MUST PURCHASE SAID WORKS SO ERECTED—IF NO AGREEMENT CAN BE REACHED, VILLAGE MUST APPROPRIATE—FRANCHISE TO ERECT AND OPERATE ELECTRIC WORKS DOES NOT GIVE OWNER EXCLUSIVE RIGHT.

1. *Under the provisions of section* 3990, *G. C., when a village desires to erect electric works at the expense of the village, and such works have already been erected by "any person, company of persons or corporation," to whom a franchise to erect the same has been granted, if such "person, company or persons or corporation" is willing to sell, the village must purchase said works so erected. If no agreement can be made as to compensation therefor, the village must proceed to appropriate said works.*

2. *The grant of a franchise to erect and operate electric works in a village does not give the owner or owners thereof exclusive rights thereunder. Other franchises of the same character may be granted by the municipality if it considers it expedient so to do.*

COLUMBUS, OHIO, August 23, 1915.

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

GENTLEMEN:—I am in receipt of a letter from the solicitor of Newton Falls, Ohio, desiring my opinion upon the questions therein stated, which I consider of sufficient public importance to warrant my addressing said opinion to you. His letter is as follows:

> "As solicitor for the village of Newton Falls, Ohio, I desire to submit for your opinion a question which has been referred to me by the village council.
>
> "In the year 1904, the then council of the village deeming it necessary to provide for the lighting of streets, public buildings, and the accommodation of the inhabitants of the village, advertised for bids for the furnishing of the same. One J. W. Carr put in a bid, a copy of which is hereto attached and marked 'Exhibit B.' June 14, 1904, the council passed

an ordinance, a copy of which marked 'Exhibit A' is hereto attached. By this ordinance a franchise running for twenty (20) years was granted to said Carr. July 1, 1904, council adopted a resolution, a copy of which marked 'Exhibit C' is hereto attached. By this resolution the mayor was authorized to enter into a contract with said Carr to run for the period of ten (10) years, a copy of said contract, marked 'Exhibit D' is hereto attached. This contract has expired by limitation as provided therein, but the franchise has about nine (9) years yet to run.

"Under his contract Carr erected a small plant, set poles, strung wires and for the period of the ten (10) years carried out his part of the contract.

"At the expiration of Carr's term, the present council again advertised for bids. Several bids were received, Carr among other bidders. Council considering the bids too high rejected them and decided that it would be for the interest of the village to erect and operate its own light plant. (The village already owns and operates its water plant.)

"The question is, can the village, under existing circumstances, erect and operate a lighting plant of its own, independent of the Carr franchise, without first purchasing of Carr his old and now out of date plant?

"Section 3990 of the General Code, reads in part as follows: 'The council of a municipality may, when it is deemed expedient and for the public good, erect gas works or electric works at the expense of the corporation, or purchase any gas or electric works already erected therein, but in villages where gas works or electrical works have already been erected by any person, company or persons, or corporation, to whom a franchise to erect and operate gas works or electric works has been granted, and such franchise has not yet expired, the council shall, with the consent of the owner or owners, purchase such gas works or electric works already erected therein, * * *.' And further provided what is to be done in case a village and the owner cannot agree.

"Section 3990 of the General Code, is a re-enactment of section 2486 of the Revised Statutes, as amended May 12, 1902. See Laws of Ohio, Vol. 95, page 599.

"The well considered case of State ex rel. v. The City of Hamilton, found in Ohio State Reports, Vol. 47, page 52, and cited in the case of State ex rel. v. Toledo, found in Ohio State Reports, Vol. 48, page 112, would appear to settle the question were it not for the fact that these cases were decided prior to the amendment of section 2486 by the act passed May 12, 1902. I am aware of the ruling of your predecessor in the case of the village of Middleport, a somewhat similar one, found in Vol. 2, at page 1962, Annual Report of the attorney general. But there is this difference between the Middleport case and that of Newton Falls. In the Middleport case the contract had not expired and in the Newton Falls case it has.

"Section 3809 of the General Code, among other things, limits the period of time for which council may enter into contracts for lighting of streets, etc., to ten years.

"Under these conditions and in view of the statute now in force, what can the village do? Is the word 'shall' as used in section 3990 mandatory or no? If it is, then the village of Newton Falls must either purchase the old and out of date plant of Carr or make a new contract with the lowest bidder, neither of which is desired. And again, suppose that Carr is not the lowest bidder for the new contract. What is there in the statute to

prevent the present council from granting a new franchise to some other person or company, and entering into a new contract? An early opinion will be very much appreciated."

The full provisions of section 3990, G. C., above referred to, as amended.

"The council of a municipality may, when it is deemed expedient and for the public good, erect gas works or electric works at the expense of the corporation, or purchase any gas or electric works already erected therein, but in villages where gas works or electrical works have already been erected by any person, company of persons, or corporation, to whom a franchise to erect and operate gas works or electric works has been granted, and such franchise has not yet expired, the council shall, with the consent of the owner or owners, purchase such gas works or electric works already erected therein. If the council and owner or owners of such gas or electric works are unable to agree upon the compensation to be paid therefor, the council may file in the probate court of the county where such gas works or electric works are located, a petition to appropriate such gas works or electric works, and thereupon the same proceedings of appropriation shall be had as is provided for the appropriation of private property by a municipal corporation. A municipal contract existing between any village and such person, company of persons or corporation for the public or street lighting shall be considered as an element of value in fixing the compensation to be paid for such gas works or electric works."

In the opinion of this department found in volume II of the attorney general's report for the year 1912, page 1962, referred to in this letter, section 3616, G. C., is quoted as reflecting upon the general powers of municipalities, and section 3618 is quoted as providing specifically for the establishment, maintenance and operation of municipal lighting, power and heating plants, and section 3990, supra, is quoted. General Hogan then observes:

"I think it will not be controverted that no municipality has the right, and never did have, under the municipal laws, to grant an exclusive franchise to any electric or waterworks company.

"This being so, the municipality has never parted with its right to construct its own waterworks, or electric light plant; and can operate the same in competition with existing plants, except it must purchase the electric light plant."

I am in full accord with these observations and I am unable to see in what manner the expiration of the contract referred to in this letter can effect the right of either the municipality or the contractor under the provisions of section 3990, supra. The conditions named in this statute are based wholly upon the existence of a franchise and not of a contract for lighting the municipality, that may subsist between the parties, nor can the situation in any way be affected by the fact that such a contract has expired.

It might well be observed that the income from the contract with the municipality ordinarily forms a very small proportion of the earnings of a light plant. This, of course, cannot change the provisions of the statute. The only legal effect

of the expiration of a contract with the municipality is to eliminate that contract as a factor in determining the value of the company's plant in case of an appropriation proceeding, as provided in the last clause of said statute.

Therefore, following the rule announced in the former opinion, the municipality in question may establish, maintain and operate electric works, and if the owner of the present plant is willing to sell, the municipality must purchase said plant. If no agreement can be made as to compensation, the municipality must appropriate.

Coming now to consider the last question submitted in this letter, there is nothing in section 3990, G. C., or in any other statute of this state, which gives the owner of this franchise the exclusive right against the world to operate a light plant in Newton Falls. As observed in the opinion quoted, no municipality has the right, and never did have, under municipal laws, to grant an exclusive franchise to any electric company. Therefore the municipality of Newton Falls is free to grant a franchise to one or as many persons or companies as it may deem expedient, and may contract with the same for its municipal lighting (the contract with the present plant having expired) independent and regardless of any franchise that said plant may now hold.

I think the foregoing observations answer all the questions submitted in this letter.

Respectfully,
EDWARD C. TURNER,
Attorney General.

755.

STATE HIGHWAY COMMISSIONER—NO AUTHORITY TO CO-OPERATE WITH COUNTY ROAD IMPROVEMENT ASSOCIATION IN GIVING STATE FUNDS TO BUILD OR ASSIST IN BUILDING ROADS IN SUCH COUNTY—MONEY CANNOT BE USED UNDER DIRECTION OF ASSOCIATION—PORTAGE COUNTY.

The state highway commissioner has no authority in law to co-operate with a county road improvement association by giving it state funds to build or assist in building one or more of the roads in such county, the money to be used under the supervision and direction of such association.

COLUMBUS, OHIO, August 23, 1915.

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

DEAR SIR:—I have your letter of August 2, 1915, in which is enclosed a letter addressed to you from B. F. Batchelder, chief engineer, The Portage County Improvement Association, which is as follows:

> "Herewith are enclosed itemized statements and the distribution of same of the expenses incurred and paid by the Portage county road commission for the completion of that portion of the east and west center road in Deerfield township, known as road No. 87 H, from Deerfield Center to Deerfield Station, length 1.4 miles.
>
> "The work on this road was commenced in the year 1914, under an arrangement with the state highway commissioner and the amount of

$4,000.00 was appropriated by the state as its portion of the repairs on this road. During the year 1914, there was expended on such repairs $3,042.34 of the state's portion, and on December 10, 1914, the balance of the appropriation, $957.66 was returned to Mr. J. R. Marker, former state highway commissioner, with the understanding that the amount was to be available during the season of 1915 for the completion of the repairs on the road in question.

"The repairs on this road have now been completed and the cost and expenses of the same as indicated in the enclosed statement have been paid by the Portage county road commission for which payments receipted bills and payrolls are now on file with the county auditor of Portage county.

"The aggregate amount expended during the year 1915 on this road is $1,550.63 of which amount under the arrangement above mentioned, the state's portion would be $957.66, the balance $592.97 will remain a charge to be borne by the Portage county road commission.

"Will you please take this matter up and advise us as to what data if any you will require in the making of the transfer of the above noted balance returned last year to the state highway department, viz., $957.66 to the Portage county road commission."

You ask to be advised whether, as state highway commissioner, you may lawfully place to the credit of the Portage County Improvement Association said sum of $957.66.

I understand that a commission was organized in Portage county under authority of section 6886-1 of the General Code, being section 1 of the act of the general assembly as found in 103 O. L., 732, and entitled "An act to permit any person, persons, firm, partnership, corporation or association of persons to contribute a fund for the purpose of assisting in the improvement of highways and to provide for commissions for improving the same."

Section 6886-1, G. C., provides:

"When the county commissioners of any county have determined to improve one or more highways within such county and any person, persons, firm, partnership, corporation or association of persons desire to contribute a fund for the purpose of assisting in the improvement of such highway, such fund to be not less than ten per centum of the total cost of such improvement, the said person, persons, firm, partnership, corporation, or association may apply to a judge of the court of common pleas of the county, who may appoint four suitable and competent freeholders of the county who shall, in connection with the county commissioners, constitute a commission for the purpose of the improvement of such road and serve until its completion."

Sections 6886-2 to 6886-11, inclusive, of the General Code, being sections 2 to 11, inclusive, of the aforesaid act, vests in said commission the authority to improve one or more of the highways of said county.

Section 6886-12, being section 12 of said act, provides as follows:

"Whenever, in any county in the state, there shall be a bona fide, voluntary association, either incorporated, or unincorporated, not for profit, of not less than one thousand citizens of any county, one of the purposes

of which organization is the improvement, maintenance and repair of the public highways of said county, the commission as provided for in section one of this act, having the right to expend money in grading, draining, curbing and improving county and state highways by the use of gravel, macadam, stone, brick, slag or other material, or expending money for improving, maintaining and repairing said highways, from the public funds under their charge and control, applicable for the construction, maintenance or repair of public highways, may, without the necessity of petition being presented by property owners or of advertising for competitive bids, make contracts with said association, or its proper representatives, to do such work of grading, draining, repairing and improving county or state highways within said county, by the use of gravel, macadam, brick, slag or other material and for the betterment generally of the highways of said county and make payments therefor out of any road or bridge funds under the control of said respective boards of officials, in the treasury, or levied for the purpose of construction, maintaining and improving the public highways in said county."

It is evident that the Portage County Improvement Association is an organization within the meaning of the provisions of section 6886-12, G. C., as above quoted, and that the Portage county road commission, organized under section 6886-1, G. C., has been co-operating with said Portage County Improvement Association in the manner and under the authority provided in said section 6886-12, G. C.

There is, however, no provision of said act authorizing the state highway commissioner to co-operate with said association by giving it state funds to build or assist in building one or more of the roads in said county, the money to be used under the supervision and direction of said association, and I find no authority under any other statute for such use of the state funds by the state highway commissioner.

I am of the opinion, therefore, that the action of Mr. Marker, former state highway commissioner, in placing the sum of $4,000 to the credit of said Portage County Improvement Association was without authority in law, and that the expenditure of said sum of $3,042.34, or any part of said sum, was illegal.

Replying to your question, I am of the opinion that, as state highway commissioner, you have no authority in law to place any of the state funds to the credit of said association.

Respectfully,
EDWARD C. TURNER,
Attorney General.

756.

INSPECTION OF STEAM BOILERS—CERTIFICATE FEES MUST BE PAID BEFORE CERTIFICATE DELIVERED—INSPECTION FEES PAID BEFORE INSPECTION IS ACTUALLY MADE.

Certificate fees provided for in section 1058-21, *G. C., must be paid before certificate is delivered.*

Inspection fees provided for in section 1058-25, *G. C., must be paid at time of inspection before inspection is actually made.*

COLUMBUS, OHIO, August 24, 1915.

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

GENTLEMEN:—Under date of August 14th, you submitted for my written opinion the following proposition:

> "Must the certificate fees mentioned in section 1058-21, G. C., and the inspection fees mentioned in section 1058-25, G. C., be collected before the certificate may be issued; or may the certificate be issued and collection made afterwards?
>
> "In other words, when should said fees be collected relative to the time the services are performed? Many inspections are made for which certificates are refused on account of the condition of the boilers."

Section 1058-19, G. C., (103 O. L., 650) provides that the owner or user of a boiler required to be inspected shall, after due notice, prepare the boiler for internal and external inspection at the appointed time, notice thereof having been previously given.

Section 1058-20, G. C., (103 O. L., 650) provides that if upon making the internal and external inspection, the inspector finds the boiler to be in safe working order, with the fittings necessary to safety, and properly set up, upon his report to the chief inspector of steam boilers, the chief inspector shall issue to the owner or user thereof a certificate of inspection, stating the maximum pressure at which the boiler may be operated, as ascertained by the rules established by the board of boiler rules, and thereupon such owner or user may operate the boiler mentioned in the certificate for one year from the date of inspection, unless certificate shall be sooner withdrawn.

Section 1058-21, G. C. (103 O. L., 651), after stating what the certificate of inspection shall contain and where it is to be placed, provides further:

> "The owner or user of a steam boiler herein required to be inspected shall pay to the chief inspector of steam boilers the sum of one dollar for each certificate issued."

Section 1058-25, G. C. (103 O. L., 651), provides that the owner or user of a boiler required to be inspected "shall pay to the chief inspector *upon inspection* five dollars for each boiler internally and externally inspected, and two dollars for each boiler inspected while in operation."

Section 1058-28, G. C. (103 O. L., 652), provides a penalty for violation of the act, and states that,

"Whoever being the owner, or operator of any steam boiler, herein required to be inspected, operated (operates) the same in violation of any provision of the law or of any rule promulgated by the board of boiler rules, and approved by the governor, or without having the same inspected and a certificate issued therefor as provided in this act, etc., shall be fined, etc."

It is to be noted, in the first place, that the law requires all boilers required to be inspected to be so inspected before the same are operated, and section 1058-25 provides that the owner shall pay "upon inspection" the proper fee.

Therefore, so far as the fee mentioned in said section is concerned, the same is to be paid at the time of the inspection. In other words, the payment should precede the services rendered. The inspector would have no authority to inspect the boiler until the amount of the inspection fee had been received.

The certificate fee is provided for by section 1058-21, which requires the owner or user of the boiler to pay the sum of one dollar for each certificate issued. The certificate cannot be issued until the one dollar has been paid.

Respectfully,
EDWARD C. TURNER,
Attorney General.

757.

TREASURER OF STATE—MAY NOT USE MONEYS IN HIS CASH DRAWER BELONGING TO STATE TREASURY FOR PURPOSE OF REDEEMING CHECKS IN PAYMENT OF PREMIUMS PAYABLE INTO STATE INSURANCE FUND, WHEN RETURNED "NOT PAID FOR WANT OF SUFFICIENT FUNDS"—CANCELLATION OF ALL ENTRIES SHOWING PAYMENT—CAN ACCEPT NOTHING BUT LEGAL TENDER IN ABSENCE OF RULES BY INDUSTRIAL COMMISSION.

The treasurer of state may not lawfully use moneys in his cash drawer belonging to the state treasury for the purpose of redeeming checks received by him in payment of premiums payable into the state insurance fund, when returned "not paid for want of sufficient funds" or other reasons. The cancellation of all entries showing payment is the only legal course in such event.

In the absence of the promulgation of rules by the industrial commission authorizing the acceptance of checks and the conditions thereof, the treasurer of state has no authority to accept anything other than legal tender as a payment into the state insurance fund.

COLUMBUS, OHIO, August 24, 1915.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of July 14, 1915, requesting my opinion as follows:

"For the purpose of settling the question of the rights and privileges of the treasurer of state concerning bad checks issued in payment of

premiums due the industrial insurance commission, I respectfully submit for your early opinion the following:

"The treasurer of state carries no funds belonging to the industrial commission in the state treasury vault. All obligations of the industrial commission are paid by check on the active depositories.

"QUESTION. A check issued in payment of industrial premiums made payable to the treasurer of state is received. The treasurer reports the premium as paid to the commission and places the check in the bank for collection. In due time the check is returned marked 'not sufficient funds' or 'account closed.' The treasurer not having any funds to the credit of the commission pays the amount of the check in question out of the cash drawer (state funds) and carries the check as a cash item until lifted by the drawer thereof, or insurance cancelled by the industrial commission and a refund voucher issued by the commission to the treasurer of state and the check lifted by them.

"There seems to be some question as to the proper method of handling this question. I believe I would have the right to issue a check on the depository of the industrial commission to redeem any checks that may come back belonging to them and certify the transaction to the commission in the same manner as we handle their warrants in payments of claims.

"Another method and the one followed up to the time of the submission of this question was, to report the bad check to the auditor of the commission who would on authority of the commission issue a refund to the treasurer of state, and take up the bad check and turn it over to the department of the attorney general for collection."

I understand that you have in mind two alternative methods of dealing with the situation described by you, both involving the use of moneys in the cash drawer of the treasurer of state, which belong to the state treasury, and the reimbursement of the state treasury, either by the issuance and deposit therein of a check on the insurance fund by yourself or such issuance and deposit by the industrial commission.

Looking at both of these methods from the standpoint of technical law, I would have to advise that neither of them is legal. There is no authority of law for the treasurer of state using state funds to reimburse a bank which has taken a bad check which has been credited as a payment to the insurance fund. The two funds are quite separate and distinct, and must not be commingled in any way, even for convenience in bookkeeping.

In my opinion, under the circumstances mentioned by you, there is no way in which the treasurer of state or the industrial commission can lawfully cash such a bad check for the purpose of reimbursing the depository bank. The only legal way in which a transaction of this sort can be carried out is to cancel the credit to the insurance fund and to make a corresponding credit in favor of the depository bank. In truth and in fact, as well as in contemplation of law, there has been no payment into the insurance fund within the contemplation of section 1465-72 of the General Code (103 O. L., 82). Neither the industrial commission nor the treasurer of state has, strictly speaking, any authority to accept checks in lieu of legal tender in payment of the insurance premiums, and when a check is a matter of fact accepted it must be regarded as accepted provisionally only, subject to collection. So that when collection fails it is as if no payment into

the fund had been made and no deposit with the depository bank had been made, and all entries showing payment into the fund or deposits in the depository bank should be simply cancelled.

I realize that this is not the most convenient way of handling such situations. However, it is clear that there be a complete payment before any employer is entitled to the benefits of the workmen's compensation act. Such payment, in the absence of an enabling statute, is made only when the cash is on hand. It is different with payments into the state treasury under and by virtue of section 24 of the General Code, which requires payment of checks collected by various state officers immediately into the state treasury.

But section 24 of the General Code does not apply to the state treasurer nor to the industrial commission in the administration of the workmen's compensation law. So that checks are not acceptable as mediums of payment, and until the actual cash has been realized there is no premium payment such as will protect the employer and enter into and become a part of the fund or any deposit thereof.

As a matter of practice, justified by established commercial usage, certified checks may safely be accepted, but for the future I advise that no uncertified checks whatever be accepted in payment of state insurance premiums. As to past transactions not yet consummated I advise against the use of state treasury cash under the circumstances named, and recommend the cancellation of all debit entries or the making of such credit entries as will show the nature of the transaction in lieu of the use of cash, however awkward this may be as a matter of bookkeeping.

I think I should say, however, in order to state my position fully, that the above discussion and the conclusions which I have expressed apply to the law as it stands without any amplification by the industrial commission under its power to promulgate "rules and regulations with respect to the collection, maintenance and disbursement of the state insurance fund," which it has by virtue of section 1465-55, General Code (103 O. L., 75). Such rules and regulations may authorize you as treasurer of state to receive checks, and may prescribe the effect which shall be given to payment by check, as by affording protection to the payer until and unless the check is returned unpaid; or by denying protection to him on account of any injury which may occur after the acceptance of such a check and before it is ascertained that the check is not good, or in any other way defining the consequences of the receipt of such check, consistently with the requirement that there must be an actual payment into the fund before permanent protection can be afforded. Such rules may not, of course, authorize you to commingle state funds and state insurance funds in the manner in which they have heretofore been commingled with a view to caring for situations of the kind described by you.

Respectfully,

EDWARD C. TURNER,

Attorney General.

758.

COUNTY SURVEYOR—MAY DRIVE AUTOMOBILE OWNED BY HIS MOTHER IN DISCHARGE OF OFFICIAL DUTY.

A county surveyor, when necessary in the discharge of his official duty, may hire an automobile owned by his mother.

COLUMBUS, OHIO, August 24, 1915.

HON. CLARK GOOD, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—Your letter of July 15, 1915, and your letter explanatory thereof dated August 10, 1915, duly received. The question submitted thereby is as follows:

> "Has the county surveyor the right under the statute to hire an automobile from his mother?"

Section 2786, G. C., provides in part as follows:

> "The county surveyor and each assistant and deputy shall be allowed his reasonable and necessary expenses incurred in the performance of his official duties."

The duties of the surveyor being such as to require his presence in various parts of the county at different times, it follows that he must incur expenses for livery hire, and it would be assumed, of course, that he will secure such services in the most economical manner with due regard for efficiency. There would be no doubt of his authority to hire an automobile when occasion demanded, and if the bills therefor are reasonable the same should be paid.

Aside from the question of good faith there would be no necessity for the commissioners or the auditor to inquire from whom the automobile had been hired, while, as in this case, the hiring of an automobile by a county surveyor from his mother might justify an investigation as to whether the machine really belonged to her or whether it might be the property of the surveyor himself, yet, if as a matter of fact the machine is found to be the property of the mother, there is no legal reason why the bills for hiring thereof should not be paid.

It might be added that the foregoing will not be changed by the new highway law which goes into effect September 6, 1915, as that law contains a provision covering the payment of expenses of the county surveyor when acting as county highway superintendent, being a part of section 138 of said law, 106 O. L., page 612, as follows:

> "In addition thereto the county highway superintendent and his assistants when on official business shall be paid out of the county treasury their actual necessary traveling expenses including livery, board and lodging." (Sec. 7181, G. C.)

Specifically answering your question, therefore, I am of the opinion that a county surveyor, when it becomes necessary for him in the discharge of his official duties to hire an automobile, may hire the same from his mother.

Respectfully,
EDWARD C. TURNER,
Attorney General.

759.

ARTICLES OF INCORPORATION OF THE SECURITY AUTOMOBILE MUTUAL INSURANCE COMPANY, APPROVED.

COLUMBUS, OHIO, August 24, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I enclose herewith the articles of incorporation of The Security Automobile Mutual Insurance Company, with my approval attached thereto, as required by law.

You will observe that the form of the certificate differs from that customarily used heretofore. This is because the organization of mutual fire insurance companies is provided for by an act passed in 1914, and referred to in the certificate. Prior to that time insurance companies, other than life, could be organized only with a capital stock. The attorney general in affixing code numbers to this act used numbers which do not fall within the chapter relating to insurance companies other than life generally. Therefore, in order properly to refer to the legislation applicable to the organization of companies of this character it is necessary to mention the act of 1914, as well as the chapter relating generally to fire insurance companies.

Respectfully,
EDWARD C. TURNER,
Attorney General.

COLUMBUS, OHIO, August 24, 1915.

I hereby certify that I have examined the foregoing articles of incorporation of THE SECURITY AUTOMOBILE MUTUAL INSURANCE COMPANY, and that I find them to be in accordance with the provisions of chapter 1, subdivision II, division III, title IX, part second of the General Code, and with the provisions of an act of the general assembly of Ohio entitled "An act relating to the organization and admission of mutual fire insurance companies and to repeal sections 630, etc., of the General Code," passed February 6, 1914, approved February 17, 1914, and filed in the office of the secretary of state February 20, 1914, the sections of said act being designated therein as sections 9607-1 to 9607-29 of the General Code; and that said articles of incorporation are not inconsistent with the constitution and laws of this state and of the United States.

EDWARD C. TURNER,
Attorney General.

760.

ROAD DISTRICT—COMPOSED OF TWO OR MORE TOWNSHIPS—WHERE ONE TOWNSHIP LATER BECOMES WHOLLY INCORPORATED INTO AND ABSORBED BY A MUNICIPALITY, SUCH INCORPORATION DISSOLVES EXISTING ROAD DISTRICT AS TO INCURRING NEW OBLIGATIONS BINDING UPON PROPERTY IN SUCH TOWNSHIP—CITY OF YOUNGSTOWN.

Under house bill No. 159, found in 106 O. L., 201, where a road district is composed of two or more townships, and one of such townships after the organization of such road district becomes, or has become, wholly incorporated into and absorbed by a municipality therein, such incorporation of said township automatically works a dissolution of said existing road district, insofar as the incurring of new obligations binding upon the property in such township is concerned. Under the facts presented and assuming that in the annexation of territory to the city of Youngstown all statutory requirements have been complied with, the act in question applies to the road district in Mahoning county consisting of Youngstown, Austintown, Jackson and Boardman townships.

COLUMBUS, OHIO, August 24, 1915.

HON. A. M. HENDERSON, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—I have your communications of July 26th and August 4, 1915, relating to the Heinselman bill, being house bill No. 159, amending section 7095, G. C., and supplementing section 7129, G. C., by the enactment of section 7129-1, G. C. The act is found in 106 O. L., 201.

Previous to its amendment by the Heinselman bill, section 7095, G. C., read as follows:

> "Not less than two nor more than four adjacent townships in any county, occupying contiguous and compact territory, may organize into road districts. Such road districts shall be governed and controlled for the purpose of constructing pikes and improving roads, as hereinafter provided by a road commission composed of one member from each township."

The Heinselman bill amended the section by the addition of the following language:

> "Provided that where a road district, organized under the provisions of this law is composed of two or more townships, one of which after the organization of such road district becomes, or has become, wholly incorporated into and absorbed by a municipality therein, such incorporation of said township shall, forthwith, from and after the time when this act goes into effect, without further legislation automatically work a dissolution of said existing road district, in so far as the incurring of new obligations binding upon the property in such township is concerned. Any unfinished contract in such road district shall be completed under the supervisions of the county commissioners and paid for by them out of the funds of such district."

Section 7129-1, G. C., as enacted in the Heinselman bill, reads as follows:

> "Where a road district organized under the provisions of this chapter is dissolved by the provisions of section 7095, the roads built by the district roads commissioners before said dissolution shall be kept in repair by the county commissioners, who shall, for this purpose, levy annually an amount not exceeding one-fourth of one mill upon each dollar's valuation of all the taxable property in said former road district."

The Heinselman bill was passed April 27th, approved May 1st, and filed in the office of the secretary of state May 3rd, and therefore went into effect August 2, 1915. Section 7095, G. C., is expressly repealed by amended senate bill No. 125, found in 106 O. L., 574, which bill will go into effect on September 6, 1915, while section 7129-1, G. C., is not expressly repealed by amended senate bill No. 125. It, therefore, appears that section 7095, G. C., as amended in the Heinselman bill, became the law of the state on August 2nd, and will so remain until the going into effect of amended senate bill No. 125 on September 6, 1915.

You state that there has been a road district in Mahoning county composed of Youngstown, Austintown, Jackson and Boardman townships. About a year ago the city of Youngstown extended its territory to include the whole of Youngstown township. You state that the road commission of the above described district has incurred a very large indebtedness and was recently enjoined by the city of Youngstown from issuing any more bonds, but it does not appear from your communications whether the suit brought by the city is still pending or whether a permanent injunction has been allowed. The following language is quoted from your communication of July 26th:

> "There is included within Youngstown township a public park known as Mill Creek park, covering about 400 acres wholly within Youngstown township, which park is under the control of a park commission provided for by a special act of the legislature creating this park. The city of Youngstown has no control over the park, neither do the county commissioners have any control over this park. However, technically, the whole of the territory of Youngstown township is within the boundaries of the municipality of Youngstown."

You further state that the road commissioners referred to by you are not disposed to submit to the terms of the Heinselman bill and that you anticipate some difficulty should the road commissioners attempt to continue in office, and that if they are permitted to remain in charge of the district and carry out the contracts existing when senate bill No. 125, known as the Cass act, becomes effective, it will very much complicate and interfere with the county commissioners of the county and the county highway superintendent in taking charge of and controlling the road work in Mahoning county.

You conclude your communication of July 26th as follows:

> "It is our opinion that upon the date of becoming effective, this Heinselman bill abolishes the road districts as above described, notwithstanding that Mill Creek park is in nowise controlled by the municipality and we believe that it was intended that the act should become operative where the geographical boundaries of a municipality and the township become identical without respect to the fact that there may be some control within the township and municipality to some extent outside the powers of the municipality. We are somewhat strengthened in our belief be-

cause there are other overlapping powers within the city of Youngstown such as the property of Mahoning county wholly controlled by the county authorities, and also federal property, to wit, the postoffice and federal county building and premises within the city of Youngstown and Youngstown township and we believe that there exists in this county such a situation as was contemplated in this bill. We expect to instruct the county commissioners to take charge of all of the property, such as road building, machinery, material and funds of this road district and to carry out all unfinished contracts and unfinished business under the provisions of this act and to enjoin the good roads commission, when the law becomes effective in the event they undertake to exercise their functions in any way, but would like, if possible, between now and that time to receive your opinion upon the whole question involved. If the county commissioners may take up the work under this act, it will very nicely blend with the provisions of the Cass bill with which you are already familiar and save to the county an additional expense of at least $600.00 per month.''

The question of whether Mill Creek park is or is not a part of the city of Youngstown seeming to be the principal question involved in your inquiry, a request for additional information along this line was directed to you on July 31, and under date of August 4th, you transmitted to this office copies of two ordinances of the city of Youngstown, one ordinance authorizing the annexation of certain territory to the city of Youngstown and the other ordinance accepting the allowance and finding of the county commissioners in the matter. In you communication of August 4th, you also cite me to 88 O. L., 31, for the legislation under which Mill Creek park is controlled. You further state that the boundaries of the city of Youngstown, as extended by the local legislation referred to above, are identical with the boundaries of Youngstown township, with the exception that on the eastern side of the city a small amount of additional territory belonging to the adjoining township has been included within the limits of the municipality. In other words, if Mill Creek park is to be regarded as a part of the city of Youngstown, then the city of Youngstown includes all of Youngstown township and a small part of an adjoining township; and Youngstown township would fall within the provision of the Heinselman act for the reason that it has become wholly incorporated into and absorbed by a municipality therein.

I have carefully examined the act referred to by you and found in 88 O. L., 31, being an act to authorize any township in the state having a population at the last federal census and which at any subsequent federal census may have a population of 35,066 to establish a free public park. Waiving the question of the constitutionality of this act which might well be raised upon obvious grounds, it may be observed that the act which is too voluminous to permit of setting it forth in this opinion, does not contain any provision either expressly or impliedly prohibiting the subsequent annexation to a municipality of the territory contained within any part established under the act in question. I have also carefully examined the ordinances submitted by you and do not find therein any provisions evidencing an intention to exempt from their operation Mill Creek park or any other part of Youngstown township. The fact that real estate may be owned and controlled, so far as ownership gives control, by the state or a county or a township or a board of education, is not inconsistent with and does not preclude the annexation of such real estate by a municipality. The same rule would seem to apply with equal force to real estate owned by a township board of park commissioners, and I, therefore, concur in the conclusion expressed by you to the effect that Mill Creek park is now a part of the city of Youngstown, assuming of

course that all the statutory requirements relating to the annexation of territory have been fully satisfied. This being true, it follows that upon the going into effect of the Heinselman act on August 2, 1915, the road district referred to by you was automatically dissolved, in so far as the incurring of new obligations binding upon the property of Youngstown township is concerned, and it became the duty of the county commissioners of Mahoning county to take charge of and complete any unfinished contracts in such road district and to pay any sums due or becoming due on such contracts out of the funds of the road district in question, which duty on the part of the county commissioners will continue until the repeal of section 7095, G. C., by amended senate bill No. 125, becomes effective on September 6, 1915, and the going into effect of amended senate bill No. 125 will not serve to revive the road district theretofore automatically dissolved. On and after September 6, 1915, the situation will be governed by the appropriate provisions of amended senate bill No. 125. Respectfully,

EDWARD C. TURNER,
Attorney General.

761.

STATE HIGHWAY COMMISSIONER—CONTRACT—MAY INCORPORATE PROVISION IF WORK IS NOT COMPLETED AT TIME SPECIFIED IN CONTRACT, NO EXTENSION OF TIME SHALL BE GRANTED—FOR EACH DAY'S DELAY, CONTRACTOR SHALL FORFEIT REASONABLE SUM AS LIQUIDATED DAMAGES.

The state highway commissioner may lawfully incorporate in a contract for the construction of a highway, a provision to the effect that if for reasons for which the contractor is responsible or which could, in the exercise of reasonable diligence, have been avoided by the contractor, the work is not completed at the time specified in the contract, then no extension of time shall be granted, and for each day's delay in the performance of the contract after the time specified therein for its completion, for which delay the contractor is responsible, said contractor shall forfeit a reasonable sum to be fixed by the terms of the contract and agreed upon by the parties to said contract as liquidated damages accruing to the state because of such failure to perform, and to be withheld by the state from any payment or payments due or to become due said contractor upon the proper completion of said contract.

COLUMBUS, OHIO, August 24, 1915.

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

DEAR SIR:—I have your communication of August 13, 1915, which reads as follows:

> "There has been in the past a decided laxity on the part of contractors in completing their work under contract within the time set forth and agreed upon in the specifications and contract, a condition that is very hard for this department to correct.
>
> "The time fixed for doing the work is in my opinion always reasonable and under ordinary conditions the work should be completed within the time specified.
>
> "As time is one of the most important factors in a contract, the state always being the loser when a job of work is not completed within a spe-

cified time, it seems to me that the progress of the work might be greatly stimulated by refusing an extension of time, or providing in the specifications that no extension be granted and that a specified amount fixed in the contract be deducted for each and every day the contract exceeds the specified time in completing the work under contract.

"This would appear not as a penalty, but as a payment for damages imposed upon the state through the negligence of the contractor.

"I, therefore, respectfully request your opinion as to whether or not such a provision in our contracts would be legal?"

It may be observed in the first instance that the statutes are silent as to the right of the state highway commissioner to provide in a contract for the construction of a highway for the forfeiture of a definite sum by the contractor in case the contract is not completed at the time specified therein and the contractor is responsible for the delay. It, therefore, becomes important to consider what, if any, implied authority exists in the state highway commissioner in this particular.

In this connection permit me to call your attention to an opinion of this department rendered on April 19, 1915, to the bureau of inspection and supervision of public offices, in which opinion the implied authority of boards of county commissioners in this particular was considered. The second question asked by the bureau of inspection and supervision of public offices and answered in the above cited opinion, was as to the right of a board of county commissioners, in the absence of express statutory authority, to provide for the forfeiture of a definite sum by a contractor in case a contract is not completed at the time specified therein and the contractor is responsible for the delay. After commenting upon the necessity of such a provision in contracts made by boards of county commissioners, it was held that the general authority of the board of county commissioners to make a contract, carries with it the implied authority to incorporate such a provision in said contract. This holding was based upon the proposition that the rule of law applicable to such a provision in a private contract, applies with equal force to a contract made by a board of county commissioners. The conclusion reached was expressed in the following language:

"A board of county commissioners may provide in a contract that for each day's delay in the performance of the contract, after the time specified therein for its completion, for which the contractor is responsible, said contractor shall forfeit a reasonable sum to be fixed by the terms of the contract and agreed upon by the parties to said contract as liquidated damages accruing to the county, because of such failure to perform, and to be withheld by the board of county commissioners from any payment or payments due or to become due said contractor upon the proper completion of said contract."

I am unable to distinguish in principle between the implied right of a board of county commissioners and the implied right of the state highway commissioner in this particular. It is, therefore, my opinion that the state highway commissioner may lawfully incorporate in a contract for the construction of a highway a provision to the effect that if for reasons for which the contractor is responsible or which could, in the exercise of reasonable diligence, have been avoided by the contractor, the work is not completed at the time specified in the contract, then no extension of time shall be granted, and for each day's delay in the performance of the contract after the time specified therein for its completion, for which delay the contractor is responsible, said contractor shall forfeit a rea-

sonable sum to be fixed by the terms of the contract and agreed upon by the parties to said contract as liquidated damages accruing to the state because of such failure to perform, and to be withheld by the state from any payment or payments due or to become due said contractor upon the proper completion of said contract.

A copy of the opinion referred to herein is herewith enclosed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

762.

EMPLOYES OF COURT HOUSE BUILDING COMMISSION—SUCH EMPLOYES MUST BE CHOSEN FROM ELIGIBLE LIST OF CIVIL SERVICE ACT.

Section 26 of the General Code does not prevent the civil service law of 1913 *from applying to "pending proceedings."*

The employes of a court house building commission, acting under sections 2333, *et seq., G. C., are in the civil service of the county, notwithstanding the commissioners are not county officers and notwithstanding the temporary and special character of the employment.*

Such employes hired after the civil service act went into effect must, therefore, be chosen from eligible lists prepared in accordance with said act.

COLUMBUS, OHIO, August 24, 1915.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I am in receipt of a letter under date of August 18th, from Hon. Charles A. Groom, assistant prosecuting attorney, requesting my opinion upon the following question:

> "Must employments made by a commission acting under sections 2333 et seq. of the General Code, in the building of a court house, be made under the civil service law, when the commission was appointed prior to the passage of the civil service act of 1913, and a contract with the architects, made prior to the date when that act became effective, stipulates that the clerk of the works to be employed by the commission shall be one 'whose competence is approved by the architects?' "

The first question which I have considered in connection with this general question is as to whether or not employes of the court house commission are in the civil service of the county of Hamilton.

Without quoting the building commission statutes it is sufficient to state that they provide for the appointment by the common pleas court of certain persons, who, with the county commissioners, are to constitute a commission for the accomplishment of a certain specific purpose, to wit, the construction of a building. When that purpose is accomplished the commission ceases to exist and the service of all its employes is terminated. Due to the fact, then, that such a service is temporary and particular, can it be regarded as within the civil service of the county; or is not the civil service of the county inclusive only of the regular and permanent positions or employments under authority of the county?

No great help is obtainable on this point from the civil service act itself. That act, it is true, contains specific provisions for the making of temporary and special appointments in the competitive class; and it is significant to note that the provisions of section 14 of the act of 1913, now in effect, in this particular relate to services for a temporary period "not to exceed one month," the inference being that services required for a temporary period exceeding one month are to be secured in the manner provided by the remainder of the act.

The definition of the term "civil service" in section 1 of the act referred to (103 O. L., 698) is:

> "The term 'civil service' includes all officers and positions of trust or employment, including mechanics, artisans and laborers in the service of the state and the counties, cities and city school districts thereof."

To be precise, there are two questions involved:

> "(1) Does the idea of 'civil service' or the idea embraced in the word 'service' denote continuity or permanency?
>
> "(2) Does the phrase 'the service of the county' include persons not employed by one of the regular county governmental agencies?"

The very fact that the civil service act makes special provision for temporary appointments for periods not exceeding one month signifies, with respect to the first question, that the word "service" does not necessarily denote permanency. However, there is authority available on this point. It is well known that our civil service law and the constitutional provision which it is intended to execute are based upon the legislative and constitutional provisions, respectively, of New York, where the civil service idea may be said to have had its birth.

In the case of People ex rel. v. Gilroy, 15 N. Y. Supp., 242, it was held that an inspector on the work of laying mains of a certain public service company, who was employed for that service only and who was to be paid by the company, was not within the then existing statutory civil service. The court bases its decision on both grounds suggested by the statement of facts, namely: His employment was not continuous, and the work was not to be paid for by the city.

However, in People ex rel. v. Civil Service Boards, 41 Hun., 287, it was held that a clerk employed by the commissioners for the construction of a new aqueduct for the city of New York was within the civil service of the city of New York, and could not be employed by the commissioners save after examination as required by the civil service act at that time in force and applicable to the city of New York.

This case appears to me to be decisive of both the two questions just suggested. The commission for the construction of the aqueduct therein involved was engaged in an undertaking of identically the same character as the court house commission about which you inquire. The relation it sustained to the regular government of the city of New York was even more remote than the relation sustained by the court house commission to the regular government of Hamilton county; for it appears in the report of the case that the aqueduct commission was provided for by special act of the state legislature and its members were designated by the act itself. Yet, the work being carried on for the benefit of the city, and when completed to become the property of the city and to be paid for by it, it was held that it was a municipal undertaking and persons engaged in it were in the service of the city.

In the opinion of Daniels, J., of the supreme court, I find the following:

> "The property required for the enterprise was to be acquired by the city of New York, and the expenses of both the property and the work were to be provided for and paid by the city. The state at large had no special interest whatever in the land to be obtained or the ends to be secured, but they were for the benefit, advantage and proprietorship of the city itself, and that was sufficient to constitute the persons who might be employed and engaged in it, officers, agents, or employes of the city. * * * It is not necessary to inquire whether he (the relator) will, in that manner, become an officer of the city, for this section of the statute (the civil service act) is not restricted to that class of individuals, but it includes, generally, all clerks and persons in the civil service of the city. The employment he desired to obtain was a part of that civil service. * * *"

The case, then, decides that permanency of position is not an essential element of the civil service idea, and that where a specific undertaking is carried on for the benefit of and at the expense of a subdivision, persons engaged therein and whose compensation is paid by such subdivision are in the service of the subdivision for the purpose of the civil service law, although their superiors may not be officers of the subdivision.

From this it follows that decisions like those which Mr. Groom cites, to the effect that the building commission, being a body with independent powers and duties, is not a county board and its members are not county officers, are not in point.

I have also considered the question as to whether or not the civil service act could have any effect upon the powers and duties of the building commission. This question is raised by the decision of the supreme court of this state in State ex rel. v. Cass, 84 O. S., 443, affirming a decision in 32 C. C., 208. In this case it was held that the construction of a court house under the statutes referred to constitutes a "proceeding" within the meaning of what is now section 26 of the General Code, which provides generally that the repeal or amendment of a statute shall not affect pending proceedings, unless otherwise specifically provided in the repealing or amending act.

The decision in the case cited was to the effect that a change in the law requiring competitive bids to be invited on all branches of the work did not apply to a building commission which had been appointed prior to the amendment; so that such commission might still proceed under the law as it existed when the commission was appointed, which law did not require that all branches of the work be let on competitive bids, etc.

The language of Fillius, J., at page 219, of the Circuit Court Report, is as follows:

> "The amendment for which so much is claimed * * * is not effectual to limit or restrict the powers of the commission granted by the original act so far as the proceeding relative to this court house is concerned."

It is argued on the authority of this case that because the civil service act, which became effective after the proceeding in question was instituted, restricts the powers of the building commissioners as compared with those possessed by them prior to its passage, therefore, it cannot apply to this particular case.

In my judgment, the logic of this argument is sound, if the major premise thereof can be sustained. Its application, however, depends upon whether or not section 26 of the General Code applies to the operation of the civil service law.

Section 26 of the General Code is a statute. It does not embody any constitutional principle, and its terms clearly import that it is only to be applied in the absence of a contrary legislative will clearly expressed. The civil service law is not an ordinary statute. It was passed in compliance with the mandate of article XV, section 10 of the constitution, which provides that:

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

Much space might be devoted to a discussion of the exact effect of the constitutional provision. It seems to me that, in part at least, it is self-executing. The question as to its effect would be immediately raised if the general assembly were to attempt to repeal all the civil service laws. Waiving this question, however, it is clear that whatever effect article XV, section 10, may have had, it was not in any way controlled by section 26 of the General Code. That is to say, in so far as article XV, section 10, may have had an implied repealing or amending effect upon existing statutes there could not be read into it the general saving clause provided for by section 26 of the General Code. (See McMaster v. Keller, 1 C. C., 478.)

I think that the civil service act of 1913 must be given as broad an effect and operation as article XV, section 10 requires. That is, the legislature will be presumed to have intended to exert to the utmost the power and duty vested in and imposed upon it by the constitutional provision.

For these reasons I do not think that the civil service act of 1913 is in any way governed by section 26 of the General Code, and that accordingly there is no saving therein as to pending proceedings, in so far as such proceedings may be affected by its terms.

In another view of the same question there is some doubt in my mind as to whether providing for the creation of an eligible list from which appointments to positions in the civil service may be made is any real or substantial limitation or restriction upon the powers of the building commission, within the purview of the decision cited. That is to say, I do not think that the civil service act can be regarded as a "repeal" or "amendment" of the building commission act. It is certain it is not an express repeal or amendment, and there is some doubt as to whether section 26 applies, save in cases of express repeal or amendment. It is not even an implied amendment of the former act. The power of the commissioners to employ still resides in them, and though qualified in a sense by the requirement that employment shall be made from the eligible list, such qualification is not, in the exact sense at least, an amendment of the prior statute.

In Railroad v. Railroad, 72 O. S., 368, the second branch of the syllabus is as follows:

> "The act passed May 10, 1902, to provide for one steam railroad crossing another steam railroad is made to take effect and be in force from and after its passage, *and being original legislation and not an amendment of a statute,* section 79, Revised Statutes, does not exempt pending actions or proceedings from its application. * * *"

An examination of the opinion in the case cited shows that there was a new act which was admittedly inconsistent with the provisions of the pre-existing law.

Accordingly, it worked a change in the law, which is sometimes loosely spoken of as an "implied repeal or amendment." As a matter of fact, there was no amendment or repeal at all, but merely a new law which, by reason of its later enactment, superseded the old.

In the opinion of the court, per Summers, J., it is said:

> "It is to be observed that this act was neither a repeal nor an amendment of a statute, but original legislation."

The application of this case to the question at hand is perhaps not perfect. I think it must be admitted that it is inconsistent with the earlier decision in Railroad Co. v. Hedges, 63 O. S., 339. However, the earlier decision is per curiam and the later case seems to be better considered. On its authority, unless the mere enactment of a law on an entirely new subject of legislation can be regarded as a "repeal or amendment" of all inconsistent statutes within the meaning of section 26, the last named section does not apply; and, for reasons which I have suggested, I do not believe that within the purview of said section 26 the process sometimes inaccurately spoken of as an "implied repeal or amendment" can be regarded as a repeal or amendment.

However, there is a third, and in itself conclusive, reason why section 26, even if it could apply to a statute like the civil service act in the face of the two considerations just discussed, does not actually apply in this instance, for said section 26 provides a standing rule of statutory interpretation merely, which rule is not to be applied if it is "otherwise expressly provided in the amending or repealing act."

Regarding for the sake of argument the civil service law as an "amending or repealing act," I think it clearly appears from an examination of its provisions that the intention to make it applicable to pending proceedings is evinced by things which are found "expressly provided" therein.

In the first place, section 2 of the civil service act (section 486-2, G. C.) expressly provides that on and after January 1, 1914, all appointments and promotions in the civil service which the act covers "shall be made only according to merit and fitness to be ascertained as far as practicable by examination, etc."

In the second place, the act embodies a section which is specifically designated as a "schedule." (See section 486-31.) It is well known that the office of a schedule is to express fully the intention of the legislative body as to the going into effect of the law. Section 486-31 preserves certain existing things, such as existing eligible lists and the status of officers and employes in the classified service holding their positions under existing civil service laws, etc. By expressly preserving these existing conditions did not the legislature very conclusively show the intention that no other existing condition should be preserved? Very slight evidence is all that is required to show that the legislature does not intend section 26 to apply. (See Friend v. Levy, 76 O. S. 26.)

Mr. Groom calls attention to the fact that if the civil service law be regarded as applicable it would impair the obligation of the architects' contract. It is sufficient to say in answer to this that although the architect is mentioned in the section along with the other employes of the commission, in practice and in substance architects employed on public works are really independent contractors and not servants or employes, and the question is, therefore, whether the civil service act can be held to apply at all. But even if it should be deemed applicable, it is clear that it could not, for reasons stated by Mr. Groom, in any way impair the obligation of a contract entered into prior to the date on which it became effective.

This department has previously held that employment contracts for specific

periods of time or for performance of specific services were not affected in any way by the civil service law, even though the positions involved were in the classified service thereunder.

Mr. Groom also observes that the provisions of the building commission act are special and will be regarded as an exception to the general provisions of the civil service law. I do not think this point can be sustained. The civil service law is comprehensive in its terms and though an office or employment be provided for by a special act, it will not be deemed, on that account, to be not subject to the provisions of the civil service law. To hold otherwise would deprive the civil service act of any real force and effect whatsoever.

At first glance it appeared to me that to impose civil service regulations upon the selection of employes by the building commissioners would be violative of the contract of the architects. I observe, however, that the stipulation relative to the approval of competency by the architects relates only to the chief clerk of the works, and Mr. Groom's letter makes it clear that the chief clerk of the works has already been employed, while his question relates to the employment of additional clerks.

For all of the foregoing reasons, then, I am of the opinion that the additional clerks and employes now required by the building commission must be employed under the civil service regulations.

Respectfully,
EDWARD C. TURNER,
Attorney General.

763.

ROADS AND HIGHWAYS—EXISTING STATUTES NOR CASS HIGHWAY LAW PROVIDE ANY SCHEME OF CO-OPERATION ROAD IMPROVEMENT TO BE PARTICIPATED IN BY STATE, COUNTY AND CITY WHERE CORPORATION LINE OF CITY IS CENTER LINE OF INTER-COUNTY HIGHWAY OR MAIN MARKET ROAD.

Neither the existing statutes, nor the Cass highway law provide any scheme of co-operative road improvement to be participated in by the state, a county and a city.

COLUMBUS, OHIO, August 24, 1915.

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

DEAR SIR:—I have your communication of August 16, 1915, which reads as follows:

> "We have received application from the commissioners of Fairfield county of the date of December 21, 1914, for the improvement of about three miles of the Lancaster-Newark I. C. H., No. 359, Fairfield county.
>
> "Plans for this improvement have been made and same show that over a distance of 1,053.5 feet from the beginning of the road, the corporation line of the city of Lancaster lies in the center of the road.
>
> "The topography of the road at the beginning is such that a permanent improvement should not be made without a change in grade. For this reason, it will not be possible for this department to improve the half of the road lying outside of the city of Lancaster until the city of

Lancaster simultaneously improves the half lying within the city. It is, therefore, only possible to carry on this improvement through the agency of a single contractor, or firm of contractors.

"At a meeting of commissioners held sometime during the winter, resolutions were passed agreeing to the improvement of the road and agreeing to pay the cost of the construction for that part lying within the city.

"With the above facts before you, I would be glad to have your opinion in the matter of letting contract for this work—stating:

"First. Whether it is possible, under the law, to let a contract for the entire road and assess the portion of the cost within the city of Lancaster to that corporation, and,

"Second. If this is not possible, whether an arrangement can be made by which this department and the city of Lancaster can enter into separate contracts with the same individual, or firm, to carry on the improvement under the direction of this department.

"It is our desire to enter into the contract for the improvement of the above at an early date and would be glad to have you render me an opinion at as early a date as possible."

Replying to your first question, it should be observed that under the law now in force it is impossible for the state highway department, under any conditions, to lawfully engage in the improvement of a road inside the limits of a city. Section 1186, G. C., as found in 103 O. L., 452, provides that each application for state aid in the construction, improvement, maintenance or repair of highways shall be accompanied by a proper certified resolution of the county commissioners, stating that the public interest demands the improvement of the highway therein described and that the description does not include any operation of the highway in the limits of any municipality. So far as your present inquiry is concerned, the situation will not be changed by the going into effect on September 6, 1915, of amended senate bill No. 125, for while by section 229 of amended senate bill No. 229 being section 1231-3, G. C., the state highway commissioner is authorized, under certain conditions, to extend a proposed road improvement into or through a village, this authorization does not go so far as to authorize the state highway commissioner to extend a proposed improvement into or through a city. It will, therefore, be impossible for the state highway department, either under the existing statutes or under the provisions of amended senate bill No. 125, when said bill goes into effect, to let a contract for the entire road and assess the cost of building that portion of the road within the city of Lancaster against said city. In fact, either under the existing statutes or under amended senate bill No. 125, there is no situation or condition under which the state highway department can let a contract for or assume any supervision or control over the building of a road inside the corporate limits of the city of Lancaster.

Replying to your second question, the practical difficulty presents itself in that both under existing statutes and under amended senate bill No. 125, the state highway commissioner is required to award all contracts of this class at competitive bidding. It is provided by section 1201, G. C., 103 O. L., 455, that the state highway commissioner shall award the contract to the lowest responsible bidder. It is provided by section 199 of amended senate bill No. 125, being section 1206, G. C., that the state highway commissioner shall award the contract to the lowest and best bidder. It is sufficient for the purposes of this opinion to observe that similar restrictions exist in the letting of contracts by municipal corporations where the contracts are of the magnitude which it is obvious would be possessed by a contract for the improvement of that part of the road now under consideration and situated within the city of Lancaster, without discussing minutely

such restrictions. If, therefore, the state highway commissioner should undertake to regrade and surface that part of the road in question outside of the city, and the city should undertake to regrade and surface that part of the road inside the city, both contracts would have to be let at competitive bidding and there could be no assurance that one contractor would be successful in obtaining both contracts, even if he should submit bids on both. The practical difficulties that would arise in drawing plans and specifications and making estimates to meet a situation where one contractor might do the work in the city and another contractor the work outside the city, are too obvious to require comment. In making both fills and cuts, it is manifest that the contractor first improving the road would necessarily be required to do a considerable amount of work that would accrue to the benefit of the contractor who might follow him upon what might be termed the other half of the work. I am unable to suggest any practical solution of the difficulty presented by you and can only observe that the situation is one which is not met by the existing statutes, and that the only remedy is in legislative action providing a co-operative scheme of road improvement for the state, a county and a city, where the corporation line of a city is the center line of an intercounty highway or main market road.

The above must not be taken as indicating that there is no method of improving so much of the road in question as is divided along its center line by the corporation line of the city of Lancaster, the holding being merely that neither the present law nor the Cass highway law furnishes any scheme by which the state, county and city can co-operate in making the improvement. I deem it proper in this connection to call your attention to the provisions of sections 128 to 133, inclusive, of the Cass highway law, being sections 6949 to 6954, inclusive, of the General Code, which will become effective on September 6th, next. These sections will authorize the board of county commissioners to extend a proposed road improvement into or through a municipality with the consent of the council of the municipality, the cost to be divided between the city and county as may be agreed. When they become effective they will furnish a method by which the city of Lancaster and Fairfield county may co-operate in the improvement of that part of the highway lying partly within and partly without the city, but they will not authorize co-operation in such improvement on the part of the state highway department.

Respectfully,
EDWARD C. TURNER,
Attorney General.

764.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF ROADS IN GUERNSEY AND WOOD COUNTIES, OHIO.

COLUMBUS, OHIO, August 25, 1915.

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

DEAR SIR:—I have your communication of August 21, 1915, transmitting to me for examination final resolutions as to the following roads:

Guernsey County, Cambridge-Caldwell Road, Petition No. 1549, I. C. H. No. 353;

Guernsey County, Cambridge-Caldwell Road, Petition No. 1549, I. C. H. No. 353;

Guernsey County, Steubenville-Cambridge Road, Petition No. 661, I. C. H., No. 26;

Wood County, Toledo-Perrysburg Road, Petition No. 1418, I. C. H. No. 53.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

765.

COUNTY COMMISSIONERS—MAY FURNISH JUDGE OF COMMON PLEAS COURT WITH AN OFFICE AND EQUIP SAME WITH FURNISHINGS—DUTY TO PROVIDE JUDGE WITH ALL LAW BOOKS REASONABLY NECESSARY FOR USE OF HIS OFFICE.

It is proper for county commissioners under the provisions of section 2419, *G. C., to furnish a judge of the court of common pleas an office and equip it with furnishings, and their duty to provide all law books reasonably necessary for his use in the administration of his office.*

COLUMBUS, OHIO, August 25, 1915.

HON. PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—I have your letter of August 19, 1915, in which you state that your judge of the court of common pleas has ordered certain law books, and you inquire whether the county commissioners can pay for office furnishings and law books for a judge of the court of common pleas under the provisions of section 2460, G. C., and section 2570, G. C.

You further state that you can find no section of the statute or law under which a judge of the court of common pleas can furnish his office and equip it with law books at the expense of the county.

It may be stated, primarily, that there is no statutory authority given to any judge of the court of common pleas to purchase, at the expense of the county, law books for use in his office or court room. The only express provision of the Code applying to this subject is found in section 1531, G. C., as amended in 103 Ohio Laws, page 414, which limits such right to the court of appeals. It may be stated, therefore, that a judge of the court of common pleas cannot legally obligate the county to pay for furnishings and law books for his office or court room, when ordered by him without the approval of some other duly constituted authority.

You inquire, however, whether the commissioners of your county can pay for furnishings and books for a judge of the court of common pleas under the provisions of sections 2460, G. C., and 2570, G. C.

Since June 1, 1831, it has been the statutory duty of the county commissioners to erect and maintain court houses and offices for county officials in their respective counties. This duty was first imposed by section 1 of an act passed March 31, 1831, and found in volume 29, page 315, Ohio Laws. Without attempting to follow the various changes and amendments in and to this act, it is suf-

ficient to say that section 1 of said act is now known as section 2419 of the General Code, and this section still imposes said duty upon the county commissioners in each county.

In the case of Commissioners of Trumbull County v. Hutchins, 11 Ohio, 369, the court, in commenting upon this subject, said:

> "The administration of justice is a public charge and so is everything necessary to its administration. It is the legal duty of the county commissioners to furnish all things coupled with the administration of justice within the limits of their own county. It is their duty to furnish suitable and convenient buildings for holding court at the expense of the county."

This interpretation of the law has never, to my knowledge, been changed, modified or questioned.

In another case, that of Mayhew v. Commissioners of Hamilton County, 1st Disney, 188, the court, again commenting upon the same subject-matter, says:

> "We remark that it is the duty of the public to make suitable provisions for the administration of justice. This includes not merely the organization of courts, but the providing of court rooms, with all the appendages, furniture and appointments whatsoever, necessary to render them comfortable to the courts and commodious to the public. These, under our system, with the exception of judges' salaries, are uniformly chargeable upon the county treasury, when other provision is not made; each county being, for this and other purposes of public concern, a political organization represented by the county commissioners. Section 1 of the act providing for the erection of public buildings, authorizes and empowers the commissioners to build and furnish suitable court houses, etc., and to provide therein rooms for clerks of courts, sheriffs and other county officers. Section 3 of the same act requires the commissioners to furnish and keep them in repair. These words are not used in a restricted sense, but in a general and enlarged one, embracing all that is necessary and proper to make, and to keep them in a condition, commodious and comfortable for the transaction of the public business, including all the labor requisite for that purpose."

The furnishing of an office for a judge of the court of common pleas and of law books necessary to him in the administration of his duties comes clearly within the principles announced in the foregoing cases, and within the express provisions of section 2419, supra. Law books are now indispensable to the expeditious and proper administration of business in our courts. Without them a judge would be helpless and it would seem that it would require no argument to show that they are as necessary to him in the conduct of his office as are record books to the clerk of his court, or tax duplicates to a county treasurer.

I am of the opinion, therefore, that it is proper for the county commissioners to furnish a judge of the court of common pleas with an office and to equip it with furnishings and their duty to furnish all law books reasonably necessary for the administration of his office and that the same would come within those "things which are coupled with the administration of justice," as defined by the supreme court, supra, and within the provisions of said section 2419, and that the payment therefor is an obligation which the county commissioners may allow and pay under their general powers.

It would be more satisfactory, however, and under a strict construction of the statutes the only legal method, to have an order for such books or furnish-

ings first submitted to the county commissioners and approved by them, in which case no question of the legality of the claim could arise and no differences of opinion as to its necessity could interfere with its allowance.

Respectfully,
EDWARD C. TURNER,
Attorney General.

766.

APPROVAL OF CONTRACT FOR CONSTRUCTION AND COMPLETION OF ADDITIONS AND ALTERATIONS IN FOURTH FLOOR OF OHIO STATE CAPITOL ANNEX.

COLUMBUS, OHIO, August 25, 1915.

HON. BENSON W. HOUGH, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—I have carefully examined the contract entered into by you on August 23, 1915, with Ray W. Loomis and Fred E. Fletcher for the construction and completion of the additions and alterations in the fourth floor in the Ohio state capitol annex, as per plans and specifications approved July 21, 1915; and also the bond which is offered by said contractors, with the American Surety Company of New York as surety, and find the same in all respects in compliance with law and have, therefore, this day approved and filed the same in the office of the auditor of state.

I am herewith returning to you the other bids submitted at the same time, also two copies of the contract as entered into and a copy of the bond.

Respectfully,
EDWARD C. TURNER,
Attorney General.

767.

PROPERTY OF STATE AND COUNTY LIQUOR LICENSING BOARDS SHOULD BE TAKEN OVER BY ADJUTANT GENERAL WHEN SAID BOARDS CEASE TO EXIST—LEASES FOR DISTRICT BOARDS SHALL BE MADE BY ADJUTANT GENERAL—RENT SHALL BE APPROVED BY BUDGET COMMISSIONER.

When the state and county liquor licensing boards cease to exist by virtue of the going into effect of the act found in 106 *O. L.,* 560, *the adjutant general should take over the property on behalf of the state.*

Leases for district liquor licensing boards shall be made by the adjutant general, subject to the approval of the governor, and the rent provided for therein shall receive the approval of the state budget commissioner.

COLUMBUS, OHIO, August 25, 1915.

HON. BENSON W. HOUGH, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—I am in receipt of a letter from Colonel E. S. Bryant, assistant adjutant general, under date of August 19, 1915, requesting my written opinion as follows:

"I am advised that the county liquor licensing boards go out of office August 31, 1915; that the office furnishings were mostly furnished by the state liquor licensing commission, and paid for by state funds.

"When the state and county boards are abolished, are there any duties of the adjutant general relative to the custody and disposition of such furnishings used by them?

"Under the provision of section 146-106, O. L., 319, is the adjutant general required to rent offices for the district liquor licensing boards provided for in section 1261-20, 106 O. L., 566?"

The act creating the state liquor licensing board is found in 103 O. L., at pages 216 et seq., the sections being known as sections 1261-16 to 1261-73 of the General Code.

Under the provisions of section 1261-22 (103 O. L., 218), the state is divided into licensing districts, each county constituting a district, and it is provided that there shall be a board consisting of two commissioners, representing the state, to be known as "The ---------- county liquor licensing board," to be appointed by the state liquor licensing board, one member of which was to hold office for two years from the second Wednesday in August, 1913, and the other for four years from the same date, and until their successors are respectively appointed and qualified, and that beginning with the second Wednesday in August, 1915, the state board shall appoint one commissioner biennially, to hold office for four years and until his successor is appointed and qualified.

This section is repealed by the act found in 106 O. L., at page 560.

Under the provisions of the act found in 103 O. L., 216, the county liquor licensing boards were authorized to provide themselves with books, stationery and other paraphernalia for an office which they were authorized to provide, the expenses to be approved by the state board and to be paid in the same manner as the expenses of the state board, which is by voucher of the state board on warrant of the state auditor on the state treasurer.

It is, therefore, apparent that the office furnishings provided for the county boards were paid for by the state and that, therefore, the same is the property of the state.

The act found in 106 O. L. at page 560, hereinbefore referred to, was filed in the office of the secretary of state on the 5th day of June, 1915, and, consequently, will not become operative until midnight of September 3, 1915, and, therefore, the county liquor licensing boards as now constituted will continue in the discharge of their duties until the time just foregoing mentioned, and will not go out of office on August 31, 1915, as suggested in the letter hereinbefore set out.

I have searched the statutes in vain to find any authority devolving upon the adjutant general to take charge and dispose of property which belongs to the state and which, because of the abolishment of an office, leaves the same in charge of no one. There does not seem to be any provision of law that I can find which provides for the custody and disposition of such property.

However, there has been a custom for many years that all property that is not needed by a particular department, board or commission shall be surrendered to the adjutant general and his receipt taken therefor, he thereby becoming the custodian of the same. The custom has also been in vogue for many years in this state that such property so obtained by the adjutant general may be disposed of by him either by condemnation and sale, or by transfer to some other department, board or commission.

Such having been the custom for many years, and there being no direct provision of law as to the disposition of the property of a board or commission that

has been abolished, I am of the opinion that the adjutant general should, as soon as the statute abolishing the county liquor licensing boards goes into effect, take charge of the property that is left by said county liquor licensing boards.

Your next question relative to the renting of offices for the district liquor licensing boards provided for in the act found in 106 O. L. at page 560, involves consideration of section 146 of the General Code, as amended in 106 O. L., 319, and which was filed in the office of the secretary of state on May 20, 1915, and will, therefore, go into effect prior to the going into effect of the act found in 106 O. L., page 560.

In the act found in 106 O. L., 560, section 7 thereof—designated as section 1261-27, G. C.—provides that the district liquor licensing boards shall, upon organization, "select some suitable city or village within its districts for its office."

However, section 146 as amended, hereinbefore referred to, provides that the adjutant general "shall rent all offices, buildings, and rooms for all officers, commissions, departments and bureaus of the state located outside the state house and execute all leases in writing for the same on behalf of the state subject to the approval of the governor, and deposit a copy thereof in the office of the secretary of state within ten days after the lease has been executed."

The district liquor licensing boards are a branch of the state government for the purpose of carrying out the provisions of the act locally.

Under the provisions of section 1261-22, being section 1 of said act, the state is divided into liquor licensing districts and a board is to be appointed for each such district. The members of the board have a fixed term of office, are required to give bond, and exercise a part of the sovereignty of the state in the performance of their duties. This constitutes such members "officers," and since the state is divided into liquor licensing districts, they are thereby constituted "state officers," and since they are required to select for their office some suitable city or village within their district, such offices will be located "outside the state house."

By reason of the provisions of section 146, G. C., as amended, hereinbefore in part set out, I am of the opinion that the adjutant general is required to rent the offices for the district liquor licensing boards after such boards have selected a suitable city or village in which their offices shall be located, the lease for the premises being subject to the approval of the governor.

In the act found in 106 O. L., 560, section 8 thereof—designated as section 1261-28 of the General Code—provides that all expenses of each district liquor licensing board "shall be subject to the approval of the state budget commissioner."

The rent to be paid under leases made by the adjutant general's department on behalf of the district liquor licensing boards must be met by the said district liquor licensing boards, and since such expense is subject to the approval of the state budget commissioner, I am of the opinion that while the adjutant general is required to rent offices for such boards, subject to the approval of the governor, nevertheless, since the expenses are to be subject to the approval of the state budget commissioner, the amount of rent provided for in each such lease should likewise be approved by the state budget commissioner.

Since the district liquor licensing boards are in every practical sense the successors of the county liquor licensing boards in the enforcement of the liquor license law, and since under the provisions of section 146, G. C., as amended, the adjutant general is given "full control and supervision of fixing and placing of all offices, commissions, departments and bureaus of the state in offices, buildings and rooms outside the state house when the same cannot be placed therein," I am of the opinion that the furniture which is taken charge of by the adjutant

general at the time of the going out of office of the county liquor licensing boards may be used in furnishing, in so far as necessary, the offices of the district liquor licensing boards.

Specifically answering your questions, therefore, I am of the opinion

(1) That when the state and county liquor licensing boards are abolished the furnishings used by such boards are to be taken over by the adjutant general, and so much thereof as is necessary may be used by him in furnishing the offices of the state liquor traffic inspector and the district liquor licensing boards.

(2) That the adjutant general is required to rent the offices for the district liquor licensing boards, subject to the approval of the governor, the amount of rent for such offices to receive the approval of the state budget commissioner.

I wish to note in passing that section 1261-28, as found in 103 O. L., at page 220, was not specifically repealed by the act found in 106 O. L., 560, but the provisions of section 8 of such act, since the same contains practically the same provisions as are found in section 1261-28 (103 O. L., 220), will repeal, by implication, said last named section. But even if this were not so, and each district liquor licensing board was authorized to provide itself with an office, nevertheless, such provision would be repealed by implication by the amendment of section 146, G. C., as found in 106 O. L., 319.

Respectfully,
EDWARD C. TURNER,
Attorney General.

768.

DEPUTY STATE SUPERVISORS OF ELECTIONS AND CLERKS OF SUCH BOARDS—MAY NOT BE PAID COMPENSATION UNDER SECTION 4990, G. C., FOR SERVICES IN CONDUCTING PRIMARY ELECTIONS IN THOSE COUNTIES IN WHICH NO PRIMARY ELECTION IS AUTHORIZED—CONSTITUTIONAL INHIBITION.

Deputy state supervisors of elections and clerks of boards of deputy state supervisors of elections may not be paid compensation under authority of section 4990, *G. C., for services in conducting primary elections in those counties in which no primary election is authorized to be held by reason of the provisions of article V, section 7 of the constitution and section* 4951, *G. C.,* 103 *O. L.,* 476.

COLUMBUS, OHIO, August 25, 1915.

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

GENTLEMEN:—I acknowledge receipt of yours under date of August 12, 1915, as follows:

> "May the members and clerk of the board of deputy state supervisors of elections be paid any compensation under the provisions of section 4990, General Code, in counties where no primaries were held because of no election precinct in the county having over two thousand population?"

It is a well established rule that public officials are entitled to only such salaries, emoluments, perquisites, fees and compensation as are expressly provided by law.

The only authority of law for compensation of deputy state supervisors of elections and clerks of boards of deputy state supervisors of elections for holding primary elections is found in section 4990, G. C., to which you refer and which provides as follows:

> "For their services in conducting primary elections, members of boards of deputy state supervisors shall each receive for his services the sum of two dollars for each election precinct in his respective county, and the clerk shall receive for his services the sum of three dollars for each election precinct in his county, and judges and clerks of election shall receive the same compensation as is provided by law for such officers at general elections."

It will be observed that this section provides for a determinate compensation to be paid for a specific and particular service as distinguished from a salary to be paid to an officer for a prescribed period of time by reason of his incumbency in office and the discharge of the general duties thereof, regardless of whether or not the performance of any such duties devolved upon the officer during such prescribed period. The compensation herein prescribed is for services in conducting primary elections. Manifestly, if no such primary election may be lawfully held, compensation for services rendered in conducting the same could not be lawfully claimed, for in the very nature of things no such services could be rendered. It would not be seriously contended that, if by reason of constitutional amendment and legislative enactment all primary elections throughout the state were abolished without express repeal of section 4990 supra, any deputy state supervisor of elections could be lawfully paid for services in conducting such election. Section 4990 provides for an additional compensation for the performance of additional duties imposed upon the particular officers therein named and without the imposition of such additional duties no reason for the compensation exists.

The case here under consideration, where no primary election may be lawfully held, is clearly distinguishable from the case of State ex rel. vs. Hogg, 19 C. C. (n. s.) 55, in which it was held that where a primary is authorized to be held within a county, the legal basis of calculation of the compensation of the county board of elections and clerk thereof is the total number of precincts in the county, notwithstanding primaries were not held in each of such precincts.

Article V, section 7, of the constitution, and section 4951, G. C., 103 O. L., 476, enacted pursuant thereto, provide that primary elections shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population unless petitioned for by a majority of the electors of such township or municipality.

I am, therefore, of opinion that no compensation may be paid to deputy state supervisors of elections and clerks of boards of deputy state supervisors of elections under authority of section 4990, G. C., for services in conducting a primary election on August 10, 1915, in those counties in which by reason of the provisions of article V, section 7, and section 4951, G. C., 103 O. L., 476, no such primary election could have been then lawfully held.

Respectfully,
EDWARD C. TURNER,
Attorney General.

769.

CERTIFICATE OF PERSONAL PROPERTY OWNED BY THE SPENCERIAN COLLEGE COMPANY—SHOULD CONTAIN SCHEDULE OF KIND AND VALUE OF PROPERTY OWNED BY INSTITUTION—VALUE OF PROPERTY IN SUCH STATEMENT SHOULD BE VERIFIED BY OATHS OF TRUSTEES OF SAID INSTITUTION.

The certificate required to be filed in the office of the secretary of state under provision of section 9922, G. C., should contain a schedule of the kind and value of the property owned by the institution mentioned in said section and the statement of the value of said property should be verified by the oaths of the trustees of said institution.

COLUMBUS, OHIO, August 26, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of August 23rd, submitting for my approval a certificate of personal property owned by the Spencerian College Company, of Cleveland, Ohio. You enclose with said certificate a communication from said company, under date of August 21, 1915, also the check of said company, made payable to the secretary of state, for the sum of five dollars, as the fee for filing said certificate.

You state that the superintendent of public instruction has sent to you the following communication:

> "This is to certify that the Spencerian school of Cleveland has filed its course of study in this office in accordance with section 9923 of the General Code, and that the equipment as to faculty and other facilities for carrying out such course are proportioned to its property and to the number of students in actual attendance, so as to warrant the issuing of degrees by the trustees thereof."

Section 9922, G. C., provides as follows:

> "When a college, university, or other institution of learning incorporated for the purpose of promoting education, religion, morality, or the fine arts, has acquired real or personal property, of twenty-five thousand dollars in value, has filed in the office of the secretary of state a schedule of the kind and value of such property, verified by the oaths of its trustees, such trustees may appoint a president, professors, tutors, and any other necessary agents and officers, fix the compensation of each, and enact such by-laws consistent with the laws of this state and the United States, for the government of the institution, and for conducting the affairs of the corporation, as they deem necessary. On the recommendation of the faculty, the trustees also may confer all the degrees and honors conferred by colleges and universities of the United States, and such others having reference to the course of study, and the accomplishments of the student, as they deem proper."

Section 9923, G. C. (104 O. L., 236), provides as follows:

> "But no college or university shall confer any degree until the president or board of trustees thereof has filed with the secretary of state a

certificate issued by the superintendent of public instruction that the course of study in such institution has been filed in his office, and that the equipment as to faculty and other facilities for carrying out such course are proportioned to its property and the number of students in actual attendance so as to warrant the issuing of degrees by the trustees thereof.''

While it appears that the Spencerian College Company owns personal property of sufficient value to bring the Spencerian School of Cleveland within the provisions of section 9922, G. C., and that the certificate required by the provisions of section 9923, G. C., as amended, has been issued by the superintendent of public instruction and has been filed in your office, I find upon examining the certificate submitted by you that the same does not contain a schedule of the kind and value of the personal property, owned by the Spencerian College Company. Moreover the statement of the value of the personal property of said company is verified by the oaths of the president and secertary of said company, while the provisions of section 9922, G. C., require that said statement shall be verified by the oaths of the trustees of said school.

I am of the opinion, therefore, that said certificate does not comply with the requirements of said section 9922, G. C., and I am returning the same without my approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

770.

DISTRICT LIQUOR LICENSING BOARD—MEMBER OF DISTRICT APPOINTING BOARD MAY NOT HOLD CLERKSHIP UNDER DISTRICT LIQUOR LICENSING BOARD.

A member of the district appointing board may not hold a clerkship or other position under the district liquor licensing boards, as created by amended senate bill No. 307, 106 O. L., 560.

COLUMBUS, OHIO, August 26, 1915.

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

GENTLEMEN:—I acknowledge receipt of yours under date of August 18, 1915, as follows:

> ''We would respectfully request your written opinion upon the following question:
>
> ''Can a member of the appointing board of a district liquor license commission under the new law, to become effective in September, hold a clerkship or other position under the district board?''

There is found no express statutory inhibition against a member of the district appointing board being chosen as a clerk or other authorized employe of the board of district supervisors or district liquor licensing board of any liquor licensing district, under amended senate bill No. 307, 106 O. L., 560. The answer to your inquiry then turns upon whether or not the positions of clerk or employe

of the district liquor licensing board are incompatible with the office of member of the appointing board, a determination of which involves a consideration of the duties, powers and relationship of the two positions.

By the provisions of section 1261-22b, G. C., 106 O. L., 562, the county clerks, recorders and presidents of boards of county commissioners are constituted ex-officio members of the appointing board of the liquor licensing district in which such county is located. The principal functions of the appointing boards under sections 1261-22c and 1261-23, G. C., 106 O. L., 562, are the appointment of two district liquor traffic supervisors for their respective districts, who shall constitute the district liquor licensing boards of the several districts of the state, and to fix the salaries of such supervisors subject to the approval of the state budget commissioner. A further power and authority to be exercised by the appointing boards is the removal from office of the members of the district liquor licensing boards under the provisions of section 1261-25, G. C., 106 O. L., 565, for any violation of the rules and regulations referred to in section 1261-24, G. C., or for any misconduct in office, nonfeasance, bribery, incompetency, incapacity, gross neglect of duty or gross immorality upon complaint filed by the state inspector or any person.

The district liquor licensing board so appointed, whose compensation is fixed in the first instance by the appointing board and who are subject to removal from office by the appointing board for the causes above stated, is authorized under the provisions of section 1261-27, G. C., 106 O. L., 562, to select a secretary and to fix his compensation subject to the approval of the state budget commissioner. Under section 1261-28, G. C., 106 O. L., 563, the district liquor licensing board is further authorized to employ such clerks and employes as it deems necessary to the transaction of its business and fix their compensation subject to the approval of the state budget commissioner.

From the above statement of the powers, authorities and duties of the boards referred to, if a member of the appointing board might be selected as secretary or employed as a clerk of the licensing board, a case may be readily conceived in which a member of the appointing board would be required to sit in judgment upon the removal of a district supervisor whom he had appointed or helped to appoint, and fix his compensation in consideration for the assistance of the district supervisor in the selection or employment, and fixing the compensation of such member of the appointing board as secretary or clerk of such licensing board. Under section 1261-29, G. C., 106 O. L., 564, the secretary of the licensing board may be removed for violation or neglect of duty or for any other good and sufficient cause, and all other employes shall serve only during the pleasure of the board. From this a case may be readily imagined where a faithful discharge of the duty of a district supervisor would require his participation in the dismissal from service of a person whose duty it might then or thereafter be to pass upon the removal of such supervisor from office if the person so dismissed was at the same time a member of the appointing boards.

The rule by which the compatibility of public offices may be determined in all cases is not easy of statement. That stated in the case of State ex rel. v. Gilbert, 12 C. C., n. s., 275, sufficiently indicates the principle. The rule is there stated as follows:

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

It is against the public interest and therefore in conflict with public policy that a person should occupy two public positions, the duties and powers of which

are such that the authority of one position may be exercised to the advancement of the personal interest of the person holding the same in violation of the faithful performance of the lawful powers and duties of the other position, and in the interest of the public.

In the application of this principle to the matters of fact hereinbefore set forth, the conclusion forces itself that the positions of member of the district appointing board and a clerkship or other employe of the district licensing board are incompatible.

A cursory consideration of the powers, duties and relationship of the two positions or offices will clearly and readily disclose a palpable conflict of duty manifestly inconsistent with a faithful performance of the duties of either position, with a view to the public interest.

Respectfully,
EDWARD C. TURNER,
Attorney General.

771.

VILLAGE COUNCIL—MAY PROVIDE FOR APPOINTMENT BY MAYOR OF SUITABLE PERSON AS DEPUTY MARSHAL—SUCH APPOINTEE TO ACT AS INTERPRETER IN MAYOR'S COURT—RECEIVE COMPENSATION FOR HIS SERVICES.

When provided for by council and subject to its confirmation, the mayor of a village may appoint deputy marshals, policemen, night watchmen and special policemen, and the council may by ordinance under sections 4385 *and* 4387, *G. C., confer upon one so appointed the power and duty of acting as interpreter in the court of the mayor of the village and fix the compensation to be paid to such officer from public funds.*

COLUMBUS, OHIO, August 26, 1915.

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

GENTLEMEN:—I acknowledge receipt of yours under date of August 15, 1915, as follows:

> "We would respectfully request your written opinion upon the following question:
>
> "May the council of a village provide by ordinance for the appointment or employment of an interpreter deemed necessary in the proper conduct of the mayor's court of said village, and pay his compensation from the public funds?
>
> "We know of no authority of law that would permit of any charge to be made as against the defendant convicted in said court, i. e., said compensation could not be made a part of the costs of the case and assessed against the defendant in case of conviction. What, if any, legal method could be employed to provide such aid to such courts having a large foreign population within its jurisdiction?"

It is well established in this state that municipal corporations, in their public capacity, possess such powers and such only, as are expressly granted by statute, and such as may be implied as necessary and essential to carry into effect those which are expressly granted.

Bloom v. City of Xenia, 32 O. S., 461;
Ravenna v. Pennsylvania Co., 45 O. S., 118;
State v. Carter, 67 O. S., 433;
Townsend v. Circleville, 78 O. S., 123.

Hence, unless authority therefor is expressly conferred by statute or it be found necessarily essential to carrying into effect an authority so conferred, a village council may not provide by ordinance for the appointment or employment of an interpreter for the mayor's court.

Upon examination of the statutes of the state and as deemed applicable to the question submitted, and affording a practical solution thereof, your attention is directed to the following provisions:

> "Section 4384. The marshal shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. When provided for by council, and subject to its confirmation, the mayor shall appoint all deputy marshals, policemen, night watchmen and special policemen, and may remove them for cause, which shall be stated in writing to council.
>
> "Section 4385. The marshal shall be the peace officer of the village and the executive head under the mayor of the police force. The marshal, the deputy marshal, policemen or night watchmen under him shall have the powers conferred by law upon police officers in all villages of the state, and such other powers not inconsistent with the nature of their offices as are conferred by ordinance.
>
> "Section 4387. In the discharge of his proper duties, he shall have like powers, be subject to like responsibilities and shall receive the same fees as sheriffs and constables in similar cases, for services actually performed by himself or his deputies and such additional compensation as the council prescribes. In no case shall he receive any fees or compensation for services rendered by any watchman or any other officer, nor shall he receive for guarding, safekeeping or conducting into the mayor's or police court any person arrested by himself or deputies or by any other officer a greater compensation than twenty cents."

Section 4384, G. C., authorizes the mayor of a village, when so provided for by council, and subject to its confirmation, to appoint all deputy marshals, policemen, night watchmen and special policemen.

By section 4385, G. C., it is provided that the marshal, deputy marshals, policemen or night watchmen shall have the powers conferred upon police officers in villages of the state and such other powers not inconsistent with the nature of their offices as are conferred by ordinance.

From the above it is deemed clearly within the authority of council to make provision by ordinance for the appointment of deputy marshals, night watchmen, policemen and special policemen, by the mayor of a village, subject, however, to confirmation by the council and to confer by ordinance such powers as it may choose in addition to those conferred by statute, and which are not inconsistent therewith, upon such officers.

The general duties and powers of an interpreter are confined to the interpretation of the questions submitted to persons called as witnesses and the answers of such witnesses given in response thereto and the translation of such documentary evidence written or printed in another language, as may be competent, into English.

This duty or the exercise of such power may not be said to be inconsistent with the powers conferred upon marshals, deputy marshals, policemen or watchmen, nor would the performance of the duties of an interpreter result in substantial interference with the proper performance of the duties of such officer.

It is further provided in section 4387, G. C., supra, that the council may prescribe compensation for such officers in addition to the fees therein allowed. The provision for such additional compensation indicates a contemplation of services on the part of the officers so appointed other than those for which fees are prescribed.

I am, therefore, of opinion that the council of a village may provide by ordinance for the appointment of a competent person as a deputy marshal, policeman or special policeman, by the mayor, subject to confirmation by the council, and may further provide that a person so appointed shall perform the duties of an intepreter in the court of the mayor of such village and prescribe proper compensation either monthly, by the case, or per diem, to be paid such person for the services rendered as interpreter.

It may be suggested that such additional compensation here authorized may be limited to such sum as the council may deem reasonable for the actual services rendered, but no part of such compensation as interpreter may be taxed in the costs.

Respectfully,
EDWARD C. TURNER,
Attorney General.

772.

LIQUOR LICENSE LAW—INTERPRETATION OF THAT PART OF SECTION 1261-22, G. C., 106 O. L., 562, THE WORDS "THE MOST POPULOUS COUNTY OF THEIR RESPECTIVE DISTRICTS"—COUNTY IN WHICH APPOINTING BOARDS ARE REQUIRED TO MEET—MUST BE DETERMINED FROM LAST PRECEDING FEDERAL CENSUS OF SUCH COUNTIES.

The district appointing boards are required, under the provisions of section 1261-22, G. C., 106 O. L., 562, to meet at the county seat of that county of the district having the greatest population, as determined by the last preceding federal census.

COLUMBUS, OHIO, August 26, 1915.

HON. JOSEPH W. HORNER, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of August 21, 1915, as follows:

> "The law provides 'five days after this act becomes effective the said appointing boards shall meet at the court house in the most populous county of their respective districts,' etc.
>
> "The twenty-second district consists of the counties of Licking and Muskingum.
>
> "The question has been submitted to me how are we to determine which county has the largest population; that is to say, shall we go by the last U. S. census or shall we go by the last government estimate?
>
> "From the best information obtainable at this time, it seems as if Licking county has the greatest population."

Your inquiry involves a consideration of that part of section 1261-22c, G. C., 106 O. L., 562, which is as follows:

> "Five days after this act becomes effective the said appointing boards shall meet at the court house in the most populous county of their respective districts at twelve o'clock, noon, at which time and place such boards shall organize by selecting a president and secretary. * * *"

The appointing boards are here unqualifiedly required to meet at the county seat of the most populous, or county having the greatest population within the district as prescribed by section 1261-22, G. C., 106 O. L., 560.

First it may be observed that it is beyond all practical possibility to determine with certainty the exact population of any territory with the extent of that of a county in this state at a given time, nor is there here prescribed any rule by which or basis upon which such populaion is for practical purposes to be determined. There is, however, a well established and universally recognized standard by which in all practical affairs we are wont to determine the population of all cities and political subdivisions of the several states in the absence of any specially prescribed rule governing the particular case.

This recognized standard, it is needless to say, is the official report of the federal census taken decennially under authority of the general government. In the absence then in the present instance of any other or different provision, it will at least be presumed that the legislature had in contemplation only the adoption of the recognized and established rule by which questions of population are everywhere determined almost if not altogether without exception in similar matters.

While municipalities are authorized under the provisions of section 3625, G. C., to take an official census, no authority is found for a county to do so.

Although under section 1261-59, G. C., 103 O. L., 236, special provisions are made for the adoption of any official census taken in any political subdivision, taken within a year next preceding the granting of licenses, in determining the number of licenses which may be granted under the constitution and statutory limitations thereof, and further special provision is there made for determining the population of bona fide summer resorts containing a population of less than five thousand, according to the last preceding federal census for a like purpose, such special provisions may not be held to be applicable to a different state of facts in a subsequent act, no reference thereto being made.

I am, therefore, of opinion that the county in which the appointing boards are required to meet under section 1261-22c, supra, must be determined from the last preceding federal census of such counties.

Respectfully,
EDWARD C. TURNER,
Attorney General.

773.

CONTRACT—LOCAL GAS DISTRIBUTING COMPANY—SUPPLYING COMPANY—GAS FURNISHED BY LATTER TO FORMER IS SOLD AND DELIVERED AND PAID FOR ACCORDING TO VOLUME THEREOF—ALL RECEIPTS FROM LOCAL BUSINESS CONSTITUTE GROSS RECEIPTS OF DISTRIBUTING COMPANY—COSHOCTON GAS COMPANY CASE DISTINGUISHED.

Where the contract between a local gas distributing company and a supplying company is such as to show that the gas furnished by the latter to the former is sold and delivered and paid for according to the volume thereof, the case is not within the rule of the decision in State v. Coshocton Gas Company, 12 N. P., n. s., 570, and all the receipts from the local business constitute gross receipts of the distributing company.

COLUMBUS, OHIO, August 26, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have asked me to advise you as to whether the contract between the Alliance Gas & Power Company, a local public utility, and the East Ohio Gas Company, a copy of which is enclosed with your letter, is sufficiently similar to the contract involved in the case of State v. Coshocton Gas Co., 12 N. P. (n. s.), 570, as to limit the liability of the first named company for excise tax to such taxes based upon any part of the total receipts from the sale of gas in the city of Alliance and its environs less than the whole.

I refer the commission, in the first instance, to opinion No. 378, in which I examined the contract between the Springfield Gas Company and the Ohio Fuel Supply Company for the purpose of testing its application to the question of excise taxes by the rule laid down in Coshocton Gas Company case, *supra*. The analysis which is therein made of the Coshocton Gas Company decision need not be repeated in this opinion.

The agreement between the East Ohio Gas Company and the Alliance Gas & Power Company, which I have before me, contains the following stipulations, which are clearly distinguishable from the corresponding stipulations in the Coshocton Gas Company contract and also from those in the Springfield Gas Company contract:

> "(1) The East Ohio Gas Company, the supplying company, agrees 'that it will sell natural gas to the party of the second part * * * at the rate or price of seventy-five per centum (75%) of the *gross sales* of said natural gas, which shall be made by the party of the second part at domestic rates, and at the rate or price of eighty-five per centum (85%) of the *gross sales* * * * at a reduced rate, for other purposes. * * That the price at which gas is to be sold in said city of Alliance and vicinity by the party of the second part for domestic and other purposes *shall be fixed by the* party of the first part, and the party of the second part hereby agrees to sell said natural gas at the prices so fixed. No natural gas shall be sold at any special rate except it be stipulated for *by special contract between the parties hereto* on contracts the same as now used by the party of the first part, or which the party of the first part may use at any future time.'
>
> "(2) The local company agrees that it will 'pay to the party of the first part for all natural gas received during any month, on or before the

20th day of the month following that in which such gas shall be received.'

"(3) The local company further agrees to furnish each month a statement showing 'the gross amount of sales of gas to consumers during the last preceding month. * * *'

"(4) It is mutually agreed that "the quantity of gas delivered by the party of the first part to the party of the second part shall be ascertained monthly by the reading of the meters by which such gas is supplied to consumers, which method is hereby adopted by the parties to this agreement as the basis of such measurement."

I have quoted all those parts or portions of the contract which relate to the basis of compensation and the test of delivery. By referring to the previous opinion which I have mentioned the commission will observe that the vital difference between the two contracts which were therein considered and the present contract lies in the fact that under those contracts the supplying company was to have a certain percentage of the proceeds of collections of the local business; whereas under this contract the supplying company is entitled to a certain percentage of the gross sales, regardless of whether collections are made or not.

As Judge Rogers of the Franklin county common pleas court pointed out in deciding the Coshocton Gas Company case, the obligation arising as between the parties to the contract in that case out of the successful conduct of the business was the duty on the part of the local company to *account* for moneys collected on the joint account. In other words, the parties did not stand towards each other with respect to a month's business in the relation of debtor and creditor, but in the relation of trustee and principal.

No such result could be claimed for the contract between the East Ohio Gas Company and the Alliance Gas & Power Company. It is clear that the obligation of the Alliance Company to the East Ohio Company arises, so to speak, the instant that a measurable quantity of gas passes through a consumer's meter and that fact is registered by the instrument; and that obligation is the duty of the Alliance Company *to pay* the East Ohio Company a certain percentage of the selling price of that quantity of gas. In the other two cases which I have considered no obligation would arise until the consumer had paid the local company for the gas, and then the obligation would be to *account* for a certain percentage of the proceeds.

From another point of view: It must be admitted that upon the reasoning in the Coshocton Gas Company case the result would have been different if the local company had merely purchased its supply from a supplying company in such a way as that the entire volume of gas passing from the mains of one company to the mains of the other company was measured and paid for periodically at so much per unit of measurement.

I am unable to see that the contract between the Alliance Gas & Power Company and the East Ohio Gas Company differs essentially from such a supposed arrangement. True, there is more than one meter, and while the gas is in the distributing system of the Alliance Company it remains the general property of the East Ohio Company. But as the contract makes very plain, the parties have chosen to regard the delivery as incomplete until the consumer's meter is reached for purposes which serve their own convenience; and they have expressly fixed upon the readings of the consumers' meters as conclusively determining the amount of gas delivered by the one party to the other.

It must be admitted also that in other particulars, such as with respect to the stipulations as to the maintenance of the distributing system, etc., the contract under examination has much in common with the other two contracts with which it has been compared. Notwithstanding all these points of similarity, however,

the one vital point on which the Alliance contract differs from the other two is sufficient, in my opinion, to distinguish it for purposes of the application of the decision in the Coshocton Gas Company case.

I, therefore, advise that the decision in State v. Coshocton Gas Company, *supra,* does not apply to the business of the Alliance Gas & Power Company as conducted under its contract with the East Ohio Gas Company so as to produce the result arrived at by the court in the Coshocton Gas Company case; but that the facts being distinguishable from those in the Coshocton Gas Company case, a conclusion opposite to that reached by the court in that case must, for the very reasons on which that conclusion was based, be reached in the case of the Alliance Gas & Power Company. In other words, the Alliance Gas & Power Company is to be treated as the sole proprietor of its own business. The receipts which it has from its customers are to be treated as belonging, in the first instance, solely to it, and without diminution constitute the basis of the excise tax.

Respectfully,

EDWARD C. TURNER,

Attorney General.

774.

INTERPRETATION OF SECTIONS 7419 AND 5649-4, G. C.—"EMERGENCY"—RUN DOWN CONDITION OF ROADS MUST EXIST AS SPECIFIC AND DEFINITE FACT—GENERAL LANGUAGE WILL NOT SUFFICE—EACH CASE MUST BE DETERMINED AS IT ARISES AND EACH RESOLUTION MUST STAND BY ITSELF—RESOLUTION OF COUNTY COMMISSIONERS MUST DEFINITELY SHOW ON ITS FACE THE EXISTENCE OF AN EMERGENCY—THERE MUST BE SOME UNUSUAL CIRCUMSTANCES TO BRING LEVY WITHIN AUTHORITY OF SECTION 5649-4, G. C.

A resolution of a board of county commissioners finding that certain principal highways of the county are "unfit for travel or cause difficulty, danger or delay to teams passing thereon," "by reason of the large amount of traffic thereon or from neglect or inattention to the repair thereof" does not sufficiently state an emergency within the meaning of section 5649-4, *G. C., and such resolution, though adopted under section* 7419, *G. C., is not sufficient to authorize the making of a levy outside of the Smith law limitations.*

*A resolution of a board of county commissioners, reciting that numerous roads of the county are so "worn by the large amount of travel * * * that their condition causes difficulty, danger and delay to traffic," does not sufficiently state an emergency within the meaning of said section so as to authorize the making of such a levy outside of the Smith law limitations.*

COLUMBUS, OHIO, August 26, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge the receipt of your letter of August 14th, as follows:

> "A board of county commissioners adopted a resolution under section 7419, G. C., in substantially the following form:
>
> " 'Whereas, we find that the following principal highways (naming them) of the county, by reason of the large amount of traffic thereon or

from neglect or inattention to the repair thereof, have become unfit for travel or cause difficulty, danger or delay to teams passing thereon, and being satisfied that the ordinary levies authorized by law for such purpose will be inadequate to provide money necessary to make the repairs in said roads rendered necessary from the causes above enumerated,

"'Be it Resolved, That there be levied a tax of 1.2 mills upon the dollar of all the taxable property of the county for the repair of said roads.'

"May such rate be levied as an emergency tax irrespective of any of the limitations of the so-called Smith law? In other words, is such a levy an emergency levy within the meaning of section 5649-4, which the commissioners are authorized to levy irrespective of any limitations of the Smith law?"

Your question directly involves the interpretation of the following sections of the General Code:

Section 5649-4, as amended 103 O. L., 527:

"For the emergencies mentioned in sections 4450, 4451, 5629, 7419 and 7630-1 of the General Code, the taxing authorities of any district may levy a tax sufficient to provide therefor irrespective of any of the limitations of this act."

Section 7419, General Code:

"When one or more of the principal highways of a county, or part thereof have been destroyed or damaged by freshet, landslide, wear of water courses, or other casualty, or, by reason of the large amount of traffic thereon or from neglect or inattention to the repair thereof, have become unfit for travel or cause difficulty, danger or delay to teams passing thereon, and the commissioners of such county are satisfied that the ordinary levies authorized by law for such purposes will be inadequate to provide money necessary to repair such damages or to remove obstructions from, or to make the changes or repairs in, such road or roads as are rendered necessary from the causes herein enumerated, they may annually thereafter levy a tax at their June session, not exceeding five mills upon the dollar upon all taxable property of the county, to be expended under their direction or by the employment of labor and the purchase of materials in such manner as may seem to them most advantageous to the interest of the county, for the construction, reconstruction or repair and maintenance of such road or roads or part thereof."

In reality the only question is as to the interpretation of section 5649-4, for section 7419 standing by itself is not sufficient authority for the making of a levy outside of the Smith law limitations. The Smith law was passed subsequently to section 7419, and it is at least safe to say that had not section 5649-4 been enacted as a part thereof, levies under section 7419 would have been subject to the appropriate limitations of the Smith law. The exact question being, not as to whether or not a valid levy has been made under section 7419, but as to whether or not a *preferred* levy outside of the Smith law limitations has been made under favor of section 5649-4, that section and not section 7419 must be first interpreted.

I perceive the following questions which the resolution quoted by you raise as to the application of section 5649-4:

> "(1) Is section 5649-4 to be so interpreted as that any levy therein mentioned, i. e., a levy for one of the emergencies mentioned in the sections referred to therein, is *ipso facto* outside of the Smith law limitations; or is the section a grant of power to the taxing authorities to make a levy for one of the named emergencies outside of the Smith law limitations if they see fit, leaving it optional with them to make an ordinary levy under the sections named, subject to the limitations of the Smith law?
>
> "(2) Is any levy which may be made under authority of the sections referred to in section 5649-4, a levy for an 'emergency' within the meaning of section 5649-4; in other words, is section 5649-4 to be interpreted, so to speak, as a legislative declaration that all levies made under authority of the sections named are emergency levies? Or, it being ascertained that a given levy is made under authority of one of the sections referred to in section 5649-4, must it still be ascertained in addition thereto that the levy is an emergency levy?"

At first blush I was impressed that both of these questions were involved in the facts stated by you, and have therefore stated them as so involved. On reflection, however, I think the first of these two questions may be eliminated; for while the resolution which you quote does not specifically refer to section 5649-4 nor recite that the levy of 1.2 mills for which it provides shall be made in addition to all other levies under the Smith law, thus leaving room for argument that, if section 5649-4 is a mere grant of power to levy for certain purposes outside of the Smith law limitations, the resolution does not evince an intention on the part of the commissioners to make such a levy; yet there is sufficient evidence on the face of the resolution to show, in my opinion, that the commissioners did intend that the levy shall be made exclusive of the Smith law limitations. This evidence is found in the fact that the levy is not in the form of an estimate of the amount needed. If it were an ordinary levy, subject to adjustment with other rates through the agency of the budget commission, it would have been expressed in an amount as well as in mills, agreeably to the provisions of section 5649-3a, which provide for the filing of the annual budget. Moreover, it would have been treated, had it been regarded as an ordinary levy subject to revision, as a mere item in the budget; whereas the commissioners have at least attempted to make it a separate and independent levy.

For these reasons, I conclude that whatever may be the law as to the authority of the commissioners to levy under section 7419 within the limitations of the Smith law, the resolution quoted by you embodies a palpable effort to make a levy outside of those limitations, even though the intention might have been more clearly expressed.

This leaves the second of the two questions of law as I have stated them as the only point on which the answer to your specific questions can hinge. It is probably true that as a first impression it would appear from the language of section 5649-4 that all levies under the several sections enumerated therein are to be regarded, for the purposes of that section, as emergency levies; and in consequence thereof that if a levy can be sustained as a valid exercise of power under any one of the sections enumerated in section 5649-4, it is on that account alone an emergency levy within the intendment of said section and may be made without regard to the Smith law limitations.

But a careful study of section 5649-4 dispels this impression, in my opinion.

In the first place, if the legislature had intended to provide that all levies under authority of sections 4450, 4451, 5629, 7419 and 7630-1 of the General Code might be made outside of the limitations of the Smith law, it could have expressed that intention in unequivocal language, simpler than that which it has chosen to use. As for example:

> "The limitations of this act shall not apply to taxes levied under sections 4450, etc."

On the contrary, the general assembly has used the words: "For the emergencies mentioned in sections 4450, etc." The most natural and obvious implication of this language is that *there may be occasions for the exercise of the taxing power other than the emergencies mentioned in the sections referred to.* That is to say, in grammar and in logic the expression used by the legislature refers to something *in* the sections enumerated less comprehensive than the sections themselves. If this is the correct view, then in order to determine what levies may be made outside of the limitations we would not stop with ascertaining whether or not a given levy could be made under authority of one of the sections enumerated, but would inquire further as to whether the occasion for the levy was an "emergency."

It must be admitted that strict rules of grammar and logic must be applied with caution in the interpretation of the statute. I would, therefore, not be content to rest my interpretation of section 5649-4 upon any such technicality. But in my opinion section 5649-4 points the way to intrinsic evidence showing that the legislature intended that it should be strictly applied in the way which I have described. I think it must be admitted that if it clearly appears on the face of one of the sections referred to in section 5649-4 that such section contemplates the levy of taxes for conditions that could not under any circumstances be regarded as emergencies, in addition to conditions which might be so regarded, this of itself would show that the legislature intended that the only levies under that section which, under favor of section 5649-4, could be made outside of the limitations would be the emergency levies.

The interpretation of section 7419 is put in issue by your question. I think it is more appropriate, therefore, to take another one of the sections mentioned in section 5649-4 and examine it, with this question in mind:

> "Are all the things for which levies may be made under this section 'emergencies' in any sense of the word?"

I may say with respect to sections 4450, 5629 and 7630-1 that there is nothing referred to in any of these sections which may not properly be regarded as an emergency; but the case stands differently with respect to section 4451. That section provides as follows:

> "When expenses are incurred by the board of health under the provisions of this chapter, upon application and certificate from such board, the council shall pass the necessary appropriation ordinances to pay the expenses so incurred and certified. The council may levy and set apart the necessary sum to pay such expenses and to carry into effect the provisions of this chapter. Such levy shall, however, be subject to the restrictions contained in this title."

The occasions of the exercise of the taxing power provided for in this section are two:

> "(1) The incurring of expenses by the board of health 'under the provisions of this chapter;' and
>
> "(2) The anticipation of the incurring of expenses by the board of health in order 'to carry into effect the provisions of this chapter.'"

If by "the provisions of this chapter" were meant those provisions of the chapter relative to the powers and duties of the municipal board of health, relating to the prevention of the spread of dangerous communicable disease, in time of epidemic or threatened epidemic, as provided for by sections 4425 to 4450, inclusive, then it would be obvious that where expenses had been so incurred and a levy were made to meet them, the levy would be in every sense of the word a levy for an "emergency;" but "this chapter" embraces everything relating to boards of health—from sections 4404 to 4476 of the General Code, or at least all that part of the chapter excepting section 4467 et seq. relating to sanitary plants, which carry their own levying provisions.

From this fact it becomes apparent that the expenses incurred by the board of health under the "provisions of this chapter" would contemplate, among other things, the following items:

> "(1) The regular compensation of a health officer appointed by the state board of health and made by section 4405 'a valid claim against such municipality.'
>
> "(2) The salaries of officers and other appointees of the board of health under authority of section 4412 of the General Code.
>
> "(3) The expense incident to keeping a record of proceedings, etc., it being provided by section 4409 that 'each board of health * * shall procure suitable books, blanks, and other things actually necessary for the transaction of its business.'
>
> "(4) The expense incident to creating 'a complete and accurate system of registration of births, marriages, deaths and interments occurring within its jurisdiction for the purpose of legal and genealogical investigations and to furnish facts for statistical, scientific or sanitary inquiries.' (Sec. 4419, G. C.)"

Other expenses might be mentioned, but I have limited my enumeration to those things which clearly are not emergency conditions. Indeed, the effect of regarding all levies which might possibly be made under section 4451 of the General Code as "emergencies" would be simply this: To take out of the Smith law limitations the whole levy of a municipal corporation for the health fund, because that levy is referable to section 4451. No such interpretation of section 5649-4 and 4451 considered together has ever been given, so far as I am advised, in practice, and it seems to me that a mere statement of the consequences of holding that all levies under section 4451 are necessarily "emergencies," or that they may be made so at the mere election of council regardless of their purpose, is enough to compel the choice of that interpretation of section 5649-4 which logic and the rules of syntax indicate, namely: That it is not every levy which may be made under the sections referred to therein which is outside of the Smith law limitations, but only those levies which are for such "emergencies" as are "mentioned" in such other sections that may be so made.

With this principle established, we approach section 7419 with a view to determining whether it mentions conditions that are not emergencies as well as

conditions which are emergencies, or in other words, whether or not a distinction may be observed among the different conditions which it mentions.

Before analyzing the section in detail, however, it may be well to remark that section 7419 has been treated by the legislature and by the courts as a section under which, prior to the Smith law at least, regular taxes could be levied from year to year for road repair purposes. That is to say, the section was not regarded solely as one intended for use upon extraordinary occasions, but was employed repeatedly as the means of raising current revenues.

Section 7421, which for obvious reasons must be read in connection with section 7419, shows that the legislature has treated section 7419 as a means of raising current revenues. It provides as follows:

> "All money assessed and collected under the provisions of section 7419, which remains in the hands of the county treasurer, unexpended and unappropriated, for a period of six months after the annual September settlement for the fiscal year during which the tax was collected, shall be paid to the treasurer of the township or municipal corporation from which it was collected, and be expended on the public roads, under the direction of the trustees of the proper township or municipal corporation, in such manner as seems to them most advantageous to the interest of the township or corporation, for the construction, reconstruction, or repair of roads, and in building or repairing bridges."

If the general assembly had not conceived of the provision for a levy under section 7419 as ordinary current revenues of the county, it would certainly not have passed section 7421.

The supreme court evidently took the same view of this statute in its original form in Lima v. McBride, 34 O. S., 338. The second branch of the syllabus in this case is as follows:

> "2. Where the county commissioners, intending to make a levy of taxes for road purposes, under the act of April 30, 1869 (66 Ohio L., 60), cause such levy to be entered on the record, in general terms, the tax will not be regarded as invalid, or made under the act of 1877 (74 Ohio Laws, 92), on the mere ground that the record does not show the existence of facts which warranted the levy under the former act."

The reference is to what is now section 7419 of the General Code. Comparison of the original act of 1869 with the present section will show no very material changes in the language of the law. In spite of the fact that the occasions for the levy have always been those specifically referred to in the first part of the section in its present form, the supreme court sustained as a levy under this section one made under a resolution of the following tenor, as shown in the report at page 339:

> "The commissioners made a levy for county road fund of four mills."

In other words, while the court did refer in the opinion, per Okey, J., to the levy as "the extraordinary levy," yet it treated the levy as one, in effect, for general and current revenues.

In sharp contrast to the decision of the supreme court in the case above cited is the decision of the circuit court of Franklin county in the case of the State on the Relation of the Tax Commission v. Sayre, Auditor, not officially reported. In that case the commissioners of Franklin county had attempted to levy outside

of the Smith law limitations, by passing a resolution in which the language of section 7419 was substantially quoted, except that the roads alleged to be in need of repair were specifically enumerated therein. The court held the resolution insufficient upon which to base a levy outside of the Smith law limitations, holding that general language of this kind, together with the repeated use of the word "or" and without specifications as to which road had been damaged in one way and which in another, could not be justified as an emergency levy.

While the court in the case last above referred to did not base its decision upon the point which is raised by your letter, yet it is significant to note that the levy was not set aside on the ground that it was not made in compliance with section 7419 (which indeed could not have been the case in the light of the decision in Lima v. McBride, *supra*), but on the ground that it was not a compliance with section 5649-4. The decision, therefore, does go at least one step in the direction which my discussion has taken, for it establishes the conclusion that a mere compliance with section 7419 will not justify a levy under section 5649-4.

The fact that section 7419 is susceptible to use as a means of raising current revenue, established by the considerations above mentioned as well as by the fact apparent on the face of the statute that the levy therein authorizd may be made "annually," tends strongly to establish the conclusion that there must be something in this statute which is not of an *emergency* character.

When section 7419 is analyzed it seems possible to distinguish different classes of occurrences or conditions, some of which would seem in every instance to constitute emergencies, and others of which would seems to constitute emergencies only under most exceptional circumstances. In every case, however, there must be a concurrence of two elements or conditions in order to constitute an emergency, viz.:

> "(1) The existence of certain specific conditions in the specific roads, caused by certain specific means; and
>
> "(2) The inability of the commissioners to meet the conditions so caused by levying within the ordinary limits of law."

It is clear from the decision of the circuit court in the case above cited that the emergency conditions must exist as specific and definite facts, and that any equivocal or general language used in a resolution the purpose of which is to make a levy outside of the Smith law limitations and under section 7419, will be insufficient.

In view of the decision cited and of the difficulty of the question involved, I do not believe I would be justified in expressing any opinion as to just what circumstances of those mentioned in section 7419 would, in a given instance, constitute an "emergency" within the meaning of section 5649-4. Each case must be determined as it arises and each resolution must stand by itself.

It is clear, however, for reasons which I have pointed out, that the resolution of the commissioners in order to be sufficient authority for the making of a preferred levy, must specifically and definitely show on its face the existence of an emergency. Neither the resolution quoted in your letter nor the resolution of the commissioners of Miami county, a certified copy of which you have sent to me, states an emergency, in my opinion. This is clearly the case with respect to the resolution quoted in your letter, for in that resolution it is recited that the roads

> "by reason of the large amount of traffic thereon *or* from neglect *or* inattention to the repair thereof, have become unfit for travel or cause difficulty, danger *or* delay to teams passing thereon."

While the resolution shows a lack of sufficient funds, it does not show the existence of specific conditions with respect to particular roads, but is equivocal and general like the resolution held insufficient in State ex rel. v. Sayre, *supra*.

The Miami county resolution is somewhat more specific, in that it limits the statement of conditions as follows:

> "We find them much worn by the large amount of travel so that their condition causes difficulty, danger and delay to traffic."

However, some eleven improved roads are mentioned and all are grouped together under the one description of conditions. I am satisfied that ordinary wear of the roads under normal circumstances cannot be the occasion of an emergency. There must be something unusual in the circumstances in order to bring the levy within the scope of the authority granted by section 5649-4. It is scarcely conceivable that there should have been an unprecedented and unusual amount of traffic over all eleven roads mentioned in the Miami county resolution at the same time. Therefore, for lack of definiteness, I am of the opinion that this resolution does not sufficiently state the existence of an emergency.

For the above reasons, and without going into detail with respect to the possible applications of sections 7419 and 5649-4 of the General Code, I advise that neither of the resolutions submitted to me by you is sufficient to authorize the making of a levy outside of the Smith law limitations for the purposes therein mentioned.

Respectfully,
EDWARD C. TURNER,
Attorney General.

775.

CHILDREN'S HOME SHOULD NOT BE USED AS DETENTION HOME FOR CHILDREN—DISCRETION OF TRUSTEES TO PROVIDE SHELTER FOR DEPENDENT AND NEGLECTED CHILDREN—DETENTION HOMES SHOULD NOT BE ERECTED ON PREMISES OF CHILDREN'S HOMES.

Children's homes should not be used for the detention of children including delinquents who are under the jurisdiction of the juvenile court, but whose status has not been determined by the court, as a general rule. However, trustees of children's homes should exercise their discretion under section 3090, *G. C., to the end that dependent and neglected children should be provided with shelter if no positive reason to the contrary exists.*

Detention homes should not be erected on the premises of children's homes.

COLUMBUS, OHIO, August 28, 1915.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge receipt of your request for an opinion relative to the use of children's homes for the detention of wards of the juvenile court pending disposition of their cases and of the use by the juvenile court of children's homes for the detention of delinquents; also the right to build a detention home on the premises of the children's homes, which request, in full, is as follows:

> "We have found a disposition in several counties of this state to provide for the detention of wards of the juvenile court at the children's

home pending final disposition of the cases. Many of such wards are charged with delinquency. We think that sections 1670 and 3089 do not permit such an arrangement.

"Recently in a certain county a number of prominent public officials have recommended that the detention home in that county be abolished and that the customary inmates of such home be cared for at the county children's home. Because our position in this matter has been challenged, we ask for your opinion in the matter. That is:

"Has the juvenile court the right to use the county children's home as a detention home for children, including delinquents, and, also, is it legal to build upon the premises of the children's home a building to be used especially for such wards?"

Section 3089 of the General Code, as amended (103 O. L., 890) is as follows:

"The home shall be an asylum for children under the age of eighteen years, of sound mind and not morally vicious and free from infectious or contagious diseases, who have resided in the county not less than a year, and for such other children under such age from other counties in the state where there is no home, as the trustees of such home and the persons or authority having the custody and control of such children, by contract agree upon, who are, in the opinion of the trustees, suitable children for admission by reason of orphanage, abandonment or neglect by parents or inability of parents to provide for them. *In no event shall a delinquent or incorrigible child be committed to or be accepted by such home.* If an inmate of such home is found to be incorrigible, he or she shall be brought before the juvenile court for further disposition. Parents or guardians of such children shall in all cases where able to do so pay reasonable board for their children received in such children's home."

In section 3089 of the General Code, *supra*, it is provided specifically that "*in no event shall a delinquent or incorrigible child be committed to or be accepted by such home.*" The provisions of the section are clear and unambiguous, and there is not only no authority for the use of children's homes for the detention of delinquents, but there is an express prohibition against it. There is no authority to accept children in children's homes except that contained in section 3090 of the General Code, as amended (103 O. L., page 890), which is as follows:

"They shall be admitted by the superintendent on the order of the juvenile court or of a majority of such trustees, accompanied by a statement of facts signed by the court or trustees, setting forth the name, age, birthplace, and present condition of the child named in such order, which statement of facts contained in the order, together with any additional facts connected with the history and condition of such children shall be, by the superintendent, recorded in a record provided for that purpose, which shall be confidential and only open for inspection at the discretion of the trustees."

Children under the jurisdiction of the juvenile court would, under the provisions of section 3090 of the General Code, be sent to children's homes, if at all, only after their cases had been disposed of, and in no event would delinquent children be committed to the home. The provision for their being admitted to the home on the order of the juvenile court only relates to admission after a determination of their status by the juvenile court.

Answering your first question specifically I would say that there is no authority for the use of a children's home as a detention home for children including delinquents.

Section 1670 of the General Code, as amended (103 O. L., 875), is as follows:

> "Upon the advice and recommendation of the judge exercising the jurisdiction provided herein, the county commissioners shall provide by purchase or lease, a place to be known as a 'detention home' within a convenient distance of the court house, not used for the confinement of adult persons charged with criminal offenses, where delinquent, dependent or neglected minors under the age of eighteen years may be detained until final disposition, which place shall be maintained by the county as in other like cases. In counties having a population in excess of forty thousand, the judge may appoint a superintendent and matron who shall have charge of said home, and of the delinquent, dependent and neglected minors detained therein. Such superintendent and matron shall be suitable and discreet persons, qualified as teachers of children. Such home shall be furnished in a comfortable manner as nearly as may be as a family home. So far as possible delinquent children shall be kept separate from dependent children in such home. The compensation of the superintendent and matron shall be fixed by the county commissioners. * * *"

The section just quoted authorizes the county commissioners, under certain conditions, to provide by "purchase or lease a place to be known as a 'detention home' within a convenient distance of the court house, not used for the confinement of adult persons charged with criminal offenses." It would appear, therefore, that it was clearly intended that the detention home is to be a separate and distinct institution in charge of a superintendent and matron, and that there is no provision of law whereby the children's home, or a part thereof, can be utilized for the purpose of a detention home. The grounds within the enclosure surrounding a children's home are as much a part of the home as the building itself, and to place on the premises of a children's home a building to be used as a detention home, which detention home, of course, is used for detaining delinquents, dependent and neglected minors under the age of eighteen years while their cases are being investigated by and until they are disposed of by the juvenile court, would constitute a violation of the provisions of section 3089 of the General Code, as amended, *supra*.

In the consideration of questions of this character, and those of a kindred nature, it should be borne in mind that in the administration of the various laws affecting children the primary purpose is the welfare of the child. Section 1683 of the General Code, which is section 2 of the juvenile court act, is as follows:

> "This chapter shall be liberally construed to the end that proper guardianship may be provided for the child, in order that it may be educated and cared for, as far as practicable in such manner as best subserves its moral and physical welfare, and that, as far as practicable in proper cases, the parent, parents or guardian of such child may be compelled to perform their moral and legal duty in the interest of the child."

From a reading of the section just quoted it will be observed that the juvenile court law is to be liberally construed to the end that proper guardianship may be provided for the child. While, as stated above, there is express provision of law which prohibits the admission of delinquent children to children's homes, it would appear only reasonable and proper that, especially in the case of dependent or

neglected children who may be under the jurisdiction of the juvenile court, where other means are not available for their care during or pending the disposition of their cases the trustees of the children's homes should exercise the discretion vested in them under the provisions of section 3090 of the General Code, as amended, supra, and admit such children to the home under their control, there being no positive reason for contrary action.

It is my opinion, therefore, that while children's homes may not generally be used by the juvenile court for the detention of children, including delinquents whose status has not been determined by the court, that dependent or neglected children should be cared for at the children's homes when necessity arises and in the judgment of the trustees there is no positive reason why such children should not be received; that there is not only no provision of law for the erection of a detention home on the premises of a children's home, but that such erection would be in conflict with the provisions of section 3089 of the General Code, as amended.

Respectfully,

EDWARD C. TURNER,

Attorney General.

776.

PHYSICIAN EMPLOYED IN STATE HOSPITAL CANNOT ACT AS MEDICAL WITNESS—SEE SUPPLEMENTAL OPINION NO. 848.

A physician employed in a state hospital cannot act as a medical witness under section 1956, *G. C.*

COLUMBUS, OHIO, August 28, 1915.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Under date of August 17th, you requested my official opinion as follows:

> "The Ohio state reformatory has forwarded to this department statement of D. W. Cummins, probate judge of Richland county, amounting to $303.60 for fees and expenses account of lunacy inquests of fifteen inmates of the Ohio state reformatory confined in the Columbus state hospital.
>
> "Included in this statement is $180.00 for Drs. G. H. Williams, B. B. Barber and G. A. Rowland, examining physicians and witnesses. These physicians being employes of the Columbus state hospital, we would like to have your opinion before issuing vouchers in payment of same."

Section 1956, G. C., relative to inquests of lunacy, provides that the medical witnesses used at such inquests "must have at least five years' experience in the practice of medicine, shall not be related, by blood or marriage, to the person alleged to be insane or to the person making the application for commitment, nor have any official connection with any state hospital."

The persons who were used as medical witnesses as per your inquiry were physicians who, you state, are *employes* of the Columbus state hospital, and the question naturally arises as to whether or not a physician employed at the Columbus state hospital could be considered as having "any official connection" with such hospital.

A reading of the statute, and the fact that it simply states "official connection" leads me to the conclusion that the legislature intended that those physicians

who were employed at a state hospital should not be used as medical witnesses in lunacy inquests, as a physician or any one else employed in an institution is, in the ordinary meaning of the term, "officially connected" with such institution.

I am, therefore, of the opinion that since there is a positive prohibition in the statute against a physician permanently employed in a state hospital being a medical witness, vouchers calling for payment to such physicians for such services should not be issued.

Respectfully,
EDWARD C. TURNER,
Attorney General.

777.

STATE BOARD OF HEALTH—REGULAR MEETINGS—MUST BE HELD IN COLUMBUS—ANNUAL CONFERENCES AT SUCH TIMES AND PLACES AS BOARD MAY DIRECT—SPECIAL MEETINGS MAY BE HELD OUTSIDE OF COLUMBUS WHEN NECESSARY TO HOLD SAME IN PARTICULAR LOCALITY IN CONDUCT OF INVESTIGATION PERTAINING TO THAT LOCALITY.

1. *Regular meetings of the state board of health held pursuant to section* 1233, *G. C., must be held in Columbus.*

2. *Annual conferences of health officers held pursuant to sections* 1245 *and* 1246, *G. C., may be held at such times and places as the board may direct.*

3. *Special meetings of the state board of health may be held outside of Columbus, when necessary to hold same in a particular locality in the conduct of an investigation pertaining to that locality.*

COLUMBUS, OHIO, August 28, 1915.

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

DEAR SIR:—Your letter of August 4, 1915, requesting my opinion received, and is as follows:

> "Enclosed you will find a letter from the state board of health in which they set up the fact that there has been some question as to whether said board is at liberty to hold meetings in various sections of the state,
>
> "I wish you would take this letter into consideration and advise this office just what the limitations of this board are under the statutes made and provided as to holding meetings outside of Columbus, Ohio."

I have also noted the letter of Hon. E. F. McCampbell, secretary and executive officer of the state board of health, enclosed with your letter and which is herewith returned to you.

Section 1233 of the General Code provides as follows:

> "The state board of health shall meet in Columbus during the month of January of each year and at such other times as it may direct. A ma-

jority of its members shall constitute a quorum. The board shall choose one of its members as president, and, subject to the provisions of this chapter, may adopt rules and by-laws for its government."

Section 1236 of the General Code provides as follows:

"Suitable rooms for the meetings of the state board of health and the office of its secretary shall be provided by the state."

The specific provision in section 1233, supra, that the only meeting which the board of health is required to hold thereunder shall be held in Columbus, and the only discretion lodged in the board as to other meetings therein authorized being as to the time when they shall be held, the conclusion is inevitable that such meetings should be held also in the city of Columbus. This conclusion is strengthened by the provisions of section 1236, G. C., supra, as to suitable rooms for the meetings of the board and office of the secretary.

It would hardly be claimed that the state should provide more than one place for the holding of such meetings and it would follow that the place should be the office of the secretary.

While meetings held in pursuance of section 1233, supra, should be held in Columbus, there are other activities of the board to which the same reasoning does not apply.

Section 1245 of the General Code provides as follows:

"The state board of health may make provision for annual conferences of health officers and representatives of local boards of health for the consideration of the cause and prevention of dangerous communicable diseases and other measures to protect and improve the public health. Each board of health or other body or person appointed or acting in the place of a board of health shall appoint a delegate to such annual conferences. The city, village or township shall pay the necessary expenses of such delegate upon the presentation of a certificate from the secretary of the state board that the delegate attended the sessions of such conferences."

Section 1246 of the General Code provides as follows:

"The state board of health may provide for one annual conference of representatives of city boards of health, another for representatives of village boards of health, and one or more for representatives of township boards of health, or make such other division of conferences as it deems best. No conference shall continue in session longer than three consecutive days, and no board of health shall be required or authorized to send a delegate to more than one conference in any year."

These sections give considerable discretion to the state board of health in the matter of holding of annual conferences of health officers, leaving the number of such conferences, the date and place of holding the same, entirely to the determination of the board, the only limitation being that no health officer shall be required to attend more than one of such conferences in any one year. If the purposes sought to be accomplished by these sections can be better attained by holding several conferences in different places in the state at different times dur-

ing the year, there would appear to be no legal objection to so doing. Section 1234 of the General Code provides for the payment of the expenses of the secretary as follows:

> "* * * The necessary traveling and other expenses incurred by the secretary in the performance of his official duties shall be paid by the state. * * *"

and section 1235 of the General Code provides for the payment of the expenses of members of the state board of health as follows:

> "Each member of the state board of health shall receive five dollars for each day employed in the discharge of his official duties, and his necessary traveling and other expenses while engaged in the business of the board. * * *"

Clearly attendance at such conferences would be a part of the official duty of the secretary and a part of the business of the board and the expenses of the secretary and members of the board incident thereto should be paid, together with those of any employes whose attendance the board may deem necessary.

Section 1237, G. C., provides as follows:

> "The state board of health shall have supervision of all matters relating to the preservation of the life and health of the people and have supreme authority in matters of quarantine, which it may declare and enforce, when none exists, and modify, relax or abolish, when it has been established. It may make special or standing orders or regulations for preventing the spread of contagious or infectious diseases, for governing the receipt and conveyance of remains of deceased persons, and for such other sanitary matters as it deems best to control by a general rule. It may make and enforce orders in local matters when emergency exists, or when the local board of health has neglected or refused to act with sufficient promptness or efficiency, or when such board has not been established as provided by law. In such cases the necessary expense incurred shall be paid by the city, village or township for which the services are rendered."

Section 1239, G. C., provides as follows:

> "The state board of health shall make careful inquiry as to the cause of disease, especially when contagious, infectious, epidemic or endemic, and take prompt action to control and suppress it. The reports of births and deaths, the sanitary conditions and effects of localities and employments, the personal and business habits of the people and the relation of the diseases of man and beast, shall be subjects of careful study by the board. It may make and execute orders necessary to protect the people against diseases of lower animals, and shall collect and preserve information in respect to such matters and kindred subjects as may be useful in the discharge of its duties, and for dissemination among the people. When called upon by the state or local governments, or municipal or township boards of health it shall promptly investigate and report upon the water supply, sewerage, disposal of excreta of any locality and the heating, plumbing and ventilation of a public building."

Other sections of the General Code confer upon the state board powers and duties with reference to sewage disposal and water supply throughout the state.

If, in the judgment of the board, it should become necessary, in conducting any of the investigations or carrying out any of the powers and duties conferred by sections last above quoted and referred to, to hold a meeting of the board in a particular locality upon a matter pertaining to that locality, it would be proper to do so and attendance at such a meeting would likewise be a part of the official duty of the secretary, and a part of the business of the board, and the expenses of the secretary and members of the board, and such employes as the board may direct, in making such investigations and in attending such meetings should be paid.

I am, therefore, of the opinion that the regular meetings of the state board of health, held pursuant to section 1233, G. C., supra, should be held in the city of Columbus; that annual conferences of health officers may be held at such times and places as the state board of health may direct; and that special meetings of the board, which may become necessary in the proper discharge of its duties, may be held outside of Columbus.

Respectfully,
EDWARD C. TURNER,
Attorney General.

778.

THE WORDS "GENERAL ELECTION" USED IN SECTION 1176, G. C., REFER ONLY TO NOVEMBER ELECTION REQUIRED TO BE HELD IN EVEN NUMBERED YEARS FOR ELECTION OF STATE AND COUNTY OFFICERS—PROPOSITION TO PURCHASE AND EQUIP COUNTY EXPERIMENT FARM MAY BE SUBMITTED ONLY AT SUCH ELECTION.

The phrase "general election" as used in section 1176, *G. C.,* 106 *O. L.,* 124, *has reference only to the November election required to be held in the even numbered years for the election of state and county officers, and the proposition to purchase and equip a county experiment farm and to issue bonds or notes of the county therefor, as provided for in said section, may be submitted only at such election.*

COLUMBUS, OHIO, August 28, 1915.

HON. JOHN C. D'ALTON, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of August 18, 1915, making the following inquiries:

> "First. Can the commissioners submit to the voters of this county the proposition to establish an experiment farm therein, at the election to be held in November of this year?
>
> "Second. If such an election can be held, then at what time must the petition asking for the election be filed with the county auditor?
>
> "These questions, we take it, are to be answered by construing section 1165-3 of the General Code."

In consideration of your first question, it is suggested that section 1165-3 of

the General Code, to which you refer, was repealed in 103 O. L., 304, and therein substantially re-enacted as section 1176, G. C., which was amended in 106 O. L., 124, to provide as follows:

> "Section 1176. Upon the filing of a petition with the county auditor signed by not less than five per cent. of the electors based upon the vote for governor at the last preceding election, residing within the county, the commissioners of such county shall submit to the qualified voters of such county a proposition to establish an experiment farm within such county, and to issue notes or bonds for the purchase and equipment of such farm, such proposition to be voted upon at the next general election following the receipt of the petition by the commissioners. Notice of the intention to submit such proposition shall be published by the county commissioners in two newspapers of opposite politics printed and of general circulation in said county, for at least four weeks prior to the election at which the proposition is to be voted upon, together with a statement of the maximum amount of money which it is proposed to expend in the purchase and equipment of such farm."

First it will be noted that it is here provided that the proposition to establish an experiment farm and issue bonds or notes for the purchase and equipment thereof, shall be voted on "at the next general election following the receipt of the petition by the commissioners." Is the election to be held in November, 1915, for the election of township and municipal officers a "general election" within the terms of the statute above quoted?

This question was considered in an opinion of my predecessor, Hon. Timothy S. Hogan, in an opinion found at page 1363 of the annual report of the attorney general for the year 1911-1912, in which it was held that the county commissioners were not authorized under the provisions of section 2307, G. C., to submit to the electors of the county the proposition of the discharge of a county treasurer and the sureties on his bond from liability at the November election, 1911, said section providing that "such board may, at the next ensuing general election * * * submit to the qualified electors" of the county such proposition.

While section 2307, G. C., includes within its terms treasurers of cities, villages, townships and school districts, as well as of counties, the conclusion in the above opinion is limited to the submission of such questions by county commissioners.

Elections are throughout the statutes termed general, regular and special elections. These terms are deemed to have a fairly well established meaning and unless used with special application or qualifying terms, "general election" is understood to mean the regular recurring November election at which state and county officers are elected. The term "regular elections" includes all those elections at which public officers are elected to fill the vacancies occurring by reason of the expiration of the terms of such officers as established by law, whether such officers be state, county, township or other officers whose terms of office are definite and determinate, the time of holding which election is definitely fixed by law. A special election is generally understood to mean an election held at a time not definitely fixed by law for the election of an officer to fill a vacancy occasioned by some exigency other than the expiration of the term fixed or an election which is held for the submission to the electorate of a question usually other than the selection of an officer, and at a different time from that at which a regular or general election is being held. Thus in section 4826, G. C., reference is made to "all general elections for governor," etc. Section 4826, G. C., 103 O. L., 23, refers to "all general elections for state and county offices," etc. Section 4827, G. C., relating

to notice of election, provides: "At least fifteen days before holding any such general election, the sheriff shall give notice," etc. The term "such" beyond question, has reference only to the election of those officers mentioned in the preceding section, viz.: State and county officers and judges of the court of appeals. As to notice of the election of township officers, it is provided in section 4832, G. C., that:

> "At least twenty days before the regular election of township officers, the township trustees shall issue their warrant to a constable of the township,"

directing him to notify the electors of the time and place of holding such election.

Section 4840, G. C., provides:

> "Unless a statute providing for the submission of a question to the voters of a county, township, city or village provides for the calling of a special election for that purpose, no special election shall be so called. The question so to be voted upon shall be submitted at a regular election in such county, township, city or village, and notice that such question is to be voted upon shall be embodied in the proclamation for such election."

In section 4948, G. C., it is provided that unless inconsistent with the context, the term "general election" as found in chapter 6, title XIV of part first, relating to primary elections, shall be construed to mean the "November election in the years when state and county officers are to be elected." While this definition is here specifically limited to the particular chapter mentioned, it is not without significance that the legislature chose to use it there in the sense in which it is generally understood.

While the distinction between a general and regular election above attempted to be pointed out may not be found to have been uniformly observed, unless there should appear from the context or otherwise some indication of an intent to give to terms a different meaning or application, their most generally accepted significance should be adopted.

Lewis' Southerland Statutory Construction, sections 389, 390.

Sections 1174 to 1177-9, G. C., inclusive, 106 O. L., 123, et seq., were originally enacted as sections 1165-1 to 1165-13, G. C., inclusive, 101 O. L., 124, et seq., in substantially the same terms in which the amendments now appear in so far as the same affects the question here under consideration, and after a careful examination of these sections throughout their history, I fail to find anything therein which would warrant an inference that the legislature intended to use the phrase "general election" in any other than the ordinary meaning of its terms.

I am, therefore, led to conclude that the proposition to issue bonds or notes for the purchase and equipment of a county experiment farm may be submitted to the voters of the county only at the election at which state and county officers are required to be elected under the provisions of section 1 of article XVII of the constitution, which are as follows:

> "Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in the even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years."

You further inquire at what time the petition required under section 1176, G. C., supra, must be filed. No provision is found which specifically fixes the time of filing such petition, but it will be observed that notice of the submission of the question of the issuance of the notes or bonds, with a statement of the maximum amount which it is proposed to expend in the purchase and equipment of such farm, is required to be published by the commissioners in two newspapers of opposite politics, printed and of general circulation in the county, for at least four consecutive weeks prior to the election, thus necessitating the filing of the petition at such time as will give reasonable time and opportunity to provide for the publication for the full period of four weeks prior to the day of the election. Without undertaking a technical construction of the language here used, relative to the time of advertisement, it is sufficient to say that a publication in each of two proper papers, once in each calendar week for four such weeks next preceding the calendar week in which the election is held, the first publication being more than twenty-eight days prior to the day of the election, will fully meet the requirements of the statute.

Respectfully,
EDWARD C. TURNER,
Attorney General.

779.

BOARD OF EDUCATION—MAY ISSUE BONDS UNDER AUTHORITY OF SECTION 7629, G. C., FOR PURPOSES THEREIN SET FORTH, SUBJECT TO LIMITATIONS IN SAID SECTION AND ALSO TO LIMITATIONS PROVIDED BY SECTIONS 5649-2 TO 5649-5b, G. C.

Section 7629, G. C., was not repealed by implication by the enactment of section 5649-2 to 5649-5b, G. C., and the board of education of a school district may issue bonds under authority of said section 7629, G. C., for the purposes therein set forth, subject to the limitations provided in said section and subject also to the limitations provided by section 5649-2 to section 5649-5b, G. C.

COLUMBUS, OHIO, August 28, 1915.

HON. C. H. CURTIS, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—I have your letter of August 14, 1915, which is as follows:

"I desire your official opinion as to the authority of boards of education to issue bonds under the provisions of section 7629 of the General Code, or whether their only authority now to issue bonds is under the sections preceding, where submitted to a vote of the people? At least two of our boards in this county find it necessary to take advantage of this section, and I suppose other boards in the state also will need to act under its provision as well, if permitted.

"In this connection I call your attention to the case of Rabe v. The Board of Education, reported in 88 O. S. Report, wherein it is held that certain sections of the Code are repealed by implication, including section 7630, by the passage of the sections 5649-2, et seq., and yet you will also observe that this same section 7630 was supplemented by the legislature in the spring of 1913 (103 O. L., page 527) after the passage of said sections which it is said were repealed by implication.

"It seems to me that there is no reason for holding that said section

7629 is also repealed by implication, falling with its fellow sections, but that such boards still have the two methods of issuing bonds, to wit: Under 7625 et seq., by submitting to a vote of the people, and also by said section 7629, subject of course to the limitations within such section, and also within the limitations of said section 5649-2 et seq. I have observed your recent opinion wherein you held if a board proceeded under the former, it could not then proceed under the other section, and with this I agree, and it also suggests to me your opinion that the said section referred to, to wit: 7629, is a valid law at the present time, or you would have said so in such recent opinion."

In the case of Rabe, et al., v. Board of Education of the Canton School District, 88 O. S., 403, the supreme court in its opinion, at page 409, held:

> "The provisions of sections 5649-2 et seq., in reference to the rate that may be levied in any taxing district, are so clearly in conflict with the provisions of sections 7591 and 7592, General Code, that these sections are necessarily repealed by implication. That being true, section 7630, General Code, must fall with them, for that section provides only for the application of the limitation in these repealed sections to the issue of bonds under section 7629, General Code."

However, the court did not hold that section 7629, G. C., is repealed by implication by the enactment of section 5649-2 et seq., of the General Code. On the contrary, the court in said opinion, at pages 414 and 415, recognizes said section 7629, G. C., as in full force and effect. You will note, however, that the court in said opinion holds that the provisions of said section 7629, G. C., are limited by the provisions of said section 5649-2 et seq. of the General Code, the first and second branches of the syllabus providing as follows:

> "1. Sections 5649-2 to 5649-5b, General Code, inclusive, limit the rate of taxes that can be levied in any taxing district for any and all purposes. Any statutes existing at the time of the passage of these sections, in direct conflict therewith and not specifically repealed thereby, are repealed by implication.
>
> "2. These sections of the General Code furnish the basis of calculation for the issue of bonds in anticipation of income from taxes levied or to be levied."

I am of the opinion, therefore, in answer to your question, that the board of education of a school district may issue bonds under authority of section 7629, G. C., for the purposes therein set forth, subject to the limitations provided in said section and subject also to the limitations provided by section 5649-2 to section 5649-5b, inclusive, of the General Code.

Respectfully,

EDWARD C. TURNER,

Attorney General.

780.

PHYSICIAN—COMPENSATION FOR MEDICAL SERVICES RENDERED TO INJURED EMPLOYE OF BOYS' INDUSTRIAL SCHOOL, VALID—ALTHOUGH PHYSICIAN IS EMPLOYED TO ATTEND INMATES OF SCHOOL—NO OBLIGATION TO ATTEND EMPLOYES OF SCHOOL WITHOUT CHARGE.

Claim of doctor for compensation for medical services rendered to injured employe of Boys' Industrial School valid notwithstanding regular employment of doctor to attend inmates of school when contract of employment imposes no obligation to attend employes of school without charge.

COLUMBUS, OHIO, August 28, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter in which you request an opinion as follows:

> "Your opinion is desired with respect to the following:
>
> "Is a physician, employed at a stated salary at the boys' industrial school, Lancaster, to render medical attention to inmates of the institution, entitled to receive compensation from the state insurance fund for the treatment of injuries sustained by an employe of said school?
>
> "The commission now has under consideration the claim of an employe of the above mentioned school. This claim includes a bill rendered by a physician, who is employed by the school, covering services rendered for the treatment of claimant's injuries.
>
> "We desire your opinion as to whether the physician in question has a right to charge for services so rendered, or whether such services are covered by the salary he receives as an employe of the school."

The particular point in question and which forms the basis of your request for an opinion is that based upon the uncertainty of the relation of the doctor referred to to the boys' industrial school at Lancaster. Considerable correspondence has passed between this office and your department and the board of administration in an effort to ascertain just what the status of the physician was with reference to his obligations under his employment agreement with the school to furnishing medical attention to the officers of the school. There seems to have been a very uncertain state of affairs with reference to his exact obligation, and all other means failing resort was had to the doctor himself by your board for the purpose of ascertaining just what his understanding of the situation was. To that end and in answer to your letter addressed to him he replied under date of August 24th, as follows:

> "August 24, 1914.
>
> *"The Industrial Commission of Ohio.*
>
> "DEAR SIRS:—In reference to J. M. Stouder's case, and my understanding of relations between industrial school and myself, I will say that I was hired by him (superintendent) to take care of the boys and any work among the officers which I did, I was at liberty to charge for. I had been paid for my work among the officers by them (officers) right along.
>
> "When the previous doctor was hired it was with the understanding that he was to get a certain salary and the work among the officers was

extra. This custom of charging had been the privilege of all the doctors there. While I had been there I had received no order, written or verbal, to the effect that I could not charge.

"If it had been the custom not to charge I surely would not have charged in this case.

"Hoping this answers your question satisfactorily, I remain, etc."

From the statement made by the doctor, coupled with the fact that there is nothing to contradict it, or even to qualify it save in the statement made by the superintendent of the boys' industrial school to the effect that:

"There has never been an understanding that the physician's service should be given to officers gratis. In fact it is pretty well accepted by our officers that they are expected to pay for such service. However, he would be and is expected to attend in case of accident at the time, but could not be expected to continue same indefinitely."

(The statement just quoted was contained in a letter addressed to the Ohio board of administration by R. U. Hastings, superintendent of the industrial school.)

it would appear that the relation of the physician employed to render medical services to the boys who are inmates of the institution to officers of the institution does not differ from that of an outside physician in so far as the operation of the workmen's compensation law is concerned.

It is, therefore, my opinion that in passing upon a claim made by the physician employed to care for the boys who are inmates of the boys' industrial school for medical services rendered to an employe of the institution injured in the course of his employment, and who has made application for compensation, the existing relations between the physician and the boys' industrial school should not enter into the matter. Or, in other words, his claim should be treated in the same manner as that of an outside physician.

Respectfully,

EDWARD C. TURNER,

Attorney General.

781.

BOARD OF EDUCATION—DEPOSITORY—WHEN BANK FAILS—PROCEEDS OF BONDS DEPOSITED AS SECURITY FOR DEPOSITORY CONTRACT—BOARD OF EDUCATION CANNOT DELEGATE AUTHORITY—A DEPOSITORY CONTRACT THAT PROVIDES FOR PAYMENT OF BALANCE DUE A TAXING DISTRICT OUT OF PROCEEDS OF SUCH BOND SALE BEFORE LIQUIDATION OF OTHER ASSETS OF BANK AND REDUCTION OF BALANCE DUE BY PAYMENTS FROM SAME IS LEGAL.

A board of education cannot delegate to a community not composed of its own members, power to make a contract with a bank for the deposit of school funds. A depository contract must be made by board when in session. Bonds can be deposited as collateral security for public funds held by such bank under depository contract. When bank fails, proceeds from sale of bonds held as security from depository contract can be used to make good amount on deposit at the time the bank closed its doors without consent of officers in charge of liquidation. Method of proving security.

COLUMBUS, OHIO, August 28, 1915.

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

GENTLEMEN:—I acknowledge receipt of your letter of August 17th, requesting my opinion upon four questions, which I shall set out and answer in their order.

Your first question is:

"First. Can a board of education legally delegate to a committee or commission, not composed of its own members, a power to make a contract with a bank for the deposit of school funds under sections 7604-7608? Or must depositary contract be made by such board while in session?"

Answer:

The answer to the first part of the question is no, and to the second part yes.

Your second question is:

"Second. Can bonds that are listed as assets of a bank be, in anticipation of a possible failure of the bank, deposited as collateral security for public funds, other than state funds, held by such bank under a depositary contract providing for such deposit?"

Answer:

Assuming that the bonds are deposited at the time of securing the money or in exchange for other bonds so deposited, the answer is yes.

Your third question is:

"Third. In case a bank that has deposited bonds as described in the previous section fails, can the proceeds of the sale of the bonds be used, so far as necessary, to make good the amount on deposit at the time the bank closed its doors, without the consent of the officials in charge of the liquidation?"

Answer:

The answer to this question is yes.

However, the following observations should be made as to the methods of proving or as to the time of selling and crediting such security.

(a) If the matter is one pending in the state courts, the subdivision holding the securities should not sell same until it has proved its claim and received all dividends that may be declared. After receiving all such dividends the collateral may be sold and applied on the debt. If the collateral be sold before the estate has been fully administered, then the claim could be proven only for the deficiency between the amount realized from the collateral and the total amount of the claim. The following is the syllabus in the case of State National Bank v. Esterly, 69 O. S., 24:

> "Where the property of an insolvent debtor, by order of court, is placed in the hands of a receiver to be administered upon for the payment of the insolvent's debts, a creditor who holds collaterals taken to secure his claim, and upon which he has realized before a dividend is declared, is entitled to a dividend on only so much of his debt as remains after deducting the proceeds of the collaterals; and this sum may be ascertained at the time the dividend is declared, although the claim had formerly been proven and allowed for the full amount."

On the other hand, under the case of the Board of County Commissioners of Putnam County v. The Putnam County Banking Company et al., decided by the court of appeals of Putnam county on July 15, 1915, it was held that the secured creditor need not sell or surrender the securities, but might hold them and prove his entire claim, and after applying all dividends declared on the entire claim might then sell the securities and apply them in making up the deficiency between the amount of the dividends and the full amount of the claim.

(b) Where the litigation is pending in a United States court of equity, then the rule laid down in the third branch of the syllabus in the case of Merrill v. National Bank, 173 U. S., 131, should be followed. Said syllabus is as follows:

> "A secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals, or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when, from them and from collaterals realized, the claim has been paid in full."

It is, therefore, immaterial whether the security be sold immediately or after the estate is wound up.

(c) As unincorporated banks now may become depositaries, and as such banks may be declared bankrupts under the national bankruptcy act (Burkhart v. German American Bank, 14 Am. Bk. Rep., 222), the bankruptcy rule should also be stated. In bankruptcy, only the excess of the claim over and above the securities may be proven. Therefore, it would make no difference in practice whether the securities were sold before or after the winding up of the estate.

It will be seen from the above suggestions that there is a diversity of law upon this subject, and indeed the law as laid down in both the Merrill case by the supreme court of the United States and the Esterly case by the supreme court of Ohio was concurred in only by a majority of the members of those respective courts.

Therefore, it is important that each taxing subdivision should consult its legal adviser in each case before taking any action.

Your fourth question is:

"Fourth. Is a depositary contract legal that provides for the payment of a balance due a taxing district out of the proceeds of such bond sale, before the liquidation of the other assets of the bank and the reduction of the balance due by payments from same?"

Answer:
The answer is yes.

Respectfully,
EDWARD C. TURNER,
Attorney General.

782.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF MARION-WALDO ROAD, MARION COUNTY, OHIO.

COLUMBUS, OHIO, August 30, 1915.

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

DEAR SIR:—I have your communication of August 26, 1915, submitting for my examination final resolution relating to the Marion-Waldo road, I. C. H. No. 109, Petition No. 1001, located in Marion county.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

783.

CORPORATION — INCREASE OF CAPITAL STOCK — MAY BE MADE BY ISSUANCE OF PREFERRED STOCK BEFORE ALL ITS AUTHORIZED STOCK HAS BEEN FULLY SUBSCRIBED AND AN INSTALLMENT OF TEN PER CENT. PAID ON EACH SHARE—SECRETARY OF STATE NOT AUTHORIZED TO COLLECT FEE FOR FILING CERTIFICATE OF INCREASE OF CAPITAL STOCK OF CORPORATION.

A corporation may increase its capital stock by the issuance of preferred stock before all its authorized stock has been fully subscribed and an installment of ten per cent. paid on each share.

The secretary of state is not authorized to collect a fee of $5.00 *for filing a certificate of the increase of capital stock of a corporation upon the ground that such increase of its capital stock is an amendment to the articles of incorporation.*

COLUMBUS, OHIO, August 30, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of August 25, 1915, requesting my opinion, as follows:

"We are herewith enclosing ten cents revenue stamp uncancelled, check for twenty-five dollars, increase of capital stock (preferred) of

The Columbia Planter Company, together with letter from Bowman & Bowman, attorneys at law, Springfield, Ohio, and respectfully ask your opinion upon the questions therein submitted.''

The letter of Sirs Bowman & Bowman, attorneys at law, of Springfield, Ohio, referred to in your letter, and which states the facts upon which your questions are based, is as follows:

''As per my telephone conversation this morning with one of your staff, I am returning to you your letter of August 20th relating to the attempted increase of stock by The Columbia Planter Company by issue of preferred stock, with the other papers.

''You returned this certificate because we had crossed out the provisions of it certifying that the capital stock of the company was fully subscribed.

''We did this pursuant to a conversation about a week ago with one of your staff whom Mr. Hildebrant called to the phone for us, and who advised us that the present attorney general, reversing a ruling of his predecessor, had held that the section of the Code relating to the increase of common stock, and which provided as a condition that the original stock must all be subscribed, was not to be construed as part of the section providing for the issue of preferred stock, and which contains no such condition; and that, therefore, it was no longer necessary to reduce common stock so as to get rid of the unsubscribed surplus before you could get authority to issue the preferred stock.

''This ruling seemed to us to be unquestionably correct, and acting upon it we proceeded to provide for an issue of preferred stock while we still had an unsubscribed portion of our original authorized common stock.

''If we had the right to do this, of course we ought not to be required to certify that the original stock had all been subscribed.

''I would be glad for you to call the attorney general's attention also to the custom of your office of demanding an additional fee of five ($5.00) dollars on the issue of preferred stock upon the claim that the preferred stock issue was not only an increase of capital stock and subject to the fee provided by law for an increase of stock, but was also an amendment of the charter, and therefore also subject to the authorized fee provided for amendments to the charter.

''An increase of common stock above that originally authorized in the charter, is also an amendment of the charter; but your office has never charged the additional fee of five ($5.00) dollars for increase of common stock, and it seems to me clearly you are not entitled to charge it because the increase is by way of preferred stock.''

The first question raised in the letter of Sirs Bowman & Bowman as to whether or not all of the original stock of a corporation must be first subscribed and an installment of ten per cent. on each share paid in before a corporation may increase the amount of its preferred stock, has not been considered by me. Therefore, the information given them that I had reversed a ruling of my predecessor, Mr. Hogan, is erroneous.

I find upon investigation that Mr. Hogan, under date of March 10, 1914, did render an opinion to Honorable Charles H. Graves, secretary of state, in which he held that ''the full subscription of capital stock already authorized is not a condition precedent to the increase of capital stock of a corporation by the issu-

ance and deposition of preferred stock as provided in section 8699 of the General Code." This conclusion was reached and given out by Mr. Hogan after a reconsideration of an opinion upon the same question rendered by him to Honorable Charles H. Graves, secretary of state, under date of April 18, 1911, under which an opposite conclusion had been announced.

Sections 8698 and 8699, of the General Code, providing when a corporation may increase its capital stock, are as follows:

> "Sec. 8698. After its original capital stock is fully subscribed for, and an installment of ten per cent. on each share of stock has been paid thereon, a corporation for profit, or a corporation not for profit, having a capital stock, may increase its capital stock or the number of shares into which it is divided, prior to organization, by the unanimous written consent of all original subscribers. After organization the increase may be made by a vote of the holders of a majority of its stock, at a meeting called by a majority of its directors, at least thirty days' notice of the time, place and object of which has been given by publication in some newspaper of general circulation, and by letter addressed to each stockholder whose place of residence is known. Or, the stock may be increased at a meeting of the stockholders at which all are present in person, or by proxy, and waive in writing such notice by publication and letter; and also agree in writing to such increase, naming the amount thereof to which they agree. A certificate of such action shall be filed with the secretary of state.
>
> "Sec. 8699. Upon the assent in writing of three-fourths in number of the stockholders of a corporation, representing at least three-fourths of its capital stock, to increase the capital stock, it may issue and dispose of preferred stock in the manner by law provided therefor. Upon such increase of stock, a certificate shall be filed with the secretary of state, as provided in the next preceding section."

Without entering into a discussion of the reasons therefor, I deem it sufficient to state that I agree with the conclusion expressed by Mr. Hogan in his opinion of March 10, 1914, above referred to, and therefore advise you that it is not required that the certificate of increase of capital stock of a corporation by the issuance of preferred stock contain a statement showing that the authorized capital stock of such corporation has been fully subscribed and an installment of ten per cent. on each share of said stock has been paid.

Replying to the second question relative to the authority of the secretary of state to charge, in addition to the fee authorized by law for filing a certificate of increase of capital stock of a corporation, a fee of $5.00 for the filing of such certificate upon the ground or claim that such increase of capital stock amounts to an amendment of the charter of the corporation, I call attention to section 8719, of the General Code, which is as follows:

> "A corporation organized under the general corporation laws of the state, may amend its articles of incorporation as follows:
>
> "1. So as to change its corporate name, but not to one already appropriated, or to one likely to mislead the public.
>
> "2. So as to change the place where it is to be located, or its principal business transacted.
>
> "3. So as to modify, enlarge or diminish the objects or purposes for which it was formed.
>
> "4. So as to add to them anything omitted from, or which lawfully

might have been provided for originally, in such articles. But the capital stock of a corporation shall not be increased or diminished, by such amendment, nor the purpose of its original organization substantially changed."

By the direct provisions of the above quoted section a corporation cannot increase its capital stock by an amendment to its articles of incorporation. It therefore follows that an increase of the capital stock of an incorporation cannot be construed as an amendment to its articles of incorporation. Therefore the fee for filing a certificate amending articles of incorporation required by paragraph 9, of section 176, of the General Code, cannot be exacted by the secretary of state for filing a certificate of increase of capital stock.

I therefore advise you that The Columbia Planter Company may not be required to pay a fee of $5.00 for the filing in your office of its certificate of increase of capital stock on the ground that such increase amounts to an amendment of its articles of incorporation.

Respectfully,
EDWARD C. TURNER,
Attorney General.

784.

BOARD OF AGRICULTURE—LICENSE FEE FOR EACH BRAND OF FEED STUFFS, POULTRY FEEDS, ETC.

The board of agriculture of Ohio may not issue a license under the provisions of section 1143, *G. C.,* 106 *O. L.,* 157, *except upon the payment of the full license fee of twenty dollars for each brand of feed stuffs, condimental stock and poultry feeds, animal or poultry regulators, conditioners, tonics or similar articles in each calendar year.*

COLUMBUS, OHIO, August 31, 1915.

Board of Agriculture of Ohio, Columbus, Ohio.

GENTLEMEN:—In yours under date of August 25, 1915, you submit for an opinion a question which may be stated as follows:

"May the board of agriculture of Ohio prorate the license fee of twenty dollars required to be paid under section 1143, G. C., 106 O. L., 157, and issue licenses thereunder upon the receipt of a sum which bears a like proportion to the total fee required under said section as the period from July 22nd to December 31st, inclusive, bears to the whole period of **one year?**"

Section 1143, to which reference is made, provides as follows:

"Before selling or offering for sale within this state any of such feed stuffs, condimental stock and poultry feeds, animal or poultry regulators, conditioners, tonics, or similar articles, defined in section 1141 a person, firm or corporation manufacturing or compounding said articles, and selling or offering them for sale, either directly or indirectly in this state,

shall pay each year a license fee to the board of agriculture for the sale of each brand of feed stuffs, condimental stock and poultry feeds, animal or poultry regulators, conditioners, tonics or similar articles, twenty dollars.

"The board of agriculture may reject any application for license if the certificate provided for in the preceding sections is misleading or not distinguishing. Upon the granting of such application and the payment of such fee said board shall issue a license for the current year. All licenses shall expire on the thirty-first day of December of each year. The payment of a license fee by such person, firm or corporation shall exempt an agent thereof, or dealer therein, from the requirements of this section; but until such license fee, which shall be the full license fee collected by the state for the privilege of selling or offering for sale any of the said brands in any one year, any person, firm or corporation selling or offering the same for sale shall be liable to the board of agriculture for said license fee of twenty dollars."

Bearing in mind that public officers have only such authority as is expressly granted by statute or which is necessarily implied as being essential to the execution of power or the performance of a duty so expressly imposed, I am of opinion that the answer to your inquiry must be in the negative. No express authority for prorating such license fee for that portion of the calendar year subsequent to the taking effect of section 1143, G. C., supra, can be found, and I am unable to conceive of a theory upon which it might be asserted that such authority is necessary to the performance of any duty imposed upon the board by the act in which said section is found (Am. Sen. Bill No. 250, 106 O. L., 143) or other law of this state. It would, therefore, follow that the board is without such authority.

If there were doubt upon this question it would, to my mind, be completely dispelled by a consideration of that part of section 1143, as follows:

"The payment of a license fee by such person, firm, or corporation shall exempt an agent thereof, or dealer therein, from the requirements of this section; but until such license fee which shall be the full license fee collected by the state for the privilege of selling or offering for sale any of the said brands in any one year, any person, firm or corporation selling or offering the same for sale shall be liable to the board of agriculture for said license fee of twenty dollars."

From this it would seem clear that the intention of the legislature was that no agent should be exempt from the provisions of this section until the full license fee shall have been paid. That is, the legislative intent is by this made especially free from doubt that in every instance the full license fee shall be paid in each calendar year.

The answer to the foregoing question obviates the necessity of further reference to the matter of the issuance of licenses in such cases, after the beginning of the calendar year.

Respectfully,
EDWARD C. TURNER,
Attorney General.

785.

PRIVATE EMPLOYMENT AGENCIES—NO PROVISION CONCERNING AMOUNT TO BE CHARGED APPLICANT FOR SECURING EMPLOYMENT —REGISTRATION FEES UNDER SECTION 890, G. C., NOT TO BE CONSTRUED AS CHARGES FOR SECURING EMPLOYMENT EITHER IN WHOLE OR IN PART.

Laws governing private employment agencies make no provisions concerning the amount to be charged by such agencies for securing employment. Registration fees which may be exacted under section 890, G. C., are not to be construed as charges for securing employment either in whole or in part.

COLUMBUS, OHIO, August 31, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This office is in receipt of a communication from Mr. L. J. Hackney, general counsel of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, located at Cincinnati, Ohio, which is as follows:

> "I wish to enquire as to your interpretation of those sections of the Ohio Code governing private employment agencies, 886 to 897, inclusive.
>
> "I am advised that an agency charges, in some instances, $5.00 for obtaining employment. In justification for this, it is said that section 890 limits the fee of $2.00 for registration, but has no application to what the agency may charge for procuring employment. It is also said that the superintendent of the industrial commission has advised that the statute referred to does not place any limits upon the amount which may be charged for employment. I am impressed that this is certainly not the spirit of the statute. The value of registration would seem to be unimportant and the requirement that the fee therefor shall be returned in case there is no employment indicates that employment is the service for which the fee may be retained.
>
> "I would be glad to have your views of the question, as my company is obliged to consider it very frequently."

In the letter Mr. Hackney refers to sections 886 to 897, inclusive, of the General Code, and particularly section 890 of the General Code, which is as follows:

> "When a registration fee is charged for receiving or filing applications for employment or help, it shall not exceed two dollars, for which a receipt shall be given containing the date, name of applicant, amount of fee and character of employment or help desired. If the applicant does not obtain a situation or employment through the agency within one month after registration, and makes a demand therefor within thirty days after the expiration of the period, the fee paid by him shall be returned to the applicant by the person in charge of the employment agency."

Under the provisions of section 890 a fee of two dollars for registration may be charged the applicant for employment or help, which fee is made returnable to the applicant on his demand within thirty days after the expiration of a one month period after registration if the applicant has not been secured employment during the month.

The charging of the fee for registration is not to be construed as a charge for the securing of employment, but rather is to be regarded as an act on the part of an applicant for help or employment evidencing his good faith, and as a guarantee to the employment agency that effort to secure help or employment for the applicant will not be wasted. The statutes covering this question are silent with reference to the amount which may be charged by a private employment agency to applicants for whom they may secure employment, and it is my opinion that the statutes do not fix a limit to charges which may be made by a private employment agency for securing employment, that matter being left entirely to the agreement between the private employment agency and the applicant.

A bill which was prepared and presented in the last session of the general assembly provided for the posting of a schedule of maximum fees, charges and commissions in every room in which the business of a private employment agency was conducted; also its filing with the industrial commission of Ohio. While the bill did not fix the fees, it sought to compel private employment agencies to establish maximum charges and lodged with the industrial commission of Ohio supervision over all questions arising thereunder. However, the bill failed to become a law.

A copy of this opinion has been sent to Mr. Hackney, who made the request.

Respectfully,
EDWARD C. TURNER,
Attorney General.

786.

FORMER SUPERINTENDENT OF PUBLIC WORKS—MAY NOW SUBMIT BID FOR WORK ON PLANS PREPARED WHILE HE WAS SUPERINTENDENT—CAN BE AWARDED CONTRACT.

The fact that a former superintendent of public works having while superintendent prepared plans and estimates for work to be done under competitive bidding has, since leaving office, associated himself with a certain corporation does not preclude such corporation from submitting a bid in pursuance of advertisement for competitive bids and being awarded a contract for such work.

COLUMBUS, OHIO, September 2, 1915,

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

DEAR SIR:—Under date of August 23, 1915, you submitted the following for official opinion:

> "Bids were opened by this department on the 12th of August, for the dismantling of a canal dredge on the Miami and Erie canal at Lockland, Ohio, and the construction of a new hull on the Ohio canal at Cleveland, upon which the contractor was required to install the machinery removed from the dismantled dredge, in other words, to build a new dredge, using the old machinery.
>
> "When the bids were opened and tabulated, it was found that the Mueller Construction Co., of Columbus, Ohio, was the low bidder. John I. Miller, late superintendent of public works, is now a member of this firm, and the question has been raised as to whether or not this department can legally enter into a contract with this company under the cir-

cumstances. The same question arises in regard to letting the contract for rebuilding the aqueduct over Mill creek, in the village of Carthage, Ohio, this firm being the low bidder for this work.

"The prices bid for these two jobs are quite reasonable, and if there are no legal objections to awarding the contracts to this firm, I shall be glad to do so."

There is no consideration of public policy that would enter into this question as it appears to me, for the reason that Mr. Miller is no longer the superintendent of public works and the bid submitted by the company with which he has associated himself since leaving the office of superintendent of public works was in pursuance of an advertisement for competitive bids. The only question, therefore, is whether or not there is any statutory inhibition covering the matter.

Section 12910 of the General Code does not apply, nor does section 12911.

Section 12914 reads as follows:

"Whoever, being a member of a board of public works, engineers, superintendent, collector of tolls, gatekeeper, weighmaster, inspector, secretary, clerk or other person holding office under such board, during the location or construction of a canal or feeder, is interested in a contract for purchase of lands, town lots or water privileges for hydraulic purposes on or adjacent to a canal or feeder under the charge of such board, or for labor, construction or supplies thereon, shall be fined not less than one hundred dollars nor more than one thousand dollars and forfeit his office."

Without considering said section and its various provisions, it is sufficient to say that said section only covers the superintendent while he is acting as superintendent, and does not apply to a person who has ceased to be superintendent.

There being no statutory provision governing the matter, nor is it against public policy to award the contract to the company with which Mr. Miller has associated himself since leaving office, the same being on a bid submitted in pursuance of an advertisement for competitive bids, I am of the opinion that you may award the contract to the company in question.

Respectfully,
EDWARD C. TURNER,
Attorney General.

787.

WILBERFORCE UNIVERSITY—TRUSTEES OF COMBINED NORMAL AND INDUSTRIAL DEPARTMENT—CONTRACT FOR RECITATION BUILDING—CANNOT AWARD SAME UNTIL APPROPRIATION BECOMES AVAILABLE.

The trustees of the combined normal and industrial department of Wilberforce University are not authorized to let a contract for the recitation building until the appropriation becomes available, to wit, on July 1, 1916.

COLUMBUS, OHIO, September 2, 1915.

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

DEAR SIR:—Under date of August 25th you submitted to me the following inquiry:

"The combined normal and industrial department at Wilberforce University proposes to erect two buildings, one known as a gymnasium and the other as a recreation building. The general assembly appropriated for the

Gymnasium the sum of.....$40,000.00
Recreation building the sum of..... 60,000.00

The $40,000.00 is now available. The $60,000.00 is not available until July, 1916.

"The architect has prepared the plans and specifications for both buildings and the board of trustees have approved them.

"The board desires to ask for bids on both buildings at this time, believing that in so doing that better bids may be procured and a better class of contractors would be attracted if there was hope that they would secure contracts amounting to approximately $100,000.00.

"Would there be any objections to filing plans for both buildings with this department, at this time, after same have been approved by the state commission in the usual way, and receiving bids on both buildings? In the awarding of the contracts it would be understood that there could be no money paid out on the recreation building until after July 1, 1916. A definite contract could be entered into for the gymnasium, and a conditional contract made for the recreation building with the stipulation that same should not be an obligation on the state until after July, 1916. The board believes that a contractor would be willing to enter into such a conditional contract and make arrangements to carry on the work with the understanding that he could not be paid any money from the state treasury for the recreation building until same was available.

"The board believes that they would not only effect a saving in the total cost of the two buildings, but would also be able to advance the work and secure the use of the building at a much earlier date than they otherwise would.

"(I assume that you mean by 'recreation' 'recitation' building—106 O. L., 824.)"

The question which you desire answered is whether or not a state office, department or institution can ask for and receive bids for the construction of a building, the appropriation to pay for which is not available at the time the bids are received, and can award a contract on such bid with the understanding that no money should be paid out under such contract until the appropriation becomes available.

I am of the opinion that it cannot. While it may be that the board may have on hand the plans, profiles and estimates at any time prior to the advertising for bids for the particular building covered by such plans, profiles and estimates, without reference as to whether or not the money to pay for such building is available; nevertheless, under the provisions of section 2318, General Code, the officer, board or other authority to whom the bids are submitted is required, on the day named in the notice for bids published, to open the proposals and award the contract to the lowest bidder.

Under the provisions of section 2319, G. C., there is a provision for accepting other than the lowest bid or the rejection of all bids upon written consent of the governor, auditor of state and secretary of state. Nevertheless, if such action as

is provided for by section 2319 is not contemplated, it is the duty of the particular board or officer to award the contract on the day named in the notice under the provisions of section 2318.

While it is true that under the provisions of section 2318, G. C., the contract entered into by the successful bidder "shall not be binding on the state until submitted to the attorney general and he certifies thereon that he finds it to be in accordance with the provisions of this chapter," nevertheless, the law contemplates that upon the opening of the bids the contract shall be awarded.

Furthermore, should a contract now be awarded for the recitation building with the understanding that there could be no money paid out for such building until after July 1, 1916, nevertheless, if such an agreement were legal, it would create a present contingent liability for the payment of such fund on and after July 1, 1916.

The appropriation of $60,000.00 for the recitation building for the combined normal and industrial department of Wilberforce University is found in section 3, of House Bill No. 701. The prelude to the appropriations made in said section 3 provides as follows:

> "The moneys herein appropriated shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1916, or incurred subsequent to June 30, 1917."

It is apparent, therefore, from the appropriation act itself that the contract cannot be let prior to the money appropriated becoming available.

Respectfully,
EDWARD C. TURNER,
Attorney General.

788.

BOARD OF ADMINISTRATION—REMOVAL OF MEMBER BY GOVERNOR—PROPER LEGAL PROCEDURE.

COLUMBUS, OHIO, September 2, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—I am in receipt of your request for opinion under date of September 1st, reading as follows:

> "I hereby request a statement from you giving the proper legal procedure to be followed by this office in case it becomes desirable to remove from office a member of the board of administration of the state of Ohio."

Section 1834, of the General Code provides as follows:

> "Sec. 1834. The governor shall have the power to remove any member for want of moral character, incompetency, neglect or breach of duty, or malfeasance in office, the ground to be stated in writing after reason-

able opportunity to the member to be heard thereon. The governor shall on each removal report the same to the senate with his reasons therefor. If the senate be not then in session such report shall be filed in the office of the secretary of state and be by him transmitted to the senate within ten days after the beginning of the next session.

"Failure on the part of any member to attend three consecutive meetings of the board unless excused by formal vote thereof may be treated by the governor as his resignation."

(1.) The first step, being the one conferring jurisdiction, is the filing with the governor of written charges against the member of the board of administration upon the ground of either, any two, or of all the following: Want of moral character, incompetency, neglect or breach of duty, or malfeasance in office.

These charges should embody facts which in judgment of law constitute one or more of the above mentioned statutory grounds.

(2.) A copy of said charges, duly certified by the governor as a true copy, should be served personally upon the member of the board by some person designated by the governor, and such person should make return to the governor, showing personal service of the charges upon the accused member. It will not be sufficient that the written charges simply allege that the member was of immoral character, or that he was incompetent, or that he had neglected his duty, or that he had committed a breach of duty, or that he had been guilty of malfeasance in office, for such allegations would be merely legal conclusions. The charges should contain a recital of facts which constitute one or more of the statutory grounds.

(3.) Accompanying the charges should be a notice from the governor stating the time when and place where the accused would be given an opportunity to be heard. The time set in the notice should give the accused a reasonable opportunity to prepare his case and to be present at the appointed place. What is reasonable time is dependent upon the facts and circumstances of each particular case.

(4.) The statute does not require that evidence in addition to the charges filed be offered on behalf of the complainant or, in other words, to support the charges. On the other hand, the governor may, in his sound discretion, hear or receive evidence other than the charges, but which must be material and relevant to the charges contained in the written copy served upon the accused.

It should here be pointed out that the supreme court of Ohio has at least seemed to have held that evidence to support the charges must be offered. See State ex rel. vs. Sullivan, 58 O. S., 504-516. In view of this last mentioned case it would be the safer course to pursue to require evidence in support of the charges though, as above stated, I am of the opinion that the charges when signed by the person who prefers them constitute at least a prima facie case and place the burden upon the accused to refute them. This is contrary to the ordinary procedure in a court of justice, where it is required that evidence to support an indictment must be offered first or the charge fails. Hence, in the application of the above suggestion care must be exercised that no injustice is done the accused.

(5.) At the time and place appointed the charges as filed, a copy of which had theretofore been duly served upon the accused, should be read to the accused and he should be called to offer his defense.

(6.) I am of the opinion that under the cases decided by the supreme court of Ohio, the governor would not have the right arbitrarily to refuse to hear any witnesses offered by the accused as to matters tending to exculpate the accused from the charges as filed. The number of witnesses or the limitation beyond which the testimony on behalf of the accused might go in addition to and outside of

that material and relevant as a defense will rest in the sound discretion of the governor. In the absence of abuse of such discretion the courts would be without power to interfere upon such ground.

(7.) No evidence may be offered or considered against the accused which is not relevant and material to the charges as filed, or at least in rebuttal of such evidence as the governor has allowed the accused to offer. The governor will be the sole judge of the relevancy, materiality, weight and sufficiency of all evidence offered, and unless there was a clear abuse amounting to unfairness to the accused the courts would not be authorized to review such matter.

(8.) Whether or not testimony shall be given under oath rests in the sound discretion of the governor. However, the governor would not be authorized to require the evidence of the accused or his witnesses to be given under oath, if the evidence in support of the charges was not also given under the sanctity of an oath.

(9.) Neither the governor, the person or persons preferring the charges, nor the accused have any power to compel the attendance of witnesses nor may a witness be compelled to be sworn. Documentary evidence and signed writings may be admitted, providing they are communicated to the accused.

From the foregoing it will be seen that common sense and fair play, rather than any technical rules, are to govern the procedure. Where charges have been filed with the governor embodying facts which in judgment of law constitute either want of moral character, incompetency, neglect or breach of duty, or malfeasance in office, on the part of a member of the board of administration, a copy of the charges has been served upon the accused member, such accused member has been given reasonable notice of the time and place when and where such charges would be heard and the accused has been given a full and fair opportunity to be heard in his own defense, and testimony is offered in support of the charges (the charges if signed may themselves be offered as a part of the testimony), the action of the governor is final and cannot be reviewed by the courts.

(10.) If the governor should remove a member of the board of administration, it will be the duty of the governor to file a report of such removal with the reasons therefor in the office of the secretary of state, the senate not being in session.

Respectfully,
EDWARD C. TURNER,
Attorney General.

789.

CIVIL SERVICE COMMISSION—SHOULD CERTIFY FOR APPOINTMENT TO POSITIONS IN SERVICE THOSE PERSONS WHO HAVE TAKEN NON-COMPETITIVE EXAMINATIONS, IN ADDITION TO THREE OTHER CANDIDATES FOR POSITIONS.

Provision for certifying incumbents under section 486-31, *G. C., civil service act, valid.*

COLUMBUS, OHIO, September 2, 1915.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for opinion of September 1st, reading as follows:

"Section 10 of article XV of the constitution of Ohio, reads as follows:

" 'Appointments and promotions in the civil service of the state, the

several counties and cities, shall be made according to merit and fitness, to be ascertained as far as practicable by competitive examination. Laws shall be passed providing for the enforcement of this provision.'

"Section 486-2 of the civil service law of Ohio, enacted by the general assembly of 1913, reads as follows:

" 'On and after January 1, 1914, appointments to and promotions in the service of the state, counties, cities and city school districts thereof, shall be made only according to merit and fitness, to be ascertained, as far as practicable, by examinations which, as far as practicable, shall be competitive, etc.'

"Section 486-2 of the civil service law passed May 27, 1915, reads:

" 'On and after the taking effect of this act, appointments to and promotions in the service of the state, the several counties, cities, and city school districts thereof, shall be made only according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations.'

"Section 486-31 of the civil service act, passed May 27, 1915, provides as follows:

" 'The name of each officer, employe, and subordinate holding a position in the classified service of the state, the counties, cities, and city school districts thereof, at the time this act takes effect, who has not passed a regular competitive examination, and who has not been in the service seven years, as herein provided, shall, within ten days after this act becomes effective, be reported by the appointing authority to the commission, and shall be certified to the appointing authority in addition to the three candidates for appointment to such position. If any such person is appointed, he shall be deemed to have been appointed under the provisions of this act, etc.'

"Will you kindly render your opinion in regard to the following question:

"In view of the wording of the constitutional amendment, and the evident intent of both laws to carry out the provisions of this amendment, can this commission legally certify for appointment to positions in the service, those persons who have taken non-competitive examinations; and is not the paragraph of section 486-31 which provides for the certification of non-competitives in contravention of the constitutional provisions, and the intent of the civil service law?"

Without entering into any lengthy discussion of the whys and wherefores, it is my opinion that the commission may legally and should certify for appointment to positions in the service those persons who have taken non-competitive examinations, by virtue of which examinations they were holding positions at the time said act became effective, in addition to three other candidates for such positions.

Respectfully,
EDWARD C. TURNER,
Attorney General.

790.

WHERE A QUESTION OF CENTRALIZATION HAS BEEN SUBMITTED TO VOTERS OF A SCHOOL DISTRICT AND VOTED DOWN, THE SAME PROPOSAL CANNOT AGAIN BE SUBMITTED TO A VOTE WITHIN A PERIOD OF TWO YEARS, EXCEPT UPON PETITION OF FORTY PER CENT. OF THE ELECTORS OF SAID DISTRICT—IF BOND ISSUE FOR PURPOSE OF ERECTING SCHOOL BUILDING HAS BEEN SUBMITTED TO ELECTORS AND CARRIED, NOT NECESSARY TO RESUBMIT QUESTION.

Upon the filing of a petition of at least forty per cent. of the electors of a school district, asking for a resubmission of the question of centralizing the schools of said district, the board of education of said district, acting under authority of section 4726, G. C., as amended in 104 O. L., 139, may, by resolution, determine to resubmit said proposition to a vote of said electors, at a special election called for that purpose, and in said resolution fix the time for holding said special election.

The question of issuing bonds for the purpose of erecting a suitable school building, purchasing a site, etc., having been submitted to a vote of the electors of said district by the board of education of said district, under authority and in compliance with the provisions of section 7625, G. C., at the same time that the question of centralization was first submitted, and a majority of said electors, voting on said proposition, having voted in favor of said bond issue, it will not be necessary to resubmit this question to a vote of said electors.

COLUMBUS, OHIO, September 2, 1915.

HON. ELI H. SPEIDEL, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—I have your letter of August 16, 1915, which is as follows:

"On August 11, 1915, by order of the board of education of Miami school district, there was submitted to the electors of said district, the proposition of centralization of the schools.

"This district is composed of about eight or ten districts. There was at the same time submitted the proposition of issuing $20,000.00 in bonds for the purpose of erecting a suitable school building, purchasing a site, etc. The proposition to issue the $20,000.00 in bonds carried, but the question of centralization lost.

"The board of education now seeks to secure a petition of forty per cent. of the electors of said district in order that the question of centralization may be submitted to the electors of that district.

"Is there anything in the law that would prohibit this question of centralization being submitted to the voters at a special election to be called the latter part of November, or early in December, 1915?

"Would it be necessary to again vote upon the question of issuing bonds, or would the old vote stand provided the question of centralization should carry at the second election?"

Section 4726, G. C., as amended in 104 O. L., 139, provides:

"A rural board of education may submit the question of centralization, and, upon the petition of not less than one-fourth of the qualified electors of such rural district, or upon the order of the county board of education, must submit such question to the vote of the qualified elec-

tors of such rural district at a general election or a special election called for that purpose. If more votes are cast in favor of centralization than against it, at such election, such rural board of education shall proceed at once to the centralization of the schools of the rural district, and, if necessary, purchase a site or sites and erect a suitable building or building thereon. If, at such election, more votes are cast against the proposition of centralization than for it, the question shall not again be submitted to the electors of such rural district for a period of two years, except upon the petition of at least forty per cent. of the electors of such district.''

The question of centralization having been submitted to a vote of the qualified electors of the school district referred to in your inquiry, and a majority of said electors, voting on the question, having voted against said proposition, the same cannot again be submitted to a vote for a period of two years, except upon the petition of at least forty per cent. of the electors of said district. If, however, such a petition is filed with said board of education of said district, said proposition may be resubmitted to a vote at a general election or at a special election called for that purpose, the same as in the first instance.

I am of the opinion, therefore, in answer to your first question, that upon the filing of said petition with the board of education of said district said board may, under authority of the above provision of section 4726, G. C., by resolution, determine to resubmit said proposition to a vote of the qualified electors of said district, at a special election called for that purpose, and in said resolution fix the time for holding said special election.

The question of issuing bonds for the purposes mentioned in your letter having been submitted to the electors of said district by the board of education of said district, under authority and in compliance with the provisions of section 7625, G. C., and a majority of said electors, voting on said proposition, having voted in favor of said bond issue, I am of the opinion, in answer to your second question, that it will not be necessary to resubmit this question to a vote of said electors.

Respectfully,

EDWARD C. TURNER,

Attorney General.

791.

CIVIL SERVICE—THE SEVEN YEARS' CONTINUOUS SERVICE MAY NOT BE CUMULATED BY SERVICES IN COUNTY, CITY OR OTHER POLITICAL SUBDIVISION OF STATE—MUST BE SEVEN YEARS OF CONTINUOUS AND SATISFACTORY SERVICE IN SOME ONE OR MORE OF STATE DEPARTMENTS.

Under section 486-31, *G. C., the term of service in state or one or more subdivisions may not be cumulated.*

COLUMBUS, OHIO, September 2, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter in which you request an opinion, as follows:

''Section 486-31 of the General Code, as amended at the last session of the general assembly (106 O. L., p. 400), makes it the duty of this

commission, within ten (10) days after the act above mentioned becomes effective, to report to the civil service commission the name of each officer, employe and subordinate holding a position in the classified service, who has not passed a regular competitive examination and who has not been in the service for the period of seven years prior to January 1, 1915.

"In order that we may comply with the provisions of the civil service law in certifying such names, we desire your opinion as to whether the seven years' period of service referred to in said section must be a continuous period of service in the same position or in the same department in the state government, or whether the act simply contemplates seven years of continuous service, whether that service has been in the same or different departments of the state government, or partly in the service of the state and partly in the service of the county, city or other political subdivision.

"Trusting that we may have your reply at an early date in order to enable us to comply with the provisions of said act at the earliest possible date, we are,"

Section 486-31 of the General Code, as amended (106 O. L., 418), is as follows:

All officers, employes and subordinates in the classified service of the state, the several counties, cities and city school districts thereof, holding their positions under existing civil service laws, and who are holding such positions by virtue of having taken a regular competitive examination as provided by law, shall, when this act takes effect, be deemed appointees within the provisions of this act; but no person holding a position in the classified service by virtue of having taken a noncompetitive examination shall be deemed to have been appointed or to be an appointee in conformity with the provisions of this act; provided, however, that all persons who have served the state or any political subdivision thereof continuously and satisfactorily for a period of not less than seven years next preceding January 1, 1915, shall be deemed appointees within the provisions of this act.

The name of each officer, employe and subordinate holding a position in the classified service of the state, the counties, cities and city school districts thereof at the time this act takes effect, who has not passed a regular competitive examination and who has not been in the service seven years as herein provided, shall, within ten days after this act becomes effective, be reported by the appointing authority to the commission and shall be certified to the appointing authority in addition to the three candidates for appointment to such position. If any such person is reappointed, he shall be deemed to have been appointed under the provisions of this act. If no eligible list exists such person may be retained as a provisional employe until such time, consistent with reasonable diligence, as the commission can prepare eligible lists when such position shall be filled as prescribed in this act; provided that nothing contained in this section shall be deemed to vacate the office of existing chiefs of police departments or chiefs of fire departments of municipalities. All existing eligible lists of persons who have taken regular competitive examinations shall continue in force for the term of eligibility to be fixed by the commission as provided herein. All property of the existing state commission shall become the property of the commission to be appointed hereunder."

It is my opinion that a person who has served *continuously* in any one or more departments of the state government, or any person who has served continuously

in any one or more departments of a single political subdivision of the state, for a period of not less than seven years next preceding January 1, 1915, shall be deemed appointees within the provisions of the act.

I am of the opinion that periods of service in the county, city or other political subdivisions of the state may not be cumulated with a period of service for the state to make up the seven years' continuous service, or vice versa. In other words, the seven years' continuous and satisfactory service must have been service to the state in some one or more of the state departments to bring the person within the provisions of the act; similarly as to the various political subdivisions.

Respectfully,
EDWARD C. TURNER,
Attorney General.

792.

MAYOR OF VILLAGE MUST APPOINT CEMETERY TRUSTEES—COUNCIL WITHOUT AUTHORITY TO PLACE CONTROL OF VILLAGE CEMETERIES WITH BOARD OF TRUSTEES OF PUBLIC AFFAIRS.

Mayors of villages must appoint cemetery trustees as provided by section 4175, *G. C. Village councils are without authority to enact ordinances whereby village cemeteries are placed under the control of the board of trustees of public affairs.*

COLUMBUS, OHIO, September 2, 1915.

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

GENTLEMEN:—I have your letter of August 28, 1915, in which you submit the following inquiry:

> "Is it mandatory upon the mayors of villages to appoint a board of cemetery trustees as authorized to do by section 4175, General Code; or if the mayor does appoint such board in conflict with the wishes of council, which by ordinance has imposed the duty of managing the village cemetery upon the board of public affairs, which authority is supreme?"

The powers and duties of the board of trustees of public affairs of villages are defined by section 4361 of the General Code, as amended in 103 Ohio Laws, page 561. By the express terms of this section the control of village cemeteries is not conferred upon said board, and it is, therefore, without authority from this section to take charge of village cemeteries. This was so held in an opinion by this department, reported at page 866 of the attorney general's report for 1914.

Your inquiry states that council by ordinance has conferred this authority upon said board. I assume that said ordinance was enacted under the provisions of the last clause of said section 4361, G. C., as amended aforesaid, which provides:

> "and such boards shall have such other duties as may be prescribed by law or ordinance not inconsistent herewith."

While the management and control of cemeteries of villages by the board of trustees of public affairs would not be inconsistent with its duties as expressly

imposed by said section 4361, G. C., supra, yet I incline to the opinion that this duty cannot be inferred as one of the duties which may be prescribed by ordinance, as provided in the last clause of said section.

The state has elected, by the provisions of section 4175, G. C., to control this subject directly. This section confers upon mayors of villages owning a public cemetery the power to appoint a board of three members, to be known as the board of cemetery trustees. The authority thus conferred is exclusive. It cannot be presumed that the state intended, by the grant of power in the last clause of said section 4361, G. C., to include therein any matter which had already been covered by direct legislation. In other words, while municipal corporations may be given the power to provide regulations in local matters which are covered by state laws of general application, yet this rule cannot apply when the state, by a law which is applicable only to municipalities, has fully provided for the matter in question. If this were permitted, the result would be a conflict of jurisdiction such as is presented in your inquiry.

I am of the opinion, therefore, that said section 4175, G. C., controls and that the ordinance in question is null and void, from want of power in the village council to enact, and that the mayor of said village must appoint its board of cemetery trustees.

Respectfully,

EDWARD C. TURNER,
Attorney General.

793.

BOARD OF EDUCATION—WHERE CONTRACT MADE FOR DEPOSIT OF FUNDS PRIOR TO MAY 15, 1915, WHICH CONTRACT WILL NOT EXPIRE UNTIL JULY 1, 1916, IT IS THE DUTY OF BOARD TO LET NEW CONTRACT FOR FUNDS WITHIN THIRTY DAYS AFTER FIRST MONDAY IN JANUARY, 1916—WHEN CONTRACT BEGINS AND ENDS—UNDER AMENDED SECTION 7604, G. C., BOARD MAY LET CONTRACT FOR DEPOSIT OF ITS FUNDS, WHICH CONTRACT SHALL EXPIRE WITHIN THIRTY DAYS AFTER FIRST MONDAY IN JANUARY, 1918.

Under the provisions of section 7604, G. C., as amended in 106 O. L., 328, it will be the duty of the board of education of a school district, which prior to May 15, 1915, made a contract for the deposit of its funds, which contract by its terms will not expire until July 1, 1916, to let a new contract for the deposit of said funds within thirty days after the first Monday in January, 1916, to commence with the date of the expiration of the existing contract and to expire within thirty days from the first Monday in January, 1918.

Where a contract was made subsequent to said date of May 15, 1915, and prior to August 26, 1915, for a term of two years, the provisions of said amended section will terminate said contract within said thirty day period and require the letting of a new contract in compliance with said provisions.

The board of education of a school district may, under authority of said section 7604, G. C., as amended and now in force, let a contract for the deposit of its funds, which contract, by its terms, shall expire within thirty days after the first Monday in January, 1918.

COLUMBUS, OHIO, September 2, 1915.

HON. C. A. WILMOT, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—In your letters of August 14th and August 26th you call my

attention to the provisions of section 7604, G. C., as amended in 106 O. L., 328, which is as follows:

> "That within thirty days after the first Monday of January, 1916, and every two years thereafter, the board of education of any school district by resolution shall provide for the deposit of any or all moneys coming into the hands of its treasurer. But no bank shall receive a deposit larger than the amount of its paid in capital stock, and in no event to exceed three hundred thousand dollars."

The act of the general assembly, known as Amended Senate Bill No. 163, amending this section, as well as sections 7605 and 7609, of the General Code, was passed May 15, 1915, and became effective August 26, 1915.

The questions on which you request my opinion may be stated as follows:

> "1. Where the board of education of a school district established a depository for the school funds of said district prior to May 15, 1915, under authority and in compliance with the provisions of sections 7604 to 7608, inclusive, of the General Code, as then in force, and the contract with such depository, by its terms, will not expire until July 1, 1916, will the above provisions of section 7604, G. C., as amended, terminate said contract and require said board of education to let a new contract within thirty days after the first Monday in January, 1916?
>
> "2. Where the contract was made subsequent to said date of May 15, 1915, and prior to August 26, 1915, for a term of two years, will the provisions of said amended section terminate said contract within said thirty-day period and require the letting of a new contract in compliance with said provisions?
>
> "3. May a board of education establish a depository at the present time to extend beyond said thirty-day period?"

The provisions of section 7604, G. C., as in force prior to August 26, 1915, made it the duty of the board of education of every school district to provide a depository for the funds of such district. While said provisions were mandatory, nevertheless, many boards of education did not comply with their requirements and the statutes, as then in force, nowhere provided a penalty for such non-compliance.

The legislature, with the intent of making effective said mandatory provisions, provided such a penalty by amending section 7609, G. C. The provisions of this section, as amended by said amended senate bill No. 163, must therefore be considered in connection with the provisions of section 7604, G. C., as amended and as above quoted.

Section 7609, as amended (106 O. L., 328), provides as follows:

> "When a depository is lawfully provided, and the funds are deposited therein, the treasurer of the school district and his bondsmen shall be relieved from any liability occasioned by the failure of the bank or banks of deposit or by the failure of the sureties therefor, or by the failure of either of them, except as above provided in cases of excessive deposits. Upon the failure of the board of education of any school district to provide a depository according to law the members of the board of education shall be liable for any loss occasioned by their failure to provide such

depository, and in addition shall pay to the treasurer of the school funds two per cent. on the average daily balance on the school funds during the time said school district shall be without a depository. Said moneys may be recovered from the members of the board of education for the use and benefit of the school funds of the district upon the suit of any taxpayer of the school district."

It will be observed that section 7604, G. C., as amended, provided a definite period of time within which the board of education of every school district shall provide for the deposit of the funds of such district.

If, upon the expiration of the thirty-day period provided by said section, the board of education of a school district is without a depository for its funds, the members of said board will be liable, under the provisions of section 7609, G. C., as amended, for any loss caused by their failure to provide such depository, and in addition thereto shall be required to pay, to the treasurer of said school funds, two per cent. on the average daily balance of said funds during the time said district shall be without such depository.

It cannot be held that the provisions of section 7604, G. C., as amended, will terminate a contract made prior to May 15, 1915, the date of the passage of said amended senate bill No. 163, for the reason that, under such a holding, said statute as amended would be retroactive and in violation of section 28, of article II, of the constitution of the state, which provides that the general assembly shall have no power to pass retroactive laws, or laws impairing the obligations of contracts.

I am of the opinion, however, in answer to the first question above stated, that, under the provisions of section 7604, G. C., as amended, it will be the duty of the board of education of a school district which, prior to May 15, 1915, made a contract for the deposit of its funds, which contract by its terms will not expire until July 1, 1916, to let a new contract for the deposit of said funds within thirty days after the first Monday in January, 1916, to commence with the date of the expiration of the existing contract and to expire within thirty days from the first Monday in January, 1918.

This procedure will, I think, comply with the requirements of said section 7604, G. C., as amended, and will be in keeping with the legislative intent to make the time of letting contracts for the deposit of school funds, and the term of such contracts, uniform throughout the state.

In keeping with former opinions rendered by me, I am of the opinion that a contract for the deposit of school funds, entered into subsequent to May 15, 1915, and prior to August 26, 1915, was made in contemplation of the probable going into effect of said amended senate bill No. 163, and that said contract is subject to the provisions of section 7604, G. C., as amended, the same as a contract made subsequent to August 26, 1915, the date when said amended section became effective.

I am of the opinion, therefore, in answer to the second question above stated, that the contract therein referred to will be terminated by the provisions of said section 7604, G. C., as amended, and that it will be the duty of the board of education which made said contract to let a new contract within the thirty-day period mentioned in said section, for the term of two years.

While I am of the opinion that the board of education of a school district, in establishing a depository for its funds at the present time may provide, by the terms of the contract, that the same shall expire within the thirty-day period provided by section 7604, G. C., as amended, I do not think that the provisions of said statute are mandatory in this respect. On the contrary, I think it was the

intention of the legislature, in amending sections 7604 and 7609, of the General Code, to fix a definite period of time beyond which no school district shall be without a depository for its funds and, as before stated, to make the time of letting such contracts, and the terms thereof, uniform throughout the state.

I am of the opinion, therefore, in answer to the third question above stated, that the board of education of a school district may, under authority of section 7604, G. C., as amended and as now in force, let a contract for the deposit of its funds, which contract by its terms shall expire within thirty days after the first Monday in January, 1918. This will be a substantial compliance with the requirements of said section 7604, G. C., as amended, and will work to the advantage of the school district for which such depository is to be provided, for the reason that the letting of the contract for the longer term will cause banks, in bidding for the deposit of the funds of said district, to offer a higher rate of interest than would be offered for the short term expiring within thirty days after the first Monday in January, 1916.

Respectfully,
EDWARD C. TURNER,
Attorney General.

794.

REVETMENT WALL AT LAKE ST. MARYS, OHIO—BALANCE OF APPROPRIATION MADE IN 1914 IS STILL AVAILABLE—APPROPRIATION BILL FOR 1915 DID NOT LAPSE BALANCE.

Balance of appropriation of $40,000 *for continuation of revetment wall at Lake St. Marys, made in house bill No.* 53, 104 *O. L.,* 221, *is still available, not having been repealed by section* 6 *of house bill No.* 314, 106 *O. L.,* 101.

COLUMBUS, OHIO, September 2, 1915.

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

DEAR SIR:—I am in receipt of your letter of August 24th, wherein you submit the following:

> "The general assembly of Ohio, by an act passed February 16, 1914, making sundry apropriations, allowed the department of public works the sum of $40,000.00 for continuing the revetment wall at Lake St. Marys.
>
> "By an act of the general assembly passed March 12th, 1915, it was provided that all unexpended balances in any appropriation account against which there is no liability on February 16, 1915, and any excess of such balances over liabilities, shall lapse into the fund from which the same was appropriated.
>
> "After the wall was completed, there remained a balance of $5,465.29 in this fund. This retaining wall runs along the inner slope of the reservoir and forms the west boundary of a public road that runs over the top of the reservoir embankment. This produces a serious situation for vehicles passing along the same, as parties driving upon the roadway run the risk of slipping over the steep slope into the ditch back of the wall. In order to prevent any such catastrophe, it was intended in the original plans to fill the ditch back of the wall with earth, and to erect along the

top of the retaining wall a heavy iron railing. Accordingly, on the 24th of June advertisements were inserted in newspapers asking for bids on the back filling, to be opened on July 2d, 1915. When the bids were opened, it was found that Joseph Mueller, of Van Wert, Ohio, was the low bidder. In this case, the question arises as to whether or not the appropriation of February 16, 1914, out of which payment was to be made had not already lapsed?''

In opinion No. 296, rendered April 27, 1915, to Honorable A. V. Donahey, auditor of state (a copy of which is herewith enclosed), I held as follows:

''In conclusion, then, it is my opinion that house bill No. 314, passed in 1915, has the substantial, though not technical, effect of repealing so much of house bill No. 53, passed by the eightieth general assembly, as relates to the subjects for which appropriations are made in said house bill No. 314; but that as to those appropriations made in house bill No. 53 for purposes not covered by the 1915 law, the latter has no effect whatever.''

The appropriation of $40,000.00 for continuing the revetment wall at Lake St. Marys was made in house bill No. 53, referred to in the former opinion, the conclusion of which is quoted above. There was no appropriation relating to the same subject-matter made in house bill No. 314, which is the act referred to by you as passed March 12, 1915, nor is there any language found in the appropriation bill—H. B. No. 701—passed at the recent session of the legislature which will in any way affect the appropriation made in house bill No. 53 passed in 1914.

In the opinion to which I have heretofore referred, I stated as follows:

''It is clear that the appropriation accounts in question (the appropriations made in house bill No. 53, passed in 1914), unless affected by house bill No. 314, passed by the present session of the general assembly, continue to be available for disbursement and to constitute authority for the incurring of liabilities, and will continue to be such, unless exhausted, until two years from the passage of house bill No. 53, in so far as the same are for the current expenses of the state government or its institutions, or until two years from a date ninety days subsequent thereto, with respect to other appropriations of a continuing character.''

I am, therefore, of the opinion that section 6, of house bill No. 314, did not lapse the balance of $5,465.29 of the $40,000.00 appropriation made in house bill No. 53 for continuing the revetment wall at Lake St. Marys, and that, therefore, the same was on July 2, 1915, and still is available for the letting of the contract in question.

Respectfully,
EDWARD C. TURNER,
Attorney General.

795.

AUDITOR OF STATE—WITHOUT AUTHORITY TO APPOINT AN INSPECTOR TO INSPECT MATERIALS DURING CONSTRUCTION OF A COURT HOUSE—BUILDING INSPECTION.

Auditor of state as chief inspector and supervisor of public offices, is without authority to appoint an inspector to inspect materials as they enter into work of construction of a building.

COLUMBUS, OHIO, September 3, 1915.

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

GENTLEMEN:—Under date of August 28th you wrote me as follows:

"We are submitting herewith letter and resolution from the new court house building commission of Hamilton county, addressed to Hon. A. V. Donahey, auditor of state, requesting the appointment of an inspector from this department to inspect the materials as they enter into the work of the new court house being constructed there.

"Can such employment be legally made, and if so, how is the inspector to be paid?

"An early reply will be greatly appreciated as the commission is anxious in regard to this matter."

The letter and resolution accompanying your letter are as follows:

"CINCINNATI, OHIO, August 20, 1915.

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

"DEAR SIR:—Attached to this please find a resolution passed by our commission.

"This resolution covers the ground, but before final action (as our fund is limited) we would like to hear from you in regard to the expense entailed. We were told that it would probably be necessary for you to assign some one here and that the expense would be $10.00 a day through the entire progress of the work—which will be from 24 to 30 months from now. This seems to run into a good deal of money, and we are wondering if you can suggest some plan which would be more economical and at the same time entirely satisfactory to you.

"Yours very truly,

"THE COURT HOUSE BUILDING COMMISSION.

"(Signed) JAMES A. GREEN, President.

"Be it Resolved by the Hamilton county new court house building commission that the state auditor be and he is hereby requested to have a representative from the department of the bureau of inspection and examination of public offices present on the job during the construction of the new Hamilton county court house, it being the judgment of this commission that it would be to the public interest to have an inspector from said department on hand during the progress of the work to inspect the materials as they enter into the work, and also examine the accounts as the work progresses, rather than to have such inspection and examina-

tion made after the building is completed; that the clerk be and he is hereby directed to certify a copy of this resolution to the auditor of the state of Ohio.

"I hereby certify that the above is a true copy of the resolution adopted by the new court house building commission at its meeting on Tuesday, August 17, 1915.

"(Signed) GEO. O. DECKEBACH, Secy."

It appears from the resolution that the Hamilton county new court house building commission has filed a request with the auditor of state to have a representative from the department of bureau of inspection and supervision of public offices present on the job during the construction of the new Hamilton county court house, and the question naturally arises as to whether or not the auditor is legally authorized to make such an appointment and, if so, how the inspector is to be paid.

Section 274, G. C., provides that there shall be a bureau of inspection, etc., in the department of the auditor of state "to inspect and supervise the accounts and reports of all state offices, etc., and the offices of each taxing district, or public institution in the state of Ohio. * * *".

Another section of the statute authorizes the auditor of state to prescribe and require the installation of a system of accounting and reporting for the public offices which shall be uniform. (Section 277, G. C.)

Section 284, G. C., provides the time of the examination of all offices, and further provides:

"On examination, inquiry shall be made into the methods, accuracy and legality of the accounts, records, files and reports of the office, whether the laws, ordinances and orders pertaining to the office have been observed, and whether the requirements of the bureau have been complied with."

Section 286, G. C., provides for the substance and filing of such reports, and further provides:

"If the report sets forth that any public money has been illegally expended or that any public money collected has not been accounted for, or that any public property has been converted or misappropriated action shall be brought."

The above statutes are the ones which set forth the powers and duties of the bureau and prescribe their limits, and I am unable to find in any of the powers prescribed the right of the auditor of state or the bureau to assign an inspector to superintend the work or pass upon the material being placed in a building under construction. His duty is to examine the accounts after the building has been constructed and the money paid, in order to determine the legality of such payments.

While it might be for the best interests of the particular taxing district that an inspector appointed by the bureau should be "on the job" during the construction of the court house, nevertheless the law does not contemplate the appointment of such an inspector by the bureau, and, consequently, I do not believe that such an appointment can be legally made.

Respectfully,

EDWARD C. TURNER,

Attorney General.

796.

APPROVAL OF CONTRACT BETWEEN BOARD OF TRUSTEES OF BOWLING GREEN STATE NORMAL COLLEGE AND CLARENCE G. TAYLOR AS RECEIVER OF THE LAKE ERIE, BOWLING GREEN AND NAPOLEON RAILWAY COMPANY FOR ELECTRIC LIGHT AND POWER FOR COLLEGE.

COLUMBUS, OHIO, September 3, 1915.

HON. J. E. SHATZEL, *Secretary Board of Trustees, Bowling Green State Normal College, Bowling Green, Ohio.*

DEAR SIR:—I am returning herewith the proposed contract between the board of trustees of the Bowling Green State Normal College and Clarence G. Taylor, as receiver of the Lake Erie, Bowling Green and Napoleon Railway Company, for electric light and power, with my approval endorsed thereon.

This contract has been changed so as to comply with the suggestions made in an opinion rendered to you on August 11, 1915, wherein it was suggested that provision should be made for the payment of arbitrators, in the event the same were appointed in accordance with article 8 of the agreement.

Respectfully,
EDWARD C. TURNER,
Attorney General.

797.

SUPERINTENDENT OF PUBLIC WORKS—WITHOUT AUTHORITY TO CANCEL LEASE OF CANAL PROPERTY FOR REASON THAT LESSEE DOES NOT DESIRE TO LONGER USE LEASED PROPERTY.

The superintendent of public works is without authority to cancel a lease of canal property merely because the lessee, or the assignee of the lessee, does not desire to longer use the leased property.

COLUMBUS, OHIO, September 4, 1915.

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

DEAR SIR:—I have your communication of August 18, 1915, which reads as follows:

> "The commissioners of Miami county, Ohio, after the flood of 1913, built a bridge on a new site across the Miami river and the canal, which parallels the river in the city of Piqua, Ohio. The approach to the new bridge is obscured by the buildings on a leasehold of state canal property now owned by Mrs. Irene Edge Simes, and for which she pays an annual rental of $30.00.
>
> "The commissioners have arranged to purchase Mrs. Simes' building, and are asking this department to cancel the lease. In other words, the city desires to be relieved of the payment of the rental, which will amount to about $400.00 for the unexpired term of the lease. It appears from the letter which I herewith submit, that some of my predecessors have indicated their willingness to cancel this lease.

"What I desire to know is, whether or not, I have the authority to cancel this lease under the existing circumstances?"

The letter to which you refer and which is submitted by you is from the clerk of the board of commissioners of Miami county and adds little to the facts stated by you. The arrangement between the commissioners and Mrs. Simes is, as I understand it, merely to the effect that for an agreed consideration Mrs. Simes is to transfer her lease to the county commissioners, the transfer to be subject, of course, to the approval of the superintendent of public works. The commissioners are now asking you whether you will cancel the lease and relieve them from further payment of rent in case they carry out their arrangement with Mrs. Simes, and you inquire as to your authority to cancel a lease under such circumstances.

I know of no statute which authorizes the superintendent of public works to cancel a lease of canal property merely because the lessee does not desire to longer use the same. The term of canal leases is fixed by the statute at fifteen years, and while this department has approved leases of canal lands containing a clause authorizing the superintendent of public works to cancel such leases in case an opportunity should arise to lease the property in question for electric railway purposes, yet it would be going much farther than that to hold that the superintendent of public works has authority to cancel a lease of canal lands merely because the lessee does not care to longer use the same.

I am of the opinion that no such authority exists in the superintendent of public works, and that you are not authorized, under the circumstances set forth by you, to cancel the lease in question and relieve the lessee, or her assignee, from the payment of subsequent installments of rent due under the lease.

Respectfully,
EDWARD C. TURNER,
Attorney General.

798.

OHIO STATE UNIVERSITY—APPROVAL OF CONTRACT FOR TUNNEL FROM BOTANY AND ZOOLOGICAL BUILDING TO ELEVENTH AVENUE—APPROVAL OF CONTRACT WITH THE CLEVELAND TRINIDAD PAVING COMPANY FOR NEIL AVENUE ROADWAY.

COLUMBUS, OHIO, September 7, 1915.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—On September 3, 1915, you submitted for my approval two contracts entered into by your board, one on September 2, 1915, with H. C. McCall for a tunnel from the botany and zoological building to Eleventh avenue on the campus of the Ohio State University, in the sum of $3,333.33, and the other a contract entered into on September 2, 1915, with The Cleveland Trinidad Paving Company for the Neil avenue roadway on the campus of said university, in the sum of $10,000.00. I have carefully examined the advertisement for bids, the contract and bond and find the same to be in all respects proper, and have therefore approved the contract as required by law.

I have obtained from the auditor of state a certificate that there are funds now available for the purposes of said contract.

I have this day filed said contracts with the auditor of state and herewith return you the affidavits in proof of publication of notice calling for bids on said work together with other work, the contracts for which I have still under consideration.

Respectfully,
EDWARD C. TURNER,
Attorney General.

799.

BOARD OF EDUCATION—COMPLIES WITH STATUE GOVERNING STATE AID—SAME WILL BE GRANTED, ALTHOUGH BOARD HAS CONTRACTED TO PAY TEACHERS GREATER SALARY THAN REQUIRED—WHEN COUNTY BOARD CAN DIRECT LOCAL BOARD TO SUSPEND—LOCAL BOARD IS "SUSPENDING AUTHORITY" AND IT IS ITS DUTY TO COMPLY WITH ORDER OF COUNTY BOARD.

If the board of education of a school district complies with all the requirements of the statutes governing state aid, said district will not be debarred from receiving such aid because of the fact that the board of education of such district has contracted to pay certain teachers a greater salary than that required by the provisions of section 7595-1, *G. C., as amended* 106 *O. L.*, 430.

Under the provisions of section 7730, *G. C., as amended in* 106 *O. L.*, 398 *when the average daily attendance of any school in a county district for the preceding year was below ten, the board of education of such county district is authorized to direct the local board of education to suspend said school and transfer the pupils to another school or schools.*

It is the duty of such local board to comply with the order of said county board directing such suspension and transfer and to post the notices required by the provisions of said section 7730, *G. C., as amended.*

The local board of education is the "suspending authority" referred to in the latter part of said section 7730, *G. C., as amended.*

COLUMBUS, OHIO, September 7, 1915.

HON. G. O. MCGONAGLE, *Prosecuting Attorney, McConnelsville, Ohio.*

DEAR SIR:—I have your letter of August 13th, which is as follows:

"Under sections 7595 and 7595-1, G. C., as amended, O. L. Vol. 105-106, page 430, where elementary teachers such as described in section 7595-1 are not to be had, and the board of education of a rural district employ certain teachers at $45 per month for eight months, such teachers not having had at least one year's professional training, but having had six weeks' professional training and from four to six years' teaching experience, such board making levy in accordance with section 7595. May such district receive state aid, its funds being insufficient, or will the fact that it pays $45 per month to teachers not having one year's professional training debar it from receiving state aid?

"Also, under section 7730, G. C., as amended, O. L., 105-106, page 398, which provides, among other things that 'When the average daily attendance of any school for the preceding year has been below ten, such school shall be suspended and the pupils transferred to another school or

schools when directed to do so by the county board of education.' * * * * 'Provided, however, that any suspended school as herein provided may be re-established by the suspending authority upon its own initiative, etc.'

"Does the phrase 'When directed to do so by the county board of education,' refer to the 'suspension,' or to the 'transfer' of pupils, only?

"If the county board directs the suspension, is it mandatory upon the rural board to comply, and must the rural, or county board post the notices of suspension?

"Which board is the 'suspending authority,' where the county board directs that a school be suspended by reason of its average daily attendance being below ten?"

Sections 7595 and 7595-1, G. C., relate to the proper division of school funds and salaries paid teachers in school districts receiving state aid and, as amended in 106 Ohio Laws, page 430, became effective August 31, 1915. These sections, as amended, provide as follows:

"Sec. 7595. No person shall be employed to teach in any public school in Ohio for less than forty dollars a month. When a school district has not sufficient money to pay its teachers such salaries as are provided in section 7595-1, of the General Code, for eight months of the year, after the board of education of such district has made the maximum legal school levy, at least two-thirds of which shall be for the tuition fund, then such school district may receive from the state treasurer sufficient money to make up the deficit.

"Sec. 7595-1. Only such school districts which pay salaries as follows shall be eligible to receive state aid: Elementary teachers without previous teaching experience in the state, forty dollars a month; elementary teachers having at least one year's professional training, forty-five dollars a month; elementary teachers who have completed the full two years' course in any normal school, teachers' college or university approved by the superintendent of public instruction, fifty-five dollars per month; high school teachers not to exceed an average of seventy dollars per month in each high school."

While the board of education of a rural school district makes the maximum legal school levy, at least two-thirds of which shall be for the tuition fund, and employs certain teachers at $45 per month for eight months of the year, who have not had at least one year's professional training as prescribed by the above provisions of section 7595-1, G. C., as amended, you inquire whether such district is eligible to receive state aid.

The well defined policy of the state is to standardize the public schools and to make as nearly equal as possible the advantages of education. It was the intention of the legislature to carry out this policy when it enacted the provisions of sections 7595 and 7595-1, of the General Code, as above quoted, to make it possible for every school district to pay its teachers, having the qualifications prescribed by said section 7595-1, G. C., the salaries mentioned therein for eight months of the year, by providing that, when any school district has not sufficient money to pay such salaries for at least eight months of the year, after the board of education of such district has made the maximum school levy allowed by law, at least two-thirds of which shall be for the tuition fund, such district may receive from the state treasury an amount sufficient to make up the deficit.

The salaries of the teachers of a school district are paid from the tuition fund of such district and, the board of education of said district having complied with the requirements of section 7595, G. C., as amended, in making its school levy, this fund is derived from two sources, as follows:

> "1. From the amount received from the state from the 'state common school fund' and the 'common school fund.'
> "2. From two-thirds of the maximum legal school levy as allowed by the county budget commissioner."

Section 7603, G. C., relates to the apportionment of school funds by the county auditor and provides as follows:

> "The certificate of apportionment furnished by the county auditor to the treasurer and clerk of each school district must exhibit the amount of money received by each district from the state, the amount received from any special tax levy made for a particular purpose, and the amount received from local taxation of a general nature. The amount received from the state common school fund and the common school fund shall be designated the 'tuition fund' and be appropriated only for the payment of superintendents and teachers. Funds received from special levies must be designated in accordance with the purpose for which the special levy was made and be paid out only for such purpose, except that, when a balance remains in such fund after all expenses incident to the purpose for which it was raised have been paid, such balance will become a part of the contingent fund, and the board of education shall make such transfer by resolution. Funds received from the local levy for general purposes must be designated so as to correspond to the particular purpose for which the levy was made. Moneys coming from sources not enumerated herein shall be placed in the contingent fund."

I note, however, that this section has been modified by an act of the general assembly, amending section 5654, G. C., as found in 103 Ohio Laws, page 522, so that the balance remaining in any fund realized from a special levy of taxes, after all expenses incident to the purpose for which it was raised have been paid, will no longer be transferred to the contingent fund and become a part of said contingent fund, as provided in said section 7603, G. C., but said balance shall be transferred by the board of education to the sinking fund of the school district and thereafter shall be subject to the uses of such sinking fund, as provided in said section 5654, G. C., as amended.

The amount which a school district is entitled to receive from the state, under the above provisions of section 7603, G. C., must not be confused with the amount which such district may receive from the state under the conditions provided in section 7595, G. C., as amended, and other sections of the General Code governing state aid to weak school districts.

Expenditures other than salaries of teachers are, by statute, made payable out of the tuition fund, and these must be taken into account in determining the amount available for said salaries.

Section 7596, G. C., as amended 103 O. L., 267, provides:

> "Whenever any board of education finds that it will have such a deficit for the current school year, such board shall on the first day of October, or any time prior to the first day of January of said year, make

affidavit to the county auditor, who shall send a certified statement of the facts to the state auditor. The state auditor shall issue a voucher on the state treasurer in favor of the treasurer of such school district for the amount of such deficit in the tuition fund."

Under provisions of this section it will be observed that when a board of education of a school district finds that it will have a deficit in its tuition fund for the purpose of paying its teachers the salaries required by provisions of section 7595-1, G. C., as amended, said board shall, not later than January first of the current year, make affidavit to the county auditor, who shall send a certified statement of the facts to the state auditor. Upon receipt of such certified statement, showing that said district has complied with all the requirements of the statute governing state aid, and setting forth the estimated deficit of said district for said current year, the state auditor is required to issue a voucher on the state treasurer in favor of the treasurer of said district for the amount of said deficit in the tuition fund.

At the time of making the aforesaid affidavit to the county auditor it is impossible to determine what the actual deficit for the school year will be, and any difference between this said actual deficit and the estimated deficit, should be properly adjusted between the state treasurer and the treasurer of said district at the end of said school year.

The certified statement to the state auditor must show, among other things:

"1. That the board of education of the school district in question made the maximum school levy allowed by law, two-thirds of which was for the tuition fund.

"2. The estimated amount of the tuition fund that will be realized from two-thirds of said levy.

"3. The estimated amount that must be paid from said fund other than for the salaries of teachers.

"4. The estimated amount that will be available for the payment of said salaries.

"5. The number of teachers employed by the board of education of said school district, properly classified according to qualifications prescribed by section 7595-1, G. C., as amended.

"6. The estimated amount of money which will be required in the tuition fund to pay said teachers the salaries provided by said section 7595-1, G. C., as amended, for eight months of the year."

The difference between the estimated amount which will be required in said tuition fund as above set forth in Item 6, and the estimated amount available for said teachers' salaries as set forth in Item 3, will be the amount of the deficit for which the state auditor shall issue a voucher.

As I view it, with the exception of salaries paid to high school teachers, the provisions of section 7595-1, G. C., as amended, determine the minimum salaries which the board of education of a school district, which complies with the other provisions of the statute governing state aid to weak school districts, must pay in order to be entitled to receive such aid.

If, therefore, the certified statement of facts from the county auditor shows that the board of education of a school district has complied with all the requirements of the statute governing state aid to weak school districts, I do not think the state auditor is required, before issuing the aforesaid voucher, to determine

whether said board of education has contracted to pay its teachers salaries, which in the aggregate will amount to more than the amount required under Item 6, as above set forth.

Under provisions of section 7603, G. C., the contingent fund of said district will be entitled to receive, in addition to the one-third of the amount realized from the maximum legal school levy, all moneys coming from sources not enumerated in said section. If said board of education finds that the amount realized from two-thirds of the maximum legal school levy, together with the amount received from the state as state aid, under authority of section 7595, G. C., as amended, is less than the aggregate amount which said board has contracted to pay its teachers, this difference may be made up by transferring any surplus money in the contingent fund to said tuition fund, under authority of section 2296, G. C., as amended in 103 Ohio Laws, page 522, and in the manner provided by sections 2297, et seq., of the General Code, or said board may, under authority of section 5656, G. C., and within the limitations therein provided, borrow money for this purpose.

If, therefore, the board of education of the school district referred to in your inquiry complies with all the requirements of the statute governing state aid, I am of the opinion, in answer to your first question, that said district will not be debarred from receiving such aid because of the fact that the board of education of such district has employed certain teachers, with less than one year's professional training, at a salary of $45 per month.

You further inquire whether the phrase, "When directed to do so by the county board of education," as used in section 7730, G. C., as amended in 106 Ohio Laws, page 398, refers to the suspension of a school or only to the transfer of the pupils.

Section 7730, G. C., as amended, provides:

> "The board of education of any rural or village school district may suspend any or all schools in such village or rural school district. Upon such suspension the board in such village school district may provide, and in such rural school district shall provide, for the conveyance of pupils attending such schools, to a public school in the rural or village district, or to a public school in another district. When the average daily attendance of any school for the preceding year has been below ten, such school shall be suspended and the pupils transferred to another school or schools when directed to do so by the county board of education. No school of any rural district shall be suspended until ten days' notice has been given by the board of education of such district. Such notice shall be posted in five conspicuous places within such village or rural school district; provided, however, that any suspended school as herein provided, may be re-established by the suspending authority upon its own initiative, or upon a petition asking for re-establishment, signed by a majority of the voters of the suspended district, at any time the school enrollment of the said suspended district shows twelve or more pupils of lawful school age."

While that part of the statute referred to in your question is somewhat ambiguous, I think that, where the average daily attendance of any school in a district for the preceding year was below ten, said provision makes it mandatory on the board of education of such district, when directed to do so by the county board of education of the county in which said district is located, to suspend said school and transfer the pupils to another school or schools.

I am of the opinion, therefore, in answer to your second question, that said

provision vests the authority in the county board of education to direct the local board, under the conditions prescribed in said section, to suspend such school and to transfer its pupils.

Replying to your third question, I am of the opinion that the local board must comply with the order of the county board directing such suspension and transfer, and that it is the duty of said local board to post the notices required by the above provision of the statute.

While the county board of education has authority, under the conditions set forth in the statute, to direct the local board to suspend the school and transfer the pupils to another school or schools, the local board must, by resolution setting forth the order of the county board, declare such suspension and transfer of the pupils and provide for posting said notices.

I am of the opinion, therefore, in answer to your fourth question, that the local board of education is the "suspending authority" referred to in the latter part of said section 7730, G. C., as amended.

Respectfully,
EDWARD C. TURNER,
Attorney General.

800.

CONSTRUCTION OF SECTION 1261-34, G. C.—HOW TO MEASURE DISTANCE FROM SALOON TO SCHOOL BUILDING—CONSTRUCTION OF PHRASE "MEASURING THE DISTANCE IN A STRAIGHT LINE FOLLOWING THE STREET FROM THE NEAREST POINT OF THE PREMISES."

Under section 1261-34, G. C., (Greenlund act) the street or streets upon which the school premises abut are made the straight line upon which the respective distances of 200 feet and 300 feet in any direction shall be measured.

Said section does not authorize measuring part of the distance along one street and the balance of the distance along a separate and distinct intersecting street.

The fact that the street upon which school premises abut is curved or broken is immaterial.

COLUMBUS, OHIO, September 8, 1915.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I am in receipt of yours of September 4, 1915, reading:

> "Some weeks ago the school house clause of the Greenlund law was referred to your department, and while we understand the same has been under consideration, no opinion has been rendered. Since the filing of the referendum on the McDermott law, we are having very many inquiries from county boards with reference to this matter and would, therefore, be glad to receive your opinion upon the clause."

I have no record of having received a request for an opinion on this matter from your commission, but have been considering the question upon the request of the prosecuting attorney of Hamilton county and others.

As this matter is one that comes particularly under your jurisdiction, and especially in view of your letter, I shall address the opinion to you.

Your question relates to that part of section 1261-34, G. C. (103 O. L., 223), which reads as follows:

> "No license shall be granted after August 1, 1915, to operate a saloon within three hundred feet of any permanent public or parochial school building, measuring the distance in a straight line following the street from the nearest point of the premises on which such school building is located, nor two hundred feet in a straight line following the street from the nearest point of the premises. This provision shall not apply to a bona fide reputable hotel or club; or to a saloon located within three hundred feet of a school house in the central or a main business section of the city."

I have experienced considerable difficulty in interpreting this section, but my difficulty has come from my well grounded notion of what the law ought to be rather than what it is. My duty, however, is to advise you what the law is rather than what I think it should be.

It is true that in construing ambiguous terms and phrases in order that *some* meaning may be given to a statutory provision and the purpose thereof, when manifest, in some substantial way attained, courts have gone far in the elimination of words, phrases or even perhaps whole sentences or in reading into such provisions such terms as are necessary to give to the same some meaning or to in at least some degree attain the purpose so manifestly sought. But courts are in no instance warranted in indulging in strained, extravagant or exaggerated construction solely for the purpose of a more complete attainment of what may be conceived to be the most desirable end. Courts cannot indulge in judicial legislation for the mere purpose of a more complete accomplishment of even the most laudable end. And while courts have gone to great length to give to legislative expression some meaning that the same may have some substantial effectiveness or at least not result in defeat of the manifest purpose of the enactment, they are never warranted in going beyond the express terms of the legislative declaration for the mere purpose of giving to such legislative expression a more sweeping operative force than that which the plain and ordinary meaning of its terms impart.

In the first place the language contained in the first part of the sentence, "No license shall be granted to operate a saloon within three hundred feet of any permanent public or parochial school building," cannot be said to be the sole declaration of legislative intent when in the same sentence the method is prescribed for measuring the distance. In other words, the evident intent of the legislature, *from what they have said,* is that no saloon is to be located within three hundred feet of such school building, *"measuring the distance in a straight line following the street from the nearest point of the premises on which such school building is located."* It is my opinion that the language "in a straight line *following the street* from the nearest point of the premises *on which such school building is located"* and the language "two hundred feet in a straight line following the street from the nearest point of the premises" makes *the* street or streets on which the school building or premises is *located* the straight line. That is, if the school building or premises abut upon one street only then the measurements may be made along that street only. If the school building or premises abut upon more than one street then the measurements may be made along either of such streets and no saloon may be within the prescribed distance on any such street.

It may be observed here that the "nearest point of the premises" clearly means that point of the premises which is the shortest distance from the saloon, whether such point of the premises be on the side thereof or otherwise.

In ascertaining the three hundred feet distance a line is to be projected at

an angle of ninety degrees from the point of the school building nearest the saloon to the street upon which the school premises abut; from this point no saloon may be located *on either side* of the street within three hundred feet.

To illustrate: Suppose that school premises are located upon a street running north and south, then to ascertain the three hundred feet distance north on said street, a line should be extended from the northerly corner of the school building (part nearest the proposed saloon) to the street. From this point so found no saloon may be located on either side of the street within three hundred feet to the north. To ascertain the distance to the south, a line should be extended from the southerly corner of the school building (part nearest the proposed saloon) to the street and from this point the distance measured to the south. Similarly as to other streets upon which the school premises abut. The two hundred feet distance should be determined from the nearest point of the premises (nearest to the proposed saloon) treating the street as the straight line.

The street being the straight line meant by the language of the statute, the fact that the street itself is not straight, i. e., curved or broken, would be immaterial. So also would be the fact that parts of a continuous thoroughfare running in the same general direction had been given different names.

But the statute does not authorize the turning of corners from the street on which the school premises abut to a separate and distinct street on which no part of the school premises abut, in making these measurements.

I can imagine situations where this will leave a saloon within three hundred feet of a school building, and while I regret that such may be the case, the remedy is legislative not judicial. However, in this connection it is admitted in the briefs furnished by those who favor another contention, that a saloon might be located on premises actually abutting school premises even under the interpretation that corners may be turned. To illustrate: A school might be located on one street and a saloon on the next street running parallel with no nearby intersecting streets and thus, even though corners be turned, and several different streets be used in the measurement, the saloon would not be within the prescribed territory. These are legislative faults which I feel the courts are without power to remedy.

It is suggested that some uncertainty arises as to the meaning of the term "premises" as here used. This is a term of varied significance. In cases of insurance policies, it has been held to include only a building or even a part of the same, while in conveyances, it oftimes clearly includes vast acreage. So that little assistance, if any, may be gained by an examination of particular cases, in determining its application in the present instance. In other words, the meaning of the word "premises" depends in every case upon the subject-matter under consideration, the context in which it is found, as well as the relationship in which it is used.

To my mind it conclusively appears that as here used, the term premises includes more than the land actually covered by the building, and the building itself, notwithstanding the restrictive language, "on which such school building is located," clearly modifying this term. This restricting phrase must, however, be given some substantial meaning, and the one that suggests itself is that the premises is here limited to that land immediately surrounding the school building which is used only for school purposes and directly in connection with such building; that is to say, it would not include land occupied for church, residence or other purposes, though the latter were owned by the same party as the school, nor in my opinion would it include grounds used for athletic purposes in connection with the school, if such athletic grounds were separate or distinct from the usual or ordinary play grounds immediately surrounding the school building.

Respectfully,

EDWARD C. TURNER,
Attorney General.

801.

INTERPRETATION OF SECTION 12932, G. C.—THE WORD "BROTHER" DOES NOT INCLUDE THE RELATION OF BROTHER-IN-LAW—BOARD OF EDUCATION.

The word "brother" as used in section 12932, G. C., does not include the relation of brother-in-law.

COLUMBUS, OHIO, September 8, 1915.

HON. J. W. WATTS, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—In your letter of August 27, 1915, you request my opinion as follows:

> "A teacher has been employed by the votes of three of the members of the board of education of a certain rural school district in this county. One of the three members of the said board was at the time of the hiring a brother-in-law of said teacher, having married the said teacher's sister some years ago and she still being his wife.
>
> "Section 12932 of the General Code makes it an offense for a member of a board of education to vote for or participate in the making of a contract with a person as teacher in a public school to whom he or she is related as father or brother, mother or sister, but this section does not specifically provide that such hiring shall be illegal as between the board of education and the teacher.
>
> "What is your construction of this statute? Is such a contract illegal? Does the word 'brother,' as used in the above section, include 'brother-in-law' as well?"

Section 12932, G. C., provides:

> "Whoever, being a local director or member of a board of education, votes for or participates in the making of a contract with a person as a teacher or instructor in a public school to whom he or she is related as father or brother, mother or sister, or acts in a matter in which he or she is pecuniarily interested, shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned not more than six months, or both."

This statute being penal in its nature, under the well settled rule of construction, its provisions must be strictly construed.

From your statement of facts it appears that the member of the board of education referred to in your inquiry, was not, at the time the contract of employment was made with the teacher in question, related to said teacher within the terms of the statute above quoted. Moreover, it does not appear that said member was in any way pecuniarily interested in said contract.

Replying to your questions, I am of the opinion that the word "brother" as used in said statute does not include the relation of brother-in-law, and that, in so far as the action of the said board of education is concerned, said contract of employment is legal.

Respectfully,
EDWARD C. TURNER,
Attorney General.

802.

OFFICES COMPATIBLE—PRESIDENT BOARD OF EDUCATION OF TOWNSHIP RURAL SCHOOL DISTRICT—TOWNSHIP TREASURER.

The office of president of the board of education of a township rural school district is not incompatible with the office of township treasurer.

COLUMBUS, OHIO, September 8, 1915.

HON. JOHN C. D'ALTON, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—In your letter of August 7, 1915, you request my opinion as follows:

> "May the president of a board of education in a township school district hold by appointment an office of township treasurer? The board of education has designated under section 4782, G. C., a depository for school funds. In your opinion would the office of president of such board of education and of county treasurer be incompatible under section 3273, G. C.?"

I have your letter of August 23, 1915, in which you state that the second question in your letter of August 7th was intended to be a restatement of the first question and should read as follows:

> "In your opinion, would the office of president of such board of education and of township treasurer be incompatible under section 3273 of the General Code?"

Section 3271, G. C., which required the trustees of the township to meet on the last Monday in December of each year at the place for holding township meetings, for the purposes therein provided, was repealed by section 305 of amended senate bill No. 125, as found in 106 O. L., 664. By provision of section 304 of said act, the same became effective September 6, 1915.

Inasmuch as the provisions of said section 3271, G. C., were not re-enacted, township trustees are no longer required or authorized to hold said December meeting for the purposes provided in said section.

While section 3273, G. C., has not been expressly repealed by the legislature and said section, by its terms, makes it the duty of the township treasurer to be present at said December meeting for the purpose of making a settlement with the board of education of the township rural school district and requires the president and clerk of said board to attend said meeting for said purpose, I call your attention to the fact that the provision of section 4763, G. C., making the township treasurer ex-officio treasurer of the funds of the township school district, was repealed by the act of the general assembly as found in 104 O. L., 158, and said provision was not re-enacted. It follows, therefore, that inasmuch as the township treasurer is no longer the treasurer of the funds of the township rural school district, the provisions of section 3273, G. C., are necessarily repealed by implication.

The answer to your question must, therefore, be determined by reference to the statutes now in force relating to the offices of president of the board of education of the township rural school district and township treasurer, and governing their respective duties.

Under the provision of section 3261, G. C., the township trustees are authorized to appoint a person, having the qualifications of an elector, to fill a vacancy in the office of township treasurer.

There being no constitutional or statutory provision prohibiting a person, having such qualifications, from holding both the office of president of the board of education of the township rural school district and the office of treasurer of such township at the same time, it remains to be determined whether either of said offices, under the provision of the statutes, now in force, governing their respective duties, is subordinate to or in any way a check upon the other, or whether it is physically impossible for one person to discharge the duties of both of said offices, under the rule laid down by the court in the case of State ex rel. v. Gebert, 12 C. C. (n. s.), 274. Upon careful examination of the statutes governing the respective duties of the aforesaid offices, I find that neither of said offices is subordinate to or in any way a check upon the other, nor can it be said that it is physically impossible for one person to discharge the duties of both of said offices. Said offices are not, therefore, incompatible under the rule laid down by the court in the case of State ex rel. v. Gebert, supra.

I am of the opinion, therefore, in answer to your question, that the president of the board of education of a township rural school district, having the qualifications of an elector, may hold by appointment the office of township treasurer.

Respectfully,

EDWARD C. TURNER,

Attorney General.

803.

BOARD OF EDUCATION—NOT DEBARRED FROM RECEIVING STATE AID FOR REASON THAT TEACHERS ARE EMPLOYED AT SALARIES IN EXCESS OF AMOUNT REQUIRED BY STATUTE, PROVIDED AVERAGE OF SALARIES PAID TO HIGH SCHOOL TEACHERS OF DISTRICT IS NOT MORE THAN SEVENTY DOLLARS PER MONTH—APPLICATION FOR STATE AID NEED NOT SHOW EXACT AMOUNT EACH HIGH SCHOOL TEACHER IS TO RECEIVE—WHAT APPLICATION OF BOARD OF EDUCATION FOR STATE AID SHOULD CONTAIN.

A school district will not be debarred from receiving state aid because of the fact that the board of education of said district has employed teachers at salaries in excess of those required by the provisions of section 7591, *G. C., as amended* 106 *O. L.,* 430, *provided, however, that the average of salaries paid by said board of education to the high school teachers of said district is not more than seventy dollars per month.*

It is not necessary for a board of education, in making application for state aid, to show the exact amount which each high school teacher employed by said board is entitled to receive according to the terms of his contract of employment. If said application shows the number of high school teachers employed, the number of months for which they are employed and the total amount of the salaries which said high school teachers will be entitled to receive under the terms of their contract of employment, the state auditor will be able to determine whether said board of education has complied with the above provisions of section 7595-1, *G. C., as amended, governing salaries paid to high school teachers.*

COLUMBUS, OHIO, September 8, 1915.

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

GENTLEMEN:—In your letter of August 25, 1915, you request my opinion upon the following questions:

> "Can boards of education, under section 7595, General Code, receive from the state sufficient money to make up the deficit in their tuition fund, providing they have paid more to their teachers than the statutory amounts, the excess coming from sources other than school funds; i. e., would an application be in legal form if it has set up as an item of expense, going to make up the deficit, the legal amount allowed teachers in case the teachers had received more from sources other than the school funds?
>
> "Is it necessary for a board of education, in making an application for state aid, to show the exact amount paid from school funds to each high school teacher employed, or would it be sufficient to give the number of high school teachers and the total amount paid? Section 7595-1."

The answer to your first question is found in opinion No. 799 of this department rendered to Hon. G. O. McGonagle, prosecuting attorney of Morgan county, under date of September 7, 1915. A copy of said opinion is enclosed.

This opinion holds that, with the exception of salaries paid to high school teachers, the provisions of section 7595-1, G. C., as amended in 106 O. L., 430, determine the minimum salaries which the board of education of a school district, which complies with the other provisions of the statutes governing state aid to weak school districts, must pay in order to be eligible to receive such aid; that

if the certified statement of facts from the county auditor to the state auditor shows that the board of education of a school district has complied with all the requirements of the statutes governing state aid, the state auditor is not required, before issuing his voucher on the state treasurer in favor of the treasurer of such school district for the amount of the deficit in the tuition fund of such district, as determined by said certified statement of facts, to determine whether said board of education has contracted to pay its teachers' salaries, which, in the aggregate, will amount to more than the amount required in the tuition fund of said district, as estimated by said board of education, to pay said teachers the salaries provided by said section 7595-1, G. C., as amended, for eight months of the year, and that said school district will not be debarred from receiving state aid because of the fact that said board of education has employed teachers at salaries in excess of those required by the provisions of said section 7595-1, G. C., as amended; provided, however, that the average of salaries paid by said board of education to the high school teachers of said district is not more than seventy dollars per month.

In keeping with this former holding I am of the opinion, in answer to your second question, that it is not necessary for a board of education, in making application for state aid, to show the exact amount which each high school teacher employed by said board is entitled to receive according to the terms of his contract of employment. If said application shows the number of high school teachers employed, the number of months for which they are employed and the total amount of the salaries which said high school teachers will be entitled to receive under the terms of their contracts of employment, the state auditor will be able to determine whether said board of education has complied with the above provisions of section 7595-1, G. C., as amended governing salaries paid to high school teachers.

Respectfully,
EDWARD C. TURNER,
Attorney General.

804.

EMPLOYMENT—COMPENSATION—TO BE EFFECTIVE MUST BE FIRST APPROVED BY GOVERNOR—INDUSTRIAL COMMISSION ACT—APPROVAL OF SALARIES OF ALL OFFICERS IN WRITING BY GOVERNOR IS ESSENTIAL FOR BOARD OF ADMINISTRATION OFFICERS—CIVIL SERVICE.

1. *All employments made and compensation fixed under and by virtue of the provisions of section* 871-14, *G. C.,* 103 *O. L.,* 99, *to be effective must first be approved by the governor.*

2. *The approval of the salaries of all officers in writing by the governor, as provided in section* 1842, *G. C.,* 102 *O. L.,* 214, *is essential and necessary to give validity to their appointments and until so approved no salaries of officers appointed under said section become effective.*

COLUMBUS, OHIO, September 8, 1915.

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

DEAR SIR:—I have your letter of August 31, 1915, as follows:

"There are two questions confronting this department which requires immediate action on our part:

"Section 871-14 (103 O. L., 99) provides that the employments and compensation of the employes of the state industrial commission shall first be approved by the governor in writing.

"Section 1842 (102 O. L., 214) provides that the salaries of employes of the state board of administration shall be approved by the governor in writing.

"We, pursuant to the mandate of section 871-14, are refusing to issue warrants upon vouchers for salaries of employes unless we have certified information that the employment of the employe in question had the approval of the governor. Also, pursuant to sections 871-14 and 1842, we are refusing to issue warrants for salaries unless we first have certified information that such salaries were approved by the governor.

"There are other statutes affecting other departments in a like manner, but we submit the above as sufficiently advising you of the situation.

"The point is raised that the enactment of the civil service law repealed by implication the provision that the employment shall be first approved by the governor, and that the provision requiring the governor's approval of the salary is directory and not mandatory.

"Being in doubt we desire an opinion from you upon both questions."

Section 871-14, 103 O. L., 99, to which you refer, provides as follows:

"The commission is authorized and empowered to employ, promote and remove a secretary, or secretaries, deputies, clerks, stenographers, and other assistants, as needed; to fix their compensation, and to assign to them their duties. Such employments and compensation to be first approved by the governor."

You state in your letter it is claimed the civil service act, 106 O. L., 400, repeals by implication the last clause in said above quoted section, which is "such employments and compensation to be first approved by the governor." This contention is wholly untenable. When an employment is to be made under the foregoing section which is within the classified list, as provided by said civil service law, the whole purpose of such law is effected when it furnishes an eligible list from which such employment must be made. If such employment is not within the classified service, said civil service act has no application whatever to the provisions of said above quoted section. Further, when the provisions of the civil service law do apply, no compensation is fixed by it in any case and it does not control or undertake to control the appointing power in any manner whatever, except to limit its selection to the class or list which it furnishes as eligible to such employment.

With this limitation the discretion of the appointing power in the matter of making employments and appointments is untrammeled and complete. When such discretion is exercised, and the employment made and compensation fixed, the section above quoted requires that first it shall be approved by the governor. This means that the act of the appointing power cannot, under the law, become effective, either as to employment or compensation, until so approved. My conclusion, therefore, is, that while the civil service act, when applicable, qualifies the power and authority conferred by said section by limiting the appointments or employments to the certified lists as furnished by the state civil service commission, it does not in any manner affect the duty of the governor to approve both the appointments and compensation.

The second question submitted in your letter involves a consideration of the last clause in said section 1842, 102 O. L., 214, which is as follows:

> "The board after conference with the managing officer of each institution shall determine the number of officers and employes to be appointed therein. It shall from time to time fix the salaries and wages to be paid at the various institutions, which shall be uniform, as far as possible, for like service, provided that the salaries of all officers shall be approved in writing by the governor."

You state in your letter that the provision in the foregoing section, requiring the governor's approval of all salaries, is claimed to be merely directory. This provision, in my judgment, bears a very important relation to the salaries of all officers appointed under the provisions of said section. It is very clear that the legislature so regarded it when it required such approval to be in writing. An act of a public officer required by law, to be so evidenced, must be held to be necessary to give validity to the proceedings of which it is a part. In this instance, it is as essential, in a jurisdictional way, to give an officer a legal status and right to his salary as his appointment itself. While many reasons might be urged in support of the necessity of this provision, it is sufficient to say that the law vests in the governor the right and authority to supervise and control the salaries of all *officers* of state institutions, and it requires such authority to be exercised before their salaries become effective.

I am, therefore, of opinion that until the salaries of all officers appointed under said foregoing section are approved in writing by the governor, they do not become effective.

Respectfully,
EDWARD C. TURNER,
Attorney General.

805.

OHIO STATE UNIVERSITY—CONTRACTS FOR HOME ECONOMICS BUILDING—UNIVERSITY MAY ENTER INTO SAME, ALTHOUGH PART OF APPROPRIATION NOT AVAILABLE UNTIL JULY 1, 1916.

Ohio State University may now enter into contracts for home economics building to cost within appropriations made in both section 2 and section 3 of house bill No. 701, but only $75,000 can be paid on such contracts prior to July 1, 1916.

COLUMBUS, OHIO, September 8, 1915.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—On September 3, 1915, you submitted to me for approval certain contracts entered in to by your board on September 2d, one with Robert H. Evans & Company and the other with The Huffman-Conklin Company for the erection of a building to be known as the home economics building on the campus of the university, the contract prices therefor being as follows:

"Robert H. Evans & Company	$116,289.00
The Huffman-Conklin Company	22,292.00
Total	$138,581.00"

The appropriation made for the purpose of such construction was made in house bill No. 701, passed at the recent session of the legislature, section 2 thereof appropriating $75,000.00 and section 3 thereof $75,000.00. The appropriations made in section 2 are stated at the beginning of such section, as follows:

> "The following sums shall not be appropriated to pay liabilities or deficiencies existing prior to July 1, 1915, or incurred subsequent to June 30, 1917."

And the specific appropriation made to the university is in the following language:

> "Additions and Betterments—
> G2. Structures and Parts—
> Home economics building to cost completed $150,000.00__ $75,000.00"

The balance of the appropriation is made in section 3, the first sentence of which is as follows:

> "The moneys herein appropriated shall not be expended to pay liabilities or deficiencies existing prior to July 1st, 1916, or incurred subsequent to June 30, 1917."

And the specific appropriation is in the following language:

> "G. Additions and Betterments—
> G2. Structures—
> To complete home economics building---------- $75,000.00"

It therefore appears that there is available now but $75,000.00, and that the balance of $75,000.00 will not be available to pay liabilities until July 1st, 1916.

You propose to enter into a contract now for the construction of the home economics building in excess of the amount appropriated in section 2 of house bill No. 701, and the estimate made therefor discloses that it contemplated that the expenditure should be in excess of said appropriation.

The question therefore naturally arises as to whether or not the language used at the beginning of section 3 of house bill No. 701 that "the moneys herein appropriated shall not be expended to pay liabilities or deficiencies existing prior to July 1st, 1916, or incurred subsequent to June 30, 1917," are the controlling words of the appropriation or whether the entire appropriation made for the home economics building, to wit the $75,000.00 made in section 2 and the $75,000.00 in section 3, do not show a legislative intent that the restrictive language at the beginning of section 3 should not apply in regard to this particular appropriation.

Section 2 appropriated $75,000.00 for a building to be known as the home economics building "*to cost complete* $150,000.00." The entire sum of $150,000.00 was, however, appropriated in house bill No. 701, and no further legislation is necessary to make complete the appropriation of $150,000.00 to which the legislature restricted the cost of the building.

The restrictive language of the appropriation made in section 2—that the building was not to cost over $150,000.00—would not, as I see it, authorize the auditor of state to pay out the $75,000.00 therein appropriated at all until he was assured that the building to be constructed would not cost above $150,000.00, and of this he could be assured only by the awarding of a contract within said amount.

If the general provisions at the beginning of section 3 apply to the $75,000.00 therein appropriated, it would render ineffective the appropriation made in section 2 until July 1, 1916. This I do not believe to have been the intention of the legislature. It seems to me that what the legislature intended was that the home economics building was to cost not to exceed $150,000.00; that a contract could now be awarded up to that sum for the said building, but that only $75,000.00 could be expended prior to July 1, 1916, on estimates of the architect, even though on such estimates there should be a sum greater than that due the contractor; but that after July 1, 1916, the balance of said sum could be paid out.

Had the legislature only appropriated $75,000.00 instead of $150,000.00 at this session of the legislature, a contrary opinion would be reached, since this legislature was unauthorized to bind any succeeding legislature.

I have examined the advertisement for bids submitted with the contract of The Robert H. Evans & Company and The Huffman-Conklin Company for the erection of the home economics building, and find same to be in all respects proper. I have also examined the contract and bond of The Robert H. Evans & Company and the contract and bond of The Huffman-Conklin Company, and find the same to be in proper form and in compliance with law. The contract for heating and ventilating of the home economics building, being Item 15 of the formal proposal based on the specifications, was awarded with the written consent of the governor, auditor of state and secretary of state. I have filed the two contracts, with my approval endorsed thereon, with the auditor of state.

Respectfully,
EDWARD C. TURNER,
Attorney General.

806.

ALLIANCE ARMORY SITE—APPROVAL OF ABSTRACT OF TITLE—STATE ARMORY BOARD MAY AUTHORIZE SECRETARY TO SIGN PETITION PROVIDED FOR IN SECTION 3725, G. C.

Approval of title to Alliance armory site.
The state is included within section 3725, G. C., state armory board may authorize its secretary to sign such a petition.

COLUMBUS, OHIO, September 8, 1915.

Ohio State Armory Board, Columbus, Ohio.

GENTLEMEN:—Under date of July 24th you submitted to this department an abstract of title and unrecorded deed for an armory site in Alliance, Ohio, accompanying which was a letter to the following effect:

> "On Saturday we received the abstract of title and unrecorded deed for an armory site in Alliance, Ohio.
>
> "The plat shows the inadequate size of this armory site and the three streets and railway right-of-way which bound same. The board's architect has approved the site on condition that strips from the abutting streets be added to it by the city council of Alliance. It seems necessary to secure approval of the site before securing said vacation, therefore the board passed the resolution of today, which reads as follows:

"'*ALLIANCE SITE*: The deed and abstract for Alliance site bounded by Hester street, Mechanics avenue, Ely street and L. E. A. & W. railroad right-of-way, were presented to the board, together with a blank petition for vacation of parts of Hester street, Mechanic avenue and Ely street, which parts are needed to enlarge said site. The secretary was directed to refer all said papers to the attorney general with request for approval of the site as deeded.

"'*Further Resolved,* That when the title to said site is approved by the attorney general, the secretary is thereupon authorized to sign petition for vacation of parts of said streets.'"

I have carefully examined the deed and abstract, and I find that the title to said property upon acceptance of said deed will vest in the state a good and sufficient legal title to the property described in said deed, as follows:

"Situated in the city of Alliance, county of Stark, and state of Ohio, and known as being the west part of lot number two hundred and forty (240) in the city of Alliance, Ohio, and further described as follows: Beginning at the northeast corner of the intersection of Mechanic avenue and Ely street being the southwest corner of said lot number 240; thence north along the east line of Mechanic avenue a distance of 98 feet to the intersection of the south line of Hester avenue; thence in a southeasterly direction along the south line of Hester avenue a distance of 85.82 feet to the west right of way line of The New York Central Railway Company; thence south along said west right of way line on a curve approximately 44 feet to the north line of Ely street; thence west along the north line of Ely street, 43.5 feet to the east line of Mechanic avenue, the place of beginning. The above curve being an 8 degree curve."

There is, however, a question as to whether or not the state armory board, having accepted a deed for the property in question, said property being bounded on three sides by streets and on the fourth by the right of way of a railroad company, would be authorized to petition council to vacate the whole or part of any of said streets, none of said streets, as I understand it, being county roads.

After the receipt of your letter and enclosures, I communicated with Honorable Arthur W. Morris, city solicitor of Alliance, Ohio, requesting him to advise me relative to certain matters contained in the abstract and also to give me his views as to the right of the state armory board to petition council to vacate the streets, and in response he cites me to section 3725, of the General Code, and following sections and claims that the state is within the purview of such statutes.

Section 3725, G. C., provides as follows:

"On petition by a person owning a lot in the corporation praying that a street or alley in the immediate vicinity of such lot may be vacated or narrowed, or the name thereof changed, the council of such municipality, upon hearing, and upon being satisfied that there is good cause for such change of name, vacation or narrowing, that it will not be detrimental to the general interest, and that it should be made, may declare by ordinance such street or alley vacated, narrowed, or the name thereof changed. And council may include in one ordinance the change of name, or the vacation or narrowing, of more than one street, avenue or alley."

In Cleveland Terminal & Valley Railroad Co. et al. vs. State ex rel., 85 O. S., 251, the first branch of the syllabus is as follows:

> "1. In conducting transactions with respect to its lands the state acts in a proprietary, and not in a sovereign capacity, and being amenable to all the rules of justice which it prescribes for the conduct of its citizens, it will not be permitted to revoke a grant of lands made upon a valuable consideration which it retains."

The state, therefore, owns lands in a proprietary capacity and may well be considered to be "a person owning a lot" within the meaning of section 3725. Therefore, I agree with Mr. Morris that the word "person" as used in section 3725, since said statute grants a right or privilege, includes also the state in its proprietary capacity.

The state armory board has power to acquire land for armory purposes for the state and erect buildings thereon. It is, therefore, the managing officer for the state in that regard. Since the state can only act through agents, and since the state armory board is the proper agent in regard to armories, the said armory board may authorize its secretary to sign a petition for vacation of streets. To hold otherwise would reach the conclusion that the state had authorized citizens owning lands abutting on streets to petition for the vacation thereof when the state itself had no such authority.

In view of the foregoing, I am of the opinion that the secretary of the state armory board is authorized to sign the petition for the vacation parts of streets mentioned in the petition accompanying the papers.

I am herewith returning to you the abstract of title to the Alliance site, the executed but unrecorded deed to said site and the proposed petition for vacation of strips from abutting streets.

Respectfully,
EDWARD C. TURNER,
Attorney General.

807.

ALL TAX LEVIES FOR TOWNSHIP PURPOSES MUST BE APPLIED TO ALL TAXABLE PROPERTY IN TOWNSHIP INCLUDING TAXABLE PROPERTY WITHIN MUNICIPAL CORPORATION LOCATED IN SAID TOWNSHIP—SAID LEVIES ARE IN ADDITION TO LEVIES MADE IN SAID MUNICIPALITY BY TAXING AUTHORITIES THEREOF FOR CORPORATION PURPOSES.

All tax levies, lawfully made by township trustees for township purposes, except those levies which, by express provision of the statute are made to apply only to taxable property in the township outside of the municipality located therein, must be applied to all the taxable property in the township including the taxable property within the municipal corporation located in said township and said levies are in addition to the levies made in said municipality by the taxing authorities thereof for corporation purposes.

COLUMBUS, OHIO, September 9, 1915.

HON. A. C. MCDOUGAL, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—In your letter of August 25th, you request my opinion on the following question:

"Should tax levies made by township trustees be applied to municipalities within such townships, over and above their own municipal levies?"

Section 5649-3a, G. C., provides in part:

"The aggregate of all taxes that may be levied by a county, for county purposes, on the taxable property in the county on the tax list, shall not exceed in any one year three mills. The aggregate of all taxes that may be levied by a municipal corporation on the taxable property in the corporation, for corporation purposes, on the tax list, shall not exceed in any one year five mills. The aggregate of all taxes that may be levied by a township, for township purposes, on the taxable property in the township on the tax list, shall not exceed in any one year two mills. The local tax levy for all school purposes shall not exceed in any one year five mills on the dollar of valuation of taxable property in any school district. Such limits for county, township, municipal and school levies shall be exclusive of any special levy, provided for by a vote of the electors, special assessments, levies for road taxes that may be worked out by the taxpayers, and levies and assessments in special districts created for road or ditch improvements, over which the budget commissioners shall have no control."

The tax limitations above provided are, of course, subject to the further limitations provided by section 5649-2, G. C., as amended in 103 O. L., 552, and by section 5649-5b, G. C., as amended in 103 O. L., 57.

Under the above provision of section 5649-3a, it will be observed that the levies made by the trustees of a township for township purposes are made "on the taxable property of the township."

This clearly means all the taxable property in the township including the taxable property within the limits of a municipal corporation located therein.

The same meaning must be given to the provisions of section 5649-2, G. C., as amended, governing the aggregate of all levies that may be made in a township "on each dollar of the tax valuation of the taxable property of such * * * township."

Without citing the various statutes governing tax levies which the trustees of a township may make for the purposes provided in said statutes I find, upon examination, that the tax levies which said statutes by their terms authorize the township trustees to make, are properly divided into three classes:

"1. Taxes which the township trustees are authorized to levy on all the taxable property of the township.

"2. Taxes which the trustees are authorized to levy under statutes which contain no express provision as to the taxable property upon which the levy shall be made.

"3. Taxes which the township trustees are authorized to levy upon taxable property outside of a municipal corporation located in the township."

An example of levies coming under the first class above set forth is found in section 5646, G. C. By express provision of this statute the levies authorized by said statute are to be made "on each dollar of the taxable valuation of the property of the township."

The tax levy authorized by provision of section 3444, G. C., comes under the second class, said section containing no express provision as to the taxable property upon which said levy shall be made.

The levies authorized by provision of section 3298-18, G. C., as found in 106 O. L., 647, come under the third class. This section relates to levies made by the township trustees for the purposes set forth in the annual estimate filed with said trustees by the county highway superintendent and provides in part:

> "After the annual estimate for each township has been filed with the trustees of the township by the county highway superintendent, they may increase or reduce the amount of any of the items contained in said estimate, and at their first meeting after said estimate is filed, they shall make their levies for the purposes set forth in the estimate upon all of the taxable property of the townships, not exceeding in the aggregate two mills in any one year upon each dollar of the valuation of such taxable property in said township outside of any incorporated village or city. Such levies shall be in addition to all other levies authorized by law for township purposes, but subject, however, to the limitation upon the combined maximum rate for all taxes now in force."

It is evident that tax levies made by township trustees in compliance with the statutes authorizing the same and coming within the third class above mentioned may not be applied to taxable property within the corporate limits of a municipality located in a township. On the other hand it is equally clear that tax levies lawfully made by the township trustees for township purposes and coming within either the first or second class above set forth, must be applied to all the taxable property in the township including the taxable property within the municipality located therein.

I am of the opinion, therefore, in answer to your question, that all tax levies, lawfully made by township trustees for township purposes, except those levies which, by express provision of the statute are made to apply only to taxable property in the township outside of the municipality located therein, must be applied to all the taxable property in the township including the taxable property within the municipal corporation located in said township; that said levies are in addition to the levies made in said municipality by the taxing authorities thereof for corporation purposes and must be taken into consideration by the county budget commissioners in determining the aggregate amount of taxes that may be levied in said municipality by the various taxing authorities under the limitations provided by section 5649-2, G. C., as amended in 103 O. L., 552.

Respectfully,

EDWARD C. TURNER,

Attorney General.

808.

EMERGENCY LEVIES—MADE UNDER SECTION 5649-4, G. C., NOT TO BE COUNTED IN ASCERTAINING LIMITATION OF FIFTEEN MILLS IMPOSED BY SECTION 5649-5b.

Emergency levies made under authority of section 5649-4, *G. C., are not to be counted in ascertaining the limitation of fifteen mills imposed by section* 5649-5b, *G. C.*

COLUMBUS, OHIO, September 9, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of an inquiry submitted by Hon. Frank J. Doorley, solicitor of the city of Sidney, involving a question the general importance of which justifies, in my judgment, the preparation of an opinion to the commission.

Mr. Doorley's question is as follows:

> "Where there is a levy of 1.4 mills for emergencies mentioned in section 5649-4 of the General Code, may the electors of a subdivision, by favorable vote under sections 5649-5 and 5649-5a of the General Code, authorize the levying of taxes for the purpose involved in the proposition submitted to them so as to produce in the aggregate a levy, exclusive of the state highway levy, of 16.4 mills, 15 mills of which will be for what might be termed ordinary current expense and sinking fund purposes, together with the purpose voted upon, and 1.4 mills of which will represent the emergency levies?"

Sections 5649-4 and 5649-5b, G. C., when considered together will of themselves, I think, furnish an answer to this question. They were last amended in 103 O. L., 527, and 103 O. L., 57, respectively, and as so amended provide as follows:

> "Sec. 5649-4. For the emergencies mentioned in sections 4450, 4451, 5629, 7419 and 7630-1 of the General Code, the taxing authorities of any district may levy a tax sufficient to provide therefor irrespective of any of the limitations of this act.
>
> "Sec. 5649-5b. If a majority of the electors voting thereon at such election vote in favor thereof, it shall be lawful to levy taxes within such taxing district at a rate not to exceed such increased rate for and during the period provided for in such resolution, but in no case shall the combined maximum rate for all taxes levied in any year in any county, city, village, school district, or other taxing district, under the provisions of this and the two preceding sections and sections 5649-1, 5649-2 and 5649-3 of the General Code as herein enacted, exceed fifteen mills."

It will be observed that the levies which may be made under favor of section 5649-4 may, by the express terms of that statute, be provided for "irrespective of any of the limitations of this act;" that the limitation provided for by section 5649-5b is one of the "limitations of this act," and that section 5649-5b itself is a limitation upon levies "under the provisions of this and the two preceding sections" (by which is meant, of course, sections 5649-5, 5649-5a and 5649-5b) "and sections 5649-1, 5649-2 and 5649-3 of the General Code"—that is to say, all of the sections of the Smith one per cent. law so-called, excepting section

5649-4. Thus it is very clear that levies made under favor of section 5649-4 of the General Code are not to be considered in computing the aggregate levy subject to the fifteen mill limitation of section 5649-5b; so that when the electors of a subdivision have authorized an additional levy for a given purpose under sections 5649-5 and 5649-5a, the taxing authorities may under favor of such authority (if the additional levy authorized, together with the other levies which may lawfully be made within the territory, will produce an aggregate of fifteen mills) make such levies as to produce an aggregate levy, exclusive of the emergency levies under section 5649-4, of fifteen mills. So that where such emergency levies are made they may be, in a sense, added to the fifteen mill limitation and are, to be exact, treated precisely like the levy made by and under section 6859-1 of the General Code as amended 105 O. L., 5.

To be exact, then, in the case Mr. Doorley submits the aggregate levy which may be made, on the assumption that the number of mills of additional levies authorized is sufficient, together with other levies which may lawfully be made under the limitations of the Smith one per cent. law, to exhaust the fifteen mill limitation, is 16.7 mills, 15 mills of which represent levies for all purposes excepting the emergencies mentioned and the state highway improvement fund; 1.4 mills of which represent the emergency levies; and .3 mill of which represents the state highway improvement levy.

Respectfully,
EDWARD C. TURNER,
Attorney General.

809.

TAXES AND TAXATION—BOARD OF COMPLAINTS—HAS AUTHORITY TO INCREASE LISTED AMOUNT OF TAXABLE PROPERTY UPON ITS OWN INITIATIVE—WHERE VALUATION IS ONLY ISSUE, AMOUNT NOT QUESTIONED—COMPLAINT MUST BE MADE BEFORE BOARD CAN ACT.

The board of complaints, under the Warnes law, 103 *O. L.,* 789, *has authority to act upon its own initiative only in increasing the listed amount of taxable property. Where the amount listed is not questioned and the only issue is as to valuation, the board of complaints has no authority to act except upon complaint.*

COLUMBUS, OHIO, September 9, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The prosecuting attorney of Allen county calls my attention to certain statements made in a circular issued by the tax commission to the several boards of complaints on July 26, 1915, being circular No. 97. He quotes the following therefrom:

> "The board shall act upon complaint only.
>
> "It shall not increase or decrease the value of any real or personal property as fixed by the district assessor and equalized by the tax commission except upon written complaint thereof filed with the county auditor or with the board.
>
> "Also, under the law the board of complaints, which convenes on the first Monday in August, 1915, has no authority to hear complaints con-

cerning the valuation of property for the year 1914, except in cases where additions and corrections were made by the district assessor after the duplicate was completed and delivered to the county auditor in September, 1914, and as to which the taxpayer had no opportunity to be heard by the board of complaints, which begins its session in August, 1914. Hence, before hearing any complaints on 1914 valuations, he should consult this commission, giving the character of the same.''

Calling my attention to section 5624-7, of the General Code, as amended in 103 O. L., 800, which authorizes the tax commission to prescribe general and uniform rules and regulations respecting the manner of the exercise of the powers and the discharge of the duties of the officers, relating to the assessment of real and personal property, the prosecutor inquires whether, in the light of the statutory provisions respecting the powers and duties of boards of complaints, the rules promulgated by the tax commission are valid and can be enforced.

In the view which I have taken of the prosecutor's question, I have deemed it proper to address an opinion to the commission thereon.

The respective powers and duties of boards of complaints seem to have been provided by section 5602, of the General Code (103 O. L., 793), as follows:

''Complaints against any valuation or assessment on the tax list for the current year may be filed with the county auditor before the meeting of the district board of complaints or thereafter during its session. Any taxpayer may file such complaint as to the valuation or assessment of his own or other's property, and the county commissioners, the prosecuting attorney, county auditor, county treasurer or any board of township trustees, any board of education, mayor or council of any municipal corporation in the county shall have the right to file such a complaint.''

Section 5603, G. C. (103 O. L., 793), provides as follows:

''The county auditor shall lay before the district board of complaints all complaints filed with him. The board shall investigate all such complaints and may increase or decrease any valuation or correct any assessment complained of, and no other.''

Section 5606, G. C. (103 O. L., 793), provides as follows:

''The district board of complaints may increase or decrease any valuation complained of and increase or reduce the listed amount of any taxable property, upon its own initiative or if the party affected thereby or his agent makes and files with the board a written application therefor, verified by his oath, showing the facts upon which it is claimed such increase or decrease or reduction should be made, but not without affording the district assessor an opportunity to be heard thereon.''

With respect to the interpretation to be given to section 5624-7, G. C., I think the case of State ex rel. v. Halliday, 61 O. S., 352, controls. That case involved the interpretation of a statute vesting similar powers in the auditor of state. The first branch of the syllabus is as follows:

''(1.) Where a letter of instruction sent by the auditor of state to a county auditor embraces and commands the performance of a number

of acts, some of which are proper and others not, the latter officer is bound to follow the former but may disregard the latter."

Of course, this decision is supported by manifest reason, and section 5624-7, G. C., itself provides that the tax commission has power to issue such orders and intructions only as are not "inconsistent with any provision of law." If in issuing orders and instructions under this section the commission misinterprets the law, its orders and instructions so issued are merely invalid to the extent of their conflict with the law, and valid as to the remainder thereof not inconsistent with the law.

Section 5606, of the General Code, above quoted, is rather ambiguous. It will be observed that the first clause thereof is that "The district board of complaints may increase or decrease any valuation complained of." If the sentence stopped here, it could not be claimed that the board of complaints could act upon its own initiative, especially in view of the fact that section 5603 explicitly provides that the board may "*increase or decrease any valuation or correct any assessment complained of, and no other.*"

Returning now to section 5606, it will be observed that the first sentence thereof goes on to provide that the board may "increase or reduce the listed amount of any taxable property, upon its own initiative or if the party affected thereby or his agent makes and files with the board a written application therefor, verified by his oath, showing the facts upon which it is claimed such increase or decrease or reduction should be made, but not without affording the district assessor an opportunity to be heard thereon."

The most reasonable interpretation of this section is that while the board may act upon valuations only when complaints are filed, it may increase or reduce the listed *amount* of taxable property, either upon its own initiative or upon application therefor. Such an interpretation avoids, at least in part, what would otherwise be a direct conflict between section 5603 and section 5606.

There is a real distinction between changing a valuation and changing the listed amount of property. In the one case the property has been listed, but at an incorrect valuation; in the other case the property has not been listed at all, and if the amount is not changed it will in effect escape taxation. This observation applies principally, if not entirely, to personal property returns, in which the taxpayer lists the number of articles of personal property owned by him and the value thereof, and the amount of money in possession and invested by him. In an ordinary case it might frequently occur that the valuation of listed property was correct, and yet that the taxpayer had omitted some part of his taxable personal property. The legislature evidently intended to give to the board of complaints authority to initiate investigations as to the completeness of returns, but not to vest the board with general power to revise valuations.

Even when a board of complaints acting upon its own initiative has discovered that the amount of taxable property listed by a given taxpayer is insufficient and has increased the same, such board has no authority, in my opinion, to place a valuation thereon, for it is provided by section 5624-18, of the General Code (103 O. L., 803), that

"When the district board of complaints discovers or has its attention called to the fact, that in the current year or in any year since the year 1910 any taxable land, building, structure, improvement, minerals, mineral right or personal property in the county, has escaped taxation or has been listed for taxation at less than its true value in money, it shall forthwith notify the district assessor of such fact. The district assessor

shall make such inquiries and corrections as he is authorized and required to make by law in other cases in which real or personal property has escaped taxation, or has been improperly listed or valued for taxation.''

Inasmuch as this section expressly provides what shall be done by the board of complaints when it discovers or has its attention called to the fact of an omission of taxable property from the list for the current year, and inasmuch as section 5606, General Code, does not expressly provide that the listed amount, when increased by the district board of complaints, may as so increased be valued by that board acting upon its own initiative, I am of the opinion that the proper interpretation of the two sections considered together is that which reposes in the board of complaints the authority to make such inquiries and corrections as will result in bringing the omitted property upon the tax list, when under section 5624-18, of the General Code, it becomes the duty of the board to call the attention of the district assessor to the facts discovered by it. Thereupon, the district assessor must make further inquiries, and if the facts as reported to him by the board of complaints are confirmed, he must make the final entries on the tax duplicate, both as to the amount of property and the value thereof as corrected. The truth is that the words ''upon its own initiative,'' as found in section 5606, of the General Code, are incompatible with the general scheme of the Warnes law, and being so must, I think, be given a narrow interpretation. It is not necessary to read them out of the statute entirely, as I have pointed out, but their application is very much narrowed by the other provisions which I have considered.

Other reasons than those which I have mentioned and other applications of the statute as I have interpreted it might be cited, but I think what I have said is sufficient to establish this conclusion.

From this it follows that the first instruction quoted from the circular of the tax commission is not complete and requires qualification. Fully stated it would be that

> ''The board of complaints shall act upon complaint only with respect to valuations.''

It also follows that the second statement in the commission's circular as quoted is correct, and that with respect to *valuations,* both where no correction is made by the board in the listed amount of property and where such a correction is made, the board is without authority to act unless a complaint is made.

The third excerpt from the circular of the commission invites consideration of section 5596, of the General Code (103 O. L., 791), which provides as follows:

> ''The district board of complaints shall have power to investigate all complaints against assessments on the tax list, with respect to the amount of property listed as well as with respect to the valuation at which the same is listed. The power of the board shall extend to all cases in which real estate or personal property has been assessed for taxation for the current year, and to additions and corrections made during the next preceding year to the tax lists of previous years, but not to assessments, additions or corrections made by the tax commission of Ohio.''

My recent opinion to the tax commission relative to the interpretation of this section really covers the prosecuting attorney's third question. For the reasons

stated therein, I advise that the board at its 1915 session cannot act upon complaint or otherwise with respect to the valuations appearing upon the 1914 duplicate, unless such valuations were changed by addition and correction on the face of the duplicate. However, the tax commission has stated the rule too narrowly, in that it has fixed the time as of which the addition or correction must have been made in order to entitle the taxpayer to relief at the present session of the board as the first of September, 1914, when the duplicate was delivered by the district assessor to the auditor. This, in my judgment, is erroneous, and, as stated in the previous opinion, the present board of complaints has jurisdiction of all additions and corrections made to the tax list and duplicate; that is, all changes in valuation appearing on the face of the duplicate as changes. But as to changes in valuations made by the district assessor before making up his tax list and duplicate, and therefore entering into the listed valuation as the same appears on the face of the tax list and duplicate, which are open to public inspection from and after some time in July under the Warnes law, the same do not constitute "additions and corrections" within the meaning of section 5596, G. C.

To be specific, then, the tax commission's rule is inaccurate with respect only to the date therein named. Instead of the clause:

> "except in cases where additions and corrections were made by the district assessor after the duplicate was completed and delivered to the county auditor in September, 1914, and as to which the taxpayer had no opportunity to be heard by the board of complaints, which begins its session in August, 1914,"

there should be the following:

> "except in cases where additions and corrections were made by the district assessor after the tax list and duplicate were made up and completed and open to public inspection in the office of the district assessor in July, 1914."

It is to be kept in mind, of course, that, as advised in the previous opinion referred to, if a complaint was actually made to the board when in session in 1914 this fact of itself precludes action by the board in 1915, although the complaint in 1914 related to additions and corrections made in that year.

Respectfully,
EDWARD C. TURNER,
Attorney General.

810.

STATE AND COUNTY LIQUOR LICENSING BOARDS—RIGHT OF MEMBERS OF SUCH BOARDS TO PARTICIPATE IN CIRCULATING PETITIONS FOR PURPOSE OF PROCURING REFERENDUM ON McDERMOTT LIQUOR LICENSE LAW—WHAT CONSTITUTES MISCONDUCT IN OFFICE UNDER LIQUOR LAWS.

COLUMBUS, OHIO, September 9, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—I acknowledge receipt of yours under date of September 2, 1915, as follows:

"I would like your opinion as to whether or not active participation by any members of the state or county liquor licensing boards in circulating petitions or procuring the same to be circulated either by other members of such boards or by licensees under such boards who are engaged in the saloon business, for the purpose of procuring a referendum election on what is known as the McDermott liquor license law, constitutes misconduct in office, under the liquor license law known as the Greenlund act, section 28 of the corrupt practice act, or any other law of the state.

"Second. If the facts should disclose that any member or members of the state board procure members of the county licensing boards to circulate such petitions or secure names thereon through other persons, for the purpose of defeating such McDermott law, with the purpose, either expressed or implied, of continuing any of the members of said boards in office, would such action on the part of such members be a violation of section 5175, subdivision 3 of the General Code, vol. 104, p. 122, of the Session Laws?

"Third. Would the action of any member or members of the state licensing board in directing employes in the office of such board to carry blank referendum petitions in such matter to members of the county licensing boards or other board or prominent politicians for the purpose of procuring signatures thereon, such work being done by employes in that department, occupying the time of their service therein, constitute misconduct?"

Your inquiry involves a consideration of section 1261-21, G. C., 103 O. L., 218, being section 6 of the Greenlund act to which you refer, and which provides as follows:

"Any state license commissioner may be removed by the governor in case of misconduct in office, bribery, incompetency, gross neglect of duty or gross immorality upon a hearing, thirty days' notice having been given to the commissioner whose removal is considered, as well as the attorney general, who may attend the hearing and represent the state; and the decision of the governor shall be final."

The answer to each of the questions submitted turns upon whether the activities of a state license commissioner referred to therein constitute "misconduct in office" within the meaning of that phrase as used in the statute above quoted.

The phrase "misconduct in office" is not easy of definition, which would be entirely free from criticism and not subject to many and varied exceptions.

In the case of State ex rel. vs. Slover, 113 Mo., 202, it is said:

"Misconduct in office is broad enough to embrace any wilful malfeasance, misfeasance or nonfeasance in office."

In the case of State v. Bair, 71 O. S., 410, at page 427, of the opinion, the supreme court of this state says:

"Our attention has not been called to a better definition of the phrase in question than the following: 'Any unlawful misbehavior in relation to the duties of an office, wilful in its character.' "

The same court in State ex rel v. Hawkins, 44 O. S., 115, said:

"The only question that this court can consider, is, whether charges involving official misconduct were preferred * * * The law as to this

question is, as we think, accurately stated by Dixon, C. J., in State v. McGarry, supra (26 Wis., 496): The cause must be one which touches the qualifications of the officer for the office, and shows that he is not a fit or proper person to perform the duties;''

From these authorities it may be gathered that any misconduct, activity, engagement or voluntarily assumed obligations of an officer, which bears such relation to the duties of his office or to the exercise of the powers thereof as to render him unfit for their performance, or places him in a position inconsistent, in conflict or incompatible with a fair and impartial performance of the duties and functions thereof, constitute misconduct in office in the common acceptance of that phrase.

It will be observed that section 3 of the Greenlund law, section 1261-18, 103 O. L., 217, provides in part as follows:

''Every licensing commissioner and the secretary of all licensing boards, whether state or county, shall, before entering upon the duties of his office, take an oath to support the constitution and laws of the United States, the constitution and laws of the state of Ohio, to perform the duties of his office impartially and without prejudice, and to carry into effect the letter and spirit of the liquor licensing system of this state.''

Now it could not be maintained without much difficulty that one might wilfully violate his oath of office and not be guilty of misconduct therein.

It is not necessary that one be guilty of a criminal offense or that he be convicted of such to constitute misconduct in office. Graham et al v. Stein, 18 C. C., 770.

If, then, that provision of the licensing law which requires every license commissioner and secretary of all licensing boards to take an oath to carry into effect the letter and spirit of the liquor licensing system of this state, and to perform the duties of his office impartially and without prejudice, is to be given any force whatever, then the voluntary action of a commissioner in placing himself under the slightest obligation to any one who is or may become directly or indirectly interested in the administration of the office, would constitute misconduct in office. The manifest purpose of this provision, as to the oath, is to emphasize the obligations of these officers and its effect can only be to impel a more liberal interpretation of the provision of the act as against such officers in its application in relation to their administration of the same.

The spirit of the license system of this state, as embodied in amended senate bill No. 203, 103 O. L., 216, is made manifest from the provisions of section 1 (1261-16, G. C.) which provides that no license commissioner shall hold any other public office for profit except that of notary public, nor shall said commissioners be interested, directly or indirectly, in the liquor business, etc., and section 3 (1261-18, G. C.) which provides that:

''No member or employe shall take any part, except to vote in any election involving the prohibition or numerical limitation of saloons; any violation of this provision shall be deemed misconduct in office and such member of such board may be removed therefor by the appointing power.''

The spirit of this act is then that no person who is in any way charged with the administration of the license law shall either directly or indirectly use his official position as an influence to in any way serve his personal interests or engage in any political activities or use his office, either directly or indirectly, to

influence the political activities of others in matters intended to affect the liquor traffic of the state or any part thereof. In other words, the public policy of this state is here asserted to be to completely divorce those officers who are charged with the administration of the license system of the state from any and all activitis, except to vote, in relation to or having as its purpose any change or alteration in that system.

While it may be asserted that no official duty is by law imposed upon license commissioners, as such, in relation to referendum petitions on the McDermott liquor license law, being amended senate bill No. 307, 106 O. L., 560, or any other law passed by the general assembly, it will be readily conceived that any activities in respect to the circulation of such petitions for a referendum of amended senate bill No. 307 by such officers, must of necessity have a direct relationship to the discharge of the duties of such office.

How this relationship will arise is aptly illustrated by the case of Graham v. Stein, 18 C. C., 770, in which it is held:

> "Syl. 4. The prosecuting attorney is the legal adviser of the county officers and in voluntarily placing himself in a position either to be obliged to refuse to give such officials advice, or to give advice hampered by a contract with a third person adverse to the interests of the county, is official misconduct."

Here the law imposes no duty on the prosecuting attorney, as such, to his private clients, but his obligations arising from his voluntary contract with them were incompatible with a faithful discharge of the duties of his office imposed by law. In like manner, though there is no duty of a license commissioner, as such, as to referendum petitions, yet may he not voluntarily assume such relationship thereto and engage in such activities and enter into such arrangements with other officers and licensees as to render his position and his personal interests incompatible with a faithful performance of the duties of his office and a full discharge of the obligations of his oath as such officer?

In the very nature of things the solicitation by an officer charged with the administration of the licensing system of this state, of any person or persons who are or may thereafter become interested in any license to traffic in intoxicating liquors, or the granting of the same, is inconsistent and in conflict with a fair and impartial carrying into effect the spirit of the license system.

Section 28 of the corrupt practice act, section 5175-28, G. C., to which you refer, provides as follows:

> "Any person, who while holding a public office, or being nominated or seeking a nomination or appointment therefor, corruptly uses or promises to use, directly or indirectly, any official authority or influence possessed or anticipated, in the way of conferring upon any person, or in order to secure, or aid any person in securing, any office or public employment, or any nomination, confirmation, promotion or increase of salary, upon consideration that the vote or political influence or action of the person so to be benefited or of any other person, shall be given or used in behalf of any candidate, officer, or party or upon any other corrupt conditions or consideration, is guilty of a corrupt practice."

I assume that by "section 5175, subdivision 3 of the General Code, vol. 104, 122, of the session laws" in your second inquiry, reference is made to subdivision 3 of section 5175-29m, G. C., 104 O. L., 122, which provides as follows:

"Whoever directly or indirectly * * * (3) Promises to help another to obtain appointment provided for by the constitution or laws of Ohio or any municipality therein as a consideration for obtaining or preventing signatures to an initiative, supplementary or referendum petition * * * is guilty of a corrupt practice."

The gist of the offense defined in this latter provision is not the procuring of signatures or preventing the procurement of signatures to a petition for the purpose of defeating or enacting any law, but rather the use, or the express or implied promise to use, the official power, authority, prestige or influence of the office held for a corrupt practice.

Under section 7 of the Greenlund act (G. C., 1261-22), members of the county licensing boards may be appointed or removed by the state board.

Under section 8 of said act (G. C., 1261-23), the salary of the county licensing commissioners is fixed in the first instance by the state board.

Under section 12 of said act (G. C., 1261-27), the state board may fix the compensation of the secretary of the county board and may also designate one of the members of the county board to act as such secretary.

Under section 13 of the said act (G. C., 1261-28), all expenditures of the county board and all expenses of the members thereof are subject to the approval of the state board.

Throughout said act the general supervision and control of the county boards is given to the state board.

It can hardly be said that a member of the county board, or any of the employes thereof, would be in an independent position to refuse to act when asked to do so by a member of the state board, even in a matter outside of the official duty of either. Nor could it be said that the member of the state board, in asking the member of the county board to so act, had not placed himself in a position incompatible with the impartial and unprejudiced discharge of his duties.

In view of the well defined policy of the state against corrupt practice, the express terms of the license law of the state and its manifest spirit, and in consideration of the fundamental principles of sound public policy which forbid the prostitution of public offices for the adavncement of purely private and personal interests, whether it be for the purpose of perpetuating individuals in office or otherwise, I am of the opinion that if a state or county license commissioner engages in the activities set forth in either of the inquiries submitted by you, the same will constitute misconduct in office for which such officer may, under the law, be removed.

My answer to each of your three questions is in the affirmative.

Respectfully,

EDWARD C. TURNER,

Attorney General.

811.

BOARD OF CONTROL OF OHIO AGRICULTURAL EXPERIMENT STATION—FORMER EMPLOYES' POSITIONS ABOLISHED WHEN NEW BOARD CREATED—EMPLOYES RETAINED PENDING ORGANIZATION OF BOARD ARE PROVISIONAL.

The board of control of the Ohio agricultural experiment station is not bound to continue former employes in positions which were abolished and to take the place of which new positions were created in the board of control act.

Employes retained are to be regarded as provisional or temporary in character and to continue pending organization of work of board, and its approval of appointments as provided in section 1171-4, *G. C.,* 106 *O. L.,* 123, *under civil service laws.*

COLUMBUS, OHIO, September 9, 1915.

HON. GEORGE E. SCOTT, *President, Board of Control, Ohio Agricultural Experiment Station, Mt. Pleasant, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of August 20th, which is as follows:

> "I am writing to ask your opinion in regard to the status of the officers and employes of the Ohio agricultural experiment station, and the relation thereto of the board of control of this department.
>
> "The act creating the board of control seems to contain no clause requiring the board to continue in office or employment those formerly in position through appointment by the agricultural commission. Neither does there appear to be in the act creating the board of agriculture of Ohio, any transfer of obligation in this matter to the board of control of the Ohio agricultural experiment station.
>
> "Sec. 1082 of said act transfers to the Ohio agricultural experiment station certain properties, but, so far as I have been able to see, no obligation to continue any one in official position or employment.
>
> "Are the officers and employes of the station now legally in their respective positions by virtue of appointment by the agricultural commission, or have they been legislated out of office, and is it now our duty to fill the vacant positions?"

The act creating the board of control, to be found on page 122, 106 O. L., clearly operates to put an end to the terms of employment of the employes of the agricultural experiment station formerly conducted by the agricultural commission, and there is nothing contained in the act which serves to continue such employment.

Section 1171-4, G. C., which is section 6 of the board of control act on page 123, 106 O. L., is as follows:

> "The board of control shall appoint a director, who shall be a person of acknowledged ability and training in the principles and practice of scientific agriculture. It shall fix the terms of office and salaries of all officers and employes of the station and upon written charge for good and sufficient cause may remove them. The director shall have control of the affairs of the station, and be responsible to the board of control for the management of all of its departments. With the approval of the board

of control he shall appoint chiefs of departments, assistants and other employes necessary for the proper management of the station and shall assign them to their respective duties. He may suspend an officer or employe of the station for cause, which suspension with the reasons therefor he shall immediately report to the board of control for its final action."

Had the proper course been followed when the board of control act became effective, such employes of the agricultural experiment station as are in the classified service should have been appointed under the provisions of section 486-14 of the General Code, which is section 14 of the civil service act, to be found on page 705 of volume 103, Ohio Laws, and which makes provision for temporary and exceptional appointments.

Under the provisions of section 486-16 of the General Code, which is section 16 of the civil service act, passed in 1913 (103 O. L., 706), the employes of the agricultural experiment station whose offices were abolished were entitled to be placed at the head of an eligible list for certification by the appointing officer under the provisions of the 1913 civil service act.

Neither of these courses appears to have been followed, but, on the contrary, employes of the agricultural experiment station were permitted to continue in their employment where they have since performed their duties.

It is my opinion, therefore, that these employes should be regarded as having been retained, provisionally or temporarily only, pending the action of the board of control in its organization and the furtherance of work assigned to it and its approval of appointments as provided for in section 1171-4 of the General Code, *supra*, under the civil service act to be found in 106 O. L., page 400, in so far as the employes of the agricultural experiment station are embraced within its provisions.

Respectfully,
EDWARD C. TURNER,
Attorney General.

812.

BOARD OF AGRICULTURE—ACT CREATING BOARD ABOLISHED DEPARTMENTS OF OLD BOARD—BOARD OF AGRICULTURE HAD AUTHORITY TO CONTINUE EMPLOYES, PROVISIONALLY—CIVIL SERVICE.

The act creating the board of agriculture had the effect of abolishing the entire department organization established by the agricultural commission of Ohio under the act found in 103 *O. L.,* 306. *Employes of the agricultural commission were deprived of their employment by force of the act of* 1915 *itself. The board of agriculture, however, had authority to continue such employes provisionally, pending the certification of appropriate eligible lists and pending the complete and permanent organization of its sub-departments, and the compensation of such person so provisionally employed may lawfully be paid.*

COLUMBUS, OHIO, September 9, 1915.

HON. R. W. DUNLAP, *Secretary, Board of Agriculture of Ohio, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 10th, requesting my opinion as follows:

"The board of agriculture would like to be advised regarding employes of the agricultural commission.

"Do persons who held positions under the agricultural commission law retain same positions under the law creating the board of agriculture?"

The act under which the board of agriculture of Ohio is organized is entitled, "An act to create the board of agriculture of Ohio and to prescribe its organization, its powers and its duties; to amend (certain enumerated) sections * * * of the General Code and sections 122 and 123 of an act 'to create the agricultural commission of Ohio * * *,' approved May 3, 1913, * *."

As the title suggests, the main purpose of the act is to create a new state agency to be designated as the "Board of Agriculture of Ohio," and to prescribe its powers and duties; but this purpose is worked out by amending certain sections of the General Code, which upon examination in their former state appear to have been those which formerly provided for the organization, powers and duties of the agricultural commission of Ohio. But while this statement is true as descriptive of the *form* of the act found in 106 O. L., 143, it does not necessarily follow that on that account the act in substance does not create an entirely new and distinct department. It appears, for example, from inspection of the act found in 103 O. L., 304, and comparison thereof with the act last above referred to, that the field embraced by the activities of the board of agriculture is not as broad as that comprising the scope of the activities of the agricultural commission. (See section 2, of the act of 1915—section 1082, of the General Code, 106 O. L., 177.)

The exact question of law which I have considered is this:

"Did the general assembly in passing the act of 1915 evince an intention to retain intact the subordinate departments, bureaus and other organizations formerly under the general supervision of the agricultural commission, merely transferring their supervision and administration to the newly created board of agriculture; or did it show an intention to abolish the subordinate departments, bureaus and organizations by the abolition of the agricultural commission itself?"

For it is conceivable that the legislature might, by appropriate language, have abolished the agricultural commission as a state board or agency, and yet have continued in existence the department of agriculture as such, and in this way might have perpetuated the existence of the subordinate bureaus, departments and organizations within the agricultural department, merely transferring their supervision and administration to the board of agriculture.

I think it is clear that if upon inspection it is found that the legislature manifested an intention to continue the general organization of all or any part of the former department of agriculture, a change in the supreme management and control of that department would not of itself necessarily abolish the subordinate positions therein; while if there is no language from which such an intention can be inferred, then I think it would follow that the abolition of the agricultural commission and the creation of a board of agriculture of Ohio would have the effect of doing away with all the subordinate positions in the department of agriculture as they existed under the control and management of the agricultural commission.

In seeking for evidence of the legislative intention in this respect the inquiry is, I think, limited to the consideration of sections relating to the internal organization of the department. Sections which formerly prescribed what might

be termed the external powers and duties of the agricultural commission, and which are so amended as merely to strike therefrom the words "agricultural commission," or their equivalent, and to substitute the words "board of agriculture," or their equivalent, are of no importance in this connection, as they, together with the general language of section 2 of the act above referred to, merely show that the legislature intended to transfer some of the powers of the agricultural commission to the board of agriculture, and that in its external relations the activities of the department were intended to be continuously discharged.

The sections which I think require study are sections 1087 and 1089, of the General Code, both in their original form as enacted in 1913 and in their amended form as amended in 1915, and the above mentioned section 2, of the act of 1915, designated as section 1082, of the General Code.

Section 1087, of the General Code, as it was enacted as section 9 of the agricultural commission act of 1913, provides as follows (103 O. L., 306):

> "The agricultural commission is authorized to employ a secretary, heads of bureaus, experts, clerks, stenographers and other assistants and employes, and to fix their compensation and these and all similar acts involving expenditures of money shall be subject to the approval of the governor. The commissioners, secretary, experts, clerks, stenographers and other assistants and employes that may be employed, shall be entitled to receive from the state their actual and necessary traveling expenses while traveling on the business of the agricultural commission. Such expenses shall be itemized and certified to by the person who incurred the expense, and allowed by the agricultural commission."

The same section as amended 106 O. L., 145, is as follows:

> "The board of agriculture is authorized to elect a secretary who shall be the chief executive officer of the board. His annual salary shall be four thousand dollars, and he shall give bond with sureties approved by the board in the sum of ten thousand dollars. The board of agriculture shall appoint heads of bureaus, experts, clerks, stenographers and other assistants and employes, and said board shall fix their compensation within the limits prescribed by law. The secretary, experts, stenographers and other assistants and employes shall be entitled to receive from the state their actual and necessary expenses while traveling on the business of the board of agriculture, when itemized and approved by such board."

A similar comparison may be made with respect to the latter part of section 1089, as found in 103 O. L., 306, with the same section as found in 106 O. L., 145. They are as follows:

"(103 O. L., 306):

> "Said boards, officers and departments to whose powers and authority the agricultural commission succeeds shall on and after the 15th day of July, 1913, have no further legal existence, and the agricultural commission is hereby authorized and directed to assume and continue as successor of said respective boards, officers and departments, and shall continue the construction, control and management of all of said departments of the state government above enumerated, subject to the provisions of this act, and shall have power and authority to establish bureaus of fair administration; live stock diseases; nursery and orchard and bee in-

spection; fertilizer, lime, fungicide, insecticide and feed stuffs inspection; sanitary inspection; food inspection; statistics; chemistry and bacteriology; and it shall have power to establish a state chemical and bacteriological laboratory in which all analyses in connection with law enforcement may be made, and the commission is further authorized and empowered to establish such other bureaus and departments as it deems necessary.

"(106 O. L., 145):

"The board of agriculture of Ohio shall have power and authority to establish bureaus of fair administration; live stock diseases; nursery, orchard and bee inspection; fertilizer, lime, fungicide, insecticide and feed stuffs inspection; sanitary inspection; food inspection; the protection, preservation and propagation of birds, fish and game; the preparation and publication of statistics relating to the work of the board, timely crop reports, and other matters of interest to those engaged in agriculture; chemistry and bacteriology; and it shall have power to establish a state chemical and bacteriological laboratory in which all analyses in connection with law enforcement may be made; and the board is further authorized and empowered to establish such other bureaus and departments as it deems necessary."

A similar comparison may also be made between the first part of section 1089, as enacted as section 11, of the agricultural commission act of 1913 (103 O. L., 306), and section 2, of the act of 1915, designated as section 1082, General Code (106 O. L., 177), as follows:

"(103 O. L., 306):

"The agricultural commission shall succeed to and be possessed of the rights, authority and powers now exercised by the state board of agriculture, the secretary of the state board of agriculture, the board of live stock commissioners, the board of control of the state agricultural experiment station, the state dairy and food commissioner, the commission of fish and game, the state board of veterinary examiners and the state board of pharmacy, except such duties as are conferred on said state board of pharmacy by sections 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311 and 1312. The board of trustees of the Ohio State University shall arrange for the extension of the teachings of agriculture and domestic science of the university as provided in sections 7973 and 7974, of the General Code, and carry on the work and extension authorized and directed by such sections under the direction and supervision of the agricultural commission. The commission is empowered to make such transfers, changes and consolidations of the work of the above named departments as it may deem necessary. The commission shall also succeed to and be in control of all records, land, moneys, appropriations and other property, real or personal, now or hereafter held for the benefit of said respective departments of the state government, the same to be held in trust for the state of Ohio. Said boards, officers and departments to whose powers and authority the agricultural commission succeeds shall on and after the 15th day of July, 1913, have no further legal existence, and the agricultural commission is hereby authorized and directed to assume and continue as successor of said respective boards, officers and departments, and shall continue the construc-

tion, control and management of all said departments of the state government above enumerated, subject to the provisions of this act, and shall have power and authority to establish, etc.

"(106 O. L., 177):

"The board of agriculture shall succeed to and be possessed of the rights, authority and power now exercised by the agricultural commission, unless otherwise specifically provided by law. It shall also succeed to and be in control of all records, land, moneys, appropriations and other property, real or personal now or hereafter held for the benefit of said agricultural commission. Provided, however, that the records, lands, moneys, appropriations and other property, belonging to the experiment station and the division of forestry and experiment farms shall be transferred to the board of control of the experiment station; and provided further, that all books, records and other property belonging to or in the custody of the division of farmers' institutes shall be transferred with this division to the trustees of the Ohio State University."

I call attention to the following facts made prominent by the comparisons above suggested:

(1.) The secretary, heads of bureaus, experts, clerks, stenographers and other assistants and employes were to be "employed" by the agricultural commission, with the approval of the governor. Similar subordinates of the board of agriculture are, in the case of the secretary, to be elected, and in the case of the remaining subordinates to be appointed.

There are two differences here. In the first place, the approval of the governor is no longer required, and in the second place the secretary is to be elected and not employed. There is a substantial difference between proceedings by which the board *elects* an *officer* and by which a person is *employed,* which I need not discuss in this connection. There is no vital distinction between an employment and an appointment, as the terms are used in the two forms of the section, respectively.

Under the agricultural commission the secretary was in the same category as the other employes. Now he is an officer who is required to be elected, and whose status is to be sharply distinguished from that of the other subordinates. Clearly an intention is thus far manifested to effect a partial reorganization of the agricultural department, in that the secretaryship created by the agricultural commission is not perpetuated but is clearly abolished.

(2.) The authority to establish bureaus and departments possessed by the board of agriculture is the same as that possessed by the agricultural commission. The language of section 1089 has not been changed materially in this respect, save by the authorization of the publication of statistics and crop reports. But if the legislature had intended that the subordinate bureaus and departments created by the agricultural commission should continue until changed by the board of agriculture language like that found in section 1089 as enacted in 1913 would have been used, viz.:

"The commission is empowered to make such transfers, changes and consolidations of the work of the above named departments as it may deem necessary. * * * The commission is hereby authorized and directed to assume and continue as successor of said respective boards, officers and departments, and shall continue the constructions, control and management of said departments of the state government above enumerated."

So far as section 1089 in its amended form is concerned, there is not only no such expression of intention to recognize the subordinate departments as continued, subject to new management and control, as was manifested by the above quoted language in the act of 1913; but said section standing by itself authorizes the original creation of such subordinate departments and bureaus, and by ignoring the existence of any such departments and bureaus as they formerly were constituted under the agricultural commission, the section, when taken in connection with the repeal of the statutes under which the subordinate departments, etc., were originally established, indicates an intention that there shall be a reorganization, and that the old departments and bureaus shall cease to exist. In other words, so far as section 1089 is concerned, and in view of the repeal of the act of 1913, there are no departments, bureaus, etc., of the board of agriculture until the board of agriculture has created such departments and bureaus.

(3.) However, what is designated as section 1082, above quoted,, must be read in this connection, for I think it is apparent that the office of this section is to provide fully for the transition from the agricultural commission to the board of agriculture. Whatever of continuity in the personnel and internal organization of the department is to be preserved must be provided for by this section, and if not so provided for is necessarily destroyed.

This section shows on its face that the board of agriculture is to succeed to and be possessed of the rights, authority and power of the agricultural commission, unless otherwise specifically provided by law. That is to say, as already pointed out, this provision preserves the continuity of the functions and powers considered externally. The section also vests in the board of agriculture the "records, land, moneys, appropriations and other property" held for the benefit of the commission, with certain exceptions, but the section does not provide, as did original section 1089 (103 O. L., 306), that certain *departments* should continue under the control of the board of agriculture. Such departments as are recognized are those which are transferred to agencies other than the board of agriculture.

Upon this analysis of section 1082, therefore, it appears that though designed for the purpose of providing for the transition of activities and functions from the one state board to the other, it does not preserve the continuity of the subordinate bureaus, departments, etc., or the personnel of the departmental force as it formerly existed, in the face of the fact that the general assembly had before it, in the shape of original section 1089 as enacted in 1913, language appropriate for such a purpose.

The conclusion irresistibly follows, then, that the general assembly did not intend that the subordinate positions in the department of the agricultural commission should continue to exist, notwithstanding the abolition of the commission itself; but that, on the contrary, the whole departmental organization should be abolished and a new one should be provided for by the board of agriculture.

The provisions of the civil service law afford no obstacle to the effectuation of the intention of the legislature. Without analyzing and quoting from the civil service law of 1913, it is sufficient to state that there is nothing therein inconsistent with the idea of abolishing offices and departments and thus terminating the tenure of subordinate employes and appointees thereof. In fact, the law of 1913 contains a specific provision which recognizes the possibility of such legislation in section 16 thereof (103 O. L., 706), as follows:

> "Whenever any permanent office or position in the classified service is abolished or made unnecessary, the person holding such office or posi-

tion shall be placed by the commission at the head of an appropriate eligible list, and for a period of not to exceed one year shall be certified to an appointing officer as in the case of original appointments.''

For all of the foregoing reasons, I am of the opinion that persons who held positions under the agricultural commission do not retain their positions under the law creating the board of agriculture, and that there are no subordinate positions in the department of agriculture under the management of the board of agriculture until such positions are created by the board. It was necessary for the board of agriculture to act under section 1089, of the General Code, to create the departments of its work, then to appoint such heads of bureaus, experts, clerks, stenographers and other assistants and employes as may be permissible within the limits of the appropriations made by the legislature, before any of the persons who, I presume, have been serving by holding over during the change of administration had any strictly and technically legal standing as employes, etc., of the board of agriculture.

I assume, however, that the board of agriculture upon its organization took over as a matter of fact certain departments as formerly organized by the agricultural commission. In all cases in which this was done and in which the employes were notified that they would be continued in their employment, such action was, in my judgment, sufficient to re-establish the sub-departments and to confirm the status of the persons employed therein until such time as the board, by formal action under section 1089, of the General Code, might reorganize its work. In other words, while the law itself does abolish the old departments and positions, at the same time it gives to the board of agriculture the authority to create such departments and positions, and inasmuch as the law will not favor a state of facts which will result in a condition in which no one is authorized to carry on official work which is required to be done, the acquiescence of the board of agriculture in the continuance of such persons in their respective employments and the approval by the board of salary and expense vouchers drawn in favor of such employes would of itself be, in my opinion, sufficient action on the part of the board of agriculture to constitute a re-establishment of such departments.

Specifically answering your question then, I am of the opinion that persons who held positions under the agricultural commission law were not as a matter of law entitled to retain the same positions under the law creating the board of agriculture; but that if the board of agriculture recognized their incumbency and treated them as its own employes, that would be sufficient to entitle them to remain in their respective employments.

However, such recognition on the part of the board of agriculture, being tantamount to reappointment or re-employment, raises a further question under the civil service law. In order to bring about the result which I have described in a perfectly legal way, it would have been proper, and in a sense technically necessary, that the civil service commission prepare eligible lists for all the positions thus to be filled. The incumbents by virtue of the provision above quoted would be entitled to have their names placed at the heads of such eligible lists and would, therefore, be eligible to appointment. However, the rule is that appointments made otherwise than from eligible lists certified by the civil service commission are treated as provisional only, and under favor of section 14, of the civil service law—section 486-14, of the General Code—provisional appointments may last only until an eligible list may be prepared, which is to be done within ninety days after the occurrence of the vacancy. Emergency appointments are recognized by the same section, but the lawful duration of these is limited to ten days.

Under the peculiar circumstances of the case the proper course of action, in

my opinion, is for the board of agriculture to request eligible lists for appointments to all the positions within its department for which appointments have not been made since it organization. These eligible lists should contain the name, in each case, of the present incumbent and the names of three other persons. As soon as such lists are furnished the board of agriculture should proceed to make appointments from such lists.

By section 486-31, as amended, it is provided in effect that persons holding positions in the civil service who have not taken competitive examinations, shall not be entitled to continue in their respective positions save as provisional appointees in the absence of eligible lists; and where eligible lists exist, composed of names of those who have taken competitive examinations, the names of such persons who have not taken competitive examinations shall be certified for reappointment in addition to the names on the eligible list, when an appointment may be made by the appointing authority from the eligible list thus augmented.

In case the board of agriculture desires to continue the same form of organization into bureaus and divisions as obtained under the agricultural commission, no formal action other than that described will be necessary to put the department upon a permanent basis; but if the board desires to change the former organization of the department, the board should formally provide for such reorganization, designating the different bureaus and divisions therein and request an eligible list from the civil service commission based upon such reorganization.

Until these things are done present incumbents are to be regarded, in my opinion, as provisional appointees and their salary and expenses may lawfully be paid.

Respectfully,

EDWARD C. TURNER,

Attorney General.

813.

CIVIL SERVICE COMMISSION—COMPETITIVE EXAMINATION—NOT REQUIRED OF EMPLOYES AND SUBORDINATES HOLDING POSITIONS IN CLASSIFIED SERVICE AT TIME NEW CIVIL SERVICE ACT BECAME EFFECTIVE—COMMISSION MUST ALSO CERTIFY TO APPOINTING AUTHORITY THREE CANDIDATES WHO HAVE TAKEN COMPETITIVE EXAMINATION.

Under section 486-31 *of the General Code,* 106 *O. L.,* 400, *a competitive examination is not required of officers, employes and subordinates holding positions in the classified service of the state, the counties, cities and city school districts thereof at the time the civil service act, as amended,* 106 *O. L.,* 400, *became effective; but it is the duty of the civil service commission to certify such officers, employes or subordinates to the appointing authority in addition to the three candidates for appointment to such positions who have taken a competitive examination.*

COLUMBUS, OHIO, September 10, 1915.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of September 3, 1915, requesting my opinion as follows:

> "Your letter of September 2d is not responsive to the inquiry made in our letter of the 1st inst., as to the clause of the civil service statute providing for certification of an officer or employe holding a position in the classified service without competitive examination.

"The statute does not in plain terms say that such officers shall be exempted from competitive examination, and the precise question is whether their exemption from competitive examination can be made a part of the language of the statute by 'construction and interpretation.'

"As the commissioners understand their powers, they have no authority, under the statute, to certify anyone as eligible to appointment in the classified service who has not passed a competitive examination.

"We wish to have a more careful examination of the question by your department."

The answer to your question involves the interpretation of the language contained in section 486-31, of the General Code, as amended in 106 O. L., page 400, which is as follows:

"Sec. 486-31. SCHEDULE. All officers, employes and subordinates in the classified service of the state, the several counties, cities and city school districts thereof, holding their positions under existing civil service laws, and who are holding such positions by virtue of having taken a regular competitive examination as provided by law, shall, when this act takes effect, be deemed appointees within the provisions of this act; but no person holding a position in the classified service by virtue of having taken a non-competitive examination shall be deemed to have been appointed or to be an appointee in conformity with the provisions of this act; provided, however, that all persons who have served the state or any political subdivision thereof continuously and satisfactorily for a period of not less than seven years next preceding January 1, 1915, shall be deemed appointees within the provisions of this act.

"The name of each officer, employe and subordinate holding a position in the classified service of the state, the counties, cities and city school districts thereof at the time this act takes effect, who has not passed a regular competitive examination and who has not been in the service seven years as herein provided, shall, within ten days after this act becomes effective, be reported by the appointing authority to the commission and shall be certified to the appointing authority in addition to the three candidates for appointment to such position. If any such person is reappointed, he shall be deemed to have been appointed under the provisions of this act. If no eligible list exists such persons may be retained as provisional employes until such time, consistent with reasonable diligence, as the commission can prepare eligible lists when such position shall be filled as prescribed in this act. * * *"

Under the section, part of which is above quoted, the legislature has considered and made provision for two classes of officers, employes and subordinates in the classified service who were holding positions when the amended civil service act went into effect, other than those who have taken competitive examinations.

1. Such officers, employes and subordinates "who have served the state or any political subdivision thereof continuously and satisfactorily for a period of not less than seven years next preceding January 1, 1915."

2. Such officers, employes and subordinates who held positions in such classified service of the state, the counties, cities and city school districts thereof at the time said amended civil service act went into effect, who have not passed a regular competitive examination and who have not served the state or any political subdivision thereof continuously for a period of not less than seven years next preceding January 1, 1915.

Officers, employes and subordinates embraced within the first class above described are, by the terms of the statute, made appointees and continue in their respective positions.

The name of each officer, employe or subordinate embraced in the second class above described, by the provisions of the statute, shall be certified to the appointing authority in addition to the three candidates for appointment to such position. It is clearly the intent of the law that the officers, employes and subordinates within such second class shall be certified without the requirement of a competitive examination; and shall, by virtue of their former service, stand in the same position before the appointing authority as the other three candidates who have taken a competitive examination. This provision gives the appointing authority the privilege of retaining a competent officer, employe or subordinate who, during a term of service less than seven years in duration, has acquired experience and demonstrated his fitness for the position. If the legislative intent be otherwise construed, and such officer, employe or subordinate be required to take a competitive examination, he would be in no better position than an applicant without experience, and the provision that his name be certified to the appointing authority in addition to the names of three candidates who have taken a competitive examination would be without meaning and purpose.

Respectfully,

EDWARD C. TURNER,

Attorney General.

814.

"PUBLIC WORK" DEFINED—INTERPRETATION OF SECTION 37, ARTICLE II, CONSTITUTION AND STATUTES IN REGARD TO EIGHT HOURS CONSTITUTING "DAY'S WORK"—EMPLOYMENT BY MONTH OR DAY IS WITHIN APPLICATION OF STATUTE—WORKMEN EMPLOYED PRIOR TO JULY 1, 1915, FOR A DEFINITE TERM BEYOND THAT DATE ARE NOT SUBJECT TO PENAL PROVISIONS OF STATUTE—POLICE AND FIREMEN EXEMPT FROM PROVISIONS.

Persons employed in cleaning streets, as well as those engaged in their replacement, construction, repair, maintenance or alteration, and persons engaged in the construction, repair, replacement, alteration, maintenance or operation of municipal power, heat, light and water plants, wharves, docks, waterways and sewers, constructed, maintained, repaired or operated for public use or benefit by the state, or any political subdivision thereof, or engaged in the construction, maintenance, repair, replacement, alteration or operation of any public undertaking of a structural nature of substantial permanence, capable of being regarded as a whole and of public utility, service, and interest, are within the provisions of section 37 of article II of the constitution, and sections 17-1 *and* 17-2, *G. C.,* 103 *O. L.,* 854.

COLUMBUS, OHIO, September 10, 1915.

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

GENTLEMEN:—I am in receipt of a number of requests for an opinion involving the construction of sections 17-1 and 17-2, G. C., 103 O. L., 854, and deeming the questions submitted to be of general public interest and importance, I am taking the liberty of addressing an opinion thereon to you.

The requests submitted make particular inquiry as to the application of the statutes above mentioned, to employes of municipalities engaged in cleaning, re-

pairing and in the construction of streets and sewers; the construction, maintenance and operation of municipal waterworks, heat, power and light plants, and the construction and improvement of public highways.

The statutes to which reference is made in these several inquiries were enacted May 23, 1913, 103 O. L., 854, and provide as follows:

> "*Section* 17-1, *G. C.* Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise; and it shall be unlawful for any person, corporation or association, whose duty it shall be to employ or to direct and control the services of such workmen to require or permit any of them to labor more than eight hours in any calendar day or more than forty-eight hours in any week, except in cases of extraordinary emergency. This section shall not be construed to include policemen or fireman.
>
> "*Section* 17-2, *G. C.* Any person who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction be fined not to exceed five hundred dollars or be imprisoned not more than six months or both."

This statute was passed for the manifest purpose of providing a penalty for the violation of the provisions of section 37, of article II, of the constitution, as follows:

> "Except in cases of extraordinary emergencies, not to exceed eight hours shall constitute a day's work, and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise."

The question submitted therefore involves a determination of whether men employed on the streets of a city in cleaning and making repairs of the same and as engineers at municipal waterworks plants, "are engaged on any public work" within the meaning of that phrase as found in the statute and constitutional provision above quoted. The construction of this phrase was considered in two opinions of my predecessor, Hon. Timothy S. Hogan—one under date of February 13th, 1914, and one of the date of April 29, 1914, to be found at pages 283 and 595, of the report of the attorney general for the year 1914, and also in an opinion of this department under date of April 30, 1915, being opinion No. 305, of this year.

In the opinion under date of April 29, 1914, supra, it was held that the phrase "workmen engaged on any public work," etc., did not include employes of waterworks departments of cities. In the opinion under date of February 13th, 1914, supra, it was held that the regular experiment station work carried on at the Miami university at Oxford, Ohio, is not a public work within the meaning of that phrase as used in the constitutional provision and statute under consideration. In opinion No. 305 under date of April 30, 1915, it was held that the work regularly performed at the agricultural experiment stations is not "public work" within the meaning thereof as found in the statute above quoted.

It will be observed that that part of the statute here more particularly under consideration as declaratory of the substantive rule of law, is in the exact language of section 37, of article II, of the constitution, and therefore, whatever construction is to be given to the constitutional provision, must attach with equal force

and aptness to the language of the statute. That is to say, the phrase "engaged on any public work" has no other meaning in the statute than that which must be ascribed to it as used in the constitution. The statute, however, is penal and may not be construed without regard to the well established rule that penal statutes will be strictly construed in favor of the accused. But this rule requires only a fair and reasonable interpretation of terms in view of the plain purpose of the enactment. This phrase "public work" as used in legislation of this character of that in which it is here found, is not as comprehensive in its meaning as the terms might clearly import when used in a different relationship. No one would suppose "public work" in this application to include within its scope all work performed, for, in the interest of, or at the expense of the general public. In other words there is a clear distinction, though the line of demarcation is not easy of definition between "public work" as here used, and "working for the public" or "public employment"—that is, being employed by the public. The term "work" as here used is not synonymous with employment, but rather relates to the ultimate object of the employment. "Public work" in its most comprehensive sense is defined in 32 Cyc., 1256, as "a work in which the state is interested, every species and character of work done for the public, and for which the taxpaying citizens are liable, work by or for the state and by or for a municipal corporation and contractors therewith." On the other hand, "public works" is defined in the Century dictionary as "all fixed works constructed for public use, as railways, docks, canals, waterworks, roads, etc." So that the phrase is used with varying signification within the limits indicated by these definitions, dependent upon the context in which it is found, and the subject-matter in relation to which it is used.

In the federal eight-hour law of August 1, 1892, which bears a marked similarity in phraseology to the constitution and statute of this state, is found used in similar relation to that of "any public work" here under consideration, the phrase "any of the public works" of the United States.

While the supreme court of the United States in the case of Ellis vs. United States, 206 U. S., 263, 51 L. Ed., U. S., 1054, distinguished between "any of the public works" and "any public work," it will be noted upon reflection that this distinction, which was based somewhat upon the accompanying words "upon" and "any of the," in the last analysis is the distinction above attempted to be pointed out as between "public work" and "employment by the public." Indeed, it will be observed that while there is omitted from the language of the Ohio constitution the words "of the," the word "work" therein is preceded by the phrase "on any," and I am inclined to conclude that in view of the similarity of context and identity of purpose so inseparably associated with the phrase "on any public work" as found in the Ohio constitution that it is there used as synonymous with "upon any of the public works" as found in the federal statute here referred to, of which the court in the opinion announced in the above mentioned case said: "The words 'upon' and 'any of the' and the plural 'works' import that the objects of labor referred to have some kind of permanent existence and structural unity, and are severally capable of being regarded as complete wholes."

In the case of Ellis vs. Grand Rapids, 123 Mich., 567, it is said:

> "Public works is distinguished from public department as used in the statutes giving preference to veterans in employment in all public departments and upon public works."

One is an employment by the public, the other an employment upon an object

or undertaking having some kind of permanent existence of structural character and capable of being properly regarded, when completed, as a whole and of general public interest and utility.

In the case of U. S. to use of Fidewater Steel Co. vs. Perth Amboy Shipbuilding Co., 137 Fed., 689, the court in discussing the meaning of "any public work" as used in the act of August 13, 1894, c. 280, relative to bonds of contractors for the prosecution of "any public work" or for repairs upon any public building or "public work," the court, in referring to the dictionary definitions of this phrase, said :

> "Without quarreling with these definitions, we conclude that the meaning of the words 'public work' in the act is broader and more comprehensive than the dictionary meaning given to 'public works;' that public work is suceptible of application to any constructive work of a public character, and is not limited to fixed works."

It is worthy of notice that here the singular form of the word "work" is used as distinguished from the form used in the act of August 1, 1892, under consideration in the case of Ellis vs. U. S., supra, thus adding support to the conclusion reached as to the fundamental distinction made by the court in that case not being dependent primarily upon the plural form as there pointed out.

In the case of Winters vs. Duluth, 82 Minn., 130, it was held that a municipal pump station was within the meaning of "public works" as used in a statute requiring notice to the city before liability would attach for any defect in any street or public works of the city.

In the case of Seibert vs. Cavinder, 3 Mo. App., 426, it is held that sewer-building and macadamizing of streets are public works within the meaning of that term as found in the charter of the city of St. Louis.

A "public work" then upon general authority and principle comprehends all public undertaking of structural character, though not fixed in their nature, of substantial permanence and capable of being regarded, when completed, as a whole, and it may be readily inferred that "public works" is not limited in its application to such public undertakings only while in process of construction, but even after completion one may properly be said to be engaged on a public work while employed in the maintenance, repair, replacement, alteration or operation of such public undertakings as are of a structural nature, of substantial permanence, capable of being regarded as a whole and of public utility, service and interest.

Further light may be thrown upon this phase of the question if we may with propriety refer to the history of the adoption of the constitutional amendment under consideration and this, I think, under authority of the case of the State ex rel. vs. Kinnon et al., 7 O. S., 563-567, we are fully warranted in doing in the present instance. This amendment to the constitution was originally adopted as proposal No. 209 by the constitutional convention April 23, 1912, Con. Pr. & D. 1345, in the following form:

> "Not to exceed eight hours shall constitute a day's work and not to exceed forty-eight hours a week's work, on the construction, replacement, alteration, repair, maintenance and operation of all public works, buildings, plants, machinery at which laborers, workmen and mechanics are employed, etc."

Adopted by the convention in this form this proposal was referred to the committee on arrangement and phraseology. On May 22, 1912 (Con. P. and D., 1740-1),

the committee reported back this proposal in the form in which it was adopted by the people except the term "laborers" was used for which the word "workman" was afterwards substituted by amendment. (Con. P. and D., 1769.)

With reference to the powers, duties and functions of the committee on revision, arrangement and enrollment of a constitutional convention which is analogous to the commitee on arrangement and phraseology above referred to, the court in the case of State ex rel. vs. Kinnon, supra, said:

> "The duties of that committee are indicated by its name. They were of a literary and clerical character. To initiate constitutional provisions was no part of its proper office. But it took, on reference, what had been previously agreed on, after full discussion in committe of the whole and in the convention proper, and arranged the subject-matter under appropriate heads, revised and corrected the language, and attended to its enrollment."

Thus it is clearly determined that the sole duty of the committee on arrangement and phraseology relative to the terms of the proposal as adopted, was to revise and correct the language that the full meaning and intent of the convention, as set forth in the original form of the proposal be concluded in apt, concise and appropriate terms.

A comparison of the proposal as finally adopted with its original form will disclose no substantial alteration of meaning, and that the work of the committee was confined solely to the elimination of tautological terms.

Since it was not within the duties of the committee to effect any change in meaning, we must conclude that it was the intention of the convention, and the people in adopting the same as well, that the proposal as finally adopted should be construed to mean the same as when referred to the committee.

If this be a legitimate source of light, we are supported in the conclusion above suggested that "public work" as found in the constitutional amendment comprehends the maintenance, repair, replacement, alteration and operation as well as the construction of a public undertaking.

The terms "maintenance, repair, replacement, alteration" and "operation," as well as "buildings, plants, machinery" were stricken out by the committee manifestly for the sole reason that they were all included within the meaning of the phrase "public work" itself, as we have heretofore attempted to point out. But that this provision was intended to be applicable to the maintenance and operation, etc., as well as to original construction, is evidenced by the declaration of its author in the very introduction of the debate (Con. P. and D., 1339) as follows:

> "This proposal provides for an eight-hour day on public works, and not to exceed forty-eight hours a week in the maintenance and operation of public works."

It may be here pointed out also, if the plural form of the word "works" be deemed fundamental to the distinction made in the case of Ellis vs. U. S., supra, that the plural form was used in the proposal as originally adopted by the convention.

It then having been determined that the term "public work" as used in the constitutional provision and statute under consideration comprehends the maintenance, repair, construction, alteration and operation of all public undertakings of a structural nature of substantial permanence and of general public utility, whether fixed or otherwise, it follows that all persons employed in the work of such con-

struction, maintenance, alteration, repair and operation are engaged on a public work, and if the same is aided or carried on by the state or any political subdivision thereof, such persons and their employers are subject to the penalties, possess the rights and are entitled to the remedies therein set forth.

Works of a structural character would clearly include waterworks, light plants, streets, bridges, highways and all such other public utilities as are constructed, maintained or operated by or with the aid of the state or any political subdivision thereof for the use or benefit of the public, and hence all persons employed to perform any part of the work of constructing, maintaining and operating, or of repairing, altering or replacing such public utility, would be subject to the provisions of sections 17-1 and 17-2, G. C., 103 O. L., 854, above quoted, whether such persons be laborers, mechanics, civil engineers, or architects, and whether employed directly by the state or political subdivision, or by one who contracts with the political subdivision or other person, firm or corporation for the performance of the labor necessary to the construction, maintenance, repair, alteration, replacement or operation of such public utility.

Policemen and firemen are by the terms of the statute specifically exempt from its provision. It will be readily observed, however, that the police and fire departments of municipal corporations are not public works within the definition of that phrase as hereinbefore stated, and hence policemen and firemen would not have been subject to the provisions of sections 17-1 and 17-2, G. C., supra, had no mention been made of them whatever.

It may be further observed that this statute applies only to workmen. It is not every one who may be engaged in a public service that is subject to the provisions thereof. The distinction between a workman and a public officer is so marked as to avoid necessity of discussion. It is sufficient to say that public officers of the state or of a political subdivision thereof are not within the terms of the statutes. Aside from the fact that public officers are not workmen, they are not generally engaged on work of a structural nature.

Inquiry is made as to the application of this statute to workmen under civil service who were employed prior to July 1, 1915, and to be paid by the month. Persons who are employed by the month are as clearly within the application of the statute as those employed by the day. The month, year or other period of employment, in the very nature of things is constituted of a fixed and definite number of days which may not be in excess of eight hours in length nor more than six eight-hour days in any one calendar week.

Workmen who are under civil service and who were employed in the construction, maintenance, repair, replacement or operation of any public work hereinbefore defined, and who were lawfully employed prior to July 1, 1915, for a definite and fixed term extending beyond that date, are not subject to the penal provisions of section 17-2, G. C., supra, during the term of such employment.

It will be noted that while section 37, of article II, of the constitution, is not penal, it is self-executing and became effective January 1, 1913, and hence any contract entered into since that date would be subject to the constitutional provision, notwithstanding that the statute making such violation a criminal offense did not become operative until July 1, 1915.

It would then follow that contracts of employment upon any public work as above defined, carried on or aided by the state or any political subdivision thereof, which have been entered into since July 1, 1915, are in contravention of section 37, of article II, of the constitution, and are subject to the penal provisions of section 17-2, G. C., supra.

As above stated, streets, roads and all public thoroughfares are works of a structural nature, of substantial permanence and of general public utility. The cleaning of the same is necessary to the proper maintenance thereof, and hence

persons employed in cleaning the streets, as well as those engaged in their construction, repair, replacement or alteration, are subject to the terms of sections 17-1 and 17-2, G. C., supra.

Municipal power, heat, light and water plants are obviously within the above definition of public works, and all persons engaged in the construction, repair, replacement, alteration, maintenance or operation thereof are subject to the provisions of said section. In like manner would wharfs, docks, waterways, sewers, constructed or maintained, repaired or operated for public use or benefit by the state or any political subdivision thereof, or by the aid thereof, come within the terms of this statute.

Respectfully,
EDWARD C. TURNER,
Attorney General.

815.

AGRICULTURAL COMMISSION—LEASE FOR ASSISTANT TO STATE VETERINARIAN—TERMS OF SUCH LEASE CONTINUE LONGER THAN APPROPRIATIONS EXISTING AT TIME IT WAS ENTERED INTO—LEASE VOID.

A lease made by the agricultural commission of Ohio, since by its terms the lease will continue longer than appropriations existing at the time it was entered into, is void.

COLUMBUS, OHIO, September 10, 1915.

Board of Agriculture of Ohio, Columbus, Ohio.

GENTLEMEN:—On August 30th Mr. A. S. Cooley, the state veterinarian appointed by your board, requested the opinion of this department as follows:

> "The agricultural commission of Ohio having entered into a contract leasing one room, No. 5, on the south side of the Interurban building, Lima, Ohio, for the purpose of an office, and there being no further use of said office, the same being vacant and no use to this department, we request your opinion as to whether said lease is binding and whether the board of agriculture must continue to pay twenty-five ($25.00) dollars per month for rental thereof?"

He enclosed with his letter of inquiry a copy of the lease referred to and also correspondence had between Dr. Paul Fischer, state veterinarian of the agricultural commission of Ohio, and Mr. T. P. Riddle, of Lima, Ohio, who was an employe of said board.

The lease calls for one room on the second floor, on the south side of the Interurban building at Lima, Ohio, for the purpose of an office, and from the letter of Mr. Riddle under date of July 29, 1915, it appears that the purpose for which such room was rented was for demonstration work in hog cholera extermination.

The lease was made between The Ohio Electric Company and the agricultural commission of Ohio for the room aforesaid, the lease being "for and during the full term of two (2) years next ensuing from the 1st day of June, 1914, and to be fully completed and ended on the 31st day of May, 1916; yielding and paying

therefor, during the said term, six hundred dollars ($600.00), payable as follows: Twenty-five dollars ($25.00) per month, in advance, on the last day of the preceding month at the office of the assistant general manager of said lessor in said building.'' The lease was executed on the first day of June, 1914.

The first question to be determined in this matter is as to whether or not there was any authority on the part of the agricultural commission of Ohio to enter into a lease for office room other than the office provided for in the state capitol in the city of Columbus under the provisions of section 1086, G. C. (103 O. L., 306.)

Under the provisions of section 1108, G. C. (103 O. L., 310), the agricultural commission is required to ''promote and protect the live stock interests of the state, prevent the spread of dangerously infectious and contagious diseases, and co-operate with the bureau of animal industry of the United States department of agriculture in such work. The agricultural commission may use all proper means in the prevention of the spread of dangerous by (dangerously) infectious and contagious diseases among domestic animals and in providing for the extermination of such diseases.''

It appearing that the office rented in Lima was for the purpose of demonstration work for hog cholera prevention, I am of the opinion that there was ample authority in section 1108, hereinbefore in part quoted, to authorize the agricultural commission to enter into a lease for rooms for the purposes hereinbefore mentioned.

It is to be noted, however, that the lease was for a term of two years beginning on the 1st day of June, 1914, and therefore ending on the 31st day of May, 1916. The question arises first as to whether or not there was on June 1, 1914, any appropriation for the payment of the rent for the premises in question and, if so, whether there was an appropriation which would extend for the entire period covered by the lease.

House bill No. 590, passed April 16, 1913, and receiving the approval of the governor on May 9, 1913, appropriated certain sums to the Ohio state board of agriculture, and under this appropriation if there were any funds therein appropriated which would be available to pay rent for the premises aforesaid, the same would terminate two years thereafter, or at least by May 10, 1915, the payment of rent being, of course, a current expense.

House bill No. 47 (104 O. L., 64), passed February 16, 1914, was approved by the governor on February 17, 1914, and filed in the office of the secretary of state on the same day, and the appropriations made therein will only be good until at the latest February 17, 1916.

There was therefore, assuming that proper appropriation had been made for the payment of rent, no appropriation existent at the time the lease was made that would not lapse prior to the termination of the lease, and, consequently, would entail upon a subsequent legislature the duty of providing funds to meet the balance of the rent money after the lapsing of the appropriations existent at the time of the execution of the lease.

The case of State vs. Medbery, 7 O. S., 522, is a leading case in Ohio relative to the right of the various departments of state government to enter into a contract for the payment of money, which contract will not terminate before the expiration of the appropriation existing at the time the contract is made. I do not find that this case has ever been questioned in Ohio. The decision of the court is very exhaustive, and I will not undertake to go further than cite the case in this opinion. The case involved the right of the board of public works to enter into a contract for five years in pursuance of a statute passed authorizing such contract. The court, on page 542, states the following:

"We are of the opinion that the discretion, power and responsibility of the general assembly conferred by the constitution were not intended to be, and therefore cannot be thus superseded; that no law could be passed under which an agreement between the board of public works and two or more citizens could, for any period beyond two years, divest the general assembly of its discretion and control over the appropriations or the amount of the appropriations to be made for repairs of the public works of the state."

If the legislature could not pass a bill authorizing a department or board to enter into a contract beyond the expiration of the appropriation made by such legislature, then surely a board could not enter into a contract, the termination of which would extend beyond the expiration of the appropriation made by the legislature to it. Consequently, I am of the opinion that the contract entered into by the agricultural commission of Ohio and the Ohio Electric Company for the premises at Lima is absolutely void, there being no authority conferred upon the agent of the state to enter into any such a contract. The mere fact that a contract might have been entered into for a period less than the period for which the contract was actually entered into would not make the contract partially valid and partially void, but since the term of the contract is an entire term, the entire contract is void; and, therefore, without passing on the question as to whether or not with the abolishment of the agricultural commission of Ohio the contract entered into by such board would cease, I am of the opinion that the contract at its inception was absolutely void and, therefore, there is no obligation on your board to continue to pay the rent.

Respectfully,
EDWARD C. TURNER,
Attorney General.

816.

NATIONAL FLAG—CONSTRUCTION OF PENAL STATUTES WITH REFERENCE TO SAME.

Sections 12396, 12397 *and* 12398, *G. C., being penal statutes, are to be strictly construed.*

A mere showing of red and white stripes on a blue background with no representation of the stars or the general outline or other distinctive indicia of the flag is not considered a representation of the flag within the purview of the above sections of the General Code.

COLUMBUS, OHIO, September 10, 1915.

HON. C. F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I have your letter of September 3d, requesting my written opinion as follows:

"We desire to secure your construction of sections 12396 and 12397, of the General Code, with reference to the desecration of the national flag, and we enclose herein a printed design which we wish you would kindly return with your opinion.

"We desire to know whether in your opinion the users and publishers of this design which shows a banner upon which is a shield printed in red,

white and blue and bearing the words 'We give national mileage coupons free fare anywhere' are guilty of a violation of section 12396, of the General Code of Ohio. You will note that no stars anywhere appear upon the design, although the colors and stripes do appear.

"We would appreciate a reply at your earliest convenience and the return of the design enclosed."

Section 12396, of the General Code, found in the chapter entitled "Offenses Against the State and the United States," provides as follows:

"Whoever prints, paints or places a word, figure, mark, picture or design upon a flag, standard, color or ensign of the United States, or the state of Ohio, or causes it to be done, or exposes, or causes to be exposed, such flag, standard, color or ensign upon which is printed, painted or placed, or to which is attached or appended a word, figure, mark, picture or design, or manufactures or has in possession an article of merchandise upon which is placed or attached a representation of such flag, standard, color or ensign, or publicly mutilates, defiles, defaces or casts contempt upon such flag, standard, color or ensign, shall be fined not more than one hundred dollars or imprisoned not more than thirty days, or both."

Section 12397, of the General Code, provides:

"The words 'flag,' 'standard,' 'color' or 'ensign,' as used in the next preceding section, shall include any flag, standard, color or ensign or a picture or representation thereof, made of or represented on any substance, and purporting to be a flag, standard, color or ensign of the United States, or the state of Ohio, or a picture or representation thereof, upon which shall be shown the colors, the stars and the stripes in any number thereof, or which might appear to represent a flag, standard, color or ensign of the United States or state of Ohio."

Section 12398, of the General Code, provides:

"The next two preceding sections shall not apply to an act permitted by the statutes of the United States or by the United States army and navy regulations, nor shall they apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant or commission of appointment to office, society lodge or emblem, ornamental picture, or stationary for use in correspondence, on which shall be printed, painted or placed said flag disconnected from an advertisement."

While it might well be argued that the placing of printed matter upon a banner or design of the character enclosed with your letter is in contravention of the purpose and policy of the act, yet under the fundamental rules of strict construction applicable to all penal laws, a statute defining a crime cannot be extended by construction to persons or things not within its descriptive terms though they may appear to be within the reason and spirit of the statutes.

In case the State vs. Meyers, 56 O. S., 340, the court say:

"Persons cannot be made subject to such statute by implication. Only those transactions are included in them which are within both their spirit and letter; and all doubts in the interpretation of such statutes are to be resolved in favor of the accused."

In the case of Little vs. Seminary, 72 O. S., 417, the following is quoted from the opinion of the court:

> "The rule that the reason of a law is its life, so frequently helpful in the determination of questions arising at common law, must have a restricted application in the interpretation of the statutes. Courts are not permitted to go beyond the plain meaning of the language which the legislature has used to express its intention."

Whether or not any particular design or picture is a representation of the flag, or might appear to be a representation of the flag or colors of the United States or of the state of Ohio, is essentially a question of fact, and with respect to the enclosed printed design it must be conceded that the question of its representing or appearing to represent a flag, standard, color or ensign of the United States or of the state of Ohio is by no means free from speculation.

There has been no judicial determination of the scope of the application of this legislation, and I am unable to say, as a matter of law, that it would extend to a printed design of the character enclosed with your letter.

I am of the opinion, on the contrary, that the mere showing of the red and white stripes on a blue background with no representation of the stars or the general outline of the flag, as in the case of the enclosed design, is not such a representation of the flag as is comprehended by the provisions of the penal statutes under consideration.

I therefore advise that in my opinion the placing of the printed matter upon such a design as the one enclosed cannot be regarded as a violation of the provisions of section 12396, of the General Code subjecting the person so printing or using such design to the penalty prescribed in said section. I return herewith the design you submitted, as per your request.

Respectfully,
EDWARD C. TURNER,
Attorney General.

817.

COUNTY CHILDREN'S HOME—WHEN DESTROYED, TRUSTEES DISBANDED AND NO OTHER HOME PROVIDED—WARDS OF FORMER HOME ARE CAST UPON COUNTY COMMISSIONERS—DESTITUTE CHILDREN.

In the case of a children's home having been destroyed and swept away by flood or other casualty, its trustees having disbanded and no other home provided, the care of destitute children, including wards of the former home, is cast upon the county commissioners to the same extent as if the home had never been established.

COLUMBUS, OHIO, September 10, 1915.

HON. H. H. SHIRER, *Secretary, Board of State Charities, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for an opinion upon a statement of facts as follows:

> "During the flood of March, 1913, the children's home of Morgan county was destroyed. Previous to that time a number of children had

been placed in foster homes by the trustees of that institution. Since the destruction of the home the board of trustees has been disbanded. Section 3093, General Code, particularly states that the trustees of such a home are responsible for all children placed in foster homes. Inasmuch as the home has been disbanded, are the former trustees still responsible for the supervision of these children, and if not, who is?''

Under the statement of facts presented, the children's home of Morgan county having been destroyed and the board of trustees of the home disbanded, it is my opinion that the duties resting upon the former board of trustees, which no longer exists, are now cast upon the county commissioners under the provisions of section 3092, General Code, as amended, page 891, of the 103 O. L., as follows:

''In any county where such home has not already been provided, the board of commissioners shall make temporary provisions for destitute children by transferring them to the nearest children's home where they can be received and kept at the expense of the county, or by leasing suitable premises for that purpose, which shall be furnished, provided and managed in all respects as provided by law for the support and management of children's homes, but if such child be not abandoned or surrendered by its parents, a complaint must first be filed with the juvenile court setting forth the facts as to such children, and if such court commits such children to an institution or agency for the care of children, then said commissioners may pay reasonable board for such child, whether placed in an institution or with a private family. But the commissioners may provide for the care and support of such children within their respective counties, in the manner deemed best for the interests of such children which may include the payment of board for such children in a private home, when placed therein by an institution or society certified by the board of state charities as provided by section 1352-1, of the General Code, and they shall levy an additional tax, which shall be used for that purpose only.''

It is my opinion therefore that the situation is the same as if a home had not been provided, and that until such time such a home may be provided, if at all, the county commissioners will be charged with the care and support of destitute children, as provided in Sec. 3092, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney General.

818.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF CERTAIN HIGHWAYS.

COLUMBUS, OHIO, September 11, 1915.

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

DEAR SIR:—I have your letters of September 7 and September 9, 1915, transmitting to me for examination final resolutions as to the following roads:

"Montgomery county—Dayton-Indianapolis Rd., petition No. 978, I. C. H. No. 28;

"Montgomery county—Dayton-Troy Eastern Rd., petition No. 1674, I. C. H. No. 487;

"Butler county—Cincinnati-Hamilton Rd., petition No. 1307, I. C. H. No. 39;

"Allen county—Lima-Delphos Rd., petition No. 1530, I. C. H. No. 127;

"Cuyahoga county—Cleveland-East Liverpool Rd., petition No. 1389, I. C. H. No. 12;

"Clermont county—Cincinnati-Chillicothe Rd., petition No. 588."

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

819.

PROBATE JUDGE—WHERE JUDGE IS ILL, JUDGE OF COURT OF COMMON PLEAS HAS AUTHORTIY TO DISCHARGE DUTIES IMPOSED BY LAW ON PROBATE JUDGE.

The provisions of section 1592, G. C., do not confer any jurisdiction on the court of common pleas but the authority therein conferred is limited to the judge of said court and the said section is not in contravention of any provisions of the constitution.

COLUMBUS, OHIO, September 11, 1915.

HON. MEEKER TERWILLIGER, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—I have your letter of September 8, 1915, in which you state the probate judge of your county is now incapacitated from attending to the duties of his office, by reason of sickness, and that this situation is likely to continue for some time. You further state that under the provisions of section 1592, G. C., as amended in 103 O. L., page 257, your common pleas judge is ready and willing to discharge the duties imposed by law upon the probate judge, but that some doubt exists as to the constitutionality of the section aforesaid. The question which you submit in that connection is:

"Does the constitution of Ohio confer any exclusive jurisdiction upon the probate court, which by section 1592, G. C., could not be extended to the common pleas court?"

Section 1592, G. C., aforesaid, as amended in 103 O. L., page 257, provides as follows:

"When it is made to appear to the satisfaction of a common pleas judge within a county that the probate judge thereof is absent therefrom he may perform the duties conferred upon him by law for the admission of patients to a hospital for the insane of the state, or when it is made to

appear that the probate judge is incapacitated on account of illness, or is absent from his county in obedience to an order issued by the governor of the state directing him to perform military service, he may perform all the duties conferred by law upon such probate judge. The record of such cases shall be made and preserved in the proper records of the probate court by the deputy clerk thereof.''

It would seem that the situation, as now existing in your county, is covered by that provision of the foregoing section which authorizes the judge of the common pleas court to perform all the duties conferred by law upon the probate judge, when the latter is incapacitated on account of illness from attending to the duties of his office. In this connection it must be observed that this section does not confer, or undertake to confer, any authority or jurisdiction on the court of common pleas. Its only purpose is to provide a substitute judge for the probate judge, when conditions arise as described in said section, which make such substitution necessary. The person selected and empowered by the provisions of this section to act when such conditions occur, is the *judge* of the common pleas court. The jurisdiction of the probate court is not invaded in the slightest degree by the conferring of this authority upon a common pleas judge, nor is the common pleas court in any manner involved in the administration by the judge so selected of the duties thus imposed.

It must be remembered, as remarked by Justice Story, that a court is not a judge nor a judge a court, and this distinction, as well as the matter of the jurisdiction of the two courts, seems to have been present in the legislative minds in the enactment of this section. It is further provided therein that the record of all cases disposed of by said common pleas judge shall be made and preserved in the proper records of the probate court by the deputy clerk thereof. This provision clearly divorces all business transacted by the common pleas judge, in the discharge of the duties of the probate judge, from any connection whatever with the business of the common pleas court.

A brief examination of another section of the General Code, whereby jurisdiction is expressly conferred upon the common pleas court as distinguished from the common pleas judge, will, I think, demonstrate this distinction more clearly.

By the provisions of section 1589, G. C., when a probate judge is interested in any proceedings in the probate court, jurisdiction is conferred upon the common pleas court to hear and determine such matters, but in this section it is further provided that all original papers in such cases so transferred shall be certified to the common pleas court. This requirement is important because it transfers completely from the probate court to the common pleas court all such cases and proceedings coming within the provisions of said section, and they thereafter become a part of the records of the common pleas court.

In the succeeding section it is provided that upon final decision and settlement, an authenticated transcript of the orders, judgments and proceedings of the common pleas court shall be filed and recorded in the probate court.

When these provisions are compared with the requirements of section 1592, and considered in connection with the constitutional question that might be involved were jurisdiction conferred upon the common pleas court instead of the judge of the court of common pleas, it would seem that the legislature intended the provisions of the latter section to be applied and administered as literally expressed.

Another section of the code, viz., 10492, also indicates the distinction here made. By the provisions of paragraph one of this section, any common pleas judge may take proof of wills and approve bonds to be given in case of the ab-

sence or sickness of the probate judge, but the record of such act must be preserved in the probate court. Again, by the provisions of section 11194, G. C., when a probate judge in office desires to contract the marital relation, he must apply to the judge of the court of common pleas for his license. It could not be claimed for a moment that this provision conferred jurisdiction upon the court of common pleas to issue said license, and further said section provides that the record of the issuing of such license shall be made in the probate court.

Attention may be called to the provisions of section 1593, G. C., but this section is confined to lunacy matters, and jurisdiction as to them is not expressly given by constitutional provision to the probate court. Under sections 4 and 8, of article IV, of the constitution, jurisdiction as to lunacy matters may be conferred by law on the common pleas or probate court, or both.

In view of the provisions of the various sections above noted, I think it clearly appears, when the legislature conferred jurisdiction upon the judge of the common pleas court and not upon the common pleas court, it manifestly intended such jurisdiction should be exercised entirely independent of any connection with that court, and this conclusion applies to the section in question. When a judge of the common pleas court, under the provisions of said section 1592, G. C., performs any duty imposed by it upon him, he is required to authenticate the record he makes, but he does so by signing his name as common pleas judge acting as probate judge, and the record is complete.

I conclude, therefore, that section 1592, G. C., supra, confers no jurisdiction upon the common pleas court under any of the conditions therein provided for, and that it does not invade the jurisdiction of the probate court, and is not in contravention of any of the provisions of the constitution.

Respectfully,

EDWARD C. TURNER,

Attorney General.

820.

CIVIL SERVICE COMMISSION—APPOINTMENT OF SECRETARY—COMMISSION'S DUTY TO CONDUCT A COMPETITIVE EXAMINATION—THEN CHOOSE FROM ELIGIBLE LIST.

It is the duty of the civil service commission to prepare an eligible list from which a secretary is to be chosen; that is to be done by competitive examination; the commission is to have supervision and control of such examination.

COLUMBUS, OHIO, September 11, 1915.

State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of your letter of September 9th, 1915, requesting an opinion as follows:

> "Some two or three weeks before the old civil service law expired, I wrote you requesting an opinion as to the manner in which the new law should appoint its secretary. The new law reads:
>
> " 'The commission shall appoint, from an eligible list to be prepared by said commission, within thirty days after its appointment, a

secretary who shall be ex-officio chief examiner, whose duty it shall be, under the direction of the commission, to keep minutes of the proceedings of the commission * * *'

"Under the interpretation the commission has given it, we decided we would advertise an examination for this position and that we would invite two other people, disinterested, to assist in conducting this examination, and that the list that would be created in this way the three highest should be certified to the commission, and they should select one of the three that they deemed best qualified for this position.

"I am enclosing you a copy of a letter from Mr. Mayo Fesler. The experience of the former board in giving this examination over to outside parties entirely resulted in the annulment of the examination, and I feel that the law requires this commission to take the responsibility of creating an eligible list, and I ask you to instruct us as to what your interpretation of the law is. I am enclosing the copy of Mr. Fesler's letter that you may be informed of his contention."

As I understand it your commission, after requesting an opinion, became convinced that the law was clear and cancelled your request. However, the question being again asked, I hasten to advise you.

The statutes which require an interpretation are sections 486-5 and 486-12, G. C., amended 106 O. L., 402 and 408, which in part provide:

"Sec. 486-5. The commission shall appoint, from an eligible list to be prepared by said commission, within thirty days after its appointment, a secretary * * *.

"Sec. 486-12. From the returns of the examinations the commission shall prepare an eligible list of the persons whose general average standing upon examinations for such grade or class is not less than the minimum fixed by the rules of the commission and who are otherwise eligible * * *."

The second of these two provisions is a general one not of itself applicable to the appointment of the secretary of the commission. However, the term "eligible list," as used in section 486-5, is so far limited by other provisions of the act, such as that quoted, as in my opinion to denote as an essential element of its meaning the holding of a competitive examination of applicants for the position. That is to say, I do not think it would be lawful for the commission to prepare an eligible list otherwise than by holding a competitive examination.

There are some fundamental legal principles to which attention should be called now at the outset of your administration which, if adhered to, will instill full confidence of the public in your administration of the office.

The duty and responsibility of administering the civil service law is placed upon your commission alone. Its guardianship is not entrusted to any outside person or persons, nor may they dictate to you how your affairs shall be conducted.

The preparation of an eligible list for secretary of the commission is your duty under the law, and the commission would have no more right to surrender its supervision of such examination than it would to ignore other plain provisions of the law and pick a personal favorite for its secretary.

While the commission, if it so desires, may with propriety invite *disinterested* citizens to assist in conducting the particular examination, it would be highly improper to allow any person, who had or might have any preconceived notion of who ought to be your secretary, to have the slightest thing to do with the examination.

On the other hand, warned by the fiasco of a similar examination held under the old board, you, who are charged directly by the law with the responsibility and under the sanctity of your oaths of office, may with even more propriety conduct the examination yourselves, letting the manner in which you do it and the results thereof speak for themselves.

I therefore advise you that it is your duty under the law to prepare the eligible list from which your secretary is to be chosen; that this is to be done by competitive examination; that while you may invite other disinterested citizens to participate with you, you have no right under the law to surrender all supervision or control of said examination to outside parties.

Respectfully,
EDWARD C. TURNER,
Attorney General.

821.

TREASURER OF STATE—EMPLOYES IN OFFICE ARE IN CLASSIFIED SERVICE OF STATE CIVIL SERVICE—PRACTICABILITY OF ASCERTAINING MERIT AND FITNESS BY COMPETITIVE EXAMINATION LEFT TO CIVIL SERVICE COMMISSION.

The employes in the office of the treasurer of state are not, as a matter of law, outside the classified service of the state civil service.

It is within the province of the civil service commission to determine whether or not it is practicable to ascertain the merit and fitness of such employes by competitive examinations.

COLUMBUS, OHIO, September 13, 1915.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of August 25th, 1915, requesting my opinion as follows:

> "The law creating classified service has been questioned by the treasurer of state, R. W. Archer (as far as it is applied to his office), who claims that it is in conflict with the letter and spirit of a law passed by the general assembly March 17th, 1915, and known as amended senate bill No. 297; and particularly that section of the said law which reads as follows:
>
> " 'The treasurer of state upon receipt of any such moneys shall set up an account thereof, as otherwise provided by law, and shall have authority to employ such assistants, clerical and expert help, or other employes, as he may deem necessary for the proper discharge of the duties of his office.'
>
> "We would be glad to have your interpretation of the question involved by the foregoing statement of facts."

I am also in receipt of a letter from the treasurer of state in which he enumerates the duties of the several employes in his office.

The term "such moneys" used in the quotation in your letter from section 1 of amended senate bill No. 297, section 24-1 of the General Code (106 O. L., 500), refers in part to moneys paid into the treasury by banks for the expenses of ex-

amination; to taxes paid by foreign insurance companies; to fees collected for the inspection of petroleum, illuminating oils, gasoline and naphtha; to charges and earnings received by the state institutions and by the Ohio board of state charities; to expenses of operating and maintaining the bureau of inspection and supervision of public offices paid in by the several counties, and the expenses of inspecting and auditing public accounts and reports paid in by the several taxing districts.

Section 8 of the civil service law, as amended (106 O. L., 400), being section 486-8 of the General Code, defines the classified service as follows:

> "* * * * * * *
>
> "(b) The classified service shall comprise all persons in the employ of the state, the several counties, cities and city school districts thereof, not specifically included in the unclassified service, to be designated as the the competitive class and the unskilled labor class.
>
> "1. The competitive class shall include all positions and employments now existing or hereafter created in the state, the counties, cities and city school districts thereof, for which it is practicable to determine the merit and fitness of applicants by competitive examinations. Appointments shall be made to, or employment shall be given in, all positions in the competitive class that are not filled by promotion, reinstatement, transfer or reduction, as provided in this act, and the rules of the commission, by appointment from those certified to the appointing officer in accordance with the provisions of this act.
>
> "2. The unskilled labor class shall include ordinary unskilled laborers. Vacancies in the labor class shall be filled by appointment from lists of applicants registered by the commission. The commission shall in its rules require an applicant for registration in the labor class to furnish such evidence or take such tests as it may deem proper with respect to age, residence, physical condition, ability to labor, honesty, sobriety, industry, capacity and experience in the work or employment for which he applies. * * * *"

I am unable to agree with the contention of the treasurer of state that the provisions of the civil service law just quoted are, so far as the same are applicable to the employes in his office, in conflict with the letter and the spirit of the language quoted in your letter from section 24-1 of the General Code (106 O. L., 500).

The provisions of section 24-1, of the General Code may afford strong argument to be considered by the civil service commission in deciding whether "it is practicable to determine the merit and fitness" of certain applicants by competitive examinations, but it cannot be said that such employes are, solely by virtue of the language of said section 24-1 of the General Code, removed from the classified service.

As stated to your commission in my opinions of February 1, 1915, and of August 7, 1915, the question of whether it is practicable to determine the merit and fitness of applicants for a particular position is one to be determined in the first instance by your commission. No hard and fast rule may be laid down to govern every instance which may arise. The presumption, however, is that all positions, except those specifically exempted in the act, are within the competitive classified service unless your commission specifically finds that it is not practicable to determine the merit and fitness of the candidates for the particular position by competitive examination.

This determination of the civil service commission will be subject to review in the courts, and in this connection your attention is called to secton 486-29 of the General Code (106 O. L., 418), which reads as follows :

"TAXPAYERS' RIGHT OF ACTION. The right of any taxpayer to bring an action to restrain the payment of compensation to any person appointed to or holding any office or place of employment in violation of the provisions of this act, shall not be limited or denied by reason of the fact that said office or place of employment shall have been classified as, *or determined to be classified as, not subject to competitive examination;* provided, however, that any judgment or injunction granted or made in any such action shall be prospective only, and shall not affect payments already made or due to such persons by the proper disbursing officers, in accordance with the civil service rules in force at the time of such payments."

Respectfully,
EDWARD C. TURNER,
Attorney General.

822.

TOWNSHIP CEMETERY—FORM OF BALLOT WHERE TOWNSHIP TRUSTEES DESIRE TO SUBMIT ESTABLISHMENT OF SAME TO ELECTORS.

In an election at which there is to be submitted to the electors of a township the proposition of establishing a township cemetery and levying a tax therefor, under sections 3445, *G. C., et seq., the proposition should be placed on the ballot for township officers in the following form:*

	Cemetery	YES
	Cemetery	NO

COLUMBUS, OHIO, September 14, 1915.

HON. JOSEPH T. MICKLETHWAIT, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—I acknowledge receipt of yours of September 9, 1915, as follows:

"I will greatly appreciate an opinion from you on the following at an early date:

"As the trustees of a township in this county wish to submit to the electors thereof at the election next November the question of establishing a township cemetery, as provided in section 3445 of the General Code of this state, some questions arise in connection with section 3446 of the General Code, which provides the manner of submitting the proposition and the form of the ballot.

"*First*—Section 3446, G. C., provides how those who favor the question are to indicate it, but fails to state how those opposed to it shall indicate their position. How is that to be done?

"*Second*—If the intention of the legislature was that the word 'cemetery' was to be written on the ballots by those who favored it, would not all those ballots on which that word was not written count against the proposition?

"*Third*—Could not this question be legally submitted by having the proposition printed on the ballots (either the regular ballot for township officers or on a separate ballot) with the words 'yes' and 'no' printed thereon, thus giving to the electors a better way to indicate their wishes in the matter."

The provision for the submission to the electors of a township of the question of levying a tax for cemetery purposes, as referred to by you, was first enacted March 14, 1853, 51 O. L., 496. That provision of said act pertinent to the question under consideration is found in section 30 of the same, and reads as follows:

'and if a majority of the voters at any such election, shall deposit ballots having written or printed thereon 'tax for burying-ground,' the trustees shall immediately notify the auditor of the county," etc.

This provision remained unchanged until the codification of 1880, when it was incorporated therein as a part of section 1465, Revised Statutes, in the following form:

"and the electors who favor the proposition shall put on their ballots for township officers the word 'cemetery;' and if a majority of all the votes given at such election is in favor of the proposition, the trustees shall procure the lands for that purpose and levy the taxes as aforesaid."

This continued to be the law governing the matter now in question until the amendment of section 1465, R. S., April 2, 1906, 98 O. L., 251. Until this amendment the law clearly defined the method of voting upon the proposition of taxation for cemetery purposes to be to write upon the ballot for township offices the word "cemetery" by all those in favor of such proposition. If such number of electors of the township so wrote "cemetery" upon the ballots for township officers as constituted a majority of all the votes given in the township at such election, the levying of a tax was thereby approved, otherwise the proposition was defeated.

This provision was again amended, however, in 98 O. L., 257, to read as follows:

"and the electors who favor the proposition shall put on their ballots for township offices the word 'cemetery' and if a majority of the votes given at such election on such proposition is in favor of the proposition, the trustees shall procure the lands for that purpose and levy taxes as aforesaid."

Thus the legislature changed substantially the basis from which to determine whether the proposition had been approved, but continued the prescribed manner of voting thereon. Theretofore, not voting at all on the proposition was in effect a vote against the proposition, or a negative vote, hence the lack of necessity for

any provision for another method of expressing a disapproval of the proposition, or negative sentiment. That is to say, it was sufficient then to provide only an affirmative expression on the question.

By a change of the basis of determining the result of such an election from a majority of those voting at that election to a majority of those voting on the proposition, in the very nature of the case rendered it necessary that opportunity be given for the expression of a negative choice. This the general assembly failed to expressly do, and this provision was incorporated in the General Code by the codifying commission in the language of section 3446, as follows:

> "The electors who favor the proposition shall place on their ballots for township offices the word 'cemetery.' If a majority of the votes given at such election on such proposition is in favor thereof, the trustees shall procure the lands for that purpose and levy taxes as hereinbefore provided."

The language here is substantially the same and under the familiar rule of construction will be interpreted to mean the same as the provisions of section 1465, R. S., as amended in 98 O. L., 251, supra, and hence a continuation of the necessity for an opportunity of the electors to express a negative choice on the proposition in a manner other than by failure to vote thereon, since upon the basis here prescribed a failure of an elector to vote on the proposition is not in any sense, or in any way, a negative vote on such proposition.

It would hardly be argued that the legislature intended that the basis of determining the result of the election should be changed to the number of those voting on the proposition, thus limiting the determination of the result to a consideration of the number of those voting on the proposition only, and at the same time make it impossible for an elector to vote against such proposition. At least such an absurdity is not to be presumed.

It was, it seems, manifestly the intent of the general assembly that if a majority of those electors voting on such proposition were favorable thereto, the trustees should then be authorized to procure the necessary lands and to levy the taxes provided therefor. By reason of the amendment in 98 O. L., 251, above referred to, so clearly changing the basis of calculation, I am, under the present state of the law, unable to concur in your suggestion that not to vote at all upon the proposition is now in effect a negative vote thereon. I think, however, that a practical solution of the question under consideration is found in your third question.

The first and fundamental principle of an election is that every elector have a fair, adequate and equal opportunity to give full expression to his choice on any matter that is a proper subject of an election. I am therefore of opinion that the proposition of taxation for the purchase and maintenance of a cemetery should be placed on the ballot for township officers in the following form:

	Cemetery	YES
	Cemetery	NO

that the elector may express his choice by placing a cross mark in front of that

statement for which he desires to vote, and that the ballots should be counted in the same manner as provided for counting ballots on other questions, and if a majority of those so voting upon this question vote in favor thereof, the same will thereby be approved.

Respectfully,
EDWARD C. TURNER,
Attorney General.

823.

LONGVIEW HOSPITAL—INSANE PERSONS CAN BE TRANSFERRED TO LIMA STATE HOSPITAL WHEN LONGVIEW IS PURCHASED BY STATE —SUPPLEMENT TO OPINION NO. 688, AUGUST 5, 1915—STATE HOSPITAL.

The only way that Longview hospital would be considered a "state hospital" would be by an agreement for the rental and ultimate purchase of said property made between the Ohio board of administration and the county commissioners of Hamilton county.

COLUMBUS, OHIO, September 14, 1915.

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

MY DEAR JUDGE:—As explained to you when you were here recently, answer to your letter of August 13th was accidently overlooked. You ask me in this letter to take up the Longview asylum matter again, which was dealt with in opinion No. 688, on August 5, 1915. I see no reason to change that opinion.

You further ask me in your letter to "ascertain if there is not some other way in which Longview asylum, true only partly maintained by the state, can get the advantage of transfer of seventy or more dangerous insane persons to the Lima institution."

I respectfully call your attention to the provisions of house bill No. 532, passed April 28, 1913, and found in 103 O. L. 754, entitled "An act to provide for the lease by the state of the Longview hospital and other property in Hamilton county; for its use, maintenance and management, and the ultimate purchase thereof."

Section 1 of the act grants authority to the Ohio board of administration and the county commissioners "to contract for the rental and use, and to provide for the ultimate purchase by the state *for a hospital for the insane;* of the property now owned by Hamilton county and occupied and used as the Longview hospital for the insane and the county infirmary, or so much thereof as in the judgment of the board of administration may be needed, subject to the terms and conditions of this act."

Section 2 authorizes the board of administration to lease said property from the county commissioners at a rental not to exceed sixty thousand dollars per annum, until the value of such property can be ascertained.

Section 3 authorizes the submission of the question of value to arbitration, on failure of the county commissioners and the Ohio board of administration to agree, and provides that after the value is fixed at which the state may purchase, four per cent. thereof shall be the annual rental.

Section 4 makes provision for the payment of the rental and for the purchase of the property, and provides that "upon any payment on the principal sum of the value of such property the rental shall be proportionately reduced."

Section 6 of said act provides as follows:

> "Said property when rented or acquired by the state of Ohio shall be used and maintained as a hospital for the insane to be known as 'The Longview State Hospital,' and the Ohio board of administration shall have all the powers with respect thereto conferred as to the institutions named in section 1835, of the General Code, and by title 5, division 1, chapter 2 of the General Code."

Section 7 provides for a deed when the purchase price has been fully paid.

This is the only authority I can find that would in any way authorize the inmates of said hospital to be transferred to the Lima state hospital. By that I mean that only by an agreement for the rental and ultimate purchase of said property made between the Ohio board of administration and the county commissioners of Hamilton county would the said Longview hospital be considered a "state hospital."

Respectfully,
EDWARD C. TURNER,
Attorney General.

824.

WHEN CIVIL SERVICE COMMISSION CERTIFIES PAY ROLL UPON WHICH SALARY WARRANT IS DRAWN—PERSON ENTITLED TO SUCH WARRANT—WHEN COMMISSION FAILS TO CERTIFY, NOT ENTITLED TO WARRANT—NO ELIGIBLE LISTS, THE INCUMBENT OF POSITION MAY BE APPOINTED PROVISIONALLY—PROVISIONAL APPOINTMENTS ARE UNDER SECTION 486-14, OF CIVIL SERVICE LAW—NO "EMERGENCY" WHERE THERE IS A QUALIFIED PERSON ELIGIBLE FOR PROVISIONAL APPOINTMENT—SALARY OF OFFICE FOLLOWS OFFICE—RIGHT OF EMPLOYE TO RECOVER COMPENSATION *AS SUCH* DEPENDS UPON ACTUAL PERFORMANCE OF SERVICE—EMPLOYES DISCHARGED IN VIOLATION OF CIVIL SERVICE LAW CANNOT RECOVER COMPENSATION FROM STATE, EVEN THOUGH VACANT PLACES HAVE NOT BEEN FILLED MEANWHILE AND NO SALARIES PAID TO OTHER PERSONS.

The auditor of state in issuing warrants for salary and compensation of persons in the classified service of the state should be guided exclusively by the certificate of the state civil service commission attached to the pay roll on which such warrant is demanded. If such certificate is attached, the auditor of state may lawfully issue the warrant; if it is not attached, he must refuse to issue a warrant. In neither event does the duty of the auditor of state to issue a warrant depend upon the legality under the civil service law of the appointment of the person demanding its issuance, except as established by the presence or absence of such certificate.

Except in a case of emergency, the only event in which the appointing power upon the taking effect of the civil service act of 1915, *might, in the absence of*

an eligible list appoint, to succeed a person who has theretofore been holding a position in the classified service otherwise than by virtue of having passed a competitive examination, a person other than such prior incumbent is when such other person has been nominated by the appointing authority to the civil service commission for non-competitive examination and certified by such civil service commission after such examination. But if these steps have been taken such appointment may lawfully be made, and in that event the appointing authority is not obliged to appoint the previous incumbent provisionally until the completion of the eligible list.

Under no circumstances may an employe of the state unlawfully discharged from a civil service position recover from the state the compensation attaching to the position from which he was dismissed during his separation therefrom.

The only circumstance under which the amount of compensation paid to a person unlawfully appointed to a position in the civil service of the state can be recovered from the head of the department is when such compensation was paid without the pay roll certificate of the civil service commission, as provided in section 486-21, *G. C., as amended.*

The liability of the auditor of state upon his official bond for having issued a warrant upon the treasury for the payment of salary of a person whose appointment is thereafter held by the courts to have been made without authority of law or violation of the civil service law is, as to civil service positions, dependent upon compliance or noncompliance with section 486-21 *requiring the certification of pay rolls by the civil service commission. If the auditor of state issues his warrant on a certified pay roll he is protected; if he issues his warrant without such certification, he may be held liable at the suit of a citizen. He can in no event be made liable at the suit of the ultimately successful claimant of the position.*

COLUMBUS, OHIO, September 14, 1915.

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

DEAR SIR:—I have given careful consideration to your letter of September 7th, wherein you request my opinion upon the following questions:

> "1. Is a person entitled to a warrant upon the treasury, who was appointed without his name having been certified by the civil service commission to the appointing power from a list of eligibles, and who was not an incumbent in the civil service on the 30th day of August, 1915?
>
> "2. If the appointing power does not desire to retain as a provisional employe an incumbent originally appointed without competitive examination, and holding his place on the 30th day of August, 1915, may he appoint another whose name has not been certified by the civil service commission from an eligible list?
>
> "3. If there be no eligible list, may the appointing officer appoint, as a provisional employe, a person other than the incumbent on the 30th day of August, 1915?
>
> "4. In cases where an employe, holding a position on the 30th day of August, 1915, under a non-competitive examination, is dropped from employment, without cause, pursuant to the act of May 27, 1915, but such employe does not commence an action in his own behalf to compel his reinstatement to the position, and the court in some other proceeding holds the act of May 27, 1915, invalid, can such employe hold the state

for his salary during the time of such separation from his employment, even in the event that his position has been filled by appointment of another?

"5. In cases where an employe, holding a position on the 30th day of August, 1915, under a non-competitive examination, is dropped from employment without cause, pursuant to the act of May 27, 1915, but such employe commences an action at law to compel his reinstatement to such position, and the court thereafter holds the act of May 27, 1915, invalid and orders his reinstatement, can the state be held for his salary during such time of separation from his position, even though his position has been filled by the appointment of another, and such other has been paid a salary during such period?

"6. In the event that an employe has been dropped from his position under the act of May 27, 1915, and another has been appointed to fill his place, and the salary of the position is paid to such other person on the voucher of the head of the department, and thereafter the employe so dropped from his position is reinstated to his employment by reason of the court holding the act of May 27, 1915, invalid, can the auditor of state, under section 270, G. C., or any other provision of law, recover from the said head of the department the amount of salary so paid to the other person:

"(a) In cases where the other person is appointed from a list of eligibles?

"(b) Where the other person is not appointed from a list of eligibles, in cases where such eligible list exists?

"(c) In cases where the other person is provisionally appointed and no eligible list exists?

"7. Can the auditor of state be held to be liable upon his official bond for having issued a warrant upon the treasury for the payment of the salary of a person whose appointment is thereafter held by the courts to have been made without authority of law, or in violation of the civil service laws? Does the auditor of state issue such warrants at his peril?"

Your first question cannot be categorically answered. Under some circumstances a person may be lawfully appointed to a position generally in the classified service of the state in the manner mentioned by you, an instance of which I shall give in answering your second question.

From the viewpoint of the auditor of state, therefore, it is impossible to tell, without further inquiry, as to whether a person appointed under the circumstances stated by you is lawfully appointed under the civil service rules and statutes, and even if such person has not been lawfully appointed it does not therefore follow that he is not entitled to a warrant covering his compensation for services actually rendered, as I shall hereinafter point out.

I call your attention to the positive and unmistakable provisions of section 486-21, of the General Code (106 O. L., 415). This section, which is of itself an answer to several of the questions you present, is as follows:

"Sec. 486-21. PAY ROLLS. After the taking effect of this act it shall be unlawful for the auditor of state, or for any fiscal officer of any county, city or city school district thereof, to draw, sign or issue or authorize the drawing, signing or issuing of any warrant on the treasurer or other disbursing officer of the state, or of any county, city or city school district thereof, to pay any salary or compensation to any officer, clerk,

employe, or other person in the classified service unless an estimate, pay roll or account for such salary or compensation containing the name of each person to be paid, shall bear the certificate of the state civil service commission, or, in case of the service of a city, the certificate of the municipal service commission of such city, that the persons named in such estimate, pay roll or account have been appointed, promoted, reduced, suspended, or laid off or are being employed in pursuance of this act and the rules adopted thereunder.

"Any sum paid contrary to the provisions of this section may be recovered from any officer or officers making such payment in contravention of the provisions of law and of the rules made in pursuance of law; or from any officer signing or countersigning or authorizing the signing or countersigning of any warrant for the payment of the same, or from the sureties on his official bond, in an action in the courts of the state, maintained by a citizen resident therein. All moneys recovered in any action brought under the provisions of this section must, when collected, be paid into the treasury of the state or appropriate civil divisions thereof, except that the plaintiff in any action shall be entitled to recover his own taxable costs of such action."

This section, in my opinion, is the sole and absolute measure of the rights of the different officers and parties concerned in your first inquiry.

If the civil service commission has certified to the pay roll having the name of the person in question thereon, he is entitled to warrant (provided, of course, he has actually rendered the services compensation for which is intended to be afforded to him thereby). The auditor of state is protected by such certificate. It is only sums paid contrary to the provisions of this section—i. e., paid without certificate of the civil service commission—that can be recovered under favor of the last part of the section, and even such recovery can be made only from "any officer or officers making such payment * * * or from any officer signing or countersigning or authorizing the signing or countersigning of any warrant for the payment of the same, or from the sureties on his official bond;" and in no event can the recovery authorized by the latter part of the section be had from the person receiving the warrant himself.

That this is the meaning of this section and the spirit of the entire civil service act in this regard is further demonstrated by section 486-29 of the civil service law, relating to taxpayers' right of action, which provides in part that

"Provided, however, that any judgment or injunction granted or made in any such action shall be prospective only, and shall not affect payments already made or due to such persons by the proper disbursing officers, in accordance with the civil service rules in force at the time of such payments."

This policy is further embodied in section 486-28, which visits a penalty for illegal appointment, not upon the appointee, but upon the officer violating the civil service rules and statutes in making such appointments. In other words, throughout the civil service law there is manifested an intention to protect the person actually rendering the service, though illegally appointed, and to punish the officer making the appointment or the disbursements; but the disbursing officers are, as already stated, protected by a certificate of the civil service commission.

For all these reasons, I answer your first question by advising that if the civil service commission certifies to the pay roll upon which the warrant in ques-

tion is to be drawn, then the person in question is entitled to such warrant; but if the civil service commission does not certify thereto, he is not entitled to such warrant. Of course, if the failure of the civil service commission to certify to such pay roll is wrongful, it may be compelled by mandamus.

Your second question involves consideration of the schedule of the civil service act of 1915, designated as section 486-31. I previously advised the civil service commission in opinions, copies of which I enclose herewith, that the effect of the section as a whole terminated the *right* of each person holding a position in the classified service who has not passed a regular competitive examination, and who has not been in the service seven years next preceding January 1, 1915, to continue in the service of the state without positive action on the part of the appointing authority. The appointing authority must certify the name of such person to the proper civil service commission, and such name thereupon shall be placed upon the proper eligible list. If such an eligible list is in existence the name is added to the first three names thereon and certified to the appointing authority. If no such eligible list is in existence the name, nevertheless, must go on the eligible list when the same is prepared, in addition to three others; but in the meanwhile the incumbent in question may be appointed provisionally.

Your question requires me to consider specifically the meaning and application of the following sentence in section 486-31:

> "If no eligible list exists such person *may* be retained as a provisional employe until such time, consistent with reasonable diligence, as the commission can prepare eligible lists, when such position shall be filled as prescribed in this act * * *."

The precise question is as to whether or not the word "may," as used in this sentence, must be read "shall." In my opinion, a negative answer must be given to this question; but such an answer is by no means a complete answer to the question as you state it. Provisional appointments are regulated generally by section 486-14 of the law, which provides in part as follows:

> "Whenever there are urgent reasons for filling a vacancy in any position in the classified service and the commission is unable to certify to the appointing officer, upon requisition by the latter, a list of persons eligible for appointment after a competitive examination, the appointing officer may nominate a person to the commission for non-competitive examination, and if such nominee shall be certified by the commission as qualified after such non-competitive examination, he may be appointed provisionally to fill such vacancy until a selection and appointment can be made after competitive examination; but such provisional appointment shall continue in force only until regular appointment can be made from eligible lists prepared by the commission, and such eligible lists shall be prepared within ninety days thereafter. In case of an emergency an appointment may be made without regard to the rules of this act, but in no case to continue longer than thirty days, and in no case shall successive appointments be made. Provided, however, that interim or temporary appointments, made necessary by reason of sickness or disability of regular officers, employes or subordinates shall continue only during such period of sickness or disability, subject to rules to be provided for by the commission."

Reading this provision in connection with section 486-31 I think the following conclusions are established:

The incumbent to whom section 486-31 applies is entitled to the same benefit as a person certified for provisional appointment by the commission *after non-competitive examination*, as provided in section 486-14; but if some other person is chosen by the appointing authority and the civil service commission has examined such other person by non-competitive examination, and certified that such other is qualified after such non-competitive examination, then, in my opinion, the appointing authority may appoint the other person so certified. I do not think that where there is an incumbent to whom section 486-31 applies the last sentence of the first paragraph of section 486-14 can be so applied as to permit the appointing authority to make "an emergency * * appointment * * without regard to the rules of this act." There could not be said to be an "emergency" where there is a qualified person eligible for provisional appointment. Of course, if the incumbent should be discharged for cause after having been provisionally appointed, or had been properly dismissed under the old civil service law prior to the going into effect of the new act, or should resign, or be ill or die, under such and similar circumstances an emergency might exist; so that I do not mean to say that any and all emergency appointments which may have been made immediately upon the taking effect of the new act are in any sense illegal.

Therefore, to recapitulate, it is my opinion that if the appointing power does not desire to retain as a provisional employe an incumbent originally appointed without competitive examination and holding his place on August 30, 1915, the only circumstance under which such desire may be fulfilled is when some other person has been nominated by the appointing authority to the commission for non-competitive examination, has been given such non-competitive examination and has been certified by the commission to the appointing authority as qualified therefor. In that event, the person so nominated, examined and certified may be appointed by the appointing authority in preference to the former incumbent. But in no event may the appointing authority make a provisional appointment under the circumstances named by you without "regard to the rules of this act." In other words, while the word "may" in section 486-31 cannot be read "must," yet the only circumstance (other than the existence of a real emergency) under which any person other than the incumbent can be appointed provisionally when no eligible list existed at the time the act went into effect is that last above described, namely, the certification by the civil service commission of another person as qualified after a non-competitive examination.

The foregoing answer to your second question constitutes also an answer to your third question, which appears to be but a variation of your second question.

Your fourth and fifth questions may be considered and answered together, inasmuch as both of them relate to the right of an *employe* of the state who has been wrongfully discharged from a civil service position to recover from the state the salary pertaining to the position during the time he was ousted therefrom, in the event of the successful establishment by him of his wrongful discharge and his right to continue in the service.

This general question was very carefully considered by the supreme court of the state of New York, appellate division, in the case of Sutliffe vs. the city of New York, 117 N. Y., Supp., 813. It was held therein that the civil service law does not destroy the distinction between an officer and an employe; that the right of an officer to the salary and emoluments of his office follows and attaches to the right or title to the office itself, whereas the right of an employe to recover compensation *as such* depends upon the actual performance of services. In other words, the salary of an office follows the office, regardless of whether or not services are performed, but the salary of an employment depends upon the performance of services.

In case an employment is wrongfully terminated, the result is called a breach of contract. While the incumbency of a person holding a civil service position lacks some of the elements of a contractual relation between the incumbent and the public, yet the remedy for its wrongful termination is the remedy as for breach of contract, unles the position is an office. The measure of damages for the breach is *prima facie*, of course, the amount of the compensation which the person would have received had he remained in the public employment; but it may be shown by the public in mitigation of damages that the compensation which the person ought to have received has been paid to another who has actually performed the services, or even that the person who was wrongfully ousted from his employment has, by devoting his time to other pursuits while ousted therefrom, which he could not have followed had he remained in the public employment, earned considerable sums of money, thus reducing his actual damages. In short, the right of the ousted employe is to recover damages, and not to recover the compensation itself.

Now the two cases presented by you relate to *employes* of the *state*. Being employes, their rights against the public are measured by the rule above laid down; and their employer being the *state*, their rights are unenforcible without special legislative sanction, because the state cannot be sued without its consent, and even though such consent has in general terms been given by amended article I, section 16 of the constitution, yet that provision is not self-executing and no general and permanent legislation has been passed under favor thereof.

Again, there is no appropriation from which such liabilities of the state may be paid.

It is the state, and the state alone, which would have to be regarded as the defaulting party under the circumstances named by you, as when a state officer, in pursuance of law and an appropriation made therefor, makes an employment or any other contract he binds the state, and not himself personally. Personal liability of any officer is not brought in question by your questions. It is not necessary for me, therefore, to consider the same. I may say generally that if any such liability exists it could not be founded on contract, but would necessarily sound in tort.

For the foregoing reasons I advise that in no event mentioned in your fourth and fifth questions, or in any other similar event, could an employe discharged from the service of the state in violation of the civil service law recover from the state the compensation which should have been paid to him after establishing his right to continue in the employment. Even if his place had not been filled in the meantime, so that the compensation in question had not been paid to another person, the same result would follow.

For the sake of clearness I may point out that if a similar question should arise in the government of a city the result would be quite different, as the New York case which I have cited abundantly establishes; for a city may be sued in its corporate capacity.

As a final conclusion, then, in connection with your fourth and fifth questions, I beg to advise that any claims against the state which might come into existence under the circumstances imagined by you could be provided for only by legislative appropriation.

Part of the discussion responsive to your first question also applies to your sixth question. I am required by the form thereof to consider section 270, of the General Code. Said section provides in part that:

> "Sec. 270. * * * If a warrant for the payment of money from the state treasury has been illegally or improperly issued by the auditor of

state, or the amount of a warrant issued by him exceeds the sum which should have been named therein, and payment of such warrant or excess has been made by the treasurer of state, the auditor shall cause the amount of such warrant or excess to be collected and returned to the state treasury without delay. Unless the account of the appropriation from which it was paid has been closed, the auditor of state shall credit the amount collected to such appropriation; but, if such account has been closed, he shall credit the amount so collected to the general revenue fund."

It will be observed that this provision covers more generally the ground covered, at least in part, by the second paragraph of section 486-21, above quoted. An analysis of the two provisions in connection with the present question is not out of place. Section 270 does not authorize, it will be observed, the collection by the auditor of state from the person drawing the voucher, as you inquire. In other words, it is merely silent in this particular. Looking to that section alone, I am unable to see that it warrants the recovery of any money, under the circumstances imagined by you in stating your sixth question, from the head of the department making the appointment. The statute does not itself make such head of the department liable therefor, and in the absence of any statute no liability exists. Such officer has not received the illegally expended sum, even assuming it to have been illegally expended. The only theory upon which, independently of any statute, there could be a recovery from a public officer on account of the payment made to a third party, where there was no direct or indirect pecuniary benefit to the public officer, would be that the public had been damaged by the illegal act, and in such event the cause of action would sound in tort and would certainly not be covered by section 270, of the General Code.

Section 486-21, as I have pointed out, applies only to the recovery of payments on pay rolls not certified to by the civil service commission. The old civil service law contains substantially the same provisions, so that if the old civil service law should be held to be in effect, the same result would follow. (See section 486-21, 103 O. L., 710.)

My advice to your, therefore, in answer to your sixth question is that under the circumstances therein named there can be no recovery from the head of the department by the auditor of state, whether the other person is appointed in any of the three ways mentioned by you or not, unless the state civil service commission has not certified to the pay roll; but if the state civil service commission has not certified to the pay roll, then there may be a recovery, agreeable to the provision of section 486-21, from the head of the department or from the auditor of state, in an action brought by any citizen for the use of the state, regardless of the circumstances surrounding the appointment of the "other person."

For the sake of accuracy I may remark that I understand that two members of the present civil service commission were members of the commission appointed by the governor under the provisions of the civil service law of 1913. Under all the circumstances, I advise that the present commission is the *de jure* commission under the act of 1915, if that be the law now in effect, and the *de facto* civil service commission under the act of 1913, if that act be now in effect. In either event the certificate of the civil service commission constitutes a protection to the auditor of state, and its presence or absence determines the question of liability under section 486-21.

I may also add in answer to your sixth question that I have considered the bearing of the act providing for the inspection and supervision of public offices, and particularly section 286, of the General Code, as amended 103 O. L., 507. It is sufficient to state in this connection that, in my opinion, nothing in this section

or the sections supplementary thereto enlarges what would otherwise be the right of the auditor of state or the attorney general to collect moneys from the *head of the department* under the circumstances mentioned by you.

I think I have already indicated in a general way what my answer to your seventh question will be. Without repeating any of the discussion which has preceded, beg to advise, in my opinion, the auditor of state is protected in the issuance of a warrant upon the treasury of the state for the payment of the salary of a person whose appointment is thereafter held by the courts to have been made without authority of law, or in violation of the civil service rules by the certificate of the civil service commission. The auditor should pay no warrants for compensation of persons in the civil service of the state without such certificate attached to the pay roll, but where a certificate is so attached he cannot be held to answer for payment made in accordance therewith at the suit of the adverse claimant to the position, even though such adverse claimant should thereafter establish the illegality of the appointment of the "other person." This statement applies whether the position involved is an office or an employment. If it is an office, it is well settled that the disbursing officer is protected in making payments to a *de facto* incumbent, even though the *de jure* incumbent may serve notice on him not to do so. If it is an employment, then, as I have pointed out, the right to recover the compensation as such is dependent upon the actual rendition of the services, and a wrongfully ousted employe could not, therefore, recover from the disbursing officer or on his official bond.

The above remarks apply primarily to imaginary suits brought by the ultimately successful claimant of the position. Save under section 486-21, of the General Code, however, no cause of action against the auditor of state as a disbursing officer could, under any circumstances, arise in favor of the state itself or of any person other than such claimant.

I feel constrained to make two general observations in connection with the whole foregoing opinion:

In the first place, the new civil service law, and particularly section 8 thereof (section 486-8 of the General Code), materially changes the line of demarcation between the classified and the unclassified service of the state. In those cases in which the unclassified service has been thus *enlarged*, as compared with that service as it existed under the former law, an appointment may, of course, lawfully be made under the new act, assuming it to be in effect, without regard to eligible lists and without regard to whether or not the incumbent of the position prior to August 30, 1915, was in the classified or unclassified service or had taken a competitive or non-competitive examination, or no examination whatsoever.

In the second place, I wish to observe that I have given this opinion to you as an accommodation in appreciation of your position in the matter. However, it deals almost entirely with *imaginary* questions. Actual questions, should they arise, may present features not considered in this opinion, and for that reason I wish to warn you that the foregoing opinion is only entitled to that weight, even as the advice of one administrative officer to another, which should be accorded to any expression of view on purely moot questions, and should be strictly limited to the assumed facts as you have stated them.

Respectfully,

EDWARD C. TURNER,

Attorney General.

825.

NORMAL SCHOOL COMMISSION TO SELECT SITE FOR SCHOOL IN EASTERN OHIO—NO APPROPRIATION FOR EXPENSES OF COMMISSION IN REGULAR APPROPRIATION BILLS—NO EMERGENCY WITHIN PROVISIONS OF SECTION 2313, G. C., 106 O. L., 182—EMERGENCY BOARD WITHOUT AUTHORITY TO PAY SUCH EXPENSES.

The fact that an act providing for the rendition of gratuitous services by the members of a commission authorizes them to be reimbursed for their actual and necessary expenses, but fails to appropriate therefor, together with the failure of the general assembly to make provision for such expenses in the regular appropriation bills, does not constitute an "emergency requiring the expenditure of money not specifically provided by law" within the meaning of section 2313, G. C., as amended, 106 O. L., 182; consequently, the emergency board may not set aside a part of its appropriation for the payment of such expenses.

COLUMBUS, OHIO, September 14, 1915.

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

DEAR SIR:—Your letter of September 10th, just received, requests my opinion as follows:

> "At a conference held at the governor's office today, being present the normal school commission to select a site for normal school in eastern Ohio, under an act of May 27, 1915, hereto attached, and the auditor of state, it was discovered that the enabling act creating the commission did not carry any appropriation for necessary expenses of such commission. Neither do the appropriation bills carry any such appropriation.
>
> "Would it be lawful, under sections 2312 and 2313, G. C., for the emergency board to appropriate money to pay the necessary expenses of this commission while performing the duties enjoined upon them by statute? There is no way that the expenses of this commission can be met except by an emergency appropriation.
>
> "Would the contingent fund appropriated to the governor of Ohio be applicable for this purpose?"

The act providing for the appointment of a commission to establish one additional normal school and to provide for the maintenance thereof, expressly provides that: (106 O. L. 490.)

> "The members of said commission shall serve without compensation, but shall be paid their reasonable and necessary expenses while in the discharge of their official duties."

and that such members shall be appointed and commence the discharge of their duties "within thirty days after the *passage* of this act" (which must be understood, of course, to mean the date on which the act becomes effective).

The emergency board is now governed, *inter alia*, by sections 2312 and 2313 of the General Code, as amended 106 O. L. 182.

Section 2313, as amended by said act, provides as follows:

> "In case of any deficiency in any of the appropriations for the expenses of an institution, department or commission of the state for any

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

This section standing by itself amounts to nothing. Machinery necessary to its complete execution is found in sections 2313-1 and 2313-2, as enacted 103 O. L. 445, which were not in anywise amended in 1915. These sections provide as follows:

"Sec. 2313-1. The written authority provided for in section 2313 shall specify the amount in which and the purposes for which obligations may be created as therein provided. It shall be filed with the auditor of state and he shall open an account in his office in accordance therewith for the payment of any obligation authorized as provided in section 2313. The applicant receiving such authority shall issue proper vouchers to the auditor of state, as provided by section two hundred and forty-four of the General Code. Upon receipt of such vouchers the auditor, if satisfied as provided in said section that the claim presented is due and payable, shall draw his warrant on the treasurer of state against any appropriation for the uses and purposes of the emergency board.

"Sec. 2313-2. The general assembly may provide at the time of making the appropriations for the expenses of the various institutions, commissions and departments of state a contingent appropriation for the uses and purposes of the emergency board. *Such appropriation unless otherwise specifically provided by law shall be applied exclusively to the payment of deficiencies in other current appropriations as provided by sections* 2312, 2313, 2313-1. Except as provided in said sections, no officer, board, commission or department of state shall have authority to create any deficiency, nor to incur any indebtedness on behalf of the state. The emergency board provided for in said sections may not in any biennial period authorize the expenditure of any sum or sums of money exceeding in the aggregate the amount appropriated for its uses and purposes as hereinbefore provided."

It will be noted that there is an inconsistency between section 2313 in its present form and the two supplementary sections above quoted, in that section 2313 empowers the emergency board to authorize a state department to create obligations within the scope of the purpose for which an appropriation has been made *or* to expend money not specifically provided for by law; whereas, section 2313-2 expressly provides that the general appropriation for the uses and purposes of the emergency board shall be applied "exclusively to the payment of deficiencies in other current appropriations."

This discrepancy is explained by noting the changes that were made in section 2313 by its amendment of 1915. As it stood prior to such amendment it empowered the emergency board merely to authorize the creation of obligations

within the scope of the purpose for which an appropriation had been made when, on account of any "unforeseen emergency" happening "when the general assembly is not in session," the further creation of obligations against such appropriation would create a "deficiency" therein.

The power to authorize the incurring of further obligations was thus much more limited under the law of 1913 than it is under the present statute, for the law of 1913 made no attempt to empower the emergency board to authorize the expenditure of money "not specifically provided for by law," as does the present section.

A very nice question is thus raised as to whether or not the subsequent enactment of amended section 2313 has any effect upon the unamended section 2313-2, so as to make the appropriation for the uses and purposes of the emergency board available for the payment of expenditures "not specifically provided for by law" but allowed by the emergency board, as well as for the payment of "deficiencies in other current appropriations" when permitted by the order of the emergency board.

I entertain grave doubts as to whether the emergency board has any power to permit or authorize the disbursement of its appropriation in payment of expenditures "not specifically provided for by law" but allowed by it, not only because section 2313-2 does not in terms permit such expenditures, and because further the change in section 2313 is scarcely, in my opinion, sufficient to affect the meaning of section 2313-2 (my reason here being that an amendment by implication cannot, in my judgment, have the effect of creating a new or enlarged power); but also for the reason that there is serious doubt, in my mind as to whether the distinctly new matter in section 2313 is constitutional.

However, I observe a less fundamental ground upon which it is possible to base an answer to your question. I call attention to the fact that the emergency board may act in the class of cases now under examination only "in case of an *emergency* requiring the expenditure of money not specifically provided by law * * *."

If the constitutionality of this part of sections 2313 can be sustained at all, it must be upon the basis of a rather narrow meaning of the word "emergency," for section 22 of article II of the constitution provides that

> "No money shall be drawn from the state treasury except in pursuance of specific appropriations made by law."

and while an appropriation of a sum for contingencies related to the purposes for which appropriations were made may perhaps be justified as not constituting a delegation of legislative power, it is clear that a law committing to an administrative tribunal the authority, upon its own motion and in any and all classes of cases, to appropriate money for a purpose for which the general assembly has failed to appropriate anything would be an unconstitutional delegation of legislative power.

I am, therefore, of the opinion that the word "emergency" must be strictly construed, and as between two possible meanings thereof the narrower must be chosen, and one so broad as to do probable violence to the constitutional principles referred to must be rejected.

The exact and primary meaning of the word "emergency" denotes a sudden, unexpected happening. There is at least much less apparent conflict between the statute and the constitutional principle to which I have referred, if the former be so interpreted as to be limited to cases where the general assembly when in session failed to provide the money in question because the necessity therefor

could not be foreseen at the time; or, stated conversely, cases in which the necessity requiring the expenditure of money did not exist when the legislature was in session and could not have been foreseen when the legislature acted.

It is my opinion that the word "emergency" must be so interpreted, and that such an interpretation, besides being required in order to save the statute from rejection on constitutional grounds, is the obvious and primary meaning thereof.

It is my opinion, therefore, that any condition the existence of which could have been as readily seen and provided against when the legislature was in session as at the time the application was made to the emergency board, cannot constitute an "emergency" within the meaning of section 2313.

In another view of the case, the "emergency," in order to satisfy section 2313, must be one of a character apparently requiring immediate appropriation of money. For example, where authority to bind the state by the creation of contractual obligations is necessary in order to meet the conditions, an emergency under other proper circumstances might be said to exist; whereas, if the particular activity can be carried on as well without the immediate appropriation of money as with such appropriation, no emergency can be said to exist. The principle running through the entire field is that of strict construction of these statutes, and the presumption that whatever *can* be sufficiently provided for by direct legislation is not to be regarded as having been committed to the emergency board.

Now with respect to the precise question which you submit, it cannot be said that the legislative purpose embodied in the main act would fail if the allowance which has been requested is not made. As a matter of fact, an appropriation would not have given to the members of the commission to establish the proposed new normal school *any additional substantive rights whatever.* They are just as much entitled to be reimbursed for their actual and necessary expenses under the law as it now stands as they would have been had an appropriation been made for that purpose. The only difference between their present situation and the one in which they would have found themselves had the legislature made an appropriation, is that the reimbursement of their expenses must await a subsequent appropriation instead of being provided for in the remedial sense by an existing appropriation.

The members of the commission may proceed in the discharge of their duties and incur expenses. They have the right to expect that the next session of the general assembly will make an appropriation to reimburse them (and in making such appropriation such session could act by a mere majority vote, because it is not unlawful for them to incur the expenses as it would be unlawful for them to undertake to bind the state by contract. This distinction is not to be forgotten).

On the other hand, the state has the right to expect from the members of this commission, who have accepted appointment as such, that they will serve and perform their duties, regardless of the failure of the legislature to make the appropriation.

It will not, therefore, be presumed that the main law cannot be carried into effect because of the failure of the legislature to make the appropriation, and in point of fact I do not suppose that it can be seriously contended that any such result will ensue.

I am of the opinion, for all the foregoing reasons, that the emergency board may not lawfully appropriate money to pay the necessary expenses of the commission about which you inquire. I do not agree with you that there is no way that the expenses of this commission can be met except by an emergency appro-

priation, but point out that, as I have heretofore stated, these expenses can be provided for just as easily by the next session of the general assembly as they could have been by the last session thereof.

I am further of the opinion that the contingent appropriation for the use of the executive department cannot be applied to this purpose. Without going into detail it is sufficient to state that the commission is no part of the "executive department" as that phrase is used in the appropriation bill.

Respectfully,
EDWARD C. TURNER,
Attorney General.

826.

BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS—NOT REQUIRED THAT ONE BE A REGISTERED ELECTOR TO QUALIFY TO SIGN A REFERENDUM PETITION—MERE FAILURE OF NAME FOUND UPON A PETITION TO APPEAR UPON REGISTRATION LIST IS NOT PER SE SUCH INSUFFICIENCY AS ELECTION BOARD IS REQUIRED TO ESTABLISH IN COURT—QUALIFICATION OF SIGNERS—WHAT ELECTOR MUST PLACE UPON PETITION—RESIDENCE, STREET NUMBER, WARD, PRECINCT IN INK, EACH SIGNER FOR HIMSELF.

Boards of deputy state supervisors of elections in counties containing cities wherein general registration of voters is required by law, are not required by the provisions of section 5175-29i, *G. C.,* 106 *O. L.,* 295, *to proceed to establish in the court of common pleas the insufficiency of signatures upon referendum petitions, which are in every other respect regular and sufficient, by reason of the fact alone that the names of such persons do not appear upon the registration lists.*

Under the provision of the same section deputy state supervisors of elections are required to proceed to establish the insufficiency of all those signatures on those petitions in which the street and number are inconsistent with the ward and precinct as therein stated.

Boards of deputy state supervisors of elections are required, by the provisions of this section, to return the parts of the petition transmitted to them by the secretary of state not later than fifty days before the election. A retention of such parts of petitions, however, beyond this limit, would not of itself invalidate such petitions.

COLUMBUS, OHIO, September 15, 1915.

HON. ROBERT P. DUNCAN, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of September 13, 1915, as follows:

> "As legal adviser of the board of deputy state supervisors of election, of Franklin county, Ohio, this board has submitted to me several questions on which I desire your opinion, owing to the fact that the questions are of state wide interest and importance and that prosecuting attorneys of other counties will be asked to give opinions on the same.
>
> "Referring to section 5175-29i, as amended 106 O. L., 295:

"1st. Is it necessary for the board, in addition to reporting to the secretary of state the names appearing on initiative and referendum petitions which are not upon the registration lists, to proceed to establish the insufficiency of such signatures in an action before the court of common pleas by the method provided in that section?

"2d. Shall this board proceed to establish the insufficiency of signatures where the signer has filled in the correct address from which he is registered but where the ward and precinct filled in are incorrect, i. e., do not correspond to the address given; also where the signer has filled in the correct ward and precinct from which he is registered, but the address filled in does not correspond with the ward and precinct?

"3d. Must this board return the petitions to the secretary of state fifty days before election with a certification of the total number of sufficient signatures thereon, or may this board retain these petitions and withhold this certification until forty days before the election, which is the limit within which to prove the insufficiency of signatures?"

Your inquiry involves a consideration of the following constitutional and statutory provision. That part of section 1g of article II of the constitution, which reads:

"* * * Any initiative, supplementary or referendum petition may be presented in separate parts but each part shall contain a full and correct copy of the title, and text of the law, section or item thereof sought to be referred, or the proposed law or proposed amendment to the constitution. Each signer of any initiative, supplementary or referendum petition must be an elector of the state and shall place on such petition after his name the date of signing and his place of residence. A signer residing outside of a municipality shall state the township and county in which he resides. A resident of a municipality shall state in addition to the name of such municipality, the street and number, if any, of his residence and the ward and precinct in which the same is located. The names of all signers to such petitions shall be written in ink, each signer for himself. To each part of such petition shall be attached the affidavit of the person soliciting the signatures to the same, which affidavit shall contain a statement of the number of the signers of such part of such petition and shall state that each of the signatures attached to such part was made in the presence of the affiant, that to the best of his knowledge and belief each signature on such part is the genuine signature of the person whose name it purports to be, that he believes the persons who have signed it to be electors, that they so signed said petition with knowledge of the contents thereof, that each signer signed the same on the date stated opposite his name; and no other affidavit thereto shall be required. The petition and signatures upon such petitions, so verified, shall be presumed to be in all respects sufficient, unless not later than forty days before the election, it shall be otherwise proved and in such event ten additional days shall be allowed for the filing of additional signatures to such petition. * * *"

Section 5175-29i G. C., 106 O. L., 295-296:

"As soon as the board of deputy state supervisors of elections of a county receives the parts of the petitions transmitted by the secretary of state, it shall keep the same open to public inspection until the time it is required to return the same to the secretary of state.

"In any county containing a city or cities wherein a general registration of voters is required by law, the board of deputy state supervisors of elections of such county shall carefully compare the names of the electors who signed the parts of the petition and who reside in such city, or cities, with the registration lists. If any names appear on the parts of the petition which are not upon the registration lists, such board shall, unless satisfied that the petitioner in question is an elector of said county and qualified to sign the petition, make a note thereof in its report to the secretary of state. It shall also scrutinize all parts of the petition, whether from a city or other political subdivision within the county, for repetition of signatures, illegal signatures and for the omission of any of the formal or other requisites set forth in the constitution. If said board shall find any signature or signatures insufficient, it shall make a note opposite such signature or signatures to that effect, and notify the person or persons who solicited such signatures, or other person or persons interested in the circulation of the part of the petition containing such signatures, of the insufficiency of the same.

"The board of deputy state supervisors of election of said county shall proceed to establish the insufficiency of such signatures in an action before the court of common pleas of such county, which must be brought within three days after the aforesaid notice is served and heard forthwith by the judge of said court, whose decision in the case shall be final. In counties having more than one judge of the court of common pleas, it shall be the duty of the presiding judge to designate the judge before whom such action shall be brought. If the signatures are adjudged sufficient they must be included with the others by the board of deputy state supervisors of election of the county; if they are found insufficient they shall not be so included.

"The petition and signatures upon the parts of the petition, properly verified, shall be presumed to be in all respects sufficient, unless not later than forty days before the election their insufficiency shall be proved, as herein provided, and in such event ten additional days shall be allowed by the secretary of state after such petition or parts of petition have been returned, for the filing of additional signatures to such petition.

"Within twenty-five days after the date when the parts of the petition were transmitted to it by the secretary of state, but not less than fifty days before the election, said board shall return the parts of the petition to the secretary of state, with a certification of the total number of sufficient signatures thereon. The number so certified shall be used by the secretary of state in determining the total number of signatures to the petition, which he shall record and announce. The signatures to the petition and parts of the petition when so certified, shall be in all respects sufficient."

It may first be observed that the manifest and sole purpose of the provisions of section 5175-29i G. C., supra, is, in the last analysis, to restrict the authority of the secretary of state in his determination of the sufficiency of the petitions referred to to a consideration only of those signatures thereon, the legality of which shall have been determined in the manner therein prescribed and to safeguard the authority of the people in initiative and referendum matters against fraud.

Referring to your first inquiry, it will be noted that section 5175-29i G. C., supra, as to cities in which there is general registration of voters, provides that:

"If any names appear on the parts of the petition which are not upon the registration lists, such board shall, unless satisfied that the petitioner in question is an elector of said county and qualified to sign the petition, make a note thereof in its report to the secretary of state."

If we consider this provision alone, it might be argued that as to this particular class of names there is conferred upon the board of deputy state supervisors of elections no further authority or duty in regard thereto than that which is therein expressly stated. It will also be noted that further along it is provided,

"The board of deputy state supervisors of elections of said county shall proceed to establish the insufficiency of such signatures," etc.

If the antecedent of "such" in this provision is all the signatures to which reference is made in the preceding paragraph, it would appear to follow that, without question, the board should proceed to establish the insufficiency of all those signatures which do not appear upon the registration list, unless from other sources of information the board is satisfied that the person whose name appears on the petition is an elector of the county and qualified to sign such petition. On the contrary, if the term "such" relates only to a part of those signatures referred to in the preceding paragraph, then it may be argued with force that the duty to proceed to establish the insufficiency of signatures relates only to those classes of names the insufficiency of which arises from causes other than from a failure to appear upon the registration lists.

An examination of the constitution and statutes, however, fails to disclose any requirement that to be legally qualified in signing an initiative, supplementary or referendum petition, one must be a registered elector. Therefore, the failure of the name of an elector who is qualified to sign a petition to appear upon a registration list, cannot be in any sense said to render the signature of such elector insufficient. While such name may, by reason of this fact, be the subject of inquiry, it is not for that alone insufficient.

While no useful purpose to be served by making note of the fact that a name does not appear upon the registration list in the report required to be made suggests itself, in view of these considerations and the constitutional provision that "the petition and signatures upon such petitions, so verified, shall be presumed to be in all respects sufficient, unless not later than forty days before the election, it shall be otherwise proved * * * ," I am of the opinion that the mere failure of a name found upon a petition to appear upon the registration list, is not of itself such an insufficiency as the board of elections is required to proceed to establish in court.

Considering your second question, it may be said that the requisites of a legal and sufficient signature to an initiative, supplementary or referendum petition are clearly set forth in the constitutional provision above quoted, in the following language:

"Each signer of any initiative, supplementary or referendum petition must be an elector of the state and shall place on such petition after his name the date of signing and his place of residence. A signer residing outside of a municipality shall state the township and county in which he resides. A resident of a municipality shall state in addition to the name of such municipality, the street and number, if any, of his residence and the ward and precinct in which the same is located. The names of all signers to such petitions shall be written in ink, each signer for himself."

In an opinion of my predecessor, Hon. Timothy S. Hogan, under date of July 17, 1913, found at page 1356 of the reports of the attorney general for 1913, it was held that under this provision each signer was required to fill in all the above constitutional requisites to a valid signature himself and that the same might not be filled in by a second party.

The further information as to place of residence is just as essential to certainty of identity as is the name of a signer and in every case indispensable in determining the qualification of persons, whose names appear upon the petition, to sign the same.

In reference to the ward or precinct of those voters who reside in cities, it might be said that if the street and number be stated, the board of elections would thereby have knowledge of the ward and precinct. To this it may be said that this information is not intended solely for the use of the deputy state supervisor of elections, and in the adoption of this provision of the constitution, the people have chosen to place upon the signer the obligation of the responsibility of setting forth the required information correctly, and it is no part of the duty of the board of deputy state supervisors of elections to make any correction or alteration, or to undertake to harmonize any inconsistencies therein. It is not sufficient that as a matter of fact a signer lives at a certain number, street, ward and precinct of a given city, but that his signature upon a petition be sufficient and valid, each and all of these matters must there correctly appear in the prescribed form.

The authority for initiation and referendum is founded solely upon the petition and upon the face of the same must that authority correctly and regularly appear without correction or alteration by a party other than the signer.

I am therefore of the opinion that if upon a comparison it be shown that the street and number, as stated upon the petition, is inconsistent with the ward and precinct therein set forth, the board is required to proceed to establish the insufficiency of such signature.

Your third question involves a consideration and construction of the fourth and fifth paragraphs of said section taken together.

The fourth paragraph aforesaid provides that the petition and signatures shall be presumed sufficient when properly verified unless not later than forty days before the election it shall be otherwise proved.

Standing alone, this paragraph would seem to authorize proceedings to test the sufficiency of petitions to continue until within forty days before the election. That is to say that the proceedings authorized by this section might continue until said date. But paragraph five aforesaid provides that not less than fifty days before the election the parts of the petitions shall be returned to the secretary of state with a certification of the total number of sufficient signatures thereon. The number so certified shall be used by the secretary of state in determining the total number of signatures to the petition which he shall record and announce.

The duties imposed by these provisions of said section must be performed by the secretary of state prior to forty days before the election. They must be done before that time in order that it may be fully ascertained and determined that the petition is sufficient. If found insufficient from lack of names, then ten day's additional time shall be allowed by said secretary for the filing of additional signatures. Manifestly this could not be done if the various boards of deputy supervisors of elections were not required to return said parts of petitions at such a time prior to the limit (forty days) as to enable this work to be finished by the secretary of state by that time. The legislature, therefore, has fixed the time for the return of said parts of the petition at not less than fifty days before the election, thus giving the secretary of state an interim of at least ten days

within which to complete the remaining work of determining the total number of signatures and recording and announcing the same, as provided in the last clause of said paragraph five.

I conclude, therefore, that each board of deputy supervisors of election is required to return the parts of the petition transmitted to it not less than fifty days before the election. The fact, however, that the deputy state supervisors of elections had held the petitions beyond the fifty-day period, would not invalidate the petitions.

I have held this opinion until today in order to get the benefit of decisions of the judges of the courts of common pleas on matters touching your inquiries. I enclose herewith a copy of the journal entry showing the ruling of Hon. Henry W. Coultrap, judge of the court of common pleas of Vinton county, Ohio. I had been promised a copy of the opinion of Judge Estep of the Cuyahoga county common pleas court by this morning, but the same did not arrive.

I have indicated above, so far as applicable to your questions, the duties of the deputy state supervisors of elections in presenting the matters to the judge of the court of common pleas. So far as deputy state supervisors of elections are concerned, the final decision as to what constitutes a sufficient signature rests with the judge of the court of common pleas and that will vary in the different jurisdictions. While Judge Coultrap has held that the writing in of the residence and date of the signature, by a person other than the signer of the petition, invalidates the signature, I am informed that Judge Estep has held directly opposite.

Respectfully,

EDWARD C. TURNER,

Attorney General.

827.

BOARD OF EDUCATION—DUTY UPON SUSPENDING A SCHOOL TO TRANSFER PUPILS TO ANOTHER SCHOOL—ANY SUSPENDED SCHOOL *MAY* BE RE-ESTABLISHED WHENEVER PUPILS QUALIFIED TO ATTEND THE SCHOOL IN SUSPENDED DISTRICT NUMBER TWELVE OR MORE —RE-ESTABLISHMENT MAY BE CARRIED OUT *AT ANY TIME* WHEN ENROLLMENT SHOWS REQUIRED NUMBER.

The local board of education of a school district is the "suspending authority" referred to in the latter part of section 7730, G. C., as amended in 106 *O. L.,* 398.

Where the resolution of a county board of education was passed prior to August 26, 1915, *the date when section 7730, G. C., as amended became effective, but subsequent to the date of the passage of the act of the general assembly amending said section, which resolution directs that certain schools shall be suspended and that the suspension shall be carried into effect after said amendment shall become effective, such action of the county board taken in connection with the action of the local boards suspending said schools in the manner required by said section 7730, G. C., as amended, is a substantial compliance with the requirements of said amended section and such proceedings are legal.*

Under provision of section 7730, G. C., as amended, any suspended school may be re-established in the manner provided in said section whenever the number of pupils, who under the provisions of section 7681, G. C., as amended in 106 *O. L.,* 489, *are qualified to attend the school in the suspended district when the same is re-established and who are enrolled in another school or schools to which they have been transferred by order of the board of education, is twelve or more.*

The local board of education may take the necessary steps to re-establish a suspended school as required by provision of said section 7730, G. C., as amended, at any time the school enrollment of said suspended district shows the required number of pupils.

COLUMBUS, OHIO, September 15, 1915.

HON. FRANK B. GROVE, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—I have your letter of September 4th in which you request my opinion as follows:

> "I desire your opinion upon a question arising under section 7730, G. C., as amended May 27, 1915, and effective August 26, 1915.
>
> "I shall not take the space to quote said section in full, but only the parts necessary to state my question. Said section, in part, provides: 'When the average daily attendance of any school for the preceding year has been below ten, such school shall be suspended and the pupils transferred to another school or schools when directed to do so by the county board of education.'
>
> "On August 16, 1915, our county board of education passed by a unanimous vote a resolution of which the following is a copy:
>
> "'Resolved, That it is the will of the county board of education that the schools known as Oakdale and Beech Point in Athens township, Lower Crab Orchard in Freeport township, No. 2 in German township, Creal's in North township, and No. 7 in Shortcreek township, be suspended and that the suspension shall be carried into effect after section 7730 of the laws passed by the eighty-first general assembly shall become effective.'
>
> "I am informed that the county board took such action on August 16, in order that the local boards of the above-named districts might know

as soon as section 7730 became effective on August 26, that the county board wished such local boards to suspend the above-named districts; and hence would know at the earliest opportunity what district schools would be directed to be suspended by the county board.

"Notice of above resolution was sent to the local boards of above schools, and said named schools were suspended by the local boards, acting in pursuance to the direction of the county board given in above resolution. Such suspensions by the local boards were made after August 26, 1915.

"Section 7730, G. C., as so amended, further provides:

" 'Provided, however, that any suspended school as herein provided, may be re-established by the suspending authority upon its own initiative, or upon a petition asking for re-establishment, signed by a majority of the suspended district, at any time the *school enrollment* of the said suspended district shows twelve or more pupils of *lawful school age.*'

"Certain of said schools now contend that their districts now contain twelve or more pupils of lawful school age, hence the following questions arise:

"1. Under the conditions hereinbefore stated, which is the 'suspending authority,' as stated in 7730, the county board of education or the respective local district boards?

"2. Was the aforesaid resolution, which was adopted August 16, effective under 7730 as a direction to said respective local boards to suspend said schools after August 26, the date when said amended section went into effect?

"3. What is the proper construction of the phrase in above section, 'school enrollment * * * of lawful school age.' Does such language mean that before said schools may be re-established by the suspending authority that there shall be twelve or more pupils in said district between the compulsory school ages of eight to sixteen, or does it mean between the ages of six and twenty-one? How would such 'school enrollment' be determined by the re-establishing authority in order that they may know with certainty when said district contained twelve or more pupils in accordance with the provisions of above section?

"4. If it be shown that any of said suspended districts now contains twelve or more pupils of lawful school age, may the suspending authority immediately re-establish such school and hire a teacher for the coming year, 1915-16?"

Your first question has been answered in opinion No. 799 of this department rendered to Hon. G. O. McGonagle, prosecuting attorney of Morgan county, under date of September 7, 1915. A copy of said opinion is enclosed.

This opinion holds that the local board of education of the school district is the "suspending authority" referred to in the latter part of section 7730, G. C., as amended in 106 O. L., 398.

While the resolution of the county board of education, a copy of which is set forth in your letter, was passed prior to August 26, 1915, the date when section 7730, G. C., as amended in 106 O. L. became effective, I note that said resolution was adopted by said county board after the passage of the act of the general assembly amending said section and in contemplation of the probable going into effect of said amendment. Said resolution provides that the suspension shall be carried into effect after said amendment shall become effective. The action of the local boards, required by provision of said section as amended, having been taken subsequent to said date of August 26, 1915, I am of the opinion, in answer

to your second question, that the action of the county board, taken in connection with the action of the local boards, was a substantial compliance with the requirements of said amended section and that said proceedings are therefore legal.

Your third question calls for a construction of the phrase "at any time the school enrollment of the said suspended district shows twelve or more pupils of lawful school age."

Under the above provision of the statute it is the duty of the board of education of a school district upon suspending a school, to transfer the pupils to another school or schools.

Replying to your third question I am of the opinion that the above phrase means, when taken in connection with the latter provision of section 7730, G. C., as quoted by you, that any suspended school *may* be re-established in the manner provided in said section whenever the number of pupils, who under the provision of section 7681, G. C., as amended in 106 O. L., 489, are qualified to attend the school in the suspended district when the same is re-established and who are enrolled in another school or schools to which they have been transferred by order of the board of education, is twelve or more.

The right of pupils having the aforesaid qualifications to attend another school or schools under said order of transfer, is not limited to pupils between the ages of eight and fifteen years if males, and between the ages of eight and sixteen years if females, who by the provisions of section 7763, G. C., as amended in 104 O. L., 232, must attend either a public, private or parochial school. It follows therefore that if said board of education finds that the number of pupils within said suspended district, having the qualifications as to age and residence provided by section 7681, G. C., is twelve or more as shown by the enrollment of said pupils in the other school or schools to which they have been transferred, said board may proceed in the manner provided by section 7730, G. C., as amended to re-establish a school in said district.

Your fourth question is answered by that part of section 7730, G. C., as amended and as above quoted, which provides that a suspended school may be re-established *at any time* the school enrollment shows the required number of pupils.

Respectfully,
EDWARD C. TURNER,
Attorney General.

828.

EIGHT-HOUR LAW—OHIO UNIVERSITY—JANITORS, PLUMBERS, ENGINEERS AND FIREMEN EMPLOYED BY UNIVERSITY WITHIN PROVISIONS OF LAW—ALSO THOSE EMPLOYED IN STREET PAVING—CITY OF ATHENS.

Work done in removing building and excavating basement cellar, under contract with the Ohio University, work done by janitors, plumbers, engineers and firemen employed by Ohio University, paving of streets of the city of Athens, and other work done thereon for city all comprehended under provisions of eight-hour law since July 1, 1915.

Constitutional amendment became effective January 1, 1913, *but penalty provision contained in eight-hour law only effective from July* 1, 1915. *Work contracted for prior to that date not affected thereby.*

COLUMBUS, OHIO, September 15, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge receipt of your letter of September 9th, which is as follows:

> "I am enclosing you a communication from I. N. Coleman, one of our deputy factory inspectors. You will notice that Mr. Coleman is asking for information as to whether or not certain employments mentioned in his letter come within the provisions of the eight-hour law, which went into effect on July 1, 1915.
>
> "As we are somewhat in doubt on this matter, we would ask you to kindly give us an opinion as to whether or not the employments mentioned in Mr. Coleman's letter come within the provisions of the eight-hour law.
>
> "If you desire any further information in connection with this matter we shall be glad to furnish the same."

With your letter you enclose a communication from Mr. I. N. Coleman, one of your deputy factory inspectors, which letter is as follows:

> "Replying to your letter of the first inst. regarding the working of men over eight hours on public works, will say that upon inquiry that Charles P. Kircher & Co., contractors, of West Union street, Athens, Ohio, have a contract with the Ohio university, of Athens, Ohio, to remove a residence building from a lot owned by the Ohio university and excavate a basement cellar and haul the dirt which is excavated from this cellar upon the campus grounds of the university; this work is now being done and the men and teams employed by Charles P. Kircher & Co. work nine hours per day.
>
> "The employes of the Ohio university who are employed as janitors, plumbers, engineers and firemen work from nine to twelve hours per day.
>
> "The city of Athens under the directions of O. F. Rowland, mayor, are working men on streets and other improvements of the city nine hours per day.
>
> "Charles Mariner, 101 Mill street, Athens, Ohio, has a contract for street paving for the city of Athens, Ohio, and he is working his men and teams nine hours per day."

Replying to your request, I have to advise that it is my opinion that the employments referred to in the letter of Mr. Coleman are embraced within the provisions of the eight-hour law which went into effect on July 1, 1915. It is unnecessary to go into detail with reference to the special features involved in these particular cases, as they are all covered in opinion 814 rendered by this office under date of September 10, 1915, addressed to the bureau of inspection and supervision of public offices, Columbus, Ohio, which opinion will govern in the questions propounded by you, and for your information I am enclosing a copy of the opinion referred to.

It is to be observed that while section 37 of article II of the constitution of the state of Ohio is self-executing and became effective on January 1, 1913, yet the penalty provision of the eight-hour law only became effective on July 1, 1915, and could not be applied to any contracts entered into in violation of the constitutional amendment prior to July 1, 1915.

Respectfully,
EDWARD C. TURNER,
Attorney General.

829.

ABSTRACT OF TITLE AND DEED FOR REAL ESTATE SITUATED IN COVENTRY TOWNSHIP, SUMMIT COUNTY—LAND LYING BETWEEN HIGH WATER MARK OF RESERVOIR AND FEEDER AND CENTER OF ROAD BELONGING TO MARY RYAN.

COLUMBUS, OHIO, September 15, 1915.

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

DEAR SIR:—Some time since you transmitted to me for examination an abstract of title prepared by Henry C. Wilcox & Son, abstractors, of Akron, Ohio, for the following described premises:

> "Situated in the township of Coventry, county of Summit and state of Ohio, and known as part of tract thirteen (13), being all the land lying between high water mark of the reservoir and feeder and the center of the road and more particularly described as follows:
>
> "Beginning at a stake in the center of the road leading through land now or formerly owned by Jacob P. Whitelaw and land now or formerly owned by William Winkelman at the east end of the feeder bridge (said point is about five hundred ninety (590) feet south of the north line of said tract 13, and about five thousand (5,000) feet east of the west line of tract 13); thence in center of road as traveled north fifty-seven degrees (57°) east one hundred forty and 30/100 (140.30) feet; then 0° south thirty minutes (30) west forty-two and 60/100 (42.60) feet; thence south eighteen degrees twenty-five minutes (18° 25′) west sixty-eight and 60/100 (68.60) feet; thence south seventy-four degrees forty-five minutes (74° 45′) west thirty-three and 75/100 (33.75) feet; thence north fifty-eight degrees ten minutes (58° 10′) west seventy-five and 20/100 (75.20) feet, together with any land lying between this traverse and high water mark, and containing seven thousand two hundred fifty (7,250) square feet, or one-sixth of an acre of land, as surveyed June 20, 1901, by T. D. Paul."

I have carefully examined the abstract as submitted and the affidavit made by Isaac Winkelman on September 4 ,1915, which I have attached to the abstract. From my examination of the abstract I am of the opinion that on the eleventh day of August, 1915, Mary Ryan was seized of a good and indefeasible estate in fee simple of said premises, subject only to the following:

1. Mineral rights which were reserved to the grantors in the deed of Samuel Warner, et al., to Henry Thornton, dated February 2, 1875, and recorded in deed book 95, page 118 of the deed records of Summit county, Ohio.

2. The taxes for the year 1915, the amount of which had not been ascertained at the date of the making of this abstract.

I have also examined the deed submitted by you, wherein Mary Ryan, widow of Patrick Ryan, deceased, is grantor, and the state of Ohio, through its superintendent of public works, John I. Miller, is grantee. The deed should be to the state of Ohio. It will therefore be necessary for a new deed to be executed in which the state of Ohio is named as grantee. In the present condition of the title to these premises, Mrs. Ryan will be unable to convey this property to the state of Ohio absolutely free and unincumbered unless she obtains a release of the mineral rights above referred to by a proper instrument of conveyance, and arranges for the payment of taxes.

The abstract of title and deed above referred to are herewith transmitted to you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

830.

STATE ARMORY BOARD—CIVIL SERVICE—DEPARTMENT IS NOT SUCH A PRINCIPAL APPOINTIVE BOARD TO BE ENTITLED TO HAVE CERTAIN EMPLOYES EXEMPT FROM CLASSIFIED SERVICE OF CIVIL SERVICE LAWS.

The state armory board is not "authorized by law to appoint a secretary, assistant or clerk and stenographer" and, therefore, is not as a "principal appointive board" entitled to "two secretaries, assistant or clerks and one personal stenographer" in the unclassified service under paragraph 8 of section 486-8 of the civil service law of 1915 (106 O. L., 405); so that any clerks or employes of the adjutant general's department who may perform services for the state armory board may not be placed in the unclassified service.

COLUMBUS, OHIO, September 16, 1915.

State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge the receipt of your letter of September 10th, in which you state that the department of the adjutant general has submitted to the commission the question whether or not the state armory board is a separate and distinct department and entitled, under section 486-8, paragraph 8, of the present civil service law of Ohio, to have certain of its employes exempted from the classified service of the state.

The paragraph of the civil service law which requires interpretation is as follows: (106 O. L. 405.)

"8. * * * two secretaries, assistant or clerks and one personal stenographer for * * * each of the principal appointive * * * boards * * * authorized by law to appoint such secretary, assistant or clerk and stenographer."

It is evident from your letter that the commission has very carefully considered this question and has arrived at certain intermediate conclusions which, in my opinion, are correct and which, therefore, may be stated without expressing fully the reasons for reaching them. They are as follows:

"1. The state armory board is a 'principal appointive board.'

"2. Whether or not the state armory board may, so to speak, be entitled to the benefits of paragraph 8 of section 486-8 depends upon whether or not the said board is 'authorized by law to appoint such secretary, assistant or clerk and stenographer.'"

As I have said, I agree perfectly with the reasons expressed in the letter of the commission in support of these two propositions, and am of the opinion that the state armory board is a department separate and distinct from the adjutant general's department in so far as the degree of such separation and distinctness might be material as affecting the application thereto of the statute under consideration. I am, however, likewise of the opinion that such separation and distinctness is not of itself sufficient to authorize any employes of the state to be placed in the unclassified service under favor of the statutory exemption above quoted, unless such employes are those which the state armory board as such separate and distinct state agency is "authorized by law to appoint."

Therefore, if the inquiry relates to secretaries, clerks and stenographers at least nominally in the department of the adjutant general, but who are engaged in performing duties pertaining to the department of the state armory board, the answer thereto would depend upon whether or not, regardless of the nature of the duties performed by them, they were appointed under authority of law by the state armory board.

As you point out in your letter, the peculiar question involved here arises by reason of the relation of the state armory board to the department of the adjutant general.

The state armory board owes its existence, its powers and duties to chapter 4 of title XV, part first of the General Code—sections 5253 to 5271, thereof, inclusive.

The powers and duties of the state armory board are provided therein, but the statutes fail by express provision at least to authorize the employment of any assistants, secretaries, clerks and stenographers by the state armory board. In fact there is no authority to appoint reposed in the state armory board at all, save that mentioned in section 5264, which directs the state armory board to appoint for each armory a board of control, consisting of officers of organizations quartered therewith.

Whatever implication may be derived from the related statutes tends at least toward the conclusion that the board has no authority to appoint or employ subordinates; for in general the functions of the board are limited to providing armories and expending, after appropriations properly made, that division of the "state military fund" which is designated as the "state armory fund." The remainder of the "state military fund," designated as the "maintenance Ohio national guard fund," is to be disbursed in all respects by the adjutant general, and the board has therefore nothing to do with. But as to the "state armory fund" it is provided by section 5768 that

"From the 'state armory fund,' the board (the state armory board) shall provide armories by leasing, purchasing or constructing as provided in this chapter."

It is further provided by section 5269:

"All bills authorized by contracts made and approved by the board, shall be paid upon vouchers of the adjutant general."

There is in these statutes at least colorable warrant for the conclusion that the clerical work incident to the conduct by the state armory board of its business is to be performed by the department of the adjutant general.

Now the word "law" as used in the provision of the civil service act now under discussion must mean obviously a permanent statute or an appropriation. There must be found in one of these two sources direct and positive authority for the appointment of a clerk, assistant, secretary or stenographer before the department in question may be said to be "authorized by law to appoint" such subordinates. The mere silence of a permanent statute, together with such implications as may arise therefrom, when coupled with the positive delegation of authority to appoint through the agency of an appropriation bill, may, in a given instance, constitute sufficient authority; but where both are silent; that is, where neither the law nor the appropriation bill by its terms authorizes the appointment or employment of such subordinates, then, in my opinion, the requirements of the civil service law in this particular are not satisfied.

We have seen what the effect of the permanent statutes standing by themselves is in this instance. Turning to the current appropriation law, I find that the appropriations for this and related purposes are made under the general heading "Ohio national guard." Under this heading there are subordinate classifications. First, there is a list of general appropriations under no specified subclassification; then there is a list of appropriations under the heading "Armory fund," one under the heading "Adjutant general," and one under the heading "State house and grounds."

The personal service salary appropriations of the first class are limited to employes connected with the state arsenal. The wage appropriations in this classification are limited to drill and camp pay; the unclassified personal service appropriations are for the purpose of inspections and examinations. Consistently with the scope of these personal service appropriations the maintenance appropriations falling in the first class, upon examination, appear to be of the class indicated by section 5267 of the General Code, which describes how that division of the "state military fund" designated as the "maintenance Ohio national guard fund" shall be expended. Inasmuch as the next subordinate heading is designated "Armory fund," I am of the opinion, and so advise, that all that precedes this heading, as it appears at page 711 and again at page 791 of 106 Ohio Laws, constitutes an appropriation of the "maintenance Ohio national guard fund." That is, the "personal service" and "maintenance" appropriations appearing first under the general heading "Armory fund" in the appropriations for each of the two years covered by the current bill, are to "pay the per diem, transportation, subsistence and incidental expenses of militia companies, inspections and incidental expenses of camp, including horse hire, fuel, lumber, forage of horses, and medical supplies," as provided in section 5267 of the General Code.

These appropriations as a matter of form, and indeed as a matter of substance when consideration of the transfer provisions of the bill is involved, should

have been totaled before the subordinate heading "Armory fund" was reached. This has not been done; but the armory fund items are treated in the bill as a part of a single appropriation for "Maintenance" under the heading "Ohio national guard." However, this error in the bill, whatever may be its effect in other particulars, has no effect whatever upon the question under consideration.

Passing for the moment the items under the designation "Armory fund," we find other personal service appropriations under the heading "Adjutant general." These are for salaries of members of the office force of the adjutant general. I find also under the subordinate heading "State house and grounds" other personal service appropriations for the compensation of laborers, janitors, engineers, etc., in and about the state house and grounds.

Returning now to the subordinate heading "Armory fund," it appears that the only appropriations under this designation are for "maintenance" purposes. In point of fact there are but three items in the 1915 bill; one for the construction of an armory at Akron, one for the construction of other armories, and one for the rent of armories; and in the 1916 bill there are but two items: one for the construction of armories, and one for the rent of armories.

In my opinion, the appropriations under the general heading "Armory fund" are the only ones referable to the activities of the state armory board. This conclusion is supported not only by the fact that the phrase "Armory fund" obviously designates the "State armory fund" provided for in section 5268, G. C., which is to be expended exclusively for "leasing, purchasing or constructing" armories, but also by inspection of all the appropriations under the general heading "Ohio national guard." Certainly it will not be contended that by virtue of any of the appropriation accounts or items mentioned in either of the appropriation bills the state armory board is authorized to appoint a "secretary, assistant or clerk and stenographer."

It being apparent that neither in the general statutes nor in the appropriation bills is the state armory board given authority to appoint or employ any subordinate whatever, it follows that the state armory board is not "authorized by law to appoint such secretary, assistant or clerk and stenographer" within the meaning of paragraph 8 of section 486-8 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

831.

BANKS AND BANKING—WHEN ADDITIONAL DEPOSITS MADE BY COUNTY TREASURER IN AN INACTIVE DEPOSITORY; AND, LATER THESE ADDITIONAL DEPOSITS WITHDRAWN (CHECK ORDER OF COUNTY COMMISSIONERS)—ADDITIONAL BOND GIVEN BY SURETY COMPANY MAY BE SURRENDERED.

Where additional deposits, lawfully made by the county treasurer in an inactive depositary under the direction of the county commissioners, have been withdrawn from said depositary by said treasurer and said depositary has fully accounted for the interest on said additional deposits as computed on the average daily balances, said commissioners may surrender to the surety company the additional bond given to secure said additional deposits, but before such surrender is made the county commissioners should notify the county treasurer that the surety company has been released on said undertaking and that the authority theretofore given to said county treasurer to place additional deposits in said inactive depositary is withdrawn.

COLUMBUS, OHIO, September 16, 1915.

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

GENTLEMEN:—In your letter of September 2d you request my opinion on the following question:

> "A bank is designated as the depositary of the county funds, and it gives surety company bond as provided by law, sufficient to cover the amount of funds at the time of the award. Later on the deposits are increased and the county commissioners require additional surety. The depositary bank gives an additional surety bond.
>
> "Query: When the deposits have been decreased, have the county commissioners the right to cancel the additional bond given in this instance?"

The authority of the commissioners of a county to increase the deposits in a bank which has been duly designated as an inactive depositary of county funds, under authority and in compliance with the requirements of the statutes governing such designation, is found under section 2715-1 of the General Code which provides in part as follows:

> "When the aggregate amount placed with all the banks and trust companies qualifying for the same, in any county, does not equal the amount that may be placed into inactive depositaries the county commissioners shall, upon securing additional security from any or all of such inactive depositaries authorize the county treasurer to increase the deposits therein."

Under the above provision of the statute it will be observed that the county commissioners may not authorize the county treasurer to increase the deposits in an inactive depositary until sufficient additional security is given by such depositary as therein required.

Where a bank as an inactive depositary offers as security for additional deposits a surety bond in an amount fixed by the county commissioners and said bond is approved and accepted by said commissioners as sufficient additional

security for such additional deposits, you inquire whether said county commissioners have the right to cancel said bond when the additional deposits for which such security was given have been withdrawn from said depositary.

Section 2724, G. C., relates to the undertaking required of a depositary under provision of section 2722, G. C., and provides:

> "Such undertaking shall be continuous and remain in full force as to any and all deposits secured by it until surrendered or cancelled by ten days' written notice to the county commissioners, the county auditor and county treasurer, each separately, given by a surety thereunder to withdraw the money of the county in such depositary."

Said section further provides that:

> "If the money of the county so deposited is paid by such depositary to the county treasurer on his demand within such ten days, or if it furnishes and substitutes new and satisfactory undertaking or securities, as provided herein, such surety shall be released from his obligation, but not before."

Section 2725, G. C., provides:

> "No surrender or cancellation shall operate to relieve any surety or liability for deposits made before such notice was given, until such deposits are secured to the satisfaction of the county commissioners by resolution spread on their journal or until such deposits are returned to the county treasury. No such surrender or cancellation shall be accepted until satisfactory undertakings in the same amount shall be substituted therefor."

The provisions of section 2724, G. C., authorize the county commissioners to release the surety under the conditions therein provided and subject to the further conditions provided in section 2725, G. C.

Section 2729, G. C., relates to the original undertaking of a bank or trust company as a depositary of county funds and provides:

> "Upon the acceptance by the commissioners of such undertaking, and upon the hypothecation of the bonds as hereinafter provided, such bank or banks or trust companies shall become the depositary or depositaries of the money of the county and remains such for three years or until the undertaking of its successor or successors is accepted by the commissioners."

I do not think, however, that the provisions of this statute apply to the additional bond given by such depositary under authority and in compliance with the requirements of section 2715-1, G. C.

I am of the opinion, therefore, in answer to your question that whenever the additional deposits made by the county treasurer in an inactive depositary have been withdrawn from said depositary by said treasurer, either in the ordinary course of business or upon the order of the county commissioners, and said depositary has fully accounted for the interest on said additional deposits as computed on the average daily balance, said commissioners may surrender to the surety company the additional bond given to secure said additional deposits. Before such surrender is made, however, the county commissioners should notify

the county treasurer that the surety company has been released on said undertaking and that the authority theretofore given to said county treasurer to place additional deposits in said inactive depositary is withdrawn.

Respectfully,
EDWARD C. TURNER,
Attorney General.

832.

COUNTY COMMISSIONERS—BRIDGE REPAIRED UNDER PROVISIONS OF SECTION 2345, G. C.—CONTRACT AWARDED AFTER AMENDED SENATE BILL NO. 125, CASS HIGHWAY LAW, BECAME EFFECTIVE—PLANS AND SPECIFICATIONS SHOULD BE APPROVED BY COUNTY HIGHWAY SUPERINTENDENT—IF CONTRACT EXCEEDS $10,000 PLANS SHOULD ALSO BE APPROVED BY STATE HIGHWAY COMMISSIONER.

The provisions of section 2345, G. C., were neither amended nor modified by any provision of amended senate bill No. 125, which became effective September 6, 1915. Where subsequent to said date of September 6, 1915, a contract for the repair and restoration of a bridge was awarded to a bidder, on the plan submitted by him under authority of section 2345, G. C., the plans and specifications for said improvement should be approved by the county highway superintendent, in compliance with the requirements of section 7187, G. C., as found in 106 O. L., 614, and if the consideration for said contract exceeds $10,000, said plans and specifications should also be approved by the state highway commissioner, in compliance with the requirements of said section.

COLUMBUS, OHIO, September 16, 1915.

HON. HOMER E. JOHNSON, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—In your letter of September 9, 1915, you request my opinion as follows:

> "On June 21, 1915, the county commissioners completed the condemnation of several bridges, declared the same in need of immediate repair and restoration and ordered the surveyor to make an estimate of the costs thereof. On July 26, 1915, said estimates were filed. Commissioners approved the same and made a levy for the raising of money to pay therefor. Ordered an issue of bonds in anticipation of the levy. Bonds were sold September 7, 1915, contracts for these three bridges were let September 8th.
>
> "By reason of the Cass road law going into effect September 7, 1915, do the bidders still have the right on the 8th inst., to still submit plans with their bid? (As provided by section 2345, G. C.)
>
> "If bidders should submit such plan, which was adopted by the commissioners and contract let thereon, would said plan require the approval of the county highway superintendent under the Cass road law?"

The authority of the county commissioners to condemn the bridges in question and to declare the same in need of immediate repair and restoration, is found in section 5643, G. C., which provides:

"If an important bridge, belonging to or maintained by any county, becomes dangerous to public travel, by decay or otherwise and is condemned for public travel by the commissioners of such county, and the repairs thereof, or the building of a new bridge in place thereof, is deemed, by them, necessary for the public accommodation, the commissioners, without first submitting the question to the voters of the county, may levy a tax for either of such purposes in an amount not to exceed in any one year two-tenths of one mill for every dollar of taxable property upon the tax duplicate of said county."

Section 5644, G. C., authorizes the issue of bonds in anticipation of the taxes levied under authority of the above provision of section 5643, G. C., for the purposes therein provided. From your statement of facts it appears that contracts for the repair and restoration of three of the bridges which were condemned by the commissioners of your county, were let on September 8, 1915. Amended senate bill No. 125, known as the Cass road law, became effective on September 6, 1915, and in view of the provisions of this act you inquire whether bidders had the right on the 8th inst., in offering bids for the work contemplated in said contracts, to propose plans other than those prepared by the county surveyor, under the direction of said county commissioners, and to accompany their respective plans with the plans and specifications authorized by section 2345, G. C.

Sections 2343 to 2347, G. C., inclusive, relate to the construction of bridges by county commissioners. These sections were not repealed by section 305 of said amended senate bill No. 125, as found in 106 O. L., 664, nor have the provisions of said sections been materially modified by the provisions of said act.

Section 2344, G. C., provides:

"When it becomes necessary to erect a bridge, the county commissioners shall determine the length and width of the superstructure, whether it shall be single or double track, and advertise for proposals for performing the labor and furnishing the materials necessary to the erection thereof. In their discretion, the commissioners may cause to be prepared, plans, descriptions and specifications for such superstructure, which shall be kept on file in the auditor's office for inspection by bidders and persons interested, and invite bids or proposals in accordance therewith."

Section 2345, G. C., provides:

"They shall also invite, receive and consider proposals on any other plan at the option of bidders, and shall require that all proposals on such plan shall be accompanied with plans and specifications showing the number of spans, the length of each, the nature, quality and size of the materials to be used, the strength of the structure when completed and whether there is any patent on the proposed plan, or on any, and if any, what part thereof."

Section 2347, G. C., provides in part:

"When it is necessary to make an addition to, alteration or repairs of a bridge, the commissioners in making contracts therefor, shall conform to the provisions of this chapter in relation to the erection of bridges as nearly as the nature of the case will permit."

These provisions have not been modified by any provision of said amended senate bill No. 125, and are still in force.

I am of the opinion, therefore, in answer to your first question, that the bidders in question had the right on September 8th, in offering bids for the work contemplated by said contracts, to propose plans other than those prepared by the county surveyor, under the direction of said county commissioners, and to accompany their respective plans with plans and specifications as authorized by section 2345, G. C., and if they chose so to do, it was the duty of the county commissioners to receive and consider said plans.

A bid having been accepted and a contract awarded on a plan proposed by a bidder, which plan was accompanied with plans and specifications under authority of said section 2345, G. C., you inquire whether any provisions of said amended senate bill No. 125 requires that said plans and specifications be approved by the county highway superintendent.

Section 144, of said amended senate bill, being section 7187, G. C., relates to certain duties of the county highway superintendent, and provides in part:

> "* * * * He shall make plans, specifications and estimates for the construction, improvement, maintenance and repair of county and township highways, and shall prepare or approve all plans, specifications and estimates for the erection, maintenance and repair of bridges and culverts; no contract for the construction of a bridge the entire cost of which exceeds ten thousand dollars shall be binding upon the county unless the plans are first approved by the state highway commissioner. Plans and specifications must be prepared in all cases where the cost of the bridge or culvert exceeds two hundred dollars, and contracts in writing must be entered into in such cases."

In connection with this provision of the statute, I call your attention to the provision of section 303 of said amended senate bill, as found in 106 O. L., 663, which provides in part:

> "This act shall not affect or impair any contract or any act done, * * * * prior to the time when this act or any section thereof takes effect under or by virtue of any law so repealed, but the same may be asserted, completed, (or) enforced * * * * as fully and to the same extent as if such laws had not been repealed. The provisions of this act shall not affect or impair any act done or right acquired under or in pursuance of any resolution adopted by the board of commissioners of any county * * * * prior to the time of the taking effect of this act," etc.

Inasmuch as the contract in question was made after said amended senate bill No. 125 became effective, I am of the opinion, in answer to your second question, that the plans and specifications upon which said contract was let and which are a part of said contract, should be approved by the county highway superintendent in compliance with the requirement of section 7187, G. C., as above quoted, and if the consideration for said contract exceeds ten thousand dollars, said plans and specifications should also be approved by the state highway commissioner, as required by the above provision of section 7187, G. C.

Respectfully,

EDWARD C. TURNER,

Attorney General.

833.

FOREIGN CORPORATION—AT TIME OF FILING CERTIFICATE PROVIDED BY SECTION 183, G. C., TO DO BUSINESS IN OHIO HAD NO PROPERTY IN OHIO—PAID FEE—NOW DESIRES TO INCREASE BUSINESS IN THIS STATE—FEE PAID UNDER SECTION 183 CANNOT BE DEDUCTED FROM TOTAL AMOUNT OF INCREASE UNDER SECTION 185, G. C.

Where a foreign corporation voluntarily pays a minimum fee of ten dollars ($10.00) *and procures a certificate authorizing it to transact business in this state under section* 183, *G. C., though at the time it owns no property in Ohio and does no business in the state; and said corporation subsequently becomes liable to comply with section* 185, *G. C., the whole proportion of the authorized capital stock of the company represented by its property and business in Ohio, upon such compliance constitutes an "increase" within the meaning of section* 185, *G. C., so that no part of the original fee of* $10.00 *will be deducted from the fee payable by the corporation under section* 185, *G. C.*

COLUMBUS, OHIO, September 17, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 13th, requesting my opinion as follows:

> "A foreign corporation at the time of filing certificate to do business in Ohio had no property in Ohio, paying a fee of fifteen dollars ($15.00) under section 178, and ten dollars ($10.00) under section 183, of the General Code. It is now their desire to increase their business in Ohio, and what we would like to know is whether the ten dollars paid under section 183 should be deducted from the total amount of the increase under section 185, of the General Code."

This question is not covered by opinion No. 699, addressed to you under date of August 6, 1915, to which, however, I refer you for a general discussion of the application of section 185, of the General Code.

I assume from your letter that no question is raised either by your department or the corporation as to its liability to pay *some* fee under the circumstances mentioned, and that question will not, therefore, be discussed.

It seems to me that section 185 of the General Code on its face contains an answer to your question. It provides in full as follows:

> "Sec. 185. A corporation which has filed its statement and paid the fee prescribed by the preceding two sections and which thereafter shall *increase* the proportion of its capital stock, represented by property used and business done in this state, shall file within thirty days after such increase an additional statement with the secretary of state, and pay a fee of one-tenth of one per cent. upon the *increase* of its authorized capital stock represented by property owned and business transacted in this state."

As the section explicitly provides, the fee is to be computed not upon the amount of the authorized capital stock, represented by property owned and business transacted in this state as *increased,* but upon the *increase* itself. This

means that whenever the "proportion" of the authorized capital stock of a company represented by its property and business in this state, as that term is interpreted in opinion No. 699 above referred to, becomes larger than it has been, an additional statement shall be filed and a fee shall be paid, based not upon the new "proportion," but upon the difference in amount between such new "proportion" and the "proportion" upon which the initial compliance fee, or the last supplementary compliance fee may have been based.

I realize, however, that this general principle is not of clear application to the facts which you state, because in the case which you present the "proportion," as that term was defined by me in the former opinion referred to, was nothing. That is to say, the corporation complied, or assumed to comply, with section 183, of the General Code, when it had no property in this state and, presumably, before it transacted any business in this state. That being the case, it cannot be said that any of its capital stock was at that time represented by property owned and used and business transacted in Ohio. Accordingly, the doing of any business in Ohio and the ownership of any property in Ohio would "increase" the proportion of its capital stock represented by property and business in Ohio and the whole "proportion" thereby produced would constitute such "increase."

The corporation, though complying with the laws of Ohio in a laudable spirit, was not liable to comply with section 183, because it did not at that time own or use a part or all of its capital or plant in this state. It is true that a foreign corporation must comply with section 183 before doing business in this state, but it is not true that the compliance must be effected before property is acquired in this state; on the contrary, the section presumes that the corporation will acquire property in this state before attempting to do any business in this state.

In this view of the case, the original compliance by the company with section 183 was purely voluntary, and payment of the ten-dollar minimum fee was gratuitous.

The section does not provide directly that fees theretofore paid shall be credited in any way upon the fee to be exacted under it.

An illustration may serve to show the possible operation of the statute: Suppose that the company, instead of owning no property and doing no business in Ohio at the time of its original compliance with section 183, had owned a small amount of property in Ohio and that its authorized capital stock was relatively small, so that one-tenth of one per cent. upon the proportion of its authorized capital stock, represented by property owned in Ohio would have been some amount less than ten dollars; then when the company subsequently increased the proportion of its authorized capital stock, represented by property owned and used and business transacted in Ohio, and became liable for a fee under section 185, it could not have insisted that the difference between the minimum fee of ten dollars and the amount produced by taking one-tenth of one per cent. upon the proportion of its authorized capital stock, represented by property owned and used and business transacted in this state, at the time of its original compliance should be deducted from the fee payable under section 185.

The illustration cited involves exactly the same principle as that which is involved in your question; but in addition the question, as you state it, shows, as I have remarked, that the payment of the ten dollars in the first instance was purely voluntary on the part of the company.

Because there is no authority to deduct the entire minimum fee from the fee payable under section 185 for any reason, and because the entire "proportion" as now to be ascertained is an "increase," the original "proportion" having been nothing, I am of the opinion that the proper way to fix the fee under the circumstances stated by you is to take the entire "proportion" as now ascertained, and

as that term is defined in opinion No. 699, to which I have referred, and compute one-tenth of one per cent. thereof, without any deduction on account of the fee of ten dollars previously paid.

Respectfully,
EDWARD C. TURNER,
Attorney General.

834.

BOARD OF AGRICULTURE—MEMBERS HOLDING INVESTIGATIONS, INQUIRIES, OR HEARINGS PREVIOUS TO AN AUTHORIZATION BY BOARD ARE ENTITLED TO NECESSARY EXPENSES.

It is not required that, before members of the board of agriculture of Ohio may under section 1085, *G. C.,* 106 *O. L.,* 144, *undertake or hold any investigation, inquiry or hearing, the same shall be previously authorized by the board, and the members of the board are entitled to their necessary expenses while engaged in any investigation or holding any inquiry or hearing which the board is by law authorized to undertake or hold, though the same shall not have been previously ordered or directed by the board.*

COLUMBUS, OHIO, September 18, 1915.

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

DEAR SIR:—I acknowledge receipt of yours under date of September 10, 1915, as follows:

> "Will you kindly give me your written opinion as to whether or not the investigations, inquiries and hearings provided for in section 1085, G. C. (106 O. L., 144), to be made by one or any two members of the board of agriculture of Ohio may be so made by such members without prior authorization by the said board of agriculture sitting as a board in regular meeting, and their expenses while so engaged paid under the provisions of section 1081, G. C. (106 O. L., 144)?"

Sections 1081 and 1085, G. C., 106 O. L., 144, to which you refer, provide as follows:

> "Sec. 1081. Each member of the board of agriculture of Ohio shall serve without compensation, but he shall be paid his necessary expenses while engaged in the discharge of his official duties.
>
> "Sec. 1085. Any investigation, inquiry or hearing, which the board of agriculture is empowered by law to hold or undertake may be held or undertaken by or before any one member of the board of agriculture or before any member or members of the board of agriculture. All investigations, inquiries, hearings, decisions and orders made by any one or any two members of the board shall when approved and confirmed by the board of agriculture be deemed to be the order of the board of agriculture. All matters of general policy shall be decided by a majority of the board."

The language of section 1085, G. C., supra, is clear, unambiguous and to the effect that any investigation, inquiry or hearing, which the board is empowered

by law to hold or undertake, may be held or undertaken by or before one or more members of the board. While it is provided by section 1084, G. C., 106 O. L., 144, that six members of the board shall constitute a quorum and by reason thereof all official action by the board, as such, requires the presence of at least six members except in so far as this provision may be modified by further provisions of law.

General provisions, however, are always subject to qualification by special provisions relative to the same subject-matter, and such special provisions will be regarded when reading an entire act together as exceptions to the general provisions.

In view of this rule and the explicit terms of section 1085, G. C., supra, it seems clearly the legislative intent that no further authority for making such investigations and inquiries, or holding any such hearing as the board is by law authorized to make or hold by the members of the board shall be required. That is to say, the express language of this section alone, confers upon the members of the board authority to hold hearings and undertake investigations and inquiries as fully and completely as that authority is conferred upon the board itself.

The provision of this section, which requires the approval of the board of all investigations, hearings, inquiries, decisions and orders of members by the board before the same becomes effective, seems to indicate a contemplation on the part of the legislature that the same may be made upon the authority of the statute alone.

Answering your question specifically, I am of the opinion that members of the board of agriculture are entitled to their necessary expenses incurred in making any investigation or inquiry or holding any hearing which the board is authorized by law to make, hold or undertake, whether the board has ordered or directed the same to be made or not.

Respectfully,
EDWARD C. TURNER,
Attorney General.

835.

COUNTY SCHOOL EXAMINER—WHERE AT TIME OF APPOINTMENT COMPLIED WITH REQUIREMENTS OF LAW THAT HE BE A DISTRICT SUPERINTENDENT OR TEACHER BUT LATER WITHDREW FROM PUBLIC SCHOOL WORK—CANNOT SERVE AS SCHOOL EXAMINER.

A person appointed by a county board of education as county school examiner under authority of section 7811, *G. C., as amended in* 104 *O. L.,* 102, *may not continue to serve as such school examiner after having withdrawn from public school work as a district superintendent or as a teacher.*

COLUMBUS, OHIO, September 18, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—I have your letter of September 15th requesting my opinion as follows:

> "The county board of education appointed a person as county examiner, and such person met the requirements of the law at the time of his

appointment, either as district superintendent or as teacher. Can such person lawfully continue to serve on the board of school examiners after having withdrawn from the teaching profession?''

Section 7811, G. C., as in force prior to its amendment in 104 O. L., 102, provided:

''There shall be a county board of school examiners for each county, consisting of three competent persons to be appointed by the probate judge. Two of such persons must have had at least two years' experience as teachers or superintendents, and have been within five years, actual teachers in the public schools. Each person so appointed shall be a legal resident of the county for which appointed. Should he remove from the county during his term, his office thereby shall be vacated and his successor be appointed.''

This section was amended to read as follows:

''There shall be a county board of school examiners for each county, consisting of the county superintendent, one district superintendent and one other competent teacher, the latter two to be appointed by the county board of education. The teacher so appointed must have had at least two years' experience as teacher or superintendent, and be a teacher or supervisor in the public schools of the county school district or of an exempted village school district. Should he remove from the county during his term, his office thereby shall be vacated and his successor appointed.''

It was evidently the intent of the legislature in amending said section 7811, G. C., by providing that the county board of school examiners shall consist of the county superintendent, one district superintendent and one other competent teacher having the qualifications prescribed in said statute as amended, to confine the membership of said county board of school examiners to persons actively engaged in public school work.

I am of the opinion, therefore, in answer to your question that a person appointed by a county board of education as county school examiner under authority of section 7811, G. C., as amended, may not continue to serve as such school examiner after having withdrawn from public school work as a district superintendent or as a teacher.

Respectfully,
EDWARD C. TURNER,
Attorney General.

836.

BOARD OF EDUCATION—WHEN BOARD WHICH DOES NOT MAINTAIN A HIGH SCHOOL IS REQUIRED TO PAY TUITION OF PUPILS RESIDING IN THEIR DISTRICTS—RIGHT OF PUPILS HAVING QUALIFICATIONS AS TO RESIDENCE AND TRAINING NECESSARY TO ADMIT THEM TO HIGH SCHOOL—FAILURE OF DISTRICT AND COUNTY SUPERINTENDENTS TO PROPERLY CERTIFY THEM FOR PROMOTION.

The right of pupils, having the qualifications as to the residence and training necessary to admit them to a high school, to have their tuition paid by the board of education of the school district in which they reside and which maintains no high school, should not be denied because of the failure of the district and county superintendents to properly certify them for promotion.

COLUMBUS, OHIO, September 18, 1915.

HON. ELI H. SPEIDEL, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—I have your letter of September 10th, which is as follows:

"I would like to have your opinion as to the liability, if any, of the Monroe township board of education, for the tuition of three scholars who are attending the Amelia high school in Batavia township, under the following circumstances:

"In September, 1914, a family by the name of Elkins moved into Monroe township, this county, from the state of Virginia, and three of the children had received one or more years of high schooling in an accredited high school of that state. Monroe township, into which they moved, maintains no high school, and these pupils are attending the Amelia high school, located at Amelia, in Batavia township, and which is the nearest high school to the residence of these pupils.

"I wish you would advise me whether or not in your opinion these pupils are entitled to the same privileges as are other pupils of the same township, who have been promoted from the elementary to the high school by order of the district superintendent.

"I might add that none of these pupils have ever passed a Patterson examination, nor have they received a certificate of promotion from the district superintendent, who has charge of Monroe township. More briefly stated, the question is, Can a pupil coming from a foreign state, who has received one or more years of high schooling in that state, claim the same privileges of attending a high school in Ohio, as is enjoyed by such pupils as have passed a Patterson examination, or who at the last year, were promoted to a high school by order of a district and county superintendent?"

There was no requirement of the statute that the parents of children must reside in the school district a certain length of time before said children shall have the right to attend the public schools of such district under authority of and within the limitations prescribed by section 7681, G. C., as in force September, 1914, when the family mentioned in your inquiry moved into Monroe township rural school district, and said family having become residents of said rural school district at said time, the children in question had the same rights in at-

tending a public school and were subject to the same requirements under the statutes and under the rules and regulations of the board of education as the children of any other residents of said district attending such school.

From your statement of facts it appears that Monroe township rural school district does not maintain a high school and the said children, having received one or more years of instruction in an accredited high school of West Virginia, are attending the high school in another district.

Section 7747, G. C., as amended in 104 O. L., 125, provides:

> "The tuition of pupils who are eligible for admission to high school and who reside in rural districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part of the month shall create a liability for the entire month. No more shall be charged per capita than the amount ascertained by dividing the total expenses of conducting the high school of the district attended, exclusive of permanent improvements and repair, by the average monthly enrollment in the high school of the district. The district superintendent shall certify to the county superintendent each year the names of all pupils in his supervision district who have completed the elementary school work, and are eligible for admission to high school. The county superintendent shall thereupon issue to each pupil so certified a certificate of promotion which shall entitle the holder to admission to any high school. Such certificates shall be furnished by the superintendent of public instruction."

Inasmuch as said pupils are residents of Monroe township rural school district, which does not maintain a high school, it follows that if said pupils are eligible for admission to the high school mentioned in your inquiry, then their tuition should be paid by the board of education of said rural school district.

You state that said pupils have never passed a Patterson examination and have not received a certificate of promotion from the district superintendent in charge of said rural school district.

I deem it proper to call your attention to the fact that the provisions of section 7740, et seq., of the General Code, authorizing the county school examiners to hold examinations of pupils in township, special and village districts and to grant diplomas to successful applicants, were repealed by certain acts of the general assembly as passed in 104 O. L., pages 100 and 125. Said acts became effective May 20, 1914.

It follows therefore that since said date of May 20, 1914, the authority to determine the eligibility of pupils residing in rural district and village districts under district supervision is vested in the district superintendent in charge of such rural or village district, except as to those pupils who were granted diplomas under authority of section 7744, G. C., prior to said date of May 20, 1914, and who have not completed their high school work.

When the pupils in question became residents of Monroe township rural school district in September, 1914, it was the duty of the district superintendent in charge of said district to determine whether said pupils were eligible for admission to high school. From your statement of facts it seems clear that if said district superintendent had examined said pupils he would have found them amply qualified and would have certified their names to the county superintendent and the county superintendent would then have issued certificates of promotion as above provided under section 7747, G. C.

While this was not done and from a technical standpoint said pupils might

be said to be ineligible to attend said high school, inasmuch as said pupils, at the time of entering said high school, had the qualifications as to residence and training necessary to admit them to said school, I do not think they should be denied the right to have their tuition paid because of the failure of the district and county superintendent to properly certify them for promotion.

I am of the opinion, therefore, that if the board of education of said rural school district was served with a written notice that said pupils could attend said high school and the date when said attendance would begin and if said board of education of said rural school district made no objection at that time, it is estopped from denying the eligibility of said pupils to attend said high school because of not having had the aforesaid certificates of promotion, and that said board of education should pay the tuition of said pupils for the year 1914-1915, said tuition to be computed in the manner provided by said section 7747, G. C., as amended. The district superintendent should at this time certify said pupils as eligible for admission to high school and the county superintendent, upon the filing of the certificate of said district superintendent, should issue certificates of promotion under authority of said section 7747, G. C., as amended.

Respectfully,
EDWARD C. TURNER,
Attorney General.

837.

STATE HIGHWAY COMMISSIONER—MONEY DEPOSITED AS GUARANTEE MAY BE RETURNED WHEN CONDITIONS HAVE BEEN SATISFIED—BALANCE OF FUND CONTRIBUTED BY COUNTY COMMISSIONERS AND CERTAIN PROPERTY OWNERS FOR IMPROVEMENT OF A CERTAIN INTER-COUNTY HIGHWAY MAY BE APPLIED ON FINAL ESTIMATE OF CONTRACT FOR SAID IMPROVEMENT.

A sum of money deposited with the state highway commissioner as a guarantee for a certain period of time against defects in material furnished and labor performed, according to the terms of a contract for the improvement of an inter-county highway, may be returned to the person, firm or corporation making such deposit when the conditions of the guarantee have been satisfied.

The balance of a fund contributed by the commissioners of Hardin county and by certain property owners in said county toward the improvement of a section of an inter-county highway located therein, may be applied on the final estimate of a contract for said improvement in conformity with the purpose for which said sum was contributed.

COLUMBUS, OHIO, September 18, 1915.

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

DEAR SIR:—In your letter of August 3d you enclose pass book of the Capital City bank in the name of J. H. Tilton, chief clerk, showing a balance of $5,165.00 on June 22, 1915.

From the additional memoranda enclosed in said letter and from information received from Mr. Tilton and from Mr. Hastings, your chief clerk, I understand this balance represents the sum of $200.00 which was deposited with Mr. Tilton, as chief clerk of the state highway department under your predecessor, Mr. J. R.

Marker, by the firm of Apper, Zellar, Dilhoff & Karsch, as a guarantee for a term of one year against defects in materials furnished and labor performed by said firm in the construction of a section of an inter-county highway according to the terms of the contract between said firm and the state highway commissioner; also the sum of $4,965.00 which is the balance of a fund of $7,770.00 contributed by the commissioners of Hardin county and by certain owners of property in said county toward the construction of a part of an inter-county highway located in said county and known as the Roundhead-McGuffey road. This road is being improved according to the terms of a contract between the state highway commissioner and Henry S. Enck, said contract having been awarded to the said Henry S. Enck on his bid of $23,787.00.

I understand that neither the commissioners of said county nor the trustees of any township in said county made application to the state highway department to have said road improved and that said contract for said improvement was made by the state highway commissioner without an agreement with said county commissioners or with the trustees of any township in said county.

The state highway commissioner in letting the contract for said improvement evidently acted under provision of section 1185, G. C., as amended in 103 O. L., 451, which provides in part as follows:

> "If the county commissioners have not made use of the apportionment to such county on or before the first day of May next succeeding, then the state highway commissioner shall enter upon and construct, improve, maintain or repair any of the inter-county highways or parts thereof in said county, either by contract, force account, or in such manner as the state highway commissioner may deem for the best interests of the public, paying the full cost and expense thereof from the said apportionment of the appropriation to said county so unused as aforesaid."

It appears that out of the aforesaid fund of $7,770.00 Mr. Tilton paid Mr. Enck the sum of $2,805.00, leaving the balance of $4,965.00.

In your letter of August 27th you state that Mr. Tilton has turned over to you the aforesaid balance of $5,165.00, and you ask to be advised as to the proper disposition of this fund.

I am informed by Mr. Hastings that the conditions of the guarantee of the firm of Apper, Zellar, Dilhoff & Karsch have been satisfied and that said firm now asks that said sum of $200.00 be returned to it.

I am of the opinion, therefore, that if you find that the conditions of said guarantee have in fact been satisfied said sum should be returned to said firm.

While there was no provision of the statute authorizing the commissioners of Hardin county to contribute to said improvement fund in the manner in which the same was done, or authorizing the state highway commissioner or Mr. Tilton as chief clerk of the state highway department to receive such contributions for said purpose, I am informed that said improvement is practically completed according to the plans and specifications and in a manner entirely satisfactory to that department, and inasmuch as the balance of said fund has been turned over to you, I advise that said sum of $4,965.00 be applied on the final estimate of said contract in conformity with the purpose for which said sum was contributed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

838.

MERCANTILE OR MANUFACTURING CORPORATIONS CANNOT OPERATE SAVINGS BANK BY ACCEPTING DEPOSITS OF ITS EMPLOYES—CORPORATION POSSESSES ONLY SUCH POWERS AS ARE EXPRESSLY GRANTED OR SUCH AS ARE NECESSARY TO CARRY INTO EFFECT THE POWERS EXPRESSLY GRANTED.

Mercantile, manufacturing and other similar corporations are not authorized to accept deposits of employes under regular savings bank rules.

COLUMBUS, OHIO, September 20, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of September 9th, 1915, requesting my opinion as follows:

> "The question as to whether or not a mercantile corporation, manufacturing or otherwise, would have the right to accept deposits of its employes, under regular savings bank's rules the same as a savings bank has been submitted to this department. We would appreciate your opinion."

The right to receive deposits of money is perhaps the most distinguishing and important function of banking, which, in Ohio, is carefully limited and regulated by legislative acts.

The rules regulating savings banks are found in sections 9762 et seq., of the General Code. It is sufficient to state, without quoting these sections, that the rules of law under which savings banks may operate in Ohio are definite and strict. They must maintain a prescribed reserve fund; they are limited, restricted and regulated in making investments and loans; they are required to issue pass books to all depositors, and they are subject to state inspection, etc., etc.

In its final analysis, therefore, your question involves the right of a mercantile, a manufacturing or other like corporation to operate a savings bank. Section 8623, of the General Code, relative to the organization of corporations, is as follows:

> "Except for carrying on professional business, a corporation may be formed for any *purpose* for which natural persons lawfully may associate themselves.
>
> "The word 'purpose' is intentionally in the singular number in this section; and a corporation cannot be formed for two or more distinct purposes in the absence of specific statutory authority, although it might be formed for each of such purposes separately. (State ex rel v. Taylor, 55 O. S., 61.)"

It is a well settled principle of law that corporations possess only such powers as are expressly granted or such as are necessary to carry into effect the powers expressly granted. The right to operate a savings bank could not by any stretch of imagination be construed as an implied power of a mercantile or manufacturing corporation.

A further obstacle or objection which, to my mind, renders it legally impossible for a mercantile, manufacturing or other similar corporation to exercise

banking functions is found in section 3, of article XIII, of the constitution of Ohio, which, in part, is as follows:

> "Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her; except that stockholders of corporations authorized to receive money on deposit shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. * * *"

The stockholders of a corporation authorized to receive money on deposit are subject to a double liability under the language of the constitution quoted above; such liability is totally different from that assumed by a purchaser of stock in an ordinary mercantile or manufacturing corporation, and which such stockholder has a right to assume will not be increased by the company's officers.

I therefore advise you that a mercantile, manufacturing or other similar corporation is not authorized in Ohio to accept deposits of its employes under regular savings bank's rules the same as a savings bank.

Respectfully,
EDWARD C. TURNER,
Attorney General.

839.

MUNICIPAL CORPORATION—IN AN ACTION WHERE CITY IS PLAINTIFF, BOARD OF EDUCATION, DEFENDANT, CITY SOLICITOR REPRESENTS CITY—BOARD MAY EMPLOY COUNSEL PROVIDED CERTIFICATE IS FILED WITH CLERK OF BOARD THAT FUNDS ARE AVAILABLE.

Where the solicitor of a city represents such city in an action in which said city is plaintiff and the board of education of the city school district is one of the defendants, said solicitor cannot represent said board of education for the reason that the interest of said city is adverse to that of said board of education and said board may employ counsel to defend it in said action, provided that before adopting a resolution employing such counsel and authorizing payment for services rendered there is filed with said board by the clerk thereof a certificate of available funds as required by section 5660, G. C.

COLUMBUS, OHIO, September 20, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—In your letter of September 13th you request my opinion as follows:

> "The city of Dayton, through its solicitor, has brought suit in the supreme court against the budget commission of the county, the county

commissioners of Montgomery county and the board of education of the city of Dayton, claiming that the city did not get a fair division of the funds. The budget of the county commissioners was cut; likewise, the budget of the city was cut; but the budget of the board of education of Dayton was not cut.

"Query: Since the solicitor is serving the city of Dayton in a suit against the board of education of the city of Dayton, can the board of education of said city legally employ counsel for its defense in the above suit, and pay the fees necessary for the employment of such counsel?"

Section 4761, G. C., provides:

"Except in city school districts, the prosecuting attorney of the county shall be the legal adviser of all boards of education of the county in which he is serving. He shall prosecute all actions against a member or officer of a board of education for malfeasance or misfeasance in office, and he shall be the legal counsel of such boards or the officers thereof in all civil actions brought by or against them and shall conduct such actions in his official capacity. When such civil action is between two or more boards of education in the same county, the prosecuting attorney shall not be required to act for either of them. In city school districts, the city solicitor shall be the legal adviser and attorney for the board of education thereof, and shall perform the same services for such board as herein required of prosecuting attorney for other boards of education of the county."

While the latter provisions of the statute as above quoted makes the solicitor of a city the legal adviser and attorney for the board of education of the city school district, and requires him to perform the same services for said board as are required of the prosecuting attorney of the county in which such city is located, by the provisions of the statute, for other boards of education of such county, said provision of the statute cannot apply in the particular case referred to in your inquiry.

As the legal representative of the city of Dayton in the action pending in the supreme court wherein said city is plaintiff and the board of education of the school district of said city is one of the defendants, the city solicitor cannot act as the legal representative of said board of education, and the question arises whether said board may employ counsel to defend it in said case and pay for the services rendered.

It will not be necessary in answering this question to pass on the question as to whether or not the solicitor of the city of Dayton, which city has adopted the city manager plan of government, under authority of sections 7 and 8, of article XVIII, of the constitution, would be required ordinarily to act as the legal adviser and attorney for the board of education of said city.

While section 2918, G. C., as found in the chapter relating to the prosecuting attorney of the county, provides in part:

"Nothing in the preceding two sections (relating to certain powers and duties of the prosecuting attorney and making him the legal adviser of county and township officers with the exception therein mentioned),

shall prevent a school board from employing counsel to represent it, but counsel when so employed, shall be paid by such school board from the school fund.''

I am of the opinion that said provision of the statute, being general in its nature, relates to those boards of education which would ordinarily be represented by the prosecuting attorney under authority of section 4761, G. C., and that said provision is not applicable to the board of education of a city school district, which under provision of the latter part of said section 4761 is ordinarily represented by the city solicitor.

If, therefore, the board of education of the city of Dayton has authority to employ counsel to represent it in the case referred to in your inquiry, it must be implied from the power expressly given to said board by statute when taken in connection with the facts in the particular case.

Under provision of section 4749, G. C., the board of education of each school district, when properly organized, is a body politic and corporate, and as such, capable of suing and being sued.

In the case of Caldwell v. Marvin et al., 8 O. N. P. (n. s) 387, the court in its opinion said:

''It is claimed in this case that no valid contract could have been made by any board of education for services of attorneys in a quo warranto proceeding. The city solicitor, under section 3977 (section 4761, G. C.) was the legally constituted attorney or legal counsel of the board, and until he refused or failed to act, no additional legal counsel could be employed. When, however, he elected to act for the de facto board, and not for the board de jure, other counsel was necessary. The ordinary and necessary method of conducting a legal proceeding is with the assistance of legal counsel. If the right of a board of education to exercise some single power was challenged in a quo warranto proceeding there would be no question of the implied right to employ counsel in the absence of legally constituted counsel, or upon the failure or refusal of such counsel to act. Why should the rule be different where the right to exercise any power whatever is questioned and proper to be established? The public is interested in having its legally elected officers perform their duties, even though less interested than in having such duties performed.''

It was further held by the court in the case of Caldwell v. Marvin et al., supra, that where no certificate of the clerk, that the funds requisite for the payment of a claim for services rendered were in the treasury and unappropriated, was filed prior to the adoption of the resolution authorizing payment as required by section 2834b, of the Revised Statutes (section 5660, G. C.), the resolution is without effect and an injunction will lie against such payment.

The opinion of the court in this case is directly in point and is warrant for the proposition that where the solicitor of a city acts as legal adviser for such city in a case in which the interest of said city is adverse to the interest of the board of education of the city school district, said board of education has the right to be represented by legal counsel and to pay such counsel from any funds in the school treasury available for that purpose.

Replying to your question, I am of the opinion that inasmuch as the solicitor of the city of Dayton is representing said city in the action in the supreme court,

and cannot therefore represent the board of education of the city school district for the reason that the interest of said city is adverse to that of said board of education, said board of education may employ counsel to defend it in said action; provided, however, that before adopting a resolution employing such counsel and authorizing payment for services rendered, there is filed with said board by the clerk thereof a certificate of available funds as required by section 5660, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney General.

840.

APPROVAL OF LEASE FOR COAL LANDS SITUATED IN MORGAN COUNTY TO W. R. McKEE.

COLUMBUS, OHIO, September 20, 1915.

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

DEAR SIR:—You have submitted for my approval a certain lease drawn under the provisions of section 3209-1, of the General Code (105 O. L., 6) for coal lands situated in Morgan county, Ohio, being a part of section 29 and containing fifty (50) acres, the said instrument leasing said premises to one W. R. McKee.

I have carefully examined the same, and while I find that in some of its provisions the lease is very liberal, yet from the facts presented to this department relative to the same I do not see any objections thereto and, therefore, hereby approve the same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

841.

GOVERNOR'S PROCLAMATION DIRECTING BOARD OF ADMINISTRATION TO ASSUME MANAGEMENT OF LIMA STATE HOSPITAL, APPROVED.

COLUMBUS, OHIO, September 20, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—You have submitted to me a proclamation in the following form:

"PROCLAMATION.

"By virtue of the authority vested in me, under the provisions of section 1991, of the General Code of Ohio, and deeming it for the best interests in the management of the affairs of The Lima State Hospital and the state of Ohio, I, Frank B. Willis, governor of the state of Ohio, do hereby direct that the Ohio board of administration assume the man-

agement of the said The Lima State Hospital commencing on the first day of October, A. D. 1915, and that the board of commissioners for the erection of The Lima State Hospital heretofore appointed under the provisions of section 1986, of the General Code of Ohio, shall have no further legal existence from and after the above date.

"IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused the great seal of the state of Ohio to be affixed at Columbus this twentieth day of September, A. D. 1915.

"_____

"Governor of Ohio."

I approve of the above form, and suggest that the original thereof be transmitted to the Ohio board of administration, and a copy to each of the members of the outgoing board of commissioners for the erection of The Lima State Hospital.

Respectfully,
EDWARD C. TURNER,
Attorney General.

842.

STATE HIGHWAY COMMISSIONER—CASS HIGHWAY LAW—COUNTY SURVEYOR PLACED IN CHARGE OF STATE ROADS—STATE'S SHARE OF HIS SALARY PAID TO COUNTY TREASURER—COUNTY PAYS HIS ENTIRE SALARY.

Where the county surveyor has been placed in charge of state roads by the state highway commissioner the state's share of his salary should be paid to the treasurer of the county which pays the whole salary in the first instance to reimburse said county for the state's portion of said salary so paid.

COLUMBUS, OHIO, September 20, 1915.

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

DEAR SIR:—I have your letter of September 8, 1915, bearing the following inquiry:

"Where the county highway superintendent has been placed in charge of state road work by the state highway department, in what manner shall the state highway department make payments to such county highway superintendents?"

By the provisions of section 138, of amended senate bill No. 125, 106 O. L., 612, section 7181, G. C., the salary of the county surveyor is payable out of the county treasury in the same manner as the salaries of county officials are paid. This requires that said salary of said surveyor in the first instance shall be payable wholly out of the county treasury.

Under the provisions of section 139 of said bill, section 7182, G. C., when the county surveyor under designation by the state highway commissioner has charge of the highways, bridges and culverts under the control of the state within his

county, one-fifth of his salary aforesaid shall be paid by the state upon vouchers issued therefor by the state highway commissioner upon the auditor of state against the state highway fund. Said section further provides that upon presentation of such voucher the auditor shall issue his warrant upon the state treasurer.

However, it is well to observe in this connection that the state highway fund from which said salary is to be paid is particularly designated in paragraph 1 of section 214 of said bill, section 1221, G. C. This paragraph provides in substance that seventy-five per cent. of all money paid into the treasury by reason of the levy for the state highway improvement fund shall be used for the construction, improvement, maintenance and repair of the inter-county highways and for the maintenance of the state highway department including the state's portion of the salaries of the county highway superintendents. The salary, therefore, is payable out of the particular fund above specified.

As previously noted the whole salary of the surveyor being primarily payable out of the county treasury, and by the terms of said section 138 aforesaid required to be so paid, the voucher issued by the state highway commissioner for the state's proportionate part of said salary must be issued to reimburse each county to the extent said county has paid the state's share of said salary. Therefore the vouchers issued by the state highway commissioner, as provided by said section 139, supra, should be made payable to the treasurer of each county which is to be so reimbursed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

843.

A MUTUAL PROTECTIVE ASSOCIATION MAY NOT INSURE PRIVATE GARAGES, AUTOMOBILES OR MOTOR TRUCKS—ASSOCIATION LIMITED TO INSURE AGAINST LOSS OR DAMAGE TO PLACE NAMED IN POLICY WHICH MUST BE IN OHIO.

A mutual protective association organized under section 9593, G. C., may not insure private garages, automobiles or motor trucks.

Such an association may not insure against loss or damage occurring otherwise than at a location to be named in the policy which must be in the state of Ohio.

COLUMBUS, OHIO, September 17, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I return to you herewith, without my approval, the certificate of amendment of the articles of incorporation of the National Mutual Automobile Insurance Association, together with check of E. J. Brookhart and uncancelled ten cent revenue stamp attached thereto.

You have not furnished me with a copy of the original articles *showing the nature of the change made by the amendment,* but I cannot approve the same be-

cause the purpose clause of the articles of incorporation, which is amended, does not in its amended form conform to the statute, which in this case is section 9593 of the General Code. That section provides in part as follows:

> "Any number of persons of lawful age, not less than ten in number, residents of this state, or an adjoining state and owning insurable property in this state, may associate themselves together for the purpose of insuring each other against loss by fire and lightning, cyclones, tornadoes or wind storms, hail storms and explosions from gas, on property in this state, and also assess upon and collect from each other such sums of money, from time to time, as are necessary to pay losses which occur by fire and lightning, cyclones, tornadoes, wind storms, hail storms and explosions from gas to any member of such association. * * * Such associations may only insure farm buildings, detached dwellings, school houses, churches, township buildings, grange buildings, farm implements, farm products, live stock, household goods, furniture and other property not classed as extra hazardous and such property may be located within or without the limits of any municipality; provided that an association whose membership is restricted to persons engaged in any particular trade or occupation and its insurance confined in any particular kind or description of property may insure property classed as extra hazardous and located in any county or counties in this state; * * *"

The amended articles of incorporation attempt to authorize the association to insure its members "on automobiles and motor trucks and private garages owned by them in the state of Ohio." This authorization, in my opinion, is not warranted by the second of the two sentences above quoted from section 9593. The words "other property not classed as extra hazardous," as therein used, upon the most familiar principles of statutory interpretation, must be limited in meaning to *such* "other property not classed as extra hazardous" as may be of the general kind, class or character indicated by the enumeration of specific kinds of property which precedes. Private garages are not of the class of buildings indicated by the enumeration of "farm buildings, detached dwellings, school houses, churches, township buildings and grange buildings." Automobiles and motor trucks are not of the same general character as "farm implements, farm products, live stock, household goods and furniture."

These considerations are aside from what appeals to me as a rather clear prohibition against the insurance by such associations of the kinds of property which the amended articles attempt to authorize the association to insure, which is embodied in the words "not classed as extra hazardous."

It seems to me that it may be said as a matter of law that automobiles, motor trucks and garages are "classed as extra hazardous" as insurance risks, it being a matter of common knowledge that all of them are peculiarly liable to damage or destruction by fire or explosion.

It may be that the question whether a given risk should be classed as extra hazardous is one for the department of insurance, but it seems to me that the secretary of state is not authorized to issue articles of incorporation authorizing an association to transact business which it is morally certain will not be licensed by the superintendent of insurance.

I find that my predecessor reached a contrary conclusion with respect to the right of such associations to insure automobiles. For the reasons above stated, however, I am obliged to disagree with him in this particular.

There is another reason which of itself would prevent me from approving the amended articles of incorporation. As so amended, they seek to authorize the

association to insure against loss or damage occurring "anywhere." In my opinion, the phrase "on property in this state," as used in the first sentence of section 9593, together with the specific provision of the second sentence above quoted therefrom respecting the *location* of the property which may be insured, establishes the conclusion that mutual protective associations can insure property against loss or damage occurring in specific places only, and that such places must be in this state.

For both of the above reasons, I am unable, as above stated, to approve the amended articles of incorporation.

Respectfully,
EDWARD C. TURNER,
Attorney General.

844.

ROADS AND HIGHWAYS—CASS HIGHWAY LAW—SALARY OF COUNTY SURVEYOR AS PROVIDED IN SECTION 7181, G. C., DOES NOT COVER SERVICES RENDERED IN MAKING TAX MAPS—PRIOR TO JANUARY 1, 1916, COUNTY SURVEYOR MAKES TAX MAPS—AFTER THAT DATE, COUNTY COMMISSIONERS MAY APPOINT—SALARY PROVIDED IN SECTION 7181, G. C., DOES NOT COVER SERVICES TO INDIVIDUALS OR FOR DITCH IMPROVEMENT WHERE ASSESSMENT IS AGAINST PROPERTY OWNERS—SURVEYOR'S SALARY PAID IN *WHOLE* FROM COUNTY TREASURY—STATUTE LIMITS HIS EMPLOYMENT—SECTION 2788, G. C., NOT REPEALED.

Annual salary provided by section 138 *of the Cass highway bill, G. C.,* 7181, *does not cover services rendered by county surveyor in making tax maps under provision of sections* 5551 *and* 5552, *G. C.*

Prior to January 1, 1916, *when the amendment to section* 5589, *G. C., will become effective, county commissioners have no power to appoint other than county surveyor to make tax maps. After January* 1, 1916, *county commissioners may appoint surveyor or let contract.*

Salary provided for in section 138 *of the Cass highway bill, G. C.,* 7181, *does not cover services to private individuals under sections* 2807 *to* 2814, *G. C., nor does said salary cover the services of county surveyor in the location and construction of ditches where the cost of such ditches, including the engineering expense thereon, is assessed against and paid by the owners of land specially benefited.*

Entire salary under said section is payable in the first instance out of the county treasury. Where county surveyor is designated by the state highway commissioner, the county is to be reimbursed to the extent of one-fifth of such salary.

County surveyor may accept no public or private employment except that provided for by statute.

Section 2788, *G. C., is not repealed and commissioners should take this fact into consideration when appointing assistants, etc., under section* 7181, *G. C.*

COLUMBUS, OHIO, September 20, 1915.

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

GENTLEMEN:—I have your communication in which you call my attention to sections 138 and 139 of amended senate bill No. 125, known as the Cass highway code, passed by the general assembly May 27, 1915, approved June 2, 1915, and

filed in the office of the secretary of state June 5, 1915, and which as provided in section 304 thereof went into effect September 6, 1915, and then inquire as follows:

"1. Does the annual salary provided by sections 138 of the act above referred to cover services rendered by the county surveyor in the making of tax maps under the provisions of sections 5551 and 5552, General Code?

"1a. In view of the provisions of section 138 of the act to the effect that the county surveyor shall give his entire time and attention to the duties of his office, may the county commissioners still appoint the county surveyor as tax map draftsman? If not, may they employ some other competent person?

"2. Does such annual salary cover services rendered by the county surveyor to private individuals under the provisions of sections 2807 to 2814, inclusive, of the General Code?

"3. Does such annual salary cover services rendered by the county surveyor in the location and construction of ditches where the cost of such ditches, including the engineering expenses thereon, is assessed against and paid by the owners of land specially benefited? If so, is any portion of his salary to be assessed against the benefited property and how and in what amount?

"4. If, under the provisions of section 139 of the act above referred to, the state highway commissioner designates the county highway superintendent to have charge of all highways, bridges and culverts within the county under control of the state, is the entire salary of the county highway superintendent to be paid in the first instance by the county, which is in turn to be reimbursed by the state to the extent of one-fifth of such salary or is the proportion of the salary of the county highway superintendent which is payable by the state, to wit: one-fifth, to be paid by the state directly to that official?

"5. May the county surveyor under the provision of this act accept any other private or public employment?

"6. Will the county surveyor under the provisions of this act still have authority to fix the number of his assistants, deputies, etc., as provided in section 2788, General Code, and fix their salaries within the aggregate yearly allowance made by the county commissioners?"

Sections 138 and 139 of amended senate bill No. 125, being the sections to which you refer, and which have been designated as section 7181 and 7182 of the General Code, are as follows:

"Section 138. The county surveyor shall be the county highway superintendent. The county surveyor shall give his entire time and attention to the duties of his office and shall receive an annual salary to be computed as follows: One dollar per mile, for each full mile of the first one thousand miles of the public roads of the county, and in addition thereto forty dollars for each full one thousand of the first fifteen thousand of the population of the county as shown by the federal census next preceding his election, thirty dollars per thousand for each full one thousand of the second fifteen thousand of the population of the county; twenty-five dollars per thousand for each full one thousand of the third fifteen thousand of the population of the county; fifteen dollars per thousand for each full one thousand of the fourth fifteen thousand of the

population of the county and five dollars per thousand for each full thousand of the population of the county in excess of sixty thousand. Such salaries shall be paid out of the county treasury in the same manner as the salaries of other county officials are paid; provided, however, that no county highway superintendent shall receive in the aggregate a salary of more than four thousand dollars per annum. The salary above provided for, shall cover all services rendered by the county highway superintendent to the state, county and townships. In the event the county highway superintendent cannot properly perform all the duties of his office, the county commissioners shall fix the aggregate compensation to be expended for assistants by the county highway superintendent during the year. Such compensation shall be paid out of the county treasury in the same manner as the salary of county officials is paid. In addition, thereto, the county highway superintendent and his assistants, when on official business, shall be paid out of the county treasury, their actual, necessary traveling expenses, including livery, board and lodging. Such assistants may be discharged for cause at any time by the county highway superintendent.

"Section 139. The state highway commissioner may designate the county highway superintendent to have charge of all highways, bridges and culverts within the county under control of the state. If the state highway commissioner does not designate such county surveyor to have charge of the highways, bridges and culverts under control of the state within such county, a sum equal to one-fifth of the salary of said county surveyor shall be deducted therefrom as herein provided. When the county surveyor has charge of the highways, bridges and culverts of his county under the control of the state, one-fifth of his salary, as designated in the provisions of this act, shall be paid by the state upon vouchers issued therefor by the state highway commissioner upon the auditor of state against the state highway fund. On the presentation of such voucher the auditor shall issue his warrant therefor upon the state treasurer."

The material parts of section 138, above quoted, as bearing upon the salary question are: "The *county surveyor* shall be the county highway superintendent. The *county surveyor* shall give his entire time and attention to the *duties of his office* and shall receive an annual salary to be computed as follows: Such salaries shall be paid out of the county treasury in the same manner as the salaries of other county officials are paid; provided, however, that no *county highway superintendent* shall receive in the aggregate a salary of more than four thousand dollars per annum. The salary above provided for, shall cover all services rendered by the *county highway superintendent* to the state, county and townships."

It is observed, first, that the salary provided is the salary of the county surveyor, not as highway superintendent but as county surveyor. That by virtue of his office as county surveyor, the county surveyor is highway superintendent. That "the salary above provided for," that is the salary of the *county surveyor,* shall cover also all services rendered by him as the county highway superintendent to the state, county and townships. In other words, instead of this language showing an intent to pay the salary "above provided for" to the county surveyor for his services as county highway superintendent, I think it clearly means that the county highway superintendent shall draw no salary or fees as such but that the salary above provided for the county surveyor shall cover his services, not only as county surveyor but as highway superintendent. Not only is there no salary provided for the county highway superintendent, but there is an express provision that the salary of county surveyor shall cover all services

in his ex-officio office of county highway superintendent and no public authority will have the power to grant him additional compensation for his duties as county highway superintendent.

If the state highway superintendent does not, under section 139 above quoted, designate the county surveyor as county highway superintendent to have charge of the highways, bridges and culverts under the control of the state within the county, "a sum equal to one-fifth of the salary of said *county surveyor* shall be deducted." On the other hand "when the *county surveyor* has charge of the highways, bridges and culverts of his county under the control of the state, one-fifth of *his* salary as designated in the provisions of this act shall be paid by the state."

The Cass highway law covers all of the duties of county highway superintendent. On the other hand, while it covers many of the duties of the county surveyor it by no means covers all of them.

It is my opinion that not only may the county surveyor as highway superintendent draw no other fees, salary or compensation than the salary provided for the county surveyor under section 138, above quoted, but that for the duties positively and unconditionally imposed upon the county surveyor by law he may not draw any other fees, salary or compensation from the public treasury, i. e., from public funds.

Coming to your questions 1 and 1a, which will be considered together, it will be necessary to examine sections 5549, 5550, 5551 and 5552, the Warnes law and the Parrett-Whittemore law in connection with the above quoted statutes.

The maps provided for in sections 5549 and 5550 were for the use of the assessors in making the quadrennial assessment. This scheme of assessment was repealed by the Warnes law, and sections 5549 and 5550 were repealed by implication when section 41 of the Warnes law (section 5620, G. C., 103 O. L., 797) was enacted and the duty of providing such maps was cast upon the district assessor.

This section of the Warnes law (section 41, G. C., 5620) will be in effect until January 1, 1916, when all of the provisions of the Parrett-Whittemore law (106 O. L., 786) will become effective.

The same maps which might have been made under sections 5549 and 5550 also could have been made under sections 5551 and 5552; that is to say, that while sections 5549 to 5552 were all in effect, the county commissioners may have pursued either course as to the *making* of the maps, though only under 5551 and 5552 where they also wanted the maps kept up-to-date. The maps to be made under sections 5551 and 5552 were "a complete set of tax maps for the county." Such maps were for the use of the board of equalization and the auditor. The Warnes law abolished the board of equalization. Section 93 of the Parrett-Whittemore law, G. C., 5589, 106 O. L., 270, provides:

> "The county commissioners shall furnish for the county board of revision in each county, and its experts, clerks and employes, suitable office rooms at the county seat and shall furnish the county auditor for his own office and for the county board of revision, all maps, plats, stationery, blank forms, books, supplies, furniture and other equipment necessary for the proper discharge of its duties and for the preservation and safe keeping of its books, records and files. Provided, however, that the maps, plats, stationery, blank forms and other supplies and equipment used by the county auditor shall, so far as practicable, be used also by the county board of revision."

This section will become operative January 1, 1916, and will supersede all other authority for the making of future tax maps. Sections 5551 and 5552 have

never been expressly repealed, but their operative effect will be limited to the tax maps referred to in said section 93, G. C., 5589, after January 1, 1916.

When this last mentioned section becomes operative the county commissioners will have the option of either appointing the county surveyor to make the maps or of contracting with outside parties, but not of doing both. That is to say, that as the law now stands the county commissioners may appoint the county surveyor to make, correct and keep up to date a complete set of tax maps for the county. The county commissioners may not now have this work done by any one save the county surveyor and his assistants. After January 1, 1916, the county commissioners may have the tax maps made by either the county surveyor and his assistants or by outside parties, but not by both. In other words, one set of maps is required but two sets are not authorized.

Section 5551, G. C., provides:

> "The board of county commissioners may appoint the county surveyor, who shall employ such number of assistants as are necessary, not exceeding four, to provide for making, correcting, and keeping up to date a complete set of tax maps of the county. Such maps shall show all original lots and parcels of land, and all divisions, subdivisions and allotments thereof, with the name of the owner of each original lot or parcel and of each division, subdivision or lot, all new divisions, subdivisions or allotments made in the county, all transfers of property showing the lot or parcel of land transferred, the name of the grantee, and the date of the transfer, so that such maps shall furnish the auditor, for entering on the tax duplicate, a correct and proper description of each lot or parcel of land offered for transfer. Such maps shall be for the use of the board of equalization and the auditor, and be kept in the office of the county auditor."

Section 5552, G. C., provides:

> "The board of county commissioners shall fix the salary of the draughtsman at not to exceed two thousand dollars per year. They shall likewise fix the number of assistants not to exceed four, and fix the salary of such assistants at not to exceed fifteen hundred dollars per year. The salaries of the draughtsman and assistants shall be paid out of the county treasury in the manner as the salary of other county officers are paid."

Section 5551 does not impose a positive duty upon the county surveyor. It authorizes the county commissioners under certain conditions to impose a duty on the incumbent of the surveyor's office. In other words, the making, correcting and keeping up to date of tax maps is not necessarily, but may by action of the county commissioners be made one of the duties of the county surveyor. If this action is taken by the county commissioners, then it is their duty to provide a compensation for this additional work, and I am of the opinion that the county surveyor may receive it in addition to the salary provided for in section 138 of the Cass law above quoted.

I am impelled to this conclusion not only from a consideration of the Cass law and the deliberate leaving unrepealed of sections 5551 and 5552, but as well from considerations of public economy. The tax maps must be made. The commissioners may not compel the surveyor to make them without providing a compensation therefor. If the county surveyor does not make the maps, then the commissioners must contract with outside parties for the work, in all probability at a greater cost and *without the benefit of having the tax maps kept up to date.*

I am therefore of the opinion that the county surveyor may receive the compensation provided for under section 5552, G. C., when such county surveyor has been appointed under 5551, G. C.

Your second and third questions must be answered in the negative. Sections 2807 to 2814 inclusive, of the General Code, provide that land owners may call upon the county surveyor to make surveys of their lands, plant corner stones or posts, conduct proceedings to establish corners and take depositions therein, and record plats and certificates of the surveys made by him. These are clearly duties of the office of county surveyor. It is further provided that the fees of county surveyors for such services shall be paid by the person or persons applying therefor, and there is no provision of law requiring these fees to be covered into the treasury. If, therefore, a county surveyor is called upon to render services under sections 2807 to 2814, G. C., such surveyor will be entitled to charge and collect therefor the fees provided by law, and such fees will be in addition to the annual salary provided by section 138 of the act now under consideration.

Any connection that exists between the location and construction of ditches, other than such ditches as it may be necessary to construct along the sides of highways for the sole purpose of affording drainage for the same, on the one hand, and the construction, improvement, maintenance and repair of bridges and highways on the other hand, is only incidental and not such as to warrant the conclusion that the duties of the county surveyor in connection with the location and construction of ditches have any substantial relation to or connection with his duties as county highway superintendent in the construction, improvement, maintenance and repair of bridges and highways. Moreover, as suggested by you, the cost of ditches, including the engineering expense thereon, is ordinarily assessed against and paid by the owners of lands specially benefited, so that the services of the county surveyor in this particular are not in the last analysis rendered to the state, or to a county or township, but are rendered for the benefit of and are eventually paid for by the owners of the lands specially benefited. I therefore conclude that the annual salary provided by section 138 of amended senate bill No. 125 will not cover services rendered by the county surveyor in the location and construction of ditches under sections 6442 et seq. of the General Code. The compensation of the county surveyor for such services will be in addition to the compensation provided by section 138 of said act, and such compensation will be governed by the statutes now in force and relating thereto.

Coming to your fourth inquiry: It is provided by section 138 as follows: "Such salaries shall be paid out of the county treasury in the same manner as the salaries of other county officials are paid." Coming to consider section 139, it is provided as follows: "If the state highway commissioner does not designate such county surveyor to have charge of the highways, bridges and culverts under control of the state within such county, a sum equal to one-fifth of the salary of said county surveyor shall be deducted therefrom as herein provided. When the county surveyor has charge of the highways, bridges and culverts of his county under the control of the state, one-fifth of his salary, as designated in the provisions of this act, shall be paid by the state upon vouchers issued therefor by the state highway commissioner upon the auditor of state against the state highway fund. On the presentation of such voucher, the auditor shall issue his warrant therefor upon the state treasurer." Looking only to the provisions of section 138, the only conclusion to be reached is that the entire salary of the county surveyor is to be paid in the first instance from the county treasury even where the county surveyor is designated by the state highway commissioner to have charge of the highways, bridges and culverts under control of the state. Looking only to the provisions of section 139, it would seem equally clear that

where the county surveyor is designated by the state highway commissioner to have charge of the highways, bridges and culverts under control of the state, one-fifth of his salary is to be paid directly to that official by the state. A construction is to be adopted which will, if possible, harmonize and give some force and effect to the apparently conflicting provisions of the two sections. This can only be done by reaching the conclusion that where the county surveyor is designated to have charge of the highways, bridges and culverts under control of the state within such county, his entire salary is to be paid in the first instance out of the county treasury, and that the payment of one-fifth of such salary by the state is to be made to the county by way of reimbursement. That this conclusion will give full expression to the legislative intent is manifest from the language of section 139 to the effect that if the state highway commissioner does not designate the county surveyor to have charge of the highways, bridges and culverts under control of the state within such county, a sum equal to one-fifth of the salary of said county surveyor shall be *deducted* therefrom. If it had not been intended that the entire salary of the county highway superintendent should be paid in the first instance from the county treasury, there would have been no reason for the use of the word "deducted." Having in mind the elementary principle that in the construction of a statute an effort should be made to harmonize its different parts and give some effect to all the language used, and taking into consideration all the pertinent provisions of sections 138 and 139, it is my opinion that where the county surveyor is designated by the state highway commissioner to have charge of the highways, bridges and culverts of his county under the control of the state, his entire salary is to be paid in the first instance out of the county treasury in accordance with the provisions of section 138, and that the one-fifth part of his salary to be paid by the state is to be paid to the county by way of reimbursement.

Your fifth question is answered by the provision of section 138 of the act, to the effect that the county surveyor shall give his entire time and attention to the duties of his office. Under amended senate bill No. 125, the county surveyor will therefore be prohibited from accepting any employment, either public or private, not provided for by statute.

In answering your sixth question, it must first be observed that section 2788, G. C., is not expressly repealed or amended by amended senate bill No. 125. Any repeal or amendment of said section must, therefore, be by implication. Section 2788, G. C., reads as follows:

> "The county surveyor shall appoint such assistants, deputies, draughtsmen, inspectors, clerks or employes as he deems necessary for the proper performance of the duties of his office, and fix their compensation, but compensation shall not exceed in the aggregate the amount fixed therefor by the county commissioners. After being so fixed, such compensation shall be paid to such persons in monthly installments from the general fund of the county upon the warrant of the county auditor."

It will be noted that this section applies in terms only to the county surveyor, while the corresponding provisions of section 138 of the act now under consideration apply in terms only to the county surveyor in his capacity as *county highway superintendent.* Repeals by implication are never favored and it is my opinion that after amended senate bill No. 125 goes into effect, section 2788, G. C., will remain in full force and effect in so far as it concerns the assistants, deputies, draughtsmen, inspectors, clerks and other employes necessary to enable the county surveyor to properly perform the duties of his office, *other than those duties devolving upon him as county highway superintendent.*

As to the assistants needed by the county surveyor, acting as county highway superintendent, and necessary to enable him to properly perform his duties as such highway superintendent, the controlling law will be section 138 of amended senate bill No. 125. While it may not be essential in practice to preserve for all purposes the distinction between the assistants, deputies, draughtsmen, inspectors, clerks and other employes necessary to enable the county surveyor to properly perform such of his duties as are not connected with his work as county highway superintendent, on the one hand, and the assistants necessary to enable him to properly perform his duties as county highway superintendent, on the other hand, and while it may be even convenient and proper to disregard the distinction for certain purposes, yet such a distinction clearly exists. As to both classes of assistants, the aggregate amount that may be expended annually for their compensation is to be fixed by the county commissioners and in fixing these amounts regard should be had by the commissioners to the fact that stripped of all forms there is but one office to be supplied with assistants and it was not the purpose of the law to multiply employments, and that both sections of the statute taken together do not authorize the appointment of more persons than are actually necessary to discharge the functions of the office, whether they be those of county surveyor strictly or of county highway superintendent. As to the first class of assistants referred to above, it is provided that the county surveyor shall appoint them and fix their compensation, but as to the assistants provided for by section 138 of the act now under consideration and necessary to enable the county highway superintendent to properly perform the duties of his office, there is no express provision as to what official shall have the power of appointing them and fixing their compensation. The section in question refers however to the county highway superintendent as making the expenditure for assistants and he is expressly given the authority to discharge such assistants for cause. It is therefore my conclusion that the county surveyor, acting as county highway superintendent, will have the authority to fix the number of his assistants authorized by section 138 of the act under consideration, appoint the same, and fix their compensation within the aggregate compensation fixed by the county commissioners.

Respectfully,
EDWARD C. TURNER,
Attorney General.

845.

ROADS AND HIGHWAYS—COUNTY SURVEYOR DOES NOT HAVE CHARGE OF HIGHWAYS, BRIDGES AND CULVERTS UNDER CONTROL OF STATE UNTIL DESIGNATED BY STATE HIGHWAY COMMISSIONER—APPOINTMENT OF ENGINEER OTHER THAN COUNTY SURVEYOR—PATROL MAINTENANCE ON STATE ROADS—INTER-COUNTY HIGHWAYS AND MAIN MARKET ROADS—TEN PER CENT. OF COST TO BE ASSESSED AGAINST ABUTTING LAND.

1. *The county surveyor does not have charge of the highways, bridges and culverts under control of the state and within his county until designated by the state highway commissioner to so have charge.*

2. *The highway commissioner may not appoint any engineer other than the county surveyor, to have charge of the highways, bridges and culverts under the control of the state and within the county of said surveyor, except as provided in section* 142 *of the Cass highway law,* 106 *O. L.,* 613, *section* 7185, *G. C. and when an engineer other than the county surveyor is designated by the state highway commissioner, under the provisions of said foregoing section, his salary and compensation is fixed and determined by said state highway commissioner.*

3. *The state highway commissioner may establish a system of patrol maintenance on state roads and the county highway superintendent, under the direction of the state highway commissioner, may establish such system on county roads when the county commissioners approve the same and provide the necessary funds therefor.*

4. *In all cases of improvements of inter-county highways or main market roads by the state highway commissioner, ten per cent. of the cost of said improvement is to be assessed against the land abutting thereon, provided said assessment does not exceed thirty-three per cent. of the value of said property for the purposes of taxation.*

COLUMBUS, OHIO, September 21, 1915.

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

DEAR SIR:—I have your communication of August 16, 1915, which reads as follows:

> "As the highway department will soon be operating under amended senate bill No. 125 known as the Cass law, I will be pleased to have you answer the following questions:
>
> "1. Does the county surveyor become the county highway superintendent as representing the state department on the first Monday in September, automatically?
>
> "2. Is he state representative until such time as the state highway department appoints some one else, and if so, does he take over all state work at that time?
>
> "3. Can the state highway commissioner appoint any engineer other than the county surveyor as resident engineer except as provided under section 142?
>
> "4. If the state highway department appoints some other engineer as resident engineer representing the state, what salary does this engineer receive?
>
> "5. Does the state highway commissioner have power to establish a system of patrol maintenance on state roads?

"6. Can the county highway superintendent under the direction of the state highway department establish a system of patrol maintenance on the county roads?

"7. Does the abutting property in all instances of improvement under the supervision of the state highway department pay ten per cent. of such improvement?

"An early response to the above questions will be appreciated and place me in position to answer the many communications that are now reaching this department."

Your first three questions may properly be construed together.

Section 139, of the Cass highway law, section 7182, G. C., provides that the state highway commissioner may designate the county highway superintendent to have charge of all highways, bridges and culverts within the county, under control of the state. It is further provided in this section that if the state highway commissioner does not designate such county surveyor to have charge of the highways, bridges and culverts under control of the state within such county, a sum equal to one-fifth of the salary of said county surveyor shall be deducted therefrom and that when the county surveyor has charge of said highways, bridges and culverts, one-fifth of his salary shall be paid by the state.

Section 142, of the act, section 7185, G. C., provides that if in the opinion of the state highway commissioner the county surveyor of any county is not qualified or neglects to perform his duties as county highway superintendent, the state highway commissioner shall file a written statement with the commissioners of such county, stating that in his judgment such surveyor is not qualified to perform the duties of county highway superintendent or has neglected to perform his duties as such, or neglects to carry out the instruction of the state highway commissioner, and that the state highway commissioner may, after filing such statement, designate an engineer other than the county surveyor, to have charge of state roads within the county.

A study of the above provisions indicates that affirmative action on the part of the state highway commissioner is necessary in order to place any person in charge of the state highways, bridges and culverts within a county, and your first question may, therefore, be answered in the negative. The county surveyor, under the Cass highway law, will under all circumstances and conditions be the county highway superintendent, but he will not, in your language, represent the state highway department or, in other words, will not have charge of the highways, bridges and culverts within his county under control of the state, until designated to have charge of such highways, bridges and culverts by the state highway commissioner.

The above statement is, I think, a complete answer to your first and second questions.

Your third question is to be answered in the negative. It is apparent from an examination of section 142, of the act, section 7185, G. C., that it furnishes the exclusive method by which any person, other than the county surveyor, may be designated to have charge of the construction, improvement, maintenance and repair of the roads within his county under control of the state. It must first be the opinion of the state highway commissioner that the county surveyor is not qualified or neglects to perform his duties as county highway superintendent, and the state highway commissioner must file with the commissioners of the proper county a written statement to the effect that in his judgment the county surveyor is not qualified to perform the duties of county highway superintendent, or has neglected to perform his duties as such, or neglects to carry

out the instruction of the state highway commissioner. When such a statement has been filed with the county commissioners, the state highway commissioner may designate an engineer, other than the county surveyor, to have charge of the construction, improvement, maintenance and repair of the roads within such county, under the control of the state. The language of this section can leave no doubt that before the state highway commissioner can appoint any engineer, other than the county surveyor, to have charge of the state highway work within his county, he must file with the county commissioners the statement provided by section 142, of the act, section 7185, G. C.

Your fourth inquiry is as to what salary shall be paid an engineer, other than the county surveyor designated under the provisions of section 142, of said act, section 7185, G. C., to have charge of state highway work within a county. This section merely provides for the selection and designation of an engineer under the conditions specified therein, and that he shall be paid out of any funds available for the construction, maintenance and repair of state highways. No compensation or salary is fixed by said section, and the matter of his compensation is therefore left entirely to the judgment of the state highway commissioner by whom it must be fixed and determined.

Your fifth inquiry is as to the right of the state highway commissioner to establish a system of patrol maintenance on state roads.

By the provisions of paragraph (a), of section 241, of said act, section 7464, G. C., it is made the duty of the state highway department to maintain all state roads, and under the provisions of section 217, of said act, section 1224, G. C., it is made the express duty of the state highway commissioner to maintain and repair to the required standard all inter-county highways, main market roads and bridges and culverts, constructed by the state by the aid of state money or taken over by the state after being constructed.

Patrol maintenance of a road, as I understand the term, involves the employment of persons to patrol regularly said roads and make such small repairs as will serve to keep said roads in good condition and thereby postpone the necessity for larger and more extensive repair.

If there were no other provisions of this act reflecting upon the question here involved, it would seem that the requirements imposed by the sections just cited would justify sufficiently this method of maintaining and keeping in repair all state roads. In other words, as one of the methods whereby a road is maintained and kept in repair, the state highway commissioner would be authorized to adopt the patrol system. However, there are other provisions of this act which relate more closely, in my judgment, to this question. The current appropriation measure, being house bill No. 701, makes specific appropriation to repair, maintain, protect, police and patrol public highways, as provided in section 6309, G. C. (See 106 O. L., pages 695 and 776.)

Section 6309, G. C., aforesaid, provides that the revenues derived from automobile registration fees shall be paid weekly into the state treasury and that any surplus after deducting the expenses of carrying out and enforcing the provisions of the chapter of the General Code, relating to automobile registration, shall be used for the repair, maintenance, protection, policing and patroling of the public roads and highways of the state under the supervision and control of the state highway department. It will be observed that the language of this section has been adopted in said appropriation bill.

However, in paragraph 3, section 214, of said act, section 1221, G. C., it is provided that "the funds derived from the registration of automobiles shall be equally divided and one-half shall be applied and used, as provided in this section, in the maintenance and repair of the inter-county highways, and one-half to the

maintenance and repair of the main market roads of the state. From the part of the funds appropriated for use on the main market roads the state commissioner is empowered to establish a system of maintenance to be organized in such manner as the state highway commissioner may provide.'' It will thus be seen that the legislature has specifically provided herein for the disposition of the funds derived from registration of automobiles, and that said funds shall be applied and used, as provided in this section, in the maintenance and repair of inter-county and main market roads.

Without discussing all the provisions of said section 214, it is sufficient to say that there are no provisions in said section which preclude or prevent the use of said funds as provided in said paragraph 3 aforesaid, viz., in the maintenance and repair of the inter-county and main market roads. Did the legislature intend, therefore, by the provisions of said paragraph 3 to in any manner limit the use of said funds, as provided in said appropriation bill, or did the legislature intend to include in the terms ''maintenance and repairs,'' as used in said paragraph 3, the method or manner of maintaining said highways by the patrol system. I am of the opinion that the latter view must obtain, and that such methods are included in said terms ''maintenance and repair,'' and as before noted, are specifically provided for in said appropriation bill.

Further, it appears from the last clause of said paragraph 3, that from the part of said funds appropriated for use on main market roads, the state commissioner is empowered to establish a system of maintenance to be organized in such manner as the state highway commissioner may provide.

This provision clearly empowers the establishment of the patrol system as to main market roads. It is therefore my opinion that the state highway commissioner has the power to establish a system of patrol maintenance, as that term is herein defined, upon the state roads within the limits of the appropriations hereinbefore noted.

Your sixth question is as to the right of the county highway superintendents, under the direction of the state highway department, to establish a system of patrol maintenance on the county roads of their respective counties. By the provisions of section 214, of the Cass highway law, section 1221, G. C., and section 241, of said law, section 7464, G. C., the activities of the state highway department in maintenance and repair work is limited to state roads. It therefore follows that any system of patrol maintenance on the county roads of a county would have to be carried forward by means of county funds.

Section 154, of the act, section 7197, G. C., provides that the county highway superintendent, under the direction of the state highway commissioner, shall provide for the maintenance and repair of the roads of the county under such system as may be deemed expedient, so that each section of the highways of the county shall be under proper supervision and be effectively and economically improved, maintained and repaired.

Section 155, of the act, being section 7198, G. C., provides that the county highway superintendent may, with the approval of the county commissioners or township trustees, employ such laborers, teams, implements and tools, and purchase such material as may be necessary in the performance of his duties. Where county road work is done by contract, the contract is, under the terms of section 124, of the act, section 6945, G. C., let by the county commissioners, and from the provisions of section 155, referred to above, it is apparent that work by force account can be carried on by the county highway superintendent only with the approval of the county commissioners. It is true also that all levies for county highway purposes and all appropriations for such purposes must be made by the county commissioners, so that your sixth question cannot be answered generally

either in the affirmative or the negative. If the county commissioners approve the necessary steps and provide the necessary funds, county highway superintendents are authorized to establish, under the direction of the state highway commissioner, a system of patrol maintenance on county roads. If the county commissioners fail to approve the necessary steps, or provide the requisite funds, the county highway superintendent will be without authority to take such action.

Your last inquiry is as to whether abutting property in all instances of improvement, under the supervision of the state highway department, must be assessed ten per cent. of the cost of such improvement. This inquiry is answered in part by the provision of section 210, of the act, section 1217, G. C., to the effect that in no case shall the property owners abutting upon an improvement, be relieved by the state, county or township from the payment of ten per cent. of the cost and expense of such improvement, excepting therefrom the cost and expense of bridges and culverts, with the further proviso that the total amount assessed against any abutting property must not exceed thirty-three per cent. of the tax valuation of such property. It would seem from a study of the context that the provision referred to above is applicable to inter-county highway improvements and not to main market road improvements, but that the same rule is intended to apply to main market road improvements is clearly indicated by the provision of section 184, of the act, section 1191, G. C., to the effect that when a part of an inter-county highway system or main market road system of the state is improved by the state, by contract or force account, without the co-operation with a county or some township thereof, ten per cent. of the cost of said construction or improvement shall be assessed against the land abutting thereon, according to the benefits, provided the total amount assessed against any owner of abutting property shall not exceed thirty-three per cent. of the valuation of such property for the purposes of taxation.

I therefore conclude, in answer to your inquiry, that in all cases of improvements of inter-county highways or main market roads made by the state highway commissioner, either in co-operation with a county or township, or without such co-operation, ten per cent. of the cost of the improvement is to be assessed against the land abutting thereon, according to benefits, with the limitation that said assessment shall not exceed thirty-three per cent. of the valuation of such property for the purposes of taxation.

Respectfully,

EDWARD C. TURNER,
Attorney General.

846.

REPORT OF COUNTY AUDITOR—WHEN PUBLICATION TO BE MADE IN *ONLY* ONE NEWSPAPER.

If there are not one newspaper of the political party casting the largest vote in the state at the last general election and one of the second largest published and of general circulation in a county, the county auditor's report under section 2508, G. C., may be published in any newspaper published and of general circulation in the county.

COLUMBUS, OHIO, September 21, 1915.

HON. DON C. PORTER, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—I am in receipt of your letter of September 10th, 1915, in which you request my opinion upon the following:

"I would appreciate very much your opinion as to the proper construction of the following extract from G. C., section 2508, as amended in 106 Ohio Laws, page 488:

"'* * Said auditor shall cause an exact copy of said report to be immediately published one time in one newspaper of the political party casting the largest vote in the state at the last general election, and in one newspaper of the political party casting the second largest vote in the state at the last general election, published in the county and of general circulation in said county; if there are two such papers published; *if not, then a publication in one newspaper only is required.* * *'

"There are only two newspapers published in Coshocton county; the one claiming to be an independent paper, while the other claims to be a democratic paper. I have advised our county auditor that by virtue of the italicized part of the foregoing extract of G. C., 2508, that the report in question may be published in either the independent paper or the democratic paper. Is my opinion correct or not? If incorrect, kindly inform me as to how the report would be published in case both of our newspapers were independent?"

In my opinion your construction is correct.

Respectfully,

EDWARD C. TURNER,

Attorney General.

847.

STATE HIGHWAY COMMISSIONER—ROADS AND HIGHWAYS—INTERPRETATION OF CASS HIGHWAY LAW—*SIXTEEN* QUESTIONS ON AMENDED SENATE BILL NO. 125 FOUND IN 106 O. L., 574, ANSWERED.

This opinion relates to an interpretation of the CASS HIGHWAY LAW, 106 *O. L.,* 574.

1. *There is no provision for either purchasing or furnishing means of transportation for county commissioners.*

2. *An automobile used as a conveyance by county road officials may not be purchased as equipment.*

3. *Primarily, a township highway superintendent has control of the township roads within his district and in addition thereto is required to report to the county superintendent in relation to all highways within the district and to perform such duties as may be prescribed by the rules and regulations of the county highway superintendent so far as said rules and regulations do not conflict with those of the township trustees.*

Under section 3375, *G. C., the township highway superintendent has certain duties regarding the graveled and unimproved public roads of his district irrespective of whether they are township, state or county roads.*

4. *State roads include such part or parts of inter-county highways and main market roads as have been or may hereafter be constructed by the state, or which have been or may hereafter be taken over by the state, as provided in the Cass highway law, and such roads shall be maintained by the state highway department.*

5. *County roads shall include all roads which have been or may be improved by the county, by placing brick, stone, gravel or other road building material*

thereon, or heretofore built by the state and not a part of the inter-county or main market system of roads, together with such roads as have been or may be constructed by the township trustees, to conform to the standards for county roads, as fixed by the county commissioners, and all such roads shall be maintained by the county commissioners.

6. *Township roads shall include all public highways of the state other than state or county roads, as hereinbefore defined, and the trustees of each township shall maintain all such roads within their respective townships.*

7. *The county highway superintendent is required generally to approve all expenditures made from county or township funds for the construction, improvement, maintenance and repair of township and county roads and bridges, whether done by contract or force account, with the exception of claims for dragging, which are to be allowed upon the approval of the township highway superintendent.*

8. *The mileage of public roads referred to in section* 138 *of the act, G. C.,* 7181, *includes such streets of villages as form a part of a state, county or township road.*

9. *Where a county improves a road through the township and into or through a village, the part of the road in the village becomes a county road, but the duty of maintenance is cast upon the municipal authorities.*

10. *It is the duty of the county auditor to determine the mileage of public roads upon which the county surveyor's salary is to be based.*

11. *The county surveyor draws the salary provided for in section* 138, *(G. C.,* 7181), *as county surveyor and not as county highway superintendent.*

12. *The power of removal of township highway superintendents is concurrent in the county highway superintendent and township trustees.*

13. *The levies provided by sections* 105, 238 *and* 239 *are outside of the ten mill limitation but within the fifteen mill limitation of the Smith law.*

14. *The county surveyor is required to give two bonds, one as county surveyor and one as highway superintendent.*

15. *County commissioners, neither by force account or otherwise, may repair highways without the supervision of the county highway superintendent.*

16. *Under section* 214, *(G. C.,* 1221) *and house bill No.* 701 *(appropriation bill) the state's portion of the salary of county highway superintendent is to be paid out of their funds applicable for inter-county highway construction improvement, maintenance and repair.*

17. *Unnecessary for the county surveyor and his assistants and deputies, on yearly and monthly salaries, to itemize pay rolls in the manner formerly done by county surveyors.*

COLUMBUS, OHIO, September 21, 1915.

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

GENTLEMEN:—I have your communication of August 12, 1915, in which you submit sixteen questions relating to the Cass highway law, being amended senate bill No. 125, found in 106 O. L., 574. You first inquire as to whether there is any provisions in amended senate bill No. 125 for county commissioners either to purchase or be furnished means of transportation. I assume that you mean to inquire as to the right of county commissioners to purchase and maintain a vehicle or vehicles with public funds and use the same while in the discharge of their duties, in connection with highways, or to rent vehicles while so engaged and charge the cost thereof against the county. You do not cite me to any particular section or sections of the act in question as bearing upon this question and inquire as to the proper construction to be placed upon such sections; but merely inquire generally as to whether a provision of the character indicated by you is to be

found in the act. This observation is also applicable to a number of the other questions propounded by you, and the work of answering questions of this class has been one involving a test of eyesight and patience in the reading of the three hundred and four sections of the act, rather than one involving the application of legal principles. I can only say, in answer to your first question, that I have carefully examined the act in question and have been unable to find therein any provision authorizing county commissioners to purchase and maintain with public funds a vehicle or vehicles to be used by them while in the discharge of their duties in connection with highways, or to rent vehicles while so engaged and charge the cost thereof against the county.

Your second inquiry is as to whether the automobile used as a conveyance by county road officials is to be classed as equipment. I have interpreted this inquiry to be as to the right of the county commissioners or county highway superintendent, under the Cass highway law, to purchase an automobile to be used by either the county commissioners or the county highway superintendent and his assistants, or both, while engaged on work relating to the highways of the county.

The principal provisions of the Cass highway law relating to the purchase or lease of equipment by the county authorities are to be found in sections 155, 157, 158 and 160 of the act. Section 155 of the act, being section 7198, G. C., provides that the county highway superintendent may, with the approval of the county commissioners or township trustees, employ such laborers, teams, implements and tools, and purchase such material as may be necessary in the performance of his duties. It need only be observed, in connection with this section, that an automobile could not be classed as an implement or tool or as material, within the meaning of the section. Section 157 of the act, being section 7200, G. C., provides that the county commissioners may purchase such machinery or other equipment for construction, improvement, maintenance or repair of the highways, bridges and culverts under their jurisdiction, as they may deem necessary.

Section 158 of the act, being section 7201, G. C., provides that the county highway superintendent may lease or hire machinery, tools and equipment for highway, culvert or bridge repair, at a price to be approved by the county commissioners or the township trustees. Section 160 of the act, being section 7203, G. C., provides that the county highway superintendent may, with the approval of the county commissioners or township trustees, purchase from any public institution, any road material, machinery, tools or equipment, quarried, mined, prepared or manufactured by said institution, provided the same conform to the standard specifications therefor, for highways, bridge or culvert work in said county. It is manifest that none of the provisions referred to above are wide enough to authorize the county commissioners or county highway superintendent to purchase an automobile to be used by either the county commissioners or the county highway superintendent and his assistants, or both, while engaged on highway work, and I am of the opinion that no such authority is conferred by the act under consideration. This opinion is strengthened by the provision of section 138, of the Cass highway law, being section 7181, G. C., to the effect that the county highway superintendent and his assistants, when on official business, shall be paid out of the county treasury their actual necessary traveling expenses, including livery, thus evidencing a legislative intent that the county highway superintendent and his assistants when traveling about the county on officials business should have resort to hired vehicles.

Your third question is as to what roads township highway superintendents will have charge of in their townships. This question is not susceptible of a definite answer applicable under all conditions for the reason that at least one of the duties of a township highway superintendent may, under certain conditions,

extend to all of the roads of his road district, while other of his duties are limited to a certain class of roads. Section 3370, G. C., provides that the township highway superintendent shall, under the direction of the township trustees "have control of the roads of his district and keep them in good repair." While the language of this section does not limit the activities of the township highway superintendent to township roads, yet section 7464, G. C., limits the jurisdiction of township trustees in the maintaining of roads to township roads. It therefore follows that the duty of the township highway superintendent to keep the roads of his district in good repair is limited to township roads as defined in section 7464, G. C. By section 3374, G. C., the township highway superintendent is required to make a report to the county highway superintendent annually on blanks furnished by the county superintendent in relation to the highways, bridges and culverts within his township or district, containing such matter and in such form as may be prescribed by the county highway superintendent. He is also required to make additional reports from time to time as required by the county highway superintendent and to perform such other duties as may be prescribed by the rules and regulations of the county highway superintendent, so far as the rules and regulations of the county highway superinendent do not conflict with those of the township trustees. Under section 7182, G. C., the county highway superintendent may be designated to have charge of all highways, bridges and culverts within the county under control of the state. If a county highway superintendent is so designated to have charge of the highways, bridges and culverts within his county under control of the state, then the duties of the various township highway superintendents of that county in making reports to the county highway superintendent and performing other duties required by the rules and regulations of the county highway superintendent, would extend to all the highways, state, county and township, within their respective districts. By sections 3375, G. C., et seq., the township highway superintendent is given certain duties in reference to dragging the graveled and unimproved public roads of his road district, and these duties extend to all the graveled and unimproved public roads of the district without reference to their class. It will thus be seen that the question of whether the duties of the township highway superintendent are limited to township roads or also extend to county or state roads, or both, depend upon the particular function which he is exercising, some functions extending under certain conditions to all the roads of his district and other functions being limited to the township roads of his district.

Your fourth inquiry is as to what constitutes a township road, what a county road and what a state road. This inquiry is fully answered by the provisions of section 241 of the act, section 7464, G. C., which section reads as follows:

> "The public highways of the state shall be divided into three classes, namely: State roads, county roads and township roads.
>
> "(a) State roads shall include such part or parts of the inter-county highways and main market roads as have been or may hereafter be constructed by the state, or which have been or may hereafter be taken over by the state as provided in this act, and such roads shall be maintained by the state highway department.
>
> "(b) County roads shall include all roads which have been or may be improved by the county by placing brick, stone, gravel or other road building material thereon, or heretofore built by the state and not a part of the inter-county or main market system of roads, together with such roads as have been or may be constructed by the township trustees to

conform to the standards for county roads as fixed by the county commissioners, and all such roads shall be maintained by the county commissioners.

"(c) Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined, and the trustees of each township shall maintain all such roads within their respective townships; and provided further, that the county commissioners shall have full power and authority to assist the township trustees in maintaining all such roads, but nothing herein shall prevent the township trustees from improving any road within their respective townships, except as otherwise provided in this act."

Your fifth inquiry is as to whether the county highway superintendent is required to approve all expenditures for roads and bridges in the township and county. I assume that this inquiry is limited to township and county road construction, improvement, maintenance and repair. This inquiry is answered in part by the provison found in section 144 of the act, being section 7187, G. C., to the effect that the county highway superintendent shall approve all estimates which are paid from county or township funds, for the construction, improvement, maintenance and repair of roads and bridges. The idea of an estimate, when the word is used in this sense, is associated with that of a contract. That is to say, estimates would be paid from county or township funds where the county or township had entered into a contract for road or bridge work. As the work on the contract progressed, estimates would be allowed and paid and upon the completion of the work a final estimate would be allowed and paid. The provision of section 144 of the act referred to above, requiring the county highway superintendent to approve all expenditures paid from county or township funds for the construction, improvement, maintenance and repair of roads and bridges, therefore, has the effect that in so far as a county or township undertakes to construct, improve, maintain or repair a road or bridge by contract, all its expenditures must be approved by the county highway superintendent. It is also made clear from the provisions of the act, that county commissioners may, under certain conditions, proceed to construct, improve, maintain and repair roads and bridges by force account, so-called. That the legislature intended to confer such a right is indicated by the provisions of sections 157 and 158 of the act, being sections 7200 and 7201, G. C., authorizing county commissioners to purchase such machinery or other equipment for construction, improvement, maintenance or repair of the highways, bridges and culverts under their jurisdiction as they may deem necessary and to take over all machinery, tools or other equipment owned by the township when the Cass highway law becomes effective, at a price to be agreed upon between the county commissioners and the township trustees, and authorizing the county highway superintendent to lease or hire machinery, tools and equipment for highway, culvert or bridge repair under certain conditions. It is also provided by section 160 of the act, being section 7203, G. C., that the county highway superintendent may, under certain conditions, purchase from any public institution, any road material, machinery, tools or equipment quarried, mined, prepared or manufactured by said institution.

Authority to proceed by force account is more directly conferred, however, by section 155 of the act, being section 7198, G. C., which provides that the county highway superintendent may, under certain conditions, employ such laborers, teams, implements and tools, and purchase such material as may be necessary in the performance of his duties.

Regard must be had to the provision of section 141 of the act, being section

7184, G. C., which is in a large measure decisive as to the proposition now under discussion. This section provides that the county highway superintendent shall have general charge, subject to the rules and regulations of the state highway department, of the construction, improvement, maintenance and repair of all bridges and highways within his county, whether known as township, county or state highways, and such county highway superintendent shall see that the same are constructed, improved, maintained, dragged and repaired as provided by law, and shall have general supervision of the work of constructing, improving, maintaining and repairing the highways, bridges and culverts in his county, subject, however, to the provision for the designation by the state highway commissioner of an engineer, other than the county surveyor, to have charge of state work in such county. It is manifest that the provisions of this section will be applicable, under all circumstances, to the construction, improvement, maintenance, dragging and repair of all county and township roads within the county. There would be no reason in a rule requiring the approval of the county highway superintendent as to expenditures made by contract and not requiring such approval as to expenditures made when proceeding by force account.

While the letter of the provision of section 144 of the act, being section 7187, G. C., only goes so far as to expressly require the approval of the county highway superintendent to all estimates paid from county or township funds for the construction, improvement, maintenance and repair of roads and bridges, yet inasmuch as the county highway superintendent is by the terms of the act made the chief executive officer of the county in road and bridge matters and given general charge of the construction, improvement, maintenance and repair of all bridges and highways within his county, which provision will, under all circumstances be applicable to all township and county roads in the county, I am of the opinion that the spirit of the act is such as to require the approval of the county highway superintendent to all expenditures made from county or township funds for the construction, improvement, maintenance and repair of township and county roads and bridges, whether the work be done by contract or force account, with one exception, which will be hereinafter pointed out.

Referring at this point to road activities of township trustees, it will be observed that in so far as township trustees may attempt road construction or improvement, as distinguished from road repair, surveys, plats, plans, profiles, cross sections, estimates and specifications for the proposed work must be prepared by the county highway superintendent, this being provided by section 62 of the act, section 3298-3, G. C.

Under the provisions of section 65 of the act, being section 3298-6, G. C., an inspector or inspectors for such work may be appointed by the township trustees, but such inspector or inspectors are required to act under the general direction of the county highway superintendent. It will thus be seen that the township highway superintendent, as such, has nothing to do with road construction or improvement by township trustees, but by the provisions of section 75 of the act, section 3370, G. C., it is made the duty of the township highway superintendent, acting under the direction of the township trustees, to keep the roads of his district in good repair. The word "roads" as found in this provision must be read "township roads," for by the terms of section 241 of the act, section 7464, G. C., the duty of the township trustees in maintaining roads, is limited to township roads.

The township highway superintendent is, by the terms of chapter 5 of the act, being sections 3375 to 3379, inclusive, of the General Code, charged with certain duties relative to the dragging of graveled and unimproved roads, and as to expenditures for this purpose it is provided by section 81 of the act, being section 3376, G. C., that the township highway superintendent shall report all claims for

dragging that are in accordance with the provisions of the act, to the township trustees, who shall at their regular monthly meetings pay all claims for dragging that have the approval of the township highway superintendent and that are not inconsistent with the act. This provision seems to make the approval of the township highway superintendent sufficient as to claims for dragging graveled and unimproved roads, and to create an exception to the general rule, which exception, in my opinion, is the only one to be found in the act.

Answering your question specifically, it is therefore my opinion that the county highway superintendent must approve all expenditures for roads and bridges made from the treasuries of the counties and townships of the state, under the provisions of the Cass highway law, with the one exception of expenditures for dragging graveled and unimproved roads, which expenditures may be made upon the approval of the township highway superintendent.

An opinion covering your sixth and seventh questions will be prepared as soon as additional information requested from you has been received.

Your eighth inquiry is worded as follows:

> "Does the mileage of public roads include the mileage of roads in municipalities?"

I assume that the mileage of public roads, to which you refer, is the mileage of public roads mentioned in section 138 of the act, being section 7181, G. C., and being one of the factors entering into the computation of the annual salary provided by the section in question.

An examination of all the provisions of the act now under consideration discloses that in a general way the state, counties and townships are limited in the construction, improvement, maintenance and repair of highways to roads located outside municipalities.

Those cases in which the state or a county may engage in road building activities inside a municipality, constitute exceptions to the general rule. County commissioners may, under section 128 of the act, being section 6949, G. C., extend a proposed road improvement into or through a "municipality" when the consent of council of said "municipality" has been first obtained. But the term "municipality" as used in section 128, is limited by the provisions of section 133 (G. C., 6954), which provides in part:

> "* * * The word 'road' as used in sections 85 and (to) 133, both inclusive, of this act, shall be construed to include any state or county road or roads or any part thereof or any state or county road or roads and any *village* street or streets or any part thereof which form a continuous road improvement."

The power of the state highway commissioner in this particular is specifically limited to villages.

The pertinent section of the act relating to the power of the state highway commissioner in this particular, is section 229, being section 1231-3, G. C., which provides that the state highway commissioner may extend a proposed road improvement into or through a village, when the consent of the council of said village has been first obtained, but as before observed, the usual and ordinary activities of the state and counties in road matters will not, under this act, extend to the roads and streets within municipalities. However, it is my opinion that the mileage of the public roads of a county, referred to in section 138 of the act, section 7181,

G. C., and upon which the salary provided by said section is, in part, to be based, will include such streets of villages as form a part of a state, county or township road.

Your ninth inquiry is as follows:

> "If the county improves a road through the township and into or through villages, does that improvement through the village become a county road and under maintenance of the county?"

This question is to be answered in the negative. No authority is given either the state, county or township to do anything upon the roads of a village without the consent and agreement of the village council. Throughout the act a distinction obtains between "maintenance" and "repair."

Section 244 of the act (G. C., 7467), after providing that the state, county and township shall *maintain* their respective roads, in the same sentence when reference is made to the agreement between the state, county or township and a village, it is limited to "construction, improvement or repair upon roads inside of a village." Where a road is improved through a village, the village may provide for having the road through the village widened at its own expense. Clearly this part of the road could not be said to have been built or improved by the county, and this part of the road could not be considered a part of the county road.

The general control of roads within municipalities is still left with the municipality. Section 3714, G. C., which was left unrepealed, provides:

> "Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts within the corporation, and shall cause them to be kept open, in reppir, and free from nuisance."

Your tenth inquiry is as to whose duty it is to determine how mileage of public roads upon which the county surveyor's salary is to be based, and you also inquire as to whether he draws salary as county surveyor or as county highway superintendent.

I have carefully examined all of the provisions of the act now under consideration and find no provision therein specifically casting upon any official the duty of determining the mileage of public roads in the county referred to by you. The legislature seems to have overlooked this feature of the matter in the framing of the statute now under consideration. It is my opinion that it is the duty of the county auditor, who issues the warrants for salary, to ascertain the mileage and population upon which the salary is computed. It is to be observed that only the first thousand miles of public roads in the county is to be used as a basis for this computation. This should not be difficult of ascertainment.

You further inquire, in this connection, as to whether the salary provided for by section 138, is drawn by the county surveyor, as county surveyor, or as county highway superintendent. The county surveyor draws the salary provided by section 138 of the act, section 7181, G. C., as county surveyor, and by the provisions of said section said salary is in full for all services as county highway superintendent.

Your eleventh inquiry is as to how far the county highway superintendent's authority goes in removing township highway superintendents.

It is provided by section 75 of the act, section 3370, G. C., that the township highway superintendent may be removed by the county highway superintendent for incompetency or gross neglect of duty. As to whether a township highway superintendent is incompetent or guilty of gross neglect of duty, would depend upon the particular facts in each specific instance. It is sufficient for the purpose of this opinion to observe that if a township highway superintendent is incompetent, or if he is guilty of gross neglect of duty, he may be removed by the county highway superintendent, which power is concurrent with that of the township trustees.

Your twelfth question reads: "Is the tax limitation prescribed in sections 105, 238 and 239, ten mills or fifteen mills?" As between the ten-mill and fifteen-mill limitation the levies in these sections are above the ten mills but within the fifteen mills. This answer, however, is not sufficient without some explanation of the provisions of these various sections.

As this law did not become effective until after the levies were made this year, no levies may be made under the Cass highway law until 1916, and there is no immediate necessity for the interpretation of the tax levying sections, of which there are others in addition to those cited by you. With the large amount of work now pending in this department, I prefer to defer a discussion of these tax sections until I can find time to take all of them up at once.

Your twelfth question reads: "Is the tax limitation prescribed in sections of $2,000 is the bond contemplated by section 140 of the act, or whether the surveyor must give another bond as county highway superintendent.

Section 2784, G. C., which is not expressly repealed by the Cass highway law, provides as follows:

> "Before entering upon the duties of his office, the county surveyor shall give bond to the state in the sum of two thousand dollars with two or more sureties, approved by the county commissioners, conditioned for the faithful performance of his official duties. Such bond, with the oath of office and the approval of the commissioners indorsed thereon, shall be deposited with the county treasurer and kept in his office."

Section 140, of the Cass highway law, section 7183, G. C., provides that the county highway superintendent and such of his assistants as the commissioners may determine, shall give bond to the state of Ohio in a sum to be fixed by the commissioners of the county, with sureties to the approval of said commissioners. Said bond shall be conditioned that such person will faithfully discharge the duties enjoined upon him by law. Such bonds, with the approval of the county commissioners as to sureties thereon, together with the oath of office of such county highway superintendent or assistant endorsed thereon or attached thereto, shall be deposited with the county treasurer. In answering this inquiry it should be noted that the act now in question casts upon the county surveyor, acting as county highway superintendent, a great many new duties and responsibilities. There is nothing inconsistent in requirements to the effect that the county surveyor shall give one bond conditioned for the faithful discharge of his duties generally and another bond conditioned for the faithful discharge of his duties as county highway superintendent. It will also be observed that as to the bond mentioned in section 2784, G. C., the amount of the same is fixed by the statute at $2,000, while as to the bond mentioned in section 140 of the act, section 7183, G. C., the amount of the bond is to be fixed by the county commissioners. I am of the opinion that the bond referred to in section 140 of the act, section 7183, G. C., is not a substitute for the bond referred to in section 2784, G. C., and fur-

ther, that section 2784, G. C., is not impliedly repealed. From this it follows that all county surveyors should give two bonds, one the bond of $2,000 provided by section 2784, G. C., as county surveyor, and the other the bond prescribed by section 140 of the act, section 7183, G. C., as county highway superintendent, the amount of which is to be fixed by the commissioners of the county. This holding is in conformity with that of a previous opinion of this department rendered to Hon. Dean E. Stanley, prosecuting attorney of Warren county on May 18, 1915, in which a somewhat similar question was discussed. In that opinion it was held that before the prosecuting attorney of a county is entitled to a warrant from the county auditor for an expense allowance of an amount not to exceed one-half of his official salary, as authorized by the provision of section 3004, G. C., he must give the bond required by said section in addition to the official bond given by him as required by the provision of section 2911, G. C.

Your fourteenth inquiry is as to whether county commissioners, by force account or otherwise, may repair highways without the supervision of the county highway superintendent. Much of the reasoning applicable to the fifth proposition submitted by you is also applicable in answering this question. It is manifest from an examination of the entire act that its purpose is to place all highway work in the county under the supervision of the county highway superintendent, with the exception, under certain conditions, of work upon state highways carried on under the general control of the state highway commissioner.

It is expressly provided by section 141 of the act, section 7184, G. C., as follows:

> "The county highway superintendent shall have general charge, subject to the rules and regulations of the state highway department, of the construction, improvement, maintenance and repair of all bridges and highways within his county, whether known as township, county or state highways, and such county highway superintendent shall see that the same are constructed, improved, maintained, dragged and repaired as provided by law, and shall have general supervision of the work of constructing, improving, maintaining and repairing the highways, bridges and culverts in his county, subject, however, to the provision hereinafter made for the designation, by the state highway commissioner, of an engineer other than the county surveyor, to have charge of state work in such county."

Under the provisions of the section above quoted, and having in mind the general scheme and spirit of the act, it is therefore my opinion that under the terms of the Cass highway law, county commissioners cannot, either by force account or otherwise, repair highways without the supervision of the county highway superintendent.

Your fifteenth inquiry is as to whether there is money appropriated by the general assembly to pay the one-fifth part of the salary of the county highway superintendent which is to be paid by the state, as provided in section 139 of the act, section 7182, G. C. In considering this matter, reference should first be had to the provision of section 22 of article II of the constitution, to the effect that no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law. Section 214 of the act, section 1221, G. C., contains the following provision:

> "Seventy-five per cent. of all the money paid into the treasury by reason of the levy for the state highway improvement fund shall be used for the construction, improvement, maintenance and repair of the inter-

county highways as the same have been heretofore designated or as they may hereafter be established or located by the state highway commissioner in the manner provided by law, and for the maintenance of the state highway department, including the state's portion of the salaries of the county highway superintendents. Money appropriated or available for inter-county highways shall be equally divided among the counties of the state."

A subsequent provision of the same section is to the effect that twenty-five per cent. of the state highway improvement fund is to be devoted to main market road purposes. The division of this fund between inter-county highways and main market roads made by the Cass highway law, is the same as that which existed under the former statutes. It may properly be observed that the engineering and supervision required in the construction, improvement, maintenance and repair of a highway is as much a part of the cost of constructing, improving, maintaining and repairing such highway as is the material used or the physical labor employed in such work. By a reference to house bill No. 701, it will be found that said bill carries two appropriations for the construction, improvement, maintenance and repair of inter-county highways, one of these appropriations amounting to $1,533,400 and the other amounting to $826,300. The provision of section 214 of the act, section 1221, G. C., quoted above, is not, of course, an appropriation but it must be regarded as a direction to the effect that when moneys have been appropriated for the construction, improvement, maintenance and repair of inter-county highways and have been equally divided among the counties of the state, then such moneys are available for the payment of the state's portion of the salaries of the county highway superintendents for the reason that the state's portion of the salaries of the county highway superintendents is to be regarded as a part of the cost and expense of construction, improvement, maintenance and repair. It is true that the county highway superintendents will have duties to perform in reference to main market roads in those counties in which main market roads exist, but by the terms of the statute all that part of their salaries to be paid by the state is made payable from inter-county highway funds.

It is therefore my opinion, in answer to your question, that the appropriations of $1,533,400.00 and $826,300.00, referred to above, are available for the payment of the state's portion of the salaries of county highway superintendents, and that in any county the state's portion of the salary of the county highway superintendent of that county may properly be paid from the proportion of the inter-county highway funds referred to above and applicable for inter-county highway construction, improvement, maintenance and repair in such county.

Your sixteenth inquiry reads as follows:

"Will it be necessary for the county surveyor and his assistants or deputies on yearly or monthly salaries, to itemize their payrolls as heretofore?"

Assuming this question to refer to the yearly salary of the county surveyor and the monthly salary of assistants who may be provided under section 138 of the act, it is my opinion that the payrolls are not required, as a matter of law, to be itemized in the same manner that county surveyors' compensation was heretofore itemized.

Respectfully,

EDWARD C. TURNER,

Attorney General.

548.

CONVICTS TRANSFERRED FROM PENITENTIARY OR REFORMATORY TO COLUMBUS STATE HOSPITAL, CONSTRUCTIVELY IN FORMER INSTITUTIONS—PHYSICIANS OF SUCH HOSPITAL CANNOT ACT AS MEDICAL WITNESSES—OPINION SUPPLEMENTS OPINION NO. 776, AUGUST 28, 1915.

Convicts transferred from the penitentiary or reformatory to the Columbus State Hospital are constructively in such penitentiary or reformatory, and the physicians of such hospital as to such convicts are "connected with the penitentiary or reformatory" and, therefore, cannot act as medical witnesses under section 2216, G. C.

COLUMBUS, OHIO, September 21, 1915.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Under date of August 17th you requested my official opinion on the following question:

> "The Ohio state reformatory has forwarded to this department statement of D. W. Cummins, probate judge of Richland county, amounting to $303.60 for fees and expenses account of lunacy inquests of fifteen inmates of the Ohio state reformatory confined in the Columbus state hospital.
>
> "Included in this statement is $180.00 for Drs. G. H. Williams, B. B. Barber and G. A. Rowland, examining physicians and witnesses. These physicians being employes of the Columbus state hospital, we would like to have your opinion before issuing vouchers in payment of same."

The bill of costs which was forwarded to you by the Ohio state reformatory purported to be made under the provisions of section 1956 of the General Code, and I advised you in an opinion under date of August 28, 1915, being opinion No. 776, that, in my opinion, a physician permanently employed in a state hospital is not authorized to act as a medical witness.

I am, however, just in receipt of a letter from Dr. C. F. Gilliam, superintendent of Columbus state hospital, wherein he inquires whether or not I have taken into consideration section 2216 of the General Code.

In view of the fact that the bill of costs purported to be made under section 1956, I did not take into consideration the provisions of section 2216.

Section 1956 provides, among other things, as follows:

That the medical witness used at such inquest "must have at least five years' experience in the practice of medicine, shall not be related, by blood or marriage, to the person alleged to be insane or to the person making the application for commitment, nor have any official connection with any state hospital."

Section 2216, to which Dr. Gilliam refers, provides for an examination to be made of a convict to be transferred from the penitentiary or reformatory to the Lima state hospital "by two physicians of at least three years' practice in the state, not connected with the penitentiary or reformatory, and to be designated by the court."

I am of the opinion that Dr. Gilliam is right in his contention that the provisions of section 2216 are the only provisions that are to be considered in this matter, and that the provisions of section 1956 are not applicable, being general

provisions, and there being special provisions governing the matter. However, in opinion No. 685, rendered to Dr. Gilliam under date of August 5, 1915, I came to the conclusion that unless the patients that are now in the Columbus state hospital, which patients were transferred to such hospital from the Ohio state reformatory or penitentiary, are constructively inmates of either the penitentiary or reformatory, there is no provision for transferring them to the Lima state hospital, unless they exhibit dangerous or homicidal tendencies rendering their presence a source of danger to others, as provided for in section 1993 of the General Code, as amended, supra, and I further stated:

> "Without setting out all of the related statutes, I am of the opinion that insane prisoners transferred from either the penitentiary or the state reformatory remain inmates of the respective penal institutions and are still constructively in those penal institutions."

Having, therefore, decided that the inmates of the Columbus state hospital who were transferred thereto from the penitentiary or reformatory are constructively in the penitentiary or reformatory, the physicians who are attending such patients in the Columbus state hospital would be considered as "connected with the penitentiary or reformatory" in so far as the inmates confined therein are concerned, and, consequently, under the provisions of section 2216, G. C., said physicians could not be used as proper medical witnesses in an inquest thereunder, and the result is the same, to wit, that they are not entitled to fees for services rendered under section 2216.

Furthermore, as Dr. Gilliam points out in his letter, the fees are to be paid by the state, and the service is one wherein the state passes a convict from one institution under its charge to another. The physicians are receiving their compensation from the state, and now desire to receive also fees from the state. This I do not believe it is public policy to permit, and for that reason I am of the opinion that the said physicians are not entitled to the fees claimed by them for such inquests.

Opinion No. 776 was rendered under sections 1956 of the General Code. This opinion is rendered under section 2216 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

849.

ROADS AND HIGHWAYS—CASS HIGHWAY LAW—BY ITS PROVISIONS TOWNSHIP MAY ISSUE BONDS TO CONSTRUCT ROADS—QUESTION SHALL FIRST BE SUBMITTED TO ELECTORS OF TOWNSHIP—INTEREST AND SINKING FUND LEVY WILL BE MADE UPON ALL TAXABLE PROPERTY OF TOWNSHIP INCLUDING MUNICIPALITIES.

If a board of township trustees has made the levy provided by section 3298-1, *G. C., and has under section* 3298-3, *G. C., designated a certain road or roads or parts thereof to be improved, and if the money raised by said levy does not furnish sufficient funds for the construction and repair of the designated roads in such township, then the trustees may issue and sell bonds of such township to provide funds for the construction or reconstruction of such roads, provided the question of issuing said bonds shall be first submitted to the qualified electors of the township at a general or special election therefor, and approved by a majority of the electores who participated in the last election for governor in the township, as provided in section* 3298-11, *G. C. If such bonds are issued, levies for the payment of principal and interest will be outside the two mill limitation upon taxes authorized to be levied for general township purposes, and will be subject only to the limitation on the combined maximum rate for all taxes now in force, to wit, the fifteen mill limitation, and such levies will be made upon all the taxable property of the township, including the taxable property of any municipal corporation situated within the township. The sections of the General Code herein discussed did not go into effect until September* 6, 1915, *and therefore no election on the question of issuing bonds may be held until after the levies to be made under section* 3298-1, *G. C., in* 1916, *have been found insufficient.*

COLUMBUS, OHIO, September 21, 1915.

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

GENTLEMEN:—I have received several communications making inquiries as to matters of general interest under the Cass highway law, amended senate bill No. 125, and deeming the matter to be of general public interest I am taking the liberty of addressing an opinion to you upon the questions presented, which may be stated as follows:

"1. Under the Cass highway law may townships issue bonds for the purpose of constructing roads?

"2. Is an election necessary or may bonds be issued without such formality?

"3. May the interest and sinking fund levy for such bonds be made upon the entire duplicate of the township including municipalities contained within the township but whose limits are not co-extensive therewith?"

The principal provisions of the Cass highway law applicable to the questions under consideration are found in chapter 3 of the law, being sections 60 to 74 inclusive of the act, which have been designated as sections 3298-1 to 3298-15, G. C., and will be found at pages 589 et seq., 106 O. L.

Reference should first be made to section 60 of the act, being 3298-1, G. C., which provides that the board of trustees of any township may levy and assess upon the taxable property of such township a tax not exceeding three mills in

any one year, upon each dollar of taxable property therein, for the purpose of improving, dragging, repairing or maintaining any public road or roads or parts thereof. This levy is to be made general upon all the taxable property of the township.

Territory within a township and comprising only a part thereof does not cease to be a part of the township upon being organized into a municipal corporation (State ex rel. v. Ward, 17 O. S., 543) neither does the property within such territory cease to be taxable property of the township when such territory is organized into a municipal corporation. The tax authorized by section 60 of the act (3298-1, G. C.) is therefore to be levied on all the taxable property of the township including that within any municipal corporation situated within the township. It is further provided in section 60 of the act that the township road levy shall be in addition to the levy of two mills authorized by law for general township purposes, but subject to the limitation upon the combined maximum rate for all taxes now in force. The use of the expression "subject to the limitation upon the combined maximum rate for all taxes now in force" coupled with the limitation of three mills contained in the section, indicates an intention to make this levy subject to only two limitations, viz., the levy itself must not exceed three mills and the levy taken together with all other levies for taxes for all purposes must not exceed fifteen mills.

Section 67 of the act (G. C., 3298-8) provides:

> "If the money raised by the levy aforesaid does not furnish sufficient funds for the construction and repair of the designated roads in such township, the trustees may issue and sell the bonds of said township to provide funds for the construction or reconstruction of such roads. Such bonds may be issued at such times and in such amounts as in the judgment of such trustees, shall be necessary. The bonds shall bear interest at a rate not exceeding six per cent. per annum payable semi-annually, and in denomination of not less than one hundred dollars, and not more than one thousand dollars each, and shall mature in not more than ten years as may be determined by such trustees. Such bonds shall be signed by the trustees or a majority thereof on behalf of the township and attested by the township clerk. The interest thereon shall be evidenced by proper coupons attached to each bond, and such coupons shall be authenticated by the signature of the township clerk."

The above section provides that if the money raised by the levy aforesaid, that is, by the levy under section 60 of the act (G. C. 3298-1) does not furnish sufficient funds for the *construction* and *repair* of the roads in such township *designated* by the trustees under said section 62 (G. C. 3298-3) the trustees may issue and sell the bonds of said township to provide funds for the *construction* or *reconstruction* of such roads.

Section 68 of the act (G. C. 3298-9) provides:

> "Before the bonds of the township are issued to provide funds for improving the roads thereof, the question of issuing said bonds shall be first submitted to the qualified electors of the township at a general or special election therefor. The trustees shall provide by resolution for the submission of such question to the qualified electors of the township, and shall give notice by publication once each week for three consecutive weeks in a newspaper of general circulation in said township of the date of such election, and the purpose for which it is held. Said notice shall state the amount of the proposed bond issue."

Therefore, before bonds of the township may be issued to provide funds for the construction or reconstruction of the roads under section 67, above quoted, the question of issuing such bonds must be submitted to the qualified electors of the township at a general or special election held therefor.

Section 70 of the act (G. C. 3298-11) provides for the manner of conducting and canvassing the election and also contains this provision:

> "If the number of votes cast in favor of the issue of bonds is a majority of the electors who participated in the last election for governor in the township the trustees may proceed to issue such bonds."

Section 72 of the act (G. C. 3298-13) provides that levies for the payment of principal and interest on such bonds shall be in addition to the two mills authorized to be levied for general township purposes, but subject to the limitation on the combined maximum rate for all taxes now in force. While there is no direct provision as to the property subject to the levy for the payment of principal and interest on such bonds, it is apparent from a study of the entire chapter that it was the legislative intent that such levy should be made upon all the taxable property of the township. Therefore, if the board of township trustees *has made* the levy provided for in section 60 of the act (G. C. 3298-1) and has under section 62 (G. C. 3298-3) *designated* a certain road or roads or parts thereof to be improved, and if the money raised by said levy does not furnish sufficient funds for the construction and repair of the designated roads in such township, then the trustees may issue and sell bonds of such township to provide funds for the *construction* or *reconstruction* of such designated roads, provided the question of issuing said bonds shall first be submitted to the qualified electors of the township at a general or special election therefor, and approved by a majority of the electors who participated in the last election for governor in the township. If such bonds are issued, levies for the payment of the principal and interest will be outside of the two mill limitation upon the taxes authorized to be levied for general township purposes, and will be subject only to the limitation upon the combined maximum rate for all taxes now in force, to wit, the fifteen mill limitation, and such levies will be made upon all the taxable property of the township, including the taxable property of any municipal corporation situated within the township.

As the Cass highway law did not go into effect until September 6, 1915, and therefore no levy may be made this year under section 60 of the act, no election to determine the question of issuing bonds may be held until after the time in the year 1916 when the township makes its levy under section 60 of the act (G. C. 3298-1) and it is determined that said levy does not furnish sufficient funds for the construction and repair of the designated roads.

It must further be borne in mind that bonds may be issued only for the construction or reconstruction of such roads and not for the repair thereof.

Respectfully,

EDWARD C. TURNER,

Attorney General.

850.

ROADS AND HIGHWAYS—CASS HIGHWAY LAW—NEW LAW DOES NOT CREATE NEW HIGHWAY DEPARTMENT NECESSITATING RE-APPOINTMENT OF ALL OFFICERS—STATUTE UNDER WHICH RESIDENT ENGINEERS FORMERLY APPOINTED, REPEALED—ENGINEERS NOW APPOINTED UNDER SECTION 7185, G. C.

1. *Amended senate bill No.* 125, 106 *O. L.,* 574 *to* 666, *known as the Cass highway law, does not create a new highway department, and the re-appointment of all officers and employes, now serving under the state highway department, is not required except as provided by existing civil service laws.*

2. *Section* 1215, *G. C., as amended in* 103 *O. L.,* 458, *under which resident engineers were appointed formerly, is wholly repealed by said Cass highway law and their positions abolished. Section* 142 *of said law, section* 7185, *G. C., provides the only method by which engineers may now be appointed to have charge and control of state roads in any given county.*

COLUMBUS, OHIO, September 21, 1915.

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

DEAR SIR:—I acknowledge receipt of your letter of September 7, 1915, requesting my opinion upon the following questions:

> "1. Does amended senate bill No. 125 create a new highway department effective September 6, 1915, in that all officials and employes of the state highway department must be appointed under this law?
>
> "2. Throughout the state of Ohio, the highway department has been represented by resident engineers, each having a peculiar knowledge of the work in process of construction by the highway department. If it is found that amended senate bill No. 125 creates a new highway department, will it be permissible for the state highway department to appoint these former resident engineers to continue with the work upon which they have been placed until same has been completed?"

After a careful and thorough investigation and consideration of the provisions of amended senate bill No. 125, 106 O. L., 574 to 666, with a view to answering your first question, I am constrained to hold that said bill does not create a new highway department and does not require a re-appointment of all officers and employees now serving under said department, except as required by existing civil service law.

In view of the very lengthy discussion of a similar question presented with reference to the law which created the board of agriculture, a copy of which opinion is enclosed, I shall not enter into an extended review of the provisions of the bill in question. It is sufficient to say, in a general way, that said bill recognizes in many of its provisions the existence of the old law and the work accomplished and records made under its provision. There is, however, one omission in said bill which is so potent, in my judgment, as to preclude any construction other than that the legislature intended the new department merely to succeed the old. This omission is the failure of the legislature, in said bill, to make any provisions that said new department shall succeed to all the rights, powers and duties of the old department. Such provision is always made where the legislature intends to abolish wholly an existing department and create a new one in

its place. I am therefore of the opinion that without other definite clues to the legislative intention, this fact alone must be held to indicate conclusively that the legislature did not intend to abolish the old department.

If the legislature did not intend to abolish the department, as such, I think it necessarily follows that the office of state highway commissioner likewise was not abolished, for the office and the department are provided for in the same section. See section 171 of said bill, section 1178, G. C.

Referring now to your second question with reference to "resident engineers," their appointment was provided for by section 1215, G. C., as amended in 103 O. L., 458. The present law repeals this section and does not enact an equivalent section unless the provisions as to the appointment of a county highway superintendent may be regarded as a substitute therefor. These facts make it very clear that the positions of resident engineers are abolished under the new law.

Therefore I must advise that when the new law went into effect, the resident engineers could no longer be continued except under the limitations marked out in another opinion, which has been sent to you, relative to the power of the state highway commissioner to designate a person other than the county surveyor to have charge and control of the state roads in a given county. A person who has been serving as such resident engineer may be designated in that capacity under the new law.

Respectfully,
EDWARD C. TURNER,
Attorney General.

851.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS IN LORAIN, FRANKLIN, HURON AND KNOX COUNTIES, OHIO.

COLUMBUS, OHIO, September 22, 1915.

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

DEAR SIR:—I have your letters of September 14, 16 and 20, 1915, transmitting to me for examination final resolutions as to the following roads:

Lorain county—Oberlin-Elyria road. Pet. No. 1589, I. C. H. No. 313;
Lorain county—Oberlin-Norwalk road. Pet. No. 1585, I. C. H. No. 290;
Franklin county—Columbus-Washington road. Pet. No. 936, I. C. H. No. 50;
Huron county—Mansfield-Norwalk road. Pet. No. 1084, I. C. H. No. 287;
Knox county—Columbus-Wooster road. Pet. No. 986, I. C. H. No. 24.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

852.

INITIATIVE AND REFERENDUM PETITIONS—SIGNATURES MAY BE WRITTEN WITH INDELIBLE PENCIL—ELECTOR MAY NOT AUTHORIZE ANOTHER TO SIGN HIS NAME, DATE OF SIGNING, PLACE OF RESIDENCE, STREET, NUMBER, WARD OR PRECINCT.

Signatures to initiative, referendum and supplementary petitions may be written with indelible pencil. A qualified elector may not authorize another to sign his name upon such petition nor to place upon the same opposite his name, the date of signing, place of residence, street, number, ward or precinct.

COLUMBUS, OHIO, September 22, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of September 14, 1915, as follows:

> "We are herewith submitting the following question, which we have received from Hon. F. B. Willis, governor of Ohio, for your opinion:
>
> "'A correspondent has submitted the following inquiry:
>
> "'Section 1g of article 2 of the constitution in providing for referendum petitions provides: "The names of all signers to such petitions shall be written in ink, each signer for himself."
>
> "'I respectfully ask your opinion on this portion of said section in answer to the following questions, to wit:
>
> "'1st. Is it proper to count names on a referendum petition, as recently filed, on what is known as the "McDermott law" which are written with *indelible pencil?*
>
> "'2d. May a signer authorize any other person to sign his name thereon, making it a valid signature that should be counted?
>
> "'3d. If only the name is placed thereon by the signer of the petition, then in the event the street and number of residence, ward, precinct, township or county is written therein by the person circulating the petition or by some other person, will it constitute a valid signature that should be counted?'"

That part of section 1g of article II of the constitution pertinent to the question submitted, is in the language following:

> "Each signer of any initiative, supplementary or referendum petition must be an elector of the state and shall place on such petition after his name the date of signing and his place of residence. A signer residing outside of a municipality shall state the township and county in which he resides. A resident of a municipality shall state in addition to the name of such municipality, the street and number, if any, of his residence and the ward and precinct in which the same is located. The names of all signers to such petitions shall be written in ink, each signer for himself."

The first question submitted involves an interpretation of that part of the above quoted provision of the constitution as follows:

> "The names of all signers to such petitions shall be written in ink, each signer for himself."

In considering whether a signature made with indelible pencil meets the constitutional requirement that the names of all signers shall be written in ink, we may look to the purpose sought as well as to the specific terms employed. This rule is aptly stated by the supreme court of this state in Hupp v. Oil & Natural Gas Company, 88 O. S., 61:

> "1. Such interpretation will be given to a provision of the constitution as will promote the object of the people in adopting it, when such object is clearly indicated in the context, and to this end narrow and technical definitions of particular words will be disregarded."

Manifestly the purposes of the requirement that the names of signers shall be written in ink is to give more substantial permanence to those signatures that their examination and comparison may be thereby facilitated throughout the proceedings.

The term "ink" is a broad general term which includes many different forms of substances and materials which are used for different related purposes, but the term "ink" as used in relation to writing, comprehends in a general sense any substance, material or compound which is of a permanent character as distinguished from that character of writing material in such common use known as lead pencil.

In other words, it is manifest that the primary purpose of this provision was to preclude the use of an ordinary lead pencil in signing the petitions therein referred to and to give to the signatures thereon that permanence of form above suggested. Ink in its general sense is not of necessity liquid in form. Printer's ink is not ordinarily of such form as may be conveniently applied with a pen, yet it is none the less ink and its proper application would result in giving to a signature that quality of permanence which is contemplated and required by the constitution, although not in the form which we customarily find that kind of ink which is commonly used in writing.

So while an indelible pencil is a writing material in some respects dissimilar to ordinary writing fluids, yet it is a matter of common knowledge that writing executed with such pencil possesses all the qualities of durability and legibility to be found in writing made with a pen in the application of ordinary ink. Indeed, from a scientific standpoint, what is commonly known as indelible pencil contains all the chemical elements of writing fluid commonly known as ink, and is therefore ink for the purpose of the present consideration.

I am therefore of opinion, in answer to your first question, that a signature upon all initiative, referendum or supplementary petitions made with an indelible pencil, if in all other respects according to law, is sufficient and should be counted.

The answer to your second inquiry must be in the negative. It is specifically provided that each signer shall write his name for himself. This is a recognition of a well-established rule of law that one may authorize another to sign his name to any writing to which he may himself lawfully subscribe, and if it were not for the purpose of prohibiting the authorization of the signing of one's name to such petition by another, as suggested in your inquiry, it is not conceived that such provision would have been adopted, since no purpose to be served thereby suggests itself.

This provision being in the nature of an exception or limitation of a well recognized general rule by which the very object sought by a liberal construction of such limitation would have been authorized, must be held to be mandatory as distinguished from provisions which are enabling in their character.

In those provisions which are enabling in character, the essential idea is the accomplishment of a particular purpose rather than the method employed, while in those provisions which are designed to limit or restrict the method of performing a thing which is otherwise fully authorized in law, the method itself becomes the central and controlling idea and the limitation or restriction the real purpose sought to be attained thereby.

Upon your third question my predecessor, Hon. Timothy S. Hogan, rendered an opinion on July 17, 1913, found at page 1,356 of the report of the attorney-general for that year, as follows:

> "Under date of July 15th you call my attention to article II, section 1g of the constitution as amended September 3, 1912, and you request my opinion whether each signer must for himself write in the name of the township and county or name of the municipality, the street and number and ward and precinct. It would seem to me that the language of said section of article II answers your inquiry itself in that it states: 'Each signer of any initiative, supplementary or referendum petition must be an elector of the state and shall place on such petition after his name the date of signing and *his place of residence.*' It then proceeds to state how he shall designate his place of residence as follows: 'A signer residing outside of a municipality shall state the township and county in which he resides. A resident of a municipality shall state in addition to the name of such municipality, the street and number, if any, of *his residence,* and the ward and precinct in which the same is located.'
>
> "While it is true that the person soliciting the signature in making his affidavit to the part of the petition solicited by him is required only to state the number of signers and that each signature attached was made in his presence and to the best of his knowledge and belief each signature is genuine and that he believed the signers to be electors and that they signed with knowledge of the contents and on the date set opposite their name, yet from the clear statement that each signer shall place on the part of the petition signed by him his place of residence, I am of the opinion that each signer must for himself write in the name of the township and county, or the name of the municipality, the street and number and the ward and precinct, and that such section does not authorize the filling in of this information by a second party."

In this opinion I fully concur.

It will be observed that it is specified with particularity that the *signer* shall place upon the petition after his name the date and his place of residence, and a resident of a municipality shall state the street and number of his residence, if any, and the ward and precinct in which it is located. Manifestly this latter provision is mandatory and no statement of this information otherwise than upon the petition by the signer, is contemplated thereby.

No reason can be assigned for the provision that the *signer shall place* upon the petition, after his name, the date of signing and his place of residence, etc., other than to emphasize the intent that this information shall be so *placed upon the petition* by the signer himself, rather than under his direction. Without this provision that the *signer* shall place upon the petition the required information, it can not be doubted that under the general rules of law a signer might have authorized another to have stated this information upon the petition and it was manifestly for no other purpose than to limit the signatures upon such petitions

to those opposite which all the required information is placed by the signer himself, and to thus limit the power of a signer to so authorize another to place upon the petition the information required.

It cannot be maintained that any stronger reason exists for a requirement that the names be written in ink than that the place of residence, street, number, ward and precinct should be so written. Every reason that would prompt such requirement in one case would demand the same with equal force in the other, and from this it follows that the provision "the names of all signers to such petition shall be written in ink, each signer for himself" has equal application to the additional information required to be stated as to the names. In other words, when all the provisions of section 1g, article II, are read together, the conclusion that it is required therein that all names and additional information must be written in ink by the signer himself, cannot be escaped. The answer to your third question must, therefore, be in the negative. That is to say, to limit the application of that provision of the constitution quoted by you to the names of signers only, would at the same time, of necessity, permit the required information to be stated with pencil or otherwise than in ink.

If that part of that sentence which requires the names to be written in ink has equal application to the required information, then upon equally sound reasoning will it follow that the requirement in that sentence, that the name shall be written by the signer himself, has the same application to the information required to be stated by the signer opposite his name.

Respectfully,
EDWARD C. TURNER,
Attorney General.

853.

PROSECUTING ATTORNEY—DUTY OF SUCH OFFICER TO HAVE CHARGE OF SUCH PROSECUTIONS IN COUNTY AS FOLLOW FILING OF TRANSCRIPT IN COMMON PLEAS COURT BY A MAGISTRATE.

It is the duty of the prosecuting attorney, under section 2916, *G. C., as amended, to have charge of such prosecutions in the county as follow the filing of transcript in common pleas court by a magistrate.*

COLUMBUS, OHIO, September 22, 1915.

HON. G. A. STARN, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—Permit me to acknowledge the receipt of your favor of September 18th, which is as follows:

> "We have several cases pending in our court under sections 13463, et seq., on the subject of peace warrant, and I am undecided whether or not it is the duty of the prosecuting attorney to prosecute these cases in the court of common pleas. I desire to call your attention especially to section 13468, which is as follows:
>
> " 'When the magistrate finds there is reasonable ground for the complaint, he shall forthwith make a certified transcript of the proceedings including a copy of the complaint, and file such transcript in the office of the clerk of the court having jurisdiction of the complaint or forward

it to him together with the recognizance, if any is taken. If such court is in session, the accused, if in custody, shall be tried at that term unless cause for continuance be shown, and if he is under recognizance, he shall be tried at such term with the *assent of the prosecuting attorney.*'

"This is the only place anywhere in the General Code that I am able to find that reference is had to the prosecuting attorney in connection with this kind of case. I would be pleased to know at your very earliest convenience as to whether or not it is the duty of the prosecuting attorney to prosecute these cases after they reach the court of common pleas."

Section 2916 of the General Code, as amended (103 O. L., 419), is as follows:

"The prosecuting attorney shall have power to inquire into the commission of crimes within the county and except when otherwise provided by law shall prosecute on behalf of the state all complaints, suits and controversies in which the state is a party, and such other suits, matters and controversies as he is directed by law to prosecute within or without the county, in the probate court, common pleas court and court of appeals. In conjunction with the attorney general, he shall also prosecute cases in the supreme court arising in his county. In every case of conviction, he shall forthwith cause execution to be issued for the fine and costs, or costs only, as the case may be, and faithfully urge the collection until it is effected, or found to be impracticable, and forthwith pay to the county treasurer all moneys belonging to the state or county, which came into his possession as fines, forfeitures, costs or otherwise."

Under the provisions of section 2916 of the General Code, supra, the prosecuting attorney is charged with the duty of prosecuting on behalf of the state all complaints in which the state is a party, and it is my opinion therefore that it is the duty of the prosecuting attorney to prosecute in all cases when a transcript is filed in the common pleas court by the magistrate.

In your letter you quote section 13468 of the General Code, and emphasize the provision that "he may be tried at such term *with the assent of the prosecuting attorney.*" A careful reading of the section will disclose that the *"assent of the prosecuting attorney"* does not in any way indicate that discretion is conferred as to whether he shall prosecute the case but only goes to the extent of providing that if the court of common pleas is in session when the peace warrant is filed that the same may be tried at the same term of court rather than at the succeeding term, the first day of which being the time fixed for the appearance of the defendant under the provisions of section 13466 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

854.

MOTHERS' PENSION—MOTHER OF ILLEGITIMATE CHILD ENTITLED TO PENSION, PROVIDED CERTAIN SECTIONS OF GENERAL CODE ARE MET WITH.

A mother of illegitimate child is eligible to receive mothers' pension, if requirements of section 1683-2 and section 1683-3, G. C., are met.

COLUMBUS, OHIO, September 22, 1915.

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

GENTLEMEN:—Permit me to acknowledge receipt of your letter of September 17th, 1915, which is as follows:

> "We respectfully request your written opinion upon the following question:
>
> "A woman gives birth to an illegitimate child. Never marries the father of said child, but does marry another man. Keeps the child with her. Her husbands dies. Is she entitled to a mother's pension?
>
> "An early reply will be appreciated."

Section 1683-2, of the General Code (103 O. L., 877), is as follows:

> "For the partial support of women whose husbands are dead, or become permanently disabled for work by reason of physical or mental infirmity, or whose husbands are prisoners or whose husbands have deserted, and such desertion has continued for a period of three years, when such women are poor, and are the mothers of children not entitled to receive an age and schooling certificate, and such mothers and children have been legal residents in any county of the state for two years, the juvenile court may make an allowance to each of such women, as follows: * * *"

The section just quoted provides who shall be eligible to receive mothers' pensions, the particular requirements to be met being that the husband of the mother must be dead, permanently disabled, or a prisoner; that the mother shall be poor, a legal resident in any county of the state for two years and that the child or children shall not be entitled to an age and schooling certificate.

When the essentials provided for in section 1683-2, of the General Code, are present, the juvenile court may make an allowance for the support of the mother under conditions provided in section 1683-3, of the General Code (103 O. L., 878), which section is as follows:

> "Such allowance may be made by the juvenile court, only upon the following conditions: First, the child or children for whose benefit the allowance is made, must be living with the mother of such child or children; second, the allowance shall be made only when in the absence of such allowance, the mother would be required to work regularly away from her home and children, and when by means of such allowance she will be able to remain at home with her children, except that she may be absent for work for such time as the court deems advisable; third, the mother must, in the judgment of the juvenile court, be a proper person, morally, physically and mentally, for the bringing up of her children;

fourth, such allowance shall in the judgment of the court be necessary to save the child or children from neglect and to avoid the breaking up of the home of such woman; fifth, it must appear to be for the benefit of the child to remain with such mother; sixth, a careful preliminary examination of the home of such mother must first have been made by the probation officer, an associated charities organization, humane society, or such other competent person or agency as the court may direct, and a written report of such examination filed.''

The woman referred to in your inquiry appears to possess the necessary requirements to render her eligible for a mother's pension in so far as her husband is dead, and if she is a proper person to have charge of her child, and the child is not entitled to an age and schooling certificate, and it is my opinion that the fact that the child is an illegitimate one should not render her ineligible to receive an allowance from the juvenile court, provided all the conditions prescribed in sections 1683-2 and 1683-3, of the General Code, supra, exist.

This opinion is not to be construed as determining any of the questions of fact to be passed upon by the juvenile court in the particular case under consideration.

In the administration of the mothers' pension law it is to be borne in mind that it is a part of the juvenile court law, which is to be liberally construed to the end that proper guardianship may be provided for the child, and in this respect section 1683, of the General Code, should be regarded. The case under consideration is to be distinguished from the one referred to in opinion No. 1016 rendered by my predecessor, Mr. Hogan, to Honorable Charles Krichbaum, probate judge and juvenile judge of Stark county, under date of June 29th, 1914, and to be found in the annual report of the attorney general for 1914, at page 885. In that case it appeared that the mother had never married at all.

Respectfully,

EDWARD C. TURNER,

Attorney General.

855.

COLUMBUS, DELAWARE AND MARION RAILWAY COMPANY—RIGHT OF STATE HIGHWAY COMMISSIONER TO COMPEL COMPANY TO MOVE THEIR TRACKS TO CENTER LINE OF ROAD—RIGHT TO EXPEND STATE OR COUNTY ROAD FUNDS TO REMOVE TRACKS AND POLES.

1. *The provisions of section* 161 *of amended senate bill No.* 125, *section* 7204, *G. C., are not in contravention of the constitutional inhibition against the enactment of laws impairing the obligations of contracts.*

2. *When the conditions prescribed in said section obtain as to obstructions in public highways, the person or company responsible for such conditions must remove said obstructions. It is not contemplated by the state that its road funds or county road funds shall be used in paying the cost of removing said obstructions.*

COLUMBUS, OHIO, September 22, 1915.

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

DEAR SIR:—I have your letter of September 7, 1915, as follows:

"Please note the attached copy of my letter to Mr. Eli M. West, receiver for the Columbus, Delaware & Marion Railway Company, and copy of his reply to same.

"With the facts contained in these two letters before you, I would be pleased to receive your opinion on the following:

"First—Can we, under any existing statutes, force the Columbus, Delaware & Marion Ry. Co. to move their track to the center line of the road, whereas same is now located about twelve feet east of the center line?

"Second—Can we legally expend any state or county road fund to pay in whole or in part the cost of moving the track and the cost of erecting the additional poles required?

"Third—Can we force the railway company to pay the entire cost of moving track, constructing poles, etc., and paving between ends of ties?"

From the correspondence attached to your letter and referred to therein, it appears that you, in connection with the board of county commissioners of Franklin county, are now contemplating the improvement of what is commonly known as the North High street turnpike, said improvement to begin at the north corporation line of the city of Columbus and extending thence north 3810 feet.

It further appears from said correspondence that a portion of the turnpike in question is now occupied by the tracks of the Columbus, Delaware & Marion Railway Company, which company was granted a franchise on March 12, 1892, by the commissioners of said Franklin county; said franchise providing among other things as follows:

"That the west end of the ties of said railway shall be placed not nearer than eight feet from the center of said highway, and correct center line of said highway and the grounds of said roadbed to be determined and fixed by and under the direction of the county surveyor of Franklin county.

"That the said railway shall conform its grades to the present existing grade and in the future shall conform to any new grade that may be established by legal authority, and if in the future the said highway shall be improved with a permanent pavement which shall extend beyond the east line of the roadbed of said highway, the said company shall construct, and at its own expense maintain, the same kind of pavement between the rails of its tracks and one foot on the outside of the rails on each side.

"If the said road is operated by means of overhead wires it shall be built with bracket poles on one side of the road only, so that no wires shall cross the traveled portion of the highway unless necessary to reach the power house or storage sheds."

It further appears from said correspondence that the railway was located and constructed as required by said franchise and that on December 25, 1899, a new franchise for the term of twenty-five years was granted to said company, which said new franchise recites that the company had constructed its railway according to its former franchise and provides as follows:

"The main track shall be and remain as at present located, but in case of necessity turnouts may be changed or additional ones constructed, provided they do not extend into the highway farther than those at present

on the road. That portion of the line which is constructed with bracket arms shall not be changed to overhead wires extending across the highway without the consent of the property owners on the west side of the highway, secured either by agreement or condemnation.

"If in the future the North High street free turnpike shall be improved to the east of the present railway tracks by a permanent improvement the said company shall pave and keep in repair the space between its tracks and for one foot on each side thereof with the same material as that with which the street is improved, and throughout the whole length of the line the tracks shall be kept upon the grade now established, or in case of a future change of the grade of the street, the tracks shall conform to the new grade."

It appears from the correspondence above quoted that the tracks of said company are now located as provided by the terms of its franchise. Referring to your first question, you inquire if you can force said company to move its tracks under any existing law, it being your desire to have said tracks located on the center line of said new road, as appears from your correspondence. The law applying to such cases is now found in section 161 of amended senate bill No. 125, 106 O. L., 619, section 7204, G. C., as follows:

"It shall be the duty of the owners or occupants of lands situated along the highways to remove all obstructions within the bounds of the highways which have been placed there either by themselves or their agents, or with their consent. It shall be the duty of all telephone, telegraph, steam or electric railway, or other electrical companies, oil, gas, water or public service companies of any kind, to remove their poles and wires, connected therewith or any tracks, switches, spurs, or oil, gas or water pipes, mains, conduits or other objects when the same, in the opinion of the county highway superintendent, constitute obstructions in the highway or interfere with the construction, improvement, maintenance or repair of the highway or use thereof, by the traveling public, subject, however, to the rights of any such company to be or remain in such highway, by virtue of any grant or franchise to said company. If, in the opinion of the county highway superintendent, such companies have obstructed said highway, said highway superintendent shall forthwith notify the county commissioners who shall cause notice to be served on said owner, occupant or company, directing the removal of said obstructions and if said owner, occupant or company shall not within five days proceed to remove said obstruction and complete the same within a reasonable time, the county highway superintendent, upon order of the county commissioners may remove said obstructions. The expense thereby incurred shall be paid in the first instance out of money levied and collected and available for highway purposes, and the amount thereof shall be certified to the proper officials to be placed upon the tax duplicate against the property of such owner, occupant or company, as provided by law, to be collected as other taxes, and the proper fund shall be reimbursed out of the money so collected, or the cost of removing such obstructions may be collected from the owner, occupant or company by civil action by the county commissioners or township trustees.

"All such persons, firms or corporations shall be required to reconstruct or relocate their properties or any part thereof upon such public

highway, upon the order of the proper authorities if in the opinion of such authorities the same constitute an obstruction in such public highway.''

The above section defines the policy of the state which now controls its relation to railway companies occupying public roads with tracks which may constitute an obstruction to any improvement of said roads and said section places the entire cost of removing and relocating said tracks upon the companies which own the same.

It may be, and doubtless will be contended, however, by the company in question that the enforcement of the provisions of the section just quoted is that it would be an unconstitutional application thereof, in that it would contravene the provisions of section 28, article II, of the constitution, providing against the enactment of any laws impairing the obligations of contracts. A franchise such as the one under which this company is now located upon this highway and operating its railroad thereon, is frequently denominated and termed a contract and is commonly so regarded, but in a strictly legal sense it is only a right or privilege, granted in this instance by the state through its duly constituted agents, the board of county commissioners of Franklin county, upon such terms and conditions as were fixed by said commissioners, and it is a right which can only be exercised by reason of the grant thus made. Sections 9101 and 9113, G. C.

The terms and conditions, however, of this franchise, as fixed by said county commissioners, are subject to the limitation that said commissioners could not in any manner or degree surrender or alienate that governmental power of the state which is required to exist for the welfare of the public, which welfare and right to use said public road is the paramount right in this case. This power so reserved and which said commissioners could not alienate is known as the police power of the state. Referring to this reserved governmental power, Elliott on Streets and Roads, section 939, says:

''The general rule is well settled that no contract can be made which assumes to surrender or alienate a strictly governmental power which is required to exist for the welfare of the public. To what extent it prevails as against chartered rights which are protected as rights flowing from a contract it is not possible to say with certainty and precision, but we believe that it may be fully affirmed that the power extends so far as to require the private corporation to yield to the public welfare in the matter of the reasonable regulation of roads and streets.''

The rights and privileges granted as aforesaid under said franchise are subject to still further limitations, which are reserved to the state by section 2, of the bill of rights, and section 2, of article XIII, of the constitution. By the provisions of the first section noted, no special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the general assembly. Under the last quoted section it is provided that corporations may be formed under general laws, but all such laws may from time to time be altered or repealed.

Without attempting to cite the many decisions of both federal and state courts in which the scope and effect of the foregoing constitutional provisions are considered and applied to the franchise rights of corporations, in many of which cases said rights have been set aside or additional burdens have been imposed on the owners thereof, it is sufficient to say that in my judgment they amply sustain

the right of the state through its legislature to impose the provisions of said section 161, supra, upon railway and other companies occupying public roads when said conditions exist as therein prescribed.

It further must be observed that these constitutional reservations above noted are as much a part of the franchises granted by the agents of the state as they would be if actually made a part thereof and written therein. Railroad Company v. Defiance, 52 O. S., 314. However, as before observed, regardless of the application of these constitutional provisions the police power of the state cannot be alienated, and the existence of this power must be preserved for the well being of organized society, and when exercised in a reasonable manner by the state cannot be said to impair the obligation of contracts.

While your letter does not state fully all the facts connected with the proposed improvement of the road in question, it appears from the correspondence attached thereto that this improvement is to be made by paving to a width of fifty feet a public road which is a continuation of High street in the city of Columbus, and that said improvement is to begin at the corporation line of said city and extend thence north 3810 feet. It is a matter of common knowledge that said High street is the main traffic thoroughfare of a great and growing city of more than 200,000 people, upon which street it is necessary to enforce, under police supervision, strict rules of traffic to protect the lives and the property of those who must go upon it. One of the rules of traffic so in force requires of travelers to use and keep upon the right-hand side of said street. Any other method of travel if permitted thereon would result in interminable confusion and danger. The improvement you contemplate requires the railway company to move its tracks to the center of said highway to permit the sides thereof to be open for travel in the same manner immediately outside of the city limits as within. This requirement undoubtedly is one of urgent and imperative public necessity, and as necessary and essential to the safety of the public generally as a system which provides it with pure water or sanitary sewerage.

To require a relocation of the tracks of the company in question in view of the great necessity of this improvement and the increased travel on said public highway, is not in my opinion an arbitrary or unreasonable exercise of the police power of the state as effected through the provisions of section 161, supra. That is to say, in view of the imperative necessity of this improvement, if the tracks of said company in their present location constitute an obstruction to travel in such public highway or interfere with the improvement you contemplate, said company may be required by you to relocate the same as provided under said section 161 and such limitation upon said company's rights under its franchise would not be unreasonable.

I am therefore of the opinion that under the provisions of said section 161, supra, if the conditions therein prescribed obtain in the case of this company, it may be compelled by you to relocate its tracks and move them to the center of the highway.

Inasmuch as the section quoted imposes this duty upon the railway company, it is not contemplated by the state that any of its funds or any county road fund shall be used in paying the cost of moving the track and the cost of erecting additional poles and, therefore, your second question must be answered in the negative. It might be observed further that no statutory authority ever existed or now exists whereby such expense could be paid from any road or other public fund.

An answer to a part of your third question is suggested by what has already been said. When said tracks are relocated, it becomes the duty of said company

to pave between the rails and a distance of one foot on each side thereof. If said tracks are permitted to remain in their present location and the improvement contemplated by you is made, the company also is required to pave the space between its tracks and for one foot on each side thereof with the same material as that with which said highway is improved.

Respectfully,
EDWARD C. TURNER,
Attorney General.

856.

COMBINED NORMAL AND INDUSTRIAL DEPARTMENT OF WILBERFORCE UNIVERSITY—TO WHAT USE APPROPRIATIONS CAN BE MADE—RIGHT OF ELECTIVE FRANCHISE OF STUDENTS FROM OTHER STATES.

1. *Appropriations made by the general assembly of this state for its educational institutions may not be used by said institutions for any purpose other than that for which said appropriations are made.*

2. *Students from other states attending such institutions for educational purposes only and having no habitation within this state other than such institutions which they are attending, and whose parents or families reside in another state, are not entitled to exercise the elective franchise nor to receive free scholarships limited by law to residents of this state.*

COLUMBUS, OHIO, September 22, 1915.

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

DEAR SIR:—I am in receipt of a letter from Mr. Gilbert H. Jones, dean of Wilberforce university, under date of September 9, 1915, in which he makes the following inquiries:

> "1. I would like to know if it would be regarded as bad practice or contrary to state law for schools to use the funds appropriated for state educational institutions in campaigning by correspondence and canvassing by mail for students without the state of Ohio.
>
> "2. Have students twenty-one years of age or under, coming into the state for educational purposes and entering educational institutions within the state, either private or public, the right after a year's residence within the state as a student, whose parents, guardians or families are maintaining themselves in other states, the right to vote within the state in the one case, where eligible by age, and, in the next case, have they the right to free scholarships in state institutions as offered by the state to its own citizens and their children?"

Wilberforce university is not itself a state institution. There is, however, connected with Wilberforce university a "combined normal and industrial department (see sections 7975, et seq., G. C.), under the exclusive authority, direction, supervision and control of an independent board of trustees with their own treasurer. For the maintenance of this department a levy is made and an appropriation is carried in the current general appropriation bill, 106 Ohio Laws, 748, 823.

As I know of no authority in the trustees of Wilberforce university or the dean thereof to incur obligations against this appropriation, I am addressing this opinion to you and sending a copy thereof to the dean.

The provisions of the current appropriation bill covering the appropriation for the combined normal and industrial department of Wilberforce university are found in 106 Ohio Laws, pages 748 and 823. The various items specified therein for which an appropriation is made do not directly or by implication include the expenditure of any money so appropriated for the purposes named in the dean's first inquiry. No money may legally be expended for any purpose other than that for which it is appropriated. Any money spent in advertising this institution outside of the state, or in soliciting patronage from other states must come from sources other than from the appropriation made by the state for the benefit of its normal and industrial department.

In answer to the dean's second question: Students coming into this state from other states for educational purposes only and having no habitation within this state other than the educational institution which they are attending, and whose parents or families are living in another state, cannot vote in this state nor may they be considered as residents of this state within the provisions of section 7985, G. C. This section, I assume, covers the free scholarships to which the dean refers and provides that each senator and representative of the general assembly may designate one or more youth resident of his district, who shall be entitled to attend the normal and industrial department of this institution free of tuition. It is very clear that the case which the dean describes cannot be brought within the terms of this section.

I therefore conclude, as before stated, that students attending this institution from other states and having no habitation in this state other than this institution and there only for educational purposes, and whose parents or families reside in another state, are not entitled to exercise the elective franchise nor to receive free scholarships under section 7985, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney General.

857.

APPROVAL OF RESOLUTIONS FOR CERTAIN ROAD IMPROVEMENTS IN FULTON COUNTY, OHIO.

COLUMBUS, OHIO, September 22, 1915.

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

DEAR SIR:—I have your letter of September 21, 1915, transmitting to me for examination final resolutions as to the following roads:

Fulton county—Archbold-Fayette road. Pet. No. 1622, I. C. H. No. 301;
Fulton county—Toledo-Angola road. Pet. No. 1222, I. C. H. No. 21;
Fulton county—Toledo-Angola road. Pet. No. 1222, I. C. H. No. 21.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

858.

PANAMA-PACIFIC INTERNATIONAL EXPOSITION—PAYMENT OF CERTAIN BILLS FOR MAINTENANCE OF OHIO BUILDING, HELD LEGAL.

The payment of grocery bills and bills for decorating and music on special occasions at the Ohio State Pavilion at the Panama-Pacific International Exposition is not a misappropriation of the appropriations made to the commission in charge thereof.

COLUMBUS, OHIO, September 23, 1915.

HON. NEWTON M. MILLER, *Directing Commissioner, Panama-Pacific International Exposition, San Francisco, Cal.*

DEAR SIR:—Under date of September 13th, you wrote me as follows:

> "Upon presentation of vouchers for payment of grocery bills and decorating expenses for the maintenance of the Ohio pavilion at the Panama-Pacific international exposition, the auditor of state refuses to issue warrants on the treasurer for the amount of said vouchers which are properly certified to by the directing commissioner, claiming that same is a misappropriation of the funds in the treasury for the use of said commission, all of which is being expended according to the ideas and plans of the members of the board of commissioners toward the maintenance of the Ohio building and according to the application made for appropriation by the board of commissioners to the recent general assembly.
>
> "Will you, therefore, kindly render to us your opinion as to whether the commissioners can use the funds appropriafed for maintenance toward paying expenses connected with the running of the Ohio building as it was equipped and planned to be run?"

On my request for additional facts you wrote me on September 17th as follows:

> "I wish to add, by way of explanation to the application filed with you for an opinion, that the items for which the auditor of state refuses to draw warrant on treasurer are those contracted for provisions to be used in the state building where meals of the directing commissioner and the other members of the commission when in attendance at the exposition, also for the secretary of the commission, and such other officials as are quartered at the Ohio state building, are served.
>
> "This building was equipped under the former administration with rooms for such officials as are located there, with a dining room fully equipped and the building, which is constructed for the holding of such receptions as might be deemed proper by the board of commissioners to hold, and for keeping Ohio in the class to which she claims to belong socially. All the states represented at the exposition (some twenty-seven in number), are making the same use of their respective state buildings as Ohio is making of hers, and when receptions are held, such decorating is done as is necessary to make the building appear attractive, which decorating constitutes a part of the items to which the auditor takes exceptions. Music is furnished for such functions and bills for same constitute another class of items to which he excepts. The grocery bills to

which the auditor excepts are not as much as would be the hotel charges which the commission would have to pay were we not keeping open the dining room at the building, and in the judgment of the directing commissioner, this is the most economical way the attending commissioners could be cared for, during their stay at the exposition. It is the plan that every member of the commission expected carried out, and the line of expenditures that we aimed to meet in having appropriated by the last general assembly $2,000 per month for maintenance of the building, not more than one-half of which appropriation have we used to date. In case such funds cannot be used in this line, the $79,000 building would be absolutely of no use and no receptions could be given in honor of the governor during his contemplated visit at the exposition; while every governor who has to this date visited the exposition has been given a reception in his honor as the representative of his state.

"All this was planned in the erection of the building and in the furnishing of same—reception halls, dancing halls, dining room, kitchen and eight sleeping rooms, all of which plans were presented to and approved by the former governor of the state, together with the other members of the building committee.

"It was the judgment of the members of the commission that an appropriation for maintenance should be made that the building might be kept open and used as all such state buildings are used, and thereupon asked for the appropriation for maintenance, which was made by the last general assembly."

On September 17th you further advised me that the force at the Ohio pavilion located on the grounds of the Panama-Pacific international exposition came about February 15, 1915, but were not served any meals until some time in June, 1915; that during half of June, all of July and the first week of August the necessary help were served meals without charge, the reason that no charge was made being because of the added duties and the necessity of their constant attendance at the pavilion during said time; that since the first week in August those attendants who were served meals at the Ohio pavilion have been charged uniformly the price of thirty cents per meal; that there has been no charge made for lodging of the employes who are lodged in the building, because the building itself was so arranged as to show the intention to take care of the lodging of such employes during their service at the Ohio pavilion. You further advised me that the only persons who are now receiving meals without charge at the Ohio pavilion are the cook, hostess and the matron, who does the buying for the department and keeps a record of the meals that are served to those who are charged therefor.

Upon examination in the auditor's office of the plans, specifications and profiles on file in said office as to the Ohio pavilion, I find a plan of the second floor of such building, and such plan discloses that on the second floor of the east side of said building there is provision made for a sitting room, a bed room, bath room, kitchen, dining room and reception room; and on the west side of said building provision is made for six bed rooms, a dining room and kitchen, a parlor and three bath rooms; and in the specifications, on page 44 thereof, cupboards are provided for in the kitchens and the necessary plumber's carpentry in the kitchens and the toilet rooms; on page 66 specifications for bath tubs and showers; and on page 67 specifications for kitchen sinks.

Advertisement for bids under these plans, specifications and estimates were called for on Thursday, June 4, 1914, and the specifications show that the same were approved on July 16, 1914, by the governor, secretary of state and auditor

of state, and filed in the office of the auditor of state on said date. The plans were approved by the same officials on the same day and filed in the office of the auditor of state on the same day, as were the estimates of cost and bills of quantity.

The original legislation relative to the installing and maintaining of an exhibit of the products and resources of the state of Ohio at the Panama-Pacific international exposition is found in 102 O. L., 316. In such act the governor is appointed a commissioner for the purpose of installing, maintaining and exhibiting the products and resources of this state at the international exposition to be held in the city of San Francisco, in the year 1915, known as the Panama-Pacific international exposition; and as such commissioner he is given "full and exclusive charge and control of said exhibit, and the maintenance and installation thereof, with power to appoint and employ deputy commissioners, and all other persons necessary for the purpose of carrying out the provisions of this act, upon such terms and salaries as he shall deem to be fair and reasonable." The governor was to receive no compensation for his services, but was to receive his actual expenses incurred in the discharge of his duties in connection with said exposition. Under section 2 of said act the sum of $2,000 was appropriated for the purpose of paying the expenses of the commissioner and deputy or commissioner appointed by him to select a location for a state building.

Said act was supplemented by an act found in 104 O. L., 4, wherein, under section 1 thereof, the governor was authorized to appoint a special commissioner as directing commissioner for Ohio at such exposition, and such directing commissioner was to have "such exclusive powers and duties with regard to such exposition as the governor may confer upon him, and receive such compensation for his services as the governor may prescribe."

Under section 2 thereof an appropriation of $100,000 was made for the purpose of erecting a state building in which to house and exhibit the state products, of securing complete and creditable display of the interests of the state at such international exposition and of paying the *expenses* and compensation of the board of deputy commissioners and the directing commissioner.

Under section 3 the board of deputy commissioners and directing commissioner were directed to make a report monthly to the governor, and at any other time that he may request in writing.

In house bill No. 53 (104 O. L., 215), making sundry appropriations, there was $25,000 appropriated "for the purpose of installing, maintaining and exhibiting the live stock, agricultural products, resources and opportunities of this state at the Panama-Pacific international exposition in San Francisco in the year 1915."

In house bill No. 314, passed at the recent session of the legislature and known as the short term appropriation bill (106 O. L., 66) there was appropriated to the Panama-Pacific exposition commissioner: First, personal service, which included the deputy commissioner and other attendants at such Ohio pavilion; second, unclassified personal service; and third, maintenance; under contract and open order service—F-9 general plant, $10,000; the total appropriation being $20,000.

And in house bill No. 701, known as the general appropriation bill (106 O. L., 708) a like appropriation was made, to wit, for personal service, including the deputy commissioner and other attendants; unclassified personal service; and $10,000 under contract and open order service, the total appropriation being $21,671.63.

The above statutes are all of the statutes on the subject of the Ohio exhibit at the Panama-Pacific international exposition.

Under the statutes above cited the governor or his directing commissioner were given full and exclusive charge and control of the exhibit and the maintenance and installation thereof. There is no restrictive language in this statute clearly defining exactly of what such exhibit and the maintenance thereof shall consist, other than the fact that a state building is to be erected in which to house and exhibit the products of the state.

In accordance with the authorization contained in the above statutes, the commissioners proceeded to cause to be prepared plans and specifications for the state building for which the appropriation of $100,000 was made. A careful examination of said plans and specifications will disclose that there was no provision made whatever for any exhibit of the "state's products," the only provision being two relic rooms, one on either side of said building, to house such relics as the commissioners might be able to secure for exhibition in such building. In fact it is clearly shown by the plans and specifications that the Ohio state pavilion was to be used solely as an administrative building and for such social duties as might be cast upon the commissioners during the exposition proper.

It appears that the former governor and secretary of state and the present auditor of state duly approved the plans and specifications for the Ohio pavilion at the Panama-Pacific international exposition, and included in such plans were rooms designated on such plans as bed rooms, kitchens and bath rooms. Therefore, it would seem that it was the intention at that time that there should be bed rooms in said Ohio pavilion and also kitchens and dining rooms. This is presumed to have been known to the legislature when making its appropriations.

Upon request of the budget commissioner as to his understanding of the $10,000 appropriated for contract and open order service, said commissioner has advised me as follows:

> "The appropriation for the Panama-Pacific exposition commissioner was requested in lump sum both in H. B. 314 and 701, because it was alleged that no one could foresee the nature of the expenditures to which this department would be subjected. The budget commissioner and the house finance committee however, were anxious to make all the appropriations conform to the budget scheme and insisted that the salaries be specified. This was done in so far as it was possible at that time to foresee them but a lump sum was requested for any additional personal service that might be needed. In order to make the appropriation available for any proper expenditures an allowance was made under A-3 for additional personal service because that classification was more flexible than either of the others.
>
> "For the same reason the entire amount for maintenance was put under general plant service—F-9. The committee had no intention of embarrassing the exposition commissioner in any way but considered that by putting the entire sum under the most flexible item in the maintenance classification that it could be used for all legitimate purposes connected with the exposition."

Practically all of the employes connected with the Ohio pavilion are employes under the civil service law of 1913. The then civil service commission issued a bulletin calling for candidates for the various positions. Paragraph 3 thereof states:

> "That each appointee will pay his own transportation and other expenses out of salary."

This bulletin called for the position of hostess, but it is my understanding that subsequently the position of hostess was withdrawn from those in the classified service. The bulletin also called for a matron, but stated as follows:

"(Room furnished)"

and also as to the maid. There was no such statement relative to the other employes.

An examination at the governor's office discloses that the salary of the secretary was fixed at $1,800 and expenses.

We therefore have this situation: The building was built to contain bed rooms, kitchens and dining rooms; the commissioners, including the governor, are entitled to their expenses; the secretary is entitled to his expenses; the matron and maid are entitled to have their rooms furnished to them. The legislature appropriated the aggregate sum of $20,000 under "general plant service" without any specific designation as to how the money was to be expended; and also appropriated certain moneys for "unclassified service," which could readily be construed to include a cook. It could not have been the intention of the deputy commissioners or the former directing commissioner that there was to be a building erected at the Panama-Pacific international exposition containing bed rooms, kitchens and dining rooms but that the same were not to be used. It must have been their intention in so providing for the same that they were to be used, and it must also have been so understood by the building commission, as then composed, when it approved of the plans and specifications for such building. It must also have been the intention of the legislature that the building was to be operated as built when it made the appropriations for general plant service, which intention must have been concurred in by the present auditor of state, for the following reason:

You state in your letter that the auditor of state has questioned the right to incur grocery bills, which, of course, must question the right to operate the kitchens and dining rooms provided for in the Ohio state pavilion according to the plans and specifications on file. I understand from your letter that you found the said building entirely equipped with kitchen utensils and equipment and proper dining room furniture and equipment, all of which has been paid for by the state of Ohio upon warrant of the auditor of state on the treasurer of state.

Therefore, I am of the opinion that there is authority in law for the operating of the kitchens and dining rooms and that the expenses therefor should be paid out of the appropriations for general plant service, at least for those who are entitled to their expenses while serving the state at such building.

It appears that there was a time during which those attendants who were not entitled to their expenses received meals free of charge, but, as has been explained by you, the only time that occurred was when it was necessary that certain attendants be constantly in attendance because of the crowds that had to be handled during such time, and I believe that it was good sound business policy to allow those attendants to take their meals without charge at said building during the "rush season" rather than to be required to employ others to do their work while they were away at their meals, and that it is good business policy to now allow said attendants to take their meals in the said pavilion, they paying a price fixed by the commissioner therefor.

Now in regard to the decorations and music furnished at the pavilion: From an examination of the first floor plan of such pavilion, as the same is on file in the office of the auditor of state, it appears that the only rooms that were provided for outside of the large lobby and rotunda were men's and women's reception rooms, a private office, two relic rooms and a large assembly room. The

fact that there was an assembly room provided for clearly, as I view it, indicates that it was the intention of the commissioners at the time said plans were prepared—which by the approval of the plans by the building commission was concurred in by them—that the building should be used for functions; and the legislature having appropriated the sum of $20,000 toward the maintenance of said building generally, it must be assumed to have concurred in the intention of the planners of such building, that the state of Ohio should take its share in showing hospitality, not only to its own citizens who attended at such exposition, but also to the citizens of her sister states, and that there would be receptions held in such building in honor of the distinguished citizens both of her own state and of sister states who attended such exposition.

The legislature having appropriated said $20,000 generally, without specifying exactly as to how such money should be expended, I am of the opinion that the directing commissioner or the other commissioners can authorize the expenditure of moneys out of such fund for such purposes, not exceeding, of course, the total amount of the appropriation.

I am informed that the state of Ohio has erected various buildings at the Buffalo, Chicago, St. Louis and Jamestown expositions, and that said buildings have been operated in the same manner as the Ohio pavilion at the Panama-Pacific international exposition is being operated, and the presumption is, therefore, that the legislature in providing such a building intended that the use of such building should be practically the same as was the use of the former buildings.

I am, therefore, of the opinion that the vouchers presented by you for the expenses hereinbefore commented upon are not a misappropriation of the funds for the use of said commission.

Respectfully,
EDWARD C. TURNER,
Attorney General.

859.

BOARD OF AGRICULTURE—BUCKEYE CORN SPECIAL TOURS—HOW CONDUCTED.

The manner and method of conducting the Buckeye Corn Special Tours must be determined by the board of agriculture, as the same are not provided for by statutory law.

COLUMBUS, OHIO, September 23, 1915.

The Board of Agriculture, Columbus, Ohio.

GENTLEMEN:—I have your letter of September 20, 1915, in which you submit for my consideration a plan for handling this year's tour of the successful candidates in what is known as the Boys' Corn Growing Contest in this state. The plan proposed is suggested in a letter to you from Mr. T. P. Riddle, director of the bureau of junior contests, and quoting from his letter is as follows:

> "I respectfully recommend the following plan for handling this year's tour. Secure some person, who is not an employe of the state, to agree to handle the financial end of the tour. Require of that person that he deliver a certain service at a certain cost. Require no accounting other than the delivery of that service at that cost. Protect the state by a bond. The service should equal the service of last year's tour and the cost should not be increased materially. I believe some public-spirited citizen,

financially responsible, can be secured to assume this responsibility mainly for the honor involved. If such a person cannot be secured, and it becomes necessary for me to handle it, I hope some arrangement can be made so that I shall be relieved from being responsible for everything except delivering a certain service at a certain cost. The question of the legality of handling the tour on such a plan should be determined.''

The reason for suggesting the plan aforesaid is to obviate the necessity of creating a separate acount of each candidate's expenses, which involves a great clerical task and accompanying expense on the part of the board of agriculture.

The task of supervising, directing and conducting the annual tour, aforesaid, is not provided for or covered by any statutory law of this state. It is entirely voluntary on the part of the board of agriculture and is prompted by the desire to encourage and promote modern methods of agriculture and interest therein among the rural youth of the state. It is wholly gratuitous on the part of said board, and the tour itself involves no expense to the state other than the personal expense of its representatives in charge thereof. As I understand it, the expense of each successful candidate is borne by local parties in his county, which expense is paid in the first instance to said board and by it expended in his behalf. The relation, therefore, existing between said board and those who furnish the expenses of each candidate who takes the tour, is a fiduciary one and subject only to the test of a faithful economical and honest administration of the trust imposed. Any scheme or plan meeting these requirements may be followed. If the plan, as suggested above, in the judgment of said board offers any advantages over the old system, I know of no legal obstacle or objection to its adoption.

Respectfully,

EDWARD C. TURNER,

Attorney General.

860.

CORPORATION—CERTIFICATE OF AMENDMENT OF ARTICLES OF INCORPORATION—INCREASE OF CAPITAL STOCK BY ISSUANCE OF PREFERRED STOCK—MAY DO SO DEFINING AMOUNT AND CLASSES OF ITS STOCK, CREATING DESIGNATIONS, PREFERENCES AND VOTING POWERS AND PROVIDING FOR REDEMPTION OF ITS PREFERRED STOCK.

A corporation, which has filed a certificate showing an increase of its capital stock by the issuance of preferred stock, may thereafter amend its articles of incorporation defining the amount and classes of its stock, creating designations, preferences and voting powers or restrictions or qualifications thereof, and providing for the redemption of its preferred stock.

COLUMBUS, OHIO, September 23, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of September 17, 1915, requesting my opinion as follows:

''We enclose herewith uncanceled revenue stamp, check for five dollars, letter received from Hine, Kennedy & Manchester, attorneys at law,

of Youngstown, Ohio, and proposed certificate of amendment of articles of incorporation of THE OHIO HOTEL OPERATING COMPANY, and would like your earliest opinion on the question raised in the enclosed letter.''

I also quote in full the letter of Messrs. Hine, Kennedy & Manchester, referred to in your letter, as the same contains a statement of the facts which occasion your request for my interpretation of the law:

''YOUNGSTOWN, OHIO, Sept. 15, 1915.

''HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

''DEAR SIR:—

''IN RE: THE OHIO HOTEL OPERATING COMPANY.

''In reply to our letter of September 11th, we have received from you copy of portion of opinion of Edward C. Turner, attorney general, in relation to fee chargeable against Columbia Planter Company, together with the original certificate of amendment, check and revenue stamp forwarded to you. We have read the portion of opinion which you sent and agree with the conclusion of the attorney general on the point covered thereby, viz.: that the secretary of state is not entitled to charge a double fee for filing certificate of increase of stock, on the theory that an increase of stock amounts to an amendment of the articles of incorporation.

''That, however, is not the question raised in the present matter. The question raised by the tender of this certificate for filing is, 'should a corporation, after increasing its stock by preferred stock, in accordance with General Code, section 8699, amend its articles of incorporation so as to show the preference in the articles of incorporation?'

''General Code, section 8668, provides:

'When the capital stock is to be both common and preferred, it may be provided in the articles of incorporation that the holders of the preferred stock shall be entitled to yearly dividends of not more than eight per cent., payable quarterly, half yearly, or yearly out of the surplus profits of the company each year in preference to all other stockholders. Such dividends also may be made cumulative.'

''General Code, section 8669, provides:

'A corporation issuing both common and preferred stock may create designations, preferences and voting powers, or restrictions or qualifications thereof, in the certificate of incorporation, and if desired, preferred stock may be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the stock certificates thereof.'

''As stated in our previous letter, we have made it our uniform practice, which, prior to this time, has not been questioned in the office of the secretary of state, to amend the articles of incorporation after an increase of stock so as to show the changed capitalization, for two reasons:

"(1.) General Code, sections 8668 and 8669, above quoted, designate the articles of incorporation as the proper place to show the preferences therein mentioned.

"(2.) In the original organization of a corporation, the articles of incorporation are the proper place for defining the amount and classes of stock, and any preferences which may be created; it would seem to be logical that if the stock be increased, the articles of incorporation should be amended to show the true condition of the stock.

"We are not aware that the attorney general has ever passed upon this question. Before abandoning a practice which we have regarded as an essential precaution in connection with increases of stock, we feel that this question should, if not judicially passed upon by the courts, be passed upon by the attorney-general.

"We are therefore returning certificate of amendment, check covering filing fee in the sum of $5.00, and war revenue stamp, with the request that if, after reading the above explanation of our position, you still consider the certificate not entitled to record, the same may be referred to the attorney general for opinion. In that connection the attorney general should be advised that a certificate has been already accepted and filed by you showing the increase of stock in question. If you will kindly refer this matter to the department of the attorney general it will greatly oblige.

"Yours very truly,

"HINE, KENNEDY & MANCHESTER."

The original articles of incorporation of The Ohio Hotel Operating Company are not before me, but I assume, for the purpose of answering your question, that the only material change sought to be made by the proposed certificate of amendment is in the creation of "designations, preferences and voting powers" and making provision for the redemption of its preferred stock.

Stated briefly, the question presented is whether a corporation, which under section 8669, of the General Code, has increased its capital stock by the issuance of preferred stock, and which has filed a certificate to that effect with the secretary of state, may also amend its original articles of incorporation so that the same shall create a preference in the payment of dividends and distribution of assets to preferred stockholders, confer voting powers upon such preferred stock and provide for its redemption.

Messrs. Hine, Kennedy & Manchester, in their letter above quoted, have correctly stated that in my opinion to you of August 30, 1915 (opinion No. 783), I did not pass upon the question here presented, but only advised you that the secretary of state is not authorized to charge a double fee for filing a certificate of increase of capital stock of a corporation upon the theory that such certificate is also an amendment of the articles of incorporation.

Section 8719, of the General Code, relative to the amendment by a corporation of its articles of incorporation, so far as applicable, is as follows:

"A corporation organized under the general corporation laws of the state, may amend its articles of incorporation as follows: * * *

"4. So as to add to them anything omitted from, or which might lawfully have been provided for originally, in such articles. But the capital stock of a corporation shall not be increased or diminished, by such amendment, or the purpose of its original organization substantially changed * * *."

Section 8668, of the General Code, which is quoted in the letter of Messrs. Hine, Kennedy & Manchester, herein copied, authorizes a corporation which has both common and preferred stock to make provision in its articles of incorporation for the preferential payment of dividends to its preferred stockholders.

Section 8669, of the General Code, also quoted in the letter of Messrs. Hine, Kennedy & Manchester, authorizes such corporations to give other preferences, etc., to holders of preferred stock, and to make provision for the redemption of such stock.

The designation, preferences, etc., which The Ohio Hotel Operating Company seeks to confer upon the holders of its preferred stock by the certificate of amendment presented are such as the company's original articles of incorporation might have contained, if the original stock issue had consisted of both common and preferred stock.

Since the company has now increased its capital stock by the issuance of preferred stock, it follows that it may now amend its original articles of incorporation defining the relative standing of its common and preferred stock under authority of paragraph 4, of section 8719, of the General Code, above quoted.

I therefore advise that The Ohio Hotel Operating Company may amend its articles of incorporation in the manner set forth in its certificates therefor, and that such certificates should be received and recorded by you in the manner provided by law.

Your communication does not raise the question, and I deem it here unnecessary to determine whether a corporation which has increased its capital stock by the issuance of preferred stock, must necessarily amend its articles of incorporation in order to make provision for the relative standing of its common and preferred stock in the payment of dividends, the distribution of assets, and the power to vote, etc., or whether the same result may be accomplished by the insertion of such provision or provisions in the certificate of such increase of capital stock filed with the secretary of state.

I am returning herewith the uncancelled revenue stamp, the check for five dollars, the letter from Messrs. Hine, Kennedy & Manchester and the proposed articles of incorporation, which were attached to your communication.

Respectfully,

EDWARD C. TURNER,

Attorney General.

861.

STATE CIVIL SERVICE COMMISSION — SECRETARY — APPOINTMENT MUST BE MADE FROM THREE HIGHEST CANDIDATES ON ELIGIBLE LIST.

The appointment of a secretary of the state civil service commission, as provided by section 486-5, *G. C., as amended in* 106 *O. L.,* 402, *must be made from the three highest candidates on the eligible list as prepared by said commission.*

COLUMBUS, OHIO, September 24, 1915.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your favor of September 20, 1915, which is as follows:

"Section 486-5, of the civil service law of Ohio, provides that

'The commission shall appoint from an eligible list, to be prepared by said commission within thirty days after its appointment, a secretary, who shall be ex-officio chief examiner, etc., etc.'

"Query: Is this commission compelled to select its secretary from one of the three highest on the eligible list, or can it make the selection from the list as a whole?"

While the provisions quoted are applicable only to the appointment of a secretary of your commission, they cannot be said to be wholly special for the conclusive reason that resort must be had to other and general provisions of the civil service law to put them into effect. In other words, the commission must first prepare an eligible list. No provision being made in the section above quoted for an eligible list, resort must be had to the general provisions of the law whereby such list may be prepared. These provisions are found in section 486-12, of the civil service law.

Being thus compelled to adopt the plan of the general law to secure an eligible list, it then becomes important to determine whether further action is not also confined to the remaining provisions of the general law as found in section 486-13, which limits the selection to the three highest candidates on said list. It is apparent that this method may be followed and the appointment yet made from an eligible list as required by the section you quote. If this method is not followed, the appointment may then be made from the whole list.

Under these circumstances it is proper to determine if possible the legislative intent and purpose in making provision for the selection from an eligible list. By the provisions of paragraph 8, of section 486-8, of said civil service law, the secretaries of civil service commissions are specifically excepted from the list of secretaries placed by the provisions of said paragraph in the unclassified service. When this exception is considered in connection with the provisions of the section you quote, it is manifest that said provisions were made for only one purpose, viz., to unalterably place the position of secretary of your commission within the classified service. This may have been done to anticipate and prevent any attempt or action by the commission to remove its secretary from the classified service under any general authority or power granted to it by other provisions of the law.

This being so, the full purpose of the law as it appears in the section you quote is accomplished when the position is confined to the classified service, and it necessarily follows that there is no reason or ground for abrogating any of the general provisions of the law in the further stages of the transaction.

I am therefore of the opinion that the legislature did not intend in the use of the language quoted to do more than confine the position to the classified service, and that as to the other requirements of the appointment the provisions of the general law must obtain, and that the selection must be made from the three highest candidates on said eligible list and cannot be made from the whole list.

Respectfully,

EDWARD C. TURNER,

Attorney General.

862.

BALLOT—NAMES OF INDEPENDENT CANDIDATES FOR MUNICIPAL OFFICES—MUST BE PLACED IN LIST TO RIGHT OF ALL PARTY TICKETS IN SUCH ORDER AS SECRETARY OF STATE DIRECTS—SUCH LIST SHOULD BE UNDER NO PARTY NAME NOR BE CIRCLED AS PARTY TICKETS.

Names of independent candidates for council, auditor, treasurer and mayor in cities may be placed upon the ballot in lists to the right of party tickets in the order designated by the secretary of state, without party or political designation, but no circle may be placed above any such list of independent candidates.

COLUMBUS, OHIO, September 24, 1915.

HON. CHARLES F. ADAMS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of September 16, 1915, as follows :

> "In anticipation of questions which will arise concerning the matter of ballots for the November election, I desire your opinion concerning the make-up of ballots for independent candidates.
>
> "In this city there is a regular nominated republican ticket, also a democratic ticket, and there have been filed individual petitions by candidates seeking to run as independent, some for council, auditor, treasurer and one for mayor.
>
> "What I desire to know, is whether there is any construction for the placing of these independent candidates in one column on the ballot when they have not filed their petitions either jointly or under any party or independent designation. If my opinion is correct these names must appear on the ballot for the different offices in separate positions on the ballots and not a single column without any designation."

I understand from your communication that all candidates about whom you inquire have been severally nominated by petitions without seeking to have their names placed upon the ballot under party or other political designations, as authorized by sections 4996, G. C., 103 O. L., 844, et seq., and are independent candidates, under the provision of section 5003, G. C., that "candidates nominated by petition without distinctive appellations shall be certified as independent candidates."

Section 5016, G. C., provides:

> "Except as in this chapter provided, the names of all candidates to be voted for on the first Tuesday after the first Monday in November shall be placed upon the same ballot."

It is sufficient to here observe that candidates for the municipal offices named in your letter do not come within the exceptions in this section referred to.

A careful examination of the statutes fails to disclose a prescribed form for placing the names of the independent candidates for those offices referred to by you upon the ballot other than that found in section 5018, G. C., 104 O. L., 11, which provides:

> "In general the arrangement of the ballot shall conform as nearly as practicable to the plan hereinafter given. The tickets of the various polit-

ical parties shall be printed in parallel columns headed by the chosen device upon a shaded background, and the party names in such order as the secretary of state directs, precedence being given to the political party which held the highest number of votes for governor at the next preceding November election, and so on. The tickets, or lists, of candidates nominated by nomination papers, with their party names or designations, shall be printed at the right of and parallel with the tickets of political parties in such order as the secretary of state directs, precedence being given to the order herein prescribed for party tickets. No ticket or list of candidates containing more candidates for any office than are to be elected shall be printed under the name of any party.''

From the provisions of this section it would seem clear that all candidates nominated by nomination papers which are not placed upon tickets under their party names or designations, should be placed in lists upon the ballot to the right of party tickets in the order designated by the secretary of state.

I am therefore of opinion that the names of independent candidates for the municipal offices named in your inquiry should be placed in a list to the right of all party tickets upon the ballot, in such order as the secretary of state directs, giving to such list as nearly the form of the party tickets as practicable, except that such list should be under no party name or designation nor should there be placed over the same any circle as provided for party tickets.

Respectfully,

EDWARD C. TURNER,

Attorney General.

863.

STATE LIQUOR LICENSING BOARD—STATE AND COUNTY LICENSING COMMISSIONERS PROCURING AND CAUSING REFERENDUM PETITION TO BE CIRCULATED ON McDERMOTT LAW—PROCEDURE TO BE FOLLOWED IN MAKING FORMAL CHARGES.

To give to the state liquor licensing board jurisdiction under section 1261-25, *G. C.,* 103 *O. L.,* 219, *there should be filed with it charges in writing, duly signed by a citizen of the state, setting forth facts which in contemplation of law constitute cause for removal, a certified copy of which charges, together with a notice of the time and place of hearing, not earlier than thirty days subsequent to the date of service thereof, should be served personally upon the members of the county board against whom such charges are made.*

COLUMBUS, OHIO, September 24, 1915.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of yours under date of September 21, 1915, as follows:

''We enclose herewith a copy of a report made to the governor by Messrs. J. H. Secrest and C. A. Reid, appointed by the governor to investigate the activities of state and county licensing commissioners in procuring and causing a referendum petition to be circulated and signed on the McDermott law.

''The board desires to be advised of the formal charges. By whom and in what manner are they to be made to constitute a legal notice for a hearing in each individual case?''

The enclosed copy of report referred to by you is as follows:

"Columbus, Ohio, Sept. 17, 1915.

"Hon. Frank B. Willis, Governor of Ohio, Columbus, Ohio.

"DEAR SIR:—The undersigned having been heretofore appointed by you to investigate the activities of state and county licensing officials in procuring a referendum petition to be circulated, signed and filed with the secretary of state on what is known as the 'McDermott liquor license law,' beg leave to submit the following report of our investigations to this date:

"We find that the following members of county licensing boards on or about the twenty-fifth day of August, 1915, and thereafter until the first day of September, 1915, were actively engaged in circulating petitions for such referendum election, or in procuring licensees engaged in the saloon business or other persons to circulate and procure signatures of voters to such petitions:

"D. F. Dunlavy, Ashtabula county.
"Frank Lowther, Athens county,
"Robert T. Michener, Belmont county.
"Frank Pigman, Crawford county.
"Bernard H. Richter, Darke county.
"Frank H. Herman, Huron county.
"John F. Nolan, Jefferson county.
"Harry B. Galbraith, Jefferson county.
"W. D. Morrissey, Madison county.
"E. J. Leist, Pickaway county.
"William Klipstine, Shelby county.
"Dr. S. B. McGuire, Tuscarawas county.
"A. T. Paige, Summit county.

"We beg to report that other members of county licensing boards are under investigation, the result of which has not been fully determined and which will be reported at a later date.

"Respectfully submitted,
"(Signed) J. H. SECREST,
"C. A. REID."

Your inquiry involves a consideration of section 1261-25, G. C., 103 O. L., 219, which provides as follows:

> "Any county license commissioner may be removed by the state board in case of misconduct in office, bribery, incompetency, any gross neglect of duty or gross immorality, upon a hearing, thirty days' notice having been given to the commissioner whose removal is considered, as well as to the attorney general, who may attend the hearing and represent the state; and the decision of the state board shall be final."

The first step essential to conferring jurisdiction upon the state liquor licensing board in a proceeding under authority of the above quoted statute, is the filing with the board of written charges against the member of the county board upon the ground of either, any number or all of the following: Misconduct in office, bribery, incompetency, gross neglect of duty or gross immorality. These charges or complaints should be signed by the person making the same. Such complaints

may be properly made by any citizen of the state of Ohio, and I may say, in answer to your personal suggestion, that if such charges or complaints are subscribed by a state liquor license inspector, or any other employe of the state liquor licensing board, the same will be in that respect sufficient. The charges or complaint should embody facts which, in judgment of law, constitute one or more of the above mentioned statutory grounds for removal. A copy of said charges, certified by the state board as a true copy, should be served personally upon the member of the county board against whom such complaint or charge is made, by some person designated by the state board, and such person should make return to the state board showing personal service of the charges upon the accused member of the county board. It will not be sufficient that the written charges simply allege that the member is or has been guilty of misconduct in office, bribery, incompetency, gross neglect of duty or gross immorality. The charges should contain a recital of facts which, in contemplation of law, constitute one or more of these statutory grounds.

Accompanying the charges should be a notice from the state liquor licensing board, stating the time when and place where the hearing of said complaint will be had, such time of hearing being at least thirty days after the date of service of such notice. The service of said notice should be made upon the person charged in the complaint personally and return of said service of notice made to the state liquor licensing board by the person making service thereof, in the same manner as in case of service and return of the copies of the charges, or a copy of such charges may be properly incorporated in the notice. The service of such notice will be sufficient if forwarded by the state board to the sheriff of the county in which the member of the county licensing board resides against whom such charges or complaint is made, and by the sheriff served personally upon the member so charged, which facts of personal service should be shown by the return of the sheriff made to the state licensing board.

Respectfully,
EDWARD C. TURNER,
Attorney General.

864.

TAXES AND TAXATION—WHEN PUBLIC UTILITY IN FORMER YEARS MADE INCOMPLETE STATEMENT OF ITS TAXABLE PROPERTY TO TAX COMMISSION OF OHIO THEN LATER ACQUAINTED COMMISSION WITH ALL FACTS—WHEN VALUATION ON INCOMPLETE STATEMENT PLACED ON PROPERTY BY COMMISSION IS FINAL—PROPERTY OF THE CINCINNATI, NEWPORT AND COVINGTON RAILWAY COMPANY.

Where a public utility in former years made an incomplete statement of its taxable property in its report to the tax commission of Ohio, but subsequently acquainted the tax commission with all the facts relative to the omitted property, and the commission, having before it such incomplete statement of facts, places a valuation upon the property of the utility for such years, such valuation, if made in the exercise of the jurisdiction conferred upon the commission by law, and upon the basis of accurate and correct knowledge of the facts, is final and no action may be taken by the tax commission, under section 5461, *G. C., on the theory of placing omitted property on the duplicate even though the commissioners' action may have been based upon erroneous legal principles as to the situs of certain property.*

COLUMBUS, OHIO, September 24, 1915.

The Honorable Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—On June 2, 1915, you transmitted to me the following documents:

A letter to the tax commission from Messrs. Ernst, Cassatt & Cottle, of Cincinnati, Ohio, representing the Cincinnati, Newport and Covington Railway Company.

A letter of Robert S. Alcorn written to the commission in the capacity of a taxpayer.

A transcript of a hearing held on August 22, 1911, before the tax commission in the matter of the valuation of the Cincinnati, Newport and Covington Railway Company.

The original report of the Cincinnati, Newport and Covington Railway Company for the year 1913.

Referring to all these documents you state that the Cincinnati, Newport and Covington Railway Company, a corporation organized under the laws of Ohio, made reports to the tax commission for the years 1911-1914 inclusive, in which it listed as stocks owned by it and situated outside of Ohio, certain shares of stock of certain Kentucky street railroad companies aggregating in value, as listed, $825,000.00. It appears that the property of the company has been valued as an entirety at $360,000.00 for each of the above mentioned years.

The complaint is now made that the stocks above mentioned are taxable to the company in Ohio, their situs being at the company's principal place of business in Cincinnati, Ohio, regardless of where they are held and regardless, too, of whether or not they are pledged or mortgaged. It being obvious that the value of the stock is in excess of the value of the entire property of the company in Ohio, as determined by the commission, for the years mentioned, it is assumed that the commission has not valued the stocks for taxation nor considered them in arriving at the total value of the property of the company for any of the years named, and that therefore the commission should proceed, under the power which it has and may exercise in a proper case, to ascertain the true value of the stocks

in question, for the years named, and certify such ascertained amount to the auditor of Hamilton county as property omitted from the tax duplicates of such years.

You have asked me to go over the facts of the case as disclosed by the papers submitted, and to advise the commission as to whether or not it has the power to make the inquiries and corrections which it is asked to make in the premises.

The question which I shall consider is as to whether or not the commission has the power to proceed at all in the premises. I shall not consider the question as to whether or not the stocks in question are taxable in Ohio, though I may say in passing that the facts disclosed by the papers before me show rather conclusively that they are taxable in Ohio—that is, if they were held by an ordinary Ohio corporation other than a railroad company or street railroad company operating an interstate line, they would be taxable in Ohio and should be listed and valued for taxation in Ohio.

The section of the General Code under which the commission must act, if it acts at all, is section 5461. The section is very lengthy and part of its provisions do not apply to property taxation. The following portions of it will therefore be sufficient for present purposes:

> "When a public utility * * * fails to make any report or furnish any statement, which it is required to make or furnish, to the commission * * * or fails to report a part or all of its taxable property, or report the same, or part thereof, according to its true value in money, the commission shall ascertain, as nearly as practicable the * * * taxable property, or omitted part of the same, or such as was not reported according to its true value in money, that should have been reported or returned by such public utility * * * and certify * * * the value of such property, so ascertained, as required in this act, with respect to its * * * property of public utilities * * *. * * * The power and duty of the commission, above provided for, shall extend to preceding years in such manner as that the commission shall, for such years or years preceding the year in which the inquiries are made, and omissions ascertained, certify such omitted amounts so ascertained, as required in this act, with respect to such companies, in which event such omitted amounts shall be taxed at the rate of taxation belonging to the year or years in which the failure or omission occurred, in the case of property * * *; provided, however, that the power and duty of the commission with respect to property shall extend only to the five years next preceding the year in which such inquiries and corrections are made, and not in any event prior to the year 1911, except where no property of a company has been returned or assessed in any such year or years."

In an academic sense the commission may be said to have similar powers under the joint operation of sections 5399, 5400 and 1465-3 of the General Code, the effect of which may be described without quoting them, as follows:

Street, suburban and interurban railroad companies were formerly valued by county auditors or boards of auditors. When the tax commission act of 1910 was passed a section was inserted therein conferring upon the tax commission "all powers and duties and privileges" possessed by any county officer or board, the powers and duties of which were conferred upon the commission. One of the powers and duties formerly imposed upon the county auditor or board of auditors, in the assessment of such property, was the power to make corrections and list and value omitted property for previous years, this power being possessed, under section 5399 and section 5400, G. C. When tax commission act of 1911 was

passed revising that of 1910, a similar provision, preserving the powers and duties of the tax commission, thus originally devolving upon it, was made therein and has become section 1465-3, G. C.

However, an examination of section 5399 shows that the circumstances under which revisions and corrections may be made are the same as those which must exist in order to authorize such revision and correction under section 5461.

I shall quote enough of section 5399 to establish this conclusion:

> "If any person required to list property, or make a return thereof for taxation * * * fails to make a return or statement, or * * * makes a return or statement of only a portion of his taxable property, and fails to make a return as to the remainder thereof, or if he fails to return his taxable property or part thereof, according to the true value in money * * * the county auditor * * * shall * * *."

It will be observed that this language is substantially the equivalent of that found in section 5461. Therefore, for practical purposes section 5461 may be looked upon as the sole source of the authority of the commission to make additions to the tax duplicate on account of property omitted in previous years and which should have been valued by it. Analyzing the section it appears that in order to support any action of the commission it must appear to the commission that:

(1) The public utility has failed to make any report or furnish any statement which it is required to make; or that

(2) It has made a return or statement of a portion only of its taxable property and has failed to report the remainder; or that

(3) It has reported any part of its property at an incorrect valuation.

Your statement shows that the Cincinnati, Newport and Covington Railway Company made reports in each of the years in controversy. I take it also from your statement that the commission is not at the present time interested in the question of value, although statements submitted to the commission would tend to show that the stocks in question are worth much more than the $825,000.00 at which they were listed by the company. That is to say, the jurisdiction of the commission is sought to be invoked rather on the ground that these stocks have not been taxed at all than on the ground that they have been listed and taxed, but not at their true value in money.

This ground of action, on the part of the commission, may be a proper one in the present case, but for the sake of convenience its consideration may be passed.

The second ground of action by the commission, above defined, remains to be considered. Did the company, in any of the years in controversy, "fail to report a part * * * of its taxable property?"

The company mentioned the property in its report, to be sure. Your statement is that the 1913 report of the company, the original of which is before me, is, in this particular, the same as that of the company for the other years in controversy. This report shows the existence of these stocks and their ownership by the company. It also shows the valuation placed by the company thereon. *However, this property is not reported as "taxable property."* It is listed as "stocks owned outside of Ohio," i. e., as stocks not taxable in Ohio. Therefore, on the face of the report, and assuming as I have done that the stocks are taxable in Ohio, the company did not report this part of its "taxable property" because it reported the property as situated outside of Ohio and therefore not as "taxable property."

But though this must be admitted to be so, counsel for the company assert that the commission has no power to act in the premises for the following reasons, as stated in the letter of Messrs. Ernst, Cassatt & Cottle, above referred to:

> "(1) Under the head of 'personal property—stocks owned' * * * the stocks are * * * enumerated and their par value given. While they are listed in the column headed 'outside of Ohio' that could only mean that the companies were incorporated outside of Ohio and not that the stocks had a situs outside of Ohio, because it appears from page 5 of the report that the Cincinnati, Newport and Covington Railway Company was an Ohio corporation and any stocks owned by it would necessarily have a situs in Ohio."

(2) Notwithstanding the erroneous listing of these stocks by the company in its report, the representative of the company, it is claimed, appeared before the commission in 1911 and explained very fully the manner in which the company acquired legal title to them and the capacity in which that title was then being held. The commission being a continuous body, it is assumed that the notice then acquired by the commission is sufficient to give it presumptive knowledge of the true facts as claimed by the company for its purposes in making the assessments in the three subsequent years involved. It is therefore argued that the commission, having actual knowledge as to one year and presumptive knowledge as to the succeeding years, as to the existence of the stocks in question and of the attendant facts and circumstances relating to them, must have taken such facts and circumstances into account in arriving at the valuation of $360,000.00, which was the value at which the property was assessed for each of the years in question; that therefore the stocks in reality have been assessed for taxation for the years in question; and that the commission is precluded thereby from reopening the question now and assessing this particular property on the theory that it was omitted from the tax duplicate for the preceding years.

The first of these two contentions is not worthy of serious consideration. Without discussing at large the question as to whether or not, under proper circumstances, shares of stocks may acquire a situs other than at the domicile or residence of their owner, it is sufficient to observe that this point rests upon mere inference, and that the company, which has reported property as situated outside of Ohio, will not be heard to claim that its report is equivalent to a report that the property is in Ohio, because in contemplation of law it must have been in Ohio when other facts shown on the report are taken into consideration. If the commission had been misled by the erroneous listing of these stocks in the manner above described, I would not hesitate to advise, without further consideration, that even though it might be asserted that the commission ought to have known that the listing was erroneous, and ought thereby to have discovered immediately that the property was taxable in Ohio, the failure of the commission to make such a discovery would not defeat its right to assess such property for past years as omitted property, the company being originally at fault in the premises. As a matter of fact, under statutes like section 5461, it is no defense to a proceeding to assess property omitted in previous years, that the assessing officer, by the exercise of reasonable diligence in such preceding years, could have discovered the omission. Such a defense would be wholly without merit because the theory of the assessment of omitted property is merely to place that on the duplicate which ought to have been there originally; the public utility

in this instance is not required to pay any more taxes than it would have paid had a proper assessment been made in the first instance, no penalty being chargeable.

The second question presents a mixed question of fact and law. I shall state the law as I understand it.

Under statutes like sections 5399 and 5461, the following rule has been laid down by the courts:

Where the assessing officer, with full knowledge of the facts and acting within the scope of his jurisdiction or power, has determined a question with the authority to determine which the law has invested him, and such determination is erroneous and operates so as to produce a smaller assessment than would have been arrived at had his determination been correct, he has nevertheless assessed the property, and his assessment can be corrected only by a board or officer vested with authority to correct the assessment as such; and in such event the same officer or another officer may not add to the assessment on the theory that any property has been omitted from taxation.

Some of the Ohio cases embodying this rule are as follows:

In State ex rel. Guilbert v. Akins, 63 O. S., 182, it was held that where a county auditor had, in former years, permitted stockholders in national or state banks to deduct their indebtedness from the value of their respective shares, such deduction could not be placed upon the duplicate as an omission, and the taxes collected thereon. This case is perhaps not strictly in point, but it illustrates one application of the rule.

In State v. Pipe Line Company, 14 N. P. n. s. 401 it appeared that the state board of appraisers and assessors, under what was known as the Cole law, had determined the amount of the gross receipts of the defendant company for the year 1909, upon a report showing aggregate gross receipts in excess of the amount so determined by the board, the deduction being due to a claim asserted by the company to the effect that the excess receipts could not lawfully be made the basis of the excise tax. Subsequently the auditor of state sought to reverse the ruling and charge the company with omitted taxes. In a suit brought to enforce the collection of such omitted taxes the company, as a defense, relied in part upon the former determination of the board of appraisers and assessors. Bigger, J., in discussing this defense used the following language at pages 410, et seq.:

> "It is a well established principle of law upon the subject of the right of taxing officers and boards to amend and correct an assessment after it has been made and placed in the hands of the officer charged with its collection that they are without power or authority to do so, unless such power is expressly conferred by statute.
>
> "This rule seems to be well settled, and I find no authority to the contrary. The cases cited in the brief on behalf of the state are not in point, as they only decide that the action of assessing officers is not to be controlled by their predecessors in office in making assessment in prior years. They were not cases of modification or change of assessment already made and certified. The cases cited are Lee v. Sturges, 46 O. S., 152; Vicksburg, etc., Railroad Company v. Dennis, 116 U. S. 665, and Portland Hibernian Society v. Kelly, 28 Ore., 197.
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> * * * * * * * * * * * * *
>
> "I am unable to see the force of the reasoning that, while their judgment upon the facts necessary to be considered by them was final and conclusive, their judgment upon the law which must control them is not

to be given that effect. The case of State ex. rel. v. Railroad Company, 97 Mo., 348, does not in my opinion support this contention. In that case the state board was given power and jurisdiction to assess toll bridges. They assessed a bridge as a toll bridge which was not a toll bridge, and the decision was that as to such bridges the state board had no jurisdiction and their judgment that it was a toll bridge was without force or legal effect. The state board had no jurisdiction of the subject-matter. It was clearly beyond the jurisdiction of the board, but in this case there is no question of the jurisdiction of the board. It was the board, and under a claim of jurisdiction, which made the finding which it is sought to enforce by this action. If it had jurisdiction on December 31, 1909, to decide what the law was, it had jurisdiction to decide what the law was in January and July of 1909.''

It is true that in this case there was no express authority to assess receipts omitted in previous years. The case is cited, however, on the proposition that where the facts necessary to be considered by a taxing board are all before the board, and the board is proceeding to exercise a jurisdiction committed to it, its conclusion is final as to that particular assessment or determination even though erroneous as a matter of law. Of course, in order to apply this decision to the question now under consideration, it would be necessary to determine first, whether or not the tax commission had jurisdiction to determine the situs of the property in question, as a matter of law. That question will be reserved for further discussion.

In Railroad Company v. Hynicka, 4 N. P. n. s. 196, the question was as to the power of the auditor of Hamilton county to assess as omitted property a certain interstate bridge operated by a railroad company, together with certain sidetracks and inlots. The court first concluded that the property in question was of a class, the value of which when ascertained was to be merged into the value of the road as a unit, and distributed along the entire road in proportion to mileage as required by the statute applicable to railroads. Therefore, the court concluded that the value of this property should have been considered in arriving at the unit value of the railroad, and was not subject to localization and separate assessment in Hamilton county. This led to the following language in the opinion of Hoffheimer, J.:

''Finally, the property involved in this controversy was returned for taxation and the taxes found due thereon duly paid by plaintiff after the auditor, under and by virtue of section 2772, had ascertained its value. The evidence shows that the auditor undertook to tax it again on the theory that it was *omitted* property. All the steps taken by him show that in the opinion of that officer, it was property that had *escaped taxation*. But as we have already pointed out, it did not escape taxation and could not be said to be omitted property. The only question remaining then would be: Was the auditor justified in again placing this property on the duplicate on the ground that his action was in effect a *revaluation or correction* of an undervaluation?

''If the auditor has any such powers in respect to property of this character—property which according to law he had appraised and assessed in the first instance and no doubt correctly—that power is to be found in Revised Statutes, 2781a.

''The exception engrafted upon the statute, it will be noticed, speaks

only of omitted property; that is, property that has *escaped* taxation. Certainly, it was not intended that there should be a reassessment or a reappraisement of that which the officer had already appraised. Otherwise, as is pertinently asked by counsel for plaintiff, how many times is it necessary to assess railroad property? In our judgment this section gives the board *jurisdiction* to appraise and assess *omitted* property and denies *jurisdiction* to reassess and reappraise that which has already been assessed according to law.''

This case is in point as an interpretation of section 2781a, R. S., which now constitutes sections 5399 and 5400, General Code; and as I have pointed out, an interpretation of these sections may be said, for all practical purposes, to constitute an interpretation of section 5461, their provisions being very similar if not identical.

Other cases might be cited showing other applications of the rule, and it is to be admitted that the foregoing cases do not furnish a completely satisfactory parallel to the case now under consideration. However, it is believed that they sufficiently establish the rule as above laid down. That being the case, the rule of law as I have defined it requires the facts of the particular case to be investigated with a view to answering three questions, viz.:

(1) Did the tax commission, in the past years in question, have before it the facts pertaining to these stocks?

(2) Did it make a finding or determination with respect thereto?

(3) Did the commission have jurisdiction to determine the question of situs in the manner in which it was, or must have been determined?

I have interpreted the commission's letter to me as requiring possibly an answer to each one of these questions. With a view to complying with the commission's request I have availed myself of all information furnished to me by the commission and by Mr. Alcorn, together with certain verbal information given to me by Honorable Charles A. Groom, assistant prosecuting attorney of Hamilton county. I find myself able to answer the first question and will do so without stating the very complicated facts constituting the transaction by which the Cincinnati, Newport and Covington Street Railway Company was organized and became the owner of the shares of stock in question in the capacity in which it holds them. These facts are so very complicated that a mere statement of them would exceed the limitations of this opinion. It is sufficient for my purposes to state that on August 22, 1911, at a hearing before the tax commission the representatives of the company disclosed to the tax commission of Ohio what may be termed the essential facts respecting the ownership of these stocks by that company, and the relation of the company to the other corporations, the stocks of which it thus owned. A stenographic report of this conference is on file in the office of the commission, and I feel obliged to conclude that the answer to the first question which I have framed must be in the affirmative.

Coming now to the second question, and avoiding details which cannot be practicably discussed within the bounds of this opinion I beg to advise that I do not find that the tax commission ever, in any of the years in controversy, made a formal finding and determination entered on its record of proceedings showing precisely what had been done by it in assessing the property of the Cincinnati, Newport and Covington Street Railway Company. Presumably therefore the commission placed a value upon all the property of the company, of the existence of which it had knowledge, which was located in Ohio. What may for the purposes of argument be regarded as the incomplete assessment, which the commis-

sion made in these years of that property, may be explained consistently with the discharge by the commission of its powers and duties in the premises in good faith on but one of three hypotheses, namely:

(1) The commission considered that all the company's property was located and taxable in Ohio but that its value was no greater than the sum fixed by the commission as the company's assessment.

(2) The commission considered that the whole of the company's property, as a taxable public utility unit, was located but partly in Ohio and its assessment represents an apportioned share of the value of the whole, of which such Ohio property so viewed constituted but a part.

(3) The commission considered *these particular stocks* as not having a taxable situs in Ohio, and its assessment therefore represented merely the other property of the company which was clearly taxable in Ohio.

Taking these three hypotheses up in their order it is clear that if the commission merely made a mistake as to the value of the property, having before it at the time all the facts respecting the property and its ownership and location, that mistakes cannot now be rectified by proceedings under the statutes above discussed. For nothing is clearer than that the jurisdiction of the commission to determine the question of value, irrespective of that of situs, is full and complete; so that upon the principles above laid down, if the commission, in arriving at the assessment of $360,000.00 in each of the years in controversy, was valuing all the property of the company and considering all of that property as located in Ohio and subject to valuation by it, there is no escape from the conclusion that that value cannot now be changed for any of such preceding years, however great may be the discrepancy between the value thus determined by the commission for such years and the true and actual value of the property in any or all of such years.

As I have said, however, it does not appear, except by inference, that the commission did determine that all the property of the company was located in Ohio. It appears to be the practice of the commission to place nothing upon its record of proceedings excepting the assessment of the Ohio property. If I may be permitted a word of criticism, it seems to me that under the statutes applicable to the assessment of public utilities, the commission's determinations ought to be set forth in greater detail than this; and it is at least clear that if proceedings of the commission had been set forth in full in this instance, the difficulty which is now encountered would have been obviated. I refer the commission, in explanation of what I have in mind, to the following sections of the General Code:

> "Section 5424. In determining the value of the property of each such public utility to be assessed and taxed within the state, the commission shall be guided by the value of the property as determined by the information contained in the sworn statements made by the public utility to the commission and such other evidence and rules as will enable it to arrive at the true value in money of the entire property of such public utility within this state, *in the proportion which the value of such property bears to the value of the entire property of such public utility.*
>
> "Section 5429. The commission shall ascertain all of the personal property, road bed, stations, power houses, poles, wires, water and wood stations and real estate necessary to the daily running operations of the road, moneys and credits of each railroad company and each suburban or interurban railroad company, having any line, or road, or part thereof in

this state and the undivided profits, reserved or contingent fund of the company, whether in moneys, credits, or in any manner invested, and the actual value thereof in money, and also locomotives, motors and cars not belonging to the company, but hired for its use or run under its control on its road by a sleeping car company or other company. Such rolling stock not belonging to it, but under its control, may be returned by such public utility separate from its own property, and if so returned the commission shall fix the valuation of such property separately, but must include the amount in the aggregate valuation."

"Section 5430. The value of such property, moneys and credits of each of such street, suburban and interurban railroad and railroad companies, as found and determined by the commission, shall be apportioned by the commission among the several counties through which the road, or any part thereof, runs, so that to each county and to each taxing district therein, shall be apportioned such part thereof as will equalize the relative value of the real estate, structures and stationary personal property of such company therein, in proportion to the whole value of the real estate, structures and stationary personal property of the company in this state; and so that the rolling stock, main track, road bed, power houses, poles, wires, supplies, moneys and credits of the company shall be apportioned in like proportion that the length of the road in such county, bears to the entire length thereof in all the counties, and to each city, village and district or part thereof therein.

"Section 5445. When a street, suburban or interurban railroad or railroad company has part of its road in this state and part thereof in another state or states, the commission shall take the entire value of such property, moneys and credits of such public utility so found and determined, in accordance with the provisions of this act, and divide it in the proportion the length of the road in this state bears to the whole length thereof, and determine the principal sum for the value of the road in this state accordingly, equalizing the relative value thereof in this state."

It is my opinion, and I take this opportunity expressly to advise the commission, that under these statutes (as well as under statutes relative to the valuation of the property of other public utilities which are similar in purport though not quoted) the commission does not discharge its full duty unless it separately determines the value of the whole property of the utility, both within and without the state, and spreads its determination in this behalf on its record of proceedings; then makes a distinct determination as to the proportion of such whole value attributable to Ohio. This statement needs, of course, some qualification. It is not the whole value of the entire property of the utility that is to be apportioned between Ohio and the other state or states or countries, but in the case of railroads, for example, only such part of the whole as is subject to apportionment, certain fixed property being localized and subject to separate valuation in the place where it is located instead of its value being included in the amount subject to apportionment. But with this qualification the advice which I have expressed should be followed by the commission, so that it can be determined in a given instance whether the commission is valuing an interstate utility or a utility, the property of which is located entirely in Ohio. In this case that is one of the issues which is raised, for it appears from the stenographic report of the hearing of August 22, 1911, hereinbefore referred to, that the assessment of the property of the Cincinnati, Newport and Covington Street Railway Company was discussed as if the condition of affairs were as follows:

It seems to have been assumed in the discussion that the property belonging nominally to the South Covington and Cincinnati Street Railway Company, one of the corporations, the stock of which is owned by the Cincinnati, Newport and Covington Street Railway Company was, in point of fact, a part of the same system of which the plant or line admittedly operated by the Cincinnati, Newport and Covington Street Railway Company was the remainder, so that the two lines together constituted a single street railroad, interstate in character. It was further assumed that the joinder of unity of ownership with unity of use, which is required by the underlying principles of statutes like those last above cited, as interpreted in cases like Adams Express Company v. Auditor, 165 U. S., 114 and 166 U. S., 185, has been effectuated in this instance through the medium of stock ownership. That is to say, it seemed to be taken for granted that in reality there was but a single street railway operation involved; and the fact that property on one side of the river was owned by the respondent company and that on the other by the Kentucky company, was not regarded as effecting a separation of ownership, because of the fact that the stock of the Kentucky company was owned by the respondent company, which seemed to be regarded as substantially the equivalent of the true ownership by the Ohio company of the property itself belonging to the Kentucky company. So as to the stocks of the other companies which were not operating companies; these represented franchise rights used by the two companies or by the one company, whichever view of the case be accepted, in the operation of the entire system, so that they too seemed to have been regarded as evidences of title and ownership rather than as separate investments or intangible personal property.

The foregoing is a generalization expressed in order to avoid going into a great mass of detail. It states, however, with sufficient accuracy I believe, the hypothesis upon which the assessment of the property of this company was discussed verbally at the hearing on August 22, 1911. The representatives of the company and a member of the commission exchanged ideas on that occasion with respect to the valuation, not of the tracks and cars in Ohio and the shares of stock in question, but of the whole system, both on the Ohio side and the Kentucky side considered as a unit, and as to the proper apportionment of such entire value as between Ohio and Kentucky.

As I have stated, no intimation as to whether the commission did determine that the whole system was a single unit of ownership and use appears upon the record of the proceedings of the commission. And if, in other similar cases, the commission's records show that whenever the utility is an interstate one the value of the whole is first estimated and then Ohio's proportion thereof is separately determined, the very silence of the record in this case on this point would conclusively show that whatever may have been the informal statements of a member of the commission upon the occasion referred to, the whole commission did not finally arrive at the conclusion that the property of the company in Ohio was a part of an interstate property and that the shares of stock owned by it were mere evidences of title of operated property. But if, as I believe is the case, the commission does not, in every case of valuation of interstate utility property, enter the proper findings and determinations upon its record, no such inference can be drawn from the silence of the record of this particular proceeding in this respect, and we are left in the dark as to what the commission did determine.

It is of course equally impossible to ascertain from the record, or any inferences to be drawn therefrom, whether the commission, without considering the Kentucky property as a part of a single system also comprising the Ohio property, and so far as tangible property is concerned, limiting its assessment to the

property of the company located in Ohio only, separately considered the situs of these stocks as investments, or taxable subjects of ownership, and determined the same to be elsewhere than in Ohio. What slight evidence there is of the commission's actual course of procedure does not seem, for reasons already sufficiently stated, to point in this direction. But even if it be assumed that the commission took this last described course, the authority of the commission to make inquiries and corrections of the kind which it is asked to make cannot, in my opinion, be predicated upon such an assumption. For it must not be forgotten that the evidence which has been submitted to me at least tends to show that the commission had before it, at one time, and in its files at all subsequent times sufficiently full information as to the ownership of these stocks and the facts surrounding the same, to enable it to determine their taxable situs. If in the light of these facts the commission did determine, in the past years in controversy, that the stocks were not taxable in Ohio, that determination, though erroneous, may not be corrected by the commission at the present time so as to affect past years. It is true that the commission, in one sense, does not have jurisdiction to determine conclusively the question of situs. That is to say, had the commission erroneously determined that the situs of property not taxable in Ohio was in Ohio, and attempted to subject it to taxation here, this determination would be without effect, and in one sense at least it might be said to be in excess of its jurisdiction. But the reverse of this rule does not hold good.

It may perhaps be sufficiently accurate to say generally that where a taxpayer or a public utility, under statutes like section 5461, G. C., makes a partial and incorrect report or return, and then before the assessment is determined advises the taxing authorities of the true facts, *this of itself is sufficient to prevent any future action.* That is to say, the gist of section 5461, and other statutes like it, is that the omission or undervaluation in the previous year must be the result of some default or concealment on the part of the taxpayer; so that if a report or return of a taxpayer is false or incorrect, but the taxpayer subsequently and before assessment advises the taxing authorities as to the true facts, this is, in effect, a timely correction of the report or return, and if, notwithstanding such advice the taxing authorities still proceed upon the basis of the erroneous report, their successors in subsequent years cannot make the original erroneous statement or return the basis of inquiries and corrections under the statute.

For all these reasons I find myself unable to return an unequivocal answer to the second of the three questions above suggested, but have to say that the commission's record shows merely an assessment of $360,000.00 without showing whether that assessment is Ohio's proportion of a larger unit valuation or not, or whether a part of the property of the utility is located in other states. Presumptively such a record indicates that the commission considered all the property of the company as being located in Ohio, and therefore made no special finding or determination with respect to the situs of these stocks, nor did it consider them otherwise than as they would have to be considered were they the property of an ordinary corporation or individual, namely, as investments subject to independent valuation and assessment as intangible personal property in Ohio. However, the force of this presumption is very greatly weakened if not destroyed by the fact that the commission's records have not been properly kept; so that the state of the record in this particular is not in reality evidence in either direction as to what the intermediate determination of the commission may have been.

In view of this answer to my second question it will be readily observed that it is, strictly speaking, unnecessary for me to consider the third question at all. For if it is impossible to determine just what the commission did do, it is idle

to inquire whether or not it had jurisdiction to do something which may be merely imagined. However, in the view which I take of this question, it will be helpful for me to consider the third question also.

On the hypothesis that the commission did consider the whole system as a unit and the stocks as evidences of title to the property comprising such unit, we may inquire whether the commission had the authority to make such determination. That is to say, the third question may be considered as it would be if the records of the commission affirmatively showed that the proposed assessment, as discussed between the member of the commission and the representatives of the company on August 22, 1911, had actually been made. If such had been the case, would the records show that the commission had determined a question which it had jurisdiction to determine?

In my opinion the answer to this question must be in the affirmative. Section 5445, G. C., above quoted, provides what shall be done when a "street * * * railroad company has part of its road in this state and part thereof in another state or states." Whether such a company has a part of its road in this state and a part in another state or states must be determined, in the first instance, by the tax commission. To be sure in making such a determination the commission may not exceed the jurisdiction of the state. That is to say, if in making such a determination the commission *should bring into Ohio* property which Ohio has no right to tax, there would be a failure of jurisdiction. But in my opinion this principle does not apply conversely, and if, having all facts before it, the commission determines what the "road" to be assessed, under the statutes cited, is, and where it is located, and that it is located partly in Ohio and partly in another state or states, and that the value of the entire property should be apportioned in a certain way, and such determinations are erroneous, so that as a result thereof Ohio is deprived of taxable value which it otherwise would have, I do not think that there can be said to be a failure of jurisdiction, though there would, in such event, be an erroneous exercise of jurisdiction.

From another point of view, while it is true that the jurisdiction of the tax commission will not be presumed, but must be made affirmatively to appear where called in question in certain kinds of cases, yet in a proceeding of this kind, inquisitorial in its character, it is clear, upon authorities which have already been cited, that jurisdiction to act in past years, as well as the regularity of such proceedings, will be presumed. The record being merely silent and not affirmatively showing failure of jurisdiction, such failure of jurisdiction in this case cannot be assumed. For both of these reasons I have come, somewhat reluctantly, to the conclusion that the information submitted to me does not warrant me to advising the commission positively that it has the power to act upon the complaint of Mr. Alcorn. On the contrary, I feel equally unable to advise positively that the commission has not the power to act. It may be that further investigation by the commission will bring to light some fact which may show that the commission acted without knowledge of the facts in some of the years other than the year 1911; or that for some reason not yet disclosed the commission exceeded its jurisdiction in some particular in all or some of the years in controversy. Such advice as I feel able to give to the commission is based upon the somewhat limited information which seems to be available at the present writing, although the commission, as I am aware, has made every effort to supply all information which can be supplied.

While the above remarks respecting the answer to the third general question suggested by me have been limited to the supposition that the commission considered the joint operation as a unit, and apportioned a part of the value of the

whole to Ohio, they apply as well to the other two suppositions for reasons which have been pointed out in discussing these suppositions in another connection.

Of course, if the facts as alleged by the representatives of the company in the year 1911, or at any other time, were not true, or were so stated to the commission as to mislead the commission, in addition to such error as the commission might well fall into because of the incorrectness of the reports of the company, and the commission, acting upon the basis of such erroneous information, had reached its determination for the previous years, then the additions and corrections which the commission is now asked to make could, in my opinion, be lawfully made; for in that event the commission would not have had before it, at the time its previous determinations were made, the true facts necessary to support a final and conclusive determination.

Under all these circumstances my ultimate advice to the commission is that the discrepancy between the amount of the assessment of the company's property in former years and the amount at which it is alleged the property should have been valued (color to which is lent by the fact that the company, as Mr. Alcorn points out, has paid taxes for years immediately preceding 1911 at a much higher valuation than $360,000.00, and upon these very stocks considered as distinct subjects of taxation) is so great that the commission may with propriety at least make the inquiries necessary to bring out all the facts with respect to the situation, which are not shown by its records on file. When all the facts are disclosed, the principles laid down in the foregoing opinion will enable the commission, it is believed, to determine whether or not it has power to make the corrections authorized by section 5461, G. C.

In conclusion I wish to assure the commission that any action which the commission may see fit to take, after a further investigation of this matter, will be supported by this department.

Respectfully,
EDWARD C. TURNER,
Attorney General.

865.

CORPORATION—CERTIFICATE OF INCREASE OF CAPITAL STOCK BY ISSUANCE AND DISPOSITION OF PREFERRED STOCK—NOT REQUIRED TO SET FORTH ANY DESIGNATIONS, PREFERENCES, RESTRICTIONS, VOTING POWERS, PROVISIONS AS TO REDEMPTIONS IN CERTIFICATE—HOW HOLDERS OF PREFERRED AND COMMON STOCK DISTINGUISHED IN SUCH CASE.

In no case is a corporation required to set forth any designations, preferences, restrictions, voting powers, provisions as to redemption, etc., in a certificate authorizing the increase of capital stock by the issuance and disposition of preferred stock. In the absence of such provisions, preferred stock is distinguishable from common stock with respect to the liability of the holders thereof upon insolvency and their rights with respect to the distribution of the assets of the corporation.

COLUMBUS, OHIO, September 24, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I beg to acklowdege receipt of your letter of September 13th,

requesting my opinion upon the following question which is presented by a certificate of increase of capital stock by the issuance and disposition of preferred stock tendered to you for filing by The Herschede Hall Clock Company, to wit:

> "Must a corporation in the certificate authorizing the increase of capital stock by the issuance and disposition of preferred stock provided for in section 8699, of the General Code, set forth the designations, preferences, restrictions, voting powers, etc., distinguishing the preferred stock thus authorized to be issued from the other stock of the corporation,
>
> "(a) Where the corporation as originally organized has no preferred stock;
>
> "(b) Where the corporation as originally organized has preferred stock, but without designations, preferences, voting powers, etc., in the certificate of incorporation (which is the case with respect to The Herschede Hall Clock Company); and
>
> "(c) When the corporation as originally organized has preferred stock and there are with respect thereto designations, preferences, restrictions, voting powers, etc., in the original certificate of incorporation.
>
> "That is to say, in each of the cases above enumerated may the certificate lawfully omit all reference to the designations, preferences, restrictions, voting powers, etc., of the preferred stock, authority to issue and dispose of which is sought, and may a certificate under section 8699, C. C., which omits all such reference be lawfully filed by you?"

The fundamental question requiring consideration in connection with these several inquiries is as to whether or not a corporation having both common and preferred stock must set forth in the certificate of incorporation, or elsewhere in the supplementary amendments and certificates, which upon being filed in the office of the secretary of state become in effect a part of such original certificate, any designations, preferences, etc., with respect to such preferred stock.

I quote sections 8667 to 8671, inclusive, of the General Code:

> "Sec. 8667. If a corporation be organized for profit, it must have a capital stock, which may consist of common and preferred, or common only; but at no time shall the amount of preferred stock at par value exceed two-thirds of the actual capital paid in in cash or property."
>
> "Sec. 8668. When the capital stock is to be both common and preferred, it *may* be provided in the articles of incorporation that the holders of the preferred stock shall be entitled to yearly dividends of not more than eight per cent., payable quarterly, half yearly, or yearly out of the surplus profits of the company each year in preference to all other stockholders. Such dividends also may be made cumulative."
>
> "Sec. 8669. A corporation issuing both common and preferred stock *may* create designations, preferences and voting powers, or restrictions or qualifications thereof, in the certificate of incorporation, and if desired, preferred stock may be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the stock certificates thereof."
>
> "Sec. 8670. Upon the insolvency of the corporation no holder of preferred stock shall be liable for its debts until after the remedy against the common stockholders upon their liability, as provided by law, has been ex-

hausted, and then only for such amount as remains unpaid. Such liability in no event shall exceed that fixed by law for the common stock of such corporation.''

''Sec. 8671. On the insolvency or dissolution of the corporation, the holders of preferred stock shall be entitled to receive from the assets remaining after paying its liabilities, the full payment of its par value, before anything is paid to the common stock.''

Upon reading these sections together, which is proper, because they were all originally parts of section 3235a, R. S., it appears that preferred stock, as such, is distinguishable from common stock by reason of merely being called ''preferred stock.'' That is to say, without the recital of any designations, preferences, voting powers, restrictions, etc., in the certificate of incorporation or elsewhere of record in the office of the secretary of state, the holder of preferred stock, denominated and issued as such, has certain peculiar rights. Thus, under section 8670, supra, his liability is subsequent to that of the common stockholders; and under section 8671 he is to be preferred to the common stockholders in the distribution of the assets of the corporation upon its insolvency or dissolution.

I repeat that these attributes of preferred stock are possessed and enjoyed by it, regardless of the recitals of the articles of incorporation or certificates supplementary thereto on file in the office of the secretary of state, or at least in the absence of any explicit provision therein.

Coming now to consider sections 8668 and 8669, I call attention to the fact that in form these statutes are permissive. Unless there is some rule of public policy requiring a contrary interpretation, these statutes must be read literally, because they are in *pari materia* with section 8667, wherein the word ''may'' is used in evident contra-distinction to the word ''must.''

I know of no such rule of public policy. To be sure, sections 8668 and 8669 have in a way a mandatory or compulsory effect. That is, if the holders of the preferred stock which is to be issued are to be entitled to preferred dividends, to have peculiar voting power, or have any other designations and preferences aside from those which are provided for in sections 8670 and 8671, and if the stock is to be subject to redemption, these matters must be provided for in the certificate of incorporation or in the other certificates which supplement it. But I do not discover in the express terms of the statute any requirement that all preferred stock shall have these additional attributes, nor do I know of any public policy that would dictate a forced interpretation of the statutes to this effect.

In other words, I may define the preferred stock of an Ohio corporation as follows:

> ''It is that species of stock the holders of which *ipso facto* are entitled to be preferred in the distribution of the assets of the corporation upon insolvency or dissolution and in the enforcement of statutory liability; and who are entitled to preferred dividends, voting powers, etc., if such additional rights are provided for in the certificate of incorporation or the supplementary certificates, and not otherwise. In other words, the right to be preferred in the distribution of dividends is not a *necessary* attribute of preferred stock in Ohio.''

From these considerations the following conclusions with respect to the questions involved in your inquiry are derived:

(1) Where the corporation as originally organized has no preferred stock, it may lawfully file a certificate of increase by the issuance and disposition of preferred stock under section 8699, of the General Code, without specifying therein or by contemporaneous amendment, or otherwise, any designations, preferences or voting powers whatever; the effect of such certificate being to authorize the issuance of stock "preferred" only as expressly stipulated in sections 8670 and 8671, of the General Code.

(2) A corporation may be lawfully organized, in the first instance, having both common and preferred stock and without special designation, etc., as to the latter; in which event it may also lawfully increase its authorized capital stock by the issuance and disposition of preferred stock, without assigning to such increased preferred stock any such designations, preferences, voting powers, etc., in which event the effect will be the same as that described in discussing the first case.

(3) When a corporation as originally organized has preferred stock and there are in the original certificate of incorporation designations, preferences, voting powers, etc., the corporation may lawfully file a certificate of increase under section 8699, of the General Code, without stipulating therein with respect to the designations, preferences, voting powers, etc., of the increased preferred stock; in which event the question would arise as to whether the designations, preferences, voting powers, etc., in the original articles of incorporation would apply to the new preferred stock or not. It is not necessary in answering your question to pass upon this point.

For the foregoing reasons, I advise that the certificate of increase of capital stock by the issuance and disposition of preferred stock tendered to you by The Herschede Hall Clock Company may lawfully be filed and recorded.

I return to you herewith the original certificate which was sent to me by counsel for the company, with the company's check for $50.00 and uncancelled revenue stamp attached thereto; also the letter of Messrs. Kelley & Remke to you and the original articles of incorporation of The Herschede Hall Clock Company.

Respectfully,

EDWARD C. TURNER,

Attorney General.

866.

LIMA STATE HOSPITAL—PRISONER TRANSFERRED FROM PENITENTIARY TO HOSPITAL—ALLOWANCE TO BE PAID DEPENDENTS OF THOSE CONFINED IN PENITENTIARY, APPLIES TO THOSE TRANSFERRED TO INSANE HOSPITAL UNTIL EXPIRATION OF TERM OF CONFINEMENT FOR WHICH PRISONER WAS ORIGINALLY SENTENCED—NON-SUPPORT CASE.

The payment of the credit of forty cents per day provided for in section 13019, *G. C., to be made in case of insane prisoner transferred to Lima State Hospital until expiration of prisoner's term of confinement is to be made in the same manner as prior thereto.*

COLUMBUS, OHIO, September 24, 1915.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge the receipt of your request for an opinion, which is as follows:

"John Gomscak, serial number 43351, who has been confined in the Ohio penitentiary since February 5, 1915, has been adjudged insane and this day transferred to the Lima state hospital. He was serving an indeterminate sentence from Lorain county on the charge of non-support of minor children.

"Will you please advise whether or not his transfer to the Lima state hospital nullifies the payment to his dependents by the Ohio penitentiary of the forty cents per day allowed by the state under section 13019, and whether such payments should be stopped or continued, or if these payments shall in the future be made by the Lima state hospital."

Section 13019, of the General Code, referred to in your letter, is as follows:

"The board of managers of the penitentiary, or reformatory, to which a person is sentenced and confined under this subdivision of this chapter, shall credit such person with forty cents per day for each working day during the period of such confinement, which shall be paid, or caused to be paid, by such board to such trustee."

Section 2216, of the General Code, is as follows:

"When the physician of the penitentiary or reformatory reports in writing to the warden or officer in charge thereof that in his opinion a convict confined therein is insane, such warden or officer shall apply to the probate court of the county in which the institution is located, for an examination to be made of such convict by two physicians of at least three years' practice in the state, not connected with the penitentiary or reformatory, and to be designated by the court. If satisfied after a personal examination, that the convict is insane, they shall so certify in the form and manner prescribed for the commitment of insane persons to state hospitals."

Sections 2220 and 2221, of the General Code, are as follows:

"Sec. 2220. An insane convict under indeterminate sentence, transferred from the Ohio penitentiary or the reformatory to the Lima state hospital, shall be detained at such hospital for the maximum term of sentence provided by law for the offense of which the convict was convicted, unless sooner restored to reason."

"Sec. 2221. When an insane convict confined in the Lima state hospital, whose term of sentence has not expired, has been restored to reason, and the superintendent of the hospital so certifies in writing, he shall be transferred forthwith to the penitentiary or reformatory from which he came. The officer in charge shall receive such convict into the penitentiary or reformatory."

It will be observed that the provisions of section 13019, *supra*, are that the person sentenced under the chapter of which it is a part shall have placed to his credit the sum of forty cents per day during *such* confinement, that amount to be paid to the trustees appointed by the court to receive it for the dependents of the prisoner.

It will be observed from a reading of sections 2220 and 2221, of the General Code, *supra*, that the term during which an insane prisoner transferred from the reformatory or penitentiary may be detained at the Lima state hospital is governed by two things: First, his mental condition, and second, by the length of his sentence, the latter provision being a limitation as to the time he may be kept regardless of the condition of his mind; and it is further provided that if he be restored to reason before the expiration of his sentence *he shall be returned to the penitentiary or reformatory.*

In section 2218, of the General Code, will be found a provision to the effect that when the prisoner is transferred to the Lima state hospital, the *original* certificate of conviction shall be transferred to the superintendent.

At any and all events, the insane prisoner confined in the Lima state hospital is under sentence to the penitentiary, and under the rules of your board if a parole were granted him, or the governor should see fit to exercise the pardoning power, the prisoner would be released in so far as there would be no authority to hold him, except upon proceedings under section 1995, of the General Code.

It is my opinion, therefore, that the prisoner referred to in your letter is still under sentence to the penitentiary and constructively confined therein, although for humane reasons he has been temporarily transferred to the Lima state hospital in order that his health and the safety of the inmates of the penitentiary may be better guarded. It follows from this construction that until the expiration of his term of confinement under the sentence imposed, he is entitled to the credit of forty cents per day, as provided in section 13019, of the General Code, *supra*, and that payments thereunder shall be made as before the transfer.

Respectfully,

EDWARD C. TURNER,

Attorney General.

867.

ARGUMENTS AGAINST PROPOSED CONSTITUTIONAL AMENDMENTS —NO AUTHORITY TO APPOINT COMMITTEE TO PREPARE ARGUMENT AGAINST SUCH PROPOSED AMENDMENT—SEE DECISION OF SUPREME COURT, GRAHAM P. HUNT vs. CHARLES Q. HILDEBRANT, SECRETARY OF STATE, 91 O. S.

There is no authority for the appointment of a committee to prepare an argument or explanation, or both, against an amendment to the constitution proposed by initiative petition, by the governor.

COLUMBUS, OHIO, September 24, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of yours under date of September 4, 1915, which is as follows:

"We enclose herewith official argument against proposed constitutional amendment—'To provide for statewide prohibition of the sale and manufacture for sale of intoxicating liquor'—by committee composed of Graham P. Hunt, Eugene Heim and John Roehm.

"We beg to state that said paper was received in the office of the secretary of state on the third day of September, 1915, and we submit the following question to you for opinion:

" 'May said paper be received and filed on the third day of September, 1915, by the secretary of state under the law, or had the time expired in which such paper could be filed with the secretary of state?' "

With your inquiry is submitted a copy of a paper writing on file in your office, which reads as follows:

"Columbus, Ohio, September 4, 1915.

"To the Secretary of State of the State of Ohio:

"On September 2, 1915, I duly appointed F. H. Kerr, of Jefferson county, Ohio, Nicholas Duttle, of Montgomery county, Ohio, and H. R. Probasco, of Hamilton county, Ohio, a committee of three electors of the state of Ohio, to prepare and file an explanation with the secretary of state of Ohio against the constitutional amendment for statewide prohibition; that on September 2, 1915, the members before named received notice of their appointment and met together and subsequently two members thereof informed me that they would not file an explanation against the prohibition amendment; that on this date, September 4, 1915, having received the written resignation of all the members of that committee as heretofore appointed, and having received the request of The Ohio Home Rule Association, through its secretary, J. M. Kammeron, to appoint Graham P. Hunt, of Hamilton county, Ohio, Eugene Heim, of Hamilton county, Ohio, and John Roehm, of Montgomery county, Ohio, as a committee of three electors of the state of Ohio, to prepare and file an explanation with the secretary of state of Ohio, against the constitutional amendment for statewide prohibition. I, therefore, in accordance with this request and without expressing any opinion as to when the time for the appointment of that committee and the filing of the explanation expired, hereby

designate Graham P. Hunt, of Hamilton county, Ohio, Eugene Heim, of Hamilton county, Ohio, and John Roehm, of Montgomery county, Ohio, a committee of three electors of the state of Ohio, to prepare and file an explanation with the secretary of state of Ohio against the constitutional amendment for statewide prohibition.

"Frank B. Willis,
"Governor of Ohio."

I learn from personal interview, however, that the question with which you are more particularly concerned than that stated in your inquiry above quoted, is, whether the secretary of state, upon the facts above set forth, is authorized or required by law to cause to be printed and distributed among the voters of the state the "official argument against proposed constitutional amendment to provide for statewide prohibition of the sale and manufacture for sale of intoxicating liquor," received in your office on September 3, 1915.

The constitutional amendment, to which you refer, for the prohibition of the sale and manufacture for sale of intoxicating liquor, is proposed by initiative petition, and the first question which your inquiry then suggests, is whether there is authority for the preparation of an argument or explanation, or both, against a constitutional amendment which is proposed by initiative petition.

Pertinent to this question is the provision of section 1g of article II of the constitution, which is as follows:

"A true copy of all laws or proposed laws or proposed amendments to the constitution, together with an argument or explanation, or both, for, and also an argument or explanation, or both, against the same, shall be prepared. The person or persons who prepare the argument or explanation, or both, against any law, section or item, submitted to the electors by referendum petition, may be named in such petition and the persons who prepare the argument or explanation, or both, for any proposed law or proposed amendment to the constitution may be named in the petition proposing the same. The person or persons who prepare the argument or explanation, or both, for the law, section or item, submitted to the electors by referendum petition, or against any proposed law submitted by supplementary petition, shall be named by the general assembly, if in session, and if not in session then by the governor. The secretary of state shall cause to be printed the law, or proposed law, or proposed amendment to the constitution, together with the arguments and explanations, not exceeding a total of three hundred words for each, and also the arguments and explanations, not exceeding a total of three hundred words against each, and shall mail or otherwise distribute, a copy of such law, or proposed law, or proposed amendment to the constitution, together with such arguments and explanations for and against the same to each of the electors of the state, as far as may be reasonably possible."

In the same section of the constitution, as amended in 1912, it is further provided that "the foregoing provisions of this section shall be self executing, except as herein otherwise provided. Laws may be passed to facilitate the operation, but in no way limiting or restricting either such provision or the powers herein reserved."

By analysis of that part of the constitutional provision first above quoted, relating expressly to the same, the authority therein found for the preparation of arguments and explanations readily resolves itself into the following:

The persons who prepare an argument or explanation:

(1) *against* any *law, section* or *item* submitted by *referendum* petition *may be named in such petition.*

(2) *for* any proposed *law* or *amendment* may be *named in the petition* proposing the same.

(3) *for* the *law, section* or *item* submitted by *referendum petition* shall be named *by the general assembly* if in session and if not in session then *by the governor.*

(4) *against* any proposed *law* submitted by *supplementary petition* shall be named by the *general assembly* if in session if not by the governor.

A casual examination of such an analysis shows conclusively that there is nowhere in this provision of the constitution anything upon which may be based a claim for authority in any one or more persons to prepare an argument or explanation *against* a constitutional amendment which is proposed by initiative petition.

If the machinery for the preparation of an argument or explanation, or both, against such proposed constitutional amendment is provided in the constitution, it must be found elsewhere than in that part of section 1g of article II last referred to, and the particularity with which such provision is here made in specific instances gives rise at least to a strong presumption that it was clearly the intent of the framers of this amendment to the constitution, and the people in its adoption, that no constitutional provision therefor should be made.

If we are to look elsewhere for constitutional provision for the machinery necessary to carry into full operation the provision for the printing and distribution of arguments and explanations in the particular case here under consideration, we find it is provided in section 1g of article II of the constitution, supra, that "a true copy of all laws or proposed laws or proposed amendments to the constitution, together with an argument or explanation, or both, for, and also an argument or explanation, or both, against the same, shall be prepared," and that "the secretary of state shall cause to be printed the law, or proposed law, or proposed amendment to the constitution, together with *the* arguments and explanations, not exceeding a total of three hundred words for each, and also *the* arguments and explanations, not exceeding a total of three hundred words against each, and shall mail, or otherwise distribute, a copy of such law, or proposed law, or proposed amendment to the constitution, together with such arguments and explanations for and against the same to each of the electors of the state, as far as may be reasonably possible."

If it be contended that this provision makes it mandatory upon the secretary of state to print arguments and explanations, or both, for and against proposed laws and proposed amendments to the constitution in every case, manifestly there is no provision here for the preparation of such arguments and explanations except that by reason of such mandatory provision the duty of preparing the same devolves, by necessary implication, upon the secretary of state. Beyond all possibility of question, there is not here found foundation for authority in any other person or persons to prepare such argument or explanation as the secretary of state would, under the constitution, be required or authorized to print.

I think that it will not be seriously argued that it was intended by the constitutional provisions under consideration, to impose upon the secretary of state the duty of preparing an argument or explanation in any event. If that were true, a case may be readily imagined in which such officer would be required to prepare such an argument both for and against the same law or proposed amendment to the constitution. Such an absurdity would not be contended for. I think

it worthy of note, in this connection, that the secretary of state in every instance is required to print and distribute "the" arguments and explanations rather than "an" argument and explanation, clearly indicating that it was not the intent that such officer should be required to print and distribute an argument prepared by himself.

It may be observed that, notwithstanding the constitutional provision above quoted, to the effect that the provision of section 1g of article II of the constitution, shall be self executing, in the absence of any legally constituted or designated authority to prepare such argument, any number of such arguments might be presented to the secretary of state for printing and distribution, and in such event there would be authority or jurisdiction nowhere or basis from which to determine which of such arguments should be printed, although I think it must be conceded that in no event may the secretary of state print or distribute more than one such argument or explanation, or both, for and against any proposed measure.

While the conclusion, that the constitution makes no provision for the preparation of an argument against an amendment of the constitution proposed by initiative petition, cannot be escaped, it is equally clear that such argument is required in mandatory terms to be printed by the secretary of state only when prepared under and by lawful authority.

The constitution thus requiring the printing and distribution of such arguments against a constitutional amendment so proposed, and the designation of the authority or agency for the preparation of the same not having been provided therein, it follows, therefore, that it is competent for the general assembly to prescribe the necessary machinery for the carrying into effect and operation the constitutional provision in such case, and that the general assembly should do so is manifestly the intent and purpose of the constitution, from a consideration of the last sentence of section 1g of article II, supra.

The next question which concerns the present consideration is, has the legislature made provision for the legal designation of the agency to prepare such argument in the case under consideration or created or established the necessary machinery therefor?

The only legislative expression of which I am aware upon the subject of arguments and explanations in initiative and referendum matters which might be claimed to be pertinent to the present question, is found in section 5018-3, G. C., 103 O. L., 831, which provides as follows:

> "When any valid and sufficient petition or supplementary petition shall have been filed with the secretary of state demanding the submission of any measure to a vote of the people, and the general assembly is in session, the speaker of the house shall name two of its members, and the president of the senate shall name one of its members, which shall constitute a committee to prepare the explanation of the measure on behalf of the general assembly. If the general assembly is not in session then the governor shall name a committee of three electors, which committee shall serve without compensation and which shall prepare and file such explanation with the secretary of state not later than sixty days before the election at which the measure is to be voted upon."

From an examination of this section, it will conclusively appear that by its express terms it is limited in its application to *explanations* on behalf of the general assembly. That is to say, it provides for the appointment of such committee as is therein designated only in those cases in which the general assembly,

as such, may be interested in the measure proposed to be submitted by referendum or by supplementary initiative petition. This, I think, is sufficiently clear to obviate extended discussion.

Now it cannot be argued with force that the general assembly, as such, is concerned in making an explanation of a measure with which it has had nothing to do, and if the general assembly, as such, were interested in the present case at all, it might choose to make an explanation *for* rather than *against* the proposed amendment to the constitution.

In short, consideration of this statute leads to the conclusion that it is applicable only, as stated above, to those cases in which there is sought a referendum of a measure adopted by the general assembly or a failure to pass a measure which has been proposed to that body by initiative petition and cannot, therefore, serve to confer upon any officer, person or persons the power or authority to designate or create an agency for the performance of the function of preparing an argument or explanation against a constitutional amendment which is proposed by initiative petition and in regard to which the general assembly, as such, has no concern.

If doubt remained as to the correctness of this view, it must be completely dispelled by a consideration of the clear and unequivocal distinction made in the constitution as between "explanations" and "arguments," which the legislature in the enactment of section 5018-3, G. C., supra, was bound to and did recognize.

It will be observed that the first sentence of section 1g of article II of the constitution, above quoted, provides for the preparation of an argument or explanation, *or both.* In the next sentence is again found the phrase "argument or explanation, *or both*" used twice. In the next sentence this phrase is again repeated and in the next sentence will be found in three instances the expression "arguments and explanations." In view of this repeated and emphatic distinction between "argument" and "explanation" and the expicit provision that there may be both, it cannot be argued that an argument is an explanation or that an explation is an argument within the terms of the constitution.

The constitution having thus emphasized the distinction, the statute must be construed in the light of that distinction and, as above stated, the conclusion cannot be avoided that the legislature did observe the same.

With this distinction in mind, an examination of section 5018-3, supra, will readily disclose that it has application only to explanations and cannot, therefore, by any stretch of construction, be held to be applicable or in any way relevant to the question here under consideration, that being confined to arguments alone. So it may again be observed that no provision or authority for an *argument* either for or against any measure can be found outside of the constitution.

In view of the foregoing, I am forced to conclude that there is no jurisdiction conferred by the constitution, or otherwise, upon the governor, other officer, person or persons, to prepare an argument or explanation in the case under consideration or to select or appoint any person or committee to prepare the same.

It would therefore follow that the appointment or designation of the committee, to prepare such argument, by the governor in the case under consideration, is wholly without authority of law and of no effect, and could therefore confer upon such committee no authority to prepare such argument or explanation; and by reason of the failure of jurisdiction and authority in the governor and the lack of legal authority in such committee to prepare such argument, it necessarily follows that whatever may have been filed in the office of the secretary of state by such committee, cannot constitute such an argument or explanation as under the law the secretary of state is authorized or required to publish and distribute to the voters.

The above answer to the question in which you are more particularly concerned, I think, sufficiently disposes of the question specifically stated in your

communication for all present purposes. It may be observed, however, that the only limit expressly fixed by the constitution and statutes upon the time for filing arguments and explanations for and against any measure, is that found in section 5018-3, G. C., supra, which as above stated, is limited in its application to *explanations* only on behalf of the general assembly only, and that therefore the limitation therein prescribed cannot apply to the statement of facts submitted by you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

868.

MUNICIPAL CORPORATIONS—HOLDERS OF CERTIFICATES OF INDEBTEDNESS—IF HOLDER DEMANDS PAYMENT AT PROPER TIME AND PLACE AT MATURITY AND PAYMENT IS REFUSED, HE MAY LEGALLY BE PAID INTEREST AFTER SUCH TIME—FAILURE TO DEMAND PAYMENT—CANNOT LEGALLY COLLECT INTEREST AFTER MATURITY WHEN FUNDS ARE AVAILABLE—WHERE LEGAL DEMAND IS MADE AND THERE ARE NO FUNDS—ENTITLED TO INTEREST AFTER MATURITY—FAILURE TO MAKE PROPER DEMAND—OFFICER AND HOLDER LIABLE FOR SUCH INTEREST PAID.

The holder of a certificate of indebtedness issued under section 3913, *G. C., who presents the same at maturity is entitled to interest upon failure to pay the same.*

The holder of such a certificate of indebtedness who fails to present the same for payment at maturity, but had he presented the same there were no funds with which to pay it, would be entitled to interest after maturity.

The holder of such a certificate of indebtedness who fails to present the same at maturity, but who had he presented the same would have been paid the amount called for thereby, is not entitled to interest after maturity.

The officer who permitted the fund automatically appropriated by section 3913, *G. C., to be expended for purposes other than the payment of certificates of indebtedness is liable for interest which the city is legally required to pay.*

If an officer pays interest for which the city is not legally liable, the officer making the payment, together with the person receiving the same, is liable to the city.

COLUMBUS, OHIO, September 27, 1915.

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

GENTLEMEN:—I acknowledge receipt of your letter of August 18th submitting for my written opinion the following questions:

"May the holder of a certificate of indebtedness issued under authority of section 3913, General Code, be legally paid interest after the time fixed by law (within six months from date of certificate) for the redemption of such indebtedness?

"Would the illegal act of the municipal officials in not making payment of such obligations create a liability against the municipality for interest after maturity, or after six months' period has elapsed?

"If it is found that such interest (after maturity) has been paid, could finding for recovery against the holder, or against the village clerk, be enforced?"

Section 3913, of the General Code, to which you refer in your letter, provides as follows:

"Sec. 3913. In anticipation of the general revenue fund in any fiscal year, such corporations may borrow money and issue certificates of indebtedness therefor, signed as municipal bonds are signed, but no loans shall be made to exceed the amount estimated to be received from taxes and revenues at the next semi-annual settlement of tax collections for such fund, after deducting all advances. The sums so anticipated shall be deemed appropriated for the payment of such certificates at maturity. The certificates shall not run for a longer period than six months, nor bear a greater rate of interest than six per cent., and shall not be sold for less than par with accrued interest."

In the first place, it is to be noted that the certificates of indebtedness referred to are issued only in anticipation of the general revenue fund in any fiscal year, and that the amount which may be borrowed on such certificates of indebtedness shall not exceed the amount *estimated* to be received at the next semi-annual settlement, after deducting all advances that might have been made; and it is further provided that the amount received at the next semi-annual settlement, after deducting advances, to the extent of the certificates of indebtedness issued shall be deemed appropriated for the payment of such certificates, and that the certificates are not to run for a longer period than six months.

I assume for the purposes of this opinion that the certificates of indebtedness inquired about have not been issued in excess of the amount actually received at the semi-annual settlement next succeeding their issuance.

It must be noted that at each semi-annual settlement so much of the money which is received from taxes and revenues as is necessary to redeem certificates of indebtedness is, without action of council, deemed appropriated for the payment of such certificates at maturity, and, therefore, that there should have been on hand moneys with which to pay such certificates of indebtedness when the same fell due, and any failure to pay the same by the officer whose duty it was to pay the same would be an illegal act upon the part of the officer.

If a proper presentment of the certificate of indebtedness has been made, and the officer whose duty it is to pay the same has refused to pay it or has taken the money which is available for the purpose of so paying it and expended it for other purposes, although the officer has acted illegally, nevertheless I do not believe, since the debt is properly due and presentment has been made and payment refused, that the person holding the certificate of indebtedness should be deprived of the interest on such indebtedness after such presentment; but the officer who has caused the interest to run by failure to pay the certificate at maturity has involved the city in the payment of future interest, due to his unlawful act, but the city could not plead the illegal act of its officer to excuse it from paying the interest which accrued after said failure to pay.

Abbott on Municipal Corporations, volume 1, section 167, states the following: (page 365.)

"The ordinary rule applies to the payment of indebtedness of a public corporation in regard to the manner and time of its payments. The

current and running expenses of the government and its indebtedness as well are payable at the office of the public treasury, unless otherwise specified, and at the time indicated by the evidence of indebtedness. If no time is set for the payment, the debt is payable on demand. However, if the obligation is payable from a certain fund, the exhaustion of this fund necessarily postpones a payment. Interest can be collected on indebtedness payable at a certain time but not then paid by default of the debtor whether it consists of the principal of the debt or periodical installments of interest."

The author, however, cites no cases in substantiation of the above principle.

In Dillon on Municipal Corporations, section 860, it is said:

"Where a city has authority to create and contract with reference to a particular fund, and to make the debt payable therefrom only, or where by law the debt or obligation is chargeable against, and payable only out of the particular fund, a warrant drawn on such fund is chargeable against and payable only from that fund, and there can be no recovery from the city, unless there is some breach of duty on its part * * *. But a city which contracts with reference to a special fund, and issues a warrant payable therefrom, is under the duty of performing all the legal steps necessary to the raising of the fund."

Warner v. New Orleans, 167 U. S., 478;
New Orleans v. Warner, 175 U. S., 129.

"If moneys belonging to the particular fund have been received by the city, a diversion of these moneys from the fund is a breach of contract for which the city is liable to the holder of the warrants drawn on the fund."

State v. Pillsbury, 30 La. Ann., 705;
Vallian v. Newton County, 81 Mo., 591;
Ayers v. Thurston County, 63 Neb., 96;
Pine Tree Lumber Co. v. Fargo, 12 N. D., 360;
R. R. V. N. Bank v. Fargo, 14 N. D., 88;
Potter v. New Whatsom, 20 Wash., 589;
O. C. N. Bank v. Laconm, 27 Wash., 259.

Therefore, if the officer whose duty it was to pay the certificates of indebtedness at maturity has authorized the expenditure of the automatic appropriation of the money necessary for the payment of outstanding certificates of indebtedness for other purposes and, as a consequence thereof, did not have on hand at maturity the amount to pay such certificates of indebtedness, the mere failure to present the certificates at maturity would not bar the holder thereof from his right to interest thereon.

In opinion No. 532, rendered to your bureau under date of June 24, 1915, I stated relative to certificates of indebtedness as follows:

"That the funds for the payment of the certificates were in the treasury and available for their payment at the semi-annual settlement next succeeding their issue, comes of necessity and that the diversion thereof was a violation of the duty of the city and a breach of its contract all beyond the control and without the fault of the holders of the certificates

is conclusive, and by reasons thereof such certificates continue to be a valid and binding obligation of the city and to my mind an indebtedness within the terms of section 3916, G. C., supra.

"The fact that the agents or officers of the city by whom these funds were misappropriated, are liable to the city on their official bonds therefor, and that such officers ought to be made to respond to such liability will not in any respect discharge the obligation of the city to pay. Nor would any liability of such officer upon his official bond to the holder of any such certificate discharge the obligation of the city thereon."

Your first question, as to whether the holder of a certificate of indebtedness issued under authority of section 3913, G. C., can legally be paid interest after the time fixed by law for the redemption of such certificate, is to be answered in the following manner:

(1) If the holder of the certificate demanded payment at the proper time and place at maturity, and payment was refused, he may legally be paid interest after such time.

(2) If the holder fails to demand payment at maturity, and there are funds available for the payment thereof, the presumption being that the officer is able and willing to pay it, interest cannot legally be paid after maturity.

(3) If the holder of the certificate fails to demand payment at maturity, but had he so demanded it and there were no funds with which to pay the same by reason of the illegal act of the officer in disbursing the same in contravention of law, he would be entitled to interest after maturity.

Your second question as to whether the illegal act of the municipal officer in not making payment of certificates of indebtedness at maturity creates a liability against the municipality for interest after maturity, or after the six months' period has elapsed, has been answered by what has just previously been said.

Your third question is:

"If it is found that such interest (after maturity) has been paid, could finding for recovery against the holder, or against the village clerk, be enforced?"

Always assuming that the certificates of indebtedness do not exceed the actual amount received at a semi-annual settlement, I am of the opinion that if there were funds available for the payment of the certificate at maturity, and the holder thereof has failed to present the same for payment at the proper time and place, but is subsequently paid interest from maturity to the time at which the certificate is actually paid, he has been unjustly enriched by the amount so received, and both he and the officer paying him the interest could be required to restore the amount to the municipality.

If the holder of the certificate has properly presented the certificate for payment at maturity and the same has been refused, and subsequently he is paid interest after maturity, the holder would be entitled to such interest, but the officer who refused to pay him at maturity, since he was guilty of an illegal act, would be liable for the amount so paid, as he would also be liable provided he did not have on hand at maturity the amount necessary to pay the certificate of indebtedness.

Respectfully,

EDWARD C. TURNER,

Attorney General.

869.

"STATE BOARD OF PUBLIC BUILDINGS"—AMOUNT OF MONEY AVAILABLE FOR IMMEDIATE USE OF SUCH COMMISSION.

COLUMBUS, OHIO, September 28, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—Your letter of September 9th, is acknowledged and is in full as follows:

> "Under the provisions of A. S. B. 304, to provide for the appointment of a commission to investigate the office requirements of the officers, departments and commissions of the state and to proceed with the necessary work to adequately house such officers, departments and commissions, a question has arisen as to how much money is available for the immediate use of the commission.
>
> "In section 7 of said act, said section provides that a sum of money equal to the amount of money paid out of the treasury as rentals for a period of two years next prior to the date on which this act becomes effective and also a sum equal to such amount of money as may be received in the state treasury as interest on state funds for two years from and after the date on which this act becomes effective, is appropriated.
>
> "Will you please advise immediately by opinion from your department as to when both of these sums will be available?"

Section 7 to which you refer provides as follows (106 O. L. 466):

> "For the purpose of providing a fund for carrying this act into effect, there is hereby appropriated from the money in the state treasury, not otherwise appropriated; a sum equal to the amount of money paid out of the state treasury as rentals for state offices, departments and commissions for a period of two years next prior to the date on which this act becomes effective, and in addition a sum not otherwise appropriated equal to such amount of money as may be received into the state treasury as interest accruing on state funds for and during the period of two years from and after the date on which this act becomes effective. Only so much of the fund hereby appropriated shall be used as may be necessary to carry out the provisions of this act and any unexpended balance thereof shall revert into the state treasury to the credit of the general revenue fund."

This act was filed in the office of the secretary of state on June 4, 1915. The appropriations, not being for the current expenses of the state government or its institutions, would not take effect until the expiration of ninety days from and after said date. Accordingly, said section 7 went into effect on September 3, 1915. On that day both of the appropriations were "made" within the contemplation of article II, section 22 of the constitution.

I assume that in inquiring when the sums referred to in section 7 "will be available" you mean to inquire when the authority to contract against them and thus to incur contingent liabilities payable from them arose, and to what extent such power then existed.

Inasmuch as the act as a whole became effective at the same time—September 3, 1915—the authority of the "state board of public buildings," as the commission

is designated elsewhere in the act, to incur contingent liabilities payable from these appropriations arose on that day. On that day, too, it was the duty of the Auditor of State to ascertain, as to the first of the two appropriations, the amount of rentals paid out of the state treasury during the period of two years next prior to the said date—September 3, 1915—and to set the amount of the same up as an appropriation account from the general revenue fund.

It is true that the section is defective in a way, in not specifying the fund in the state treasury from which the appropriation shall be made. However, rather than that the whole section should fail, I am of the opinion that it should be held that the appropriation must be regarded as having been made from the general revenue fund; because all the other funds in the state treasury are devoted by permanent laws to specific purposes not consistent with the purposes of this appropriation, and practically all, if not all, of the money in such other funds, or which will come into them during the biennial period for which general appropriations have been made, is "otherwise appropriated" by acts previously taking effect within the meaning of the section itself.

For these reasons, I find no difficulty in arriving at the conclusion, as to the first of the two appropriations made in the section, that on September 3, 1915, it was the duty of the Auditor of State to ascertain the amount thereof in the way pointed out in the statute and to set up an account therefor on the books of his office as an appropriation from the general revenue fund.

The only serious difficulty presented by the somewhat peculiar language of the section arises with reference to the second of the two appropriations thus made; yet when this part of the section is carefully considered such difficulty appears to be after all apparent only. It is true that in form the section appropriates not the precise sums received into the state treasury from time to time as interest accruing on state funds during the period of two years therein mentioned, but "a sum equal to" the amount of money received during the entire period. It is true, too, that the "sum equal to such amount of money as may be received * * * for and during the period of two years" cannot be ascertained until the end of the period. But for that matter, neither could the amount of the particular receipts designated themselves be ascertained until the end of the period. In substance, I do not see that it makes any difference as to the *validity* of the appropriation whether the legislature sees fit to use one form of words or the other; that is, whether verbally it appropriates "a sum equal to" certain receipts for a certain period, or the receipts themselves. The effect may not be precisely the same in both cases; however that may be, the effect of the appropriation now in question may be described as follows:

The appropriation is to be regarded as "made," "effective" and "available" at the beginning of the period during which the designated receipts are to come into the treasury. The contracting power of the recipient of the appropriation is measured by the estimated amount of the appropriated income for the specified time. It is true that, strictly speaking, this is but a rough and dangerous method of appropriating in view of the statutes and fundamental principles condemnatory of the incurring of deficiencies. However, the question of power is not to be resolved negatively merely because its exercise may be attended by the risk of exceeding it. It is possible for the board, by exercising due caution, to be assured that the aggregate sums payable by the state under contracts entered into by it will not exceed the amount of the interest which the state will certainly receive during the two years.

In short, section 7 differs from an ordinary appropriation of "receipts and balances," formerly so usual in this state, in that it appropriates now a sum of money the amount of which will ultimately become certain, but which at the

present time can only be estimated; while an appropriation of receipts does not appropriate anything until the receipts themselves come into the treasury. Section 7, then, is fully effective at the present time to an extent which may be estimated but not exactly ascertained at present; whereas an appropriation of receipts seizes upon the income from a designated source of revenue as it comes into the treasury, and nothing is appropriated until it is received. It seems to have been the deliberate purpose of the general assembly to make this distinction, and I know of no constitutional or other principle which will prevent this purpose from being carried into effect. The constitution requires that an appropriation shall be "specific." The appropriation now under consideration is specific, because that may be regarded as certain which may be made certain. The situation presents an administrative difficulty, in that the Auditor of State will not be able to set up the exact amount of this appropriation account at the present time. However, it is his duty, in my opinion, to set up an amount corresponding to the estimated receipts from state treasury interest for the two year period, which amount may be collected by him at the end of the period; or he may, if he sees fit, in addition to setting up the principal sum of the appropriation account in the manner herein described, keep a running account of income from this source, crediting the same to the appropriation. In any event, the appropriation is, in my opinion, valid and constitutes authority to incur obligations not in excess of the estimated amount thereof.

One detail ought to be mentioned in this connection: No law making an appropriation can have force beyond two years from the date of its effectiveness; yet the latter part of section 7 appropriates a sum equal to the amount to be received into the state treasury for a period of two years *"from and after* the date on which this act becomes effective." Technically, this embodies a seeming attempt to appropriate for more than two years, viz.: two years and one day; for the amount appropriated cannot be fully ascertained until two years and one day after the act becomes effective. However, the unconstitutionality of a law is strongly presumed against, and the words "from and after" are susceptible to an interpretation which will include within the two year period the date on which the law becomes effective, although this is not the usual and ordinary technical meaning of the phrase.

I advise, however, as to the second part of the appropriation that it was the duty of the Auditor of State on Sept. 3, 1915, to set up on the books of his office an appropriation from the general revenue fund equal to the estimated amount of interest to be received upon state funds for the period of two years from and after that date. However, it is to be observed that the *actual* amount of interest that is so received is the measure, hence care should be exercised to the end that the actual appropriation be not exceeded.

Respectfully,
EDWARD C. TURNER,
Attorney General.

870.

OFFICES COMPATIBLE—JURY COMMISSIONER, ASSIGNMENT COMMISSIONER IN COMMON PLEAS COURT AND CONSTABLE OF SUPERIOR COURT.

The offices of jury commissioner, assignment commissioner in the court of common pleas and court constable of the superior court are not incompatible nor the duties thereof conflicting and the same person may be appointed to and hold said offices and discharge the duties thereof.

COLUMBUS, OHIO, September 28, 1915.

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

GENTLEMEN:—I have your favor of September 21, 1915, as follows:

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

"On August 6, 1913, Geo. Rauner and Geo. Dwyer were appointed jury commissioners of Hamilton county, Ohio, by the common pleas judges in joint session. The appointment was for sixty days at $5.00 per day, each. The court then designated said jury commissioners to be assignment commissioners at a salary of $2,200.00 per year, each, making a total allowance of $2,500.00, each, per year by the common pleas court.

"In addition to this, the judges of the superior court have appointed the same named gentlemen as court bailiffs in the superior court, and have placed such bailiffs in charge of the assignments for such court under the provisions of sections 1692 and 1693 of the General Code, at a salary of $600.00 per year, each, making a total allowance of $3,100.00 per year, each, for these above named persons.

"QUESTION. Were these appointments, taken altogether, legally made?"

It has been stated repeatedly by this department that offices are considered incompatible when one is subordinate to or in some way a check upon the other or when it is physically impossible for one person to discharge the duties of both or three as the case here presented.

Applying this test to the various official positions held by the parties named in your inquiry, there seems to be nothing in the facts stated to disqualify them. The law in force at the date of their appointment to the first two positions named specifically provided for their combination. See section 3007, G. C., as amended 103 O. L., 512. This provision seems to be perfectly satisfactory to the law making power as it is carried into said section as again amended 106 O. L., 534.

If in addition to the responsible duties thus imposed upon them by the provisions of the section above named, they are able to attend to the duties of court constables of the superior court, as provided in sections 1692 and 1693, G. C., as amended 103 O. L., 417, there seems to be no question of their legal right so to do.

It must be assumed in the absence of evidence to the contrary that their various duties are being performed in a manner satisfactory to the authority which appointed them to which they are primarily responsible for faithful and efficient service.

In the absence, therefore, of any evidence impeaching the efficiency of their service in the various positions named, there can be no legal objection to their appointments thereto and their continued service therein.

Respectfully,
EDWARD C. TURNER,
Attorney General.

871.

COUNTY SURVEYOR—ASSISTANT EMPLOYED UNDER AUTHORITY OF FLOOD EMERGENCY ACT—CLAIM FOR PAYMENT SHOULD BE ALLOWED BY COUNTY COMMISSIONERS AND CHARGED TO FLOOD EMERGENCY FUND.

The claim of an assistant engineer to the county surveyor employed under authority of section 10 *of the flood emergency act, as found in* 103 *O. L.,* 147, *for services rendered by him in compliance with the terms of his employment, when approved by said county surveyor and allowed by the county commissioners, should be paid from the county treasury on the warrant of the county auditor and charged to the flood emergency fund.*

COLUMBUS, OHIO, September 28, 1915.

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

GENTLEMEN:—In your letter of September 17th, you request my opinion as follows:

"We are enclosing herewith letter from the County Auditor of Marysville, Ohio, giving a copy of an entry on the Commissioners' Journal authorizing the county surveyor to employ a qualified engineer as assistant in preparing plans and specifications for bridges. This action we are informed was made necessary by the floods of 1913, and the employment was intended to be made under section 10 of the Flood Emergency Act, 103 O. L. 147. When the bill for this service was presented, same was submitted by the county auditor to the prosecuting attorney of Union county, and he held that because the county surveyor did not, at that time, make a certificate of the appointment, that same could not be paid. The prosecuting attorney seems to have held that this payment came under the provisions of section 2787 and section 2788, General Code.

"We are enclosing you the bill in question together with the opinion of the prosecuting attorney. . Attached to this is the appointment signed by the county surveyor, dated April 2, 1913, apparently to comply with the prosecutor's opinion, but the county auditor states that this writing was not filed in his office until August 23, 1915.

"We would like to have your opinion as to whether or not the county auditor of Union county should, at this time, issue a warrant upon the treasurer of said county for the payment of the bill."

Section 10 of the Flood Emergency Act, as found in 103 O. L., 147, provides:

> "For the purpose of providing for the additional work imposed upon the engineering departments of counties and municipalities by reason of the flood mentioned in section 1 of this act, the county commissioners of any county and the council of any municipal corporation are hereby empowered to authorize the employment of additional assistant or assistants to the county surveyor or city or village engineer, and to appropriate any money borowed under the provisions of this act, or otherwise available, for the salary or compensation of such assistant or assistants."

The commissioners of Union county having authorized the county surveyor of said county to employ an assistant engineer, under the above provision of the statute, it appears that said county surveyor, acting in pursuance of such authority, employed O. C. Hearing as such assistant engineer, and that the said O. C. Hearing performed the services required of him by said county surveyor under the terms of said employment.

The enclosed voucher for the sum of $300.00 as payment to the said O. C. Hearing for the services rendered as aforesaid, as approved by the county surveyor and allowed by the county commissioners, orders the county auditor to draw a warrant on the county treasurer for said amount and charge the same to the "emergency fund."

Said voucher was issued under date of April 28, 1914, and it appears that the county auditor refused to issue his warrant for said amount on the advice of the prosecuting attorney of said county whose opinion is enclosed.

Said opinion calls attention to the authority of the county surveyor to appoint assistants, deputies, draftsmen, inspectors, clerks and employes, as found in section 2788, G. C., taken in connection with the provisions of section 2787, G. C., and holds that the appointment of an assistant under the above provision of section 10 of said flood emergency act "must follow the general law and that the appointment must be made by the county surveyor who must fix the compensation and file the appointment with the auditor."

I note, however, that section 2788, G. C., does not expressly provide that the certificate of appointment made by the county surveyor must be filed with the county auditor. Section 10 of said emergency act does not by its terms require the county surveyor to file with the county auditor a certificate of appointment of an assistant engineer employed under authority of said statute and while the certificate of appointment of said county surveyor to the county commissioners under date of April 2, 1913, does not fix the compensation of said assistant engineer and it does not appear from your statement of facts that the county commissioners made an appropriation for the particular purpose of paying said assistant for services rendered by him, the enclosed voucher shows that a flood emergency fund had been established, and that the county auditor was directed to issue his warrant for said services and charge the same to said emergency fund.

Inasmuch as the said O. C. Hearing rendered the services required of him by the terms of his employment and the voucher for the payment for said services was approved by the county surveyor and allowed and ordered paid by the county commissioners, I am of the opinion that the statute authorizing such employment and the payment for said services was substantially complied with and that the county auditor should have issued his warrant to the said O. C. Hearing for said sum of $300.00 at the time when said voucher was presented for payment.

I note that the certificate of the county surveyor shows that the same was

approved by the prosecuting attorney of your county and was filed with the county auditor of August 23, 1915. I do not think, however, that the filing of said certificate was jurisdictional to the payment of said claim.

I am of the opinion, therefore, in answer to your question, that the county auditor should at this time issue his warrant on the treasurer of said county for the payment of said claim.

Respectfully,
EDWARD C. TURNER,
Attorney General.

872.

BOARD OF ADMINISTRATION — APPROPRIATION BY LEGISLATURE TO PURCHASE TWO PIECES OF PROPERTY ADJACENT TO OHIO STATE REFORMATORY—CANNOT PURCHASE ONE TRACT WITHOUT HAVING FUNDS IN APPROPRIATION SUFFICIENT TO PURCHASE OTHER.

Board of administration must purchase both pieces of property mentioned in appropriation of $5,250.00, 106 *O. L.,* 669, *within such appropriation, and cannot purchase one of such pieces without having funds in the appropriation sufficient to purchase the other.*

COLUMBUS, OHIO, September 29, 1915.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Under date of September 25th, you wrote to this department as follows:

> "The legislature authorized the expenditure of $5,250 for the purchase of two tracts of land adjacent to the Ohio state reformatory, consisting of nine acres owned by Anna Nail Ettinger and six acres owned by Emma Nail Ettinger.
>
> "The nine acre tract now owned by Miss Emma Nail who came into possession according to the terms of the will of Anna Nail Ettinger. Miss Emma Nail is one of the heirs of the Nail property. Miss Nail through her brother offered to sell the nine acre tract for $4,500.
>
> "We wish to say that it is highly desirable that the state acquire these two tracts of land, and it is especially to the advantage of the institution to get possession of the nine acre tract as it offers the only site upon which to establish a reservoir that would afford fire protection to this large institution. Moreover, there is on this tract of land a ledge of excellent sandstone rock which would afford all the material required in the improvements now under way and contemplated in the future; also good road making material for the use of the institution on highways.
>
> "It is evident that the appropriation made is not sufficient to buy both tracts. The item in the appropriation bill appropriating money for the purchase of these tracts reads as follows:
>
> "'To purchase the Anna Nail Ettinger nine acres and dwelling near the Ohio state reformatory and the Emma Nail Ettinger six acres and dwelling, $5,250.'
>
> "Before taking further steps looking to the purchase of these parcels of land we wish to be advised as to whether under the terms of the ap-

propriation bill the Ettinger tract of nine acres could be purchased separately, either through private sale or condemnation proceedings, provided the price determined upon should not leave sufficient appropriation to buy the second or six acre tract."

The appropriation to which you refer in your letter was made in house bill No. 701 (106 O. L., 669), as follows:

"G Additions and Betterments:
"G 1. Lands—
"To purchase the Anna Nail Ettinger 9 acres and dwelling near Ohio state reformatory and the Emma Nail Ettinger 6 acres and dwelling, $5,250.00."

The $5,250 for such purpose is carried in the appropriation column of the bill, and, therefore, there is no authority under section 4 of said bill to request a transfer by the board provided for in said section 4 of other moneys to such appropriation.

The appropriation is a lump sum for two purposes, and not for either one of the purposes singly, and therefore if the board cannot accomplish both purposes within the appropriation it cannot undertake to accomplish simply one purpose and leave the other unaccomplished.

There is, therefore, no authority in your board, unless arrangements can be made to purchase both pieces of property mentioned within the appropriation, to purchase solely one of the two pieces.

Furthermore, there would be no authority in the emergency board to supply the deficiency which might exist in the purchase of the two pieces of property.

Section 2313 of the General Code (106 O. L., 183), provides that in case of any deficiency in any of the appropriations for the *expenses* of a department, for any biennial period, or in case of an emergency requiring the expenditure of money not specifically provided by law, the officers of such department may make application for authority to create obligations within the scope of the purpose for which the appropriations were made or to expend money not specifically provided for by law.

The acquiring of this piece of property cannot be considered as a "case of an emergency" within the meaning of the act, the legislature having already provided for the purchase of the two pieces of property in question; nor can it be considered as a part of the expense of the department.

I am, therefore, of the opinion that your board would not be authorized, under the terms of the appropriation made, to purchase the Ettinger tract of nine acres separately, either through private sale or condemnation proceedings, provided the price determined upon should not leave sufficient of the appropriation to purchase the second or six acre tract.

Respectfully,
EDWARD C. TURNER,
Attorney General.

873.

STATE HIGHWAY COMMISSIONER—RECONSIDERATION OF OPINION NO. 753, AUGUST 23, 1915—FORMER OPINION RE-AFFIRMED,

On a reconsideration of the question from the state highway commissioner upon which opinion No. 753 of this department was rendered, the conclusion reached is the same as that found in said opinion.

COLUMBUS, OHIO, September 29, 1915.

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

DEAR SIR:—In your letter of August 31st you refer to opinion No. 753 of this department rendered to you under date of August 21st, and ask for a reconsideration of the question therein considered and relating to bridges and culverts on the Hicksville-Defiance road, I. C. H. No. 420, petition No. 574, Hicksville and Mark townships, in Defiance county.

Briefly stated the facts on which said opinion was based, as disclosed by your letter of July 31st, and by the files in your office, were as follows:

At the time plans, profiles specifications and estimates were made for the improvement of a part of said inter-county highway, the highway department contemplating the building of 6.81 miles of said road, the plans, specifications and estimates of cost for bridges and culverts were accordingly made to cover said distance. Subsequent to said time it was found that there would not be sufficient funds to build 6.81 miles of said road, and it was therefore determined by the state highway commissioner to reduce this distance to 6.30 miles in case water-bound macadam should be adopted, and 5.06 miles in case concrete should be adopted.

On June 2, 1914, the state highway commissioner received alternative bids on the two kinds of construction and, as stated in your former letter, these bids for water-bound macadam were intended to cover 33,300 lineal feet or 6.30 miles, while concrete bids were for 26,723 lineal feet or 5.06 miles. This is in keeping with the notice to contractors as said notice appears in the specifications.

The firm of Clemmer & Johnson, being the low bidder on concrete, was awarded the contract for the construction of section 1 of said road and the notice to said firm, as enclosed with the specifications, by its terms clearly limits the work of grading and paving said roadway with concrete and the constructing of the bridges and culverts which are a part of said roadway to 5.06 miles

The Hicksville-Defiance road is being improved in separate sections and the profile shows that section No. 1 ends at station 267 plus 23, a distance of 5.06 miles if concrete should be adopted. This is in keeping with the provisions of the notice above referred to.

The only material difference between the notice as published and the copy of the reprint of said notice as enclosed with the specifications to said firm of Clemmer & Johnson is that in said copy of said notice as same appears with said specifications, as shown by your files, the state highway commissioner with pen and ink changed the figures 33,300 to 26,723, and the figures 6.30 to 5.06.

The question on which you asked for an opinion was stated as follows:

> "Under the form of advertisement, plans, specifications and estimates, can the contractors be required to construct bridges and culverts for more than 5.06 miles, the length of the concrete road?

"If so, can they be required to build these structures for a distance of 6.81 miles, as contemplated and represented by the quantities under 'Bridges and Culverts'?"

While said opinion does not expressly refer to the plans and specifications for the bridges and culverts as separate from the improvement of the roadway proper, reference is made several times to the plans, profiles and specifications for said work, which was clearly intended to include bridges and culverts. On page 6 and again on page 8 of said opinion, you will note that the duty of bidders to examine the plans, profiles and specifications was recognized and considered necessary. While only a part of the letter of Clemmer & Johnson, referred to by you, was quoted in said opinion and no reference is expressly made therein to the plans and specifications for bridges and culverts, I do not understand that said firm of Clemmer & Johnson contends that they were not required to examine all plans, profiles, specifications and estimates for said improvement to which reference was made in the aforesaid notice, as the same were found on file in the office of the county commissioners and the state highway department, including plans, specifications and estimates for bridges and culverts. On the contrary, Mr. Clemmer stated in the presence of Mr. Sharp of your department, and Mr. Sherman of this department, that the plans, specifications and estimates for said improvement including those for bridges and culverts were examined, and he admits that the plans, specifications and estimates for the bridges and culverts covered a distance of 6.81, but he stated that inasmuch as the Hicksville-Defiance road was being built in separate sections and the state highway commissioner had determined to limit section 1 to 6.30 miles of water-bound macadam or 5.06 miles of concrete, he assumed from the aforesaid notice and from the notation on the profile that only those bridges and culverts were to be constructed that were included within said section 1.

Upon the facts as above set forth I reached the conclusion that said firm could not be required to construct bridges and culverts for more than 5.06 miles, the length of the concrete improvement designated as section 1 of the Hicksville-Defiance road.

Coming now to a consideration of the argument presented by you in your letter of August 31st, I fully agree with you that the primary purpose of the notice to contractors is to call attention to the fact that a certain contract will be let on a given date to direct the attention of bidders to the plans, profiles, specifications and estimates on file in the office of the county commissioners and of the state highway commissioner. This was clearly conceded in the aforesaid opinion. However, the fact must not be overlooked that the copy of said notice as enclosed with the specifications and sent to the bidders by the state highway commissioner expressed in definite terms the length of the roadway to be improved, the width of the pavement and the total estimated cost of grading and paving the roadway and constructing the bridges and culverts on said roadway as described in said notice. I am still of the opinion, therefore, that said notice is important in determining the intention and purpose of the state highway commissioner in inviting said proposals as well as in determining the liability of the bidder to whom the contract was awarded. It was not contended, however, that said notice was the determining factor in reaching the conclusion expressed in said opinion. It was contended that the firm of Clemmer & Johnson had a right to rely on the information furnished by the state highway commissioner, including said notice, in so far as the same was in keeping with the plans, profiles, specifications and estimates for said improvement on file in said offices.

In view of Mr. Clemmer's statement it is evident that said firm did not disregard the bridge plans and quantities given in the estimated cost.

Conceding therefore that the plans, specifications and estimates of cost for bridges and culverts on file covered said distance of 6.01 miles, it must be remembered that the profile of the roadway proper originally made covered this same distance but the same was modified to conform to the intention of the state highway commissioner as expressed in the notice and as shown by the notation on said profile.

In determining the liability of said firm of Clemmer & Johnson to construct bridges and culverts on 1.75 miles beyond the terminus of section No. 1 of said road, we have on the one hand the plans for bridges and culverts corresponding to the estimate of cost and covering a distance of 6.81 miles. On the other hand we have the notice to the bidders expressly limiting the grading and paving of the roadway proper and the construction of bridges and culverts to 5.06 miles if concrete should be used, the estimated cost of said improvement as expressed in said notice and the modification of the profile of said roadway in conformity with said notice.

It seems clear to my mind that by the terms of said notice sealed proposals were invited for the work of grading and paving the roadway and of constructing the bridges and culverts of so much of the Hicksville-Defiance road as was included in that part of said road described in said notice and designated by the state highway commissioner as section No. 1, that the firm of Clemmer & Johnson had the right to assume that it was the intention of the state highway commissioner that the plans, profiles, specifications and estimates as originally made to cover 6.81 miles should be modified and that said distance should be reduced to 5.06 miles in case concrete should be used, and that the notice was issued in conformity with said intention.

I am still of the opinion, therefore, in view of all the facts and circumstances of this case, that said firm of Clemmer & Johnson cannot be required to construct the bridges and culverts on the 1.75 miles extending beyond the terminus of section No. 1, of said road.

Respectfully,
EDWARD C. TURNER,
Attorney General.

874.

BOARD OF EDUCATION—STATUTES GOVERNING STATE AID COMPLIED WITH—IF BOARD EMPLOYS CERTAIN TEACHERS WITH LESS THAN ONE YEAR'S PROFESSIONAL TRAINING IT WILL NOT BAR SUCH BOARD FROM STATE AID.

If the board of education of a school district complies with all the requirements of the statutes governing state aid, said district will not be debarred from receiving such aid by the provisions of section 7595-1, *G. C., as amended in* 106 *O. L.,* 430, *because of the fact that said board of education has employed certain teachers with less than one year's professional training at a salary of* $45.00 *per month. See opinion No. 799, Sept.* 7, 1915.

COLUMBUS, OHIO, September 30, 1915.

HON. JOSEPH T. MICKLETHWAIT, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—I have your letter of September 24th, which is as follows:

"As the following proposition will very likely come to you for an opinion in case the school district should make application in the future for state aid, so I shall be pleased to have your opinion on the same at any early date:

"Section 7595 of the General Code, as amended and supplemented in 104 O. L., 165, provides, among other things, that no teacher shall be employed to teach in a public school for less than forty dollars per month, and, complying with certain requirements in said section, if there is a deficit in the school funds to pay that amount then the district shall be entitled to receive state aid.

"Supplemented section 7595-1, G. C., reads in part as follows:

"'Only such school districts shall be eligible to receive state aid which pay salaries as follows:

"'(1) * * * * * *.

"'(2) Elementary teachers having at least six weeks professional training, forty-five dollars per month.

"'(3) * * * * * *.

"'(4) * * * * * *.'

"Each of the foregoing sections was amended by H. B. No. 230, (106 O. L., 430) which went into effect about August 30th this year.

"The only part of the amended sections which involve my questions is that in section 7595-1, providing that elementary teachers having at least one year's professional training can be paid forty-five dollars a month and the district in which they teach will still be entitled to state aid.

"(1) Will not those teachers who have had more than the six weeks but less than a year's professional training at the time of their employment, at a salary of forty-five dollars per month, and who were employed before H. B. 230, (106 O. L., 430), say last May or June, became effective, be entitled to the forty-five dollars per month and still the school district in which they are teaching be eligible to state aid if it should have a deficit?

"(2) With respect to these contracts would not H. B. 230 impair their obligation?"

Your questions have have been answered in opinion No. 799 of this department, rendered to Hon. G. O. McGonagle, prosecuting attorney of Morgan county, under date of September 7, 1915.

This opinion holds that if the board of education of a school district complies with all the requirements of the statutes governing state aid, said district will not be debarred from receiving such aid by the provisions of section 7595-1, G. C., as amended in 106 O. L., 430, because of the fact that said board of education has employed certain teachers with less than one year's professional training at a salary of $45.00 per month. A copy of said opinion is enclosed.

Respectfully,

EDWARD C. TURNER,

Attorney General.

875.

BOARD OF EDUCATION—UNABLE TO PROVIDE FUNDS FOR TRANSPORTATION OF PUPILS UNDER SECTION 7731, G. C., AS AMENDED—BOARD MAY BORROW MONEY FOR THIS PURPOSE UNDER SECTION 5656, G. C.—WHEN LOCAL BOARD NEGLECTS OR REFUSES TO PROVIDE TRANSPORTATION, THE COUNTY BOARD SHALL PROVIDE SUCH TRANSPORTATION CHARGING COST TO LOCAL DISTRICT.

Where the board of education of a local school district is unable, because of its limits of taxation, to provide the necessary funds to pay for the transportation of pupils, as required by the provisions of section 7731, G. C., as amended in 104 *O. L.,* 140, *said board may borrow money under authority of section* 5656, *G. C., to pay a charge against said district made by the county board of education in case said county board furnishes such transportation to said pupils as required by the provisions of said section* 7731, *G. C., when the local board fails or neglects to furnish such transportation, or to pay for services actually rendered under a contract of employment made by the board of education of said local district for said services. See opinion No.* 612, *July* 15, 1915.

COLUMBUS, OHIO, September 30, 1915.

HON. JOSEPH W. HORNER, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—I have your letter of September 18th, which is in part as follows:

> "Several schools in Mary Ann township, Licking county, Ohio, have pupils living farther than the two mile limit and there has been a request made of the school board to provide a conveyance for these pupils living beyond the two mile limit.
>
> "The board is entirely without means and is unable to know what to do in this situation. I would like for you to give me your opinion as to how they shall meet this situation. Whether or not they will be allowed to borrow money or in what manner they shall provide transportation for these pupils?"

Section 7731, G. C., as amended in 104 O. L., 140, provides:

> "In all rural and village school districts where pupils live more than two miles from the nearest school the board of education shall provide transportation for such pupils to and from such school. The transportation for pupils living less than two miles from the school house, by the most direct public highway shall be optional with the board of education. When transportation of pupils is provided, the conveyance must pass within one-half mile of the respective residences of all pupils, except when such residences are situated more than one-half mile from the public road. When local boards of education neglect or refuse to provide transportation for pupils, the county board of education shall provide such transportation and the cost thereof shall be charged against the local school district."

As to those pupils in the rural or village school district living more than two miles from the nearest school in said rural or village district, the above provisions of the statute make it the duty of the board of education of such school district

to provide transportation for such pupils, and if said board of education neglects or refuses to provide such transportation it becomes the duty of the board of education of the county school district to provide transportation for said pupils and charge the cost thereof to said local school district.

You state that in a certain township rural school district in your county the board of education of said district is entirely without means to provide such transportation and you ask to be advised as to how said board may secure the necessary funds for such purpose.

Your question has been answered in opinion No. 612 of this department, rendered to Hon. J. W. Watts, prosecuting attorney of Highland county, under date of July 15, 1915.

This opinion holds that where the board of education of a local school district is unable, because of its limits of taxation, to provide the necessary funds to pay for the transportation of pupils as required by the provisions of section 7731, G. C., as amended, said board may borrow money under authority of section 5656 to pay a charge against said district made by the county board of education in case said county board furnishes such transportation to said pupils as required by the provisions of said section 7731, G. C., when the local board fails or neglects to furnish such transportation, or to pay for services actually rendered under a contract of employment made by the board of education of said local district for said purpose. A copy of said opinion is enclosed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

876.

STATE HIGHWAY COMMISSIONER—WHERE AND HOW AN EXTENSION OF TIME SHOULD BE GRANTED TO COMPLETE CONTRACT —ONLY ON APPLICATION OF CONTRACTOR.

An extension of time for the completion of a contract let by the state highway commissioner should be granted only on the application of the contractor. As a matter of practice, this application should be made before the time for the completion of the contract has expired, although the application may be made after such time, provided no action has been taken by the state highway commissioner under section 1203-1, *G. C.,* 103 *O. L.,* 456, *or section* 1209, *G. C.,* 106 *O. L.,* 635, *as the case may be. After the time for the completion of a contract has expired and before an extension of time is granted, no partial estimates should be allowed and paid to the contractor. In no case should an extension of time be allowed without securing from the bondsmen of the contractor a written agreement consenting to the extension.*

COLUMBUS, OHIO, September 30, 1915.

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

DEAR SIR:—Under date of August 30, 1915, I have a communication from Mr. H. M. Sharp, deputy of construction in the state highway department, which communication reads as follows:

"We have been undecided as to the legal way to proceed in the extension of time for the completion of work covered by our contracts.

"We would like very much to submit for your opinion, a few questions which we think would supply us with the information we desire.

"First: When the time set for completion of a contract expires, should the highway department wait for request from the contractor for an extension of time?

"Second: After the expiration of time, as set forth in the contract, and before an extension is granted, should the highway department allow any partial estimates for work done?

"If an estimate is allowed under such conditions, would it be a recognition of the contract in force, but not legally covered by a proper bond?

"Third: Should the highway department secure a written agreement from the bondsmen or surety company concurring in the extension of time asked for by the contractor before such extension is granted?

"Fourth: Are the bondsmen or surety company holding for the life of the contract?

"Our work has been held up so much this year by bad weather that probably more than three-fourths of the contractors will have to have an extension of time on their contracts. Therefore, we are anxious to know that we are taking care of these extensions in the proper manner."

The pertinent provisions of the General Code of Ohio in force prior to September 6, 1915, are found in sections 1203 and 1203-1, as found in 103 O. L., 456. The following provision is found in section 1203:

"Before entering into a contract he (the state highway commissioner) shall require a bond with sufficient sureties conditioned that if the proposal is accepted, the contractor will perform the work upon the terms proposed, within the time prescribed and in accordance with the plans and specifications, and will indemnify the state and county against any damages that may be claimed by reason of the negligence of the contractor in the construction of the improvement."

Section 1203-1 reads as follows:

"If the contractor has not commenced or carried forward with reasonable progress or is improperly performing or has abandoned, or fails or refuses to complete a contract under the provisions of this chapter, the state highway commissioner shall have full power and authority to enter upon and construct, either by contract, force account or in such manner as he may deem for the best interests of the public, paying the full cost and expense thereof from any moneys that may be due or become due such contractor, and in case there is not sufficient moneys due the contractor to pay for said work, the highway commissioner shall require the contractor or his bondsman to pay for it. It is the duty of the attorney general or any prosecuting attorney of the county in which said highway is situated, to collect the same from the contractor and his bondsman."

The two sections referred to above were repealed by amended senate bill No. 125, found in 106 O. L., 574, and known as the Cass highway code. The Cass

highway law contains very similar provisions, however, the same being found in sections 201 and 202 of said law, being sections 1208 and 1209, G. C. Section 1208, G. C., contains the following provision:

> "Before entering into a contract the commissioner shall require a bond with sufficient sureties, conditioned that the contractor will perform the work upon the terms proposed within the time prescribed, and in accordance with the plans and specifications thereof, and that the contractor will indemnify the state, county or township against any damage that may result by reason of the negligence of the contractor in making said improvement."

Section 1209, G. C., as found in 106 O. L., 635, reads as follows:

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

From a comparison of the provisions of the Cass highway law, relating to this matter, with the provisions of the law as they existed prior to September 6, 1915, it will be seen that in so far as your inquiry is concerned, said provisions may be regarded as identical and the opinion herein expressed will be applicable to contracts entered into under both the old and the new law.

It is first inquired as to whether, when the time set for the completion of a contract expires, the highway department should wait for a request from the contractor for an extension of time. It is sufficient to observe, in answer to this inquiry, having reference to what will be hereafter observed in answer to the other inquiries, set out in the communication above quoted, that the highway department cannot assume that a contractor, who has not completed his contract within the time specified, desires an extension of time, and it would therefore be improper for the state highway department to grant an extension of time in the absence of an application therefor from the contractor. As a matter of practice, this application on the part of the contractor should be made in advance of the time set for the completion of the contract so that action granting or refusing the request for an extension may be taken by the highway department at a time not later than the day set for the completion of the contract. In the absence of a request from the contractor for an extension of time, the only action which the highway department is authorized to take is that pointed out in section 1203-1, G. C., 103 O. L., 456, applicable to contracts entered into prior to September 6, 1915, and in section 1209, G. C., 106 O. L., 635, applicable to contracts entered into subsequent to September 6, 1915.

The second inquiry is as to whether, after the expiration of the time for the completion of the contract as set forth therein and before an extension of time is granted, the highway department must allow any partial estimates for work done. This inquiry should be answered in the negative. Upon the expiration of the time set for the completion of the contract, all funds in the hands of or under the control of the state highway department applicable to the contract in question and not disbursed, should be held for the purpose of completing the work either by contract, force account, or in such other manner as is deemed for the best interest of the public, in the event that no extension of time is granted; and it therefore follows that after the expiration of the time set for the completion of the contract no money should be paid the contractor until it is determined that he desires an extension of time and until such extension has been granted in the manner hereinafter indicated.

It is unnecessary, in properly advising your department, in this matter, to determine whether or not the payment of the estimate, under the conditions above set forth, would be a recognition of a contract in force but not legally covered by a proper bond, for the reason that under such circumstances it is the duty of the highway department, as above pointed out, to retain all funds in its hands and applicable to the contract in question until it be determined whether or not an extension of time is to be granted.

The third inquiry contained in the communication set forth above is as to whether the highway department should secure a written agreement from the bondsmen or surety company concurring in the extension of time asked for by the contractor, before such extension is granted, and it is also inquired in this communication whether the bondsmen or surety company hold for the life of the contract.

It should be the uniform practice of your department to grant no extensions of time without the written consent of the bondsmen or surety company. This will avoid many complications which would be bound to follow any other course. Whether or not the bondsmen or surety company could be held where there has been an extension of time without first obtaining their consent, would depend upon the facts of each particular case.

Summarizing the above answers, it may be observed that the extension of time should be granted only on the application of a contractor, which application, as a matter of practice, should be made before the time for the completion of the contract has expired, although I see no objection to the application being made after the time for the completion of the contract has expired, provided no action has been taken by the state highway commissioner under section 1203-1, G. C., or section 1209, G. C., as the case may be. After the time for the completion of the contract has expired and before an extension of time is granted, no partial estimates should be allowed and paid to the contractor. In no case should an extension of time be allowed without securing from the bondsmen of the contractor a written agreement consenting to the extension.

Respectfully,
EDWARD C. TURNER,
Attorney General.

877.

CORPORATION — AN AMENDMENT TO ARTICLES OF INCORPORATION—CANNOT CHANGE A PART OF ITS CAPITAL STOCK COMPOSED ENTIRELY OF COMMON STOCK TO PREFERRED STOCK.

A corporation cannot change common stock to preferred stock by an amendment of its articles of incorporation.

COLUMBUS, OHIO, October 1, 1915.

HON. CHARLES, Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your favor of September 18th, with enclosures, in which you request my opinion as follows:

> "We are herewith enclosing communication from Miller, Thompson, Dunbar & Martin, attorneys at law, check of The Oppenheimer-Straus Company for five dollars, ten cent internal revenue stamp uncancelled, and copy of certificate of amendment of the articles of incorporation of The Oppenheimer-Straus Company, asking to amend their articles of incorporation so as to change a part of their capital stock from common to preferred, by amendment.
>
> "We submit the following question to you for an opinion:
>
> "'May an incorporation by amendment of its articles of incorporation change a part of its capital stock composed entirely of common stock to preferred stock?'"

I have carefully considered the letter of Messrs. Miller, Thompson, Dunbar & Martin, attorneys for Oppenheimer-Straus Company, in which they argue at length in support of the position taken by them that your question should be answered in the affirmative.

In connection with their letter I have also examined the reports of opinions of the attorney general, and find that they have not been in entire harmony—former Attorney General Sheets holding that a corporation is not authorized by amendment of its articles of incorporation to change common stock to preferred stock, while former Attorney General Ellis held that such change by amendment was authorized by the statutes. I am unable to agree, however, from an examination of the opinions cited in the letter of Messrs. Miller, Thompson, Dunbar & Martin, that Attorney General Hogan passed upon the particular question here under consideration.

In two of my former opinions to you, one dated June 9, 1915 (opinion No. 472), and the other dated April 20, 1915 (opinion No. 265), I advised you that a corporation could not by amendment of its articles of incorporation, under section 8719 of the General Code, change preferred stock to common stock. One of the reasons given for such conclusion being that this change from preferred stock to common stock would amount to an increase of common stock of the corporation, and therefore prohibited by the express provisions of said section 8719 of the General Code, which is as follows:

> "A corporation organized under the general corporation laws of the state, may amend its articles of incorporation as follows:
>
> * * * * * * * * * * *
>
> "4. So as to add to them anything omitted from, or which lawfully

might have been provided for originally, in such articles. But the capital stock of a corporation shall not be increased or diminished, by such amendment, nor the purpose of its original organization substantially changed."

The contemplated change of common stock to preferred stock would, indirectly at least, permit a corporation to reduce its entire capital stock, for if the corporation may by the amendment of its articles change common stock to preferred stock, it may necessarily, under section 8669 of the General Code, make provision for the redemption of such preferred stock at a time and a price fixed in such amendment. The corporation could, therefore, by such action, fix a time in the future at which its stock would automatically be decreased, and thereby accomplish by indirect means what it is specifically forbidden to do under section 8719 of the General Code.

Specific provision has been made by statute authorizing a corporation to increase its capital stock and providing the procedure therefor. In section 8698 and section 8699 of the General Code, also in section 8700 of the General Code, authority is granted and the method of procedure prescribed for securing a reduction of the capital stock.

Again, the amendment sought to be made by The Oppenheimer-Straus Company through its articles of incorporation is not, in my judgment, the addition of "anything omitted from or which might lawfully have been provided for originally." The said amendment seeks to change common stock to preferred stock, granting that the original articles of incorporation of said company might have provided for both common and preferred stock, it does not follow that provision could also have been made in such original articles authorizing a transformation of common stock to preferred stock at some future time. As well argue that because the incorporators of a manufacturing corporation might have originally organized as a banking corporation instead of for manufacturing purposes, that therefore under section 8719 of the General Code they may at any time amend the articles of incorporation so as to substitute banking purposes for manufacturing purposes and thereby secure authority to engage in the business of banking.

The rights of the other stockholders are also entitled to consideration. Section 8720 of the General Code provides that the amendment authorized by section 8719 may be adopted by a vote of the owners of three-fifths of the corporation's subscribed capital stock.

In this connection I have not overlooked the statement of Messrs. Miller, Thompson, Dunbar & Martin, that in the case presented the amendment has been adopted by the unanimous vote of all the stockholders. That fact might be material as reflecting upon the rights of the stockholders in a case where the secretary of state has heretofore accepted an amendment whereby a corporation has changed its common stock to preferred stock, because if all stockholders had agreed, they would be estopped from thereafter claiming that they were injured by such action; but it is immaterial for the purpose of arriving at a correct answer to your question.

If such amendment is permissible at all it must be under authority of section 8719 of the General Code, which authorizes amendments to be made by a vote of three-fifths of all stockholders and which gives no greater latitude of amendment where there is an unanimous agreement of stockholders. Therefore, if all stockholders can by unanimous vote authorize such amendment, then three-fifths of the owners of its stock may authorize the same amendment. It would then follow that three-fifths of the stockholders of the corporation could materially increase the liability of the remaining stockholders and decrease the value of their

holdings, not only without the consent of the remaining stockholders, but even as against their express will. It certainly cannot be said that such result was intended from the language used in section 8719 of the General Code, which expressly prohibits the increase or decrease of capital stock of a corporation by amendment.

I am therefore of opinion, in answer to your question, that a corporation cannot by amendment of its articles of incorporation change a part of its capital stock composed entirely of common stock to preferred.

Respectfully,
EDWARD C. TURNER,
Attorney General.

878.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS IN ATHENS AND ASHTABULA COUNTIES.

COLUMBUS, OHIO, October 1, 1915.

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

DEAR SIR:—I have your communications of September 29 and 30, 1915, transmitting to me for examination final resolutions as to the following roads:

Athens-McArthur, Athens County, Petition No. 819-820, I. C. H. No. 160;

Hampden-Andover, Ashtabula County, Petition No. 1686, I. C. H. No. 475.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

879.

MUNICIPAL CORPORATION—JURORS' FEES AND MILEAGE IN APPROPRIATION PROCEEDING PAYABLE FROM COUNTY TREASURY.

Jurors' fees and mileage in appropriation proceedings by municipal corporation are payable from the county treasury under the provisions of section 3008, *G. C.*

COLUMBUS, OHIO, October 2, 1915.

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

GENTLEMEN:—I am in receipt of the following inquiry, of the date of September 27, 1915:

"Are jury fees to be considered as a part of the costs in the case

and as such chargeable to the judgment debtor in appropriation proceedings instituted by a municipal corporation? (See enclosures of C. D. McClintock, legal adviser of the village of Brewster, Ohio.)"

From the correspondence attached to your inquiry it appears that appropriation proceedings were and are now pending in the common pleas court of Stark county, Ohio, in which the village of Brewster, a municipality of said county, is seeking to appropriate certain properties for sewerage purposes, and that the payment of jury fees in said cases is causing some controversy.

The question, as I understand it, is whether jurors' fees in appropriation proceedings by municipal corporations shall be taxed as costs and charged to the corporation, or shall the same be paid from the county treasury as in other civil actions in the common pleas court.

The question is not without complications and when decided either way is not without doubt. For many years jury fees in appropriation proceedings by private corporations were paid in some jurisdictions by said corporations appropriating, and in others from the county treasury. This conflict in the interpretation and construction of section 6451, R. S.—now section 11089, G. C.—was finally settled by the decision in Railroad Co. v. County Commissioners, 71 O. S., 454.

In this opinion the supreme court recognized that costs may include jurors' fees and, under the term "whole costs" as used in said section 11089, did include such fees and that the same must be paid as costs by the corporation.

The reasoning of the court in this case, however, seems to be applicable only to the particular language used in said section 11089, supra, which differs materially from section 3693, G. C., under which costs are disposed of in appropriation proceedings by municipalities.

The special provision of said last named section covering the matter in question is as follows:

"The costs of the inquiry and assessment shall be paid by the corporation and all other costs taxed as the court directs."

Here is a case of real ambiguity. What are the costs of inquiry and assessment? What are the "other costs" to be taxed as the court directs?

In considering this question it is well to remember that in appropriation proceedings by municipalities many items of cost are involved that are not included in proceedings by private corporations. Again, in the case of Railroad Co. v. County Commissioners, supra, it was strongly urged in support of the claim of the railroad company that it could not be held for jurors' fees, that such an application of section 11089, supra, would be unconstitutional in that it would impose burdens upon private corporations from which other suitors in similar proceedings were exempt. It was urged further in this connection that municipal corporations were exempt from this liability.

This last claim seems to have been conceded by the court in its opinion, for in deciding this proposition it rests its conclusion on the ground that municipal and private corporations are not similarly situated.

It may be stated as a general rule that because by common law costs were not taxed to any party, it is only by express statute law they become taxable. McDonald v. Page, Wright, 121.

It follows from this that in a general way costs refer only to such expenses as are by express provision of some law made taxable and to be included in a judgment. Commisioners v. Commissioners, 14 C. C., 26.

There is nothing in the context of the section quoted which would warrant reading into the word "costs" any item of expense other than those usually and

ordinarily included in the term. In other words, there is nothing in the language of this section to justify any inference that the legislature used this term other than in its usual legal sense and meaning. In view of these considerations and the attitude of the court in Railroad v. Commissioners, as hereinbefore noted, I incline to the conclusion and so hold that the term "costs" as specified in section 3693, supra, must be taken to include only those items of expense as are usually understood to be included therein and that jurors' fees and mileage in appropriation proceedings by municipal corporations are payable from the county treasury under the provisions of section 3008, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney General.

880.

SHERIFF—RIGHT TO APPOINT SPECIAL DEPUTY SHERIFFS—SERVICES ON ELECTION DAY—MUST APPOINT IF SIGNED STATEMENT IS FILED BY DULY RECOGNIZED COMMITTEE REQUESTING SAME.

It is the duty of the sheriff of a county upon the filing of the signed statement mentioned in section 5169-15, *G. C.*, 106 *O. L.*, 21, *by the duly recognized committee or committees provided for by section* 5080-1, *G. C.*, 104 *O. L.*, 124, *to appoint the special deputies mentioned in said section* 5169-15, *G. C.*

COLUMBUS, OHIO, October 2, 1915.

HON. PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—Your letter of September 29th, asking my opinion, is received and is as follows:

> "I would like for you to give me an opinion on section 5169-15 of the law enacted in 1915 by the last legislature being in volume 105-106, page 21.
>
> "The sheriff of this county has asked me to put this question up to you whether the anti-saloon league and the home rule association can compel him as sheriff to appoint deputy sheriffs in the voting precincts of this county."

Section 5080-1 of the General Code (104 O. L., 124), provides in part as follows:

> "Not later than forty days prior to an election at which questions are to be submitted to a vote of the people, any committee which in good faith advocates or opposes a measure may file a petition with the board of deputy state supervisors of elections of any county asking that such petitioners be recognized as the committee entitled to nominate inspectors to the count at such election, as herein provided. If more than one committee alleging themselves to advocate or oppose the same measure file such petitions, the board of deputy state supervisors shall decide and announce by registered mail to each committee not later than thirty days immediately

preceding the election, which committee is entitled to nominate such inspectors. Such decision shall not be final, but any aggrieved party may institute mandamus proceedings in the common pleas court of the county wherein such deputy state supervisors have jurisdiction to compel such board of deputy state supervisors to certify the nominees of such aggrieved party to the judges of elections as herein provided. * * *"

Section 5169-15 of the General Code (106 O. L., 21) provides as follows:

"Whenever the committee provided by law for naming inspectors and challengers in any county file with the sheriff of the county at least five days before the election a signed statement that they have good reasons to believe that there will be bribery of electors or violation of election laws in certain precincts, wards or townships, of the county, at the next election, such sheriff shall appoint the persons named by such committee as special deputy sheriffs to prevent such violation of the law, but he shall not be liable on his bond for the acts of such special deputies. The sheriff shall name the persons certified to him by said committee, and such deputies shall have the same authority to make arrests and serve process as the sheriff or other public officer. Such deputies shall have the same authority as judges of elections have, as provided for in section 4890 of the General Code, to call to their aid any officer of the peace or elector to aid them in enforcing the law. Each deputy shall give a bond in the sum of $1,000 payable to the state of Ohio that he will faithfully perform the duties placed upon him to enforce the law, for an honest election. The compensation for such officers shall be paid by the committee naming them, and not more than one such officer shall be named for any one precinct by any committee."

Section 5080-1, *supra,* provides for the selection of the committee mentioned in section 5169-15, *supra.* The provisions of section 5169-15 confer no discretion upon the sheriff, but make it his duty to appoint the deputies when the signed statement provided for therein has been filed by the duly constituted committee.

I am of the opinion in answer to your question that there is no duty resting upon the sheriff to appoint deputies at the request of the anti-saloon league and the home rule association, as such, but that if the duly constituted committee or committees file the signed statement provided for in section 5169-15, supra, it is the duty of the sheriff to appoint deputies in the precincts designated in such signed statement.

Respectfully,
EDWARD C. TURNER,
Attorney General.

881.

OFFICES INCOMPATIBLE—TOWNSHIP TRUSTEE—TOWNSHIP HIGHWAY SUPERINTENDENT—TRUSTEES MAY PERMIT TOWNSHIP HIGHWAY SUPERINTENDENT TO USE HIS OWN TEAM WHEN HE CAN EFFECT A SAVING OF TIME AND REDUCTION OF EXPENSE TO TOWNSHIP.

A person holding the office of township trustee may not, upon resigning said office, be appointed township highway superintendent during the term for which he was elected township trustee or for one year thereafter.

Township trustees in the exercise of their discretion may permit the township highway superintendent to use his own team when by so doing he can effect a saving of time and a reduction of expense to the township.

COLUMBUS, OHIO, October 2, 1915.

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

GENTLEMEN:—In your letter of September 14th, you request my opinion upon the following questions:

> "(1) Can a township trustee legally be appointed township road superintendent under the new highway law, provided, however, he first resigns as township trustee and his successor is appointed, he taking his chances with other applicants, and the full board making the appointment? The good faith of the trustee in the matter not being questioned and he being a competent man?
>
> "(2) Can a township superintendent, under the new road law, legally use his own team on the roads, the trustees fixing the compensation for all team labor, and providing that he can use his own team? The question arises from this condition: In making small repair, hauling a small amount of lumber or culvert material, or other small work, where a team, or team and wagon, are necessary, the superintendent can expedite matters and reduce cost by thus doing."

Where a person holding the office of township trustee resigns said office and the vacancy thus created is filled in the manner provided by section 3262, G. C., you inquire whether said person is then eligible to appointment as township highway superintendent by the trustees of said township under authority of section 75 of amended senate bill No. 125, being section 3370, G. C., as found in 106 O. L., 593, which provides in part:

> "For the purposes of this act there shall be in each township not less than one nor more than four road districs, as the township trustees may determine. The district or districts shall include all the territory in such township. The trustees of the township shall appoint for each road district a superintendent who shall be known as township highway superintendent and who shall serve until his successor is appointed and qualified."

Said section 3370, G. C., further provides that the township highway superintendent under the direction of the township trustees shall have control of the roads of his district and keep them in good repair. Section 78, being section 3373, G. C., authorizes the township trustees to fix the compensation of the township

highway superintendent for time actually employed in the discharge of his duties and further provides that such compensation and all proper and necessary expenses, when approved by the township trustees, shall be paid by the township treasurer upon the warrant of the township clerk.

Section 79, being section 3374, G. C., provides:

> "The township highway superintendent shall perform such other duties as may be prescribed by law or by the rules and regulations of the township trustees or the county highway superintendent, so far as the rules and regulations of such county superintendent do not conflict with those of the township trustees."

In determining the answer to your first question consideration must be given to the provisions of section 12912, G. C., which are in part as follows:

> "Whoever being * * * the trustee of a township, is interested in the profits of a contract, job, work or services for such * * * township, or acts as * * * superintendent * * * in work undertaken or prosecuted by such * * * township during the term for which he was elected or appointed or for one year thereafter, shall be fined, etc."

Under the above provisions of section 12912, G. C., a person holding the office of township trustee is prohibited from acting as superintendent in any work which, during the term for which he was elected trustee or for one year thereafter, is or has been undertaken or prosecuted by the township.

I am of the opinion, therefore, in answer to your first question that a township highway superintendent, appointed under authority of section 3370, G. C., 106 O. L., 593, is a superintendent within the meaning of the above provision of section 12912, G. C., and that a person holding the office of township trustee may not, upon resigning said office, be appointed township highway superintendent during the term for which he was elected township trustee or for one year thereafter.

Coming now to a consideration of your second question, I find no provision of the statute which by its terms prohibits the township highway superintendent as such from using his own team for the purposes mentioned in your inquiry. Where the township trustees fix the compensation for team labor and provide that the township highway superintendent may use his own team, when by so doing he can expedite the work and reduce the expense to the township, it cannot be said that the expenditure of the township funds under such conditions is illegal on the ground that the same is against public policy.

I am of the opinion, therefore, in answer to your second question, that the township trustees in the exercise of their discretion may, under the conditions set forth in your inquiry, permit the township highway superintendent to use his own team when by so doing he can effect a saving of time and a reduction of expense to the township.

Respectfully,
EDWARD C. TURNER,
Attorney General.

882.

CHATTEL LOAN LAW—NO ASSIGNMENT OF WAGES IS VALID UNLESS SAME SHALL BE IN WRITING AND MADE TO SECURE DEBT CONTRACTED SIMULTANEOUSLY WITH EXECUTION OF SUCH ASSIGNMENT—PRE-EXISTING DEBT MERGED IN AN ASSIGNMENT—PURPOSE OF CHATTEL LOAN LAW.

A valid assignment of salary, wages or earnings, or any part thereof, may not be made to secure the payment of a debt contracted prior to the execution of such assignment, although the security of such pre-existing debt is merged in an assignment of such salary, wages or earnings given to secure an additional debt contracted simultaneously with the execution of such assignment.

COLUMBUS, OHIO, October 2, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your request for opinion under date of September 3, 1915, as follows:

> "Section 6346-7 of the Lloyd chattel loan law, passed by the last general assembly, contains the following provision:
>
> "'* * * Nor shall any such assignment be valid unless the same shall be in writing and made to secure a debt contracted simultaneously with the execution of such assignment, etc.'
>
> "A loan company, heretofore doing business under the old chattel loan law, has raised the following question:
>
> "A borrower now owes $25.00. He wishes to secure $25.00 more. The company agrees to lend him $50.00, taking as security therefor an assignment of his wages. The borrower pays to the company $25.00 of this money clearing up the old loan. Is this transaction a violation of the present law and is the wage assignment valid or invalid?
>
> "Please render us your opinion in the above matter and oblige, * * *."

From my understanding of your inquiry, the question for consideration may be stated in the following form:

> "May a lawful assignment of wages be made under the act of May 7, 1915, 106 O. L., 281, for the payment of a pre-existing debt of the assignor, when the security of such pre-existing debt is merged in said assignment with the security of a debt contracted simultaneously with the execution thereof."

Section 6346-7, G. C., 106 O. L., 284, being a part of the act above referred to, insofar as pertinent to the present consideration, provides as follows:

> "No assignment of any salary, wages or earnings, or any part thereof given to secure a loan shall be valid unless the same be in writing, signed in person by the person making the same; and if such person is married and living with husband or wife, signed also by the husband or wife of such person, as the case may be. Nor shall any such assignment be valid unless the same shall be in writing and made to secure a debt contracted

simultaneously with the execution of such assignment, with all blank spaces therein filled in with ink or typewriting, together with the date, names of the assignor and assignee, the amount for which such assignment is made, together with the rate of interest charged."

That part of the above quoted provision which it would seem is clearly determinative of the question, is in the following language:

"Nor shall any such assignment be valid unless the same shall be in writing and made to secure a debt contracted simultaneously with the execution of such assignment."

It will be first observed that the purpose and effect of the execution of such assignments as are herein referred to and authorized by the act under consideration, is to guarantee to or confer upon individuals special rights as against all other creditors of the assignor, and statutes of this character are generally subject to a somewhat strict construction against those who seek to secure such special or exclusive rights thereunder.

It seems that clearer and more unequivocal language could not have been here used to indicate the legislative intent that no assignment should be valid to secure the payment of any debt existing prior to the execution of the assignment.

The statement of facts submitted presupposes a pre-existing debt and in the very nature of things that cannot be "a debt contracted simultatneously with the execution of such assignment" when under the facts here to be considered the assignment is of necessity executed subsequently to the contracting of that debt.

It may be urged that a pre-existing debt may be lawfully secured by chattel mortgage, etc., but that alone cannot be said to take away from the original obligation the attribute or characteristic of a pre-existing debt. That is to say, in the present case the merging of the security of one debt into the security of another debt does not, of itself, discharge the pre-existing obligation nor does the mere formality or pretense of, or imaginary borrowing and paying back an additional amount to that which is in reality contracted simultaneously with the execution of the assignment avail to give validity and legal effect to that which is in clear and specific terms prohibited by law. The substance rather than the mere form must control, and it cannot be controverted that the sole purpose of and object effected by such imaginary transaction is the security of a debt by such assignment, the validity of which is specifically denied by law. Such course of business, under the present state of the law, clearly contravenes that fundamental principle everywhere recognized that one may not do indirectly that which they may not lawfully do directly, and we are not warranted in giving to statutory language a construction contradictory of its plain and literal meaning, except upon necessity arising either from the context or apparent inconsistency, and I submit that neither of these here appear.

When the terms of a statute are clear and unambiguous, its wisdom is not a matter for consideration in its application. Therefore, whether advantage or disadvantage may arise from the construction here suggested or, what may be more desirable, results obtained by a different construction, cannot control.

General principles of commercial law cannot here maintain in the face of the clear and unequivocal statutory declaration that no validity shall attach to such assignment except it be made to secure a debt simultaneously contracted. It seems conclusive to my mind, in view of the object of the whole act and the language now under consideration, that the very purpose of this particular provision, if

it be given any force at all, was to enable the borrower to start with the taking effect of this act with a "clean slate" insofar as the assignment of wages thereafter to be earned and earned subsequently to such assignment might be effected.

I am, therefore, of opinion that as to all pre-existing debts attempted to be secured thereby in the manner set forth in your inquiry, such assignments are without validity.

Respectfully,
EDWARD C. TURNER,
Attorney General.

883.

BANKS AND BANKING—"BLUE SKY" LAW—STATUTES PRESCRIBING THAT DOING OF A CERTAIN ACT SHALL CONSTITUTE AN OFFENSE, MUST BE CONSTRUED STRICTLY—UNLESS CERTAIN ADVERTISEMENTS ARE SPECIFICALLY PROHIBITED BY SECTION 6373-17, G. C., NO CONVICTION CAN BE HAD AND NO PENALTY IMPOSED.

The gist of the offense charged in section 6373-17, G. C., is that of advertising the fact that a certificate has been issued by the commissioner of the "Blue Sky" law unless such advertisement also contains in bold type a recital that the commissioner in no wise recommends such securities or other property.

Unless such advertisement contains a statement that a certificate has been issued no offense has been committed under said section.

COLUMBUS, OHIO, October 2, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of September 28th, requesting my opinion as follows:

> "Sir:—The Automobile Owners' Mutual Liability and Casualty Company, in one of its advertisements, uses this language:
>
> "'THREE REASONS WHY YOUR INVESTMENT IN THIS COMPANY IS SECURE:
>
> "'1. The sale of this stock is regulated by an act of the legislature of Ohio, passed April 28, 1913, known as 'Blue Sky Law.' Secs. 6373-12, 6373-19, and 6373-20.' * * *
>
> "Is the statement above quoted such an advertisement as to bring it within the provisions of section 6373-17, requiring, in connection with the sale of securities, that the advertisement shall also contain in bold type a copy of the recital that the commissioner in no wise recommends such securities?
>
> "The Puritan Life and Annuity Company has endorsed on its advertising circulars the following statement:
>
> "'Operating under Ohio's rigid, model blue sky law.'
>
> "Is the statement last above referred to such an advertisement as brings it within the requirements of section 6373-17?
>
> "Do the requirements of section 6373-17 above referred to, relate only to advertisements which state the fact that 'such certificate has been issued,' or do the provisions of that section forbid, in connection with the offer or sale of a security, advertisements in which such language as:

'We are operating under the Ohio blue sky law'—'We have complied with the Ohio blue sky law'—'The sale of this security is regulated by the Ohio blue sky law,' or words to that effect, or any other language which leads a person to believe that the offerer of the security has complied with all the provisions of the Ohio blue sky law, unless the advertisement also contains the statement that the security is in no wise recommended by the commissioner."

Section 6373-17 of the General Code, to which you refer in your letter, is as follows:

"Such certificate shall recite in bold type that the 'commissioner' in no wise recommends such securities or other property; and no person or company shall advertise, in connection with the sale of such securities, the fact that such certificate has been issued unless such advertisement also contains in bold type a copy of such recital."

A penalty is provided in section 6373-20 for a violation of the provisions of section 6373-17, above quoted.

It is a principle of law so well established that it requires no discussion or citation of authorities, that a statute prescribing that the doing of a certain thing shall constitute an offense must be construed strictly. Therefore, if the sections complained of in your letter are not specifically prohibited by section 6373-17 no conviction can be had and no penalty imposed. The gist of the offense defined in section 6373-17, is that of advertising that a certificate has been issued by the commissioners, unless the advertisement also contains in bold type a recital that the "'commissioner' in no wise recommends such securities or other properties."

In neither of the advertisements to which you call my attention in your letter is there a statement that a certificate has been issued, nor is any reference made to a certificate. Since, therefore, the advertising that a certificate has been issued is one of the elements of the offense, I do not believe that either of the advertisements in question constitute a violation of the law.

The advertisement of the Automobile Owners' Mutual Liability and Casualty Company recites that "the sale of this stock is regulated by an act of the legislature of Ohio, passed April 28, 1913, known as the 'Blue Sky Law,' sections 6373-12, 6373-19 and 6373-20." Such stock may not require certification by reason of coming under one of the exceptions to section 14 of the blue sky law, yet, as a matter of fact, the stock and its sale to some extent at least is still regulated by the provisions of said law.

The Puritan Life and Annuity Company advertises that it "operates under Ohio's rigid, model blue sky law." Neither does this company advertise that it has secured a certificate, nor does it necessarily follow from the fact that it is operating under "Ohio's rigid, model blue sky law" that its stock has been or need be certified.

It may have been the legislative intent to prohibit advertisements such as presented in your letter; if so, however, the language used in the statute falls short of its intended purpose and should be amended.

I am therefore of the opinion that in the two instances cited there has been no violation of the law which may be punished under the provisions of sections 6373-17 and 6373-20 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

884.

DEPUTY GAME WARDENS ARE SPECIALLY APPOINTED POLICE OFFICERS—REQUIRED TO GIVE BOND—MAY CARRY CONCEALED WEAPONS IF BOND IS FILED.

Deputy game wardens are specially appointed police officers and under the provisions of section 12819, *G. C., as amended* 103 *O. L.,* 553, *may carry concealed weapons upon giving bond as therein required.*

COLUMBUS, OHIO, October 4, 1915.

HON. HENRY W. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I have your letter of September 28, 1915, as follows:

> "Under Sec. 1395, of the General Code, has a deputy state game warden a right to carry concealed weapons? The section of the statute defining the offense of carrying concealed weapons does not give a game warden the right to carry a concealed pistol or any other weapon. Our local deputy game warden claims that the chief game warden advised him that he had the right to carry a concealed weapon by virtue of Sec. 1395, or some other section in the game law."

Before answering your specific question it will be necessary to refer to the general statute against carrying concealed weapons in this state, being section 12819, G. C., as amended 103 O. L., which is as follows:

> "Whoever carries a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person shall be fined not to exceed five hundred dollars, or imprisoned in the penitentiary not less than one year nor more than three years. Provided, however, that this act shall not affect the right of sheriffs, regularly appointed police officers of incorporated cities and villages, regularly elected constables, and special officers as provided by sections 2833, 4373, 10070, 10108 and 12857 of the General Code, to go armed when on duty. Provided, further, that it shall be lawful for deputy sheriffs and specially appointed police officers, except as are appointed or called into service by virtue of the authority of said sections 2833, 4373, 10070, 10108 and 12857 of the General Code, to go armed if they first give bond to the state of Ohio, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them; and any person injured by such improper use may have recourse on said bond."

This statute is specific in its terms and protects only the officers or persons named therein and all officers and persons not named or included within its provisions are amenable to its penalties unless their act is justified by the provisions of section 13693, G. C. As you state in your letter, game wardens are not specifically named in this statute nor does it refer to any section or sections under which they are appointed or from which they receive any authority. It follows, therefore, if they can be brought under the protection of this law it must be by virtue of the provisions of that clause thereof which includes specially appointed police officers who may go armed if they first give bond in the sum of one thousand dollars as therein provided.

Deputy game wardens are now appointed by the state board of agriculture under the provisions of section 1391, G. C., as amended 106 O. L., 170. They hold their office for the term of two years, are required to give bond for the faithful discharge of their duties and are charged generally with the enforcement of all laws for the protection, preservation and propagation of birds, fish and game within this state. They are paid such compensation as the appointing power may allow and deem proper and in addition thereto are entitled to the same fees sheriffs are allowed for like services in criminal cases.

Under the particular provisions of said section 1395, to which you refer in your letter, they may execute warrants and other processes issued in the enforcement of bird, fish and game laws in the same manner as a sheriff or constable may serve or execute the same and may arrest on sight without warrant a person found by them violating any of the so-called game laws of the state.

Without enumerating further the many other provisions of law which refer to and cover their duties and authority, I think it sufficiently appears from what has been already quoted to warrant the conclusion that such officers are specially appointed police officers of that department of the state board of agriculture which has in charge the protection, preservation and propagation of birds, fish and game in this state.

This department, under the well recognized and settled definitions of the same, is itself a police department because it is charged with the preservation of all birds, fish and game and the enforcement of all laws protecting the same. It follows, therefore, that an officer appointed by this department to assist in its particular province is a police officer in the sense that the word is ordinarily used and understood.

This conclusion is further strengthened by the provisions in other sections of the law relating to this department. For instance: section 1397, G. C., provides, among other things, that:

> "Prosecutions by the warden *or other police officer* for offenses not committed in his presence shall be instituted only upon the approval of the prosecuting attorney of the county in which the offense is committed or upon the approval of the attorney general."

Again in section 1398, G. C., we find the following provision:

> "Each warden *or other police officer* shall seize and safely keep such property, etc."

It is apparent from the language used by the legislature in the foregoing provisions that it regarded game wardens as belonging to a class known as police officers.

I am of the opinion, therefore, that under said section 12819, supra, deputy game wardens are specially appointed police officers and as such are required to give the bond in the sum of one thousand dollars as therein specified and required before they are entitled to the protection of the statute. In the absence of such bond they are subject to all the penalties of the law and in the particular case to which you refer, if said deputy game warden has not given this bond, he is certainly guilty of violating the law unless his act was justified under the provisions of said section 13693, which provisions present a question of fact under the particular circumstances of each case and do not properly enter into a discussion of the question presented by you.

Respectfully,

EDWARD C. TURNER,

Attorney General.

885.

STATE DENTAL BOARD—RECORDS OPEN TO PUBLIC INSPECTION—EXAMINATION PAPERS ARE NOT SUBJECT TO SUCH INSPECTION.

Under section 1318, *G. C.*, 106 *O. L.*, 298, *the permanent records of the Ohio Dental Board must be kept open to public inspection, during the usual business hours of the day, throughout the year, subject to the limitation that such inspection shall not endanger the records nor interfere with the discharge of the duties of the board or its officers.*

Examination papers are not subject to public inspection although they are required to be kept on file for ninety days and are subject to be brought into court under subpoena duces tecum.

COLUMBUS, OHIO, October 4, 1915.

DR. R. H. VOLLMAYER, *Secretary Ohio State Dental Board, Toledo, Ohio.*

DEAR SIR:—Your letter of September 24th, asking my opinion, received and is as follows:

> "The board wishes an understanding as to just what is meant by section 1318 of the G. C., part of which reads as follows:
>
> "'At reasonable times, its records shall be open to public inspection and it shall keep on file all examination papers for a period of ninety days after each examination. A transcript of an entry in such records, certified by the secretary under the seal of the board, shall be evidence of the facts therein stated.'
>
> "Does 'at reasonable times' mean that the records be opened for inspection to any one, any time, or does it mean that the board shall designate a certain time or times during the year when the public may be at liberty to inspect its records?
>
> "All examination papers must remain on file ninety days after such examination." Are we to understand by this that they are to be open for inspection by the public for ninety days, or merely to be on file so that in case of complaint, the state or court may call upon us to produce any or all of these papers?"

Your first question requires an interpretation of what is meant by the words "reasonable times" in section 1318, G. C., (106 O. L., 298) which section is quoted in your letter.

The Ohio State Dental Board is a state department, and as such is required to keep certain records, which are public records.

The provisions of section 1318, G. C., quoted in your letter as to the records of the board being kept open to public inspection is declaratory of the common law, and as such is to be construed according to the common law.

See Lewis' Sutherland Statutory Construction, page 634.

The records of your board must be kept open and subject to public inspection at all times during the usual business hours of the day, with the limitation that such inspection must be made at such times and in such manner as not to endanger the records or interfere with the proper discharge of the duties of the board or its officers.

That the books should be kept open under the above limitations throughout the year, and not merely at specific periods, is indicated by the fact that the secretary of the board under section 1317, G. C., (106 O. L., 298) is to receive an annual salary, and under section 1316, G. C., (106 O. L., 297), and section 1333, G. C., duties are placed upon him requiring his attention throughout the year.

I am, therefore, of the opinion in answer to your first question that the records of the Ohio State Dental Board must be kept open and subject to inspection at any time during the usual business hours of the day, throughout the year, provided such inspection is made at such times and in such manner as not to endanger the records or interfere with the discharge of the duties of the board or its officers.

The answer to your second question depends upon whether or not the examination papers which are required to be kept on file for ninety days are a part of the records of the board. In the absence of a statutory provision, such papers could not be said to be a part of the records of the board, although they are a part of its files. They are merely the means by which the board determines its action in the granting of or refusing to grant licenses to practise dentistry, and there would be no necessity for their retention in the files of the board after they had served this purpose. Section 1318, *supra,* however, provides that such papers shall be kept on file for a period of ninety days, thus indicating that at most they are only to be preserved temporarily.

However, the statute itself furnishes the answer to your question, in that it provides what records are to be kept by the board in permanent form, to wit:

> "a record of its proceedings, a register of persons licensed as dentists, and a register of licenses by it revoked,"

and after so describing such records, provides:

> "At reasonable times, its records shall be open to public inspection"

and then follows the provision:

> "and it shall keep on file all examination papers for a period of ninety days after each examination,"

thus differentiating between the records of the board, as such, and said examination papers.

Therefore, under section 1318, *supra,* examination papers are not made a part of the records of the board and are not required to be kept open to public inspection. Neither can it be said that under the common law rule they are such papers as are subject to inspection, because their confidential nature is such that it might well be said that to open them to public inspection generally would interfere with the proper administration of the laws by the board and its officers; and ample provision is made in the statute for the protection of any one who feels that there has been an abuse of discretion on the part of the board, in that the examination papers are required to be kept for ninety days and access may be had thereto by proper proceedings and upon a proper order of a court.

Specifically answering your second question, I am of the opinion that the examination papers are not subject to public inspection.

Respectfully,
EDWARD C. TURNER,
Attorney General.

886.

STATE DENTAL BOARD—FEE PAID INTO STATE TREASURY ON APPLICATION FOR LICENSE TO PRACTICE DENTISTRY CANNOT BE REFUNDED EXCEPT BY GENERAL ASSEMBLY.

A fee paid on application for license to practice dentistry in this state, and covered into the state treasury by the officer receiving the same cannot be refunded without a specific appropriation by the general assembly.

COLUMBUS, OHIO, October 4, 1915.

DR. R. H. VOLLMAYER, *Secretary Ohio State Dental Board, Toledo, Ohio.*

DEAR SIR:—Your letter of September 24th, asking my opinion, received and is as follows:

> "I am enclosing a letter I received from Dr. F. C. Snowberger, of Angola, Indiana. He wishes the state to refund $25.00 which he paid into our treasury in June, 1912. He wished to register in Ohio via the reciprocity route, and he was informed that it would be necessary for him to take the practical examination. He failed to put in an appearance at the June examination in 1912, and this is really the first word that the board has received from him since that time.
>
> "Section No. 1328 of the G. C. reads: 'Such a fee shall not be refunded unless the applicant was unavoidably prevented from attending the examination.'
>
> "The appropriation allowed us by the legislature makes no allowance for cases such as this, and I know of no way to get this money from the state in order to return it to him if you think it advisable.
>
> "I trust you will return this letter to me at your earliest convenience, and also advise me as to its proper answer."

The letter from Dr. F. C. Snowberger enclosed with your letter is as follows:

> "Angola, Ind., September 23, 1915.
>
> "Dr. R. H. Vollmayer.
>
> "Dear Doctor:—In regard to my application to Ohio board, will say that I was given to understand that it would not be necessary to take the state examination. Would not have made application had I known this, it means a lot of extra work to go over our college work again, which would be of no value to me; owing to this fact I would be to extra expense and time in reporting for the examination at next meeting. I know that I should have called your attention to this matter at an earlier date, but just neglected same.
>
> "You can return amount of New York draft as I cannot see where I would be benefited in going over my college work again to get in form for an examination as we all would have to brush up some, after being out of college any length of time.
>
> "Very sincerely,
> "F. C. Snowberger."

From the foregoing correspondence it appears that Dr. Snowberger made application for a license to practice dentistry in this state, with license from a

board other than of this state, and enclosed with his application the fee of $25.00. Upon being advised that he was not eligible for license upon said grounds, but would be compelled to take an examination, he carried the matter no further and is now making request for a return of the $25.00 fee.

Section 1328 of the General Code, being the only section which refers to fees for such applications, is as follows:

> "Section 1328. An applicant for a license to practice dentistry in this state shall pay to the secretary of the state dental board, the following fee:
>
> "An applicant for a license granted upon an examination, twenty-five dollars. Such fee shall not be refunded unless the applicant is unavoidably prevented from attending the examination, but he may be examined at the next regular or special meeting of the board without additional fee.
>
> "An applicant failing at first examination may be re-examined at the next regular or special meeting of the board without an additional fee.
>
> "An applicant for a license without examination, with license from a board other than of this state, twenty-five dollars.
>
> "An applicant for a duplicate license granted upon proof of loss of the original, five dollars."

The money having been paid into the state treasury in accordance with law cannot now be paid out of the state treasury without specific appropriation therefor, and there is no money appropriated by the current appropriation bill for such refund.

I am, therefore, compelled to advise you that there is no authority to refund the fee in question, and the refund can only be secured by Dr. Snowberger by application to and appropriation by the general assembly.

Respectfully,
EDWARD C. TURNER,
Attorney General.

887.

ROADS AND HIGHWAYS—CASS HIGHWAY LAW—TRAVELING AND NECESSARY EXPENSES—COUNTY HIGHWAY SUPERINTENDENT —ASSISTANTS—INSPECTORS, ETC.—HOW EXPENSES APPORTIONED BETWEEN STATE AND COUNTY.

Under the provision of section 7181, G. C., 106 O. L., 612, the county highway superintendent and those assistants whose appointment and compensation are authorized by said provisions of said statute, when on official business shall be paid out of the county treasury their actual and necessary traveling expenses, including livery, board and lodging.

One-half of the actual and necessary traveling expenses of the county highway superintendent and those assistants employed by him under authority of section 1219, G. C., 106 O. L., 639, with the approval of the chief highway engineer, incurred in making plans and surveys for the improvement referred to in said section 1219, G. C., when properly itemized and when approved by the county highway superintendent and the chief highway engineer or state highway commissioner, shall be paid from the state treasury on the warrant of the state auditor, and the remaining one-half of such expense, when properly itemized and approved as aforesaid, shall be paid from the county treasury or township treasury, as the case may be, on the requisition of the state highway commissioner and on the warrant of the proper official of said county or township. The actual and necessary traveling expenses of the county highway superintendent and such inspectors and superintendents as are employed by him under authority of said section 1219, G. C., with the approval of the chief highway engineer, incurred in the supervision and inspection of the aforesaid improvement, when properly itemized and approved as aforesaid, shall be paid by the state, county and township in the manner above prescribed and on the same basis as the cost of construction.

COLUMBUS, OHIO, October 5, 1915.

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

DEAR SIR:—In your letter of September 11th, you request my opinion as follows:

> "Referring again to amended senate bill No. 125, known as the Cass bill, I respectfully request your opinion on the following question:
>
> "When the county highway superintendent has been placed in charge of state road work by the state highway department, in what manner and by whom are the actual necessary traveling expenses, including livery, board and lodging, of the following persons paid when on state work:
>
> "County highway superintendent.
>
> "His assistants.
>
> "Inspectors.
>
> "Superintendents."

Section 138 of amended senate bill No. 125, being section 7181, G. C., as found in 106 O. L., 612, provides in part as follows:

> "In the event the county highway superintendent cannot properly perform all the duties of his office, the county commissioners shall fix the aggregate compensation to be expended for assistants by the county highway superintendent during the year. Such compensation shall be paid out

of the county treasury in the same manner as the salary of county officials is paid. In addition thereto, the county highway superintendent and his assistants, when on official business, shall be paid out of the county treasury, their actual, necessary traveling expenses, including livery, board and lodging."

Under the above provision of the statute the county highway superintendent and those assistants whose appointment and compensation are authorized by said provision of said statute, when on official business, shall be paid out of the county treasury their actual and necessary traveling expenses, including livery, board and lodging.

This provision of the statute within the limitations therein prescribed covers the actual and necessary traveling expenses, including livery, board and lodging, of the county highway superintendent and his assistants, when engaged in the performance of all the duties which are by law required of said county highway superintendent except those duties prescribed by section 212 of said amended senate bill No. 125.

As to those expenses incurred under authority of the above provision of section 7181, G. C., and within the limitations therein prescribed, I am of the opinion that such expenses, when properly itemized and approved by the county highway superintendent, may be paid by the county treasurer on the warrant of the county auditor.

It is evident, however, that your inquiry is more particularly directed to the authority for the payment of expenses incurred by the county highway superintendent, his assistants, inspectors and superintendends, in the performance of those duties required by the provisions of said section 212 of said amended senate bill No. 125, being section 1219 of the General Code.

This section relates to the surveys and plans of the proposed improvement of an inter-county highway, made by the state highway commissioner with the cooperation of the commissioners of a county or the trustees of one or more townships within said county, under authority of section 177 and related sections of said amended senate bill No. 125, and the division of the expense of making such surveys and plans and the expense of supervision and inspection of said improvement, and provides as follows:

"Section 212. The chief highway engineer may direct the county highway superintendent to make the necessary surveys and plans for the proposed highway improvement. The expense of such surveys and plans shall be equally divided between the state and county, except in cases where the improvement is being made on application of the township trustees, in which case the expense of such plans and surveys shall be equally divided between the state and township. The county highway superintendent, with the approval of the chief highway engineer, may employ such assistatnts as are necessary to prepare such plans and surveys, and also, with like approval, such superintendents and inspectors as may be necessary in the construction of said improvement. Each of said assistants, superintendents and inspectors shall receive such pay as the chief highway engineer may determine. All work in connection with such improvement shall be done under the direction of the chief highway engineer. The expense of supervision and inspection of said improvement shall be apportioned on the same basis as the cost of construction."

Under the above provision of the statute it will be observed that the expense of making the surveys and plans for the improvement therein referred to is

equally divided between the state and county, or in case the improvement is being made on the application of the township trustees said expense is equally divided between the state and the township, while the expense of supervision and inspection of such improvement is to be apportioned on the same basis as the cost of construction.

In my opinion the term "expense" as used in the above provisions of section 1219, G. C., covers actual and necessary traveling expenses, including livery, board and lodging.

As to the actual and necessary traveling expenses of the county highway superintendent and those assistants employed by him with the approval of the chief highway engineer, incurred in making said plans and surveys, I am of the opinion that one-half of said expense, when properly itemized and when approved by the county highway superintendent and the chief highway engineer or the state highway commissioner, should be paid from the state treasury on the warrant of the state auditor and the remaining one-half of said expense when properly itemized and approved as aforesaid should be paid from the county treasury or township treasury, as the case may be, on the requisition of the state highway commissioner and on the warrant of the proper official of said county or township, and that the actual and necessary traveling expenses of the county highway superintendent and such inspectors and superintendents as are employed by him with the approval of the chief highway engineer, incurred in the supervision and inspection of the aforesaid improvement, when properly itemized and approved as aforesaid, should be paid by the state, county and township in the manner above prescribed and on the same basis as the cost of construction.

Respectfully,
EDWARD C. TURNER,
Attorney General.

888.

COUNTY AUDITOR'S REPORT—PUBLICATION IN GERMAN NEWSPAPER—MUST BE PRINTED IN GERMAN LANGUAGE.

The county auditor's report, when published in a German newspaper as prescribed by section 2508, *G. C., as amended in* 106 *O. L.,* 488, *must be printed in the German language and this requirement obtains under all similar statutes.*

COLUMBUS, OHIO, October 5, 1915.

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

GENTLEMEN:—I beg to acknowledge the receipt of your letter of September 29, 1915, enclosing the following inquiry:

> "Where any law requires or permits the publication of a legal advertisement in a German newspaper, would it be legal if said advertisement, so printed in a German newspaper, was published in the English language?"

Since receiving your inquiry aforesaid, further communication from you discloses that the particular case under which your question arises, has reference to the publication of the county auditor's report, as prescribed under section 2508,

G. C., as amended in 106 O. L., 488. It appears in this instance the publisher of a newspaper printed in the German language is claiming the right to publish said report in said newspaper in the English language.

I have no hesitancy in saying that such publication would be wholly foreign to the purpose of this and other laws requiring publication of legal matters in German newspapers, and not in compliance with either the letter or spirit of the law.

The section in question provides, among other things, that said report, in addition to other publications, provided for, "shall be published in the same manner in one newspaper, if there be such, printed in the county in the German language and having a bona fide general circulation of not less than six hundred among the inhabitants of such county speaking that language."

It must be observed, before discussing these provisions, that it is the settled rule in this country, when legal notices are required to be published, an English newspaper is always intended unless it be expressed otherwise. This is so because all legal records of this land are required to be and are kept in the English language.

This general rule has been adopted by the courts of this state and was first announced in the case of City of Cincinnati v. Bickett, et al., 26 O. S., 49, the third branch of the syllabus of which reads as follows:

> "Where a statute of the state requires a publication to be made in a 'newspaper,' in the absence of any provision to the contrary, a paper published in the English language is to be understood as intended, and a publication in a paper printed in any other language is not a compliance with the statute."

This case was followed in 53 O. S., 346, wherein the court had under consideration the publication, in a German newspaper, of the annual report of the county commissioners, which was covered at that time by the provisions of section 917, Revised Statutes, being the same section, in its amended form now under consideration. Under the provisions of said section 917 at that time, the court held that it did not afford authority for either publishing said report in a German newspaper or paying for the same.

Under this application of the general law, any exception therefrom must be by express authority of the legislature, and when so provided must be given a literal meaning and application.

Referring now to the provision above quoted, it is apparent the legislature intended the publication made under said provisions to be printed in the German language. That its purpose was definite in this regard is shown by the provision not only that the newspaper should be printed in that language, but that it shall have a circulation of not less than six hundred among those speaking the language. The plain purpose thus expressed is to furnish a certain class of the inhabitants of a given county this report in their language.

For the foregoing considerations, I therefore hold that in the case presented, and in similar cases where legal publications are directed by law to be made in German newspapers, said publication must be printed in said newspaper in the German language. This conclusion, I think, is in harmony with the remarks of the court in State ex rel. v. Lorain, 12 N. P., (n. s.) 636.

Respectfully,

EDWARD C. TURNER,

Attorney General.

889.

BOARD OF HEALTH—LOCAL OFFICE OF REGISTRAR VACANT—CITY BOARD MAY BE COMPELLED BY MANDAMUS TO APPOINT QUALIFIED PERSON TO FILL SUCH VACANCY.

In case of a vacancy in the office or position of local registrar of a city the city board of health may be compelled by mandamus to appoint a qualified person to fill such vacancy.

COLUMBUS, OHIO, October 5, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have yours under date of September 29, 1915, as follows:

"Under section 203, General Code of Ohio, Charles Griffith, local registrar of Bucyrus, Ohio, district, was removed on the 26th day of July, 1915, by the secretary of state for failing to efficiently discharge the duties of his office in this, to wit: Failing to make reports of births and deaths to the state registrar of vital statistics.

"Under section 201, General Code, the board of health of Bucyrus, Ohio, was requested by the secretary of state to appoint a successor to the aforesaid Charles Griffith, but said board of health has failed and refused to appoint a successor to the aforesaid Charles Griffith, and we are asking your opinion on the following question:

"In case the board of health of a city fails or refuses to appoint a local registrar as provided in section 201 of the General Code, who would have the authority to appoint or what remedy has the secretary of state in the matter?"

Section 203, G. C., to which you refer, provides as follows:

"Each sub-registrar shall note, over his signature the date on which each certificate is filed, and forward all certificates to the registrar of his township within ten days, and in all cases before the third day of the following month. A local or sub-registrar who fails to efficiently discharge the duties of his office shall be forthwith removed from office by the secretary of state, in addition to other penalties which may be imposed by law."

This section confers upon the secretary of state jurisdiction to remove any local or sub-registrar for the cause therein specified, and in the event any local or sub-registrar of a city is so removed according to law, there is thereby, of necessity, created a vacancy in such office or position.

Section 201, G. C., provides as follows:

"In villages, the village clerk and in townships the township clerk shall be the local registrar, and in cities the city board of health shall appoint a local registrar of vital statistics, and each shall be subject to the rules and regulations of the state registrar, the provisions of this chapter and to the penalties provided by law. With the approval of the state registrar, each local registrar, shall appoint a deputy who, in case of absence, illness or disability of the local registrar, shall act in his stead.

Acceptance of such appointment shall be in writing and such deputy shall be subject to the rules, regulations and provisions governing local registrars."

While there is no specific provision found for filling a vacancy in the office or position of local registrar in a city, the officers in whom is lodged the authority to appoint such local registrar, are specifically designated.

Taking into consideration the purpose of the legislation upon this subject, it was manifestly the intent of the legislature that there should, at all times, be provided competent persons for the discharge of the duties and functions of such registrar, and I am, therefore, of opinion that when there exists a vacancy in the office or position of local registrar in a city, the city board of health may be compelled, by mandamus to appoint a person qualified under the law to fill such position.

Respectfully,
EDWARD C. TURNER,
Attorney General.

890.

PROSECUTING ATTORNEY—PREPARES BOND ISSUES AND TRANSCRIPTS FOR TOWNSHIP BOARDS OF EDUCATION—NOT ENTITLED TO EXTRA COMPENSATION FROM COUNTY—MAY RENDER BILL AGAINST INDIVIDUAL MEMBERS OF SUCH BOARD.

It is the duty of prosecuting attorneys to prepare bond issues and transcripts for boards of education of which they are legal advisers.

COLUMBUS, OHIO, October 5, 1915.

HON. HOMER E. JOHNSON, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—Your letter of August 2d has through inadvertence remained unanswered. Such letter was in answer to a letter from us under date of July 28th, wherein I advised you that I had received some communications from the township clerk of Waldo township with reference to the right of the board of education of said township to pay a bill presented by the prosecuting attorney for preparing a bond issue and a transcript for the board of education of Waldo township.

Your letter of August 2nd relative thereto advises us that under section 4761, G. C., you have always furnished advice and conducted litigation for the different boards of education without any charge; that you have attended board meetings when requested and made no charge, but that you feel in matters outside of the duties of the official position you are justified in making a charge therefor. And you further state:

"We feel that this case is strictly within that class of business. Several townships during the last few months have centralized or consolidated their schools. It was necessary to issue bonds; it was up to the members of the board in making a motion to adopt a certain resolution to frame the resolution in proper form. It was the clerk's duty to spread the minutes of the said meeting upon their record correctly and to make a transcript of the proceedings for the bonding company purchasing their bonds. In the Waldo case, not one of the members were able to do this correctly,

and it has been so in other cases. It was absolutely necessary for them to employ some one who knew. It was not enjoined upon the prosecuting attorney by law to do this for them. It was therefore arranged that we should draw the entire proceedings beginning with the original resolution declaring the necessity, etc., then following the notice of vote, issue of bonds, notice of sale, certificates, statistics to bidders, form of bonds and in fact everything required by the attorneys for the bonding company buying the issue. We then delivered the bonds. We do not charge for the necessary advice but we have made a small charge for making up this proceeding and then getting together a transcript of the same to accompany the delivery of the bonds. Someone else would do this if we did not. We think it no more than fair that we should be paid for this extra work, it being entirely outside of our line of duty."

Section 4761, G. C., provides in part that except in city school districts, the prosecuting attorney of the county shall be the legal adviser of all boards of education of the county in which he is serving.

You state in your letter that it has been necessary for you to prepare the resolutions, proceedings and transcripts thereof, for the reason that the members offering the resolutions were unable to properly prepare the same and that the clerk was not able to spread the minutes of the meeting upon his record correctly nor to make a transcript of the proceedings for the bonding company. While that may be true, nevertheless, if it was not the duty of the prosecuting attorney as legal adviser of the board to prepare the proper resolutions, minutes, etc., it was the duty of the members of the board of education and the clerk so to do, and your bill should, therefore, not be against the board of education for performing the duties which should have been performed by the members and clerk, but against the members themselves, if they were unable so to do. As legal adviser of the board of education, however, it would seem to me that it was your duty under section 4761, G. C., to advise the board and prepare the necessary papers for them to accomplish the work which they desired to accomplish.

I cannot, therefore, agree with you in your conclusion that it would be legal for the board of education to pay the bill presented by the prosecutor for preparing bond issue and transcript for the board of education of Waldo township.

Respectfully,
EDWARD C. TURNER,
Attorney General.

891.

STATE HIGHWAY COMMISSIONER—FORM OF BONDS—COUNTY HIGHWAY SUPERINTENDENT—ASSISTANT COUNTY HIGHWAY SUPERINTENDENT—TOWNSHIP HIGHWAY SUPERINTENDENT.

Form of bond prescribed for county highway superintendent, assistant county highway superintendent and township highway superintendent.

COLUMBUS, OHIO, October 5, 1915.

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

DEAR SIR:—I am in receipt of a communication from Hon. Ben. A. Bickley, prosecuting attorney of Butler county, asking for a copy of the form of bond

which is being used under section 7183 of the General Code, as found in 105-106 Ohio Laws, at page 613, the same being the provision contained in section 140 of the Cass law, and which provides for a bond to be given by the county highway superintendent and by his assistant.

Although not asked for, I am submitting a form of bond to be used in the case of the township highway superintendent, which differs somewhat from the others, especially with reference to the fact that the amount of the bond is fixed by statute in the sum of two hundred dollars, in section 3371, of the General Code, which is section 76 of the Cass law, and to be found on page 594 of volume 105-106, Ohio Laws.

In view of the statewide application of the question, I am addressing this communication to your office.

It is my opinion that to meet the requirements of the section referred to forms of bond may be used in the several instances as follows:

Official Bond of County Highway Superintendent.

STATE OF OHIO

KNOW ALL MEN BY THESE PRESENTS:

That we, _____as principal, and _____as surety, of_____county, are held and firmly bound unto the STATE OF OHIO in the penal sum of_____ dollars, ($_____) for the* payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, assigns and successors, jointly and severally, firmly by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That, Whereas, the said_____is the duly elected, qualified and acting county surveyor of_____county, Ohio, and, by virtue of section 7181 of the General Code of Ohio, the county highway superintendent of said county.

NOW IF SAID_____shall during his term of office, faithfully discharge the duties of his office as county highway superintendent, then this obligation shall be void, otherwise it shall remain in full force and effect.

WITNESS our hands and seals this_____day of_____191__.

*Amount to be fixed by the county commissioners.

_____

_____

_____

_____

_____

_____

_____

_____

OATH

STATE OF OHIO,

_____COUNTY, ss.

I do solemnly swear that I will support the constitution of the United States of America and the constitution of the state of Ohio, and that I will faithfully discharge the duties of the office of county highway superintendent, and otherwise, according to the best of my ability, promote the interest of the state so far as the same may be lawfully within my power.

_____

Sworn to and subscribed before me a_____in and for the county aforesaid, this_____day of_____19__.

_____

_____

The within bond is approved as to form.

_____

Prosecuting Attorney,
_____County, Ohio.

The within bond is hereby approved as to the amount and surety thereof

_____

_____

_____

Commissioners of_____County.

Official Bond of Assistant County Highway Superintendent.

STATE OF OHIO

KNOW ALL MEN BY THESE PRESENTS:

That we, _____as principal, and _____as surety, of_____county, are held and firmly bound unto the STATE OF OHIO in the penal sum of _____DOLLARS, ($_____) for the payment* of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, assigns and successors, jointly and severally, firmly by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That, Whereas, the said_____has been appointed assistant county highway superintendent of_____county, Ohio.

NOW if said_____shall during his term of office faithfully discharge the duties of his office as assistant county highway superintendent to which he has been appointed, then this obligation shall be void, otherwise it shall remain in full force and effect.

WITNESS our hands and seals this_____day of_____19__.

*Amount to be fixed by the county commissioners.

_____

_____

_____

_____

_____

_____

_____

_____

OATH

STATE OF OHIO,
_____COUNTY, ss.

I do solemnly swear that I will support the constitution of the United States of America and the constitution of the state of Ohio, and that I will faithfully discharge the duties of the office of assistant county highway superintendent to

which I have been appointed, and otherwise, according to the best of my ability, promote the interest of the state so far as the same may be lawfully within my power.

Sworn to and subscribed before me a----------in and for the county aforesaid, this----------day of----------19--.

The within bond is approved as to form

Prosecuting Attorney,
----------County, Ohio.

The within bond is hereby approved as to the amount and surety thereof

---

County Commissioners.

Official Bond of Township Highway Superintendent.

STATE OF OHIO.

KNOW ALL MEN BY THESE PRESENTS:

That we, ----------as principal, and ----------as surety of----------county, are held and firmly bound unto THE STATE OF OHIO in the penal sum of two hundred dollars ($200.00) for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, assigns and successors, jointly and severally, firmly by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That, Whereas, the said----------has been appointed township highway superintendent by the trustees of----------township,---------- county, Ohio.

NOW, if said----------shall during his term of office faithfully discharge the duties of township highway superintendent to which office he has been appointed, then this obligation shall be void, otherwise it shall remain in full force and effect.

WITNESS our hands and seals this----------day of----------191--.

OATH

STATE OF OHIO
----------COUNTY, ss.

I do solemnly swear that I will support the constitution of the United States of America and the constitution of the state of Ohio, and that I will faithfully

discharge the duties of the office of township highway superintendent to which I have been appointed, and otherwise, according to the best of my ability, promote the interest of the state so far as the same may be lawfully within my power.

Sworn to and subscribed before me a_____in and for the county aforesaid, this_____day of_____19__.

The within bond is approved as to form.

Prosecuting Attorney,
_____County, Ohio.

The within bond is hereby approved as to the amount and surety thereof

---

Trustees_____Township,
_____County, Ohio.

A copy of this opinion has been forwarded to Hon. Ben A. Bickley, prosecuting attorney of Butler county, at whose instance the same has been rendered.

Respectfully,
EDWARD C. TURNER,
Attorney General.

892.

STATE LIQUOR LICENSING LAW—INTERPRETATION OF PHRASE "A MAIN BUSINESS SECTION"—HAS NOT BEEN JUDICIALLY DEFINED—MEASURING SHOULD BE THE PLAIN AND ORDINARY ONE, NOT TECHNICAL OR PARTICULAR—COUNTY BOARDS SHOULD DETERMINE THE MATTER UPON FAIR CONSIDERATION OF ALL FACTS IN PARTICULAR CASE.

It is for the county liquor licensing boards to determine in the first instance what are the central and main business sections of cities within the terms of section 1261-34, 103 *O. L., 223, upon consideration of all material facts in each particular case.*

COLUMBUS, OHIO, October 5, 1915.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I have yours under date of September 21, 1913, as follows:

"Enclosed herewith you will find request from the Mahoning County Liquor Licensing Board, for a construction of the last sentence of section 19 of the liquor licensing code.

"The state board would be very glad to have your opinion at an early date as the question is arising in many of the counties."

The enclosed inquiry of the Mahoning County Liquor Licensing Board referred to is as follows:

> "Under date of June 25th we wrote you as follows:
>
> "'We ask you for your construction of the last sentence in the final paragraph of section 19 of the state license code; in a word, we would ask you to advise us if it is the province of this board to determine what constitutes 'a main business section.' We have two different cases to consider here, both of them in districts where foreign-born citizens largely predominate. These two districts are very largely occupied with little stores of various kinds and are unquestionably a business section for the people of the immediate locality, but to be on the safe side we ask your board for a construction of this particular paragraph.'
>
> "Will you kindly advise us in this matter?"

That portion of section 19 of the liquor license law to which you refer, being section 1261-34, G. C., 103 O. L., 223, provides as follows:

> "No license shall be granted after August 1, 1915, to operate a saloon within three hundred feet of any permanent public or parochial school building, measuring the distance in a straight line following the street from the nearest point of the premises on which such school building is located, nor two hundred feet in a straight line following the street from the nearest point of the premises. This provision shall not apply to a bona fide reputable hotel or club; or to a saloon located within three hundred feet of a school house in the central or a main business section of the city."

This inquiry is directed particularly to the meaning of the phrase "the central or a main business section of the city." This phrase has not, to my knowledge, been judicially defined. Its terms are in common use in the ordinary affairs of every day life, and are not here used in any technical or particular sense, hence must be interpreted in their plain and ordinary meaning.

The difficulty involved in your inquiry arises, however, in the application of this phrase to particular cases, giving rise to questions of fact no general rule for the determination of which can be laid down, nor can these questions be determined by any one in a particular case without a full knowledge of all the material facts which may not, at least in many cases, be obtainable otherwise than upon view of the locality under consideration.

These, then, are questions to be determined in the first instance by the county boards upon a fair consideration of all the material facts in the particular case, subject to review by the courts for abuse of discretion under the particular facts involved.

Respectfully,
EDWARD C. TURNER,
Attorney General.

893.

BOARD OF EDUCATION—MAY APPOINT SCHOOL PHYSICIAN TO PERFORM DUTIES REQUIRED BY SECTION 7692-1, G. C.—IN ITS DISCRETION SAID BOARD MAY EMPLOY A TRAINED NURSE TO AID SAID APPOINTED PHYSICIAN—BOARD MAY DELEGATE SUCH DUTIES TO BOARD OF HEALTH PROVIDING SAID BOARD OR ITS OFFICER IS WILLING TO PERFORM DUTIES—DELEGATED BOARD OR OFFICER MAY APPOINT SAID PHYSICIAN AND SAID NURSE IF DETERMINED NECESSARY.

The board of education of a school district may, under authority of section 7692, G. C., as amended 103 O. L., 897, appoint a school physician to perform the duties required by the provisions of section 7692-1, G. C., 103 O. L., 897, and in its discretion said board may employ a trained nurse to aid in the performance of said duties, or said board may delegate said duties to the board of health or officer performing the functions of a board of health in said district, providing said board or officer is willing to assume the same, together with the power to appoint said school physician and employ said trained nurse if said board or officer determines that the same is necessary for the proper discharge of the aforesaid duties.

COLUMBUS, OHIO, October 5, 1915.

HON. ALLEN T. WILLIAMSON, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—I have your letter of September 24th, which is as follows:

> "The board of education in several of the school districts in this county have had under consideration the question of appointing a trained nurse who should supervise and inspect the sanitary condition of the school buildings, and aid in the inspection of the health of the pupils. The question has been referred to me and I am inclined to advise that a board of education has the power to employ and pay a trained nurse for the above purposes. The sections of the General Code which seem to give authority to appoint school physicians and nurses are found amended and supplemented in vol. 103 at page 897 and are the General Code numbers, 7692 to 7693, both inclusive. According to section 7692 the powers therein delegated by the board of education may be redelegated by the board to the board of health exercising jurisdiction as such within the school district, and would seem to broaden the powers of the board of health in the respect of employing a nurse. However, I am in receipt of a copy of your opinion rendered to the state board of health under date of May 13, 1915, and published in department reports in the issue of June 3rd, which would seem to deny authority in the board of health to employ a nurse. In the opinion you refer to a communication from Mr. James E. Bauman, and it may be that he cited you to the above sections, and that you had them before you when rendering the opinion. In the light of the sections which I have cited I would be pleased to have your opinion on the authority of both the board of education and the board of health, acting under these sections, to employ and pay a trained nurse."

Under section 7692, G. C., prior to its amendment in 103 O. L., 897, the authority to provide for the medical inspection of pupils attending public schools was limited to boards of education of city school districts.

This section as amended now provides:

"Each and every board of education in this state may appoint at least one school physician; provided two or more school districts may unite and employ one such physician, whose duties shall be such as are prescribed in this act. Said school physician shall hold a license to practice medicine in Ohio. School physicians may be discharged at any time by the appointing power whether the same be a board of education or of health or health officer, as herein provided. School physicians shall serve one year and until their successors are appointed, and shall receive such compensation as the appointing board may determine. Such boards may also employ trained nurses to aid in such inspection in such ways as may be prescribed by the board. Such board may delegate the duties and powers herein provided for to the board of health or officer performing the functions of a board of health within the school district if such board or officer is willing to assume the same. Boards of education shall co-operate with boards of health in the preventing of epidemics."

The duties of the school physician are prescribed by the provisions of section 7692-1, G. C., as found in 103 O. L., 897. This section reads as follows:

"School physicians may make examinations and diagnoses of all children referred to them at the beginning of every school year and at other times if deemed desirable. They may make such further examination of teachers, janitors and school buildings as in their opinion the protection of health of the pupils and teachers may require. Whenever a school child, teacher or janitor is found to be ill or suffering from positive open pulmonary tuberculosis or other contagious disease, the school physician shall promptly send such child, teacher, or janitor home, with a note, in the case of the child, to its parents or guardian, briefly setting forth the discovered facts, and advising that the family physician be consulted. School physicians shall keep accurate card index records of all examinations, and said records, that they may be uniform throughout the state shall be according to the form prescribed by the state school commissioner, and the reports shall be made according to the method of said form; provided, however, that if the parent or guardian of any school child or any teacher or janitor after notice from the board of education shall within two weeks thereafter furnish the written certificate of any reputable physician that the child, or teacher or janitor has been examined, in such cases the services of the medical inspector herein provided for shall be dispensed with, and such certificate shall be furnished by such parent or guardian from time to time, as required by the board of education. Such individual records shall not be open to the public and shall be solely for the use of the boards of education and health or other health officer. If any teacher or janitor is found to have positive open pulmonary tuberculosis or other communicable disease, his or her employment shall be discontinued upon expiration of the contract therefor, or, at the option of the board, suspended upon such terms as to salary as the board may deem just until the school physician shall have certified to a recovery from such disease."

Section 7692-2, G. C., 103 O. L., 898, provides for the publication of rules by the state school commissioner (now the superintendent of public instruction) and the state board of health acting jointly, for the detailed enforcement of the

requirements of the statute above set forth, and section 7692-4, G. C., makes it the duty of each board of education by affidavit of an officer thereof or otherwise to prove to the superintendent of public instruction that it has complied with said requirements.

In view of the foregoing provisions of the statutes it seems clear that it is the duty of each board of education to provide for the inspection and examinations authorized by section 7692-1, G. C. For this purpose said board is authorized by the provision of section 7692, G. C., as amended, to employ a school physician having the qualifications therein prescribed, or the boards of education of two or more school districts may unite for the purpose of employing such physician.

Said board of education, or union of boards as the case may be, may in its discretion employ a trained nurse to aid in such inspection in such ways as may be prescribed by said board or union of boards.

In case the board of education of a school district delegates the duties and powers conferred upon it by provision of said statute to the board of health or officer performing the functions of a board of health within such school district, providing such board or officer is willing to assume said duties and powers, said board of health or health officer will have the same authority by virtue of such delegation to appoint a school physician and employ a trained nurse as is conferred by provision of said statute on said board of education.

Under provision of section 7693, G. C., as amended in 103 O. L., 898, the board of education of any school district may provide and pay compensation to the employes of the board of health in addition to that provided by the city, township or other municipality.

As I view it the provisions of section 7692, G. C., as amended, contemplate the employment of a trained nurse only when such employment is necessary to enable the school physician, appointed under authority of said section, to properly perform the duties required of him by the provisions of section 7692-1, G. C.

The question raised in the opinion to the state board of health, referred to in your inquiry, was as to whether or not the board of health of a city has the authority to employ a public health nurse and whether the council of such city has the authority to appropriate to said board of health the funds to pay the compensation and expenses of such nurse. In that opinion it was held that there is no authority on the part of a city council to appropriate to the city board of health the funds necessary to pay such compensation and expenses and that there is no authority on the part of said board of health to employ a public nurse except that contained in section 4436 of the General Code which authorizes the employment of a nurse for the purpose of giving attention to persons in quarantine. In arriving at this conclusion the above provisions of section 7692, G. C., as amended, were not considered material for the reason that it could not be said that said statute authorizes the employment of a public nurse for the performance of those duties contemplated by the state board of health in its request for said opinion.

Replying to your question I am of the opinion that the board of education of a school district may, under authority of section 7692, G. C., as amended, appoint a school physician to perform the duties required by the provisions of section 7692-1, G. C., and in its discretion said board may employ a trained nurse to aid in the performance of said duties or said board may delegate said duties to the board of health or officer performing the functions of a board of health within said school district, providing said board or officer is willing to assume the same, together with the power to appoint said school physician and to employ said trained nurse if said board or officer determine that the same is necessary for the proper discharge of the aforesaid duties.

Respectfully,

EDWARD C. TURNER,

Attorney General.

894.

INDUSTRIAL COMMISSION—PURCHASE OF BONDS OF VILLAGE OF HUDSON, OHIO, BY SAID COMMISSION, APPROVED.

COLUMBUS, OHIO, October 5, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"In re:—Bonds of the village of Hudson, Ohio, in the aggregate sum of $40,750, dated August 1, 1915, and bearing interest at the rate of five *per cent. per annum, payable semi-annually.*"

These bonds consist of three separate issues as follows: $5,500.00 issued for the purpose of securing funds to pay the village's portion of improving Aurora and Streetsboro streets, consisting of six bonds—five of which are of the denomination of $1,000.00 each, falling due between August 1, 1925, and August 1, 1927, inclusive, and one bond of $500.00, due August 1, 1927.

$12,250.00 of special assessment bonds for the improvement of Streetsboro street, being thirteen bonds in all—twelve of which are of the denomination of $1,000.00 each, falling due from August 1, 1916, to August 1, 1925, and one of the denomination of $250.00, falling due August 1, 1925.

$23,000.00 of special assessment bonds for the improvement of Aurora street, consisting of twenty-three bonds in all of the denomination of $1,000.00 each, falling due from August 1, 1916, to August 1, 1925.

I have examined the transcripts of the proceedings of the council and other officers of the village of Hudson relative to the authorization and sale of the above bonds, also the specimen bonds accompanying said transcript, and I am of the opinion that said bonds are issued for a purpose authorized by law, that the proceedings of said council and other officers are regular and in conformity with statutory provisions, that the amount of said bonds issued for the purpose of paying the village's portion of said improvement and the tax levy which will be necessary to pay the interest thereon and to create a sinking fund sufficient for the redemption of the bonds when due exceeds no statutory limitation, and that the form of all said bonds is properly drawn.

I therefore certify that when said bonds are properly executed and delivered they will constitute, in the hands of legal holders thereof, valid obligations of the village of Hudson.

Respectfully,

EDWARD C. TURNER,

Attorney General.

895.

ADVERTISEMENTS FOR BIDS FOR CONSTRUCTION OF A COURT HOUSE SHOULD BE PUBLISHED BY BUILDING COMMISSION AND NOT BY COUNTY COMMISSIONERS—PROVISIONS OF SECTION 2352, G. C., GOVERN.

Advertisements for bids for construction of new court house for Hamilton county, Ohio, should have been published by the building commission and not by the county commissioners. Said publication is governed by provisions of section 2352, G. C., regulating similar advertisements by county commissioners.

COLUMBUS, OHIO, October 5, 1915.

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

GENTLEMEN:—I have your letter of September 21, 1915, submitting the following statement and inquiry:

"Advertisement for bids for the construction of a new court house in Hamilton county, Ohio, was ordered by the building commission, and was published in six papers for six insertions.

"QUESTION. Was this permissible under the provisions of section 2338, General Code, or should the advertisements have been published by order of the county commissioners under the provisions of section 2352, General Code?"

Section 2338, G. C., to which you refer, provides in substance that the building commission shall adopt plans, specifications and estimates, shall invite bids and award contracts, and until the building is completed may determine all questions connected therewith, *"and shall be governed by the provisions of this chapter relating to the erection of public buildings of the county."*

Section 2352, G. C. is the general section of the law providing for the advertisement by county commissioners for sealed proposals for performing labor and furnishing materials for the erection of public buildings, bridges, etc., and said section limits said advertisement to one insertion per week, for four weeks, in two of the principal newspapers of the county, or, if there be only one newspaper in the county, said advertisement shall be published in said newspaper.

It appears from your inquiry that the publications made in this case were far in excess of that provided by the foregoing section 2352 and the question presented is whether said provisions of said section shall prevail, or do the provisions of section 2338 give the building commission its only authority and delegate to it the discretion to determine the manner and method of "inviting bids," without reference to any of the limitations imposed by the last clause of said section, which, as before noted, provides that said commission shall be governed by the provisions of the chapter relating to the erection of public buildings of the county.

This provision was first incorporated into said section 2338 by the codifying commission of 1910 and, therefore, was not in force at the time of the decision in the case of McKenzie v. State, 76 O. S., 369, in which it was held that the provisions of section 798, R. S.—now said section 2352, G. C.—did not apply in respect to contracts made by said building commission. The construction then adopted by the supreme court cannot, by reason of this fact furnish a guide under the present state of the law.

I have before me the recent decision of the court of appeals of Hamilton county, Ohio, in the case of State ex rel. Waltz v. Green, et al., which is to appear in volume 22 Ohio appellate and circuit court reports, in which the scope and effect of said clause is discussed. The court, after specifically directing attention to the provisions aforesaid added by the codifying commission, said:

"The General Code of Ohio is not merely the work of a codifying commission but it is also the enactment of the general assembly. Such important language could not have been added by inadvertence or without purpose, nor is it inconsistent with the preceding words of the clause of which it has been made a part. The power granting to the building commission to determine all questions connected with the building of the court house and jail is simply thereby modified by the requirements of such provisions of the chapter as are applicable thereto. The fact that certain sections of this chapter relate exclusively to bridges, infirmaries or children's homes only renders those particular sections inapplicable and is not argument against the controlling force of all provisions which are plainly applicable.

"The effect of this change is recognized in State ex rel. v. Cass, 13 C. C. n. s., 449, and the trial court here was right in holding that the words added must be deemed effective."

It is thus plainly intimated by the court above quoted that the last pro-

vision of said section 2338, being the provision added by the codifying commission, as heretofore noted, gives operative force to all provisions of the general law relating to the erecting of public buildings and applicable to the duties imposed upon said building commission, and practically the same view is expressed by the court in State ex rel. v. Cass, above cited. If, then, the provisions of said section 2352, regulating the manner and method of advertising for bids for the erection of public buildings, bridges, etc., are applicable they must control.

I know of no reason why they are not applicable. Said section 2338, supra, provides no method for advertising for bids, nor do any other sections of the law relating exclusively to the duties of a building commission make such provisions. Prior to the enactment of said provision of section 2338, this omission seems to have been a very prolific source of trouble, if we are to judge from the controversies appearing in reported cases. I cannot escape the conviction that one of the chief, if not the principal purpose in this amendment to the original law was to provide the same plan of advertising for bids as prevails when contracts are to be let by county commissioners for the erection of public buildings, bridges, etc.

I am therefore of the opinion that advertisements for bids for the construction of said court house should have been published by said building commission and not by the county commissioners, but that said publication is governed by the provisions of said section 2352, G. C., regulating similar advertisements by county commissioners.

As to the matter of findings for recovery in this particular case: I doubt very much, indeed, if, under all the facts and circumstances of this particular case, any verdict might be had at the hands of a jury because, in addition to the fact that it would well be argued that to the laymen constituting such a building commission the provisions of law were not clear and that they had acted in good faith for the best interest of the county, it would be readily apparent to the jury, from the nature and size of this particular work, that advertising in outside papers was really necessary to get the best and most economical results for the county. In other words, the jury would look upon this transaction as the exercise of good business judgment.

Respectfully,
EDWARD C. TURNER,
Attorney General.

896.

ARTICLES OF INCORPORATION OF URBANA LIBRARY ASSOCIATION, DISAPPROVED—PURPOSE CLAUSE NOT SPECIFIC.

Proposed articles of incorporation of the Urbana Library Association disapproved because same fail to set forth specifically the purpose of its incorporation, and because reference must be had to the articles of incorporation of another company in order to ascertain the purpose of its organization.

COLUMBUS, OHIO, October 5, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of August 27th requesting my opinion as follows:

> "We are enclosing herewith check for $2.00, and proposed articles of incorporation of THE URBANA LIBRARY ASSOCIATION.
>
> "It is their intention to incorporate as an incorporation not for profit, but in their purpose clause they are taking up and continuing work of

THE URBANA PUBLIC LIBRARY COMPANY, a corporation organized for profit, and whose franchise was revoked for non-payment of taxes by the tax commission on August 27, 1914.

"We do not think that a corporation organized not for profit can take up the work of a corporation and its property that was organized for profit. We would like to have your opinion on this."

As set forth in its proposed articles of incorporation, The Urbana Library Association is formed

"for the purpose of taking up and continuing the work of the Urbana Public Library Company whose franchise was revoked through inadvertence, taking over its property and, therewith and by other means, perpetuate a public library for the citizens of Urbana and its visitors and so placing sources of knowledge, means of culture and high ideals within the reach of all."

Section 8625 of the General Code, specifying what the articles of incorporation shall contain, in so far as applicable, is as follows:

"Any number of citizens, not less than five, a majority of whom are citizens of this state, desiring to become incorporated, shall subscribe and acknowledge articles of incorporation, which shall contain: * * *

"3. The purpose for which it is formed. * * *

"* * * * * *"

By virtue of the language of the section of the General Code above quoted the purpose for which a corporation is organized must be stated with reasonable certainty.

(State v. Mutual Relief Association, 29 O. S., 399.)
(Capital Company v. McGillin, 21 O. C. C., 210.)

The proposed articles of incorporation of the Urbana Library Association do not, to my mind, state with certainty the purpose of the incorporation, as required by the statute. It must be inferred that at least a part of the purpose for which it is to be incorporated is not stated at all, except by reference to the articles of incorporation of another corporation, which you state in your letter was an Ohio corporation organized for profit.

There is nothing, however, in the proposed articles of incorporation of the Urbana Library Association which reveals whether the Urbana Public Library Company was an Ohio corporation or a corporation organized in another state, or whether it was organized for profit or not for profit. The articles of incorporation of a proposed organization should set forth specifically the purpose of its incorporation, and not refer to some other paper, document or record for a complete statement of such purpose.

I therefore advise you that the articles of incorporation of the Urbana Library Association do not contain a statement of the purpose for which it is organized as required by law, and the same should not be accepted and filed by you.

The Urbana Public Library Company, as appears from the records in your office, was organized in 1891 as an Ohio corporation for profit, and in its articles of incorporation its purpose was stated to be:

"Establishing, sustaining and enlarging a public library and reading room for the use of the people of Urbana; that a taste for the best and purest literature may be created in many who have it not, and encouraged in all who have it; that a knowledge of the arts and sciences may be

advanced; and that a comfortable, pleasant room, well furnished with good books and periodicals, may prove an attractive resort for young and old; that we may glean from many men of many minds the brightest and best thoughts of all ages and all lands."

It appears therefore that the purpose for which the defunct Urbana Public Library Company was organized, was such as an Ohio corporation not for profit may now be lawfully organized to carry out, and it follows that there is nothing in the law to prevent the Urbana Library Association from adopting articles of incorporation containing such purpose statement, but it should be specifically and fully set forth in its proposed articles of incorporation, and not made a part thereof by reference to some other document. While the proposed articles of incorporation of the Urbana Library Association should not be accepted and filed by you in their present form, such articles would be in a form such as could be accepted and filed by you if the purpose of the Urbana Library Association were stated to be that of:

"Acquiring, sustaining and enlarging a public library and reading room for the use of the people of Urbana; that a taste for the best and purest literature may be created in many who have it not and encouraged in all who have it; that a knowledge of the arts and sciences may be advanced; and that a comfortable, pleasant room, well furnished with good books and periodicals, may prove an attractive resort for young and old; that we may glean from many men of many minds the brightest and best thoughts of all ages and all lands;"

and if no other improper matter were added.

Respectfully,
EDWARD C. TURNER,
Attorney General.

897.

NEWSPAPER—PUBLICATION—DAILY COURT REPORTER, DAYTON, OHIO—PUBLICATION OF "TIMES FOR HOLDING COURTS" TO BE PAID FROM COUNTY TREASURY IS CONFINED TO TWO NEWSPAPERS OF OPPOSITE POLITICS—TERM, "NEWSPAPER OF GENERAL CIRCULATION," DEFINED.

1. *The provisions of section 6252, G. C., requiring the publication of the "times for holding courts" to be made in two newspapers of "opposite politics," as therein specified, are supplementary to and control the provisions of the special statutes requiring such publications to be made in one or more newspapers of general circulation.*

Printing Co. v. State, 68 *O. S.,* 362.

2. *Whether a publication is or is not a "newspaper," or a newspaper of "general circulation" or newspaper of "opposite politics" is a mixed question of law and fact which can only be determined under the particular facts in each case.*

COLUMBUS, OHIO, October 6, 1915.

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

GENTLEMEN:—I have your letter of September 29th requesting my written opinion upon the following questions:

"Section 1695, G. C., as amended 103 O. L., 405, reads as follows:

'In the counties of Hamilton, Cuyahoga, Franklin and Lucas, the judges of the courts of record, other than court of appeals, shall jointly

designate a daily law journal published in the county, wherein shall be publised all calendars of the courts of record in such county, which shall contain the numbers and titles of causes, and names of attorneys appearing therein, together with the motion dockets and such particulars and notices respecting causes, as may be specified by the judges, and each notice required to be published by any of such judges.'

"The attention of this department has been called to the fact that a daily paper entitled, 'Daily Court Reporter,' is being published at Dayton, Ohio. We observe at the top of the first column of the second page of this paper this item:

"'Approved by the court as a sufficient medium for the publication of legal advertisements.'

"QUESTION: May any legal advertisements, such as times of holding courts, publication of which is provided for by sections 1518, 1520, 1533, 1534 and 6252, General Code, or any other advertisements required by law to be published in newspapers of opposite politics, also be published in a paper like this and be paid for out of the county treasury?

"Could notices of sale of bonds and other advertisements, which the law provides may be published in newspapers of general circulation, be published in a paper of this kind, either in the counties named in section 1695, or any other places where same may be established?

The inquiries submitted in your foregoing communication can only be answered in a general way because in each particular instance there is involved a mixed question of law and fact. It may be stated that under the statutes specified by you, and all other similar statutes, the publications in which legal advertisements are required to be made may be divided into three classes: (1) Newspapers without any other or further qualifications as to circulation or politics. (2) Newspapers having a general circulation in any given territory. (3) Newspapers of opposite politics.

Every publication in which a legal advertisement may be made under the laws of this state must have one or more of the qualifications named in the foregoing classes. A "newspaper" in which legal notices may be made has been defined by the circuit court of this state in the case of Bigalke et al. v. Bigalke, 19 C. C., page 331, wherein the court adopts with approval the definition found in Wade on the Law of Notices, section 1066, which is as follows:

> "What is a newspaper? In order to fulfill the terms of the law the notices must be directed by the court or officer to be inserted for the statutory time in some paper printed and circulated for the dissemination of news; but it is not essential that, to answer the description, the paper shall be devoted to the dissemination of news of a general character. It may with equal propriety be published in a paper devoted exclusively to the discussion of religious, legal, commercial or scientific topics and the diffusion of knowledge touching special matters within its limited sphere, as in a public journal the columns of which are open to news of a general character. It may be a religious newspaper, a commercial newspaper, a legal newspaper or a scientific newspaper, or a political newspaper."

In this case the court further held that the Cleveland Daily Record was a newspaper and, while devoted primarily and principally to the proceedings in the courts and in the recorder's office and in the various county and city offices in the county in which it was published, yet it was a legal medium for the publication of such notices as were at that time required under section 5050, R. S., being section 11298 of the General Code.

It would seem under the foregoing authority that a newspaper to be a medium

for legal advertising as contemplated by our statutes need not publish current news or matters that might be of interest to the public generally, but its news may be limited to a certain sphere and of interest only to a particular class.

Coming now to consider the requirement named in the second class heretofore specified, it is necessary to determine what constitutes a newspaper of general circulation under the requirements of those statutes which make that a requisite for the publication of legal advertisements in its columns.

Here again it may be stated that the question must be determined by the particular facts in each case and unless all the facts are known no satisfactory answer may be given. We have in the 14 C. C. Reports, (n. s.) page 531, in the case of State ex rel. v. Commissioners of Wood county, an opinion by a majority of that court which indicates from the facts there stated that the requirement of circulation may be very limited, not only as to numbers involved, but as to actual distribution of the publication within and over a certain given territory. This case was affirmed without opinion by the supreme court in 84 O. S., 447, and the facts upon which the opinion was based as stated by the court are as follows:

> "A newspaper having a circulation of 800 in a county containing a population of 50,000, distributed over twenty townships and in fifteen of those townships containing a population of 35,000, a circulation of only thirty-six, is a newspaper of general circulation within the meaning of the statute providing for the publication of the financial report of the county commissioners, required under section 2508, G. C."

It is apparent from the facts upon which the conclusion was reached in the foregoing case that the determination of the question of general circulation must depend entirely upon the circumstances of each case, which can only be ascertained by an examination of the subscription list of the newspaper under investigation, the population it purports to serve and the territory it claims to cover.

Referring now to newspapers coming within the provisions of the third class, the term "opposite politics" has been judicially defined in the case of city of Columbus v. Barr, 6 C. C., (n. s.) 151, as applying to newspapers which "are the recognized organs of parties politically opposed." Under this definition there should be no difficulty in any given case in determining the political qualification required.

Attached to your inquiry is a copy of the "Daily Court Reporter," published at Dayton, Ohio, and purporting to give a digest of the day's news in legal, real estate and business circles, and carrying the announcement, as you state in your letter, that it has been approved by the courts as a sufficient medium for the publication of legal advertisements. An inspection of its printed matter shows that in this particular issue it carries no current news whatever in its columns and that it is devoted wholly to the news of the courts and the business of the various county offices as appears from their records. Among its legal advertisements is found the times for holding courts of appeal in its district and also legal notices which are required by law in cases where the service of summons personally cannot be made in civil actions.

It is apparent from the foregoing facts that this paper has been given such legal status as would qualify it to publish all notices provided by law, except those which are limited to newspapers of opposite politics, but as to advertisements, which must be published in newspapers of opposite politics, with no other information before me, except as stated in your letter and the copy of said publication attached thereto, I must conclude that said newspaper cannot qualify as an organ of any political party.

Referring now to your specific inquiry as to whether the "times for holding courts" may be published in this newspaper and paid for out of the county treas-

ury, I am impelled to conclude that such publication and payment may not be made. This conclusion is reached for the reason that under the authority of Printing Company v. State, 68 O. S., 362, said section 6252, G. C., must be held to be supplementary to said sections 1519, G. C., as amended 103 O. L., 412, and 1534, G. C., as amended 106 O. L., 462, and to require the publication in question to be made in two newspapers of opposite politics. While the last named sections have been recently amended, their particular provisions pertinent to this inquiry have not been changed or modified by said amendments and remain the same as they were at the time said case above quoted was decided. This conclusion is reached irrespective of the provisions of said section 1695, G. C., which do not include the county in which said newspaper is published and which would be given no effect as to this particular transaction if they did include said county and provide for the publication of said newspaper.

As before stated, it is impossible to give you a specific answer as to any other case that might be involved in your inquiry. I have attempted here only to give you certain general rules, which may be applied by you to the facts in each particular case as it comes before you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

898.

STATE DENTAL BOARD—RECIPROCAL RELATIONS WITH OTHER STATES FOR PRACTICE OF DENTISTRY—EDUCATIONAL QUALIFICATIONS OF APPLICANTS NOW BECOME PART OF REQUIREMENTS SPECIFIED IN SECTION 1324, G. C.

The educational qualifications of applicants for license to practice dentistry in this state as provided by section 1321-1, *G. C.,* 106 *O. L.,* 298, *enter into and become a part of the requirements specified in section* 1324, *G. C. Whether or not such qualifications in other states are equal to those in this state becomes a question of fact to be determined by reference to the laws of each state involved or to the rules established by the dental board of said state.*

COLUMBUS, OHIO, October 6, 1915.

HON. R. H. VOLLMAYER, *Secretary, Ohio State Dental Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of October 1st as follows:

> "I am sending you under separate cover copies of the dental laws of New Jersey, District of Columbia, Michigan, Indiana, Illinois, Iowa, Kansas, Wisconsin and Minnesota.
>
> "The state board at the present time enjoys reciprocity with these states and we wish to know whether or not we can continue to do so under our amended law. Section 1324 of the General Code of Ohio permits us to enter into reciprocal relations with other states provided their requirements are equal or superior to ours."

Your attention must be directed, first, to the fact that no amendments were made to the dental law of this state by the present general assembly which can

in any manner affect the subject of your inquiry except the enactment of section 1321-1, G. C., 106 O. L., 298. This section refers only to the educational qualifications which may be required hereafter of all applicants for license to practice dentistry in this state. No changes or modifications whatever were made in the provisions of section 1324, G. C., to which you refer, nor in the provisions of section 1322, G. C., which covers the subjects upon which the professional examination must be held.

It follows, therefore, if your board had reciprocal relations with the states named in your inquiry prior to said recent amendments to the law, there is nothing in its present state which can interfere with the continuance of such relations in each case named, except it be the matter of educational qualifications heretofore noted. It must be remembered in this connection that it is clear under the provisions of section 1324, supra, that educational qualifications enter into and become a part of the "requirements" therein specified. Whether or not such educational requirements in the states named are equal to those in this state becomes a question of fact to be determined by reference to the laws of each state involved or to the rules established under such laws by the dental board of each particular state.

An inspection of the laws as submitted by you shows that in the states of New Jersey, Indiana, Wisconsin and Illinois the educational qualifications required under the express provision of the law in each instance are precisely the same as those prescribed by the laws of this state. In the remainder of the states named by you there seems to be no provision of law specifically fixing any educational qualifications, but this matter appears to be delegated to the dental board of each state, to be determined by it and to be covered by such rules and regulations as it may prescribe and adopt.

In view of this situation, I would respectfully suggest that your board procure the regulations on this subject from the board of each state wherein no provisions of law expressly fix and prescribe educational qualifications and if upon investigation of the rules and regulations in this regard they are found to equal those of this state, I know of no legal reason against a continuance of reciprocal relations with the states thus meeting said requirements.

Respectfully,
EDWARD C. TURNER,
Attorney General.

899.

COMBINED NORMAL AND INDUSTRIAL DEPARTMENT OF WILBERFORCE UNIVERSITY—APPROPRIATION FOR RECITATION BUILDING AVAILABLE JULY 1, 1916—BIDS MAY NOT BE ACCEPTED NOW AND CONTRACT AWARDED AFTER JULY 1, 1916.

Bids for the construction of a recitation building for the combined normal and industrial department of Wilberforce University, for which the funds appropriated will not be available until July 1, 1916, *may not be accepted now and the contract awarded after July* 1, 1916.

COLUMBUS, OHIO, October 6, 1915.

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

DEAR SIR:—Under date of October 2nd, you submitted for my opinion the following inquiry:

"Regarding the appropriations for the combined normal and industrial department of Wilberforce University, in which the legislature appropriated for the year 1915, the sum of $40,000.00 for a gymnasium, and for the year 1916, the sum of $60,000.00 for a recitation building, plans and specifications, estimates of cost and bills of material have been prepared for both buildings and approved by the trustees, with the distinct understanding that no payment for the plans and specifications for the recitation building, covered by the appropriation of 1916, is to be made until the funds are available. The plans and specifications of both the gymnasium and recitation building have been presented to the state building commission for approval.

"Permission has been asked to prepare two separate advertisements, one for each building, to run the usual time required by the building code, and at the specified time of receiving proposals, to receive and open proposals for both buildings, with the understanding that the advertisements for the recitation building is not to be paid for until the 1916 appropriation is available, but that bids may be received on both buildings, and if within the amount of the estimates of cost filed, that a contract may be entered into for the gymnasium building and that the bid for the recitation building may be held in abeyance until the funds in the 1916 appropriation are available, then a contract entered into covering the amount of the lowest regular bid.

"The purpose being that if the institution can advertise for both buildings at one and the same time, they will attract a much larger number of bidders and the competition will be far sharper, and if a contractor knows that he can secure a contract for both buildings, his tools, appliances and equipment, the purchasing of his materials and the arranging of his labor, will make his proposal, it is estimated, from $2,000.00 to $2,500.00 less than if these buildings were bid upon at separate times.

"It is purely unselfish on the part of anybody interested and works an advantage and saving to the institution for the state of Ohio, It seems like a common sense, sound business proposition.

"Trusting that this may have your favorable consideration and that you will find that it does not interfere or conflict in any way with the state building code, and that the trustees may be privileged to act in accordance with the above statement."

The sections of the General Code applicable to your inquiry are sections 2318 and 2323.

Section 2318 provides in part as follows:

"On the day named in the notice, such officer, board or other authority shall open the proposals and award the contract to the lowest bidder. * * *."

Section 2323 provides as follows:

"No contract shall be made for labor or materials at a price in excess of the entire estimate thereof. The entire contract or contracts, including estimates of expenses of architects and otherwise, shall not exceed in the aggregate the amount authorized by law for such institution, building or improvement, addition thereto or alteration thereof."

Under house bill No. 701, in section 2 thereof, the legislature appropriated to the "Combined Normal and Industrial Department of Wilberforce University" $40,000.00 for "gymnasium completed," and at the beginning of said section 2 it is provided that the sum so appropriated "shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1915, or incurred subsequent to June 30, 1917."

In the same bill, in section 3 thereof, there was appropriated to said department for "recitation building complete" the sum of $60,000.00, and at the beginning of said section 3 it is provided:

> "The moneys herein appropriated shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1916, or incurred subsequent to June 30, 1917."

Therefore, the appropriation for the recitation building will not become available until July 1, 1916.

The policy of the state in regard to the awarding of contracts for state buildings under the building regulations is shown by an examination of section 2318, foregoing in part quoted, and it appears from said section that the policy is that the bids shall be opened and the contract immediately awarded—on the day named in the notice for awarding the contract. Of course, it is not always possible to immediately award the contract, but it is at least contemplated that the contract shall be awarded as soon thereafter as circumstances will permit, the board to make up its mind as to who is the lowest bidder, or, as soon as the consent of the governor, auditor of state and secretary of state can be obtained, to accept a bid other than the lowest bid under the provisions of section 2319.

Section 2323 requires that the entire cost of the building shall not exceed in the aggregate the amount appropriated for such purpose.

The amount appropriated for the recitation building will not become available until July 1, 1916, and, therefore, I do not believe that it would be lawful for the board to now advertise for bids on the recitation building and then hold the bids on said building in abeyance until the first day of July, 1916.

In reaching the conclusion above expressed, I am not unmindful of the economic reason advanced by you. However, it may be with equal propriety also assumed that the successful bidder on the gymnasium building will probably make his bid on the recitation building lower by reason of already having his machinery on the ground, so that the state may not lose by strict compliance with the law. Neither is there any assurance at the present time that the same contractor may be the low bidder on each building, or that the price of materials may not be lower when bids may lawfully be received for the recitation building. I also observe that there is no fund from which the cost of advertising for bids on the recitation building may now be paid.

Respectfully,
EDWARD C. TURNER,
Attorney General.

900.

DISAPPROVAL OF RESOLUTION FOR IMPROVEMENT OF THE OHIO RIVER ROAD IN JEFFERSON COUNTY, OHIO.

COLUMBUS, OHIO, Oct. 8, 1915.

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

DEAR SIR:—I have your communication of October 5, 1915, transmitting to me for examination final resolution as to the Ohio river road, Jefferson county, petition No. 1231, I. C. H. No. 7.

I am returning this resolution without my approval for the reason that the county auditor of Jefferson county has not certified that the money required for the payment of the county's portion of the proposed improvement is in the treasury, to the credit of or has been levied, placed on the duplicate and in process of collection for the state and county road improvement fund. The county auditor has duly certified that the money required for the payment of the county's portion of the proposed improvement will be provided for by a bond issue, and such certificate is not sufficient to satisfy the requirements of section 5660 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

901.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENTS OF CERTAIN ROADS.

COLUMBUS, OHIO, Oct. 8, 1915.

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

DEAR SIR:—I have your communication of October 5, 1915, transmitting to me for examination final resolutions as to the following roads:—

"Cleveland-Sandusky, Erie county, petition No. 1125, I. C. H. No. 3;

"Washington-Bloomingburg, Fayette county, petition No. 1546, I. C. H. No. 481;

"Akron-Canfield, Mahoning county, petition No. 1651, I. C. H. No. 87;

"North Lima-East Palestine, Mahoning county, petition No. 1079, I. C. H. No. 89;

"Zanesville-McConnelsville, Muskingum county, petition No. 1376, I. C. H. No. 345;

"Cincinnati-Zanesville, Muskingum county, petition No. 1374, I. C. H. No. 10;

"Zanesville-Otsego, Muskingum county, petition No. 1382, I. C. H. No. 351;

"Payne-Hicksville, Paulding county, Petition No. 1399, I. C. H. No. 427;

"Lancaster-New Lexington, Perry county, petition No. 294, I. C. H. No. 357;

"Newark-New Lexington, Perry county, petition No. 893, I. C. H. No. 356;

"Cleveland-Kent, Portage county, petition No. 1618, I. C. H. No. 460;

"McArthur-Logan, Vinton county, petition No. 862, I. C. H. No. 397;
"Hockingport-Powhatan, Washington county, petition No. 1351, I. C. H. No. 7."

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

902.

BOARD OF EDUCATION—INTERPRETATION OF SECTION 7730, G. C., AMENDED 106 O. L., 398—DUTY TO SUSPEND SCHOOL—PROVISION TO RE-ESTABLISH DIRECTORY—"SUSPENDED DISTRICT" DEFINED.

The phrase "as herein provided" as used in section 7730, G. C., as amended in 106 O. L., 398, modifies the word "suspended" and relates to the authority of the board of education of a rural or village school district to suspend any or all of the schools of its district as well as to the duty of said board to suspend a school where the average daily attendance of the preceding year was below ten, when directed to do so by the county board of education.

The latter provision of said statute is directory rather than mandatory, and the board of education cannot be compelled, upon the filing of the petition as therein provided, to take the necessary steps to re-establish a suspended school if said board finds that the suspended district contains the required number of pupils of lawful school age.

Insofar as rural school districts are concerned, the term "suspended district" as used in said statute relates to a subdivision of the rural school district which, having been established by the board of education of such rural district under authority of sections 7644 and 7646, G. C., has been suspended by said board of education.

COLUMBUS, OHIO, October 8, 1915.

HON. A. B. UNDERWOOD, *Prosecuting Attorney, Medina, Ohio.*
DEAR SIR:—I have your letter of September 30th, which is in part as follows:

"I am writing you for an interpretation of section 7730 of the General Code of Ohio, as last amended in 105-106 Ohio Laws, page 398.

"I will state the local facts that have made necessary an interpretation of this law, so that in giving your opinion you can make an interpretation applicable to said facts.

"The facts are as follows: In Wadsworth township of Medina county, the board of education, acting under section 7730 of the 1914 law, voted about July 15th, 1915, to suspend all but three schools in said township, and to transport the pupils to a building at the township center, said suspension being perfectly legal. The reason for not suspending all the schools in the township, was lack of funds to properly fit the central building, but the board of education planned on being able to suspend and bring in the other schools

before September 1916. Pursuant to the above suspension, the board of education entered into contracts with six haulers to transport the pupils of the suspended districts to said central building for the eight months' school term of 1915-1916. Wagons were purchased for this purpose and all other arrangements completed. And then, in August, the new law, i. e., sections 7730, G. C., as amended in 105-106 Ohio Laws, page 398, took effect, containing a clause for re-establishment. The people of the suspended districts immediately got busy, and on September 14th, 1915, filed separate petitions, signed by more than a majority of the voters, in each of the suspended districts, asking the board of education to re-establish said suspended schools. The board of education thus far have refused to re-establish the schools, and desire to know whether or not they can be forced to re-establish said schools, the people having presented the necessary petitions.

"I desire your interpretation therefore of the terms: 1. *'As herein provided'*; 2. *'May'*; 3. *'Suspended district'*, as these three terms are used in that portion of section 7730, as amended in 105-106, Ohio Laws, page 398, which reads as follows:

" *'As herein provided, may* be re-established by the suspending authority upon its own initiative, or upon a petition asking for re-establishment, signed by a majority of the voters of the *suspended district*, at any time the school enrollment of the said suspended district shows twelve or more pupils of lawful school age.' "

Section 7730, G. C., as amended in 104 O. L., 139, provided as follows:

"The board of education of any rural or village school district may suspend any or all schools in such village or rural school district. Upon such suspension the board in such village school districts may provide, and in such rural school districts shall provide for the conveyance of the pupils attending such schools to a public school in the rural or village district, or to a public school in another district. When the average daily attendance of any school for the preceding year has been below twelve, such school shall be suspended and the pupils transferred to such other school or schools as the local board may direct. No school of any rural district shall be suspended or abolished until after sixty days' notice has been given by the school board of such district. Such notice shall be posted in five conspicuous places within such village or rural school district."

From your statement of facts it appears that the board of education of Wadsworth township rural school district, acting under authority and in compliance with the requirements of the above statute, suspended all but three schools in said district and let contracts for the conveyance of the pupils who would have attended the schools, suspended by said board, to the school established by said board at the center of the township.

This action was taken subsequent to the passage of the act of the general assembly of May 27, 1915, amending said section 7730, G. C., as found in 106 O. L., 398, and prior to August 27, 1915, the date when said act became effective. Said statute as amended now provides:

"The board of education of any rural or village school district may suspend any or all schools in such village or rural school district. Upon such suspension the board in such village school district may provide, and in such rural school district shall provide, for the conveyance of pupils attending such schools, to a public school in the rural or village district, or to a public

school in another district. When the average daily attendance of any school for the preceding year has been below ten, such school shall be suspended and the pupils transferred to another school or schools when directed to do so by the county board of education. No school of any rural district shall be suspended until ten days' notice has been given by the board of education of such district. Such notice shall be posted in five conspicuous places within such village or rural school district, provided, however, that any suspended school as herein provided, may be re-established by the suspending authority upon its own initiative, or upon a petition asking for re-establishment, signed by a majority of the voters of the suspended district, at any time the school enrollment of the said suspended district shows twelve or more pupils of lawful school age."

Under provision of the first part of section 7730, G. C., as found in both of its amended forms, the board of education of any rural or village school district may, in the exercise of its discretion, suspend any or all schools in said rural or village district.

It is evident, that in taking the aforesaid action, the board of education of the rural school district mentioned in your inquiry, exercised the authority conferred by said part of said statute, it being the intention of said board, as stated by you, to suspend the remaining three schools before September, 1916. It further appears from your statement of facts, that on September 14, 1915, separate petitions signed by more than a majority of the voters in each of the suspended districts were filed with said board of education asking for the re-establishment of said schools.

In view of all the facts presented by you, you first inquire whether said board of education may now be compelled to re-establish said suspended schools and in your second question you ask for an interpretation of the terms "as herein provided", 'may" and "suspended district" as the same are used in the latter part of section 7730, G. C., as amended and as now in force.

The interpretation given to the terms mentioned in your second question will determine the answer to your first question.

The phrase "as herein provided," as I understand it, modifies the word "suspended" and relates to the authority of the board of education of a rural or village school district to suspend any or all of the schools of its district as well as to the duty of said board to suspend a school where the average daily attendance of the preceding year was below ten, when directed to do so by the county board of education.

Inasmuch as the action of the board of education of the rural school district referred to in your inquiry was taken after the passage of the act of the general assembly amending said section 7730, G. C., as found in 106 O. L., 398, and in contemplation of the probable going into effect of said amendment, and in view of the fact that the same authority was conferred on said board of education by the first part of said section as found in both of its amended forms, I am of the opinion that the provision of the latter part of said section as amended and as now in force applies to the suspended schools in question, and that said board of education is authorized within the limitations prescribed by said latter part of said amended statute to re-establish said suspended schools, either upon its own initiative or upon the filing of the petitions as therein provided.

Conceding therefore that said provision of the amended statute is applicable to the schools in question, it becomes necessary in answering your first question to determine whether said provision is mandatory in view of the fact that a majority of the voters of each one of the suspended districts have filed petitions with said board of education asking for the re-establishment of the schools in said districts. In other words, does the term "may" as used in the latter part of said statute have the force of "shall."

In the case of Railroad Company v. Mowatt, 35 O. S., 284, the court in its opinion at page 287 said:

> "Where authority is conferred to perform an act which the public interest demands, "may" is generally regarded as imperative. Whether it is to be so read in another case depends upon a fair construction of the statute."

In vol. 14, Am. & Eng. Encyc. of Law, at page 979, the general rule is expressed as follows:

> "The word 'may' in a statute is sometimes used in a mandatory and sometimes in a directory and permissive sense. It has always been construed as 'must' or 'shall' whenever it can be seen that the legislative intent was to impose a duty and not merely a privilege or discretionary power, and where the public is interested and the public or third parties have any claim de jure to have the power to exercise."

While it may be argued, in view of the foregoing citations, that the latter provision of section 7730, G. C., as amended in 106 O. L., 398, is mandatory, the fact must not be overlooked that the legislature has itself recognized a distinction between the word "may" and the word "shall" in providing in the first part of said statute, in both of its amended forms that, "upon such suspension the board in such village school district *may* provide, and in such rural school district *shall* provide, for the conveyance of pupils attending such schools to a public school in the rural or village district, or to a public school in another district."

I have already held in a former opinion, that the local board of education is the "suspending authority" referred to in said statute. I think it was the intention of the legislature to vest in said local board the discretion to determine, in view of all the facts and circumstances in each particular case, whether or not a suspended school should be re-established "at any time the school enrollment of the said suspended district shows twelve or more pupils of lawful school age," even though a petition signed by at least a majority of the voters of the suspended district is filed with said board asking for such re-establishment.

In this connection I call your attention to the provisions of section 7644, G. C., which authorize each board of education to establish a sufficient number of elementary schools to provide for the free education of the youth of school age within the district under its control "at such places as will be most convenient for the attendance of the largest number thereof."

In view of this provision of the statute it would be ureasonable to hold that the term "may" as above used has the force of "shall" and that it becomes the duty of a board of education, upon filing of the petitions as provided in said statute, to take the necessary steps to re-establish a suspended school if said board finds that the suspended district contains the required number of pupils of lawful school age.

I am of the opinion, therefore, that the latter provision of said statute is directory rather than mandatory, and that the board of education of the rural school district in question cannot be compelled by writ of mandamus to take the necessary steps to re-establish the schools heretofore suspended by said board.

You further inquire as to the meaning of the term "suspended district" as used in said statute. In this connection I call your attention to the provisions of section 7646, G. C., as amended in 104 O. L., 228, which are as follows:

> "The board of education of each rural school district shall establish

and maintain at least one elementary school in each subdistrict under its control, unless transportation is furnished to the pupils thereof as provided by law."

Under the provisions of this statute, taken in connection with the provisions of section 7644, as above quoted, the board of education of a rural school district has the authority to divide said rural school district into subdistricts and establish and maintain an elementary school in each of said subdivisions.

I am of the opinion, therefore, that insofar as rural school districts are concerned, the term "suspended district" as used in the above provision of section 7730, G. C., relates to a subdivision of the rural school district which, having been established by the board of education of such rural district under authority of sections 7644 and 7646, G. C., has been suspended by said board of education.

Respectfully,
EDWARD C. TURNER,
Attorney General.

903.

COUNTY BOARD OF EDUCATION—PROVISIONS OF LAW REQUIRING TRANSFER OF TERRITORY IS DIRECTORY—SECTION 4696, G. C., 106 O. L., 397, DISCUSSED.

The provision of section 4696, G. C., as amended in 106 O. L., 397, that "if at least seventy-five per cent. of the electors of the territory petition for such transfer, the county board of education shall make such transfer," is directory.

COLUMBUS, OHIO, Oct. 8, 1915.

HON. MILTON HAINES, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR:—In your letter of September 23rd, you enclose a letter addressed to me by D. H. Sellers, superintendent of Union county schools, under date of September 22, 1915, in which he states that certain residents of a portion of the territory comprising Mill Creek rural school district, of Union county, have petitioned the board of education of said county to transfer said part of said territory to the Ostrander village school district in Delaware county, and that it is claimed by those persons presenting the petition to said county board that said petition is signed by over eighty per cent. of the electors residing in said part of said territory.

Mr. Sellers requests my opinion as follows:

"Is that portion of section 4696, which reads:

" 'Provided however that if at least 75 per cent. of the electors of the territory petition for such transfer, the county board of education *shall* make such transfer,' mandatory upon the county board irrespective of all other provisions of law, and all considerations as to the equitable distribution of territory among the school districts concerned?"

As you are probably acting as the legal adviser of the Union county board of education I deem it proper to address my opinion on the question asked by Mr. Sellers to you.

This question calls for an interpretation of the provisions of section 4696, G. C., as amended in 106 O. L., 397. The material parts of this statute are as follows:

"1. A county board of education may transfer a part or all of a school district of the county school district to an adjoining exempted village school

district or city school district, *or to another county school district,* provided at least fifty per centum of the electors of the territory to be transferred petition for such transfer.

"2. If at least seventy-five per cent. of the electors of the territory petition for such transfer, the county board of education *shall* make such transfer.

"3. No such transfer shall be in effect until the county board of education and the board of education to which the territory is to be transferred each pass resolutions by a majority vote of the full membership of each board, and until an equitable division of the funds or indebtedness be decided upon by the boards of education acting in the transfer."

Under the first part of said statute as above quoted the board of education of a county school district is authorized to transfer territory to an adjoining county school district upon the filing of a petition of at least fifty per cent. of the electors of such territory asking for such transfer.

The second part of said statute by its terms makes it the duty of said county board to make such transfer when said petition is signed, by at least seventy-five per cent. of the electors of such territory.

In either event, however, by provision of the third part of said statute, said transfer will not become effective until said county board and the board of education to which the territory is transferred pass resolutions by a majority vote of the full membership of such boards, in favor of such transfer, and until an equitable division of the funds or indebtedness be decided upon by said boards.

While the second part of said statute as above quoted is mandatory in its terms, and would seem to make it the duty of a county board to transfer territory under the condition therein set forth, especially in view of the provision contained in the first part of said statute, it seems clear that said provision must be considered directory rather than mandatory when the same is taken in connection with the provision contained in the third part of said statute, which modifies said former provision, and makes the passing of resolutions by a majority vote of the full membership of the boards of education, favoring such transfer, and an agreement between said boards upon an equitable division of the funds or indebtedness of the district from which such territory is to be transferred, conditions precedent to such transfer becoming effective.

In this connection I call your attention to opinion No. 656 of this department, rendered to the bureau of inspection and supervision of public offices, under date of July 27, 1915, in answer to a request for an interpretation of section 4782, G. C., as amended in 104 O. L., 159, which provides:

"When a despository has been provided for the school moneys of a district, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members, shall dispense with a treasurer of the school moneys, belonging to such school district. In such case, the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school districts."

I quote the following from said opinion:

"By comparing this section in its present form with the form thereof as it existed prior to the amendment referred to, it is discovered that the only change made therein by the general assembly in 1914, was to substitute the word 'shall' before the word 'dispense' for the word 'may.' This change, together with some of the other provisions of the act in which the amendment

is found, 104 O. L., 158, makes it seem as if the intention of the legislature was to make section 4782 mandatory instead of permissive merely, as it had formerly been. But whatever may have been the latent intention of the legislature, it is clear that in order that its enactment might have the effect of imposing a mandatory duty, such intention must have been effectively expressed. The test of whether or not a statute is mandatory is furnished by considering whether or not compliance with it may be effectively enforced by mandamus. The character of the writ of mandamus is such as that it will not issue except where the right thereto is clear, nor in a case where the issuance would not accomplish any practical result.

"It is manifest that mandamus would not lie to compel individual members of a board of education to act under section 4782 of the General Code, because the action therein referred to is to be 'by resolution adopted by a vote of a majority of its members,' from which it clearly follows that the right of the individual members to vote as they see fit, is preserved."

In conclusion it was held that the provision contained in the first part of section 4782, G. C., as above quoted, is directory rather than mandatory.

Inasmuch as said provision of section 4782, G. C., as amended, is similar to the provision contained in the second part of section 4696, G. C., I think the reasoning upon which the conclusion in the aforesaid opinion was based may be applied in determining the proper interpretation to be given to said provision of said section 4696, G. C. I am therefore enclosing a copy of said opinion for your consideration.

Replying to Mr. Sellers' question, I am of the opinion that said provision of said statute must be considered directory rather than mandatory and that under the provision of the latter part of said statute the transfer of the territory in question will not be in effect until the boards of education of Union and Delaware counties pass resolutions and decide upon an equitable division of the funds or indebtedness in compliance with the requirements of said provision of said statute.

Respectfully,
EDWARD C. TURNER,
Attorney General.

904.

BOARD OF EDUCATION—CHANGES IN TEXT BOOKS FOR USE IN SCHOOLS—NO AUTHORITY FOR BOARD TO PAY EXCHANGE PRICE BETWEEN OLD AND NEW BOOKS WHEN OWNERSHIP REMAINS WITH PUPILS.

A board of education, in making change in text books for use in the public schools of its district, has no authority in law to pay the exchange price between the old and new books from its contingent fund, the ownership of the newly adopted books remaining with the pupils.

COLUMBUS, OHIO, October 8, 1915.

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

GENTLEMEN:—In your letter of September 23rd, you request my opinion on the following questions:

"May boards of education, which make changes in text books for use in the public schools, pay the exchange price between the old and the new books from their contingent fund, the ownership of the newly adopted books remaining with the pupils?

"If you hold such action to be illegal, and in the course of auditing achool accounts, this department finds that such expenditures had been made upon authority of the board, would the members of the board be individually liable?"

Under provision of section 7709, G. C., as amended in 104 O. L., 225, before a text book can be adopted and purchased by any school board in this state, the publisher must file a copy of such book in the office of the superintendent of public instruction, together with the published wholesale price list thereof. This same condition applies to a revised edition of said text book.

Upon the filing of said text book, or revised edition of the same, together with said wholesale list price thereof, section 7710, G. C., as amended in 104 O. L., 225, makes it the duty of a commission consisting of the governor, secretary of state and superintendent of public instruction, to immediately fix the maximum price at which such book may be sold to or purchased by boards of education, adopting the same under authority of section 7713, G. C., which price must not exceed seventy-five per cent. of the published list wholesale price, and the superintendent of public instruction must notify the publisher of such book so filed of the maximum price fixed. If the publisher notifies the superintendent in writing that he accepts the price fixed and agrees in writing to furnish such book during a period of five years at said price, such acceptance and agreement gives the publisher the right to offer said book for sale to said boards of education.

Section 7713, G. C., provides:

"At a regular meeting, held between the first Monday in February and the first Monday in August, each board of education shall determine by a majority vote of all members elected, the studies to be pursued, and which of such text books so filed shall be used in the schools under its control. But no text books now in use or hereafter adopted shall be changed, nor any part thereof altered or revised, nor any other text book be substituted therefor for five years after the date of the selection and adoption thereof, as shown by the official records of such boards, except by the consent at a regular meeting, of five-sixths of all members elected thereto. Books so substituted shall be adopted for the full term of five years."

The above provision of the statute, making it the duty of boards of education to adopt text books for terms of five years, was originally enacted by the general assembly April 22, 1896(92 O. L., 283), and required said boards of education, upon receipt of the proper information from the state school commissioner, to meet on the third Monday of August of that year and determine what text books should be used for the term of five years from said date.

In compliance with said requirement of the statute, text books (with the exception of revised editions and books substituted in place of those regularly adopted, which have been adopted at different times within said five year periods), have been adopted by boards of education in the years 1901, 1906 and 1911. It follows that the present term will expire in August, 1916.

Section 7714, G. C., authorizes the board of education of a school district to purchase from the publisher or publishers the number of books required by the schools under its charge.

Section 7715, G. C., provides:

"Each board of education shall make all necessary provisions and arrangements to place the books so purchased within easy reach of and accessible to all the pupils in their district. For that purpose it may make such con-

tracts, and take such security as it deems necessary, for the custody, care and sale of such books, and accounting for the proceeds; but not to exceed ten per cent. of the cost price shall be paid therefor. Such books must be sold to the pupils of school age in the district, at the price paid the publisher, and not to exceed ten per cent. therefor added. The proceeds of sales shall be paid into the contingent fund of such district. Boards also may contract with local retail dealers to furnish such books at prices above specified, the board being still responsible to the publishers for all books purchased by it."

Section 7716, G. C., provides:

"When pupils remove from any district, and have text books of the kind adopted in such district and not the kind adopted in the district to which they remove, and wish to dispose of them, the board of the district from which they remove, if requested, shall purchase them at the fair value thereof, and resell them as other books. Nothing herein shall prevent the board of education from furnishing free books to pupils provided by law."

Under provision of section 7739, G. C., the board of education of a school district may, in the exercise of its discretion, furnish free text books to all the pupils attending the public schools in such district. Said section provides, however, that:

"All school books furnished as herein provided, shall be the property of the district, and loaned to the pupils on such terms and conditions as each such board prescribes."

Your first question relates to text books adopted by boards of education in compliance with the requirements of the statutes as above set forth, and sold to the pupils in compliance with the provisions of section 7715, G. C. The pupils being the owners of said text books, you inquire whether a board of education, in making a change in text books, either at the regular time for adopting the same or at other times, by a vote of five-sixths of all its members, as provided in section 7713, G. C, may pay the exchange price between the old and new books from the contingent fund, the ownership of the newly adopted books remaining with the pupils.

Upon careful examination of the statutes, I find no such authority. I am of the opinion, therefore, that your first question must be answered in the negative.

Replying to your second question, I am of the opinion that, if an audit of the school accounts of the board of education of a school district discloses the fact that such expenditures have been made by said board, the members of said board voting for the same are individually liable for such expenditures, and are subject to findings for the amounts so expended.

I am informed, however, that boards of education have been advised by one of your examiners that such expenditures are legal, and in view of this fact, I doubt whether any court or jury would sustain a finding against the members of a board of education voting for such an expenditure. I suggest, however, in view of the conclusion reached in the above opinion that boards of education be properly instructed so that in the future they may govern themselves accordingly.

Respectfully,

EDWARD C. TURNER,

Attorney General.

905.

"BLUE SKY" LAW—BEFORE CERTIFICATE MAY BE ISSUED TO AUTHORIZE DISPOSAL OF SECURITIES IT MUST APPEAR NOT ONLY "THAT LAW HAS BEEN COMPLIED WITH AND THAT BUSINESS OF APPLICANT IS NOT FRAUDULENTLY CONDUCTED" BUT ALSO THAT PROPOSED DISPOSAL OF SECURITIES IS NOT ON GROSSLY UNFAIR TERMS AND THAT ISSUER OF SECURITIES IS SOLVENT.

Before the commissioner of the "Blue Sky" law may issue his certificate authorizing the disposal of securities it must affirmatively appear that the proposed disposal of such securities is not on grossly unfair terms, and that the issuer is solvent.

Commissioner herein advised to refuse certificate authorizing sale of $34,000 of the capital stock of The Investment Securities Company.

COLUMBUS, OHIO, Oct. 8, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of September 9, 1915, in which you set forth in full a copy of a letter received by you from Mr. George R. McKay. This letter is very long and, stripped of verbiage in the way of argument and statement of business prospects, reveals the following state of facts:

George R. McKay holds a contract with The Associated Investment Company to sell all of said company's capital stock upon an eight per cent. selling commission basis. McKay represents that The Associated Investment Company is in prosperous condition, paying good dividends, and that he has already sold $150,000.00 of its stock under the terms of his contract. His anticipated net profit for selling the remaining $850,000.00 of its capital stock is $44,000.00, which he has fixed as the value of his stock-selling contract.

A corporation known as "The Investment Securities Company" was incorporated, presumably by McKay himself, with an authorized capital stock of $10,000.00, which has since been increased to $100,000.00. Its purpose is to take over McKay's stock-selling contract and to develop an organization for the purpose of handling the sale of the stock of the said The Associated Investment Company, and of other corporations.

McKay sold and turned over to The Investment Securities Company his stock-selling contract with The Associated Investment Company, and received in consideration all of its capital stock, amounting to $100,000.00 par value. Thereupon he (McKay) voluntarily and without consideration turned back to the said The Investment Securities Company stock of the said company to the amount of $34,000.00 par value, with the understanding and condition that such stock is to be sold at such price as will realize $25,500.00 net, which amount is to be used by the corporation in building up a selling organization and as its working capital.

McKay represents that the anticipated profit of $44,000.00 which will be realized from his stock-selling contract with The Associated Investment Company, which he has turned over to The Investment Securities Company, plus the $25,500.00 to be realized from the sale of the said $34,000.00 of capital stock of The Investment Securities Company, will place in the treasury of the said Investment Securities Company the sum of $69,500.00, thus making all stock actually worth $69.50 per share.

Based upon the facts above set forth, you request my opinion as follows:

> "This department asks the opinion of the attorney general's department as to whether or not, under the circumstances stated in the letter of Mr. McKay, this issue of $34,000.00 of the stock above mentioned, should be certificated."

In enacting the provisions of the blue sky law, sections 6373-1, et seq. of the General Code, the general assembly adopted two methods of accomplishing its purpose of restricting and regulating the sale of securities in Ohio, and thereby protecting the purchasing public; 1st by requiring dealers, with certain exceptions, to be licensed, 2nd by requiring the certification of the securities by the superintendent of banks, as "Commissioner," with certain exceptions, before the same can be sold in Ohio. The law attempts to protect the public not only by eliminating dishonest and irresponsible agents or dealers, but also by preventing the issuance and sale of unsound or worthless securities.

Sections 6373-14 and 6373-16 of the General Code are the sections providing for the investigation and certification of the securities and are in part as follows:

> "Section 6373-14. For the purpose of organizing or promoting any company, or assisting in the flotation of the securities of any company after organization, no issuer or underwriter of such securities, and no person or company for or on behalf of such issuer or underwriter shall, within this state, dispose or attempt to dispose of any security until such commissioner shall issue his certificate as provided in section 6373-16 of the General Code, which shall not be done until, together with a filing fee of five dollars, there be filed with the commissioner the application of such issuer or underwriter for the certificate provided for in section 6373-16, General Code, and, in addition to the other information hereinbefore required by paragraphs (a), (b), (c) and (d) of section 6373-9 of the General Code, the following: * * *"
>
> "Section 6373-16. Said 'commissioner' shall have power to make such examination of the securities or of property named in the next two preceding sections as he may deem advisable, and if it shall appear that the law has been complied with and that the business of the applicant is not fraudulently conducted, and that the proposed disposal of such securities or other property is not on grossly unfair terms, and in the case of securities that the issuer is solvent, upon the payment of a fee of ten dollars, the commissioner shall issue his certificate to that effect, authorizing such disposal. But if it shall not affirmatively so appear he shall so notify the applicant, in writing, and of his refusal to issue such certificate. * * *"

Under the provisions of section 6373-16, above quoted, before the "commissioner" may issue his certificate it must affirmatively appear not only "that the law has been complied with and that the business of the applicant is not fraudulently conducted," but "that the proposed disposal of such securities or other property is not on grossly unfair terms, and in case of securities, that the issuer is solvent."

When an application is presented to him it is the duty of the commissioner to determine from the facts presented and from his investigation whether such affirmative showing has been made. Whether a certificate should in a given instance be granted or not is rather a question of fact than of law. In the present instance, however, sufficient facts appear from the admissions and statements of Mr. McKay's letter to warrant me in expressing my opinion.

He admittedly paid only $44.000.00 for all the $100,000.00 par value capital stock of the said Investment Securities Company, and no part of the $44,000.00 paid for such stock is money, but consists entirely of anticipated profits in a contract to sell, upon a commission basis, the capital stock of another company named "The Associated Investment Company." If this contract to sell the stock of The Associated Investment Company upon a commission basis is of any value, it must necessarily be by reason of Mr. McKay's ability to sell stock, and not by virtue of any intrinsic value in the contract itself. It is to be observed that it does not appear from Mr. McKay's

statement that his services in carrying out this stock-selling contract are to be at the disposal of The Investment Securities Company without further compensation, or that they are to be rendered as part consideration for the stock issued to him.

It is to be presumed that if he continues actively to sell the stock of The Associated Investment Company he will receive compensation for his services either in commissions or by way of salary. He therefore is selling to an Investment Securities Company a contract of doubtful value at more than double its anticipated value as fixed by himself, which anticipated value is undoubtedly based largely upon his personal ability to make stock sales.

Not only has Mr. McKay failed to show "that the proposed disposal of such securities * * * is not on grossly unfair terms," but it seems clear to me that his statement of the facts discloses exactly the opposite situation—that the whole scheme is a typical example of watered stock, the sale of which, if permitted, would amount to a fraud.

I also call your attention to a further condition that must affirmatively appear before the commissioner is authorized to issue his certificate under the provisions of section 6373-16, viz.: "that the issuer is solvent." Under the facts presented in Mr. McKay's letter, The Investment Securities Company, to my mind, is insolvent. It has issued all of its stock and in return has no assets except the $34,000.00 of its own stock returned to it by Mr. McKay, and a contract of exceedingly doubtful value, authorizing it to sell upon a commission basis the capital stock of another company.

I therefore advise you that upon the facts stated in Mr. McKay's letter you should not issue a certificate under the provisions of section 6373-16 authorizing the disposal of $34,000.00 of the capital stock of The Investment Securities Company.

Respectfully,
EDWARD C. TURNER,
Attorney General.

906.

ROADS AND HIGHWAYS—CASS HIGHWAY LAW—COUNTY HIGHWAY SUPERINTENDENT—WITHOUT AUTHORITY TO BIND COUNTY BY ANY CONTRACT—COUNTY COMMISSIONERS MUST AUTHORIZE OR APPROVE.

The county highway superintendent has no authority under the Cass highway law to bind the county by any contract made by him and not authorized or approved by the county commissioners.

COLUMBUS, OHIO, October 9, 1915.

HON. JOHN M. MARKLEY, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—I have your communication of October 4, 1915, in which you state that the surveyor of your county is claiming that under the new road law he has the authority to make contracts with reference to bridges and pikes, independent of the county commissioners, and that all the authority the county commissioners have in the matter is to pay the bills for the contracts he makes. Your inquiry is as to whether the claim of the county surveyor is well founded.

By the new road law I understand you to mean the Cass highway law, found in 106 O. L., 574. Chapter VII of the Cass highway law relates particularly to the duties of the county highway superintendent. It is provided by section 155 of the Cass highway law, section 7198, G. C., that the county highway superintendent may,

with the approval of the county commissioners or township trustees, employ such laborers, teams, implements and tools, and purchase such material as may be necessary in the performance of his duties.

It is provided by section 158 of the act, section 7201, G. C., that the county highway superintendent may lease or hire machinery, tools and equipment for highway, culvert or bridge repair, *at a price to be approved by the county commissioners or township trustees.* It is provided by section 160 of the act, section 7203, G. C., that the county highway superintendent may, *with the approval of the county commissioners or township trustees,* purchase from any public institution, any road material, machinery, tools or equipment, quarried, mined, prepared or manufactured by said institution, provided the same conform to the standard specifications therefor, for highways, bridge or culvert work in said county.

Section 165 of the act, section 7208, G. C., provides that when lands are entered upon under the provisions of the preceding section, the county highway superintendent shall agree with the owners of such lands, *subject to the approval of the county commissioners or township trustees,* as to the amount of compensation and damages, if any, sustained or to be sustained by the owners. It is provided by section 168 of the act, section 7211, G. C., that the county highway superintendent *with the approval of the county commissioners or township trustees* may construct and maintain watering troughs and drinking fountains along the public highways and contract with property owners to maintain the same. It is provided by section 170 of the act, section 7213, G. C., that where lands are entered for the purpose of constructing a temporary highway, the county highway superintendent may, *with the approval of the county commissioners or township trustees,* agree as to damages with the owners of such lands.

All of the provisions referred to above are found in the chapter of the act relating especially to the powers and duties of the county highway superintendent, and they point unmistakably to the conclusion that the county superintendent is not authorized to make any contract binding upon the county unless such contract be authorized or approved by the county commissioners. I find no provision either in the chapter referred to or in any other part of the act which would warrant the conclusion that the legislature intended to confer upon the county highway superintendent authority to bind the county by any contract made by him and not authorized or approved by the county commissioners.

Answering your question specifically, it is my opinion that the county highway superintendent has no authority under the Cass highway law to bind the county by any contract made by him and not authorized or approved by the county commissioners.

Respectfully,
EDWARD C. TURNER,
Attorney General.

907.

STATE HIGHWAY COMMISSIONER—CASS HIGHWAY LAW—COUNTY HIGHWAY SUPERINTENDENT—APPOINTMENT OF SUPERINTENDENTS AND INSPECTORS SHOULD BE MADE UNDER SECTION 1219, G. C., WHEN COUNTY SUPERINTENDENT HAS CHARGE OF STATE ROADS, OTHERWISE HIGHWAY COMMISSIONER APPOINTS UNDER SECTION 1182, G. C.

In those counties in which the county highway superintendent has been designated to have charge of all highways, bridges and culverts, within his county under control of the state, such county highway superintendent has the authority under section 212 of the Cass highway law, section 1219, G. C., to appoint such superintendents and inspectors as are needed on state work, his action in the premises being subject to the approval of the chief highway engineer.

In those counties in which some engineer other than the county highway superintendent is designated to have charge of the construction, improvement, maintenance and repair of roads under control of the state, the state highway commissioner has the authority under section 175 of the Cass highway law, section 1182, G. C., to appoint the superintendents and inspectors needed on state work.

COLUMBUS, OHIO, October 9, 1915.

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

DEAR SIR:—I have your communication of October 5, 1915, in which you state that the state highway department has been making appointments of inspectors on state road improvements under authority of the provisions of section 175 of the Cass highway law, section 1182, G. C., to the effect that the state highway commissioner may appoint such superintendents, inspectors and other employes within the limits of appropriations as he may consider necessary to carry out the provisions of the chapter relating to the construction, improvement, maintenance and repair of roads and bridges by the state highway department. You further state that your attention has been directed to the provision of section 212 of the Cass highway law, section 1219, G. C., to the effect that the county highway superintendent, with the approval of the chief highway engineer, may employ such superintendents and inspectors as may be necessary in the construction of a highway improvement, and you inquire as to whether the state highway commissioner or the county highway superintendent is to be regarded as the appointing officer of the above mentioned employes.

A consideration of certain other provisions of the Cass highway law discloses that any conflict between the provisions referred to by you is only apparent, and that the provisions may be reconciled and effect given to both.

The superintendents and inspectors referred to in both provisions are, of course, such superintendents and inspectors as are required on work carried on by the state highway department. Under the provisions of sections 139 and 142 of the act, being sections 7182 and 7185, G. C., the state highway commissioner may designate the county highway superintendent to have charge of all highways, bridges and culverts within his county under control of the state, or may under certain conditions designate some other engineer. It is impossible to conclude that the legislature intended by section 1219, G. C., to provide that the county highway superintendent might employ superintendents and inspectors on state work in those counties in which some other engineer had been designated to have charge of all highways, bridges and culverts within such counties under control of the state.

The provision of the section in question to the effect that the county highway superintendent may, with the approval of the chief highway engineer, employ super-

intendents and inspectors on improvements in the making of which the state participates, must therefore be held to apply only in those counties in which the county highway superintendent has been designated to have charge of the highways under control of the state.

Authority to employ superintendents and inspectors upon state work in those counties in which some other engineer is designated to have charge of the highways under control of the state must, therefore, be found in some other part of the act, and such authority is to be found in the provision of section 175 of the act, section 1182, G. C., to the effect that the state highway commissioner may appoint such superintendents, inspectors and other employes within the limits of appropriations as he may consider necessary to carry out the provisions of law relating to the construction, improvement, maintenance and repair of roads and bridges by the state highway department.

It is therefore my opinion that in those counties in which the county highway superintendent has been designated to have charge of all highways, bridges and culverts within his county under control of the state, such county highway superintendent has the authority to appoint such superintendents and inspectors as are needed on state work, his action in the premises being subject to the approval of the chief highway engineer. In those counties in which some engineer other than the county highway superintendent is designated to have charge of the construction, improvement, maintenance and repair of roads under control of the state, the state highway commissioner has the authority to appoint the superintendents and inspectors needed on state work.

Respectfully,
EDWARD C. TURNER,
Attorney General.

908.

ROADS AND HIGHWAYS—STATE HIGHWAY COMMISSIONER—WHERE CONTRACT NOT COMPLETED ON DAY FIXED BY TERMS OF CONTRACT—PART OF INCOMPLETED WORK RE-LET TO SAID CONTRACTOR AND REMAINING PART COMPLETED BY HIGHWAY DEPARTMENT—SAME APPROVED.

When a contractor fails to complete the work included in a contract with the state highway commissioner on the day fixed for such completion by the terms of said contract, the state highway commissioner may re-let a part of the uncompleted work to said contractor and complete the remaining part of said work through the forces of the state highway department.

COLUMBUS, OHIO, October 9, 1915.

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

DEAR SIR:—In your letter of September 14th, you request my opinion as follows:

> "I am submitting herewith contract between the State of Ohio and The Adams Bros. Contracting Company.
>
> "The agreement to which we wish to call your especial attention is headed—'Proposal for Repairs,' and is as follows:
>
> " 'The undersigned further propose to furnish all material, all the tools, and do all the work necessary for the repair of bridges, culverts, masonry

and drainage structure (approximate estimate of cost of such repairs being $4,700.00), in accordance with the plans and specifications for such repairs for a sum equal to the cost to us for the labor and materials plus 20 per cent. of said cost.'

"This proposal is signed by The Adams Bros. Contracting Company. Work was commenced under this contract and the sum of approximately $5,500.00 expended in an effort toward the completion of the work, but only two-thirds of the repairs have been completed, and partly owing to the fact that the contractor has not been prosecuting the work economically, the state highway department desires to place the work under its own direct control.

"Under date of August 25th, this department wrote The Adams Bros. Contracting Co. as follows:

" 'Regarding the repair of the old stone bridges on the national road in Belmont county, would say that our funds, as appropriated for this work under your contract, were all exhausted some time ago.

"'I now deem it advisable to continue this work through the forces of our own department. Inasmuch as the amount of money required to complete the improvement is indeterminate we will not hold you for the completion of the force account structures, but will do this work ourselves.

"'In carrying on your contract we will expect not to hinder you in doing our work, and request your co-operation that both forces employed on the improvement may go forward as rapidly as possible.'

"The answer of the contractor is dated September 4th, and is also quoted below:

"'We understand from your recent letter that your department claims the right to use your own men in making repairs to bridges and culverts, etc., on our portion of this improvement.

"'Our claim is that your department has not this right. Under our interpretation of our contract we have contracted to do this work on force account and are to receive 20 per cent. profit. If your department insists on doing this work, we shall claim our profit.

" 'Before anything is done in this regard, would like to have a talk with you. Please let us hear from you and let us know when and where we could see you.'

"With the return of the attached contract, I shall be pleased to have your opinion as to what the rights of the state highway department are with relation to this contract, and whether or not it is necessary for the department to pay The Adams Bros. Contracting Co. any percentage of the total cost of the work if completed by force account by the state highway department."

The contract in question contains the following provision:

"The party of the second part further covenents and agrees that the following papers shall be bound with, and be an essential part of this contract: Notice to contractors, instructions to bidders, specifications, proposal for the work and bond for performance of the contract."

In the notice to contractors the date fixed for the completion of said contract was August 1, 1915.

Under the head of "Instructions to Bidders" I find the following:

"Should the contractor fail to complete the work herein contracted for on or before the date agreed upon as mentioned elsewhere in this contract,

or a later date set by the commissioner as hereinafter provided, he shall be liable for, and shall pay to the state, an amount of money equal to that which shall have been paid as salaries, wages and expenses to the person or persons employed by the state in engineering, superintending and inspecting the work from the above named date for completion until the same shall actually be completed and accepted.

"If the commissioner decides after due investigation that causes over which the contractor had no control delayed the completion of the work on or before the date specified, the commissioner may grant an extension of time for the completion of said work, but such extension of time shall not relieve the bond annexed to this agreement or the sureties thereon from any of the obligations therein expressed.

"If the contractor has not commenced, or carried forward with reasonable progress, or is improperly performing, or has abandoned, or fails, or refuses to complete the work under the provisions of this contract, the state highway commissioner may re-let the work or he may complete the same by force account, and in either case the highway commissioner may deduct the cost and expense thereof from any moneys that may be due or become due such contractor, and if there is not sufficient moneys due the contractor to pay for said work, the highway commissioner shall require the contractor or his bondsmen to pay for it."

It appears, however, from the statement made in your letter to The Adams Bros. Contracting Company, that it is your desire that said company shall complete all of the work included in items 1 and 2 under the head of "Proposal for the Work," and relating to the paving of the roadway proper and to grading said roadway and constructing new masonry structures, etc., as outlined in said items, and that only the work of completing the repairs of the existing bridges, culverts, masonry and drainage structures shall be taken over by your department and completed by force account.

I do not think you would have the right to take over a part of the work which is included in said contract and which was not completed on August 1, 1915, and at the same time permit the contracting company to complete the remaining part of said work according to the terms of said contract.

As I view it, this would have the effect of granting an extension of time to the contracting company and would recognize said contract as in full force and effect as to the part of the contract to be completed by said company and would give to said company the right to complete the repair work in question according to the terms of said contract, and in case said company would permit your department to complete said repair work by force account it would still be entitled to its percentage of profit according to said terms of said contract. Said company would, of course, be liable to the state for an amount of money equal to that which would be paid as salaries, wages and expenses of the person or persons employed by the state in engineering, superintending and inspecting the work from said date of August 1st until the same would be actually completed and accepted, and said extension would not relieve said company or the sureties on its bond from any of the obligations therein expressed.

Replying to your question, I am of the opinion that, unless you have granted an extension of time to said contracting company for the completion of the aforesaid contract, you have had the right since said date of August 1, 1915, to take over the work included in said contract and not completed on said date according to the terms of said contract and to re-let said work or complete the same by force account, and in either case, to deduct the cost and expense thereof from any moneys that may be due or become due said company, and if there should not be sufficient moneys due said company to pay for said work you could require said company or its bondsmen to

make up the deficit. On the other hand, I am of the opinion that by permitting said company to complete the work of paving the roadway proper and of grading said roadway and constructing new masonry structures you would thereby grant an extension of time to said company, and if said company permitted you to finish the aforesaid repair work it would still be entitled to its profits according to the terms of said contract, subject, however, to the claim of the state for the additional expense caused by the delay in the completion of said contract after date of August 1, 1915.

However, your plan for completing the work may be realized by re-letting that part of said work included in said contract in said items 1 and 2, above referred to, which remains uncompleted, to The Adams Bros. Contracting Company. The repair work in question may then be completed through the forces of your department.

Respectfully,
EDWARD C. TURNER,
Attorney General.

909.

CHATTEL LOAN LAW—LICENSEE CAN ONLY MAINTAIN ONE PLACE OF BUSINESS—CENTRAL LOAN COMPANY, DAYTON, OHIO.

A licensee, under sections 6346-1, *et seq., G. C., can only maintain one place of business for the purpose of conducting or assisting in such licensed business.*

The Central Loan Company holding a license to carry on a chattel loan business at Dayton cannot, under authority of such license, make loans or renewal of old loans, at Piqua; nor can it maintain a place of business at Piqua for collecting such loans.

COLUMBUS, OHIO, Oct. 11, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of October 2, 1915, requesting my opinion as follows:

"Columbus, O., Oct. 2, 1915.

"DEAR SIR:—We are in receipt of the following enquiry:

" 'Dayton, O., Sept. 25, 1915.

" '*State Banking Department.*

" 'GENTLEMEN:—For several years we have maintained an office for making chattel loans at both Dayton and Piqua, Ohio.

" 'We have secured our license to continue business at Dayton, but we have decided to close our Piqua office, therefore, we have not applied for license in that city.

" 'We have about twenty-five accounts in Piqua that are past due, and we want to renew the balance on them for a period of about four months. It is our intention to make the renewals from the Dayton office, as we have a number of other accounts at Piqua still unpaid, but which will be paid at the Piqua office until closed.

" 'We do not intend to make any new loans at that place whatever.

" 'The writer of this letter called on your department at Columbus, Ohio, Sept. 23rd, and I refer you to Mr. F. R. Ambrose, as he will remember our conversation.

" 'Kindly advise as quickly as possible if the loans we wish to renew can be made from the Dayton office and collected at our former Piqua office, until paid. The said loans are not to run over a period of four months.

" '[Signed] CENTRAL LOAN COMPANY.'

"Kindly render us your opinion on the above question at your earliest convenience, and oblige,

Section 6346-1 of the General Code (106 O. L., 281), so far as applicable to the question under consideration, is as follows:

"It shall be unlawful for any person, firm, partnership, association or corporation, to engage or continue, in the business of making loans on plain, endorsed, or guaranteed notes, or due bills or otherwise, or upon the mortgage or pledge of chattels or personal property of any kind, * * * at a charge or rate of interest in excess of 8 per cent. per annum, including all charges, without first having obtained a license so to do from the superintendent of banks, and otherwise complying with the provisions of this act. * * *"

Although it is not so stated in the letter of the Central Loan Company, I assume that it is engaged in the business of making chattel loans at a charge or rate of interest in excess of 8 per cent. per annum.

By virtue of the language above quoted, the legislature has made it unlawful "to engage, or continue, in the business of making loans" of certain kinds, and at a rate of interest in excess of 8 per cent. per annum without first securing a license and complying with certain restrictive and regulatory provisions of that and other sections of the act known as senate bill No. 7, (106 O. L., 281), of which said section 6343-1 is a part.

Apparently all of the restrictive and regulatory provisions of the act have been directed toward the loaning end of the business, and the legislature seems to have deemed it unnecessary to restrict or regulate the manner or method of making collections.

It therefore follows that an individual or company, which prior to the taking effect of senate bill No. 7 had made a valid loan of the kind and character sought to be regulated by the act, may continue to make collections upon such old loans until the same are fully paid without the necessaty of securing a license. Such individual or company cannot, however, without first securing a license and complying with the provisions of said act make new loans or a renewal of the old loans without first securing a license.

In view of the fact that the Central Loan Company may lawfully continue to make collections upon loans made in Piqua under its old license until such loans are fully paid, I am at a loss to understand why they desire to make a renewal of said loans from their Dayton office, unless it be for the purpose of securing the inspection charge permitted under section 6343-5 of said act.

Section 6343-3 of the General Code (106 O. L., 282), is, in part, as follows:

"Application for a license shall state fully the name or names, and address of the person or corporation * * * and the location of the office or place of business in which the business is conducted, * * * such license shall be kept posted in a conspicuous place in the office where the business is transacted * * * and not more than one office or place of business shall be maintained under the same license. * * *"

Under the language of this section, a licensee must state in the application for a license "the location of the office or place of business in which the business is conducted," and "not more than one office or place of business shall be maintained under the same license."

The Central Loan Company cannot, therefore, under its license to conduct such business at Dayton, make new loans or renewal loans at Piqua, or, by virtue of its Dayton license, maintain a place of business at Piqua either to assist in securing loans or renewals or to make collections upon any such loans or renewals. It cannot make new loans or renewals at any place other than its place of business at Dayton, nor can it maintain a place of business at any other place to make collections upon such new loans or renewals or to otherwise assist in any manner in the operation of any business undertaken under authority of its Dayton license.

Therefore, specifically answering the question asked by the Central Loan Company, it cannot, under the Dayton license, make renewal of Piqua loans and maintain a place of business at Piqua for the collection of such loans. It may, however, without securing a license to operate at Piqua, continue making collections upon its old Piqua loans made under authority of its former Piqua license, until such loans are fully paid, and, for that purpose alone may maintain a place of business at Piqua.

Respectfully,
EDWARD C. TURNER,
Attorney General.

910.

APPROVAL OF TRANSCRIPT OF BOND ISSUE, VILLAGE OF WESTERVILLE, OHIO.

COLUMBUS, OHIO, Oct. 11, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In Re: Bonds of the village of Westerville, O., in the aggregate amount of $23,000.00, dated July 1, 1915, bearing interest at the rate of 5 per cent. per annum, payable semi-annually, and consisting of three separate issues as follows:

$7,500.00 of special assessment bonds for the improvement of Vine street in said village, being fifteen (15) bonds of $500.00 each, payable at stated times between October 1, 1916 and October 1, 1925.

$12,500.00 of special assessment bonds for the improvement of West Homes street in said village, consisting of twenty-five (25) bonds of $500.00 each, payable at stated times between October 1, 1916 and October 1, 1925.

$3,000.00 of special assessment bonds for the improvement of Winter street in said village, consisting of six bonds of $500.00 each, payable at stated times between October 1, 1916, and October 1, 1925.

I have examined the transcript of the proceedings of council and other officers of the village of Westerville relative to the authorization and sale of the above bonds, and I am of the opinion that the same are being issued for a purpose authorized by law; that the proceedings of said council and other officers, as shown by the transcript, have been regular and in conformity with statutory provisions; and that proper pro

vision has been made to pay any deficiency which might result from a failure to collect from the property owners assessed for said improvement an amount sufficient to pay said bonds with interest as they severally become due.

I therefore certify that said bonds when properly drawn, executed and delivered will constitute, in the hands of legal holders thereof, valid obligations of the village of Westerville.

As no form of the proposed bonds and coupons was submitted with the several transcripts for my examination, I suggest that when they are delivered that they be submitted to me for further examination as to form and execution.

Respectfully,
EDWARD C. TURNER,
Attorney General.

911.

FORT MEIGS PARK COMMISSION—CONSTRUCTION OF A BOULEVARD IN THE FORT—SECTION 2314, G. C., NOT APPLICABLE—COMMISSION SHOULD ADVERTISE FOR BIDS.

COLUMBUS, OHIO, Oct. 11, 1915.

MR. W. H. RHEINFRANK, *Secretary, The Ft. Meigs Park Commission, Perrysburg, Ohio.*
DEAR SIR:—Your telegram of October 8, 1915, is received as follows:

> "Under section 2314, General Code, can the Fort Meigs park commission construct a boulevard in the fort costing over three thousand without four weeks advertising. If negative, can they legally subdivide the contracts for this work to bring each contract under three thousand. Would appreciate early response."

In reply to your foregoing inquiry I beg to say that said section 2314, G. C., does not include the improvement described therein because said section applies only to the erection, alteration or improvement of a state institution or building. The memorial and property of the state at Fort Meigs under your control is not an institution or building within the terms of this statute.

However, the sundry appropriation bill, 106 O. L., 834, which carries the appropriation for the improvement you contemplate, provides in section 2 thereof that:

> "The monies herein appropriated shall be paid upon the approval of a special auditing committee consisting of the major appointee authorized by section 270-5 of the General Code, commonly known as the budget commissioner, the attorney general, the auditor of state, the chairman of the finance committee of the senate and the chairman of the finance committee of the house of representatives. Such auditing committee is hereby authorized and directed to make careful inquiry as to the validity of each and every claim herein made and pay only so much thereof as may be found to be correct and just."

The special auditing committee referred to in the above quoted section is provided for by section 4 of the general appropriation bill as found in 106 O. L., 825. As it is specially provided in section 6 of said general appropriation bill that all vouchers

shall show that competitive bids were secured, "unless otherwise provided by law; or unless in the judgment of the board provided in section 4 herein, it is impracticable because of the peculiar nature or location of the work to be done, in which case the above mentioned board may in writing authorize the department affected to proceed to do the work, or that it was an emergency purchase," it would seem advisable and the better way to advertise for bids in order to meet any criticism or exception that might be made by said auditing committee because of your failure so to do. In view of the requirements in the general appropriation bill to which your attention has been called, I would respectfully suggest that you regard this advice as imperative.

Respectfully,
EDWARD C. TURNER,
Attorney General.

912.

BOARD OF ADMINISTRATION—BIDS CALLING FOR CERTAIN IMPROVEMENTS AT VARIOUS STATE INSTITUTIONS RECEIVED PRIOR TO LENGTH OF TIME REQUIRED BY STATUTE—SAID CONTRACTS DISAPPROVED—STATUTE PROVIDES THAT BIDS SHALL NOT BE OPENED UNTIL EIGHTH DAY AFTER FOURTH AND LAST PUBLICATION AND NOTICE SHOULD SO STATE.

Under section 2317, G. C., bids shall not be opened until the eighth day after the fourth and last publication, and the notice should so state.

COLUMBUS, OHIO, October 11, 1915.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Under date of October 5th, your board submitted to this department all the bids received on nine automatic side-feed, self-cleaning stokers for the Institution for the Feeble Minded; also affidavits and proofs of publication, and copies of contract between your board and the Detroit Stoker Company, of Detroit, Michigan, the low bidder.

On said date you likewise submitted all bids received by your board on two 400-H. P., side-feed, self-cleaning automatic stokers for the Ohio Hospital for Epileptics, at Gallipolis, Ohio; also three copies of contract between your board and the American Foundry & Casting Company, of Dayton, Ohio, the low bidder; and affidavits and proofs of publication from the Gallipolis Bulletin and the Cleveland Leader relative thereto, and advised me that the affidavits and proofs of publication from the Cincinnati Enquirer, Toledo Blade and Columbus Dispatch were on file in the office of the auditor of state.

On the same day you submitted to this department all the bids received by your board on two 400-H. P. water tube boilers for the Ohio Hospital for Epileptics, and copies of contract between your board and the Union Iron Works, of Erie, Pennsylvania, the low bidder; the same affidavits and proofs of publication relative to stokers being likewise submitted in regard to the water tube boilers.

You further advised me that all the bids were opened on Friday, September 10, 1915, at two p. m., as advertised, and all the contracts awarded September 27, 1915.

All of the advertisements hereinbefore referred to were begun on the 19th day of August and appeared on said date and the following dates: August 26th, September 2nd and September 9th.

Section 2317 of the General Code, requires notices to be published "weekly for four consecutive weeks next preceding the *day* named for awarding the contract."

In an opinion rendered to Hon. John E. McGilvrey, president of Kent State Normal School, Kent, Ohio, under date of August 19, 1915, I advised in reference to section 2317 as follows:

> "Said section requires the notice for bids to be published weekly for four consecutive weeks next preceding the day named for awarding the contract. This has not been done in this case. The *earliest* advertisement made in this case was on the 25th day of May, which was on Tuesday, and called for the opening of bids on June 19th, or twenty-three days prior to the opening of the bids. If the word 'weekly' is to be considered as a calendar week, four full weeks have not elapsed prior to the awarding of the contract. If the word 'weekly' is to be considered as any period of seven consecutive days, the first insertion of the advertisement was not twenty-eight days prior to the opening of the bids. In either interpretation the law has not been complied with. Therefore, I am of the opinion that contracts cannot be awarded under the advertisements made in this matter."

While it is true that in such opinion I stated that four consecutive weeks had not elapsed "prior to the awarding of the contract," yet from the context in which it is used it is apparent that such language should be read "prior to the day named for awarding the contract."

In the case in question, the advertisement has not been made in accordance with the provisions of section 2317, G. C.

If the word "weekly" is to be considered as referring to a calendar week, then the four weeks next preceding the day named for opening the bids would have been the week beginning August 29th; the week beginning August 22nd; the week beginning August 15th; the week beginning August 8th. There was no advertisement during the week beginning August 8th.

If the word "weekly" is to be considered as any period of seven days next preceding the day named for opening the bids, the first advertisement should have been on August 12th.

However, a careful consideration of section 2317, G. C., and the cases bearing upon the question of legal advertisement clearly convinces me that the language of section 2317 requires that bids shall be received up to the eighth day after the fourth and last publication, and that the notice should specify a date not earlier than eight days after the last publication as the date upon which bids will be received.

The law not having been complied with as to the time of advertising required by section 2317, G. C., I am unable to approve the contracts made on bids received under the advertisements.

I am this day returning to you all papers submitted in the above matters.

Respectfully,

EDWARD C. TURNER,

Attorney General.

913.

COUNTY BOARD OF EDUCATION—THE ONLY UNION OF SCHOOL DISTRICTS WHICH MAY BE CONTINUED AS A SEPARATE DISTRICT FOR SUSPENSION PURPOSES—UNION OF DISTRICTS PRIOR TO REPEAL OF SECTION 7705, G. C., FOR HIGH SCHOOL PURPOSES—WHEN DISTRICT SUPERINTENDENT HAS NOT BEEN APPOINTED IN MANNER PROVIDED BY SECTION 4739, G. C.—COUNTY BOARD MAY ACT.

1. *The only union of school districts which may be continued as a separate district for supervision purposes under authority of section* 4740, *G. C., as amended in* 106 *O. L.,* 439, *is that union of districts which, prior to the repeal of section* 7705, *G. C., by the act of the general assembly passed in* 1914, *were united for high school purposes and employed a superintendent, and which now maintains a first grade high school.*

2. *Whenever for any cause a district superintendent has not been appointed by September* 1*st in the manner provided by section* 4739, *G. C., as amended in* 104 *O. L.,* 140, *the county board of education, acting under authority of section* 4741, *G. C., as amended in* 104 *O. L.,* 141, *shall appoint such superintendent for a term of one year.*

COLUMBUS, OHIO, Oct. 12, 1915.

HON. JAMES P. WOOD, JR., *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—I have your letter of September 11th, which is as follows:

"I am in receipt of your favor of September 9, in which you enclose copy of opinion No. 463 in answer to my letter of September 3. This opinion was of very great assistance to me in clearing up the apparent ambiguities in section 4740, 104 O. L., 141, as amended 106 O. L., 398 and 439. However, the exact question with which our county board of education is confronted was not considered in that opinion. May I not ask for your further consideration of the following:

"In your opinion No. 463, at page 9, is the following: 'However, there is no objection to the board of education of such a school district, anticipating an application to the county board of education, entering into negotiations with a suitable person to act as part time superintendent and teacher, under the provisions of section 4740, and the making of complete arrangements, subject only to the making of the application and the establishment of the district as a separate supervision district after senate bill No. 323 goes into effect.' In another part of the opinion you state that senate bill No. 323 will not be in effect until September 2, 1915. In the case under consideration the election of a superintendent by the 'union of districts occurred August 31, an application for exemption was made to the county board of education on the same day, and was subsequently renewed, to wit, on September 9. I concur in your opinion that senate bill No. 323 was not in effect until September 2, and therefore the application made on August 31, was ineffectual. This being true, was there not a vacancy in the original supervision district on September 1st; and did not the county board of education, by virtue of section 4741, 104 O. L., 141, legally appoint a district superintendent for the entire supervision district on that date? If such appointment was legally made, will the application by the 'union of districts' to the county board of education, made subsequent to September 2 and before September 10, have the effect of eliminating the exempted district from the supervision of the district superintendent appointed by the county board of education on September 1?

"There are at present two persons claiming the right to act as superintendent for this 'union of districts,' one elected by the boards of education in said district and another appointed by the county board for the entire supervision district. I would be very glad to have the benefit of your opinion in determining which person is the legally elected superintendent."

In your letter of September 3rd you stated that in June, 1915, your county board of education, acting under authority of section 4738, G. C., as amended in 106 O. L., 396, divided the county district into supervision districts; that in one of said supervision districts, containing a village district and three rural districts, the presidents of the boards of education of said districts failed to elect a district superintendent as they were authorized and required to do under provision of section 4739, G. C., as amended in 104 O. L., 140, and that on September 1, 1915, the county board, acting under authority of section 4741, G. C., as amended in 104 O. L., 141, appointed a superintendent for the term of one year. You further stated that on August 31, 1915, the boards of education of the village district and one of the rural districts, above referred to, purporting to act under authority of section 4740, G. C., as amended in 106 O. L., at page 398, and as again amended at page 439, filed with the county board of education a copy of a resolution adopted by the two boards of education, which resolution recited that said districts had united for high school purposes; that a first grade high school was maintained therein; that said district employed a superintendent, and that said boards of education desired that said union of districts be continued as a separate district under the direct supervision of the county superintendent.

Before considering the question as to whether or not the proceedings of the county board of education were valid, I deem it advisable to first consider whether the boards of education of the village and rural districts referred to in your inquiry had authority on August 31, 1915, to unite for high school purposes and employ a superintendent.

The answer to this question is found in the opinion No. 463 of this department, referred to in your letter, in which opinion consideration was given to the provisions of section 4740, G. C., as amended in 104 O. L., 141, as amended in 106 O. L., 398, and as again amended in 106 O. L., at page 439, taken in connection with the repeal of the provisions of section 7705, G. C., and the amendments to certain statutes relating to school organization and control as made by the general assembly in 1914.

Without quoting from that part of said opinion most pertinent to your inquiry, I think said opinion taken as a whole makes it clear that while the village and rural districts in question had the authority on August 31, 1915, to unite for high school purposes under provision of section 7669, G. C., as amended in 104 O. L., 229, which section provides in part:

"The boards of education of two or more adjoining rural school districts, or of a rural and village school district, by a majority vote of the full membership of each board, may unite such districts for high school purposes,"

the boards of education of said districts comprising such "union of districts" were without authority to employ a superintendent for said union of districts, such authority having been taken away by the repeal of those provisions of the statute granting such authority. (See page 4 of said opinion).

The only union of districts that may continue as a separate district for supervision purposes under authority of section 4740, G. C., as amended in 106 O. L., 439, which provides in part:

"Any village or rural school district or union of school districts for high school purposes, which maintains a first grade high school and which employs

> a superintendent, shall upon application to the county board of education before September 10, 1915, or before June 1st of any year thereafter, be continued as a separate district under the direct supervision of the county superintendent,"

is that union of districts, which, prior to the repeal of section 7705, G. C., by the act of the general assembly passed in 1914, was united for high school purposes under authority of sections 7669, et seq., of the General Code as then in force, and employed a superintendent and which now maintains a first grade high school.

It follows, therefore, that the statements made in the third paragraph on page 5 of the aforesaid opinion must be modified to conform with the above limitation.

I am of the opinion, therefore, that inasmuch as the union of districts above referred to could not comply with that part of section 4740, G. C., as amended, and as above quoted, said union of districts could not continue as a separate district for supervision purposes under authority of said amended section, and the action of the boards of education of the districts comprising such union of districts, in employing a superintendent, was without authority in law and of no legal effect.

Coming now to a consideration of the question as to whether or not the proceedings of the county board of education were valid, I call your attention to the fact that section 4738, G. C., as amended in 106 O. L., 396, did not become effective until August 26, 1915. In the opinion hereinbefore referred to it was held that the provisions of said section 4738, G. C., as amended, are mandatory, and that the action of the county board of education required by said section must be taken after said date of August 26, 1915, and before the opening of the school year.

I am of the opinion, however, that, inasmuch as the action of the county board of education, in June, 1915, was taken after the passage of the act amending said section 4738, G. C., and in contemplation of the probable going into effect of said amended section, the action of said county board in appointing a district superintendent for the supervision district, above referred to, was a sufficient ratification of their former action re-districting the county district for supervision purposes and that the proceedings of said county board are therefore valid. It follows that the appointment of the district superintendent was lawfully made by said county board under authority of section 4741, G. C., as amended in 104 O. L., 141, which provides that "whenever for any cause in any district a superintendent has not been appointed by September 1st, the county board of education shall appoint such superintendent for a term of one year."

Respectfully,
EDWARD C. TURNER,
Attorney General.

914.

COUNTY COMMISSIONERS—CONSTRUCTION OF SEWERS OUTSIDE OF MUNICIPALITIES—SANITARY ENGINEER CANNOT BE PAID OUT OF COUNTY FUNDS—COST OF CONSTRUCTION NOT PAYABLE BY CERTIFICATE OF INDEBTEDNESS TO BE TAKEN UP BY BONDS ISSUED AT COMPLETION OF IMPROVEMENT.

In proceedings under act found in 103 *O. L.*, 734, *sections* 6602-1 *to* 6602-9e, *G. C., an engineer cannot be paid out of county funds, to be subsequently reimbursed from money raised under said act.*

In such proceedings it is not legal to pay for cost of construction as the work progresses by certificates of indebtedness authorized by section 6602-6, *G. C., to be taken up by bonds issued under said section to cover entire cost at completion of the improvement.*

COLUMBUS, OHIO, October 12, 1915.

HON. ROBERT C. PATTERSON, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Under date of August 30, 1915, you submitted for my opinion the following:

> "I desire an opinion from you upon the authority of the county commissioners to finance the construction of a sewer, under the act providing for the construction of sewers outside of municipalities, 103 O. L., 734.
>
> "A petition for such an improvement has been filed in this county; and, under the provisions of the act, the first duty of the county commissioners is to employ a sanitary engineer for the preparation of plans, etc. The act provides for the paying of the engineer out of funds raised by assessment upon property benefited, in anticipation of which money may be borrowed either upon bonds or certificates of indebtedness. Can such engineer be paid out of county funds, to be subsequently reimbursed from the money raised under the act, or must the funds for the preliminary expenses be first raised as so provided? Can the construction of the improvement be paid for as the work progresses by certificates of indebtedness, authorized by section 6 of the act, such certificates being issued to mature in a short time; and then, at the completion of the work, bonds be issued to cover the entire cost, including the taking up of the certificates?
>
> "Unless the engineer and preliminary work can be paid for either out of county funds to be reimbursed or by certificates of indebtedness to be afterwards taken up by bonds, I am unable to see how the improvement can be started, since the first requisite is the engineer and his plans. If the work can be financed along the line suggested in my second question, the improvement could be started as soon as the plans are prepared, and paid for as the work progresses; a saving of both time and interest on bonds."

The statute to which you refer, found in 103 O. L., 734, is entitled:

> "An act authorizing the county commissioners of the several counties of the state for the benefit of public health, convenience, or welfare, to construct, maintain, repair and operate sewer improvements and sewage treatment works outside of municipalities, and to repeal certain sections of the General Code,"

and the Code numbers given thereto are sections 6602-1 to 6602-9e.

Section 6602-1, G. C., provides that the county commissioners may, by resolution, lay out and establish one or more sewer districts within that portion of their respective counties, that lie within three miles of and outside of any incorporated municipality, and provides further, that the county commissioners may employ a competent sanitary engineer for the purpose, and in counties of over 100,000 they may create an engineering department.

Section 6602-2, G. C., provides that whenever the county commissioners declare the necessity of the construction, maintenance, repair, or operation of a sewer improvement, mentioned in section 1, and declare said improvement is for the purpose of drainage, etc., or when a petition, signed by the freeholders of the majority of the acreage in a sewer district petition, or when a petition signed by the owners of the majority of foot frontage of a proposed local or lateral sewer improvement, then the commissioners shall prepare the necessary plans, specifications and estimates and "as soon thereafter as possible the board of county commissioners shall declare by resolution, the necessity for making such improvements," which resolution shall contain a statement showing whether said sewer improvement is intended to be main, district, or intercepting sewer, the location, etc., a reference to the plans and specifications, the place where the same are on file, "the mode of payment of the cost and expense of the construction of said improvement, and a description of the lots or parcels of land and other property within said district to be assessed for the payment of a part or the whole of the cost and expense of construction and maintenance of said improvement *to be paid by assessments.*" It further provides for the publication of a copy of said resolution and the posting thereof.

Section 6602-3, G. C., provides that after the expiration of ten days, after the completion of said publication and posting of said resolution, the board shall determine whether to proceed, and if it decides to proceed, a resolution for that purpose to be known as the "Improvement resolution" shall be passed by the board. It is provided that said resolution shall contain "a statement of the district or part thereof for which the proposed improvement is to be made, the character of materials to be used, a reference to the plans, specifications and estimates, and mode of payment of the cost and expenses of the construction and maintenance of the proposed improvement and the resolution may provide for assessing any or all of the cost and expense of such improvement to be paid by assessment upon the lots, lands, and other real property in such district as may be specially benefited thereby."

Section 6602-8, G. C., provides as to what may be included as costs, in the following language:

> "The cost herein provided for in addition to the amount of money paid or to be paid for the construction, maintenance, repair, or operation, of any such improvement may include the cost of publication and posting of all resolutions or notices, the cost of inspection, interest on bonds issued in anticipation of the collection of said assessments and the cost of making said assessments, as well as for any money paid for the condemnation or purchase of land or right of way for any such improvement, and the compensation of the sanitary engineer in making plans and specifications for and superintending the construction, maintenance or repair of any such improvement, and for any other expense necessary and proper for the construction, maintenance, repair, or operation of such improvements."

It is clear, therefore, that the cost of the improvement may include all of what has been foregoing stated.

Under section 6602-5, it is provided:

> "The county shall pay such part of the cost and expense of the improvement, maintenance, repairs and operation for which special assessments

are levied as the board deems just, but such part shall be not less than two per cent. of all such cost and expense and in addition thereto the county shall pay the cost of intersections."

The first part of section 6602-5, G. C., provides as follows:

"If it deems expedient, the board of county commissioners may, by resolution, assess the real estate as provided in the improvement resolution, and cause such assessment to be collected, or at their option may issue bonds in anticipation of the collection of such assessments before the work is done or contracted for. Or the board of county commissioners may, at its option, defer such assessment until the work is completed, and then upon the certificate of the sanitary engineer in charge showing the completion of the work, by resolution assess the real estate as provided in the improvement resolution."

It is also provided that the assessment shall be payable in annual installments not exceeding ten in number.

Section 6602-6, G. C., provides as follows:

"For the purpose of paying a part or the whole of the cost and expense of the construction, maintenance or repair or operation of any such improvement, or for the purpose of paying the sanitary engineer provided for under the provisions of this act, and for paying for his assistants and of all his other necessary expenses, the board of county commissioners may borrow money at a rate of interest not exceeding six per cent. per annum on certificates of indebtedness to be signed by its president and clerk; such certificates of indebtedness shall be made payable at a time not more than five years from their date, or the board of county commissioners may issue and sell county bonds as other county bonds are sold to pay the whole or part of the cost of the construction, maintenance, repair or operation of any such improvement, and to pay the sanitary engineer provided for under the provision of this act and for paying his assistants, and all his other necessary expenses. Said bonds shall be signed, issued and sold as other county bonds are signed, issued and sold, and shall run for a period or periods not exceeding eleven years from their date, and shall not bear a greater rate of interest than six per cent., said bonds shall express upon their face the object for which they were issued, and shall be sold for not less than par and accrued interest.

"The board of county commissioners may levy taxes in addition to all other taxes authorized by law to pay such certificates of indebtedness and the interest thereon, or such bonds and interest thereon. Such levy shall be subject to all the limitations provided by law upon the aggregate amount, rate, maximum rate and combined maximum rate of taxation."

Your first question is whether the sanitary engineer provided for in section 6602-1 can be paid out of county funds, to be subsequently reimbursed from the money raised under the act, or must the funds for the preliminary expenses be first raised as so provided?

Under the provisions of the Smith law, the county commissioners are required to submit a budget each year and to specifically set forth therein the amount to be raised for each and every purpose allowed by law for which it is desired to raise money for the incoming year, and under the provisions of said law the county commissioners are required at the beginning of each fiscal half year to make appropriations for each of the several objects for which money has been provided, and all expenditures within

the following six months shall be made from and within such appropriations and the balances thereof; and it is further provided in such law that no appropriation shall be made for any purpose not set forth in the annual budget.

Such being the case, I cannot conceive of any fund in the county treasury which could be used for the payment of compensation or expenses of the sanitary engineer, even though the amount so expended is to be reimbursed from funds raised under the act in question. Consequently, I advise that the sanitary engineer provided for in section 6602-1 cannot be paid out of county funds, to be subsequently reimbursed from the money raised under the act.

Your next question is as follows:

> "Can the construction of the improvement be paid for as the work progresses by certificates of indebtedness, authorized by section 6 of the act, such certificates being issued to mature in a short time; and then, at the completion of the work, bonds be issued to cover the entire cost, including the taking up of the certificates?"

In this connection, section 5660 of the General Code must be considered. Said section provides in part as follows:

> "The commissioners of a county * * * shall not enter into a contract * * * involving the expenditure of money * * * unless the auditor * * * first certifies that the money required for the payment of such obligation * * * is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund."

This section of the General Code is very similar to section 3806, G. C., relative to municipal corporations, and the decisions of the courts under section 3806 would have some bearing in construing the provisions of section 5660.

It was held in the case of Comstock v. Nelsonville, 61, O. S., 288, that section 2702 R. S. (now section 3806, G. C.), was applicable to so much of the cost and expense of a street improvement as was to be paid by the municipality out of funds arising from a levy on the general tax list, but not applicable to so much of the cost and expense of a street improvement as is to be paid by an assessment on the property bounding and abutting on such improvement or adjacent thereto.

The case of Emmert v. Elyria, 74 O. S., 185, held that sections 45 and 45a of the Municipal Code (1536-205 and 1536-205a, R. S.) (now sections 3806 and 3810, G. C.) do not apply to contracts for street improvements when bonds have been authorized by the municipality to be issued to pay the entire estimated cost and expense of the improvement.

Whatever may heve been the reasoning of the court in such case, and whether or not the said case is in conflict with the case of Village v. Diekmeier, 79 O. S., 323, we are not concerned with in this opinion, for the reason that in the case of Emmert v. Elyria, the bonds had already been *authorized,* although not yet sold and in process of delivery—and the case of Emmert v. Elyria only goes to the extent of not requiring a certificate when bonds have at least been authorized.

Therefore, I am of the opinion that section 5660 of the General Code must be complied with at the time the contract is made, as provided for in section 6602-4, G. C. Such being the case, the money must be in the treasury or levied and placed on the duplicate and in process of collection, and not appropriated for any other pur-

pose, or bonds must at least have been duly authorized. The issuing of certificates of indebtedness as the work progresses, in order to take care of the work done under the contract, would be in violation of section 5660, which requires the money to be in the treasury at the time of entering into the contract.

I therefore advise that the construction of the improvement cannot be paid for as the work progresses by certificates of indebtedness authorized by section 6 of the act, but that the entire money called for by such contract, insofar as the county's portion thereof is concerned, must be in the treasury at the time of entering into the contract; the case of Comstock v. Nelsonville, *supra*—if the same construction is to be given section 5660 as was given by the court in said case in regard to section 3806—being authority that no certificate is required relative to the amount that is to be paid by assessment.

Respectfully,
EDWARD C. TURNER,
Attorney General.

915.

SUPERINTENDENT OF PUBLIC WORKS—REVENUES DERIVED FROM LEASES, SALES, ETC., ARE TO BE PAID INTO STATE TREASURY—PUBLIC PARK PATROLMEN PAYABLE ONLY FROM FUNDS APPROPRIATED FOR THAT SPECIFIC PURPOSE.

Revenues derived from the lease of land and sales of special privileges by the superintendent of public works are to be covered into the state treasury, and the salaries of the patrolmen of the public parks of the state can only be paid from the funds made available through specific appropriations for that purpose.

COLUMBUS, OHIO, Oct. 13, 1915.

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

DEAR SIR:—Permit me to acknowledge the receipt of your request for an opinion which is as follows:

> "House bill No. 456, O. L., 105-106, page 380, entitled an act to provide for the control and management of the public parks of the state. Section 3 of this act fixes the salary, and evidently intends to provide the salaries from which these payments shall be made.
>
> "It was the intention of the author of this bill to arrange for the payment of these salaries out of the revenues derived from the lease of lands and the sale of special privileges without the necessity of direct appropriations from the general assembly.
>
> "This department is greatly limited on account of funds, and if this money is available, it will greatly relieve an embarrassing situation. The statute setting apart these reservoirs, provides that the funds derived from these sources shall be kept in separate books, and the receipts of each reservoir credited to its particular fund, but under the budget system, all these revenues have been paid into the general revenue fund.
>
> "Kindly advise me whether or not in your opinion we may draw on these funds for the payment of the salaries of the police patrolmen at each of the four state reservoirs, that have been dedicated and set apart for the use of the public as public parks and pleasure resorts.
>
> "Thanking you in advance for your kindness in this matter, * * *"

Section 3 of the act to which you refer is to be found on page 381, 106 O. L., and is as follows:

> "Rule 3. The superintendent of public works is hereby authorized to employ one police patrolman at each reservoir park, at a salary of nine hundred dollars per year, two assistant police patrolmen at each state reservoir for three and one-half months, prior to and including Labor Day, at the rate of sixty-five dollars per month, and may expend for special patrolmen at each state reservoir during the summer months, a sum not exceeding ninety dollars, at the rate of $2.50 per day for each patrolman employed, *all of which expenses shall be paid from the receipts from leases, boat permits and sale of special privileges to be derived from each of the state reservoir parks or funds appropriated for such purposes, but no funds shall be expended for this purpose upon any reservoir in excess of its own earnings, except from funds especially appropriated for such purposes.*"

It will be noted that the act referred to, which is an amendment to section 479 of the General Code, is simply a code of rules governing the operation of the public parks under consideration. Section 3 of the same, which is characterized as "Rule 3," authorizes the superintendent of public works to employ one police patrolman at each reservoir park at a specified salary, fixes the maximum amount that can be expended for special patrolmen during summer months, the rate of pay per day for such patrolmen, and contains a provision that the expenses of such patrolmen shall be paid from the various receipts to be derived from each of the state reservoir parks, *or funds appropriated for such purposes.* It also contains a provision to the effect that the expenditures for such purpose for each reservoir shall not exceed its own earnings, except from funds especially appropriated for such purpose.

It is apparent from a reading of section 3 of house bill No. 456, *supra,* that there was an intention manifested in the act to make an exception to the general rule with reference to turning into the treasury receipts from *leases, boat permits,* and *sales of special privileges,* and to permit same to be applied without special appropriation to the payment of the salaries of the police patrolmen.

Sections 477 and 478 of the General Code, to be found on page 129 of 103 O. L., are still in force, and are as follows:

> "Section 477. All revenues derived from the granting of leases of lands, docks, boat landings and other special privileges connected with the state parks or pleasure resorts, shall be covered into the treasury of the state to the credit of the general revenue fund.
>
> "Section 478. The superintendent of public works shall collect, or cause to be collected, all rentals for leases of state lands, pipe permits, boat licenses, dock licenses in state parks, and moneys for special privileges of any nature in or adjacent to such parks, and shall keep such accounts in separate books to be provided for that purpose, and in transmitting such funds to the state treasurer he shall accompany them with a separate statement, giving the names of persons from whom and for what purpose such moneys were collected, and to what park or pleasure resort such funds are to be credited, and shall furnish a duplicate statement to the auditor of state."

In addition to the provisions contained in sections 477 and 478, which charge the superintendent of public works with the duty of transmitting all receipts from the granting of leases of lands, docks, boat landings, and other special privileges connected with state parks or pleasure resorts to the state treasurer to be covered into

the general revenue fund, there is a provision contained in section 24-1 of the General Code, which was approved June 3, 1915, 106 O. L., 500, and which is as follows:

> * * * "and whenever moneys are payable to the state or the superintendent of public works pursuant to any sale or lease of lands or surplus water power and appurtenant rights executed or granted by the superintendent of public works or his predecessors in office, or lease of docks or boat landings or other special privileges granted or executed by the superintendent of public works or his predecessors in office, it shall be the duty of the officer, board or commission ascertaining or fixing such charge or the amount so payable, to certify the same to the auditor of state upon triplicate forms prescribed by such auditor, and at such time or times as he may prescribe, including in such certification such matters and information as he may direct. Within five days next following the receipt by the auditor of state of such certification, and also at the time the auditor of state determines the amount payable by a county pursuant to section 287 of the General Code, or payable by a taxing district pursuant to section 288 of the General Code, the auditor of state shall transmit to the treasurer of state for collection a duplicate of the charges so certified or determined. The treasurer of state shall immediately proceed to the collection of the charges upon such duplicate and shall forthwith notify the person, co-partnership, corporation, county or taxing district so charged upon such duplicate of the amount thereof, by mail to the address of such person, co-partnership, corporation, county or taxing district known to the treasurer of state. The treasurer of state, upon the receipt of any such moneys, shall set up an account thereof as otherwise provided by law, and shall have authority to employ such assistants, clerical and expert help, or other employes as he may deem necessary for the proper discharge of the duties of his office."

The amendment to section 479 of the General Code, contained in house bill 456, referred to by you, was approved May 25, 1915, and filed in the office of the secretary of state on May 28, 1915, whereas the provisions of section 24-1 of the General Code, *supra*, providing for the payment into the state treasury of the moneys received from any sale or lease of land, or surplus water power, appurtenant rights executed or granted by the superintendent of public works or his predecessors in office, or leases of docks or boat landings or other special privileges granted or executed by the superintendent of public works were contained in amended senate bill No. 297, which was passed June 3, 1915, and filed in the office of the secretary of state on the 4th day of June, 1915, subsequent to the passage and filing of house bill 456, *supra*, showing clearly that as the law stands at present it is the duty of the superintendent of public works fixing such charges or amounts so payable, to certify the same to the auditor of state in triplicate, who, in turn, transmits to the treasurer of state for collection a duplicate of the charges so certified or determined.

In your letter you state that all moneys collected from the sources referred to have been paid into the state treasury, and you enquire whether you may draw on this fund for payment of the salaries of the police patrolmen at each of the four state reservoirs that have been dedicated and set apart as public parks and pleasure resorts.

Section 22 of article II of the constitution of Ohio is as follows:

> "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and no appropriation shall be made for a longer period than two years."

It is my opinion, therefore, that under the existing law all moneys derived from the sources enumerated in your letter must be covered into the state treasury, and

in view of the provisions of article II of the constitution, the payment of salaries of the police patrolmen at the state reservoirs which have been dedicated as public parks, under the provisions of section 3 of the amendment to section 479 of the General Code, *supra*, can only be made from the funds made available through a specific appropriation for that purpose.

Respectfully,
EDWARD C. TURNER,
Attorney General.

916.

APPROVAL OF TRANSCRIPT OF BOND ISSUE OF EUCLID TOWNSHIP, CUYAHOGA COUNTY, OHIO.

COLUMBUS, OHIO, October 13, 1915.

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

> "*In Re:* Bonds of Euclid township, Cuyahoga county, Ohio, in the sum of $5,550.00, dated June 1, 1915, bearing interest at the rate of 6 per cent. per annum, payable semi-annually."

The above bonds consist of one bond of $550.00, and ten bonds of $500.00 each, falling due one each year from October 1st, 1917, to October 1st, 1927, both inclusive.

I have examined the transcript of the proceedings of the trustees and other officers of Euclid township; also the bond form submitted, and I am of the opinion that said proceedings have been regular and in conformity with statutory law; that said bond form is proper, and that these bonds, when executed and delivered, will be, in the hands of legal holders thereof, valid obligations of said township.

The delay in reporting to you my opinion relative to the validity of the above bonds is due to the fact that a completed transcript of the proceedings was not submitted to this office until October 4th, 1915.

Respectfully,
EDWARD C. TURNER,
Attorney General.

917.

ADJUTANT GENERAL—RENTAL OF OFFICES OUTSIDE OF STATE HOUSE—FORM OF LEASE TO BE USED BY SUCH STATE OFFICERS.

COLUMBUS, OHIO, October 13, 1915.

HON. BENSON W. HOUGH, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—As requested by Colonel E. S. Bryant, assistant adjutant general, that I prepare for your department a blank lease under the provisions of section 146, G. C. (106 O. L., 319), which will apply to all outside offices used by state officers, I am herewith submitting a blank form of lease which, I believe, will fully cover your requirements:

LEASE.

THIS AGREEMENT OF LEASE WITNESSETH:

That_____, lessor___, in consideration of the rents and covenants hereinafter stipulated to be paid and performed by the State of Ohio, lessee, through_____
(Officer, board or commission.)
do___hereby GRANT, REMISE AND RELEASE to the said lessee, the following described premises, to wit:

_____

_____

To have and to hold the same, with the appurtenances, unto the said lessee for the use of_____from the_____day
(Officer, board or commission.)
of_____, 19____, for and during the term covered by the life of the existing appropriations made to said_____
(Officer, board or
_____applicable to the payment of rent for such prem- commission.)
ises herein leased.

Continued occupation by lessee, after the expiration of this lease, shall not operate as a renewal hereof for any period, but a new lease must be made. And said lessor____, for_____and for_____heirs, executors, administrators, successors and assigns, covenants with the said lessee that_____will, on or before the expiration of this present lease, at the request of said lessee, acting through the adjutant general of Ohio, grant and execute to it a new lease of the premises hereby demised, with their appurtenances, for a lawful term to be designated by lessee, acting through the adjutant general of Ohio, to commence upon the expiration of the term hereby granted, at the same rent, payable in like manner and subject to like covenants, provisos and conditions, except for renewal, as are contained in this lease.

The rent to be paid hereunder shall be_____Dollars per month and payable from the appropriations now made to the_____
(Officer,
_____upon voucher of said_____
board or commission.) (Officer, board or commission.)
and said lessee hereby covenants and agrees with said lessor____, _____ heirs, successors and assigns, that it will pay said rents, in manner aforesaid, unless said premises shall be destroyed or rendered untenantable by fire or unavoidable accident; that it will not do or suffer any waste therein, nor assign this lease, nor any part thereof, without the written consent of said lessor____, and that at the end of said term, unless a renewal be requested, will deliver up said premises in as good order and condition as they now are, or may be put by said lessor____, reasonable use and ordinary wear and tear thereof, and damage by fire and other unavoidable casualty excepted.

PROVIDED, HOWEVER, That if said rent, or any part thereof, shall remain unpaid for_____days after it shall become due, and after demand therefor has been made upon the_____
(Officer, board or commission.)
it shall be lawful for said lessor____, _____heirs, successors or assigns, to re-enter said premises and the same to have again, re-possess and enjoy, as

in_____first and former estate; thereupon this lease and everything therein contained on the said lessor____behalf to be done and performed shall cease, determine and be utterly void.

PROVIDED, HOWEVER, That nothing herein shall bind lessee for any amount of money in excess of that portion of the amount now appropriated by law to the_____applicable to rent of prem-
(Officer, board or commission.)
ises.

AND SAID LESSOR____, for_____and for_____heirs, executors, administrators, successors and assigns, covenants and agrees with said lessee that said lessee paying the rents, and observing and keeping the covenants of this lease on its part to be kept, shall lawfully, peacefully and quietly hold, occupy and enjoy said premises, during said term, without any let, hindrance, ejection or molestation, by said lessor____or_____heirs, or any person or persons lawfully claiming under them.

The said lessee, acting through the adjutant general of Ohio, may terminate this lease at any time upon the giving to the lessor____, or_____ duly authorized agent, _____days' notice of its intention so to do.

This lease shall not be binding upon lessee until approved by the governor of Ohio.

IN WITNESS WHEREOF, the said lessor____and the said lessee, acting by and through the adjutant general of Ohio, said adjutant general being thereunto duly authorized by statute, have hereunto set their hands on the _____day of_____, in the year of our Lord, one thousand nine hundred and_____.
( ), in triplicate.

_____(Lessor.)

Signed and acknowledged in the presence of

THE STATE OF OHIO (Lessee.)

By

_____ _____
as Adjutant General of Ohio.

_____

Approved_____, 19_____

_____
Governor of Ohio.

N. B. One copy of this lease must be filed in office of secretary of state within ten days after it has been executed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

918.

BOARD OF AGRICULTURE—LICENSE FOR SALE OF FEED STUFFS—WHAT CERTIFICATE MUST CONTAIN.

Before license for the sale of feed stuffs can be granted by the board of agriculture, a certificate must be filed showing the minimum percentage of protein, the minimum percentage of crude fat, and the maximum percentage of crude fibre as the constituent parts of the feed stuff; the purpose of the law being to protect the public from the imposition on it of a feed stuff containing a lesser percentage of protein and crude fat or a greater percentage of crude fibre than that stated in the certificate provided for in section 1141, *G. C., as amended. There is no penalty provided for failure to state the minimum percentage of crude fibre.*

COLUMBUS, OHIO, Oct. 13, 1915.

Board of Agriculture of Ohio, Columbus, Ohio.

GENTLEMEN:—Referring to your request for an opinion as to the requirements of section 1141 of the General Code, as amended (106 O. L., 156), with reference to the contents of the certificate therein referred to, and as to whether or not the enforcing "feed stuffs" officer of the department has implied authority essential to the execution of the laws covering impractical provisions that are a detriment to their enforcement, permit me to advise that section 1141 of the General Code, as amended, supra, with reference to the particular question involved is, in part, as follows:

> "Such certificate shall contain also a chemical analysis of the product to be sold which shall state the minimum percentage of crude protein, allowing one per cent. of nitrogen to equal six and one-fourth per cent. of protein of crude fat and crude fibre, also the maximum percentage of crude fibre of the product to be sold."

Under a strict reading of the provision just quoted, the only requirement of the law is that the certificate shall contain a chemical analysis of the product to be sold, which shall state the "minimum percentage of crude protein" and the "maximum per cent. of crude fibre" of the product to be sold.

As you have advised me in your letter and personally that it is not only impractical, but of absolutely no benefit to the purchaser to require a showing of the minimum amount of crude fibre, it is necessary, in view of the peculiar wording of the provisions contained in section 1141 of the General Code, which, according to your statement to me, is meaningless insofar as there is no such product as "protein of crude fat and crude fibre," to resort to section 1147 of the General Code, as amended (106 O. L., 158), to determine just what requirement was in the legislative mind when the law was enacted.

Fibre is of the least value of all the constituents of feed stuffs, and the purpose of the law is to guard against the imposition on the purchaser of feed stuffs which contain a greater percentage of fibre than that certified to under the provisions of section 1141 of the General Code, as amended, *supra*, or a smaller percentage of protein and crude fat than that certified under the provisions of section 1141 of the General Code, as amended, *supra*.

That this is the purpose of the law is clearly manifested in the provisions of section 1147 of the General Code, as amended, which section is a penal section and provides, in part, as follows:

> "* * * and whoever sells or offers or exposes for sale any feed stuffs containing a smaller percentage of *crude protein* and a smaller percentage of

crude fat, or a larger percentage of *crude fibre* than it is certified to contain, and whoever sells or offers or exposes for sale any condimental stock and poultry feeds, animal or poultry regulators, conditioners, tonics, or similar artioles not containing ingredients they are certified to contain, shall be fined, * * *"

In the penalty statute referred to there is no reference made to the requirement for the statement as to the minimum percentage of crude fibre. Section 1147 of the General Code being a penal statute must be strictly construed and is not susceptible of any extension to include a requirement for a showing of the minimum percentage of crude fibre.

In view of the statements contained in your letter and made to me verbally to the effect that the provisions in section 1141 as to the minimum percentage of crude fibre is meaningless from the standpoint of practical operation and is a detriment to the actual operation of the law, it is my opinion that section 1147, as amended, *supra*, which prescribes the penalty for a violation of the law, should be read in connection with section 1141 of the General Code, as amended, and be taken as a guide, and in doing so the conclusion must be reached that it was the intention of the legislature to exact a showing of the *minimum* percentage of *protein*, the *minimum* percentage of *crude fat*, and the *maximum* percentage of *crude fibre*, and that when such conditions have been met your board is authorized to issue the license for the sale of feed stuffs provided for in section 1143 of the General Code, as amended (106 O. L., page 157).

Respectfully,
EDWARD C. TURNER,
Attorney General.

919.

COUNTY BOARD OF EDUCATION—TRANSFER OF TERRITORY FROM ONE SCHOOL DISTRICT TO ANOTHER—HOW INDEBTEDNESS IS TO BE APPORTIONED—EQUITABLE DIVISION—WHEN TERRITORY ATTACHED TO SCHOOL DISTRICT WILL BE LIABLE FOR BOND ISSUE.

In transferring territory from one school district to another within the county school district, under authority of section 4692, *G. C., as amended in* 106 *O. L.*, 397, *it is the duty of the county board of education at the time of making said transfer to make an equitable division of the indebtedness of the school district from which said territory is transferred, and that part of said indebtedness which said board, in the exercise of its discretion determines shall be assumed by the school district to which said territory is transferred, will become an indebtedness of the entire district as reformed and not merely an indebtedness of the territory transferred thereto.*

In case the school district to which said territory is transferred votes in favor of a bond issue under authority of section 7625, *G. C., for the purpose therein mentioned, and said territory is thereafter transferred by the county board of education to said school district, said territory will be liable for its share of the bonded indebtedness so created.*

COLUMBUS, OHIO, Oct. 13, 1915.

HON. EARL K. SOLETHER, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—I have your letter of September 23rd which is as follows:

"Under the recent law passed by the legislature giving the county board power to transfer territory from one school district to another, our county board is contemplating the transfer of a small portion of the territory of the rural school district of Milton township to the village school district of Weston. The rural school district of Milton township voted about a year ago to issue bonds for the erection of a new schoolhouse. By transferring this small portion of territory from the rural district of Milton township, does this relieve the territory transferred from the payment of its share of the bonded indebtedness?

"If the above question is answered in the negative, then in case the territory to which this territory is transferred should vote on the question of a bond issue, and the same should carry, would this transferred territory then be liable for its share of the bonded indebtedness of the school district to which it was transferred?"

In answer to my request for additional information you state in your letter of October 5th that the Weston village school district is not exempt from county supervision.

The authority of your county board of education to transfer the territory referred to in your inquiry is found in section 4692, G. C., as amended in 106 O. L., 397, which provides:

"The county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district. Such transfer shall not take effect until a map is filed with the auditor of the county in which the transferred territory is situated, showing the boundaries of the territory transferred, and a notice of such proposed transfer has been posted in three conspicuous places in the district or districts proposed to be transferred, or printed in a paper of general circulation in said county for ten days; nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred, shall within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer. * * * The legal title of the property of the board of education shall become vested in the board of education of the school district to which such territory is transferred. The county board of education is authorized to make an equitable division of the school funds of the transferred territory, either in the treasury or in the course of collection. And also an equitable division of the indebtedness of the transferred territory."

The Milton township rural school district having a bonded indebtedness you first inquire whether the part of said district which the county board of education contemplates transferring to Weston village school district will, upon being transferred to said village school district, be relieved from the payment of its proportionate share of said indebtedness.

If said county board of education, for the purpose of transferring said territory, complies with the requirements contained in the first part of the statute as above set forth, and no remonstrance is filed with said board by a majority of the qualified electors residing in said territory, within the time limit therein prescribed, the legal title of the school property of the board of education of Milton township rural school district, located in said territory, will pass to and vest in the board of education of Weston village school district. Under provision of the latter part of said statute it will be the duty of the county board of education at the time said terirtory is trans-

ferred to make an equitable division of the school funds of said territory either in the treasury or in the course of collection, also an equitable division of the indebtedness of said territory.

In determining what proportion of the funds in the treasury of Milton township rural school district or in the process of collection shall be paid over to the treasurer of the Weston village school district, the county board of education will doubtless take into consideration the tax duplicate of the territory transferred as compared with the tax duplicate of the original district as it existed prior to said transfer, due allowance being made for the economy in administration which will be effected by said transfer of territory.

Likewise, in determining what proportion of the indebtedness of said rural township district shall be assumed by said village school district, the county board of education will take into consideration various factors upon which an equitable division of such indebtedness must be based. The question of what will constitute an equitable division of indebtedness in case of the transfer of territory from one rural or village school district to another was considered in an opinion of my predecessor, Hon. Timothy S. Hogan, rendered to Hon. Frank W. Miller, superintendent of public instruction, under date of October 8, 1914.

I quote the following from said opinion:

> "The situation presented, then, is that the rural district as originally constituted has no bonded indebtedness, whereas the district from which the territory is transferred is burdened with an indebtedness.
>
> "In such a situation the statute requires that a proportional part of the indebtedness of the old district, from which the territory was transferred, shall be assumed by the new district. What proportion shall be thus assumed depends upon various factors. If, for example, a school house, on account of which a bonded indebtedness has been incurred, is located in the transferred territory, then the new district should assume the entire indebtedness, allowance being made for the exclusion from the territory transferred of any territory formerly tributary to such school house. If, on the other hand, the indebtedness is not on account of any building which is located in the transferred territory, the assumption of indebtedness, if deemed equitable, should be made only on the basis of the fact that the new district will reap some benefit from the use of public buildings, i. e., that territory in the former township district and outside of the territory transferred will be served by the school house thus acquired. If no school building is acquired by transfer, then such portion of the bonded indebtedness of the old district should be assumed by the new district to which the transfer is made as will be equitable, having regard to the tax duplicate of the transferred territory, as compared with the tax duplicate of the original indebted district as it existed prior to the transfer, due allowance being made for whatever economy in the administration of the schools of the indebted district may be effected by detaching that territory from it and whatever additional burden the new district to which the transfer is made will assume by reason of the addition of such territory, in the administration of its schools.
>
> "In any event, if the school district which is indebted has accumulated money in a sinking fund for the retirement of the bonds, such portion of such sinking fund should be paid to the board of education of the new district to which the transfer of territory was made, as corresponds to the proportion of the indebtedness assumed.
>
> "The indebtedness so transferred becomes an indebtedness of the whole district thus formed and is not to be met by levies upon the transferred territory only.

"In all such cases there is no hard and fast rule to be applied. The statute requires an equitable division of property and indebtedness, and this requirement has the effect of reposing in the county board of education making the transfer, a sound discretion with respect to the determination which it is required to make, which will only be disturbed by the courts in case of its abuse."

I concur in the reasoning above expressed and I therefore enclose a copy of said opinion.

Replying to your first question I am of the opinion that if the board of education of your county, acting under authority and in compliance with the requirements of section 4692, G. C., as amended, transfers a part of Milton township rural school district to Weston village school district, it will be the duty of said board, at time of making said transfer, to make an equitable division of the indebtedness of said rural school district, and that part of said indebtedness which said board, in the exercise of its discretion, determines shall be assumed by said village school district, will become an indebtedness of the entire village school district as reformed and not merely an indebtedness of the territory transferred thereto, it being understood that if the Milton township rural school district has accumulated money in a sinking fund for the retirement of the bonds, such portion of said sinking fund should be paid to the board of education of Weston village school district, as corresponds to the proportion of the indebtedness assumed by said village school district.

It follows, therefore, that the territory which the county board of education contemplates transferring from said rural school district to said village school district will not, upon such transfer being made, be relieved from its burden on account of said indebtedness, but the rate of the tax levy for the payment of that part of said indebtedness transferred to said village school district, as made by the board of education of said village school district, and applied to the territory of said district as reformed, would be changed, and would, in all probability, be decreased.

You further inquire whether, in case said village school district as it now exists should vote in favor of a bond issue under authority of section 7625, G. C., for the purposes therein mentioned, and the territory in question is thereafter transferred by the county board of education from said rural school district to said village school district, said territory will be liable for its share of the bonded indebtedness so created. Upon the transfer of said territory to said village school district the same will become a part of said village school district for all school purposes. In view of the reasoning offered in support of the answer to your first question it would be unreasonable to hold that said territory would, upon being transferred to said village school district, be entitled to the benefits resulting from said bond issue without being liable for its share of said bonded indebtedness, even though the question of issuing said bonds be submitted to a vote of the electors of said village school district prior to the time said territory will be transferred.

I am of the opinion, therefore, that your second question must be answered in the affirmative.

Respectfully,
EDWARD C. TURNER,
Attorney General.

920.

APPROVAL OF ORIGINAL BONDS, VILLAGE OF HUDSON, OHIO, ISSUED IN ANTICIPATION OF COLLECTION OF SPECIAL ASSESSMENTS.

COLUMBUS, OHIO, October 13, 1915.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I hereby certify that I have examined the original bonds of the village of Hudson, issued in anticipation of the collection of special assessment for the improvement of Aurora and Streetsboro streets, respectively, and to pay the village's portion of the expense of paving such streets, opinion with respect to the proceedings for the issuance of which has been heretofore given by me to the industrial commission of Ohio, and that the form of said bonds is, in my opinion, sufficient in law.

Respectfully,
EDWARD C. TURNER,
Attorney General.

921.

BANKS AND BANKING—TREASURER OF BANK INCORPORATED UNDER LAWS OF OHIO—MUST BE STOCKHOLDER OF SAID CORPORATION IN SUCH AMOUNT AS MAY BE FIXED BY CORPORATION'S BY-LAWS—SEE SECTION 8661, G. C.

The treasurer of a bank incorporated under Ohio laws must be a stockholder of the corporation in such amount as is provided by the corporation's by-laws.

COLUMBUS, OHIO, October 13, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of October 6, 1915, requesting my opinion as follows:

> "We have had submitted to us the question as to whether or not the treasurer of a bank incorporated under the laws of this state is required to be a stockholder in the corporation."

In the General Code relative to the organization and powers of banks no specific provision has been made relative to the necessary qualifications of a bank treasurer or its other executive officers. Section 9731 of the General Code provides that every director must be the owner and holder of at least five shares of stock in his own name and right, unpledged and unincumbered in any way.

Section 9714 of the General Code, which is one of the sections relative to the organization and powers of banks, provides as follows:

> "In all other respects, such corporation shall be created, organized, governed and conducted in the manner provided by law for other corporations in so far as not inconsistent with the provisions of this chapter."

Section 8661 of the General Code, which is a part of the law relative to the organization and powers of corporations generally provides as follows:

"A majority of such *directors* must be citizens of this state. All directors and executive officers shall be holders of stock of the company for which they are chosen, in an amount to be fixed by the by-laws, and trustees of corporations must be members thereof."

The treasurer of a corporation is an executive officer, and since the sections of the General Code particularly applicable to banks are silent upon the subject of the necessary qualifications of officers of a banking corporation, it follows that the provisions of section 8661 of the General Code, above quoted, are applicable.

I therefore advise you that the treasurer of a bank incorporated under the laws of this state must be a stockholder of said banking corporation in such amount as may be fixed by the corporation's by-laws.

Respectfully,
EDWARD C. TURNER,
Attorney General.

922.

STATE HOSPITAL—IN ORDER TO COMMIT A PERSON TO A HOSPITAL FOR INSANE, A "LEGAL SETTLEMENT" MEANS THAT THERE MUST HAVE BEEN A CONTINUOUS RESIDENCE IN COUNTY OF TWELVE MONTHS—AS TO NON-RESIDENTS, BOARD OF ADMINISTRATION IS DIRECTING POWER.

Residence of twelve months in county is necessary to establish the legal settlement required to make applicant for admission to insane hospital eligible therefor, except in case of non-residents of the state.

COLUMBUS, OHIO, October 13, 1915.

HON. FRANK DELAY, *Probate Judge, Jackson, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your favor of the 19th of September, in which you ask for an opinion on a question which is as follows:

"Will you kindly give me your opinion upon the following question:

"Where a person who has resided in this state for more than a year removes from one county to another, and there becomes insane, how long must he have resided in the latter county in order to justify his commitment to an insane hospital from said latter county?"

Section 1818 of the General Code is as follows:

"When application to a judge of the probate court is made for the commitment of a person to a hospital for insane, a hospital for epileptics or the institution for feeble minded, or whenever application to the superintendent of any other benevolent institution is made for the admission of a person thereto, such judge or superintendent shall require answers to the following questions:

"1. Where was the person born?

"2. When did he become a resident of this state?

"3. When did he become a resident of the county?

"4. If not a legal resident of the state and county, on what grounds is the application made."

One of the requirements of the section is the information as to when the person who is an applicant for admission to an insane hospital became a resident of the county?

Section 10492 of the General Code provides as follows:

"Except as hereinafter provided the probate court shall have exclusive jurisdiction * * *.

* * * * * * *

"6. To make inquests respecting lunatics, insane persons, idiots, and deaf and dumb persons, subject by law to guardianship."

Section 10989 of the General Code, in part, is as follows:

"Upon satisfactory proof that a person resident of the county *or having a legal settlement* in any township thereof, is an idiot, imbecile, or lunatic, the probate court shall appoint a guardian for such person, who by virtue of such appointment shall be the guardian, etc. * * *"

Section 3477 of the General Code is as follows:

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

"First. An indentured servant or apprentice legally brought into this state shall be deemed to have obtained a legal settlement in the township or municipal corporation in which such servant or apprentice has served his or her master or mistress for one year continuously.

"Second. The wife or widow of a person whose last legal settlement was in a township or municipal corporation in this state, shall be considered to be legally settled in the same township or municipal corporation. If she has not obtained a legal settlement in this state, she shall be deemed to be legally settled in the place where her last legal settlement was previous to her marriage."

It will be observed that in section 10492 of the General Code, supra, the probate court is given jurisdiction to hold lunacy inquests, and that the jurisdiction of the court to hold a lunacy inquest is limited to such cases wherein the person is subject by law to guardianship. Again in section 10989, *supra*, will be found the provision to the effect that it is jurisdictional that a person be a resident of the county or have a *legal settlement* in a township thereof before he is subject to action on the part of the probate court towards the appointment of a guardian.

Section 1953 of the General Code is as follows:

"For the admission of patients to a hospital for the insane, the following proceedings shall be had. A resident citizen of the proper county may file with the probate judge of such county an affidavit, subsequently as follows:

"The State of Ohio_____County, SS:

"_____the undersigned, a citizen of _____County, Ohio, being sworn, says, that he believes _____is insane (or, that in consequence of his insanity, his being at large is dangerous to the community). He has a legal settlement in_____township, this county.

"Dated this_____day of_____A. D_____"

This section prescribes the requisites of an application for the admission of patients to a hospital for the insane, among which will be found a necessity for a showing as to a legal settlement in a township of the county.

The question propounded by you is, how long must a person have resided in a county to justify his commitment to an insane hospital from the county of his residence.

The question of legal settlement was considered in the case of In re Clinton Canady by J. M. Canady, vol. VII, Ohio Decisions, at page 285. This was a case involving the appointment of a guardian for an idiot, and the court in passing on the question of legal settlement, at page 286 ,says:

> "A legal settlement as in section 6203 used, in my opinion, means a continuous residence within the county for the period of twelve consecutive months. It is so defined in section 1492, in relation to pauper relief, and being an old phrase, for many years found in our statute law, it is fair to presume that the legislature intended it to have the meaning here that they elsewhere declared it to have."

It is my opinion, that under the existing statutes, a legal settlement for the purpose referred to can only be said to have been acquired only after a continuous residence of twelve months in the county, except in the case of a non-resident of the state, who, under the provisions of section 1950 of the General Code, as amended, page 447 of 103 O. L., may be admitted upon the authority of the Ohio board of administration irrespective of such non-residence.

Respectfully,
EDWARD C. TURNER,
Attorney General.

923.

COUNTY AUDITOR—AUTHORITY TO RE-IMBURSE SHERIFF FOR REWARD PAID BY HIM FOR APPREHENSION OF A FELON IN SISTER STATE—REWARD.

County auditor is legally authorized to pay to the sheriff of the county the sum authorized by resolution of the county commissioners for the reimbursement of said sheriff for a reward paid by him for the apprehension of a felon in a sister state; such reward having been paid by the sheriff pursuant to an expressed willingness of the county commissioners to pay a reward for the apprehension of the aforesaid felon.

COLUMBUS, OHIO, Oct. 13, 1915.

HONORABLE F. C. GOODRICH, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Permit me to acknowledge the receipt of your request for an opinion which is as follows:

> "Enclosed please find a resolution, which is self-explanatory, and I desire to know whether or not the commissioners can pass this resolution and make the payment of this award legal by the auditor. As stated in the resolution, at the time the sheriff offered the reward the county commissioners did not by

their minutes authorize him to do so, but it was satisfactory with them, and they now desire to fix their records so that the sheriff may be reimbursed for the money he has paid out of his own pocket.

"Thanking you for an early opinion, I am, etc."

With your letter you enclose draft of a resolution which your county commissioners propose to pass, which is as follows:

"RESOLUTION

"WHEREAS, Sheriff, Joseph Barnett and Chief of Police, Frank Gehle, of Piqua, Ohio, consulted with the commissioners of Miami county, Ohio, in reference to the offering of a reward of $100.00 for the capture and return of Giles Joiner, and

"WHEREAS, the said county commissioners of Miami county, Ohio, expressed to the said sheriff and chief of police their willingness to offer said reward upon being advised before said reward was offered, and

"WHEREAS, said sheriff and chief of police offered said reward, but neglected to so advise said county commissioners beforehand, and by means of the offering of said reward said Giles Joiner was captured and returned to this county for prosecution, and said Giles Joiner was convicted of the crime of murder in the first degree with a recommendation for mercy, and said reward was duly paid by the said sheriff to the chief of police of Winston-Salem, N. C.,

"THEREFORE, BE IT RESOLVED by the commissioners of Miami county, Ohio, that the said action of the said sheriff and chief of police in offering and paying said reward be, and the same is hereby ratified and approved, and the county auditor is hereby authorized to draw his warrant in favor of Joseph Barnett, sheriff of Miami county, for the sum of $100.00 to reimburse him for the payment of said reward."

Section 2489 of the General Code is as follows:

"When they deem it expedient, the county commissioners may offer such rewards as in their judgment the nature of the case requires, for the detection or apprehension of any person charged with or convicted of felony, and on the conviction of such person, pay it from the county treasury, together with all other necessary expenses, not otherwise provided for by law, incurred in making such detection or apprehension. When they deem it expedient, on the collection of a recognizance given and forfeited by such person, the commissioners may pay the reward so offered, or any part thereof, together with all other necessary expenses so incurred and not otherwise provided for by law."

The provisions of the section just quoted afford ample authority for the commissioners in the first instance to have offered the reward had action been taken to that end. No particular form of procedure is laid down in the statute, and under the circumstances if the question of reward was considered by the commissioners and action taken towards its offer, the action should have been taken under and pursuant to the provisions of section 2405 of the General Code, which provides that all proceedings of the board shall be public, etc., and the record of the action should have been made by the clerk of the board as provided in section 2406 of the General Code.

It appears from your letter, however, that the matter was only informally considered by the commissioners with the sheriff and chief of police, and that no record

of any action that was taken was made by the clerk. While this, in a strict sense, would be a non-compliance with the statutes, sections 2504 and 2506 of the General Code, above referred to, it would not necessarily make invalid the action of the commissioners in adopting a suitable resolution for the reimbursement of an officer acting in good faith basing his action upon a previously expressed intention of the commissioners in paying a reward personally.

From other information than that contained in your letter received at this office and at the office of the auditor of state it appears that the sheriff in proceeding to pay a reward for the apprehension of Giles Joiner did so upon the clear belief that he had been so authorized by the county commissioners, and the fact that the county commissioners in the resolution submitted recite that a consultation was held on the subject and they now stand ready to adopt a resolution providing for the reimbursement of the sheriff would seem to bear out his contention. As above stated, there is no specified form of procedure laid down for the offering of a reward other than that it shall be made a part of the records of the office of the county commissioners, under the provisions of sections 2405 and 2406.

It is my opinion that if the commissioners should adopt a resolution providing for the reimbursement of the sheriff, the auditor would have authority to draw his warrant for the payment of the amount appropriated.

I understand that the auditor of state has had this matter before him officially, and he has indicated that no question would be raised as to the payment for the purpose referred to.

Respectfully,
EDWARD C. TURNER,
Attorney General.

924.

JUSTICE OF PEACE—AUTHORITY TO SUSPEND SENTENCES AND FINES—CAN ONLY REMIT FINE OR SENTENCE *BEFORE* SAME HAS GONE INTO OPERATION AND THEN ONLY WITHIN LIMITS AUTHORIZED BY LAW—AUTHORITY TO SUSPEND AFTER EXECUTION OF SENTENCE *BEGUN*—HAS LOST ALL JURISDICTION—COUNTY COMMISSIONERS MAY PAROLE PRISONERS CONFINED IN COUNTY JAIL FOR NON-PAYMENT OF FINES—COUNTY AUDITORS MAY DISCHARGE PRISONERS INSOLVENT.

1. *The authority to suspend sentences and fines in criminal cases, delegated to magistrates under the provisions of section* 13711, *G. C., is not abrogated by any provisions in section* 1445, *G. C., as amended* 106 *O. L.*, 173, *and may be exercised in convictions under said last named statute and in all other cases of misdemeanors when not prohibited by law.*

2. *The jurisdiction of a magistrate to suspend a sentence or fine in criminal cases is not a continuing one and must be exercised before execution thereof has begun and the defendant committed.*

COLUMBUS, OHIO, Oct. 14, 1915.

HON. JOHN H. SCHRIDER, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 27, 1915, bearing the following inquiries:

> "1. Has a justice of the peace, upon a plea of guilty, under section 1445 of the G. C., the right to remit or suspend part or all of the sentence imposed, either before or after the defendant has been committed to jail?

"2. Has a justice of the peace in criminal cases where he has final jurisdiction, the right to remit or suspend part or all of the sentence imposed?

"3. If a justice of the peace in a criminal case where he has final jurisdiction has imposed a fine or a fine and jail sentence, and committed the defendant to the county jail or to the work house in default of payment of fine, and the defendant has served part of the time required, then, at that time has the justice the right to remit or suspend the remainder of the fine or term and order the defendant discharged."

In your letter you connect the word "remit" with the word "suspend" in each set of facts upon which an inquiry is based. In order to simplify what hereafter may be said it is well to suggest that the two words "remit" and "suspend" cannot be used synonymously, and that a justice of the peace can only remit a fine or a sentence before the same has gone into operation or any action taken thereon, and then only within the limits authorized by law. In other words, it is only before the execution of a sentence has begun that a justice may amend, revise or vacate it and render a *new sentence*, which must impose at least the minimum penalty provided by law in such case. Lee v. State, 32 O. S., 113. Tracy v. State, 8 C. C. (N. S.), 357.

With the foregoing observations we will consider your inquiries as based only on the question of the right to suspend under the facts as presented in each case. While there is a great conflict in opinion in many jurisdictions, the prevailing authority in Ohio sanctions the inherent right of all courts to suspend a sentence in criminal cases, at least during the term at which sentence was passed. It was held in the case or Webber v. State, 58 O. S., 616, that:

"In a criminal case the court has the power to suspend the execution of the sentence, in whole or in part, unless otherwise provided by statute, and has the power to set aside such suspension at any time during the term of court at which sentence was passed."

This principle seems to have had the approval of the same court in the recent unreported case of State v. Whiting, 83, O. S., 447, even to a greater extent than in the case of Webber v. State, supra.

However, it is immaterial in this inquiry whether this right may be exercised independent of statutory law or not, because under the particular facts stated by you the power to suspend is expressly delegated or prohibited by statutory law; that is to say, under the facts presented by you, if the authority exists to suspend the sentence, it is granted by statutory law, and if it cannot be exercised under said facts it is because the statute law prohibits such exercise.

The statutory authority granted to a justice of the peace to suspend a sentence is found in section 13711, G. C., which is a part of what is commonly known as the "probation law" of this state. Said section provides as follows:

"When the sentence of the court or magistrate is that the defendant be imprisoned in a workhouse, jail, or other institution, except the penitentiary or the reformatory, or that the defendant be fined and committed until such fine be paid, the court or magistrate may suspend the execution of said sentence and place the defendant on probation, and in charge of a probation officer named in such order, in the following manner:

"1. In case of sentence to a workhouse, jail or other correctional institution, the court or magistrate may suspend the execution of the sentence and direct that such suspension continue for such time, not exceeding two years, and upon such terms and conditions as it shall determine;

"2. In case of a judgment of imprisonment until a fine is paid, the court may direct that the execution of the sentence be suspended on such terms as it may determine, and shall place the defendant on probation to the end that said defendant may be given the opportunity to pay such fine within a reasonable time; provided, that upon payment of such fine, judgment shall be satisfied and the probation cease."

The provisions of this section confer upon justices of the peace full authority to suspend sentences under the conditions therein named. This authority may be exercised in any case in which the justice has final jurisdiction, unless its exercise is prohibited by other provisions of law applying to the particular case in question, and it may be said that it was intended to and does apply in a general way to every case coming within the final jurisdiction of a justice of the peace.

It is provided in section 13717, G. C., that when a fine is the whole or a part of a sentence, the court or magistrate may order the person sentenced committed to jail until such fine and costs are paid, provided that such person shall receive credit upon such fine and costs at the rate of sixty cents per day for each day's imprisonment. Again, by the provisions of sections 12386 and 12387, G. C., where a fine may be imposed, and the court or magistrate may order such person to stand committed to the jail until such fine and costs of prosecution are paid, the court or magistrate may order that such person stand committed to a workhouse until such fine and costs are paid, or until he is discharged therefrom by allowing a credit of sixty cents per day on the fine and costs for each day of confinement in the workhouse.

It is apparent, therefore, that in all cases, unless the statute covering the case provides otherwise, a justice may commit a defendant to the county jail or workhouse in default of payment of fine and costs, and that the provisions of said section 13711 will apply when such action is taken by the justice.

Referring now to your first inquiry, section 1445, G. C., as amended, 106 O. L., 173, provides as follows:

"Whoever violates any provisions of sections 1409 to 1444, both inclusive, shall be fined not less than twenty-five dollars nor more than two hundred dollars, and the costs of prosecution, and upon default of payment of fine and costs shall be committed to the jail of the county or to some workhouse and there confined one day for each dollar of the fine and costs against him. He shall not be discharged or released therefrom by any board or officer except upon payment of the portion of the fine and costs remaining unserved or upon the order of the board of agriculture."

There is nothing in this section which, in my judgment, is in conflict with section 13711, supra. While it is true that this section makes it mandatory to commit to a jail or workhouse in default of payment of fine and costs, that authority under the statutes heretofore noted is already vested in the court to be exercised, at its discretion and this provision has no more force than any other provision of law fixing a definite penalty in any criminal case. It certainly could not be said that it should be given any more effect than a provision which makes confinement in a jail or workhouse the penalty or a part of the penalty in the first instance. The last clause of said section prohibiting any board or officer from discharging the defendant before payment of fine and costs, clearly refers to the board of county commissioners and the county auditor. The former under the provisions of section 12382, G. C., may parole prisoners confined in the county jail for non-payment of fines and costs, and the latter under section 2576, G. C., may discharge prisoners from the county jail upon proof of their insolvency. It may be said further that the authority to discharge from the county jail delegated to the board of agriculture cannot be said to reflect upon the right of the trial court

to suspend the payment of the fine in the first instance. This provision of law I think can only be considered as intended to be effective in the event of actual confinement in the jail or workhouse.

I conclude, therefore, that the right to suspend a sentence under section 1445 supra, is not abrogated by its provisions. In reaching this conclusion I am not unmindful of the opinion of the assistant attorney general, reported at page 221 of the attorney general's reports for the year 1908. It must be remembered, however, that the probation law at that time had just gone into effect and no opportunity had been given to know anything of the results to be accomplished under it or of its application as defined by the courts under other statutes. I do not believe that the learned writer of that opinion would reach the same conclusion at this time.

The latter part of your first inquiry and the whole of your last are limited to the question of the right of a justice of the peace, after execution of sentence has begun and the defendant is confined in the jail or workhouse, to suspend the remainder of such sentence. The authority to so suspend a sentence under such circumstances is one of great doubt, and while supported by some courts the tendency of modern decisions is against it. It seems now to be the prevailing opinion that after a court has sentenced a prisoner, and execution of said sentence has begun, the court has lost all jurisdiction. This conclusion may be due to the fact that under our recent statutory laws ample provisions for parole and other similar measures have been made, which, to a great extent, supply the loss of such authority by the trial court.

In the case of State v. Perrill, 59 law bulletin, 371, it was held that after a sentence to the penitentiary or reformatory the entire jurisdiction and control of the prisoner rests with the board of management of those institutions. The opinion of the court in this case may with equal reason be applied to the case presented by your inquiry.

As before noted, county commissioners have authority to parole prisoners confined in the county jail for non-payment of fines and costs, and county auditors may discharge prisoners under like circumstances upon proof of insolvency. Workhouse directors are also authorized under their general powers to parole prisoners. In view of these considerations I incline to the opinion that justices of the peace do not have a continuing jurisdiction and therefore cannot modify, change or suspend any sentence imposed by them after the same has gone into effect and the prisoner has been committed to a county jail or workhouse and thereby placed under the control of other authority.

I conclude, therefore, that justices may suspend the payment of fines imposed under section 1445, and that they may suspend any sentence in the cases named by you in your second inquiry unless in a case where such right is expressly prohibited, but that no suspension of any sentence may be made in any case after execution thereof has begun and the prisoner committed to the control of other authority.

Respectfully,

EDWARD C. TURNER,

Attorney General.

925.

BOARD OF EDUCATION—CENTRALIZATION—TWO OR MORE SCHOOL DISTRICTS LOCATED IN SAME TOWNSHIP MAY SUBMIT QUESTION OF CENTRALIZATION TO ELECTORS OF DISTRICT—RESOLUTION DETERMINES WHETHER QUESTION SHALL BE SUBMITTED AT GENERAL OR SPECIAL ELECTION—CLERKS OF SAID BOARDS MAY PUBLISH NOTICE OF SUCH ELECTION.

Under the provisions of section 4726, G. C., as amended in 104 O. L., 139, and section 4726-1, G. C., as found in school districts located in a township may, by resolution passed by each of said boards, determine to submit to the electors of said school districts the question of centralizing the schools of said districts, and in said resolution determine whether said question shall be submitted at the general election or at a special election called for that purpose. Pursuant to said resolution the clerks of said boards of education, acting under authority and in compliance with the requirements of section 4839, G. C., may publish in their respective districts a notice which shall specify the time and place of holding said election and the nature of the question to be voted upon.

COLUMBUS, OHIO, Oct. 14, 1915.

HON. ARCHER L. PHELPS, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—In your letter of October 8th you state that prior to the enactment of the new school code there existed in Bristol township, Trumbull county, a township school district and also a special school district under the old law; that after the new school code became effective the question of centralization was submitted to the electors of the old township district, exclusive of the old special school district, which was defeated; that the question of taking a vote under the new school code was considered, but owing to the fact that neither board of education was willing to relinquish the control of the schools in its district without first having determined whether or not the township as a whole including both of said districts (now known as rural school districts under provisions of section 4735, G. C., 104 O. L., 138) would centralize; that a bill was therefore prepared and submitted to the legislature by the terms of which separate rural school districts in a township would be authorized to vote on the question of centralization without interfering with the existing school districts unless the vote would be in favor of centralization and that said bill as submitted to the legislature was enacted into a law, and is now known as section 4726-1 of the General Code, 106 O. L., 442.

You quote a part of said section 4726-1, G. C., as follows:

> "In townships in which there are one or more school districts, the qualified electors of such school districts may vote on the question of centralizing the schools of said township districts, or of special school districts therein, without interfering with the existing school district organization until the result of the election shall have been determined."

You request my opinion on several questions which for the sake of brevity may be stated in one question as follows: Inasmuch as section 4726-1, G. C., does not provide for holding an election on the question of centralizing school districts of a township, how shall said question be submitted to the electors residing in the rural districts above referred to?

Section 4726, G. C., as amended in 104 O. L., 139, provides:

> "A rural board of education may submit the question of centralization, and, upon the petition of not less than one-fourth of the qualified electors of

such rural district, or upon the order of the county board of education, must submit such question to the vote of the qualified electors of such rural district at a general election or a special election called for that purpose. If more votes are cast in favor of centralization than against it, at such election, such rural board of education shall proceed at once to the centralization of the schools of the rural district, and, if necessary, purchase a site or sites and erect a suitable building or buildings thereon. If, at such election, more votes are cast against the proposition of centralization than for it, the question shall not again be submitted to the electors of such rural district for a period of two years, except upon the petition of at least forty per cent. of the electors of such district."

Under provision of the first part of section 4726, G. C., as above quoted, the board of education of a rural school district may submit the question of centralization to a vote of the qualified electors of said district, and upon the petition of at least one-fourth of the qualified electors of such district, or upon the order of the board of education of the county school district, must submit such question to the vote of said electors, at the general election or a special election called for that purpose.

I have already held in a former opinion rendered to Hon. D. F. Mills, prosecuting attorney of Shelby county, under date of March 30, 1915, that if the rural board of education determines to submit said question at the special election called for that purpose the same may be done under the above provision of section 4726, G. C., taken in connection with the provisions of section 4839, G. C., which makes it the duty of the clerk of each board of education to publish a notice of all school elections in a newspaper of general circulation in the district or post written or printed notices thereof in five public places in the district at least ten days before the holding of such election. Said statute further provides that "such notices shall specify the time and place of the election, the number of members of the board of education to be elected, and the term for which they are to be elected, *or the nature of the question to be voted upon.*"

It was evidently the intention of the legislature in supplementing said section 4726 by the enactment of section 4726-1, G. C., to extend the authority to submit the question of centralization to cover the situation confronting the boards of education of the school districts referred to in your inquiry and to make possible the centralization of the schools of two or more school districts located in the township without interfering with the organization of said districts until the result of the vote on said question shall be determined.

The provisions of said supplemental section must therefore be read in connection with the provisions of said section 4726, G. C., for the purpose of determining the answer to the question presented by you. Under the well settled rules of statutory construction said supplemental statute must be construed, if possible, so as to give effect to the legislative intent in the enactment of said statute.

While the county board of education has authority under provision of section 4692, G. C., as amended in 106 O. L., 397, to transfer one of said rural school districts to the other and by so doing said county board could then direct the board of education of the entire rural school district as reformed to submit said question of centralization to the electors therein under authority of the above provision of section 4726, G. C., and it would then be mandatory on said board of education of said rural school district to submit said question to a vote of said electors, this plan meets with the same objection raised when the plan, referred to in your statement of facts, was considered, viz., dissolving one of said rural districts and joining it to the other under authority and in compliance with the requirements of section 4735-1, G. C., as found in 104 O. L., 138.

I am of the opinion therefore that under the provisions of said sections 4726 and 4726-1, of the General Code, the boards of education of the rural school districts referred

to in your inquiry may, by resolution passed by each of said boards, determine to submit to the electors of said school districts the question of centralizing the schools of said districts, and in said resolution determine whether said question shall be submitted at the next general election or at a special election called for that purpose. Pursuant to said resolution the clerks of said boards of education acting under authority and in compliance with the requirements of section 4839, G. C., may publish in their respective districts a notice which shall specify the time and place of holding said election and the nature of the question to be voted upon. A copy of said resolution should be certified to the board of deputy state supervisors of elections of the county in order that said board may prepare the ballots and make the necessary arrangements for the submission of said question.

Respectfully,
EDWARD C. TURNER,
Attorney General.

926.

COUNTY BOARD OF EDUCATION—TRANSFER OF PART OF COUNTY SCHOOL DISTRICT TO AN ADJOINING COUNTY SCHOOL DISTRICT—EQUITABLE DIVISION OF FUNDS OR INDEBTEDNESS MUST BE AGREED UPON BY BOTH COUNTY BOARDS.

Section 4692, *G. C., as amended in* 104 *O. L.*, 135, *and as in force prior to August* 27, 1915, *the date when said statute as amended in* 106 *O. L.*, 397, *became effective, authorized the transfer of part of a county school district to an adjoining county school district according to the terms of an agreement to be entered into between the boards of education of said county school districts, in the manner provided in said section, it being essential under provision of section* 4696, *G. C., as amended in* 104 *O. L.*, 135, *that in said agreement an equitable division of funds or indebtedness of the local school district from which said territory was to be transferred should be agreed upon by said county boards of education.*

COLUMBUS, OHIO, October 14, 1915.

HON. JOHN C. D'ALTON, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—In your letter of October 4th, you request my opinion as follows:

"On June 25, 1915, the board of education of Lucas county, Ohio, agreed with the board of education of Wood county, Ohio, to the transfer of certain territory from the Ludwig school district of Providence township, Lucas county, Ohio, to the Grand Rapids village school district of Wood county, Ohio. At the time of the transfer the county board of education of Lucas county, Ohio, made an equitable division of funds and determined that the proportion of funds of the Ludwig school district of Providence township, Lucas county, Ohio, to be turned over to the Grand Rapids village school district of Wood county, Ohio, to be 11.6 per cent. of the total funds of said Ludwig school district.

"Query: Did the Lucas county board of education have the power to make the transfer of territory and the power to make the division of funds?

"This transfer was made under section 4692 of the General Code, 104 Session Laws, page 135, which section recites that the transfer shall be made by the mutual consent of the boards of education having control of such districts.

"Section 4696 of the General Code, 104 Session Laws, page 135, recites that at the time of transfer the division of funds shall be made.

"Section 4728 of the General Code, 104 Session Laws, page 136, recites that each county school district shall be under the supervision and control of a county board of education.

"In my opinion, the construction of the words, 'the board of education having control of such districts,' in section 4692 of the General Code, refer to the board of education of the rural school district, and not to the county board of education, for the reason that section 4696 provides that the division of funds must be made at the time of the transfer. Therefore, it must be made by the board of education having the control, and the only board of education having control of the funds of the rural school district is the rural board of education. If the county board of education had the power to make the transfer and the power to proportion the division of funds, there would be no way of compelling the rural board of education to turn over that proportionment of the division of the funds."

Section 4692, G. C., as amended in 104 O. L., 135, and as in force prior to August 27, 1915, the date when said statute as amended in 106 O. L., 397, became effective, provided as follows:

"Part of any county school district may be transferred to an adjoining county school district or city or village school districts by the mutual consent of the boards of education having control of such districts. To secure such consent, it shall be necessary for each of the boards to pass a resolution indicating the action taken and definitely describing the territory to be transferred. The passage of such a resolution shall require a majority vote of the full membership of each board by yea and nay vote, and the vote of each member shall be entered on the records of such boards. Such transfer shall not take effect until a map, showing the boundaries of the territory transferred, is placed upon the records of such boards and copies of the resolution certified to the president and clerk of each board, together with a copy of such map are filed with the auditors of the counties in which such transferred territory is situated."

You do not state in your letter that the Grand Rapids village school district is subject to county supervision. I am informed, however, by Mr. Clifton, assistant superintendent of public instruction, that said district is subject to such supervision, and this fact is material in determining what boards of education were in control of the school districts in question on June 25, 1915, the date when the board of education of Lucas county school district secured the consent of the board of education of Wood county school district to the transfer of the territory in question.

While the language of the first part of section 4692, G. C., as above quoted, is somewhat ambiguous, I think it was the intention of the legislature, in enacting said statute, to authorize the transfer of a part of a county school district to an adjoining county school district or city or village school district, by the mutual consent of the board of education of such county school district and the board of education of the adjoining county school district, or city or village school district as the case might be, and to limit the term "village school district" as used in said part of said statute to village districts exempt from county supervision.

In this connection I call your attention to the fact that the above provision of section 4692, G. C., authorizing said transfer of territory was re-enacted in section

4696, G. C., as amended by the general assembly in 1915, and as found in 106 O. L., 397, said section 4696, G. C., as amended and as now in force, providing in part as follows:

> "A county board of education may transfer a part or all of a school district of the county school district to an adjoining *exempted* village school district or city school district, *or to another county school district*, provided at least fifty per centum of the electors of the territory to be transferred petition for such transfer."

Said section further provides:

> "No such transfer shall be in effect until the county board of education and the board of education to which the territory is to be transferred each pass resolutions by a majority vote of the full membership of each board and until an equitable division of the funds or indebtedness be decided upon by the boards of education acting in the transfer; also a map shall be filed with the auditor or auditors of the county or counties affected by such transfer."

This section clears up the ambiguity in section 4692, G. C., as found in 104 O. L., and evidences the above expressed legislative intent in enacting said provision of said section 4692, G. C.

Under provision of section 4728, G. C., as found in 104 O. L., 136, each county school district is under the supervision and control of the county board of education of such district.

Under provision of section 4736, G. C., as found in 104, O. L., 138, and as in force prior to the date when said provisions as re-enacted in section 4692, G. C., 106 O. L., 397, became effective, the county board of education clearly had the authority to change district lines within the county school district and to transfer territory from one rural or village school district to another, and an order of said county board of education transferring territory from one rural or village school district to another within said county school district, made under authority and in compliance with the requirements of said section 4736, G. C., was binding on the boards of education of the local districts affected by said transfer of territory.

It seems equally clear that a part of a county school district could be transferred to an adjoining county school district by mutual consent of the boards of education of such county school district, under authority and in compliance with the provisions of section 4692, G. C., as above quoted and the further provision of section 4696, G. C., as found in 104 O. L., 135, which required that:

> "When territory is transferred from one school district to another, the equitable division of funds or indebtedness shall be determined upon at the time of the transfer,"

and that the action of said county boards of education would be binding on the boards of education of the local school districts affected by such transfer.

Inasmuch as the Grand Rapids village school district is not exempt from county supervision, I am of the opinion that the transfer of the territory referred to in your inquiry would be a transfer of a part of the territory of Lucas county school district to the adjoining county school district of Wood county, within the meaning of the above provision of section 4692, G. C., and that the boards of education having control of said districts would be the county boards of education of said county school districts.

However, in order to effect a transfer of the territory in question it was necessary:

(1) That the board of education of Lucas county school district should secure the consent of the board of education of Wood county school district to the transfer of the territory in question, and for this purpose it was necessary for each of said boards to pass a resolution indicating the action taken and definitely describing the territory to be transferred, the passage of such resolution requiring a majority vote of the full membership of each board by yea and nay vote entered on the records of such boards.

(2) That a map showing the boundaries of the territory transferred be placed upon the records of such boards and that copies of said resolutions certified to by the president and clerk of each board, together with a copy of said map, be filed with the auditors of said counties.

(3) That at the time of said transfer the boards of education of said county school districts should agree upon an equitable division of funds or indebtedness of the local school district from which said territory was to be transferred.

While it appears from your statement of facts that the board of education of Wood county consented to the transfer of said territory, it does not appear that the other requirements of the statutes as above set forth were complied with. On the contrary, you state that at the time said transfer was attempted to be made, the board of education of Lucas county school district made an equitable division of funds and determined that the proportion of funds of the Ludwig school district of Providence township, in Lucas county, to be turned over to the Grand Rapids school district in Wood county should be 11.6 per cent. of the total funds of said Ludwig school district.

The above requirements of the statutes are mandatory, and inasmuch as said division of funds was not agreed upon by said county boards of education, I am of the opinion that your question must be answered in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney General.

927.

BALLOT—THERE SHOULD BE LEFT AT END OF LIST OF CANDIDATES WHOSE NAMES ARE PRINTED UPON BALLOTS AS MANY BLANK LINES OR SPACES AS THERE ARE ELECTORS AUTHORIZED TO BE ELECTED TO THE DESIGNATED OFFICE OR OFFICES—ELECTORS MAY WRITE IN NAMES AND PLACE CROSS MARK IN FRONT OF NAMES SO WRITTEN IN.

Upon the ballot for township officers, in townships in which no primary elections have been held, there should be provided at the end of the list of candidates for each particular office a number of blank lines or spaces equal to the number of electors authorized to be elected to the designated office and electors may vote for such electors, other than those whose names are printed upon the ballot, as they may choose by writing in the blank space or spaces the name of their choice and placing a cross mark in front of the name so written in.

COLUMBUS, OHIO, Oct. 14, 1915.

HON OTHO W. KENNEDY, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—Yours under date of October 11, 1915, requesting my opinion, is as follows:

"I desire your opinion as to the right of voters to write in the name of a candidate or candidates on the ballot on election day. There seems to be no doubt but that such can be done at the primary election. To be sure, it requires a certain per cent. to affect the nomination.

"I have been asked this question by two different townships. In the one township, there were nominated one democrat and two republicans, as trustees. The question is: Can the republicans write in a third name, and can the democrats write in two additional names? In the other township, the socialists, only, nominated a candidate for township trustee, both the republicans and democrats having failed to make any nomination for this position. Now, the question is: Can either the democrats or republicans, or both, write in names on election day?

"The difficulty in this situation, it seems to me, is found in that the candidates for township officers will all be on one ballot, as provided in section 5028 of the General Code, as amended in the 103 O. L. at page 520.

"Section 5070 of the General Code, among other things, provides:

" '6. If the elector desires to vote for a person whose name does not appear on the ticket, he can substitute the name by writing it in black lead pencil or in black ink in the proper place, and making a cross mark in the blank space at the left of the name so written.'

"Section 5071, General Code, provides:

" 'If there was no nomination for a particular office by a political party, or if by inadvertence, or otherwise, the name of a candidate regularly nominated by such party is omitted from the ballot, and the elector desires to vote for some one to fill such office, he may do so by writing the name of the person for whom he desires to vote in the space underneath the heading or designation of such office, and make a cross mark in the circle at the head of the ticket, in which case the ballot shall be counted for the entire ticket, as though the name substituted had been originally printed thereon.'

"Now these last two sections, to wit, sections 5070 and 5071 are very clear upon ballots where all parties have their respective tickets, but under section 5028, all candidates are grouped under the designation or title of the office for which nominated, in alphabetical order, according to surnames. This resolves the township election into a non-partisan election, in fact.

"In the two cases above cited, you will note that there are three nominations for trustees in the one case, and in the other case, there is one nomination for treasurer, and so far as the ballot is concerned, there is no politics indicated. Under the facts as above stated, I wish you would give me your early opinion as to whether or not other or additional names may be written in by voters on election day for these respective offices, or whether or not they will be obliged to vote for the person whose name is now on the ticket, or not vote at all for that office."

The question submitted by you involves a consideration of section 5028 of the General Code, as amended in 103 Ohio Laws, page 520, in addition to the sections referred to by you.

Section 5028 provides as follows:

"The names of candidates for municipal offices and the names of candidates for township offices shall be printed upon separate ballots, unless the corporate limits of the municipalities are identical with those of a township. Separate ballots shall be provided in all townships and in municipalities having a population of less than two thousand in which no primary is had

for making nominations, which ballots so intended for the use of voters shall be so arranged and printed that the names of all candidates, whose nominations for any offices specified in the ballot have been duly made, will be grouped under the designation or title of the office for which nominated, in alphabetical order according to surnames. A single blank line or space shall be left at the end of the list of candidates for each different office."

This section governs the form of ballot in all those townships in which no primary election has been held. It will be noted that by the last sentence of this section it is provided:

"A single blank line or space shall be left at the end of the list of candidates for each different office."

It was clearly the purpose of this provision to give opportunity to every elector to vote for such person as he desired for any office, other than those candidates whose names are printed upon the ballot. With this purpose of the provision in view, it should be given such construction as will effectively accomplish that purpose, if the same may be done, within the reasonable significance of its terms.

While it is provided that a single space shall be left for each different office, I am inclined to the view that "office," as here used, is not limited in its meaning to the name of the position to be filled but that where there is more than one position to be filled, although designated as the same office, the purpose of the provision requires that equal opportunity be given to vote for a person to fill each of such anticipated vacancies in office. For instance, where there are to be elected three township trustees there are within the meaning of the term "office," as here used, in my opinion, three offices to be filled.

It would therefore follow that in the preparation of the ballot for township officers, in the case of all those offices in which there is to be elected but one such officer, a single blank line or space should be left at the end of the list of candidates for that office, and in those cases in which there are to be elected more than one officer for a particularly designated office there should be provided at the end of the list of candidates whose names are printed upon the ballot a number of blank lines or spaces equal to the number of persons to be elected to that office.

That is to say, answering your question specifically, with reference to the election of township trustees, a case in which three persons may be elected to that office at the coming election, in my view of the meaning of the last sentence of section 5028, there being three different offices, there should be left at the end of the list of candidates whose names are printed upon the ballot three blank lines or spaces, that electors may have opportunity to vote for three persons other than those whose names so appear upon the ballot.

No purpose for providing blank spaces at the end of lists of candidates can be suggested other than that electors may write therein the names of such electors as they may desire to be elected to that office and express their choice for that elector by placing a cross mark in front of the name so written on the ballot, and I am therefore of opinion that electors may lawfully write in the names of electors and vote for the person whose name is so written in the manner suggested.

Respectfully,
EDWARD C. TURNER,
Attorney General.

928.

THE CITIZENS TRUST AND SAVINGS BANK COMPANY OF COLUMBUS, OHIO—LIMITATION AS TO AMOUNT OF ITS CAPITAL AND SURPLUS WHICH MAY BE INVESTED IN REAL ESTATE AND BUILDINGS.

The Citizens Trust and Savings Bank Company of Columbus, Ohio, a corporation organized as a commercial bank, a savings bank, a safe deposit company and a trust company, is limited in the amount which it may invest in real estate and building or buildings thereon used for the transaction of its business to fifty per cent. of its paid in capital and surplus.

COLUMBUS, OHIO, Oct. 14, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your letter of September 28, 1915, in which you request my opinion relative to a situation presented in a letter to you from Mr. Walter English, Cashier of The Citizens Trust and Savings Bank, of Columbus, Ohio, which letter you quote in full and is as follows:

"September 16, 1915.

"DEAR SIR:—In 1906, The Ohio Trust Company (now The Citizens Trust and Savings Bank) purchased a perpetual lease on the property at the southwest corner of High and Gay Streets as a site for its permanent home. This leasehold stands on our books at $130,000, and we pay an annual ground rent of $11,000 with the privilege of purchase of the fee in 1932 for $230,000. In case the privilege of purchase is not exercised, the ground rent of $11,000 remains unchanged perpetually. The lease contains a clause as follows:

" 'Said party of the second part for himself, his personal representatives, heirs and assigns, covenants and agrees with the parties of the first part, to erect on said real estate, in place of the building now on said real estate, a fireproof building, the same to be not less than twelve stories high, and to keep same in good repair and to promptly restore same to its former condition in case of partial or complete destruction.'

"We now desire to erect a banking and office building on the property and have negotiations on with the trustees of the estate of Mr. McCune, (who executed the lease) for a waiver of the above referred to clause, which waiver will enable us to erect a building of five stories in height with foundations, steel work, etc., strong enough to carry seven additional stories in case we should decide at some future time to add them to the five story building. Our counsel advises us that the trustees will agree to this modification. Will you therefore please give us a ruling as to the limit of investment we are allowed to make in a banking house. Are we permitted to invest sixty per cent. of our capital and surplus of $850,000, or fifty per cent., of our capital and surplus of $850,000., including, of course, the $130,000, at which the property now stands on our books. As we read the law, commercial banks, trust companies, and savings banks are restricted to sixty per cent., and safe deposit companies to fifty per cent., and, as you are aware, we carry on all four classes of business. Will the fact that we purchased the lease containing the above twelve story clause before the passage of the banking act permit us to exceed the limitation of investment, provided in the act on account of the

fact that we purchased the lease subject to all of its terms and provisions before the law limiting the amount of banking house investment was passed?

"Very truly yours,

(Signed) "WALTER ENGLISH,

"Cashier."

Upon an examination of the records in the office of the secretary of state I have secured the following supplemental information:

The Ohio Trust Company filed its original articles of incorporation November 20, 1900. Under date of October 30, 1909, The Ohio Trust Company filed its election to avail itself of the benefits and powers conferred by the act relating to the organization of banks and the inspection thereof, approved May 5, 1908. (99 O. L., 276—section 36).

Upon the same date (October 30, 1909), The Ohio Trust Company filed a certificate amending its articles of incorporation, changing its name to "The Citizens Trust and Savings Bank;" availed itself of the privileges and powers conferred by "An act relating to the organization of banks and the inspection thereof," approved May 5, 1908; and in addition to the powers conferred by its original articles, it acquired authority "to establish and be a 'commercial bank, a savings bank, a safe deposit company, and a trust company, as defined and provided for in said act,' having departments for all of said classes of business."

The Citizens Trust and Savings Bank Company is, therefore, a corporation organized and authorized to carry on four classes of business, viz.: a commercial banking business, a savings bank business, a safe deposit company business, and a trust company business.

Although I have not had an opportunity to examine the perpetual lease referred to in the letter of Mr. English, I have been orally informed by him that no definite time is fixed by its terms for erecting the twelve-story building mentioned in the lease, so that so long as the present building remains on the premises there is no obligation on the part of The Citizens Trust and Savings Bank Company to erect the new building, and the time of such erection is optional with the bank.

Under the banking act of 1908 (99 O. L., 269—sections 46, 54 and 66), commercial banks, savings banks and trust companies are limited in the amount they may invest in real estate and the construction of buildings thereon for the transaction of business to sixty per cent. of their paid in capital and surplus (General Code, sections 9753, 9762 and 9774). Under section 65 of the same act, being section 9772 of the General Code, safe deposit companies are limited in the amount they may invest for such purpose to fifty per cent. of their paid up capital and surplus.

I will first consider the second question asked in the letter of inquiry, as to whether The Citizens Trust and Savings Bank is relieved from the necessity of complying with the limitations and restrictions imposed by a law enacted after its purchase of the lease in question, under the terms of which it assumed an obligation of constructing, at some future time, an improvement which will require an expenditure of money in excess of such limitation.

Section 9741 of the General Code, which was part of section 36 of the banking act referred to, is as follows:

> "Banks, savings banks, savings societies, societies for savings, savings and loan associations, safe deposit companies, trust companies, savings and trust companies, and combinations of any two or more of such corporations, heretofore incorporated in this state which have paid in the amount of capital stock required by this chapter to enable them to commence business, if they so elect, may avail themselves of the privileges and powers herein conferred, by signifying such election and declaration under their seal, attested by the

signature of the president and secretary to the secretary of state and the superintendent of banks, which such secretary shall record, and his certificate be evidence thereof. When such election and declaration is so recorded, it shall confer all the privileges and powers conferred by this chapter, and from that time such association or corporation shall be governed by its provisions."

As stated above, the records in the office of the secretary of state disclose the fact that The Ohio Trust Company, under date of October 30, 1909, acted under authority of the above section and elected to avail itself of all the privileges and powers conferred by said act. The Ohio Trust Company was therefore, from the time of such election, and The Citizens Trust and Savings Bank is now, by virtue of such election and the law itself, subject to all the limitations and restrictions of the act.

The fact that a strict observance of all the limitations and restrictions of the law under which it has elected to act may necessitate the disposition of its lease under certain contingencies, will not be sufficient to relieve the bank from complying with such limitations and restrictions.

I am, therefore, of the opinion that The Citizens Trust and Savings Bank Company is not relieved from the necessity of complying with the limitations imposed by said banking act, relative to the investment of its capital in real estate to be used as its place of business, by the fact that its purchase of the lease referred to and its assumption of the obligations therein contained was prior to the enactment of such act.

The further question remains as to what specific limitations upon the per cent. of its capital stock and surplus invested must be observed by The Citizens Trust and Savings Bank Company in erecting a building upon the premises leased by it.

As stated above, savings banks, commercial banks, and trust companies are permitted to invest sixty per cent. of their capital stock and surplus for such purpose, while safe deposit companies may only invest fifty per cent. of their paid in capital stock and surplus for such purpose.

The Citizens Trust and Savings Bank Company is organized to do four classes of business. It cannot be said that its capital stock is divisible, or that any part of its capital stock and surplus belongs or may be attributed to any of its four departments. It is a single corporation organized to do four classes of business, and if it is subject to any one of the limitations above referred to it is subject to all of them, or, in other words, it is subject to the most stringent of the several limitations placed upon the different kinds of business conducted by it.

Since the most stringent of such limitations is that inposed upon safe deposit companies by section 9772 of the General Code, limiting the amount which such company may invest in buildings and real estate for its own use to fifty per cent. of its paid up capital and surplus, it follows that The Citizens Trust and Savings Company must limit its investment for such purposes to fifty per cent. of its paid up capital and surplus.

Respectfully,
EDWARD C. TURNER,
Attorney General.

929.

JUVENILE COURT FUNDS—NOT AVAILABLE TO PAY EXPENSES OF JUVENILE COURT JUDGES FOR ATTENDING BOARD OF STATE CHARITIES CONFERENCES.

No part of juvenile court funds are available for payment of expenses of juvenile court judges for attending board of state charities conferences to be held at Dayton, Ohio, November 3 to 5, 1915, under authority of section 1356, G. C.

COLUMBUS, OHIO, Oct. 14, 1915.

HON. SAMUEL L. BLACK, *Judge of the Probate Court, Columbus, Ohio.*

MY DEAR JUDGE:—Permit me to acknowledge your request for an opinion as to the authority of the juvenile judges to have their expenses paid in connection with attendance at the twenty-fifth annual conference of charities and correction to be held at Dayton, Ohio, November 3 to 5, 1915, your request arising out of a letter addressed to you by the secretary of the board of state charities, in which reference is made to sections 1656 and 1657 of the General Code. I find upon examination that the reference to the sections above referred to is incorrect, inasmuch as it should have stated sections 1356 and 1357 of the General Code, and I am informed that a supplemental notice has been sent out by the board of state charities making the correction.

Sections 1356 and 1357 of the General Code are as follows:

"Section 1356. At such times and places as it deems advisable, the board of state charities may hold conferences of the officers of state, county and municipal benevolent and correctional institutions, officials responsible for the administration of public funds used for the relief and maintenance of the poor, and members of boards of county visitors. Such conferences shall consider in detail questions of management of such institutions, the methods to secure their economical and efficient conduct, the most effective plans for granting public relief to the poor, and similar subjects.

"Section 1357. The necessary expenses of all the persons invited to such conferences shall be paid from any fund available for their respective boards and institutions provided they shall first procure a certificate from the secretary of the board of state charities that they were invited to and were in attendance at the sessions of such conferences."

Under date of November 9, 1914, the bureau of inspection and supervision of public offices advised the probate judge of Highland county, Ohio, in answer to a similar question. A copy of the letter is to be found on page 34 of opinion book No. 31 of the bureau of inspection and supervision of public offices, and is as follows:

"November 9, 1914.

"MR. J. B. WORLEY, *Probate Judge, Hillsboro, Ohio.*

"DEAR SIR:—In reply to yours of the 7th inst.

"We are of the opinion now that juvenile judges have the statutory right to fix mothers' pensions, they become eligible to an invitation to attend the annual conferences of the state board of charities, because the juvenile judge is now an official who is responsible for the administration of public funds used for the relief and maintenance of the poor, as provided in section 1356, General Code. So, if you have a proper invitation from the secretary

of the board of state charities, this department will not criticize payment of your expenses in attending said conference, as provided by section 1357 of the General Code.

Respectfully,
"Bureau of Inspection, etc."

Upon an examination of the statutes referred to, including the juvenile court law of which the mothers' pension law is a part, it is to be observed that while the position of the bureau of inspection, as reflected in the letter quoted above, is correct insofar as it relates to the status of a judge of the juvenile court with reference to his being an official responsible for the administration of public funds used for the relief and maintenance of the poor referred to in section 1356 of the General Code, *supra*, and his eligibility as such to receive an invitation to the conference of the board of state charities, there is nowhere to be found in the juvenile court law, including the mothers' pension act, any provision for the appropriation of funds which may be used for the purpose of making payment of the expenses for attending the conference as provided in section 1357 of the General Code, *supra*. In fact, there is no provision of the law making available any funds to be used by the judge of the juvenile court for his expenses incurred by him personally.

In view of the foregoing, it is my opinion that there are no funds available to pay the expenses of juvenile court judges who may attend the conference of charities and correction, referred to, and in addition thereto section 1357 provides that the expenses shall be paid from any funds available for the respective *"boards"* and "institutions" in neither of which classes can it be said may be included a "Court."

Respectfully,
EDWARD C. TURNER,
Attorney General.

930.

STATE LIQUOR LICENSING BOARD—INSPECTORS APPOINTED BY SUCH BOARD—WITHOUT AUTHORITY TO PUNISH FOR CONTEMPT, A PERSON WHO DISOBEYS SUMMONS ISSUED BY SUCH INSPECTOR.

Inspectors appointed by the state liquor licensing board have no power to punish as for contempt a person who disobeys a summons issued by such inspector, under authority of section 6087, *G. C.*, 104 *O. L.*, 166.

COLUMBUS, OHIO, October 14, 1915.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I have yours under date of September 25, 1915, as follows:

"Section 6087 of the Revised Statutes, as amended February 6, 1914, and contained on page 166 of vol. 104, Laws of Ohio, provides:

'In the performance of the duties imposed by this section on the inspectors appointed by the state liquor licensing board, said inspectors may summon and compel the attendance of witnesses before them to testify in relation to any matter which by law is a subject of inquiry and investigation, and require the production of any book, paper or document which they deem

pertinent. They shall have authority to administer an oath to any person appearing as a witness before them. They may at all reasonable hours enter into all buildings and upon all premises within their jurisdiction for the purpose of examination.'

"In the performance of their duties, certain inspectors of this department, in the village of Greenfield, Highland county, Ohio, recently served several subpoenas through the marshal of the village, upon citizens of that village, on a Saturday, requiring their attendance on the following Monday. At the time designated in the subpoenas, three of the parties so served refused to appear and testify, on the ground that they had been advised by counsel not to appear for the reason that no penalty was attached to their refusal to obey said summons.

"Will you please advise this board in writing fully as to the power of the inspectors of this department under this provision of the statutes, and oblige * * *."

It may be first observed that whether or not section 6087, G. C., 103 O. L., 338, conferred upon inspectors of the agricultural commission power to punish for contempt, is immaterial here, since the same was repealed by the amendment of said section 6087, G. C., 103 O. L., 442, which conferred upon inspectors appointed by the state liquor license board no authority to administer oaths or to prosecute or punish for contempt, the authority of such inspectors being there limited to making certain investigations. It would not be seriously contended that the power to make investigations alone would carry with it the power to prosecute or punish for contempt.

Section 6087, G. C., was again amended in 104 O. L., 166, as suggested by you, to read as follows:

"The inspectors appointed by the state liquor licensing board, in addition to any other duties, by personal visitation or otherwise, shall make investigations to secure the names of all persons, firms or corporations liable to such assessment or increased assessment, whose names are not already on the duplicate, and report such names to the state liquor licensing board. In the performance of the duties imposed by this section on the inspectors appointed by the state liquor licensing board, said inspectors may summon and compel the attendance of witnesses before them to testify in relation to any matter which by law is a subject of inquiry and investigation and require the production of any book, paper or document which they deem pertinent. They shall have authority to administer an oath to any person appearing as a witness before them. They may at all reasonable hours enter into all buildings and upon all premises within their jurisdiction for the purpose of examination."

While it might be maintained that it is within the inherent power of courts to punish as for contempt, for a disregard of their lawful authority, it can certainly not be maintained that such power rests in officers or inquisitorial bodies whose authority is limited to administering oaths and summoning and compelling the attendance of witnesses in the absence of statutory authority therefor. The general power to compel the attendance of witnesses has little, if any, force in the absence of jurisdictional authority to inflict a penalty upon those who may choose to disregard the requirements of a summons. In re Heffron, 16 W. L. B., 285.

A careful examination of the statutes fails to disclose authority anywhere lodged for the enforcement of the power to compel attendance of witnesses above conferred by special provision, and it is not believed that the general provisions applicable to proceedings in contempt of court are applicable to the present case.

Section 12137, G. C., provides in part:

> "A person guilty of any of the following acts may be punished as for a contempt:
> "1. Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer."
> * * * * * * *

If, however, an inspector appointed by the state liquor licensing board may be said to be an officer, it is not conceived that he is an officer in contemplation of that term as used in said section 12137, G. C., supra. This section assumed its present form in the revision of 1880, and the numerous provisions since enacted, conferring special authority to punish for contempt, disobedience of the orders and disregard of the authority of various officers, clearly indicates the interpretation given to the term "officer," as found in said section by the legislature, to have been limited to officers of the court therein referred to.

I am therefore of the opinion that there is no authority to punish, for contempt, persons who disobey summons issued by inspectors appointed by the state liquor license board.

Respectfully,
EDWARD C. TURNER,
Attorney General.

931.

ROADS AND HIGHWAYS—CASS HIGHWAY LAW—TOWNSHIP TRUSTEES ACTING THROUGH TOWNSHIP HIGHWAY SUPERINTENDENT HAVE AUTHORITY TO PURCHASE ROAD MATERIALS TO REPAIR TOWNSHIP ROADS—ALSO EMPLOY NECESSARY LABOR FOR SUCH WORK.

Under the Cass Highway Law, township trustees, acting through the township highway superintendent, have authority to purchase stone, gravel or other road materials to be used in the repair of township roads, and to pay for the hauling of such materials and employ the labor necessary in such work.

COLUMBUS, OHIO, Oct. 14, 1915.

HON. GEORGE W. PORTER, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—I have your communication of October 9, 1915, in which you refer to the following provision found in section 61 of the Cass highway law, section 3298-1, G. C.·

> "The proceeds of such levy may be used to purchase stone, gravel, or other road material to be hauled by donation, or to pay for labor and hauling when the material is donated."

In your communication you allude to the sweeping repeal of township road laws by the Cass highway law, and state that under the former law the township trustees in your county always purchased stone and gravel and paid for the labor and the hauling of the same out of the township road funds, and you observe that if the provision of the Cass highway law quoted above is to be given a literal interpretation, it would be

impossible for township trustees to purchase stone, gravel, or other road materials, unless the same be hauled by donation, and likewise impossible for them to pay for the labor and hauling unless the materials be donated. You further state that if such a construction of the law be correct, it would be impossible in your county to have any stone or gravel placed upon the roads by the township trustees, and you therefore inquire as to whether under the Cass highway law township trustees are authorized to purchase stone and gravel and pay for the labor and hauling of such material to be placed upon the roads.

I assume that the operation to which you refer, that is, the purchase of stone, gravel or other road materials, and the placing of the same on the roads of a township, is in the nature of a repair of existing roads, and that you do not intend to refer to the construction of new roads, and will therefore in this opinion deal only with the repair of roads by township trustees.

Section 241 of the Cass highway law, section 7464, G. C., contains the following provision:

> "Township roads shall include all public highways of the state other than state and county roads as hereinbefore defined, *and the trustees of each township shall maintain all such roads within their respective townships.*"

The term "maintain," as used in the above provision, is synonymous with or at least was intended by the legislature to include the term "repair." It will thus be seen that it is mandatory upon the township trustees of a township to keep in repair the township roads within their township, the term "township roads" being defined by section 241 of the Cass highway law.

Machinery for the performance of this duty is provided by section 75 of the act, section 3370, G. C., which reads as follows:

> "For the purposes of this act there shall be in each township not less than one nor more than four road districts, as the township trustees may determine.
>
> "The district or districts shall include all the territory in such township. The trustees of the township shall appoint for each road district a superintendent who shall be known as township highway superintendent and who shall serve until his successor is appointed and qualified. *Under the direction of the township trustees he shall have control of the roads of his district and keep them in good repair.* He may be removed by the township trustees or the county highway superintendent for incompetence or gross neglect of duty."

Having in mind the fact that it is the duty of the township trustees to keep the township roads in repair, and that machinery is provided to enable them to discharge this duty, it cannot be assumed, in the absence of a positive and unequivocal provision in the law, that the legislature intended to prohibit action in the matter unless the citizens of a township or those interested in the repair of its township roads should donate either the labor or the material needed for such repair.

To reach such a conclusion would be to deny to township trustees the right to carry out the duty imposed upon them by section 241 of the act, unless they were able to secure donations either of labor or of materials, and I am of the opinion that the language referred to by you does not require or warrant such a conclusion and is to be construed as a grant of power rather than as a limitation upon the general authority of the township trustees in the premises. In other words, the legislature in using such language did not intend to circumscribe the general authority of the township trustees to repair township roads and to do all things reasonably necessary in the premises, the real intention of the legislature being to confer upon the township trustees in ex-

press terms the additional authority to accept donations, either of labor or of materials, and to use public funds to provide the things not donated and necessary to a given repair.

I therefore conclude, in answer to your specific question, that under the Cass highway law the township trustees, acting through the township highway superintendent, have authority to purchase stone, gravel or other road materials to be used in the repair of township roads and to pay for the hauling of such materials and employ the labor necessary in such work.

Respectfully,
EDWARD C. TURNER,
Attorney General.

932.

ELECTION—NOMINATION PAPERS—MUST BE FILED ACCORDING TO PROVISIONS OF SECTION 5004, G. C., 103 O. L., 844, WHICH ARE MANDATORY—TIME LIMIT—CERTIFICATE OF NOMINATION.

The provisions of section 5004, G. C., 103 O. L., 844, prescribing the time within which certificates of nomination and nomination papers may be filed, are mandatory.

COLUMBUS, OHIO, October 14, 1915.

HON. MEEKER TERWILLIGER, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—I acknowledge the receipt of yours under date of September 15, 1915, in which you make inquiry as to whether certain provisions of section 5004, G. C., 103 O. L., 844, are mandatory or directory only. The provisions of said section to which your inquiry has reference, is as follows:

> "Certificates of nomination and nomination papers of candidates shall be filed as follows: * * *
>
> " 'For township or municipal offices, justices of the peace or members of the board of education, with the board of deputy state supervisors of the county, not less than sixty days previous to the day of election.' "

As bearing upon the question thus submitted, you call attention to the case of State ex rel v. Deputy State Supervisors of Elections, 17 C. C., 396. This case was decided by the circuit court of Licking county at the March term, 1898. This was an action in mandamus to require the board of deputy state supervisors of elections to print upon the ballot the name of one Fulton, as a candidate for city solicitor, upon a certificate of nomination filed with the city board of elections on March 20th or 21st, previous to an election to be held on April 3rd, next ensuing, under a statute which required in that particular case that "the nomination of city officers shall be filed with the city board of elections not less than fifteen days previous to the date of such election."

Under the facts above set forth, the court held that this provision was directory only, and a writ of mandamus was issued requiring the election officers to print the names of the candidates on the ballot.

The court in its opinion gave consideration to the fact that no objection in writ-

ing, or otherwise, to the certificate of nomination of the relator had been filed with the election officers and concluded that the same was, therefore, subject to the provision of section 10 of the act of April 18, 1892, as amended in 90 O. L., 269, that:

> "The certificates of nomination and nomination papers being so filed, if in apparent conformity with the provisions of this act, shall be deemed to be valid, unless objection thereto is duly made in writing, within five days after the filing thereof."

When is a certificate of nomination in "apparent conformity" with the law? I can conceive of no other meaning which may in reason be given to this phrase "apparent conformity" than that the petition or certificate of nomination is, upon its face, in every respect in conformity with the legal requirement. Or, stated conversely, a nomination paper may be said to be apparently in conformity with the law when it does not show upon its face that it does not meet, in all respects, those legal requirements. If, then, a certificate of nomination or petition, when speaking the truth, must show upon its face that a requirement of law has not been complied with, that it is in violation of an unequivocal mandate of law, it cannot in any sense be said to be in apparent conformity to such law, and the statutory provision above quoted, therefore, loses all application. That is to say, when a petition or nomination paper is presented to the proper officer for filing, and he endorses thereon the true date of filing in the customary form, such petition, if filed after the expiration of the statutory limit therefor, must then show upon its face that it is not in conformity with the statutory requirement as to the time of filing, and not within the statutory provision referred to by the court.

True, as stated by the court, this provision does not require exact conformity. Equally true is it that a thing may have apparent conformity and at the same time not be in exact conformity, and to just such case is the statute here under consideration applicable. It will be observed, however, that this statute does demand that the petition appear regular and that it cannot do so and speak the truth when filed after the expiration of the time limited by statute.

The court in discussing this question says:

> "If the purposes of the law are, as we have intimated and supposed, primarily to secure: First, an honest and fair nomination for public offices; and, second: fairness and honesty as a result of an election, a question may be presented in this form; should this object of the statute be defeated by a mere irregularity, it would not and could not make the result of the election doubtful. We think it should not receive such construction unless the language of the statute is so explicit that the intention of the legislature can only be ascertained by giving it this mandatory construction."

This statement of the court clearly discloses a misconception of principle. While the primary purpose of legislation relative to elections may be said to be the preservation of the secrecy of the ballot and a fair and honest election, it cannot be said that no provision thereof may have any other purpose. It seems, however, that such was one of the purposes, at least, of the legislature in fixing a limit on the time of filing nomination papers by which the rights of all might be fully protected, rather than to leave the conflicting interest of those directly concerned subject to the caprice of designing individuals, and involved in interminable doubt, and thus open wide the door to fraud. The first step toward honesty and fairness in elections is the establishment of plain and unequivocal rules of procedure giving equal security to the rights of all, free from individual choice or influence. That is to say, one of the purposes of fixing a limit beyond which petitions may not be filed, was to prevent the opportunity for fraud in leaving the same subject to the action of persons who are, of necessity, more or less interested therein on one side or the other. It was there-

fore manifestly the purpose of the legislature to make time the essence of the validity of such petitions. No other purpose can be suggested, for, had the legislature contemplated that such provision might be ignored at the convenience of individuals, its enactment was an idle performance. What purpose can be served by such provision if it be interpreted to mean that it was subject to the action of election officers in having tickets printed and that petitions may be filed at any time until the tickets are actually printed. Such construction would enable election officers to indulge in preferences and grossly fraudulent practices to the prejudice of the rights of indivuals and against public interest.

The holding of the court in the case of State ex rel. v. Supervisors of Elections, supra, is manifestly against the weight of authority in other jurisdictions upon the question. The rule is laid down in 15 Cyc., 338, as follows:

> "Statutory provisions in regard to the time of filing certificates of nomination are mandatory, and a certificate offered after the time limit is properly rejected."

And in 10 Am. & Eng. Ency., 368, 2nd Edition:

> "Statutory provisions as to time, place and manner of filing nomination papers are mandatory and a strict compliance with them is necessary to make a valid nomination."

The above statements of the rule are fully supported by the following cases:

> Donahoe v. Johnson, 8 Pa. Dist., 316;
> In re McDonald, 54 N. Y., Supp. 690;
> In re Cudderback, 39 N. Y. Supp., 388;
> Griffin v. Dingley, 114 Cal., 481;
> Hallon v. Center, 102 Ky., 123.

The court in the opinion in 54 N. Y. Supp., 690, says:

> "The time within which certain acts are required to be done under the election laws is an essential and all-important element in the orderly conduct of nominating and electing public officers. To permit a departure from the law in this respect would lead to the greatest confusion and to the subversion of the plain purposes of the law. The provisions of the statute with respect to the time of filing the certificates are clear. The certificate in question here, being for independent nominations, was required to be filed, if at all, 'at least twenty-five, and not more than forty days' before the election. * * * These provisions are mandatory, and must be complied with, and, after the time has passed, the secretary has no right to receive and file any certificate."

Indeed, the decision of the circuit court, 17 C. C., 396, supra, seems clearly to be overruled in the case of State v. Stewart, 71 O. S., 55, though reference thereto is not made. The third branch of the syllabus in the case of State v. Stewart is as follows:

> "The requirement of section 2966-22, Revised Statutes, which provides that certificates of nomination and nomination papers of candidates for offices to be filled by the electors of a district, etc., shall be filed with the chief deputy state supervisor of the county in the district, etc., containing the greatest number of inhabitants, as ascertained by the last federal census, not less than twenty-five days previous to the day of election, is a limitation upon the power to so file, and is not intended to require that objections and

other questions arising in the course of nominations of candidates shall be kept open and undecided until twenty-five days before the day of the election."

And at page 73 of the opinion the court, referring to the provision of section 2966-22, R. S., requiring that certificates of nomination or nomination papers must be filed not less than twenty-five days previous to the day of election, said:

"The latter provision does not authorize the chief deputy state supervisors of elections and the clerks of the election boards of the several counties of the district to keep open more than a reasonable time and until twenty-five days before the election a controversy which has been properly submitted to it, but is a limitation on the power to file such certificates and nomination papers, requiring that they shall be filed not later than twenty-five days before the election; and it is only intended to indicate to conventions and others who seek to make nominations and get them upon the ballot that they must take action in proper time before that date in order to make the nomination effectual."

To hold that an election may not be declared to be null and void on account of mere precedent irregularities is upon an entirely different principle than that here involved, and it is well established that an election will not be avoided for such irregularities except upon showing that upon fraud or such irregularity the result was effected or that by reason thereof illegal votes have been cast or the casting of legal votes prevented.

The right of an elector to have his name placed upon a ticket as a candidate for public office is subject to all the statutory requirements and limitations. That is to say, the nomination of candidates for public offices has become a purely statutory proceeding and, under a familiar rule of construction, to acquire rights thereunder there must be a strict compliance with such statutes.

To hold an entire election a nullity after the same has been fully consummated, of necessity affects the public interest, while to defeat the purpose of an elector to become a candidate for office can affect only a qualified or conditional individual right or privilege.

In 36 Cyc., 1159, in reference to directory and mandatory provisions of statutes, it is said:

"When the statutory provision relates to acts or proceedings immaterial in themselves, but contains negative or exclusive terms; either express or implied, then such negative or exclusive terms clearly indicate a legislative intent to impose a limitation, and therefore the statute becomes imperative, and requires strict performance in the manner prescribed."

And on page 1160:

"Under statutes conferring privileges upon private individuals for a certain period of time, such privileges cannot be exercised after the lapse of the time allowed."

That the state of facts under consideration is within this rule is beyond question. It cannot be maintained that there is not at least by implication those negative terms contemplated by this rule when consideration is given to the term "not less than," nor can it be questioned that this is a statute conferring privileges on private individuals to the exclusion of every one who does not conform to the provisions thereof. Then, under this rule, the statute under consideration must be held to be imperative in its terms.

In view of these considerations, I am unable to agree with the conclusion of the

learned circuit court, and am therefore of the opinion that the provisions of section 5004, G. C., above quoted, and to which you refer in your inquiry, are mandatory.

The case of the State of Ohio ex rel. Thomas R. Jones v. The Board of Deputy State Supervisors of Elections of Montgomery County, Ohio, has been decided, but the opinion of the supreme court in that case has not yet been prepared.

Respectfully,
EDWARD C. TURNER,
Attorney General.

933.

ROADS AND HIGHWAYS—CASS HIGHWAY LAW—TOWNSHIP TRUSTEES —IT IS THEIR DUTY TO MAINTAIN AND KEEP IN REPAIR TOWNSHIP ROAD LAID OUT BY TOWNSHIP TRUSTEES AND WHICH EXTENDS FROM DWELLING PLACE TO ANOTHER PUBLIC ROAD—COUNTY COMMISSIONERS HAVE RIGHT TO ASSIST IN MAINTENANCE OF ROAD.

Under the Cass highway law, it is the duty of the township trustees to maintain and keep in repair a township road laid out by the township trustees and which extends from a dwelling place to another public road, subject to the right of the county commissioners to assist the township trustees in such maintenance.

COLUMBUS, OHIO, Oct. 14, 1915.

HON. J. W. WATTS, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—I have your communication of October 1, 1915, in which you inquire as to whose duty it is to keep in repair a township road which was laid out by the township trustees under favor of section 6958, G. C., and which extends from a dwelling place to another public road.

Section 6958, G. C., which was a part of the law relating to township roads and which was repealed by the Cass highway law, 106 O. L., 574, read as follows:

> "A person, desiring to have a township road laid out from a plantation, dwelling place, mill or house of public worship, or to a cemetery, burial ground or public road, or from one public road to intersect another, or from a tract of wild land or timber land, stone quarry, coal mine or mineral land, other than petroleum or natural gas land, to a railroad or railroad station, or from a railroad station to a township, county or state road, or sawmill, shall petition the trustees of the proper township, after giving thirty days' previous notice thereof, by advertisement posted up in three public places within the township, setting forth therein the time when the petition is to be presented, the place of beginning of such road, the intermediate points, if any, and the place of termination thereof."

The sections of the General Code immediately following section 6958 and which were in force prior to the passage of the Cass highway law, provided for the giving of a bond by the petitioner, the appointment and duties of viewers, claims for damages, the report of the viewers and the proceedings of the township trustees upon such report.

Section 6965, G. C., after providing for an order by the trustees upon the clerk of the township to enter the report on record and an order to the petitioners, or any one of them, or to the proper superintendent in the case of the granting of the petition to open the road petitioned for, further provided:

> "Such road shall be a township road, subject to be kept open and in repair at the expense of the applicants for it, or otherwise as provided y law."

From the above quoted provision it appears that not every township road established under the provisions of sections 6958, G. C., et seq., was required to be kept in repair by the township. On the other hand, the provision of the statute was that such roads were to be kept open and in repair at the expense of the applicants therefor, unless otherwise provided by law.

As pointed out by you in your communication to me, there was a provision of law prior to the passage of the Cass highway law providing for the keeping in repair of certain township roads at the expense of the township, such provision being found in section 6967, G. C., which section read as follows:

> "A township road which commences in a state, turnpike, township, or county road, or at a railroad station, and is not less than thirty feet in width, and passes on and intersects another state, turnpike, county or township road, shall be opened, and kept in repair by the road superintendent in whose district it is situated, in whole or in part, and the costs of the view and survey of such road shall be paid out of the township treasury."

An examination of the above quoted section discloses the fact that under the law relating to township roads, as such law stood prior to the passage of the Cass highway code, it was not the duty of the township, under section 6967, G. C., to keep in repair a township road laid out by the township trustees, under favor of sections 6958, G. C., et seq., and which extended from a dwelling place to another public road. That being true, it was the duty of the applicants for such road to keep the same open and in repair at their expense, under the provisions of section 6965, G. C.

You call attention to the third paragraph of section 241 of the Cass highway law, section 7464, G. C., which reads as follows:

> "Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined, and the trustees of each township shall maintain all such roads within their respective townships; and provided further, that the county commissioners shall have full power and authority to assist the township trustees in maintaining all such roads, but nothing herein shall prevent the township trustees from improving any road within their respective townships, except as otherwise provided in this act."

You correctly observe that the Cass highway law does not make any exception as to the maintenance and repair of township roads and this fact, coupled with the further fact that sections 6965 and 6967, G. C., referred to above, were repealed by the Cass highway law, gives rise to your question, which is as to whether it is the duty of township trustees to keep in repair a township road extending from a dwelling place to another public road, or whether such a road is to be maintained by the original applicants therefor or by those who have the use of the same and for whose benefit it was originally laid out.

Under section 6975, G. C., as that section stood before the passage of the Cass highway law, township roads, whether laid out before or after the passage of such section, were declared to be public highways. Roads of the character referred to by you, that is roads laid out by the township trustees and extending from a dwelling place to another public road, are not either state roads or county roads within the definitions of such terms as set forth in section 241 of the Cass highway law, section 7464, G. C.

Since roads of the character referred to by you were, prior to the passage of the Cass highway law, declared by the legislature to be public highways, and since township roads, as defined in section 241 of the Cass highway law, include all public highways of the state other than state or county roads, and since it is provided in section 241 of the Cass highway law that the trustees of each township shall maintain all township roads within their respective townships and since the Cass highway law

contains no exceptions which would excuse township trustees from maintaining township roads extending from a dwelling place to another public road, it therefore follows that in the present state of the law it is the duty of the township trustees to maintain and keep in repair a road laid out by the township trustees under favor of sections 6958, G. C., et seq., and which extends from a dwelling place to another public road, subject to the right of the county commissioners to assist the township trustees in such maintenance, as provided in section 241 of the Cass highway law, section 7464, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney General.

934.

MUNICIPAL CORPORATION—INITIATIVE AND REFERENDUM ACT—ORDINANCE CHANGING SALARY OF OFFICER OF A MUNICIPALITY PRIOR TO HIS ENTERING UPON HIS TERM—BY REASON OF INITIATIVE AND REFERENDUM SAID ORDINANCE WILL NOT GO INTO EFFECT UNTIL AFTER OFFICER ENTERS UPON HIS DUTIES —HOW SALARY DETERMINED.

If council of a municipality, by ordinance, changes the salary of an officer prior to such officer entering upon his term and the legislation therefor is fully completed prior to such time, but by reason of the initiative and referendum act said ordinance will not go into effect until after the officer enters upon the duties of his office, such officer will be entitled to the salary as fixed by the prior ordinance until the new ordinance goes into effect, and then under the new ordinance. The inhibition contained in sections 4213 and 4219, G. C., is against action by council only.

COLUMBUS, OHIO, Oct. 14, 1915.

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

GENTLEMEN:—Under date of September 15th you referred to an opinion rendered by my predecessor, Mr. Hogan, to Honorable H. W. Houston, City Solicitor of Urbana, under date of December 29, 1911(Report of attorney general for that year at page 1619), and requested me to advise you whether or not I agree with said opinion.

The opinion referred to considered the question as to whether or not an officer of a city or village would be entitled to an increase in salary provided for by ordinance, the action on which was fully completed prior to the officer entering upon his term of office, but the ordinance not going into effect, by reason of the initiative and referendum act, until after the officer has entered upon his term; and the opinion held that if the action of council on the ordinance was fully completed prior to the officer entering upon his term of office, but the ordinance not going into effect by reason of the initiative and referendum act until after the officer had entered upon his term, the officer would be entitled to the increase in salary after the ordinance went into effect, the officer's salary being fixed when he went into office under the former ordinance until the new ordinance went into effect, and thereafter under the new ordinance.

I assume that the question which you desire answered is this:

> "If council by ordinance changes the salary of an officer prior to such officer entering upon his term, and the legislation therefor is fully completed, but by reason of the initiative and referendum act said ordinance will not go into effect until after the officer enters upon the duties of his office, will such ordinance operate as to such officer during such term?"

Section 4213 of the General Code, relative to cities, provides:

> "The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

Said section is a codification of section 126 as found in 96 O. L., at page 61, which then read as follows:

> "Council shall fix the salaries of all officers, clerks and employes in the city government, except as otherwise provided in this act * * *. The salary of any officer, clerk or employe so fixed shall not be increased or diminished during the term for which he may have been elected or appointed."

Section 4219 of the General Code, relative to villages, provides:

> "Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law, * * * The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed. * * *"

It is to be seen that the original of section 4213 was practically in the same language as section 4219 of the General Code. The duty in both instances is placed upon council to fix the salary of the officer or employe, and the inhibition against the increase or diminishing of such salary is the salary "so fixed"—meaning, of course, so fixed by council; and the provision, as I see it, is directed against council, prohibiting it from in any way endeavoring to increase or diminish the salary of any officer or employe in the municipal government, the salary of whom is to be fixed by council, during the term of the officer or employe.

The original initiative and referendum act was passed in 1911 (102 O. L., 521, section 4227-2, G. C.). Said act provided that no ordinance involving the expenditure of money should become effective in less than sixty days after its passage, and the courts of Ohio have declared that an ordinance fixing salaries is an ordinance involving the expenditure of money.

Said section was amended in 103 O. L., page 211, and provided that no ordinance or other measure should go into effect until thirty days after it shall have been filed with the mayor, except certain ordinances—the exception, however, not including a salary ordinance.

Said section was again amended in 104 O. L., at page 238, providing that no ordinance or other measure shall go into effect until thirty days after it shall have been filed with the mayor of a city or passed by the council of a village, except certain ordinances, which did not include the salary ordinance.

It has been held by this department at various times that an ordinance fixing salaries is an ordinance of a general nature, and, under the provisions of section 4227, G. C., requires publication. Said section further provides:

> "No ordinance shall take effect until the expiration of ten days after the first publication of such notice."

Hon. U. G. Denman, former attorney general of Ohio, in an opinion dated January 10, 1910, to Hon. Van A. Snider, city solicitor of Lancaster, Ohio, held that an ordinance fixing salary which, by reason of the above provision as to publication, did not become effective until the officer had entered upon his term would not affect the salary of such officer during such term.

This is at variance with the opinion of Mr. Hogan, hereinbefore referred to, and also at variance with the case of Stuhr v. Hoboken, 47 N. J. L., 147, the syllabus of which is as follows:

> "(1) The intention of the legislature in borbidding, under the charter of Hoboken, that the salary or compensation of an officer which has once been fixed shall not be increased during the continuance of his term, was to prevent council from giving to an officer during his term a larger salary or more compensation than that which was fixed for his office when his term began.

"(2) Where, after an ordinance is passed fixing a salary for the next ensuing term, an officer is elected, the ordinance will fix the salary for that term, although it did not, because of the necessity of publishing it, take effect until after the term began."

In the above case the court goes so far as to permit the officer to have his increase of salary from the beginning of his term, although the ordinance did not become effective until several days after the term had begun. This I do not believe to be the proper construction. I concur with Mr. Hogan in his opinion foregoing mentioned, to the effect that an ordinance, the legislation on which has been fully completed but which will not go into effect until after the beginning of the term of an officer, by reason of the provisions of the initiative and referendum act or by reason of the filing of a referendum petition thereunder, will, when said ordinance does go into effect, regulate the salary of said officer during the balance of his term; but that before said ordinance goes into effect the officer is entitled to the salary as fixed by a former ordinance fixing the salary. In other words, as I view it, the salary was fixed at the beginning of his term by the former ordinance until the new ordinance becomes effective and thereafter by the new ordinance, since no action of council is taken in the matter after the officer enters upon his term.

Respectfully,
EDWARD C. TURNER,
Attorney General.

935.

NO LIEN CAN BE OBTAINED BY CONTRACTORS OR SUB-CONTRACTORS ON STATE BUILDINGS—NO DUTY UPON A DEPARTMENT OR INSTITUTION ERECTING A STATE BUILDING TO RETAIN ANY MONEYS FROM CONTRACTORS IN ANTICIPATION OF LIEN.

Sections 8310 *to* 8323-10, *G. C., do not apply to construction of state buildings.*

COLUMBUS, OHIO, Oct. 14, 1915.

HON. J. E. SHATZEL, *Sec'y Board of Trustees, Bowling Green State Normal College, Bowling, Green, Ohio.*

DEAR SIR:—Under date of October 9, 1915, you inquire as follows:

"By direction of our board of trustees I am writing you to get authentic information upon a point not clear to us.

"The general contractor is about through with his work on the administration building and dormitory and the question is: Should we require him to file a statement of all he owes for labor and material used on these buildings before we allow his final estimates? Are we under any obligation to protect creditors?"

I know of no provisions of law that require a statement from contractors and subcontractors other than the act found in 103 O. L., 369, entitled:

"AN ACT

"To create a lien in favor of contractors, sub-contractors, laborers and material men."

and the amendments thereto in 106 O. L., 522.

In an opinion rendered by my predecessor, Hon. Timothy S. Hogan, August 25, 1913, to Hon. Byron L. Barger, secretary of the Ohio state armory board, volume I, attorney general's report for 1913, page 515, it was held, referring to the act found in 103 O. L., 369, as follows:

"An examination of this legislation as to mechanics' liens enacted at the last session of the legislature discloses that no provisions were made therein with reference to liens on public buildings or improvements of any kind, or against public funds that may become due and payable on account of their erection or construction. Sections 8324 and 8325, General Code, still stand as the sole authority for liens or claims against public funds on account of material or labor furnished in the erection or construction of public buildings or improvements. As before noted, these sections have no application to buildings or improvements erected or constructed by the state, * * *"

I concur in Mr. Hogan's opinion and therefore answer your inquiry in the negative. In so answering I am fully cognizant of the provision contained in the uniform blank for state contracts, as follows:

"If at any time there should be any evidence of any lien or claim for which, if established, the owner of the said premises might become liable and which is chargeable to the contractor, the owner shall have the right to retain out of any payment then due or therafter to become due, an amount sufficient to completely indemnify him against such claim or lien. Should there prove to be any such claim after all payments are made, the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging any *lien* on said premises made obligatory in consequence of the contractor's default."

There can be no lien obtained by contractors or sub-contractors on state buildings. Consequently, there is no duty devolving upon a department or institution erecting a state building to retain any moneys from the contractor in anticipation of a lien on the premises in question.

Respectfully,
EDWARD C. TURNER,
Attorney General.

936.

TRUSTEES OF UNION CEMETERY—NOT AUTHORIZED TO FIX AND PAY THEIR OWN COMPENSATION—UNLESS SALARY FIXED FOR PERFORMANCE OF CERTAIN DUTIES, SUCH SERVICES ARE CONSIDERED AS PERFORMED GRATUITOUSLY.

Trustees of a union cemetery under section 4189, *G. C., are not authorized to fix and pay compensation to themselves.*

COLUMBUS, OHIO, Oct. 15, 1915.

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

GENTLEMEN:—Under date of September 15th you wrote me as follows:

"We would respectfully request your written opinion as regards the legality of the findings for recovery made against the trustees of Woodland cemetery, Van Wert county, Ohio, by state examiner Will E. Heck, in his report of examination, filed August 27, 1914, and herein ask consideration of the brief submitted by E. C. Stitz, city solicitor and legal adviser of said board. If the findings are collectible at law, we believe the same should be enforced. We might add that said findings were returned by the department after consultation with the attorney general, and we believe that they are legally and justly due from said parties."

Your letter to me is because of the fact that in taking up with the city solicitor of Van Wert, Ohio, the question of findings against the trustees of Woodland cemetery for drawing salaries illegally, as was found by one of your examiners,

said solicitor advised me by letter that the said payments were made upon his advice as city solicitor. In the course of said letter he states:

> "When the bureau makes these findings, it says, on page 149 (of the report made in regard to the matter), 'that it is against public policy for an officer to participate in fixing his own compensation,' and 'the courts have held that when an official duty is imposed upon a public officer and no compensation provided therefor, that such service must be deemed to be gratuitously rendered.'
>
> "If that is the law, then all the city councils in the state have been receiving illegal salaries. There is no authority in the statutes for their compensation. General Code, section 4209, provides that 'The compensation of members of council, if any is fixed,' shall not exceed $150.00, etc.
>
> "The council has the inherent right to fix the compensation of its members. The legislature has no power to take away that right, but it may limit the same; which it has done.
>
> "I am enclosing my brief on this question of the right of the joint board of union cemeteries to fix their compensation."

Section 4209, G. C., is authority, as I see it, granted by the legislature to council to fix the compensation of the members thereof.

Section 4189, G. C. (103 O. L., 272), provides in regard to union cemeteries the following:

> "The cemetery so owned in common, shall be under the control and management of the trustees of the township or townships and the council of the municipal corporation or corporations and their authority over it and their duties in relation thereto shall be the same as where the cemetery is the exclusive property of a single corporation."

Said section is an amendment of a former section bearing the same number, which provided that the cemetery so owned should be under the control and management of trustees to be chosen in accordance with section 4184, G. C., which was repealed by the act found in 103 O. L., 272.

Union cemeteries are provided for in section 4183, et seq., but nowhere in any of said sections am I able to find any authority whatever for the fixing of any compensation for the joint board composed of the trustees of a township and the members of council of a municipality; and it is a well established principle in law, for which there are many authorities in Ohio, that unless the salary is fixed for the performance of certain duties no salary may be paid, and that services performed under such circumstances are considered as performed gratuitously.

Consequently, I am clearly of the opinion that the resolution No. 1 which was presented and unanimously adopted by the joint board of trustees of Woodland union cemetery making rules and regulations for the control and management of said cemetery, said joint board being composed of council of the city of Van Wert and the trustees of Pleasant township, insofar as it purports to fix a salary for the members of such joint board, is without authority of law. The said provision is found in section 6 of said rules, as follows:

> "Each councilman and township trustee shall receive a salary of forty dollars per year for his services as a member of this board."

I am, therefore, of the opinion that the findings made by your department against the members of the board who receive salary under the resolution foregoing mentioned are correct.

Respectfully,

EDWARD C. TURNER,

Attorney General.

937.

MATRON OF CHILDREN'S HOME—EXPENSES FOR ATTENDING STATE CONFERENCES OF BENEVOLENT INSTITUTIONS NOT LEGAL.

Matrons of children' homes cannot be allowed expenses for attending state conferences of benevolent institutions held under authority of section 1356, *G. C.*

COLUMBUS, OHIO, Oct. 15, 1915.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—Your request for an opinion on the question of payment of expenses of a matron of a children's home received and is as follows:

> "I write to enquire whether or not a matron of a county children's home or county infirmary may be reimbursed for expenses incurred in attending state conferences of benevolent institutions as held under the provisions of sections 1356 and 1357.
>
> "I understand that on November 6, 1913, your predecessor, General Hogan, in an opinion to the bureau of inspection and supervision of public offices, held that they could not, and I am writing to ask if you concur in this opinion."

As stated by you, this question was considered by my predecessor, Mr. Hogan, and in an opinion, No. 583, rendered by him to the bureau of inspection and supervision of public offices, under date of October 30, 1913, he held that the expenses referred to could not be allowed and paid from public funds. The opinion of Mr. Hogan was based on the fact that the duties of a matron of a children's home as outlined in section 3085 of the General Code, as amended (103 O. L., 889), did not bring her within the class of officials designated in section 1356 of the General Code. I concur in the opinion referred to, which is to be found at page 382, vol. 1, of the report of the attorney general for 1913.

It is my opinion, therefore, that a matron of a children's home cannot be allowed her expenses for attending state conferences of benevolent institutions held under authority of section 1356 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

938.

VICTOR RUBBER COMPANY—CERTIFICATES AUTHORIZING INCREASE OF ITS CAPITAL STOCK—COMMON AND PREFERRED, APPROVED.

Two certificates presented for filing to the secretary of state by the Victor Rubber Company, authorizing an increase of its capital stock from $150,000 *to* $300,000 *by the issuance of* $50,000 *preferred stock and* $100,000 *of common stock, approved, and the secretary of state advised to accept and file the same.*

COLUMBUS, OHIO, Oct. 16, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of October 15, 1915, with enclosures, in which you request me to advise you as to whether or not you should accept and file two certificates presented to you by The Victor Rubber Company, of Springfield, Ohio, both purporting to authorize an increase of its capital stock, one by the issuance of preferred stock to the amount of $50,000.00, and the other by the issuance of common stock to the amount of $100,000.00.

You enclosed the two certificates, a check for $150.00 to pay the required filing fee, two 10-cent revenue stamps, and a letter from Messrs. Bowman & Bowman, attorneys for the Victor Rubber Company, in which they set forth a statement of the facts and their reasons for urging the acceptance of the said certificates.

The facts revealed by the two certificates and by the letter of Messrs. Bowman & Bowman are as follows: On the 28th day of September, 1915, the authorized capital stock ($150,000.00) of the said Victor Rubber Company was fully subscribed and an installment of ten per cent. paid on each share. On said date, at a meeting of the stockholders at which all were present in person or by proxy, and waived in writing the notice by publication and letter required by statute, all agreed in writing to an increase in the capital stock of said company from $150,000.00 to $300,000.00, of which increase $50,000.00 was to be preferred stock and $100,000.00 common stock, and the president and secretary were authorized to certify such increase to the secretary of state.

Upon the same date, under authority of the action of the stockholders' meeting just referred to, the directors of said company adopted a resolution authorizing an increase of capital stock of said company from $150,000.00 to $300,000.00, and that $50,000.00 of such increase be issued and disposed of as preferred stock; in such resolution, also, provision was made as to the designations, preferences, voting powers, redemption, etc., of said preferred stock.

It is apparent from the recitals contained in the two certificates presented for filing that the provisions of sections 8698 and 8699 of the General Code, relative to the increase of capital stock of corporations have been complied with. Although it is true that each of the certificates recite that the capital stock is increased from $150,000.00 to $300,000.00, yet the certificate relative to the increase by the issuance of common stock recites the amount of common stock to be issued and shows compliance with the provisions of section 8698 of the General Code; and that the certificate relative to the increase by issuance of preferred stock recites the amount of preferred stock to be issued and shows compliance with the provisions of section 8699 of the General Code.

The fact that each certificate recites more than is required by statute is of no consequence so long as each certificate shows full compliance with the law. Neither are the two certificates, to my mind, objectionable to the extent of justifying a refusal to file the same even though it be granted that the contents of both certificates might properly have been embodied in a single certificate.

I am, therefore, of the opinion that the two certificates presented by the Victor Rubber Company, one authorizing the increase of its capital stock by the issuance of $100,000.00 of common stock, and the other authorizing an increase of the capital stock by the issuance of $50,000.00 of preferred stock, show that the action of the corporation and its directors has been in compliance with the General Code and should be accepted and filed by the secretary of state.

I return herewith the two certificates, the check for $150.00, the two 10-cent revenue stamps and the letter from Messrs. Bowman & Bowman, submitted with your letter.

Respectfully,
EDWARD C. TURNER,
Attorney General.

939.

SHERIFFS—PROCLAMATIONS—NOT REQUIRED TO GIVE NOTICE OF ELECTION TO BE HELD ON NOVEMBER 2, 1915.

Sheriffs of the several counties are not required by law to give notice, by proclamation, of the election to be held on November 2, 1915.

COLUMBUS, OHIO, October 16, 1915.

HON. D. M. CUPP, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR:—Yours under date of October 11, 1915, is as follows:

"I am requesting an opinion from your office as to the duty of the sheriff to issue a proclamation of the coming November election.

"Section 4827, General Code, provides for such a proclamation for the election in the even numbered years, or for what might be termed general elections; I am well aware that the statutes provide the manner of giving notice for township, school district and municipal elections; but the sheriff of our county has suggested that inasmuch as there are a number of constitutional amendments to be voted for at this coming election, a proclamation might be necessary; he appealed to secretary of state Hildebrant, and received an answer unsatisfactory; my own opinion is that such proclamation is not necessary, and I have so advised the sheriff, on the grounds that I find no statutory authority for such proclamation, and further there are other means of giving publicity to such proposed amendments."

It may be observed that only such duties relative to giving notice of holding elections are enjoined upon the sheriff as are imposed by statute.

Section 4824, G. C., makes provision for the election of electors of president and vice-president of the United States, and section 4825, G. C., provides as follows:

"At least fifteen days before the time for holding the election provided for in the preceding section, the sheriff shall give public notice by proclamation through his county of the time and place of holding such election and the number of electors to be chosen. A copy of such proclamation shall be posted at each of the places where elections are appointed to be held and inserted in a newspaper published in the county."

Section 4826, G. C., 103 O. L., 23, prescribes the time for holding all general elections for elective, state and county offices and for judges of the court of appeals.

Section 4827, G. C., provides as follows:

"At least fifteen days before the holding of any such general election, the sheriff of each county shall give notice by proclamation throughout his county of the time and place of holding such election, and the officers at that time to be chosen. One copy of the proclamation shall be posted at each place where elections are appointed to be held, and such proclamation shall also be inserted in a newspaper published in the county."

Section 4829, G. C., requires the sheriff to give notice of the time and places of holding special elections for filling a vacancy in the office of representative to congress or representative to the general assembly.

Section 4840, G. C., provides for notice of the submission of questions at a regular election as follows:

"Unless a statute providing for the submission of a question to the voters of a county, township, city or village provides for the calling of a special election for that purpose, no special election shall be so called. The question so to be voted upon shall be submitted at a regular election in such county, township, city or village, and notice that such question is to be voted upon shall be embodied in the proclamation for such election."

No further statutory provision is found touching the duty or authority of the sheriff to give notice of elections. It will be observed that no provision is made for proclamation of holding elections by the sheriff, except when electors of president and vice-president, or elective state and county officers and judges of courts of appeals, or representatives in congress or representatives to the general assembly, are to be elected. None of the foregoing officers can, under the law, be elected at the coming

November election, since no special election under the provisions of section 4829, G. C., has been directed by the governor. Since then, no proclamation of the election to be held November 2nd, next, is authorized to be made by the sheriff, section 4840, supra, can not operate to require such proclamation, for the clear import of its terms limits its operation to the incorporation of notice of questions to be submitted into a proclamation otherwise authorized or required to be made.

I am therefore of the opinion that no proclamation of the election to be held November 2, 1915, is required to be made by the sheriffs of the several counties of the state.

Respectfully,
EDWARD C. TURNER,
Attorney General.

940.

STATE HIGHWAY COMMISSIONER—FORM OF BOND FOR DIVISION ENGINEERS IN SAID DEPARTMENT.

COLUMBUS, OHIO, October 16, 1915.

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

DEAR SIR:—I have your communication of October 11, 1915, transmitting to me bond of Robert N. Waid, newly appointed division engineer in your department, for my approval as to form in accordance with section 1183 of the General Code of Ohio.

The bond which you have transmitted to me and which has been executed by the principal and surety is in the following terms, to wit:

"OFFICIAL BOND.

"STATE OF OHIO.

"KNOW ALL MEN BY THESE PRESENTS:

"That we, ROBERT N. WAID, of Columbus, Ohio, as principal, and AMERICAN SURETY COMPANY OF NEW YORK, of No. 100 Broadway, New York City, New York, are held and firmly bound unto the STATE OF OHIO, in the penal sum of FOUR THOUSAND ($4,000) DOLLARS, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, assigns and successors, jointly and severally, firmly by these presents.

"The condition of the above obligation is such, that: WHEREAS, the said ROBERT N. WAID has been duly and in accordance with law appointed division engineer of the state highway department of the State of Ohio, to serve from the 15th day of October, 1915, and until his successor shall have been appointed and qualified;

"Now, if the said ROBERT N. WAID shall, during his term of office, faithfully discharge the duties imposed upon him by law, then this obligation shall be void, otherwise it shall remain in full force and effect.

"WITNESS, our hands and seals, this 11th day of October, 1915.

"ROBERT N. WAID. (Seal.)
"AMERICAN SURETY COMPANY OF NEW YORK,
"(Seal.) "By PHIL. S. BRADFORD,
"Resident Vice-President.
"ATTEST: THOS. J. DAVIS,
"Resident Assistant Secretary."

Attached to the bond is an oath of office executed by Mr. Waid.

Referring first to the form of the bond, it should be noted that it is recited in the body of the bond that Mr. Waid is "to serve from the 15th day of October, 1915, and until his successor shall have been appointed and qualified." The expression "until his successor shall have been appointed and qualified" is not in accord with the section of the General Code creating the position of division engineer and defining the tenure of an appointee to such position.

Section 175 of the Cass highway law, section 1182, G. C., provides that the state highway commissioner may also, within the limits of the appropriations made by the general assembly, appoint as many division engineers as may become necessary to carry out the provisions of the chapter relating to the construction, improvement, maintenance and repair of roads and bridges by the state highway department. It will thus be seen that the number of division engineers in the service of your department depends upon the appropriations for their salaries, made by the general assembly, and the period of service of one or more division engineers may be terminated by the failure of the legislature to make a salary appropriation. Under the existing civil service laws, a division engineer may be removed for certain causes and, furthermore, there is no provision of law to the effect that a division engineer shall serve until his successor shall have been appointed and qualified. The expression above referred to should, therefore, be stricken from the bond, and there might be properly substituted therefor the expression "until his incumbency in said position shall have been terminated according to law."

The bond alludes to Mr. Waid's term of office, and therefore implies that he is an officer. To constitute a public office it is essential that certain independent public duties, as part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointment to the office thus created and defined, and not as a mere employe, subject to the direction and control of some one else. State ex rel. v. Jennings, 57 O. S., 415.

Under the statutes relating to the state highway department a division engineer is in effect an employe and is subject to the direction and control of the state highway commissioner, and no independent public duties are assigned by law to a division engineer to be exercised by him without the control and direction of the state highway commissioner. He is not, therefore, strictly speaking, an officer, and should not be so designated in his bond.

Relative to the taking of an official oath by Mr. Waid, your attention is directed to section 2 of the General Code of Ohio, which reads in part as follows:

> "Each person chosen or appointed to an office under the constitution or laws of the state, and each deputy or clerk of such officer, shall take an oath of office before entering upon the discharge of his duties."

A division engineer, not being an officer and not being either a deputy or a clerk of any other officer, and the statutes relating expressly to the position of division engineer not requiring an appointee to such position to take oath, it follows that the execution of an official oath on the part of Mr. Waid is not required, although there could be no objection to the taking of an oath on his part, should you so desire.

The statutory provision relating to the bond of a division engineer is section 176 of the Cass highway law, section 1183, G. C., which reads as follows:

> "Each of said employes appointed by the state highway commissioner, may be required to give bond in such sum as the state highway commissioner may determine. Such bonds shall be conditioned upon the faithful discharge of the duties of their respective positions, and such bonds shall be approved by the state highway commissioner. These bonds, with the approval of the state highway commissioner, as to sureties, and the approval of the attorney general as to form, shall be filed in the office of the secretary

of state. If the bond furnished by such officers or employes is a surety bond, the premium thereon shall be paid out of the contingent expense fund or other funds of the department."

It will be noted that under the above quoted section, the amount of the bond of a division engineer, when he is required to give a bond, is to be fixed by the state highway commissioner, who is also required to approve the bond as to sureties, and the approval of the attorney general goes only to the form of the bond. These observations suggest the form which should be taken by the approval endorsed on the bond by the state highway commissioner and attorney general respectively.

In view of the above considerations, I suggest the following as a proper form of bond to be furnished by Mr. Waid, and the proper form of oath to be taken by him, should you desire him to take an oath:

"BOND.

"STATE OF OHIO.

"KNOW ALL MEN BY THESE PRESENTS:

"That we, ROBERT N. WAID, of Columbus, Ohio, as principal, and AMERICAN SURETY COMPANY OF NEW YORK, of No. 100 Broadway, New York City, New York, as surety, are held and firmly bound unto the STATE OF OHIO, in the penal sum of FOUR THOUSAND ($4,000) DOLLARS, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, assigns and successors, jointly and severally, firmly by these presents.

"The condition of the above obligation is such, that: WHEREAS, the said ROBERT N. WAID has been duly and in accordance with law appointed division engineer of the state highway department of the State of Ohio, to serve from the 15th day of October, 1915, and until his incumbency in said position shall have been terminated according to law;

"Now, if the said ROBERT N. WAID shall, during his incumbency in said position of division engineer, faithfully discharge the duties of said position, then this obligation shall be void, otherwise it shall remain in full force and effect.

"WITNESS, our hands and seals, this_____day of_____, 19_____.

_____
_____
_____
_____
_____
_____"

"OATH.

"STATE OF OHIO, FRANKLIN COUNTY, ss:

"I do solemnly swear that I will support the Constitution of the United States of America and the Constitution of the State of Ohio, and that I will faithfully discharge the duties of the position of division engineer of the state highway department of the State of Ohio, to which I have been appointed, and otherwise, according to the best of my ability, promote the interest of the state, so far as the same may be lawfully in my power.

_____

"Sworn to and subscribed before me, a_____, in and for the county aforesaid, this _____day of_____, 19_____.

_____
_____"

"The within bond is approved as to amount and sureties.

"State Highway Commissioner
of Ohio.

"The within bond is approved as to form.

"Attorney General of Ohio."

For the reasons above indicated, I am returning the bond in question without my approval, but will be glad to approve a bond drawn in accordance with the suggestions herein made, when the same has been properly executed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

941.

FEDERAL CENSUS NOT CONCLUSIVE—CENSUS TAKEN BY CITY ITSELF UNDER SECTION 3625, G. C., MAY BE ADOPTED IN DETERMINING WHETHER OR NOT ADDITIONAL PUBLICATION OF NOTICE PROVIDED IN SECTION 6252, G. C., SHALL BE MADE IN SUCH CITY.

The last federal census is not conclusive as to the population of cities under the provisions of section 6252, G. C., and a census taken and authenticated by the city itself under section 3625, G. C., may be adopted in determining whether or not the additional publication of the notice provided in said section 6252, G. C., shall be made in such city.

Opinion of attorney general Hogan, vol. II, page 1281, report for the years 1911-1912 concurred in.

COLUMBUS, OHIO, Oct. 16, 1915.

HON. OTHO W. KENNEDY, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—I have your letter of October 13, 1915, requesting my opinion as follows:

> "At the request of the treasurer of Crawford county, Ohio, I am writing you relative to a certain opinion rendered by your predecessor, Honorable Timothy S. Hogan, on August 30, 1911, to my predecessor, Honorable W. J. Schwenck. This opinion is found in vol. II, at page 1281, of the years 1911-12 of the attorney general's opinions. This opinion states the facts, and the only question I desire your opinion on is as to whether or not you concur with your predecessor in the construction he placed on section 6252 of the General Code, in reference to the advertising of the notice of the rates of taxation in the city of Galion, Ohio.
>
> "An early reply will be very much appreciated."

I have carefully considered the opinion of my predecessor, Honorable Timothy S. Hogan, referred to in your letter, and concur in the conclusions therein expressed by him.

Respectfully,
EDWARD C. TURNER,
Attorney General.

942.

"BLUE SKY LAW"—CORPORATIONS ORGANIZED IN OHIO AND ENGAGED SOLELY IN BUSINESS OF MANUFACTURING OR COAL MINING AND QUARRYING MAY DISPOSE OF THEIR SECURITIES WITHOUT HAVING SAME CERTIFIED—DEALERS' LICENSE MUST BE SECURED BEFORE CORPORATIONS OR THEIR AGENTS CAN LAWFULLY SELL SUCH SECURITIES.

A corporation organized in Ohio and engaged solely in the business of manufacturing or coal mining and quarrying may dispose of its securities without the necessity of having the same certified under the provisions of sections 6373-14 *and* 6373-16, *G. C. (sections* 14 *and* 16 *of the blue sky law), but said corporation or any agent, in order to lawfully dispose of said securities in Ohio, must secure a dealer's license in accordance with the conditions and requirements of the blue sky law.*

COLUMBUS, OHIO, Oct. 16, 1915.

HON. A. L. DUFF, *Prosecuting Attorney, Port Clinton, Ohio.*

DEAR SIR:—I have your letters of September 15th and 23rd, 1915, in which you call my attention to the provisions of the blue sky law, and request my opinion as to whether or not a corporation organized under the laws of Ohio, owning property in Ohio, and which is engaged solely in manufacturing, mining and quarrying, "may sell its securities without filing application with the 'commissioner,' and may such securities be sold by agents who have not been licensed under this act."

I assume, in answering your questions, that the mining referred to as a part of the business of the corporation is coal mining.

Section 6373-14 of the General Code (section 14 of the blue sky law), so far as applicable, is as follows:

> "For the purpose of organizing or promoting any company, or assisting in the flotation of the securities of any company after organization, no issuer or underwriter of such securities and no person or company for or on behalf of such issuer or underwriter shall, within this state, dispose or attempt to dispose of any such security until such commissioner shall issue his certificate as provided in section 6373-16 of the General Code, which shall not be done until, together with a filing fee of five dollars, there be filed with the commissioner the application of such issuer or underwriter for the certificate provided for in section 6373-16, General Code, and, in addition to the other information hereinbefore required by paragraphs (a), (b), (c) and (d), of section 6373-9 of the General Code, the following:
> * * * * * * * * * * *
>
> "This section shall not apply where * * * the securities are those of a common carrier or of a company organized under the laws of this state and engaged principally in the business of manufacturing, transportation, coal mining, or quarrying, and the whole or a part of the property upon which such securities are predicated is located in this state. * * *"

Section 6373-16, as amended, vol. 106 O. L., 363, provides as follows:

> "Said commissioner shall have power to make such examination of the issuer of the securities, or of the property named in the two next preceding sections, at any time, both before and after the issuance of the certificate hereinafter provided for, as he may deem advisable. * * * And if it shall

> appear that the law has been complied with and that the business of the applicant is not fraudulently conducted, and that the proposed disposal of such securities or other property is not on grossly unfair terms, and that the issuer or vendor is solvent, upon the payment of a fee of ten dollars, the commissioner shall issue his certificate to that effect, authorizing such disposal. But if it shall not affirmatively so appear he shall so notify the applicant, in writing, and of his refusal to issue such certificate. * * *"

The securities of an Ohio corporation engaged principally in the business of manufacturing, coal mining or quarrying are specifically exempted from the requirements of said section 6373-14, and there is no requirement that such securities be certified by the commissioner of the blue sky law, as provided in section 6373-16 of the General Code, before the same can be disposed of.

Two distinct methods or means of control have been adopted by the Ohio blue sky law in seeking to regulate the sale of "securities:" First, by requiring dealers in certain securities to be licensed; second, by requiring the certification of certain of the securities to be sold. From the fact that the securities of a corporation are exempted from the necessity of certification, it does not, however, necessarily follow that the same may be disposed of in Ohio by an unlicensed dealer.

Section 6373-1, which prescribes generally who shall be licensed, is as follows:

> "Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed 'securities'), evidencing title to or interest in property, issued or executed by any private or quasi-public corporation, copartnership or association (except corporations not for profit), or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided."

Under the provisions of section 6373-2 of the General Code, certain securities are exempted and may be sold by an unlicensed dealer. The securities under consideration, however, do not fall within any of the exceptions set forth in said section 6373-2. The same section defines the term "dealer" as follows:

> "The term 'dealer,' as used in this act, shall be deemed to include any person or company, except national banks, disposing, or offering to dispose, of any such securities, through agents or otherwise, and any company engaged in marketing or the flotation of its own securities either directly or through agents or underwriters, or any stock promotion scheme whatsoever, except * * *." (Here follows a list of certain described persons and corporations selling securities who are excepted from the definition of the term "dealer," above quoted.)

The corporation under consideration cannot fall within any of these defined exceptions unless under the language of exception (f):

> "* * * Where the disposal, in good faith, and not for the purpose of avoiding the provisions of this act, is made for the sole account of the issuer, without any commission and at a total expense of not more than two per centum of the proceeds realized therefrom plus five hundred dollars, and where no part of the issue to be disposed of is issued, directly or indirectly, in payment for patents, services, good will, or for property not located in this state, provided that * * *."

Unless, therefore, the corporation proposes to sell its stock upon the terms and conditions described in the language just quoted it cannot escape the definition of the word "dealer" as used in the act.

I therefore advise you that a corporation organized in Ohio and engaged solely in the business of manufacturing or coal mining and quarrying may dispose of its securities without the necessity of having the same certified under the provisions of sections 6373-14 and 6373-16 of the General Code (sections 14 and 16 of the blue sky law), but that said corporation or any agent, in order to lawfully dispose of said securities in Ohio, must secure a dealer's license in accordance with the conditions and requirements of the blue sky law.

Respectfully,
EDWARD C. TURNER,
Attorney General.

943.

CIVIL SERVICE—SUPERINTENDENT OF COUNTY INFIRMARY IN CLASSIFIED SERVICE—MAY ONLY BE REMOVED FOR CAUSE—DEPUTY SEALER OF WEIGHTS AND MEASURES IN UNCLASSIFIED SERVICE—MAY BE REMOVED AT PLEASURE OF APPOINTING AUTHORITY.

The position of superintendent of a county infirmary is in the classified service as defined by the civil service law, 106 O. L., 400, and the incumbent thereof when classified under the provisions of said law may not be removed except for cause.

The deputy sealer of weights and measures, appointed under the provisions of section 2622, G. C., is in the unclassified civil service list, and may be removed at the pleasure of the appointing authority.

COLUMBUS, OHIO, Oct. 16, 1915.

HON. JOSEPH T. MICKLETHWAIT, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—By inadvertence your letter of September 20, 1915, was overlooked, hence the delay in answering.

You submit for consideration the following questions:

> "1. Is the position of superintendent of the county infirmary under either the unclassified or classified service, and can the county commissioners remove any incumbent from this office without cause?
>
> "2. Is the position of deputy sealer of weights and measures under either the unclassified or classified service and can the county auditor remove the present incumbent without cause?"

In an opinion reported in the attorney general's report for 1914, at page 376, it is held by my predecessor that the superintendent of a county infirmary is within the classified service and cannot be removed except for cause. While this holding was made under the civil service act as found in vol. 103, O. L., 698, there is no change in the present law, 106 O. L., 400, which in any manner affects in this respect the status of such superintendent. I concur in the foregoing opinion and in its conclusions.

It might be well to observe in this connection, however, that the non-competitive examination provided for in the last clause of section 10 of the act found in vol. 103 is no longer a protection to any officer claiming to have qualified by reason thereof.

This provision of the former law is expressly abrogated by section 486-16, G. C., 106 O. L., 418. If the superintendent involved in your question qualified by a non-competitive examination, he is not now under the protection of the civil service law, nor does the application of the civil service law to this position serve to extend the term of any incumbent thereof when such term is fixed by contract with the board of county commissioners. State ex rel. v. Schneller, 15 N. P. (n. s.) 438.

If, however, it becomes necessary to fill the position from an eligible list secured under a competitive examination, and the present incumbent held the position on August 31, 1915, he may be certified with three others on the eligible list for appointment, as provided by section 486-31, G. C., 106 O. L., 418.

Referring to your second question, a deputy sealer of weights and measures is a deputy of the county auditor, who by virtue of his office is county sealer of weights and measures. Section 2615, G. C. The former is appointed under the provisions of section 2622, G. C., which considered in connection with the provisions of section 2616, G. C., as amended, 106 O. L., 169, gives him ample authority to act for and in the place of the county auditor in all matters relating to weights and measures, and as to such transactions his relation to the county auditor is a fiduciary one coming clearly within the provisions of paragraph 9 of section 486-8, as amended 106 O. L., 404, which latter section defines and specifies the positions in the unclassified service. Said paragraph 9 provides as follows:

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

Under the provisions of this paragraph and the sections noted above I conclude that the deputy sealer of weights and measures is in the unclassified service and not protected by civil service laws. This conclusion also is in harmony with a former opinion of Hon. Timothy S. Hogan, reported at page 911 of the attorney general's reports for the year 1914.

You further inquire, however, if said deputy sealer of weights and measures may be removed without cause. As before observed the position not being within the protection of civil service laws and the statutes authorizing the appointment thereto not fixing any term of service, it must be held to be included within the provisions of section 9, G. C., and may be concluded at the pleasure of the appointing power. I therefore hold, in answer to the latter inquiry, that the county auditor may remove the deputy sealer of weights and measures at his pleasure and without cause.

Respectfully,

EDWARD C. TURNER,

Attorney General.

944.

STATE HIGHWAY COMMISSIONER—CERTIFICATION TO COUNTY COMMISSIONERS OF AN ESTIMATE FOR INTER-COUNTY HIGHWAY IMPROVEMENT PRIOR TO TAKING EFFECT OF CASS HIGHWAY LAW—EXPENDITURES FOR ENGINEERING LIMITED TO ORIGINAL ESTIMATE FOR THAT PURPOSE—DIFFERENCE BETWEEN ESTIMATED COST OF CONSTRUCTION AND CONTRACT PRICE MAY THEREAFTER BE USED FOR OTHER PROPER HIGHWAY WORK.

Where, under the statutes in force prior to September 6, 1915, the state highway commissioner certifies to county commissioners an estimate showing the total estimated cost and expense of an inter-county highway improvement, and further showing a division of such total estimated cost and expense into two items, one item being the estimated cost of construction and the other being the estimated cost of engineering, and such estimate is approved by the county commissioners, and thereafter the contract is let for less than the estimated cost of construction, the state highway commissioner is not authorized to expend for engineering the difference between the estimated cost of construction and the contract price, but is limited in his expenditures for engineering to his original estimate for that purpose, and the difference between the estimated cost of construction and the contract price may thereafter be used for other proper highway work.

COLUMBUS, OHIO, October 16, 1915.

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

DEAR SIR:—I have your communication of August 14, 1915, enclosing a letter addressed to you by Mr. John R. Chamberlain, deputy state highway commissioner in charge of the bureau of bridges, your communication and Mr. Chamberlain's letter relating to the matter of the improvement of the Urbana-Marysville road in Union county.

It appears that on December 9, 1914, the commissioners of Union county petitioned the state highway department for the improvement of the Urbana-Marysville road from the Champaign county line to Marysville, this section of highway passing through the village of Milford Center. Plans and estimates were prepared for that portion of the above mentioned highway lying between Milford Center and Marysville, a distance of 4.27 miles. This section of highway crosses Buck Run, at which crossing there is at present a narrow dilapidated bridge, which, though serving present needs, should properly be renewed. The estimated cost of improving this section of road, exclusive of the bridge, was $59,525.44, not including the cost of engineering, and the total estimated cost and expense of the improvement exclusive of the bridge but including the engineering expenses, was $62,000.00, the estimated cost of a new bridge over Buck Run being $4,500.00. The amount available for use by the state for road construction in Union county was $31,000.00. The county commissioners of Union county sold bonds in the amount of $31,000.00 for the construction of the section of highway in question, and the contract for constructing the improvement, exclusive of the bridge, at an estimated cost of $59,525.44, was advertised, the difference between $59,525.44 and $62,000.00 representing the estimated engineering expense on the road improvement, exclusive of the bridge. The contract was let for $7,535.44 less than the estimated cost of $59,525.44. You now inquire whether, in view of the above facts, the highway department is free to let a contract for the bridge improvement and pay for the same out of said sum of $7,535.44.

It should first be observed that the contingent liability on the contract for the

construction of the road is now fixed at $51,990.00 to be paid to the contractor, plus not more than $2,474.55 to be paid for engineering expense, making a total of not more than $54,464.56.

It is true that the original agreement between the state and county, as evidenced by the so-called final resolution adopted by the county commissioners of Union county, involved the possible expenditure of $62,000.00, half to be expended by the state and half by the county. It should be noted, however, that under the provisions of section 1193, G. C., as that section stood at the time this improvement was projected, the state highway commissioner, upon the completion of the maps, plans and specifications of the proposed improvement, was required to cause estimates to be made of the cost and expense of its construction, and transmit to the county commissioners, together with his certificate of approval thereof, copies of such maps, plans and specifications. Upon receipt of the maps, plans and specifications of the proposed improvement, with the approval thereof, by the state highway commissioner, the county commissioners were required by section 1194, G. C., as that section then stood, before any further action could be taken by the state highway commissioner, to adopt a resolution that such highway be constructed and certify a copy of this resolution to the state highway commissioner. All of the above requirements were strictly complied with in the case now under consideration.

While it was not expressly required by the statutes as they stood at the time this improvement was projected that the state highway commissioner should certify his estimate to the county commissioners, and that the county commissioners should approve the same, yet such action was in effect required by the provision of section 1212, G. C., as it then stood, to the effect that no contract should be let by the state highway commissioner for the improvement of an inter-county highway, unless the county commissioners of the county in which the improvement was to be made should make a written agreement to assume in the first instance the share of the cost and expense over and above the amount to be paid for the state, and the provision of section 5660, G. C., to the effect that the commissioners of a county should not enter into any contract, agreement or obligation involving the expenditure of money, unless the auditor first certified that the money required for the payment of such obligation was in the treasury to the credit of the fund from which it was to be drawn, or had been levied and placed on the duplicate, and was in process of collection and not appropriated for any other purpose. The written agreement of the commissioners to assume in the first instance the share of the cost and expense over and above the amount to be paid by the state was an agreement involving the expenditure of money, and the commissioners could not enter into the same until the auditor first made the certificate required by section 5660, G. C. The auditor could not make such a certificate unless the agreement involved the expenditure of a definite sum of money and it is, therefore, manifest that the estimate made by the state highway commissioner must be certified to the county authorities, although such action was not in terms required by the statutes in force at the time the improvement now under consideration was projected.

It is unnecessary to discuss in this connection the question of whether it was necessary to itemize such estimate to show the estimated cost of construction, and the estimated cost of engineering. In the case now under consideration, the state highway commissioner did certify to the county commissioners an estimate showing the estimated cost of construction to be $59,525.44, and the estimated engineering expense to be $2,474.56, a total of $62,000.00, and this estimate was approved by the county commissioners and formed the basis of and was one of the inducements to the agreement adopted by them to proceed with the improvement and assume a certain share of the cost and expense. In the view that I take of the law, in the absence of a supplementary agreement on the part of the county commissioners to assume a further part of the cost and expense above $31,000.00 appropriated by them, the facts

above set forth created a situation where the state highway commissioner was not only limited to a total expenditure of $62,000.00, but where he was also limited in the division of that sum between construction and engineering cost. In effect, the contract between the state and the county was for the construction of a highway to cost not more than $62,000.00, and the construction work thereon was not to cost more than $59,525.44 and the engineering expense thereon was not to exceed $2,474.56, having in view of course the right of the parties to increase either or both items by a later and supplementary contract.

This rule has the support of reason in that the county commissioners might be willing to expend $31,000.00 of county funds in the construction of a road where a certain proportion was to be observed between construction expense and engineering expense, and might be unwilling to make the expenditure if such proportion were to be disturbed and the engineering expense substantially increased with a corresponding reduction in the amount to be expended for construction work. In the present case, as before observed, the state highway commissioner certified to the county commissioners an estimate showing the estimated cost of construction to be $59,525.44 and the estimated engineering expense to be $2,474.56. With this estimate before them the county commissioners agreed to proceed with the improvement and pay one-half the cost thereof, or $31,000.00. All subsequent proceedings rested entirely with the state highway commissioner and it would be unconscionable to hold that because he subsequently was able to let the contract for a sum of $7,535.44 below the estimated cost of construction, he was therefore authorized to expend for engineering not only his estimate for engineering expense amounting to $2,474.56, but also said sum of $7,535.44.

I am of the opinion that no such conclusion can be reached, and that under the facts in this case the amount that can be expended for engineering is in the absence of a supplementary agreement limited to the estimate of $2,474.56. Any other conclusion would be unfair to the county authorities and would open the door to extravagance in the handling of the engineering work.

As the original amount set aside for the construction of this road was $62,000.00, this as suggested by you leaves a balance of $7,535.44, against which no contingent liabilities exists. Half of this $7,535.44 represents state funds and half represents funds raised by the county by a bond issue. As to the half represented by state funds, no contingent liability existing against it, it can be used for proper inter-county highway work any place in Union county. Through the courtesy of Mr. Milton Haines, prosecuting attorney of Union county, I have been furnished with a copy of the resolution providing for the county's bond issue of $31,000.00. I have examined the resolution and find that the bonds were issued for the purpose of paying the county's share of the cost and expense of improving that part of the Marysville and Urbana highway between Marysville and Milford Center under the provisions of sections 1178 to 1231, inclusive, of the General Code. Inasmuch as the renewing of the bridge over Buck Run is a part of the improvement of the road in question under the sections of the General Code referred to in the bond resolution, and was covered by the original application of the county commissioners, and inasmuch as no contingent liability exists against the county's half of the sum of $7,535.44, I am of the opinion that the county may properly apply its half of said sum toward the construction of the bridge in question.

It is therefore my opinion, in answer to your question, that upon the approval of the plans and specifications for the bridge in question, by the county commissioners of Union county, and upon their proper determination to proceed with its construction, and upon their agreeing to pay the county's portion of the cost and expense, that is to say, upon the county commissioners adopting a so-called final resolution covering the matter, you are authorized to enter into a contract for the construction of

the bridge in question, the state's portion of the cost to be paid from its half of the sum of $7,535.44 referred to by you, and the county's portion of the cost to be paid from its half of the same sum.

Respectfully,
EDWARD C. TURNER,
Attorney General.

945.

PROSECUTING ATTORNEY—COLLECTION OF DELINQUENT TAXES—NOT ENTITLED TO AN ALLOWANCE IN ADDITION TO SALARY FOR PROSECUTIONS BROUGHT BY COUNTY TREASURER UNDER FAVOR OF SECTION 2667, G. C.—STATUTORY SALARY IS FULL PAYMENT FOR ALL SERVICES REQUIRED BY LAW TO BE RENDERED IN AN OFFICIAL CAPACITY ON BEHALF OF COUNTY OR ITS OFFICERS, WHETHER CRIMINAL OR CIVIL MATTERS—MONEY ILLEGALLY DRAWN CAN BE COLLECTED FROM AN ATTORNEY WHO HAS BEEN EMPLOYED BY COUNTY TREASURER.

The county treasurer may not contract with an attorney to collect delinquent taxes on real estate, or employ a collector to collect delinquent personal taxes.

The expenditure of public funds for such purpose would be illegal, and if such expenditure has been made it is the duty of the prosecuting attorney, under provision of section 2921, G. C., to bring an action in the name of the state to recover for the use of the county such funds so illegally drawn from the county treasury. In case a finding is made by the bureau of inspection and supervision of public offices, it becomes the duty of the prosecuting attorney, under provision of section 286, G. C., to institute in the proper court, within ninety days from the receipt of such finding, a civil action on behalf of the county, and promptly prosecute the same to final determination to recover funds so illegally expended.

COLUMBUS, OHIO, Oct. 18, 1915.

HON. S. W. ENNIS, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—In your letter of October 12th you request my opinion on the following questions:

> "FIRST: Can the county treasurer contract with an attorney other than the prosecuting attorney of the county to collect delinquent and forfeited real estate taxes under the provisions of section 2672 of the General Code of Ohio?
>
> "SECOND: If the county treasurer has employed an attorney in accordance with the foregoing provisions of the statutes, who has filed suit in the court of common pleas of his county and enforced the payment of said taxes by an action at law, and the same has been paid into the county treasury, and he has duly presented his bill to the county commissioners and the same has been allowed and paid from the county treasury, can said money be collected back from the attorney who has enforced the payment of the same, under the provisions of the foregoing statute and the preceding statutes relating thereto?
>
> "THIRD: When a prosecuting attorney has been requested and directed to collect delinquent and forfeited real estate taxes under the pro-

visions of section 2673 of the General Code of Ohio, can he collect a fee of 25 per cent. as provided therein in addition to his regular salary?

"FOURTH: Under the provisions of section 5696 of the General Code of Ohio, can a collector be appointed to collect personal taxes as therein provided?"

You call my attention to sections 2672 and 2673 of the General Code which provide:

"Section 2672. When lands or lots or parcels thereof, advertised for and offered at both delinquent and forfeited tax sales, and returned as unsold at both, have become forfeited to the state by reason of the unpaid taxes thereon, the county treasurer may contract with a suitable person to collect the taxes or assessments thereon at a compensation deemed just and proper, subject to the approval of the county commissioners, but not to exceed twenty-five per cent. of the amount collected and shall be payable therefrom. Such allowances shall be apportioned ratably by the county auditor, among the funds entitled to share in the distribution of such taxes, and the expense of collection under the contract shall be borne by the person so contracting, who may proceed under this and the preceding sections, or as otherwise provided by law.

"Section 2673. When requested so to do by the auditor of state, if a county treasurer refuses or neglects to enforce a lien for such taxes and assessments, or either, and penalty thereon by civil action as hereinbefore provided, the auditor of state may direct the prosecuting attorney of the county to enforce such lien, in a civil action in the name of the state. Such suit shall be brought and prosecuted as hereinbefore provided. For such services the prosecuting attorney shall be allowed by the county commissioners from the amount collected not to exceed twenty-five per cent. thereof. The expense of such collection shall be borne by the prosecuting attorney, and all allowances shall be apportioned ratably by the county auditor, among all the funds entitled to share in the distribution of such taxes."

It becomes necessary, however, in determining the answers to the several questions submitted by you, to consider the provisions of other statutes relating to the collection of delinquent taxes on real and personal property.

Section 2658, G. C., relates to the collection of delinquent personal taxes and provides:

"When taxes are past due and unpaid, the county treasurer may distrain sufficient goods and chattels belonging to the person charged with such taxes, if found within the county, to pay the taxes so remaining due and the costs that have accrued. He shall immediately advertise in three public places in the township where the property was taken the time and place it will be sold. If the taxes and costs accrued thereon are not paid before the day appointed for such sale, which shall be not less than ten days after the taking of the property, the treasurer shall sell it at public vendue, or so much thereof as will pay such taxes and the costs."

If the county treasurer is unable to collect by distress the taxes assessed to a person or corporation or an executor, administrator, guardian, receiver, accounting officer, agent or factor, section 2660, G. C., provides that he shall apply to the court of common pleas in his county at any time after his semi-annual settlement with the county auditor, and the clerk shall cause notice to be served upon such corporation, executor, administrator, guardian, receiver, accounting officer, agent or factor, re-

quiring him forthwith to show cause why he should not pay such taxes. If he fails to show sufficient cause, the court at the term to which such notice is returnable shall enter a rule against him for such payment and the costs of the proceedings, *which rule shall have the same force and effect as a judgment at law* and shall be enforced by attachment or execution or such process as the court directs.

Sections 2662, 2663 and 2664 of the General Code provide ample authority on the part of the county treasurer for the collection of delinquent personal taxes from a person who has removed from the county in which the personal property was listed and who resides in another county in the state.

Section 2665, G. C., provides:

> "If a person charged with a tax has not sufficient property which the treasurer can find to distrain to pay such tax, but has moneys, or credits due, or coming due him from any person within the state, known to the treasurer, or if such tax payer has removed from the state or county, and has property, moneys, or credits due, or coming due him in the state, known to the treasurer, in every such case the treasurer shall collect such tax and penalty by distress, attachment, or other process of law. He may make affidavit that the residence of such tax payer is to him unknown, or that he is not a resident of the county where such property is found or where such debtor resides, or that such tax payer has not property in the county sufficient to distrain to pay such tax. Thereupon an attachment, with garnishee process, shall be issued and such proceedings had, and such judgment rendered for taxes, penalty, and costs, as are lawful in other cases of attachments. If the treasurer serves upon any person indebted to such tax payer a written notice, stating the amount of delinquent tax and penalty due, such debtor may, after the service of such notice, pay such tax and penalty to the treasurer, whose receipt therefor shall be a full discharge of so much of the indebtedness as equals the tax and penalty so paid."

Section 5694, G. C., provides:

> "Immediately after each semi-annual settlement in August, the county auditor shall make a tax list, and duplicate thereof, of all the taxes on personal property remaining unpaid, as shown by the treasurer's books, and the delinquent record as returned by him to the auditor. Such tax list and duplicate shall contain the name, valuation, and amount of personal property taxes, with ten per cent. penalty thereon, due and unpaid. He shall deliver the duplicate to the treasurer on the fifteenth day of September, annually."

Section 5695, G. C., makes it the duty of the county treasurer forthwith to collect the taxes and penalty on the duplicate by any of the means provided by law. Said section further provides that the funds so collected shall be distributed in proper proportions to the appropriate funds.

Section 5697, G. C., provides:

> "When personal taxes stand charged against a person, and are not paid within the time prescribed by law for the payment of such taxes, the treasurer of such county, in addition to any other remedy provided by law for the collection of personal taxes, shall enforce the collection thereof by a civil action in the name of such treasurer against such person for the recovery of such unpaid taxes. It shall be sufficient, having made proper parties to the suit, for the treasurer to allege in his bill of particulars or petition that the

taxes stand charged upon the duplicate of the county against such person, that they are due and unpaid, and that such person is indebted in the amount appearing to be due on the duplicate, and the treasurer need not set forth any other or further special matter relating thereto. The tax duplicate shall be prima facie evidence on the trial of the action, of the amount and validity of the taxes appearing due and unpaid thereon, and of the non-payment thereof, without setting forth in his petition any other or further special matter relating thereto."

The constitutionality of these statutes was upheld by the United States supreme court in the case of Insurance Co. v. Bowland, 196 U. S., 111. The court in its opinion said:

"The collection by distraint of goods to satisfy taxes lawfully levied is one of the most ancient methods known to the law, and in this case the law of Ohio authorizing it does not violate the constitutional right of a foreign company and deprive it of its property without due process of law."

Section 2667, G. C., relates to the collection of delinquent taxes on real estate and provides:

"When taxes or assessments, charged against lands or lots or parcels thereof upon the tax duplicate, authorized by law, or any part thereof, are not paid within the time prescribed by law, the county treasurer, in addition to other remedies provided by law may, and when requested by the auditor of state, shall enforce the lien of such taxes and assessments, or either, and any penalty thereon, by civil action in his name as county treasurer, for the sale of such premises, in the court of common pleas of the county, without regard to the amount claimed in the same way mortgage liens are enforced."

Section 2669, G. C., provides:

"Having made the proper parties, it shall be sufficient for the treasurer to allege in his petition that the taxes and assessments, or either, are charged on the tax duplicate against such premises, the amount thereof, and are unpaid, and he shall not be required to set forth in the petition any other or further special matter relating thereto. On the trial a certified copy of the entry on the tax duplicate shall be prima facie evidence of such allegations and of the validity of such taxes and assessments."

Section 2670, G. C., provides:

"Judgment shall be rendered for such taxes and assessments, or any part thereof, as are found due and unpaid, and for penalty and costs, for the payment of which the court shall order such premises to be sold without appraisement. From the proceeds of the sale the costs shall be first paid, next the judgment for taxes and assessments, and the balance shall be distributed according to law. The owner or owners of such property shall not be entitled to any exemption against such judgment, nor shall any statute of limitations apply to such action. When the lands or lots stand charged on the tax duplicate as forfeited to the state, it shall not be necessary to make the state a party, but it shall be deemed a party through and represented by the county treasurer."

The authority of the county treasurer to collect delinquent taxes on real and personal property is clearly defined by the above provisions of the statutes. His duty to make such collections is clearly determined by the mandatory provisions of sections 2665 and 5695 of the General Code. His broad power to distrain goods and chattels to satisfy delinquent personal taxes under the provisions of section 2698, et seq., of the General Code, his duty to enforce the lien of taxes and assessments on real estate by an action in court, when requested to do so by the auditor of state under provision of section 2667, et seq., of the General Code, taken in connection with the provisions of section 2917, G. C., which make the prosecuting attorney the legal adviser of the county treasurer, and require said officer to prosecute and defend all suits and actions which such county treasurer may direct or to which he is a party, and prohibit said county treasurer, as such, from employing other counsel or attorney at the expense of the county, compel me to conclude that the county treasurer may not contract with an attorney, other than the prosecuting attorney of the county, to collect delinquent taxes on real estate or employ a collector to collect delinquent personal taxes.

This conclusion, insofar as the collection of delinquent personal taxes is concerned, is supported by the decision of the court of common pleas of Franklin county in the case of the state of Ohio on the relation of Edward C. Turner as prosecuting attorney of Franklin county, Ohio, plaintiff, v. James T. Lindsay as treasurer of Franklin county, Ohio, defendant.

This was an action in mandamus to compel the said James T. Lindsay, as treasurer of said county, by any of the means provided by law, to collect the delinquent personal taxes and penalty as shown by the tax list delivered to him by the county auditor, without a collector. Upon a hearing of this case on the merits the court held that under the above provisions of the statutes relating to the collection of delinquent taxes on personal property it is the plain duty of the county treasurer, himself, to make the collections therein provided for, and a peremptory writ of madamus was issued directing and requiring said treasurer to proceed forthwith to make said collections.

Said conclusion, insofar as the collection of delinquent taxes on real estate is concerned, is in harmony with an opinion of my predecessor, Hon. Timothy S. Hogan, rendered to Hon. A. A. Slaybaugh, prosecuting attorney of Putnam county, under date of November 7, 1914. In this opinion, your first and third questions were considered by Mr. Hogan, the questions asked by Mr. Slaybaugh reading as follows:

> "I would like an opinion as to whether or not the county treasurer has the right to employ an attorney in actions commenced by him under the provisions of section 2667, General Code, and if so, would the provisions of section 2672 govern the amount of the fees for such attorney?
>
> "Is the prosecuting attorney compelled to act as attorney in cases commenced under section 2667 without compensation? What is meant by the word 'expenses' in sections 2672 and 2673?"

After quoting the provisions of sections 2667, 2672, 2673 and 2917, G. C., Mr. Hogan called attention to section 2912, G. C., which provides for the filling of a vacancy in the office of prosecuting attorney, and for the appointment of an assistant prosecuting attorney to perform the duties of said office in case the prosecuting attorney is unable to perform said duties on account of sickness or other disability, and held that the county treasurer has no right to employ an attorney to prosecute actions brought under section 2667, G. C.

In answer to the second question asked by Mr. Slaybaugh, Mr. Hogan called attention to the last paragraph of section 3003, G. C., which provides:

> "No prosecuting attorney shall receive a salary in excess of five thousand five hundred dollars. Such salary shall be paid in equal monthly installments,

from the general fund, and shall be in full payment for all services required by law to be rendered in an official capacity on behalf of the county or its officers, whether in criminal or civil matters."

Consideration was given to that part of section 2673, G. C., which provides:

"For such services the prosecuting attorney shall be allowed by the county commissioners from the amount collected, not to exceed twenty-five per cent. thereof."

It was noted, however, that the last paragraph of section 3003, as above quoted, was first found in the codification of 1910 in the following language:

"Such salary is to be paid in equal monthly installments, out of the general fund. Such salary shall be in full and in lieu of all compensation consisting of salaries and fees heretofore paid to prosecuting attorneys for their services as such, and in full payment for all services required by law to be rendered in an official capacity on behalf of the county or its officers, whether the same relates to either criminal or civil matters."

In conclusion Mr. Hogan said:

"This language is clear, free from all doubt or ambiguity, and of such character that it must be concluded that if the language last above copied from section 2673 was then in the Revised Statutes, its provisions were superseded by the amendment of section 1297, made March 31, 1906. So far as I have been able to ascertain, the language above quoted from section 2673, first found a place in our laws in section 1104, R. S., when amended on April 23, 1904, 97 O. L., 402.

"This makes the language of the act of March 31, 1906, as codified in 3003, G. C., the latter enactment and controlling, which compels the conclusion that the prosecuting attorney is not entitled to an allowance, in addition to his salary for prosecuting actions brought by the county treasurer, under favor of section 2667."

I concur in this opinion, and therefore enclose a copy of the same for your consideration.

I am of the opinion, therefore, that your first, third and fourth questions must be answered in the negative.

Inasmuch as I have held that the county treasurer is without authority in law to employ a person to collect delinquent taxes on real or personal property, it follows that the expenditure of the public funds for this purpose would be illegal, and if you find that such expenditure has been made it is your duty, under provision of section 2921, G. C., to bring an action in the name of the state to recover for the use of the county such funds so illegally drawn from the county treasury. In case a finding has been made by the bureau of inspection and supervision of public offices that such illegal expenditure has been made, it becomes your duty, under section 286, G. C., to institute in the proper court within ninety days from the receipt of such finding, a civil action in behalf of your county, and promptly prosecute the same to final determination to recover funds so illegally expended.

I am of the opinion, therefore, that your second question must be answered in the affirmative.

Respectfully,

EDWARD C. TURNER,

Attorney General.

946.

BOARD OF AGRICULTURE—EFFECT OF AMENDED SECTIONS OF GENERAL CODE ON TERMS OF ITS MEMBERS IS TO CONTINUE THEM UNTIL THEIR SUCCESSORS ARE APPOINTED AND QUALIFIED AND TO FIX DEFINITE DATE FOR BEGINNING OF TERMS OF SAID MEMBERS HEREAFTER APPOINTED.

1. *When an amendatory act includes all of the original act, and incorporates new provisions, the effect is not to repeal and then re-enact the original law, but it speaks from the date of its first enactment, while the new provisions become operative at the time the amendatory act goes into effect.*

2. *The only effect of the amendments made in section* 1079, *G. C., as amended* 106 *O. L.,* 555, *is to continue the term of each member of the state board of agriculture theretofore appointed under the provisions of said section, as found in* 106 *O. L.,* 144, *until his successor is appointed and qualified, and to fix a definite date for the beginning of the terms of said members hereafter appointed.*

COLUMBUS, OHIO, October 18, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—I beg to acknowledge receipt of your letter of October 14th, bearing the following statement and inquiry:

> "On April 22, 1915, there was filed in the office of the secretary of state an act creating the board of agriculture of Ohio, and in pursuance of such act on the 22nd day of July, 1915, the ten members of such board as provided for under said act were duly appointed and commissioned by the governor.
>
> "On June 5, 1915, there was filed in the office of the secretary of state an act amending sections 1079 and 1083 of the act creating the board of agriculture of Ohio.
>
> "In appointing the members of the board of agriculture of Ohio, as provided for under the act filed with the secretary of state, as of date June 5, 1915, your official opinion is requested as to the legal date of the beginning of the services of such members under said amended act."

The act which was filed June 5, 1915, to which you refer, is now the controlling law, and is found in 106 O. L., page 555, and provides as follows:

> "Section 1079. There shall be a board of agriculture of Ohio and by that name the board may sue and be sued. The board of agriculture shall consist of ten members to be appointed by the governor, with the advice and consent of the senate, two to serve for one year, two for two years, two for three years, two for four years and two for five years, *and until their successors are appointed and qualified;* and thereafter two members shall be appointed each year to serve for a term of five years, *commencing on the first Thursday after the second Monday in January.* Vacancies shall be filled in the same manner for unexpired terms. Not more than five of the members of the board shall at any time be of the same political party, and not less than six such members shall be practical farmers.
>
> "Section 1083. Immediately following the appointments of the *members* of the board of agriculture of Ohio, and annually *on the first Thursday after the second Monday in January thereafter,* the members of the board shall

meet at their office and elect a president who shall serve for one year and until his successor is elected."

I have italicized the amendments made in the foregoing law so as to indicate and bring directly to your attention the changes made by said law. It appears therefrom that the law re-enacted all of the old sections and in addition thereto the matter which I have italicized.

The only effect of the changes thus made is to continue the term of each member until his successor is appointed and qualified, and to make the beginning of the term of each member definite by fixing it as of the date of the first Thursday after the second Monday in January.

It is a familiar canon of interpretation of amendatory acts that all portions of of an original statute which are retained by the amended act are not to be construed as a new enactment, but are to be considered as remaining in force from the time of their original enactment and as being continued in operation by the amendatory enactment.

> "Where an amendment is made by declaring that the original statute 'shall be amended so as to read as follows,' retaining part of the original statute and incorporating therein new provisions, the effect is not to repeal, and then re-enact, the part retained, but such part remains in force as from the time of the original enactment, while the new provisions become operative at the time the amendatory act goes into effect, and all such portions of the original statute as are omitted from the amendatory act are abrogated thereby and are thereafter no part of the statute."
>
> Black on Interpretation of Laws, Rule 133.

In the present instance, all of the original section is re-enacted in the amended section, with the additions italicized to which your attention has already been directed. It follows from this that all of the provisions of the original law remain in force and are continued in operation by the amendatory act above quoted.

This being so, each member of the board will continue to serve under his original appointment made on July 22nd, subject, however, to the new provisions of the amended statute. As before noted, these require, first, that each member shall serve until his successor is appointed and qualified, and secondly, that the term of each member shall begin on the first Thursday after the second Monday in January. By virtue of these provisions, therefore, the members appointed on the 22nd of July, 1915, for the term of one year will have their terms extended from the 22nd of July, 1916, to the first Thursday after the second Monday in January, 1917, and this rule will apply to the terms expiring in July of each succeeding year.

Giving a direct answer to your specific question, the services of the members of this board will not begin under the new act until the expiration of the terms for which they were appointed under the original law. Then by reason of the clause in the new law extending their terms until their successors are appointed, the term of each member will be extended from the date it ends in July of each year to the first Thursday after the second Monday in the following January, at which time the term of his successor will begin. The first appointments to be made will be the successors to the members who were appointed for one year. As before observed, the terms of said members will not end until the first Thursday after the second Monday in January, 1917, when the terms of their successors will begin under the amended law.

Respectfully,

EDWARD C. TURNER,
Attorney General.

947.

APPROVAL OF RESOLUTION FOR IMPROVEMENT OF ROAD IN LOGAN COUNTY, OHIO.

COLUMBUS, OHIO, October 18, 1915.

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

DEAR SIR:—I have your communication of October 16, 1915, transmitting to me for examination final resolution relating to the Richwood-Bellefontaine road in Logan county, I. C. H. No. 236, petition No. 1499.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

948.

STATE HIGHWAY COMMISSIONER—ROADS AND HIGHWAYS—CONTRACT—LOWEST RESPONSIBLE BIDDER—HIGHWAY COMMISSIONER MAY USE SOUND DISCRETION.

Where the state highway commissioner is required to let a contract to the lowest responsible bidder, it is his power and duty to look not only to the size of the bids but also to the pecuniary ability of the bidders and to their skill, experience, integrity and judgment. If in the exercise of a sound discretion he determines that the lowest bidder is not responsible, it is his right and duty to reject the lowest bid and award the contract to the lowest responsible bidder, and in the absence of fraud or bad faith his decision upon a matter of this kind is final and not subject to review by the courts. A similar but somewhat broader construction is to be given to a statute requiring the letting of a contract to the lowest and best bidder.

COLUMBUS, OHIO, October 18, 1915.

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

DEAR SIR:—I have your communication of October 14, 1915, which reads as follows:

"Under date of October 8th, this department received bids, among others, for the improvement of section 'O' of the Newark-New Lexington road in Perry county, and section 'R' of the Cleveland-Kent road in Portage county.

"Upon each of these sections, the firm of Parrish & Bales, of Dayton, Ohio, were low bidders, the total of their bids on both jobs approximating $49,000.00. The resolutions anticipatory to the reception of these bids were filed in this department prior to September 6th of this year.

"The above named firm is at present engaged in work on three small contracts under the supervision of this department. The firm, to the best of my knowledge, is not strong financially, nor are they particularly experienced in highway construction work. For these reasons I hesitate to enter into contracts with Messrs. Parrish & Bales for the above mentioned work.

"As it is highly desirable that I make a decision at a very early date, I

would request a comprehensive opinion from your department as to my rights in the awarding of these particular contracts, interpreting for me the terms 'lowest responsible bidder', and also advise me of the meaning of the term 'lowest and best bidder' as used in amended senate bill No. 125."

I understand that both of the projected improvements, for the completion of which Parrish & Bales have submitted bids, are inter-county highway improvements and are being made in co-operation with county commissioners, and that the final resolutions of the county commissioners of the two counties, determining to proceed with the improvements, were adopted and certified copies thereof filed in your office, with the approval of the attorney general endorsed thereon, prior to the going into effect of the Cass highway law on September 6, 1915.

Section 1201, G. C., as that section stood prior to September 1, 1915, required the state highway commissioner to award contracts of this class to the lowest responsible bidder.

Section 199 of the Cass highway law, section 1206, G. C., requires the state highway commissioner to award such contracts to the lowest and best bidder. In determining whether the provision requiring the state highway commissioner to let contracts of this character to the lowest responsible bidder, or the provision requiring him to let such contracts to the lowest and best bidder, is the governing provision in the letting of the contracts referred to by you, it is necessary to consider certain of the saving provisions of the Cass highway law.

Section 302 of that act reads as follows:

"This act shall not affect pending actions or proceedings, civil or criminal, pertaining to the construction, improvement, maintenance, supervision or control of highways, bridges or culverts, brought by or against the county commissioners, county surveyor, township trustees, or road superintendent under the provisions of any statute hereby repealed, but the same may be prosecuted or defended to final determination in like manner, as if such statute had not been repealed."

Section 303 of the Cass highway law contains the following provision:

'This act shall not affect or impair any contract or any act done, or right acquired of any penalty, forfeiture or punishment incurred prior to the time when this act or any section thereof takes effect, under or by virtue of any law so repealed, but the same may be asserted, completed, enforced, prosecuted or inflicted as fully and to the same extent as if such laws had not been repealed. The provisions of this act shall not affect or impair any act done or right acquired under or in pursuance of any resolution adopted by the board of commissioners of any county, the trustees of any township, or the commissioners of any road district prior to the time of the taking effect of this act."

Inasmuch as the proceedings for these improvements were begun, the applications of the county commissioners made and approved, plans and specifications prepared and approved, and the final resolutions by the boards of county commissioners adopted prior to September 6, 1915, it is clear that under the above quoted provisions the statutory requirement, to the effect that the contracts must be let to the lowest responsible bidder, is the one which governs in this matter.

It may first be observed, however, that a board or official charged with the letting of a contract is not required, under all circumstances, to let such contract to the lowest bidder where the statute requires either that the contract be let to the lowest respon-

sible bidder or that it be let to the lowest and best bidder. Under either provision of law the board or official is authorized and required to take into consideration, in the awarding of the contract, certain factors other than the size of the bid. Any other rule would result in reading out of the statute in the one case the word "responsible" and in the other the word "best."

I will consider first the legal effect of a statutory requirement that a contract must be let to the lowest responsible bidder, since that is the requirement which will govern you in the letting of the contracts referred to in your communication.

In the case of Hubbard v. Sandusky, 9 O. C. C., 638, 6 O. C. D., 786, the court was called upon to construe a statute requiring that as to certain city improvements and under certain conditions, none of the lowest responsible bid should be accepted. The court held as follows:

> "The authority is vested in the council to decide which is the lowest responsible bid and that authority or power will not be interfered with by the courts except upon a clear showing of fraud, or gross abuse of authority practically amounting to a fraud, and the question of responsibility must enter largely into all decisions of the council in accepting bids. The court will presume always that the council acted rightfully in making a decision until the contrary is shown."

In the case of Carmichael v. McCourt, 17 O. C. D., 775, 6 O. C. C.(n. s.) 561, the court in construing a statute relating to the state board of public works and requiring that contracts should be awarded to the lowest responsible bidder (Bates R. S., section 218-44) held that such statute must be held to afford a latitude of discretion as to awards greater than that afforded by the public buildings code, but did not undertake to define that latitude.

In the case of State ex rel. v. Columbus Board of Education, 9 O. D., N. P., 336, 6 O. N. P., 347, the court was called upon to construe a statutory provision to the effect that none but the lowest responsible bid should be accepted by a board of education. The suit was one in mandamus and the relators alleged in their petition that they were the lowest responsible bidders and that their bid was $155.00 lower than the one accepted by the board of education. The board admitted that the relators were the lowest bidders, but denied their responsibility and the court in refusing a writ of mandamus used the following language:

> "The board was called upon to determine whether bidders were responsible, but the responsibility of a bidder does not rest upon his ability or inability to give adequate security for the performance of the contract. This term is given a much broader meaning when used in connection with the powers of officers and boards in the making of contracts. It includes pecuniary ability to perform the contract, skill, integrity and judgment."

In the case of Commonwealth v. Mitchell, 82 Pa. State, 343, the court in construing a statutory provision requiring a contract to be given to the lowest responsible bidder held that the word "responsible," when applied to contracts requiring for their execution not only pecuniary ability but also judgment and skill, imposes not merely a ministerial duty upon the city authorities such as would result did their powers extend no further than to ascertain whose was the lowest bid, and the pecuniary responsibility of the bidder and his sureties, but also duties and powers which are deliberative and discretionary.

It was further held in this case that the writ of mandamus would not lie to control the exercise of such deliberation and discretion in the absence of a positive showing of fraud or corruption.

In the case of State ex rel. v. McGrath, et al. 91 Mo., 386, the statute required a contract for printing to be awarded to the lowest responsible bidder. Two bids were filed, one by the relator and one by another printing concern, the relator's bid being the lower and the commissioners charged with the letting of the contract awarded the same to the higher bidder. The court held that the authority to let the contract to the lowest responsible bidder relieved the commissioners of public printing from the duty of letting the contract to the lowest bidder, and that the commissioners had a right to consider the responsibility of the bidders and that this duty involved the exercise of such a degree of official discretion as to place the commissioners beyond the control of the courts by mandamus, that the award to the higher bidder was valid and that the courts could not interfere.

I therefore conclude, that as to the contracts about which you inquire, and which you are required to let to the lowest responsible bidder, you are not required under all circumstances to award such contracts to the lowest bidders, and are in fact not permitted to award such contracts to an irresponsible bidder. It is your power and duty in the letting of such contracts to look to the responsibility of the bidders, and in determining whether a bidder is responsible, you have a right to consider his pecuniary ability to perform the contract in question and his skill, experience, integrity and judgment. If, in the exercise of a sound discretion, you determine that the lowest bidder is not responsible, it is your right and duty to reject his bid and award the contract to the lowest responsible bidder, and in the absence of fraud or bad faith your decision upon a matter of this kind is final and not subject to review by the courts.

A mass of authorities might be cited in support of the proposition that a statute which confers upon a board or public officer authority to award a contract to the lowest and best bidder confers upon the board a discretion with respect to awarding the contract, which discretion cannot be controlled by mandamus.

See State ex rel. v. Hermann, 63 O. S., 440;
State ex rel. v. Board of Public Service, 81 O. S., 218;
Scott v. Hamilton, 7 O. C. C. (n. s.) 495; 19 O. C. D., 652;
Yaryan v. Toledo, 18 O. C. D., 259.

The term "lowest and best bidder" seems to be given a somewhat wider meaning by the courts than the term "lowest responsible bidder," although the distinction between the meaning of the two terms is somewhat vague. In determining which of several bids is the lowest and best, you have a right to look to the pecuniary ability of bidders to perform the contract and to their skill, experience, integrity and judgment, and to any other similar consideration affecting their power to carry out a contract entered into by them and the probability of their being able to execute the contract in a workmanlike manner within such time as it may be proper to allow for the completion of the same.

Looking to all these considerations, it is your duty to determine which bid it would be for the best advantage of the state to accept, and the person filing that bid is to be regarded by you as the lowest and best bidder within the meaning of the statute and is to be awarded the contract. After you have exercised your discretion in determining which of several bidders is the lowest and best, the courts will not interfere with or review your decision in the absence of a showing of fraud or bad faith.

Answering specifically your question as to your right to reject the bids of Parrish & Bales for the construction of highways in Perry and Portage counties, I advise you that you have a right to consider the financial strength of this firm and its experience in highway work, and if upon a fair consideration of the same you determine that such firm is not responsible, and there are other bidders for such work, which bidders you

determine by the same test applied to Parrish & Bales to be responsible, then it is within your power, and is indeed your duty, to reject the bids of Parrish & Bales, and to award the contracts to the lowest of the responsible bidders.

Respectfully,
EDWARD C. TURNER,
Attorney General.

949.

STATE HIGHWAY COMMISSIONER—ROADS AND HIGHWAYS—APPLICATION FOR STATE AID BY COUNTY COMMISSIONERS PRIOR TO TAKING EFFECT OF CASS HIGHWAY LAW—HOW APPLICATIONS CAN BE APPROVED—MAY BE WITHDRAWN AND NEW APPLICATIONS FILED.

Applications for state aid made by county commissioners prior to the going into effect of the Cass highway law on September 6, 1915, are still valid. If such applications are now approved by the state highway commissioner, all subsequent steps in the improvement of the highways covered by such applications are to be had under the law in force at the time such applications were made. As a matter of sound public policy and in order to speedily bring the operations of the state highway department entirely under the provisions of the Cass highway law, such applications should be withdrawn and new applications made under the existing statutes.

COLUMBUS, OHIO, Oct. 19, 1915.

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

DEAR SIR:—Under date of August 18, 1915, you addressed to me a communication in which you submitted a number of questions relative to the Cass highway law. An answer to the sixteenth and last of those questions has been delayed pending the submission of additional facts by your department, and from communication above referred to and from the statements of certain members of your department I now understand the facts to be as follows:

There are on file in the office of the state highway department a number of applications which were properly signed and executed by boards of county commissioners applying for state aid on inter-county highways, under the provisions of sections 1178 to 1231 inclusive of the General Code of Ohio and the amendments thereto. These applications were made during the years 1913 and 1914, and most of them were made prior to January 1, 1914. The applications recite that the public interest demands the improvement, under the provisions of sections 1178 to 1231 and the amendments thereto of the General Code of Ohio, of certain inter-county highways therein described, that no part of such highways are situated within the limits of any municipality, that the commissioners making application to the state highway commissioner for aid from an appropriation by the state or from any fund available for the construction, improvement, maintenance or repair of inter-county highways, and that the commissioners agree for and on behalf of their respective counties to pay in the first instance from the funds of such counties not less than fifty per cent. of the cost and expense of surveys and other expenses preliminary to the construction, improvement, maintenance or repair of such highways.

Some of these resolutions were adopted by boards of county commissioners in response to letters addressed to them by the then state highway commissioner. These letters pointed out that as to approximately seventy-five per cent. of the inter-county

highway mileage of the state county commissioners had already applied for state aid and that it was desired to have every mile applied for by January 1, 1915. The following is a quotation from the letters referred to above:

> "By signing all resolutions, it will place your county in a position where it can co-operate with or receive aid from the state, for the construction, improvement, maintenance or repair, of any inter-county highway, or part thereof, when funds are available, without any delays. You merely commit your county to the policy of wanting all the inter-county highways improved and placed under state maintenance and repair just as fast as funds are available for the same.
>
> "Signing the resolutions will not be considered, by this department, an obligation for your county to appropriate any moneys for surveys; in case the county will be required or expected to share in the expense of any surveys, this department will not order any surveys, or incur any other preliminary expense, until a special authorization for the same is received from the board of commissioners of your county for each specific improvement."

The applications referred to above were made under authority of section 1185, G. C., as amended in 103 O. L., 451, which section read in part as follows:

> "The commissioners of a county may make application to the state highway commissioner for aid from an appropriation by the state or from any fund available for the construction, improvement, maintenance, or repair of 'inter-county' highways. Such application shall be filed prior to January 1st of the calendar year in which such appropriation may be made or become available. If the county commissioners have applied prior to January 1st, and upon examination of the application by the state highway commissioner, it is found to be irregular, it shall be his duty to immediately notify the board of county commissioners and request that they make the proper correction or amend the petition and return the same to the office of the state highway commissioner on or before the first of February next succeeding. * * *"

Section 1189, G. C., 102 O. L., 333, which was in force prior to the passage of the Cass highway law, contained the following provisions:

> "An application or part thereof not approved or withdrawn may be considered as an application for the apportionment of state aid moneys to a county for any succeeding year."

Having in mind the above facts you call my attention to the following provision found in section 303 of the Cass highway law, 106 O. L., 663:

> "The provisions of this act shall not affect or impair any act done or right acquired under or in pursuance of any resolution adopted by the board of commissioners of any county, * * * prior to the time of the taking effect of this act."

You now inquire as to whether the applications above referred to are to be considered as valid or whether they are null and void, and whether if valid they are operative only under the old highway laws or only under the Cass highway law which became effective September 6, 1915. You further inquire as to whether if they are valid and operative only under the old laws repealed by the Cass highway law, county com-

missioners are thereby prevented from making new applications covering the improvement of the same inter-county highway described in the old applications, such new applications to be operative under the Cass highway law.

I understand that your inquiry concerns only such applications as have not yet been acted upon and either approved or rejected by the state highway commissioner. As to these resolutions it could not be said that any act has been done under or in pursuance of the same, and in one sense of the word no right has been acquired under these resolutions making application for state aid, but in another and broader sense the county commissioners have acquired a right under their resolutions making application to the state highway commissioner for state aid in the construction, improvement, maintenance or repair of inter-county highways, that right being to have the state highway commissioner act upon said resolutions and either approve or reject the applications thereby made. No action having been taken by the state highway commissioner approving or disapproving the applications referred to by you, it is my opinion that such applications are to be considered as still valid and of full force and effect.

These applications were the first step in the proceedings by which, under the law in force prior to the going into effect of the Cass highway law, county commissioners co-operated with the state in the construction, improvement, maintenance or repair of inter-county highways. It therefore becomes important to consider the effect of certain saving provisions of the Cass highway law, one of which is referred to by you and quoted in part in your communication.

Section 302 of the act reads as follows:

> "This act shall not affect pending actions or proceedings, civil or criminal, pertaining to the construction, improvement, maintenance, supervision or control of highways, bridges or culverts, brought by or against the county commissioners, county surveyor, township trustees, or road superintendent under the provisions of any statute hereby repealed, but the same may be prosecuted or defended to final determination in like manner, as if such statute had not been repealed."

Section 303 of the act contains the following provisions:

> "This act shall not affect or impair any contract or any act done, or right acquired of any penalty, forfeitures or punishment incurred prior to the time when this act or any section thereof takes effect, under or by virtue of any law so repealed, but the same may be asserted, completed, enforced, prosecuted or inflicted as fully and to the same extent as if such laws had not been repealed. The provisions of this act shall not affect or impair any act done or right acquired under or in pursuance of any resolution adopted by the board of commissioners of any county, the trustees of any township, or the commissioners of any road district prior to the time of the taking effect of this act."

In view of the provisions above quoted, it is my opinion that if the applications referred to by you are approved by the state highway commissioner, his approval constituting the second step in the proceedings by which, under the old law, counties co-operated with the state in inter-county highway improvement, then all subsequent steps in the improvement of the highways covered by such applications are to be had under the law in force at the time such applications were made. As previously pointed out, however, section 1189, G. C., 102 O. L., 333, indicates that applications of the character referred to by you may be withdrawn, and in answer to the last branch of your question it is my opinion that as a matter of sound public policy, and in order

to speedily bring the operations of your department under the provisions of the Cass highway law and thus avoid the necessity of operating under two sets of statutes, you should not approve any applications made by county commissioners for state aid, which applications were made prior to the going into effect of the Cass highway law, but should require all boards of county commissioners in the state to withdraw all applications for state aid made prior to September 6, 1915, and make new applications under the existing statutes. If the course above suggested is followed by you, all necessity for your department referring to the statutes in force prior to the going into effect of the Cass highway law will be avoided, as soon as proceedings started under the old law, and in which the application of the county commissioners was approved by the state highway commissioner prior to the going into effect of the Cass highway law, have been completed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

950.

STATE HIGHWAY COMMISSIONER—CASS HIGHWAY LAW—THE WORDS "IMPROVEMENTS" AND "ROAD IMPROVEMENT" DEFINED—ANSWERS TO SIXTEEN QUESTIONS AS TO THE INTERPRETATION OF STATUTES AS ENACTED IN HIGHWAY LAW.

1. *The scope of the word "improvement" or "improvements" occurring in the Cass highway law cannot be indicated in general terms, and the meaning of the word as used in any particular section must be determined from the context.*

2. *The expression "road improvement" in section* 208 *of the Cass highway law, section* 1215, *G. C., may be read "highway improvement," and the expression "inter-county roads" in section* 226 *of the act, section* 1231, *G. C., may be read "inter-county highways."*

3. *The provisions of the Cass highway law relating to the letting of contracts for inter-county highways apply in all respects to the letting of contracts for the construction, reconstruction, improvement, maintenance or repair of main market roads.*

4. *In disbursing the funds derived from the registration of automobiles, it is the duty of the state highway commissioner, under the Cass highway law, to expend one half of such funds in the maintenance and repair of inter-county highways not designated as main market roads and the other half in the maintenance and repair of main market roads without reference to whether or not such main market roads are also inter-county highways.*

5. *Where work is done by the state highway department without the co-operation of a county or some township thereof, and such work includes any expenditure for bridge and culvert construction, the state is required to pay the full cost of such bridge and culvert work.*

6. *When an improvement is sought by township trustees under the provision of section* 185 *of the Cass highway law, section* 1192, *G. C., and work that does not sell is re-estimated, the amended estimate is to be referred to the township trustees for approval.*

7. *The services required by section* 180 *of the Cass highway law, section* 1887, *G. C., are to be regarded as a part of the regular duties of the county highway superintendent.*

8. *Insofar as sections* 217 *and* 242 *of the Cass highway law, sections* 1224 *and* 7465, *G. C., are in conflict, the latter is to govern.*

9. *Insofar as trees or shrubbery may be planted along inter-county highways, such planting is under the supervision and control of the state highway department. The planting of trees or shrubbery should not be included, however, in the plans for any proposed improvement unless the consent of the abutting land owners be first obtained.*

10. *The change of existing lines authorized by section* 189 *of the Cass highway law, section* 1196, *G. C., is not the change in existing inter-county or main market roads referred to in section* 182 *of the act, section* 1189, *G. C. It is impossible to lay down any general rule by which to determine whether a proposed change falls under one or the other of these heads.*

11. *It is not necessary that a road or street within an incorporated village be designated as an extension of an inter-county highway before state aid can be granted for the same. A state aid improvement within an incorporated village is not to be regarded as a state highway or a state road.*

12. *An improvement of a road inside an incorporated village made by the state highway department may or may not include a causeway or bridge or a drain, culvert or watercourse as may be agreed between the state highway commissioner and the council of the village.*

13. *The last two sentences of section* 217 *of the Cass highway law, section* 1224, *G. C., do not apply to village roads or streets.*

COLUMBUS, OHIO, October 19, 1915.

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

DEAR SIR:—I have your communication of August 18, 1915, in which you submit a number of questions relative to amended senate bill No. 125, known as the Cass highway code, and found in 106 O. L., 574.

You first inquire as to what is to be understood as the definition of the word "improvement" when used in connection with the words "construction," "maintenance" and "repair," in the sense in which it is used in the first sentence of section 177, and the third line of section 214 of the Cass highway law. The first sentence of section 177 of the Cass highway code, being section 1184, G. C., reads as follows:

> "The state highway commissioner shall have general supervision of the construction, improvement, maintenance and repair of all inter-county highways and main market roads and the bridges and culverts thereon."

The first five lines of section 214 of the Cass highway code, being section 1221, G. C., reads as follows:

> "The state highway improvement fund produced by the levy hereinafter provided for, shall be applied to the construction, improvement, maintenance and repair of the inter-county and main market road systems as follows:"

The second use of the word "improvement" in the last quoted provision is the one about which you inquire. It should first be observed that any definition of the word "improvement" herein undertaken is to be limited strictly to the word as used in the sentence under discussion. In other words, the context must always be considered and the fact that the word has a certain meaning when used in one connection, does not indicate that it is to be given the same meaning when used in another and different connection.

It will be noted that in both the parts of sections referred to by you and quoted above, the expression "construction, improvement, maintenance and repair" is used. This is not a new expression in the law of the state applicable to the activities of the state highway department. The expression was used repeatedly in the act passed in 1911, reorganizing the highway department and found in 102 O. L., 333, and in the amendatory act found in 103 O. L., 449, and is also found in many sections of the Cass highway law. While somewhat at a loss to understand the necessity for drawing any fine distinctions between the words "construction," "improvement," "maintenance" and "repair" as found in the two parts of sections referred to by you, and quoted above, it is my opinion that in a general way at least the legislature has in the two sections in question used the words "construction" and "improvement" as synonymous terms and as indicating the building of new roads; and that likewise the words "maintenance" and "repair" are used as synonymous terms and as indicating operations designed to keep up to their present standard roads that have already been built. Answering your question specifically, the word "improvement" as used in the two parts of sections to which you refer is to be understood as in a general way synonomous with the word "construction;" those two terms being used to designate one class of operations as distinguished from another class designated by the terms "maintenance" and "repair."

While as above observed, the words "construction" and "improvement" are in a general way used synonymously in the language referred to by you, and while the same may also be said of the words "maintenance" and "repair," yet there are certain slight distinctions which under some circumstances it might be proper and even important to observe between the meaning of the words "construction" and "improvement" and between the meaning of the words "maintenance" and "repair." The word "construction" as here used expresses more exactly the idea or notion of the building of a road in a location where no improved road previously existed, while the word "improvement" as here used may be said to imply the reconstruction of a road formerly improved, which reconstruction is so extensive as not to be fairly denominated a repair. The shade of distinction between the words "maintenance" and "re-

pair" may be best indicated by observing that while many operations may be properly classified either under the head of maintenance or under the head of repair, yet there are some operations of which this is not true. The application of oil or other dust preventatives furnishes an excellent illustration, for while such application properly falls under the head of maintenance, yet it could not be said to constitute a repair.

Your second inquiry is as to what is to be understood as the definition of the word "improvement" or "improvements" in the sense in which it is used in the third sentence of section 177, in section 229, section 245, section 247, in the last paragraph of section 210, and in the first line of section 214 of the Cass highway code. The third sentence of section 177 of the act, being section 1184, G. C., reads as follows:

> "He (the state highway commissioner) shall cause plans, specifications and estimates to be prepared for the construction, maintenance or repair of bridges and culverts when so requested by the authorities having charge thereof, and he shall cause to be made surveys, plats, profiles, specifications and estimates for improvements, whether upon state, county or township roads."

An examination of the sentence under consideration discloses the fact that the expression "he (the state highway commissioner) shall cause to be made surveys, plats, profiles, specifications and estimates for improvements, whether upon state, county or township roads" must be read in connection with the expression "when so requested by the authorities having charge thereof" found in the first part of the sentence. In other words, the state highway commissioner must, when requested by the local authorities having charge of a road or having the right to improve the same, cause to be made surveys, plats, profiles, specifications and estimates for any improvement of the road in question projected by the local authorities. This sentence furnishes an excellent illustration of the fact that the meaning of the word "improvement" depends upon the connection in which the word is used. As used in the sentence under consideration, it is manifest that the word "improvement" is to be taken as meaning any sort of road work requiring the making of surveys, plats, profiles, specifications and estimates, and the word therefore may include not only the building of a new road, but also the making of a repair if the repair be of such a character as to require the making of surveys, plats, profiles, specifications and estimates.

Section 229 of the act, being section 1231-3, G. C., reads as follows:

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

Any doubt as to the proposition that the word "improvement," as used in the section quoted above, is to be given a broad meaning and is to be taken as including not only the building of new roadways, but also the repair of existing roadways is removed by the provisions of section 244 of the act, section 7467, G. C., to the effect

that the state, county or township, or any two or more of them, may by agreement expend any funds available for road *construction, improvement or repair* upon roads inside of a village. This provision clearly indicates that the state may, by agreement with a village, engage in road repair as well as road construction within the limits of a village. The word "improvement" as found in section 229 of the Cass highway law, section 1231-3, G. C., must, therefore, be held to include both the construction of new roadways and the repair of existing roadways.

Sections 245 and 247 of the act, being sections 7468 and 7470, G. C., read as follows:

> "*Section* 245. The state highway commissioner, county commissioners or township trustees or other proper officials may, as a part of the plans or specifications for a proposed improvement, provide for the planting of trees or shrubbery along or upon the public highway embraced within the proposed improvement. The state highway commissioner, county commissioners or township trustees or other proper official may provide for the planting of trees or shrubbery along any public highway."
>
> "*Section* 247. The state highway commissioner, county commissioners or township trustees, may, in connection with any improvement, appropriate any drainage rights outside of the line of said highway or any easement, right or interest whatever in any property desired for any proposed improvement, and in case such official or either of them desire to appropriate such drainage right, easement, right or interest in any property in connection with any existing highway, the same may be done in the manner hereinbefore specified for the condemnation of road materials. Any land or property rights, required for the construction of a new bridge or for any additions to, or repairs to any existing bridge, may be acquired in like manner."

Having regard to the objects sought to be accomplished by the two sections quoted above, it is my opinion that the word "improvement" where it occurs in such sections, is to be given a broad and comprehensive meaning and that it includes all operations having for their object the construction, reconstruction, maintenance or repair of highways. No opinion is herein expressed, however, as to the validity of the provisions of section 245 of the act, in so far as they seek to authorize the planting of trees on highways where the public has only an easement for the purposes of travel and the fee is in the owners of the abutting land.

The last paragraph of section 210 of the act, being section 1217, G. C., reads as follows:

> "Where the application for said improvement is made by the township trustees, the state may assume all or any part of the county's proportion of the cost of said improvement. In no case shall the property owners abutting upon said improvement be relieved by the state, county or township, from the payment of ten per cent. of the cost and expense of such improvement, excepting therefrom the cost and expense of bridges and culverts, provided the total amount assessed against any abutting property does not exceed thirty-three per cent. of the valuation of such abutting property for the purposes of taxation."

The above provision is a part of chapter VIII of the Cass highway code, relating to the construction, improvement, maintenance and repair of roads and bridges by the state highway department, section 184 of the act, being section 1191, G. C., and being found in said chapter, provides that the commissioners of any county may make application to the state highway commissioner for aid from any appropriation by the state from any fund available for this construction, improvement, maintenance or repair of inter-county highways. Section 185 of the act, section 1192, G. C., provides

that in case the county commissioners do not file any application for state aid before January first of any year in which the funds will be available for the construction, improvement, maintenance or repair of some one or more of the inter-county highways or main market roads, then the board of township trustees of any township within the county may file such application. It thus appears that counties and townships may apply for state aid not only in the construction and improvement of highways, but in their maintenance and repair as well.

The first sentence of the paragraph about which you inquire relates by its terms to road work for the accomplishment of which township trustees apply for state aid. The language used in the second sentence of the paragraph relative to the state, county or township relieving property owners from assessment, indicates that the sentence in question is intended to apply to any improvement for the accomplishment of which either county commissioners or township trustees apply for state aid. Having in mind the fact that both county commissioners and township trustees may apply for state aid not only in construction and improvement work, but also in maintenance and repair work, I therefore conclude that the word "improvement" as it occurs in the first sentence of the paragraph referred to by you, means either the construction, improvement, maintenance or repair of a highway as petitioned for by township trustees under this and the preceding sections, and the word "improvement" as it occurs in the secomd sentence of the paragraph referred to by you means either the construction, improvement, maintenance or repair of a highway as petitioned for by either county commissioners or township trustees under this and the preceding sections.

The word "improvement" as found in the first line of section 214 of the act, section 1221, G. C., is a part of the expression "state highway improvement fund." It is difficult to define the word "improvement" as here used, apart from the expression in which it is used, and it is sufficient to observe that the expression "state highway improvement fund" is the expression used by the legislature to describe the fund produced by the levy provided by section 223 of the act, section 1230, G. C.

I do not understand that you are inquiring as to the proper disposition to be made of the state highway improvement fund and will therefore not touch upon that matter in this opinion.

Your third question is as to whether the word "improvement" or "improvements" when used alone, includes any or all of the terms "construction," "reconstruction," "maintenance," "repair," "planting of trees" and "renewing of bridges." Enough has been said in answer to your first and second questions to indicate that your third question cannot be answered in general terms. The scope of the word "improvement" or "improvements" occurring in the Cass highway code cannot be indicated in general terms applicable under all conditions, and the meaning of the word as used in any particular section of the law must be determined from an examination of the context.

In your fourth question, you refer to the word "road" as used in section 208 of the act and to the word "roads" as used in section 226 of this act in the term "inter-county roads," and inquire whether these words "road" and "roads" are to be given any different meaning from the terms "highway" and "highways" generally used throughout the act.

Section 208 of the act, being section 1215 G. C., reads as follows:

> "Where property is separated from a *road* improvement by a canal, street railway, steam railway or in any other similar manner, such property shall be regarded for the purposes of assessment under the provisions of this chapter as property bounding and abutting upon said improvement, and both such strip of land owned or occupied by such street railway or steam railway and the land lying back thereof shall be assessed on account of said improvement as provided herein."

The pertinent sentence of section 226 of the act, section 1231, G. C., reads as follows:

> "When contracts are let for the construction of main market roads, the provisions of this chapter relating to the letting of contracts for inter-county roads shall apply in all respects to letting of contracts for such main market roads."

I am unable to say that section 208 of the act has any different meaning by reason of the use of the word "road" before the word "improvement" than it would have if the word "highway" were substituted for the word "road."

So far as the use of the word "roads" in the expression "inter-county roads" in that part of section 226 of the act quoted above is concerned, it is manifest that the legislature intended to indicate inter-county highways, and it is therefore my opinion that in construing both sections, the word "road" or "roads" is to be given the same meaning as the word "highway" or "highways." In other words, the expression "road improvement" in section 208 may be read "highway improvement" and the expression "inter-county roads" in section 226 of the act may be read "inter-county highways."

Your fifth inquiry is as to whether the provisions relating to the letting of contracts for inter-county highways apply in all respects to the letting of contracts for the construction, reconstruction, improvement, maintenance or repair of main market roads. Section 226 contains the following provision:

> "When contracts are let for the construction of main market roads, the provisions of this chapter relating to the letting of contracts for inter-county roads shall apply in all respects to letting of contracts for such main market roads."

Having expressed the opinion, in answer to your fourth question, that the word "roads" as found in the expression "inter-county roads" in the sentence above quoted, is to be read "highways" it follows that the provisions relating to the letting of contracts for inter-county highways apply in all respects to the letting of contracts for the construction of main market roads. It is further my opinion that the word "construction," as found in the provision above quoted, is not to be given any narrow or technical meaning, but is to be taken as including any operation in connection with a main market road, which operation the state highway commissioner may undertake to carry out by contract. If, therefore, the state highway commissioner undertakes to carry out by contract any operation looking toward the construction, reconstruction, improvement, maintenance or repair of a main market road, he is to be governed in the letting of such contract by the provisions of law relating to the letting of contracts for inter-county highways.

Your sixth question is as to whether the term "inter-county highways" found in the third sub-division of section 214 of the act, section 1221, G. C., is meant to include the main market roads of the state. The third sub-division of the section in question reads as follows:

> "The funds derived from the registration of automobiles shall be equally divided and one-half shall be applied, and used, as provided in this section, in the maintenance and repair of the inter-county highways and one-half in the maintenance and repair of the main market roads of the state. From the part of the funds appropriated for use on the main market roads the state commissioner is empowered to establish a system of maintenance to be organized in such manner as the state highway commissioner may provide."

Your question evidently arises out of the situation that many of the main market roads of the state are also inter-county highways, having been designated as inter-county highways before the passage of the main market road law. If it were to be

held that the term "inter-county highways," as found in the provision quoted above, included main market roads that were also inter-county highways, the result of such a holding would be to enable the state highway commissioner to spend all of the funds derived from the registration of automobiles in the maintenance and repair of main market roads. It is manifest from an examination of the provisions quoted above, that such was not the intention of the legislature and indeed that the legislature intended to guard against such a consequence and to insure by the enactment of the provision in question that only one-half of the so-called maintenance and repair fund should be spent in the maintenance and repair of main market roads, and that the other half should be spent in the maintenance and repair of inter-county highways not designated as main market roads. It is therefore my opinion that the term "inter-county highways," as found in the provision above quoted, does not include main market roads even where such main market roads are also inter-county highways, and that it is the duty of the state highway commissioner, in disbursing the funds derived from the registration of automobiles, to expend one-half of such funds in the maintenance and repair of inter-county highways not designated as main market roads and the other half in the maintenance and repair of main market roads without reference to whether or not such main market roads are also inter-county highways.

Your seventh question is as to whether the state is required to pay the full cost and expense of the bridge and culvert work done under the provisions of the fourth sentence of section 184 of the act, section 1191, G. C. The sentence to which you refer reads as follows:

> "If the county commissioners or township trustees do not make application for the apportionment to such county on or before the first day of May, then the state highway commissioner shall enter upon and construct, improve, maintain, or repair any of the inter-county highways or parts thereof in said county, either by a contract, force account or in such manner as the state highway commissioner may deem for the best interests of the public, paying the full cost and expense thereof, except that portion to be assessed against abutting property owners, from the apportionment of the appropriation due said county and unused or unapplied for by said county or any board of trustees thereof, as hereinafter provided."

While it is true that section 219 of the act, being section 1226, G. C., provides that the word "highway" as used in the chapter relating to the construction, improvement, maintenance and repair of roads and bridges by the state highway department includes an existing causeway or bridge or a new causeway or bridge, or a drain or watercourse, which forms a part of a road authorized by law, and while it is provided in section 184 of the act, section 1191, G. C., that when a part of the inter-county highway system or main market road system of the state is improved by the state, by contract or force account, without the co-operation of a county or some township thereof, ten per cent. of the cost of said construction or improvement shall be assessed against the land abutting thereon, according to the benefits, provided the total amount assessed against any owner of abutting property shall not exceed thirty-three per cent. of the valuation of such abutting property for the purposes of taxation, yet reference must be had to the provision relating to assessment against the owners of abutting property in those cases in which a county or township co-operates in the making of the improvement.

In those cases where there is co-operation by a county or township, it is provided by section 207 of the act, section 1214, G. C., that ten per cent. of the cost and expense of an improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property abutting on the improvement, provided the total amount assessed against any owner of abutting property shall not exceed thirty-three per cent. of the valuation of such abutting property for the purposes of

taxation. No good reason can be suggested why, where the state highway department makes the improvement without co-operation, a different rule of assessment should prevail from that which prevails where there is co-operation by a county or township. On the other hand, reason would seem to require that the same rule of assessment should prevail in both cases and it is my opinion that the legislature has not indicated an intent to apply a different rule in the two cases and that where work is done by the state highway department without the co-operation of a county or some township thereof, and such work includes any expenditure for bridge and culvert construction, the state is required to pay the full cost and expense of such bridge and culvert work.

Your eighth question reads as follows:

> "When an improvement is sought by the township trustees, under the provisions of section 185, and work that does not sell is re-estimated, is the amended estimate referred to the county commissioners, as provided by section 200? Or does the last clause of section 185 imply that such amended estimate shall be referred to the township trustees for their approval?"

Section 185 of the act, being section 1192, G. C., reads as follows:

> "In case the county commissioners do not file any application for state aid before January first of any year in which the funds will be available for the construction, improvement, maintenance or repair of some one or more of the inter-county highways or main market roads, then the board of township trustees of any township within the county may file such application, and the state highway commissioner may co-operate with such trustees in the construction or improvement of such highway in the manner hereinafter provided in cases where the county commissioners make such application."

Section 200 of the act, being section 1207, G. C., relates to the letting of contracts by the state highway commissioner, and provides, among other things, that:

> "If no acceptable bid is made within the estimate, the state highway commissioner may either re-advertise the work or amend the estimate, and certify the same to the county commissioners, and upon their adoption of the amended estimate, again proceed to advertise for bids, and award the contract as provided in the preceding section."

This provision of section 200 of the act, requiring the state highway commissioner, in case he amends an estimate, to certify the same to the county commissioners for their approval, is manifestly intended to apply to those cases in which the state highway commissioner and the county commissioners are co-operating in the making of the improvement and has no application in so far as it requires the approval of the county commissioners to the amended estimate in those cases in which township trustees, rather than county commissioners, are co-operating in the making of the improvement. As indicated in your question, the last clause of section 185 of the act, which provides in effect that where the state highway commissioner and township trustees co-operate in the making of an imptovement, such co-operation shall be had in the manner provided in cases where the county commissioners apply for the improvement, is sufficient to indicate the proper procedure in the case presented by you. Where township trustees, rather than county commissioners, are co-operating with the state highway commissioner and no acceptable bid is made within the estimate, and the state highway commissioner elects to amend the estimate it is then his duty to certify the amended estimate to the township trustees for their approval.

Your ninth inquiry is as to whether the state or the county pays for the services

provided for in section 180 of the act, being section 1187, G. C. The section in question reads as follows:

> "The state highway commissioner or chief highway engineer, may call upon the county highway superintendent, at any time to furnish a map or maps of the county showing distinctly the location of any rivers, railroads, streams, township lines, cities, villages, public highways and deposits of road material, together with any other information that may be required by said commissioner or engineer. Such information shall be furnished in such form as the state highway commissioner may require. A copy of such maps, plats or other information shall be kept on file in the office of the county highway superintendent."

The services required by this section are to be distinguished from those required by section 212 of the act, being section 1219, G. C. The services required by section 212 of the act consist of making surveys and plans for proposed improvements and supervising and inspecting improvements under process of construction. It is provided by section 212 that the expense of surveys and plans shall be equally divided between the state and county and that the expense of supervision and inspection shall be apportioned between the state and county on the same basis as the cost of construction. No provision is found in section 180 providing for a division or apportionment of the cost and expense of furnishing a map or maps, and such information as may be required by the state highway commissioner or chief highway engineer. I therefore conclude that the services required by section 180 of the act are to be regarded as a part of the regular duties of the county highway superintendent and that in so far as he may require assistants or may be compelled to incur traveling or other expenses, the compensation of such assistants and the expenses thus incurred are to be met by the county. The assistants which he would be entitled to use in such work, if required, would be those provided by section 138 of the act, section 7181, G. C.

The tenth question propounded by you relates to certain apparently conflicting provisions of sections 242 and 217 of the act. Section 242 of the act, being section 7465, G. C., reads as follows:

> "In all cases where a county or township has constructed or improved any main market or inter-county road, the state highway commissioner, upon request, shall, within sixty days indicate what changes, or improvements, will be required in said road in order to bring the same up to the approved standard of construction of such road, or in any case where such road is about to be constructed, reconstructed, or improved, the state highway commissioner shall, upon application, indicate within sixty days what changes will be required in the plans and specifications therefor, to bring said road up to the standard required by the state for the construction of inter-county highways and main market roads. Whenever the changes so specified by the state highway commissioner have been made, or when such roads have been constructed according to the plans and specifications so approved by the state highway commissioner, such roads shall at once become state roads."

Section 217 of the act, being section 1224, G. C., contains the following provision, which provision is found at the end of the section:

> "Inter-county highways or main market roads on which no state aid money has been expended, if improved with construction equal to that specified by the state highway commissioner shall be taken over by the state, and shall thenceforth be maintained as prescribed herein for inter-county highways and main market roads. Upon application by the county commissioners or

township trustees the chief highway engineer shall, within sixty days, specify what changes are required in any portion of an existing inter-county highway or main market road to bring it up to the standard required by the state, and on application, the chief highway engineer shall furnish specifications for the construction of such road up to the standard required by the state."

The provisions of the two sections, as quoted above, are in conflict in that section 217 requires the chief highway engineer, under certain conditions, to specify what changes are required in an inter-county highway or main market road to bring it up to the standard required by the state, while under section 242 the same action is required of the state highway commissioner. The question therefore arises, as indicated by you, whether the action referred to above is to be taken by the chief highway engineer or the state highway commissioner. It is to be noted in this connection that the state highway commissioner is superior in authority to the chief highway engineer and has general supervision of the activities of the state highway department. The chief highway engineer is an appointee of the state highway commissioner and acts under the supervision and direction of the latter. In view of the above facts, it is my opinion that in so far as the two sections are in conflict, section 242 of the act, section 7464, G. C., is to govern, and that the action in question is to be taken by the state highway commissioner.

Your eleventh question is as to whether the provision of the first sentence of section 177 of the act gives the state highway commissioner power and authority in all cases to regulate and supervise the planting of trees or shrubbery along and upon inter-county highways and as to whether section 141 of the act gives the state highway commissioner authority to prescribe and enforce rules and regulations covering the provisions of section 245 of the act.

Section 245 of the act, being sections 7468, G. C., reads as follows:

"The state highway commissioner, county commissioners or township trustees or other proper officials, may, as a part of the plans and specifications for a proposed improvement, provide for the planting of trees or shrubbery along or upon the public highway embraced within the proposed improvement. The state highway commissioner, county commissioners or township trustees or other proper official may provide for the planting of trees or shrubbery along any public highway."

The first sentence of section 177 of the act, being section 1184, G. C., reads as follows:

"The state highway commissioner shall have general supervision of the construction, improvement, maintenance and repair of all inter-county highways and main market roads, and the bridges and culverts thereon."

Section 141 of the act, being section 7184, G. C., reads as follows:

"The county highway superintendent shall have general charge, subject to the rules and regulations of the state highway department, of the construction, improvement, maintenance and repair of all bridges and highways within his county, whether known as township, county or state highways, and such county highway superintendent shall see that the same are constructed, improved, maintained, dragged and repaired as provided by law, and shall have general supervision of the work of constructing, improving, maintaining and repairing the highways, bridges and culverts in his county, subject, however, to the provisions hereinafter made for the designation, by the state highway commissioner, of an engineer, other than the county surveyor, to have charge of state work in such county."

It is obvious from a reading of the provisions of the act quoted above, that it was the intention of the legislature to confer authority for including the planting of trees or shrubbery in the plans for proposed road improvements and authority to provide for the planting of trees or shrubbery along the public highways upon the state highway department as to main market roads and inter-county highways, upon the county commissioners as to other highways which might be improved by them and upon the township trustees as to other highways which might be improved by them. The sentence of section 177 of the act, quoted above, gives the state highway commissioner general supervision of the construction, improvement, maintenance and repair of all inter-county highways and main market roads, and the provision of section 141 of the act quoted above, makes the county highway superintendent subject to the rules and regulations of the state highway department in the construction, improvement, maintenance and repair of all the highways within his county, subject to certain exceptions which it is not necessary to note in this connection.

It is true that under section 196 of the act, being section 1203, G. C., county commissioners or township trustees may construct, improve, maintain or repair inter-county highways, but in such cases the plans and specifications for the proposed improvement must first be submitted to the chief highway engineer and approved by him. From a consideration of the above provisions, it follows that it was the intention of the legislature to give the state highway commissioner authority to regulate and supervise the planting of trees or shrubbery along and upon inter-county highways and to prescribe and enforce rules and regulations covering the planting of such trees and shrubbery in all cases except those in which counties or townships construct, improve, maintain or repair inter-county highways, in which cases the plans for such work, including any planting of trees or shrubbery that may be projected are subject to the approval of the chief highway engineer. In other words, it was the intention of the legislature to make the planting of trees or shrubbery along and upon inter-county highways as a part of the improvement of the same, subject under all conditions and circumstances to the approval either of the state highway commissioner or the chief highway engineer.

I have already referred in this opinion to the fact that, in so far as most of the highways of this state are concerned, the fee is in the owners of the abutting land and the public has only an easement for the purposes of travel. In view of this fact I would not advise any effort to include the planting of trees or shrubbery in the plans and specifications for proposed improvements unless the consent of the abutting land owners be first obtained. In so far as trees or shrubbery be planted along inter-county highways, such planting will, however, be under the supervision and control of the state highway department.

Your twelfth inquiry is as to whether the words "change" and "changes," used in section 182 of the act, include minor changes of route, and as to whether they include changes of location, and you also inquire what must be the extent of the deviation of the proposed improvement from the original traveled road in order that such deviation may come within the meaning of the word "change" and "changes" as used in section 182 of the act.

Section 182 of the act, being section 1189, G. C., reads as follows:

> "The inter-county highways and main market roads heretofore established by law, shall continue to be and remain a part of the system of inter-county highways and main market roads of the state unless changed in the manner hereinafter provided. In addition to the inter-county highways and main market roads heretofore established under authority of law, and as shown by the records in the office of the state highway department, and by the reports filed with the governor relating thereto, the state highway commissioner shall have authority to designate additional inter-county or main market roads or change existing inter-county roads after hearing and notice as hereinafter provided. Before establishing any additional main

market or inter-county roads or making any changes in existing inter-county or main market roads, the commissioner shall give notice by publication in two newspapers of general circulation in each of the counties in which said inter-county or main market road or some part thereof is located, by publication, at least once each week, for three successive weeks. Such notice shall state the time and place of such hearing, which shall be held in the county or one of the counties in which said road or some part thereof is situated, and shall further state the route of the proposed inter-county or main market road or the change proposed to be made in an existing inter-county or main market road. Any changes made in existing inter-county or main market roads or any additional inter-county or main market roads established by the commissioner shall be certified to the counties interested therein, and the report of the commissioner making such change or establishing such road shall be placed in file in the office of the department."

This section must be read in connection with section 189 of the act, section 1196, G. C., which reads as follows:

"If the state highway commissioner approves the application or part thereof, he shall, if necessary, cause a map of the highway in outline and profile to be made and indicate thereon any change of existing lines if he deems it of advantage to make such change. He shall cause to be made plans, specifications, profiles, and estimates for said improvement."

It is my opinion that the "change of existing lines" authorized by section 189 of the act, is not the "change in existing inter-county or main market road" referred to in section 182 of the act, but it is impossible, nevertheless, to answer your question by laying down any general rule by which it would be possible to determine in all cases whether a proposed change constituted a "change of existing lines" within the meaning of section 189 or a "change in existing inter-county or main market roads" within the meaning of section 182. Such a question can be answered only by reference to the particular facts of each case, and it is only possible to observe at the present time that if the change is a slight one and not such as to affect the termini or general course and direction of a road, then it is a "change of existing lines" within the meaning of section 189 of the act. If the change is substantial, however, or such as to affect the termini or general course and direction of the highway, then the change is to be regarded as a "change in existing inter-county or main market roads" within the meaning of section 182 of the act.

Your thirteenth question reads as follows:

"Is it necessary for a road or street within the limits of an incorporated village (being a continuation of an inter-county highway) to be officially designated as an extension of, or a part of, such inter-county highway, before state aid can be granted on the same? If so, shall such designation be made in accordance with the provisions of section 182? If such official designation is not necessary, is the term 'state highway,' as defined in section 219, meant to include state aid improvements hereafter made or taken over within incorporated villages? If such official designation is not necessary, is the term 'state roads' as defined in section 241, paragraph (a), meant to include state aid improvements hereafter made or taken over within incorporated villages?"

It is my opinion that the first branch of this question must be answered in the negative, and that it is not necessary for a road or a street within the limits of an incorporated village, being a continuation of an inter-county highway or main market road, to be officially designated as an extension of or a part of such inter-county highway or main market road before state aid can be granted on the same.

Prior to the passage of the Cass highway law, there were no inter-county highways or main market roads within the territorial limits of municipal corporations, and I find nothing in the act to warrant the inference that the legislature, by the passage of the Cass highway law, has sought to change the policy of the state in this direction. While it is true that the activities of the state highway department, in the construction and maintenance of roads, are in a general way limited to inter-county highways and main market roads, yet it is provided by section 229 of the act, being section 1231-3, G. C., that the state highway commissioner may extend a proposed road improvement into or through a village when the consent of the council of said village has been first obtained. I find no provision in the act to warrant the view that the street or streets within the village, over which such proposed improvement is to extend, must be first designated as inter-county highways or main market roads. On the other hand, section 229 of the act seems to create an exception to the general rule that the state highway commissioner may improve only inter-county highways and main market roads.

I therefore conclude, as above stated, that no designation of the street or streets within the village and over which the proposed improvement is to extend as inter-county highways or main market roads is necessary, either under section 182 of the act or otherwise. It is further my opinion that the term "state highway" as defined in section 219 of the act, does not include state aid improvements hereafter made or taken over within incorporated villages. Under section 241 of the act, section 7464, G. C., state roads are to be maintained by the state highway department. As was pointed out by this department in an opinion rendered September 21, 1915, to the bureau of inspection and supervision of public offices, No. 847, no authority is given either the state, county or township to do anything on the roads of a village without the consent or agreement of the village council. The general control of roads within municipalities is still left with the municipalities.

Section 3714, G. C., which was left unrepealed, provides:

> "Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance."

If a state aid improvement made within an incorporated village be held to be a state highway, then the state would be charged with its maintenance and repair and the state has no authority to repair such an improvement except by agreement with the village.

From the foregoing it follows that a state aid improvement made within an incorporated village is not to be regarded as a state highway within the meaning of section 219 of the act, or a state road within the meaning of paragraph (a) of section 241 of the act, and the duty of maintaining and repairing such an improvement rests upon the village, subject to the provision of section 244 of the act, permitting the state to expend funds appropriated for road repair upon roads inside a village, provided an agreement to that effect be made between the state and the village.

As I understand your fourteenth question, it is as to whether the improvement of a road inside of an incorporated village, made under the provisions of section 229 and 244 of the act, by the state highway department, may include a causeway or bridge or a drain, culvert or watercourse which forms a part of such road. While the terms "road" and "highway" are not in all cases used synonymously in the act now under consideration, yet in many instances an interchangeable use is made of the two words. It is provided by section 219 of the act, being section 1226, G. C., that the word "highway," as used in the chapter of which section 229 of the act is a part, includes an ex-

isting causeway or bridge, or a new causeway or bridge, or a drain or watercourse which forms a part of a road authorized by law. I therefore conclude that an improvement of a road inside of an incorporated village, made by the state highway department by virtue of the provisions above referred to, may or may not include a causeway or bridge, or a drain, culvert or watercourse, as may be agreed between the state highway commissioner and the council of the village in question.

Your fifteenth inquiry is as to whether village roads or streets come within the meaning of the provisions of the last two sentences of section 217 of the act, being section 1224, G. C. The part of the section to which you refer reads as follows:

> "Inter-county highways or main market roads on which no state aid money has been expended, if improved with construction equal to that specified by the state highway commissioner, shall be taken over by the state, and shall thenceforth be maintained as prescribed herein for inter-county highways and main market roads. Upon application by the county commissioners or township trustees the chief highway engineer shall, within sixty days, specify what changes are required in any portion of an existing inter-county highway or main market road to bring it up to the standard required by the state, and on application, the chief highway engineer shall furnish specifications for the construction of such road up to the standard required by the state."

For reasons sufficiently indicated in my answer to your thirteenth question, it is my opinion that this question must be answered in the negative, and that village roads or streets do not come within the meaning of the provisions above quoted. The duty of keeping the roads and streets of a village in repair, as before pointed out, is by section 3714 G. C., cast upon the council of the village, and in the absence of an agreement between the council and the state highway commissioner, the latter would have no authority to make any repairs whatever upon the roads or streets of a village.

Your sixteenth question involves a consideration of a number of facts not set forth in your communication to me, and an opinion covering the same will be prepared as soon as I am in possession of such facts.

Respectfully,
EDWARD C. TURNER,
Attorney General.

951.

STATE BOARD OF HEALTH—APPROVAL OF ORDER FOR CONSTRUCTION OF SEWER AND SEWAGE TREATMENT PLANT, VILLAGE OF HICKSVILLE, OHIO.

COLUMBUS, OHIO, October 19, 1915.

HON. FRANK B. WILLIS, *Governor, Columbus, Ohio.*

MY DEAR GOVERNOR:—Enclosed herewith find order of the state board of health to the village of Hicksville, Defiance county, Ohio, relative to the construction of sewers and a sewage treatment plant to collect the sewage from said village and to correct the pollution of Mill Creek and laterals.

I have examined the order, which is issued under section 1251 of the General Code of Ohio, find the same regular, and it is my opinion that it should be approved. Having approved the same under the provisions of section 1251 of the General Code, I am transmitting the order to you for your approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

952.

COMBINED NORMAL AND INDUSTRIAL DEPARTMENT AT WILBERFORCE UNIVERSITY—PROPOSED CONTRACTS FOR WATER SUPPLY SYSTEM —PROPOSAL BLANKS SHOULD BE FURNISHED TO BIDDERS FREE OF CHARGE.

Proposed contracts for water supply system at combined normal and industrial department at Wilberforce University passed on.

If proposal blanks are prepared for use of bidders, they should be furnished to those desiring to bid on state work free of charge.

COLUMBUS, OHIO, October 20, 1915.

Board of Trustees of the Combined Normal and Industrial Department at Wilberforce University, Xenia, Ohio.

DEAR SIRS:—A few days ago you submitted for my approval certain contracts which were awarded in pursuance of the action of your board on October 1st on advertisements for water supply system for your normal and industrial department.

I have examined the advertisements and find that they have been made for the proper time, in the proper newspapers, and that the said advertisements called for the bids to be received on a proper day.

An examination of the advertisements for sealed proposals discloses that the bids were to be received on the contemplated improvements to the water supply system in five several items, as follows:

"Item 1. 80,000 gallon steel tank and tower.
"Item 2. 8-inch well complete, 80 feet deep.
"Item 3. Two steam pumps.
"Item 4. One hot water storage heater.
"Item 5. Water softening plant; plumbing, steam fitting, water mains, miscellaneous."

The architect's estimates on the above, per item, and the bids are as follows:

"Item 1—Architect's estimate, $4,300.00.

Pittsburgh-Des Moines Steel Co., Pittsburgh, Pa	$3,436 00
Memphis Steel Construction Co., Pittsburgh, Pa	3,544 00
Chicago Bridge & Iron Works, Chicago, Ill	3,850 00
Shartle Machine Works, Columbus, Ohio	3,997 60

"Item 2—Architect's estimate, $322.50.

Chas. M. Kelso Co., Dayton, Ohio	$340 00
S. H. Barnes, Dayton, Ohio	365 00

"Item 3—Architect's estimate, $550.00.

Shartle Machine Works, Columbus, Ohio	$584 00
Columbus Steam Pump Works Co., Columbus, Ohio	412 50
Weinman Pump Manufacturing Co., Columbus, Ohio	529 00
Blake-Knowles Co., Cincinnati, Ohio	740 00
American Steam Pump Co., Battle Creek, Mich	766 00
Epping-Carpenter Pump Co., Pittsburgh, Pa	1,040 00

"Item 4—Architect's estimate, $300.00.

Shartle Machine Works, Columbus, Ohio	$287 60
Chas. M. Kelso Co., Dayton, Ohio	475 00
The Sims Co., Erie, Pa	300 00
Griscom-Russell Co., New York City	316 00
Whitlock Coil Pipe Co., Hartford, Conn	325 00

"Item 5—Architect's estimate, $3,769.10.

Shartle Machine Works, Columbus, Ohio ..... $4,125 00"

It will be seen by comparison of the bids of the lowest bidders with the architect's estimates on the above items that as to item 2 and item 5 the same are in excess of the architect's estimate, and, therefore, under the provisions of section 2323 of the General Code, to the effect that no contract shall be made for labor or material at a price in excess of the entire estimate thereof, bids cannot be accepted and contracts awarded for said items.

You submitted a report of your engineer on the above items, which is as follows:

"Board of Trustees, The C. N. & I. Dept. at Wilberforce University.

"ENGINEER'S REPORT

"On bids submitted October 1, 1915, on water supply system.

"Item 1. It is recommended that the bid of the Pittsburgh-Des Moines Steel Co. be accepted, as they are the lowest responsible bidders, subject to the approval of the attorney general.

"Itm 2. It is recommended that the bid of the Kelso Co. be rejected as they are not responsible bidders on this class of work; and that the bid of S. H. Barnes be accepted subject to the approval of the attorney general.

"Item 3. It is recommended that the bid of the Columbus Steam Pump Works Co., the lowest bidder, be rejected as the pumps offered do not comply with the specifications, in that, according to their catalogue there is not provided 'removable bronze lining for water cylinder;' 'hand hold plates for ready access to both suction and discharge valves;' and from the price quoted it is not considered they can furnish pumps 'of a heavy rigid design.' It is therefore recommended that the bid of the next lowest bidder, the Weinman Pump Mfg. Co., be accepted, subject to the approval of the governor, auditor of state, secretary of state, and the attorney general.

"Item 4. It is recommended that the bid of the Shartle Machine Co. be accepted, subject to the approval of the attorney general, as they are the lowest responsible bidders.

"Item 5. It is recommended that the bid of the Shartle Machine Co. be accepted, subject to the approval of the attorney general, as they are the lowest responsible bidders.

"Respectfully submitted,

"RICHARDS ENGINEERING COMPANY,

"Per Arthur Richards.

"Board of trustees accepted bids as recommended above."

There have been no minutes of your board presented to me to show what the action of your board upon the various bids was.

As to item 1, the Pittsburgh-Des Moines Steel Company, of Pittsburgh, Pa., is the lowest bidder, and a contract has been submitted, showing that the said bid has been accepted.

As to item 3, a contract has been submitted on the bid of the Weinman Pump Manufacturing Company, of Columbus, Ohio, in the amount of $529.00. Upon an examination of the list of bids hereinbefore set out it will be seen that the said Weinman Pump Manufacturing Company is not the lowest bidder, and, therefore, under the provisions of section 2319, G. C., in order to accept the bid of the Weinman Pump Manufacturing Company over the bid of the Columbus Steam Pump Works Company, the lowest bidder, it will be necessary for the board to make application, in writing, to the governor, auditor of state and secretary of state for their written consent to accept said bid in place of the bid of the Columbus Steam Pump Works Company.

As to item 4, a contract has been submitted between the Shartle Machine Company, of Columbus, Ohio, and your board covering both item 4 and item 5. As the bid on item 5 is above the estimate the same cannot be accepted, and a contract covering item 4 alone will have to be submitted, and I shall not pass upon item 4 until a proper contract is submitted.

The contract covering item 1, entered into between the Pittsburgh-Des Moines Steel Company, of Pittsburgh, Pa., and your board of trustees shows that the said contract is signed on behalf of the Pittsburgh-Des Moines Steel Company by W. H. Jackson and E. W. Crellen. It will be necessary that I have in writing the authorization of the Pittsburgh-Des Moines Steel Company for W. H. Jackson and E. W. Crellen not only to sign the contract, but the bond on behalf of said company. The Pittsburgh-Des Moines Steel Company offer as surety the Globe Indemnity Company, of New York City, N. Y. The bond given was entered into in Pennsylvania. However, from a certificate of the superintendent of insurance I learn that such company is duly authorized to transact business in Ohio. The bond does not have the financial statement of the company attached thereto, and such statement should be furnished.

As heretofore stated, before I can pass on the contract between the Weinman Pump Manufacturing Company, of Columbus, Ohio, and your board of trustees, it will be necessary that I have the written consent of the acceptance of said bid by the governor, auditor of state and secretary of state before me. The bond of the Maryland Casualty Company which was submitted by the Weinman Pump Manufacturing Company with its bid does not have a certified copy of power of attorney to agent to sign such bond nor a financial statement of the company attached thereto. Both of these should be furnished.

As I have already stated, the contract relative to item 4 will have to be reformed. I desire further to call your attention to the fact that the bond submitted by the Shartle Machine Company with its bid does not have the financial statement of the company attached thereto. This should be attached to the bond.

There is another thing that I desire to say to your board in passing. It appears from the advertisement as follows:

> "Copies of the plans and specifications may be seen at the offices of the superintendent Wilberforce university, the auditor of state and the consulting engineers and may be obtained from the consulting engineers for five ($5.00) dollars per set."

An examination of the printed pamphlet containing copies of the plans and specifications referred to shows that there was incorporated therein a proposal blank, and I am informed that there were no other proposal blanks printed sep-

arate and apart from those printed in the pamphlet. This required, of course, that all the bidders should purchase from the engineers a copy of the pamphlet at a cost of $5.00.

There should always be proper proposal blanks prepared for free distribution to those who wish to bid upon state contracts and also blank contract bonds for free distribution, and no bidder should be required to pay to get the necessary blanks in order to bid upon state contracts. A bidder should be allowed at all reasonable times to see the plans and specifications and be furnished with proposal blanks and blank forms of contract bond in order that he may submit his bid without being required to purchase anything with which so to do.

I have this day delivered to your engineer, the Richards Engineering Company, of Columbus, Ohio, all the papers submitted in order that those not necessary in the matter may be retained and those which call for correction may be corrected. As soon as the corrections are made, the contracts entered into with the Pittsburgh-Des Moines Steel Company, the Weinman Pump Manufacturing Company and the Shartle Machine Company as to item 4, together with the bonds, should be submitted for my approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

953.

ROADS AND HIGHWAYS—CASS HIGHWAY LAW—WHO SHOULD APPROVE PAY ROLL OF EMPLOYES BETWEEN TIME OF TAKING EFFECT OF CASS HIGHWAY LAW AND TIME WHEN COUNTY SURVEYOR IS DESIGNATED TO HAVE CHARGE OF STATE ROADS.

Where a county surveyor was not designated to have charge of state work in his county until October 2, 1915, and the former resident engineer continued in charge in the meantime, the pay rolls of employes for the period between September 6 and October 2 should be approved by such resident engineer or the county surveyor may approve the same if able to satisfy himself by personal investigation as to their correctness.

COLUMBUS, OHIO, October 20, 1915.

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

DEAR SIR:—I have your communication of October 12, 1915, in which you request my opinion upon a question submitted to the state highway department by Mr. John Peake, county surveyor of Franklin county. Mr. Peak's question is as to whether he should approve the pay rolls of employes of the state working under section 212 of the Cass highway law, section 1219, G. C., for the period subsequent to the going into effect of the Cass highway law and prior to his designation by the state highway commissioner to have charge of state work. The Cass highway law became effective September 6, 1915, and Mr. Peake was designated under authority of section 139 of that act, section 7182, G. C., to have charge of state work on October 2, 1915.

The above question is somewhat broader than its terms indicate and involves certain collateral matters to which I deem it proper to allude. In opinion No. 845 of this department rendered to you on September 21, 1915, it was held that

the county surveyor does not have charge of the highways, bridges and culverts under control of the state and within his county until designated by the state highway commissioner to so have charge, and that the state highway commisioner may not appoint any engineer other than the county surveyor to have charge of state work in the county of said surveyor except as provided in section 142 of the Cass highway law, section 7185, G. C.

In view of the above it will be seen that immediately upon the going into effect of the Cass highway law on September 6, 1915, it was your duty either to designate the county surveyor to have charge of state work within any given county or to designate some other engineer as provided in section 142 of the act; and until you acted in one of these two ways it could not be said, strictly speaking, that any one was in charge of state work within that particular county under the terms of the Cass highway law. Your failure to act on September 6 was, however, entirely excusable and was due to the confusion necessarily incident to the putting into operation of a new code of highway laws for the state and to the fact that at least a short time was required to master all the changes in the law and reorganize your department to conform to its provisions, and the further fact that owing to the large number of inquiries submitted relative to the new highway code, this department was unable to prepare an opinion advising you of your duties in the premises until September 21. Some slight indulgence must be extended to administrative officials under such circumstances, when the extending of such indulgence does not inflict any loss upon the public, and in view of all the facts, I am of the opinion that no question should be raised in the several counties as to the payment of compensation of resident engineers, so-called, or of employes working under their supervision for the period from September 6 until the time when either the county surveyor or some other engineer was regularly designated under the Cass highway law to have charge of state work.

In the particular instance about which you inquire, the employes referred to by Mr. Peake did not work under his supervision or direction during the period between September 6 and October 2, but were during that period under the supervision and control of the person who had been acting as resident engineer under the old law. Such resident engineer is or should be in possession of all the information necessary in order to intelligently pass upon the pay rolls in question, and I therefore conclude that he is the proper person to approve the same. There would be no objection, however, to Mr. Peake passing upon these pay rolls if he is able to satisfy himself by personal investigation that the services were properly performed by the several employes, and that they are entitled to the amounts called for by the pay rolls in question. It may properly be added that the method of procedure herein pointed out meets with the approval of Mr. E. N. Halbedel, deputy supervisor in the bureau of inspection and supervision of public offices.

Respectfully,

EDWARD C. TURNER,

Attorney General.

954.

WHEN A PROBATE COURT HOLDS AN INQUEST FOR AN APPLICANT TO STATE HOSPITAL, IT SHOULD BE DETERMINED WHETHER OR NOT THE PERSON HAS EVER BEEN ACQUITTED IN A CRIMINAL COURT ON GROUND OF INSANITY—WHEN SUCH CONDITION IS FOUND THE PERSON SHOULD BE COMMITTED TO LIMA STATE HOSPITAL—IF ACQUITTAL BE HAD IN UNITED STATES COURT, THAT FACT WOULD NOT DEPRIVE PROBATE COURT OF JURISDICTION.

A person acquitted of a criminal charge on the ground of insanity should be sent to the Lima State Hospital. If acquittal on the ground of insanity be had in a United States court that fact would not deprive a probate court of jurisdiction in an otherwise proper case.

COLUMBUS, OHIO, October 20, 1915.

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

DEAR SIR:—Permit me to acknowledge receipt of your request for an opinion, which is as follows:

> "This day the probate court of Hamilton county, Ohio, received a request from the district attorney's office 'southern district of Ohio,' federal court to issue a warrant of lunacy for Orange H. Flower.
>
> "Accompanying said request is a certificate of the clerk of the United States district court, southern district of Ohio, as to the verdict of the jury, finding the defendant insane.
>
> "Under section 13612 of the General Code: 'When a person tried upon, and indicted for an offense, and acquitted on the sole ground that he was insane, such fact shall be found by the jury in the verdict, and certified by the clerk to the probate court. Such person shall not be discharged, but forthwith delivered to the probate court, to be proceeded against upon the charge of lunacy, and the verdict shall be prima facie evidence of his insanity.'
>
> "Orange H. Flower was charged in an indictment filed in the United States district court, southern district of Ohio, western division, on October 6th, 1915, with having violated section 211 of the penal code of the United States, for sending through the United States mail obscene cards and photographs.
>
> "The finding of the jury on the 12th day of October, 1915, after a trial, was in the words following:
>
> "'We, the jury, herein do find the defendant not guilty in manner and form as charged in the two counts of said indictment on the ground the defendant was insane.'
>
> "First question: 'Does section 13612 of the General Code of the state of Ohio apply to persons indicted, tried and acquitted on the sole ground of insanity in the federal court?'
>
> "The district attorney, through his assistants, holds that it does. I am very much in doubt, therefore my inquiry to you.
>
> "Second question: 'In case this section does apply to persons indicted and tried in the federal court, can the person under section 1985, sub-section 5, "Persons acquitted because of insanity," be sent by this court to the Lima state hospital?'

"Enclosed please find copy of certificate of clerk of the United States district court.

"An early reply will be greatly appreciated."

With your letter you enclose a certificate of the clerk of the United States district court, southern district of Ohio, western division, as to the verdict of the jury finding the defendant insane in the case of The United States of America v. Orange H. Flower, which certificate is as follows:

"UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

"No. 1048.
The United States of America,
v.
Orange H. Flower.

CERTIFICATE OF CLERK AS TO THE VERDICT OF THE JURY FINDING DEFENDANT INSANE.

"I, B. E. Dilley, clerk of the United States district court in and for the southern district of Ohio, do hereby certify:

"That the above entitled cause, wherein the defendant, Orange H. Flower, was charged, in an indictment filed in the above named court on October 6, 1915, with having violated section 211 of the penal code of the United States in sending through the United States mail obscene cards and photographs, came on for hearing on October 11, 1915; and that after due trial and proceedings had, the jury empaneled and sworn in said court to try the issued joined in said case, acquitted said defendant on the sole ground that said defendant was insane, by returning into said court on the 12th day of October, 1915, its verdict in the words following, to wit: 'We, the jury, herein do find the defendant not guilty in manner and form as charged in the two counts of said indictment, on the ground of defendant's insanity.

"'(Signed) T. E. BURNHAM, Foreman.'

"IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 14th day of October, 1915, in the 140th year of the independence of the United States of America.

"B. E. DILLEY,
"Clerk of U. S. District Court, S. D. O."

For your information your attention is invited to the provisions of section 9319, of the compiled statutes of the United States of 1913, which section is as follows:

"If any person charged with crime, be found in the court before which he is so charged, to be an insane person, such court shall certify him to the secretary of the interior, who may order such person to be confined in the hospital for the insane, and if he be not indigent he or his estate shall be charged with the expense of his support in the hospital."

Section 9319, supra, was modified by an act of June 23, 1874, as amended, by an act of August 7, 1882, which is known as section 9321, of the compiled statutes of the United States, and which is as follows:

"Upon the application of the attorney general, the secretary of the interior be, and he is hereby, authorized and directed to transfer to the

government hospital for the insane in the district of Columbia all persons who, having been charged with offenses against the United States or in actual custody of its officers, and all persons who have been or shall be convicted of any offense in a court of the United States and are imprisoned in any state prison or penitentiary of any state or territory, and who during the term of that imprisonment has or shall become insane.''

Sections 9319 and 9321, of the Revised Statutes of the United States, *supra*, contain provisions for the care of insane persons, accused of crime, in the custody of the United States, such persons having been found by court to be insane; and it would appear from a reading of the sections that sufficient authority is contained therein for the transfer of such persons to the hospital for the insane located in the district of Columbia. However, Honorable Wayne B. McVeigh, attorney general of the United States, in an opinion addressed to the secretary of the interior, dated August 22, 1881, to be found on page 211, Vol. XVII, of the opinions of the attorneys general, referring to the provisions of section 9319 of the compiled statutes, says:

''The language of the section is general, inasmuch as it speaks of any person charged with crime being found in the court before which he is so charged to be an insane person, but I have no doubt that the generality of this language is, by the force of the title and the accompanying provisions, limited to courts in this district. Sufficient reasons will suggest themselves to every mind why congress should make such provision for the insane of the army and navy and of this district, as the states are expected to make for the insane persons residing within their borders; but no reason can be suggested why an insane resident of Texas should be brought and maintained here.

''In the case you have submitted it is evidently supposed that the mere fact that an insane resident of Texas has been indicted for an offense in a court of the United States renders him a proper subject for the issue of an order by you for his maintenance in the hospital under your charge. I am unable to concur in that view.''

Section 13612, of the General Code of Ohio, is as follows:

''When a person tried upon an indictment for an offense is acquitted on the sole ground that he was insane, such fact shall be found by the jury in the verdict, and certified by the clerk to the probate court. Such person shall not be discharged, but forthwith delivered to the probate court, to be proceeded against upon the charge of lunacy, and the verdict shall be prima facia evidence of his insanity.'

There is no question in my mind but that the ''court'' in the section just quoted is limited to state courts, hence, in my opinion, it is not to be considered as an anomaly in the determination of the question under consideration. However, upon referring to section 1985, of the General Code provisions will be found as follows:

''The Lima state hospital shall be used for the custody, care and special treatment of insane persons of the following classes: * * *

''5. Persons acquitted because of insanity.

''6. Persons adjudged to be insane who were previously convicted of crime. * * *''

It is admittedly a fact that the primary purpose for the erection of the Lima State Hospital was for the segregation of the criminal insane, there being several reasons which will at once suggest themselves for the segregation of such insane persons; among them may be mentioned the better care of such persons as a particular class of insane, the safety and comfort of insane persons in other hospitals which might be endangered through the indiscriminate placing there of the criminal insane, and the concentration of an effort to make a particular study of that particular class of insanity.

When an inquest is held in the probate court concerning an applicant for admission to a state hospital one of the things to be determined by the probate judge is whether or not the subject of the inquest has ever been acquitted in a criminal court on account of insanity. This, with other features in the history of the case, is to be considered by the probate court in the commitment of the applicant, and under the provisions of section 1985 of the General Code, supra, it is my opinion that when such a condition is found to exist, the subject of the inquest should be committed to the Lima state hospital. The fact that the acquittal on the ground of insanity was in a United States court would not deprive a probate court of jurisdiction.

Respectfully,
EDWARD C. TURNER,
Attorney General.

955.

BANKS AND BANKING — COUNTY COMMISSIONERS — DEPOSITORY OF PUBLIC FUNDS—SECTION 744-12, G. C., NOT INTENDED TO GIVE BANKS LOCATED *WITHOUT* COUNTY THE RIGHT TO BID FOR FUNDS OF SAID COUNTY THE SAME AS BANKS OF THIS CLASS LOCATED *WITHIN* SUCH COUNTY—RIGHT OF COUNTY COMMISSIONERS TO RECEIVE BIDS UNDER SECTIONS 2715, G. C., AND 744-12, G. C.—IF BANKS *WITHIN* COUNTY FAIL TO BID FOR INACTIVE FUNDS, COUNTY COMMISSIONERS MAY RECEIVE BIDS FROM BANKS *WITHOUT* SAID COUNTY.

A board of county commissioners, in its advertisement for bids for the deposit of public funds, should invite proposals under both section 2715, G. C., and 744-12, G. C., and the advertisement should be so worded as to invite bids from the classes of banking concerns mentioned in both of said sections, either by appropriate language or by express reference to said sections.

Under the provisions of said section 2715, G. C., as modified by the provisions of section 744-12, G. C., said county commissioners may receive bids for inactive funds from one or more banking institutions located within the county and belonging to either of the classes mentioned in said statutes, and may receive bids for active funds from one or more of said banking institutions located in the county seat of said county, if such there be. If in said county no such banking institution exists, or if the bank or banks or banking institutions belonging to either of the above mentioned classes and located within the county fail to bid for inactive funds in compliance with the requirements of the statutes governing such proposals, then and in that event only would the commissioners of said county be authorized to receive bids from banking concerns belonging to either of said classes and located without said county; provided, however, that when the aggregate amount placed with the banking concerns qualifying for the same within the county does not equal the amount that may be placed into inactive depositaries, the county commissioners may, under said section 2715-1, G. C., and in the manner provided by the statutes governing the designation of depositaries, designate one or more banking concerns belonging to either of the above mentioned classes and located without the county, for the deposit of such excess funds.

COLUMBUS, OHIO, October 20, 1915.

HON. GEO. C. VON BESELER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—I have your letter under date of October 15, 1915, which is as follows:

> "Our board of county commissioners are very anxious to dispose of at once the question of awarding to the proper bank or banks the funds of of Lake county under the provisions of the depositary laws of the state of Ohio.
>
> "The advertisement for proposals invites 'all banks legally qualified to bid' to submit proposals.
>
> "The first question, therefore, is whether such an advertisement is sufficient, or should the country commissioners invite proposals in accordance with the provisions of sections 2715 and 744-12 of the General Code of Ohio? It is our opinion, since this advertisement does not refer to either section to the exclusion of the other, that it is a sufficient notice.

"In the second place, we have this additional question, which is the one causing all the difficulty.

"Referring to your opinion No. 627, under date of July 20, 1915, rendered at the request of and to the bureau of inspection and supervision of public offices, does section 744-12 of the General Code of Ohio permit every kind of bank mentioned in section 2715 to bid for and to be awarded funds irrespective of whether they are located within or without the county?

"**In other words, is it your opinion that all banks mentioned in 2715** are entitled to submit proposals and to receive the funds of the county in accordance with the provisions of law, even though there be banks within the county incorporated under the laws of this state or organized under the laws of the United States?

"To make the proposition still more clear, if possible, if a bank incorporated under the laws of this state or organized under the laws of the United States, but situated without the county, bids a higher rate for either inactive or active funds than does such a bank situated within the county, is it the duty of the county commissioners to award these funds, either inactive or active, to such a bank without the county, or may they award such funds to such bank or banks without the county, only in the event that no bank situated within the county submits proposals?"

Section 2715, G. C., relates to the designation of active and inactive depositaries for the money of the county by the county commissioners and provides as follows:

"The commissioners in each county shall designate in the manner hereinafter provided a bank or banks or trust companies, situated in the county and duly incorporated under the laws of this state, or organized under the laws of the United States, as inactive depositaries, and one or more of such banks or trust companies located in the county seat as active depositaries of the money of the county. In a county where such bank or trust company does not exist or fails to bid as provided herein, or to comply with the conditions of this chapter relating to county depositaries, the commissioners shall designate a private bank or banks, located in the county as such inactive depositaries, and if in such county no such private bank exists or fails to bid as provided herein, or to comply with the conditions of this chapter relating to county depositaries, then the commissioners shall designate any other bank or banks incorporated under the laws of this state, or organized under the laws of the United States, as such inactive depositaries. If there be no such bank or trust company incorporated under the laws of the state, or organized under the laws of the United States, located at the county seat, then the commissioners shall designate a private bank, if there be one located therein, as such active depositary. No bank or trust company shall receive a larger deposit than one million dollars."

Section 744-12, G. C., is section 13 of the act of the general assembly as found in 103 O. L., 379-385, and entitled, "An act to provide for the examination, regulation, supervision and dissolution of certain bank concerns." This section is amended in 106 O. L., 505, and as now in force, provides:

"That whenever any of the funds of the state, or any of the political subdivisions of the state, shall be deposited under any of the depositary

laws of the state, every corporation, person, partnership and association coming within the purview of this act shall be permitted to bid upon and be designated as depositaries of such funds, upon furnishing such surety or sureties therefor as is prescribed by the laws of the state of Ohio; provided, however, that there shall not be deposited with any such corporation, person, partnership, or association by any such political subdivision an amount in excess of five hundred thousand dollars."

In opinion No. 627, of this department, referred to in your inquiry, reference was made to the provisions of section 2715, G. C., in the following language:

"Under the provisions of this section the authority of the commissioners of a county, in designating inactive depositaries for the public funds of such county, is limited to banks and trust companies situated in said county and duly incorporated under the laws of this state or organized under the laws of the United States, if such there be. In designating acting depositaries, said commissioners are limited to banks and trust companies of the above class, if such there be, located in the county seat of said county. If there is in fact no institution of this class located in such county, and eligible to bid as an inactive depositary, and if there is no institution of said class located in the county seat and eligible to bids as an active depositary, said commissioners may call for proposals from private banks located in the county or the county seat, for inactive and active depositaries, respectively.

"It is evident that under the provisions of section 2715, G. C., corporations, persons, partnerships or associations, coming within the purview of the act of the general assembly, as found in 103 O. L., 379-385, would not be eligible to bid for the public funds of a county, except in the case where no bank or trust company, organized under the laws of the state or the United States, is located in the county as to inactive depositaries and in the county seat as to active depositaries."

Reference was also made to those provisions of section 744-12, G. C., as found in 103 O. L., 384, which were carried into said section, as amended in 106 O. L., 505, as follows:

"The effect of the provisions of this section is to place banking concerns, coming within the purview of this act, on a par with banks and trust companies organized under the laws of the state or of the United States, in so far as their eligibility to bid for public funds of the state, or any political subdivision, is concerned. It follows, therefore, that those provisions of section 2715, G. C., limiting county commissioners in designating depositaries of public funds to banks and trust companies, organized under the laws of the state or of the United States, are repealed by implication by the provisions of section 744-12, G. C."

The opinion held that a board of county commissioners, in its advertisement for bids for the deposit of public funds, should invite proposals under both section 2715, G. C., and 744-12, G. C., and that if the advertisement for bids for the deposit of public funds of the county is not so worded as to invite bids from the classes of banking concerns mentioned in both of said sections, either by appropriate language or by express reference to both sections, said advertisement is not sufficient in law. It was further observed in said opinion that an express reference to either of said sections, without referring to the other, would be mis-

leading and would tend to defeat the plain provision of the law governing the deposit of public funds, viz., to secure full publicity and the greatest possible competition in bidding. It appears, however, from your statement of facts, that the commissioners of Lake county invited "all banks legally qualified to bid" to submit proposals.

As observed by you, the advertisement for bids does not, by its terms, refer to either of the above quoted sections to the exclusion of the other.

I thinks said advertisement conforms to the holding in the opinion above referred to, in that it is so worded as to invite bids from the classes of banking concerns mentioned in both of said statutes and I am of the opinion, therefore, in answer to your first question, that the notice contained in said advertisement is sufficient in law.

You further inquire whether section 744-12, G. C., permits banks, organized under the laws of the state or of the United States, mentioned in section 2715, G. C., to bid for and to be awarded funds irrespective of whether they are located within or without the county. In other words, you inquire whether, in case a bank, organized under the laws of the state or of the United States, but located without the county, offers a higher rate of interest for either active or inactive funds than is offered by the same kind of a bank located within a county, it is the duty of the county commissioners to make an award on the bid of said bank without the county or may they make such award only in the event that the bank or banks organized under the laws of the state or of the United States, and located within the county, fail to submit bids in compliance with the requirements of the statutes governing such proposals.

As has already been stated, it was held in the former opinion above referred to, that the effect of the provision of section 744-12, G. C., is to place banking concerns coming within the purview of the act of the general assembly, as found in 103 O. L., 379-385, on a par with banks and trust companies organized under the laws of the state or of the United States, in so far as their eligibility to bid for public funds of the state or any political subdivision is concerned, and that those provisions of section 2715, G. C., limiting county commissioners in designating depositaries of public funds to banking institutions of the latter class, are repealed by implication.

I do not think, however, that it was the intention of the legislature, in enacting the provisions of section 744-12, G. C., to give to banking concerns coming within the purview of the act above referred to, but located without a county, the right to bid for the funds of said county the same as banking institutions of this class located within such county. It follows, therefore, that in answering your second question, the provisions of section 2715 G. C., and 744-12, G. C., must be taken together.

In keeping with the former holding above referred to, I am of the opinion, in answer to said question, that the commissioners of a county may, under the provision of said section 2715, G. C., as modified by the provision of section 744-12, G. C., receive bids for inactive funds from one or more banking institutions located within the county and belonging to either of the above mentioned classes, and may receive bids for active funds from one or more of said banking institutions located in the county seat of said county, if such there be. If in said county no such banking institution exists, or if the bank or banks or banking institutions belonging to either of the above mentioned classes and located within the county fail to bid for inactive funds in compliance with the requirements of the statutes governing such proposals, then and in that event only would the commissioners of said county be authorized to receive bids from banking concerns belonging to either of said classes and located without said county, provided, however, that when the aggregate amount placed with the banking concerns

qualifying for the same within the county does not equal the amount that may be placed into inactive depositaries, the county commissioners may, under authority of section 2715-1, G. C., and in the manner provided by the statutes governing the designation of depositaries, designate one or more banking concerns belonging to either of the above mentioned classes and located without the county, for the deposit of such excess funds.

It will be observed that the statutes make no provision for designating an active depositary in case no banking institution of either class is located at the county seat of a county. It is hardly probable, however, that such a condition exists in any county in the state.

Respectfully,
EDWARD C. TURNER,
Attorney General.

956.

COUNTY COMMISSIONERS—WHERE MONEY COMES INTO COUNTY TREASURY WHICH BELONGS TO NO PARTICULAR FUND, COMMISSIONERS HAVE AUTHORITY TO DETERMINE AND DIRECT FUND TO WHICH SUCH MONEY SHALL BE CREDITED—BRIDGES AND CULVERTS.

Where money comes into the county treasury, which belongs to no particular fund, the board of county commissioners has the authority to determine and direct the fund to which such money shall be credited. (See State ex rel. Board of County Commissioners of Marion County v. Charles L. Allen, County Auditor, 86 *O. S.,* 244.)

COLUMBUS, OHIO, October 21, 1915.

HON. PERRY SMITH, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—I have your letter under date of October 14th, which is as follows:

> "I am sending you a copy of a letter that I received from the county commissioners today in reference to $20,000 that we compelled the two street car companies to pay in order to go over the new Sixth street bridge. I advised the commissioners in this instance and also the auditor that this money should be paid into the sinking fund, of the emergency fund so as to take care of the interest and bonds that were issued to build the bridge.
>
> "Am I right in my interpretation? The commissioners think I am wrong. An early reply to this will be greatly appreciated."

The letter of the commissioners of Muskingum county, above referred to, reads as follows:

> "Zanesville, Ohio, October 13, 1915.
>
> "Perry Smith, Prosecuting Attorney, Zanesville, Ohio.
>
> "Dear Sir:—We wish to write you asking that you take the matter of transferring the $10,000.00 from the Southeastern Light & Power Company and the $10,000.00 from the Ohio Electric Company received for the franchise for crossing the new Sixth street bridge to the emergency sinking fund to the attorney general for a final decision in the matter.

"The people and property holders on each side of the South River road desire that this road be improved and the only way said road can be improved is from money in the emergency fund. Unless this money from the two railroad companies returns back to the emergency fund, these road repairs cannot be made, as there is no other money available for this purpose.

"Your ruling as per letter is that this money should go to the emergency sinking fund, but the commissioners desire that we get the attorney general's ruling in this matter so that we may explain the matter to these property holders why this repair is not made.

"Please take this matter up with the attorney general and get his decision at your earliest convenience and oblige.

"Yours respectfully,
"MUSKINGUM COUNTY COMMISSIONERS,
By Fred C. Werner, Clerk."

In building the bridge referred to in your inquiry the commissioners of Muskingum county evidently proceeded under the so-called flood emergency act as found in 103 O. L., 141-147.

I do not deem it necessary to quote the various provisions of said act vesting in said county commissioners ample authority to permanently repair, re-construct and replace public property or public ways injured or destroyed by floods occurring in March and April of the year 1913, and to provide the necessary funds for such purpose.

It is sufficient to observe that if said county commissioners with the requirements of said act in issuing bonds for the purpose of establishing a flood emergency fund out of which to construct said bridge, and at the time such indebtedness was incurred, provided for levying and collecting annually by taxation a sufficient amount to pay the interest on said bonds and to provide a sinking fund for their final redemption at maturity, as required by the provisions of section 6 of said act, the emergency sinking fund, thus created, should be sufficient to pay the interest and to retire said bonds as the same shall become due.

In the event of a deficiency in said emergency sinking fund, section 6 of said act provides that,

"When in any year, through miscalculation or inadvertence the amount of the tax originally certified to the county auditor, as herein provided, is insufficient to provide for the payment of the interest and the maintenance of the sinking fund as required by this section, such * * * commissioners (county commissioners) * * * shall compute and ascertain the necessary amount and shall certify same to the county auditor, who shall compute and ascertain the rate of levy necessary to provide therefor, instead of the rate necessary to provide for the amount originally certified, and place the same upon the duplicate of the proper taxing district for such year."

From the facts submitted it appears that after the bridge in question was constructed, the commissioners of your county granted a franchise to the Southeastern Light & Power Company, according to the terms of which said company, in consideration of the payment to said county commissioners of the sum of $10,000, was given the right to lay its tracks on said bridge and to run its street cars thereon as soon as said bridge was completed, and that at or about the same time a similar franchise was granted by said county commissioners to the Ohio Electric Company, on the same terms and conditions and for the same purpose.

If said county commissioners had entered into an agreement with said companies, prior to the time of issuing the bonds for the construction of said bridge, according to the terms of which each of said companies would have had to pay the sum of $10,000 in consideration of the granting of franchises to said companies to use said bridge for the above mentioned purpose, when the same should be constructed, the money so paid by said companies could have been placed in the county treasury to the credit of the flood emergency fund and used as a part of the cost of building said bridge.

However, said plan was not adopted by said commissioners and you inquire whether, as a matter of law, said sum of $20,000 should now be paid into said emergency sinking fund.

While considerations of sound public policy and economic administration might require said commissioners to apply said sum of money to the discharge of said bonded indebtedness, I find no provision of law compelling them to so dispose of said money.

I am compelled to conclude that as a matter of law said county commissiners are not required to place said money in the county treasury to the credit of said emergency sinking fund.

In the letter of the county commissioners, above quoted, said commissioners state that the people and property holders on each side of the South River road desire that this road be improved and that the only way said road can be improved is from money in the emergency fund; that unless this money received from the two railroad companies can be placed in the treasury to the credit of the emergency fund said road repairs cannot be made as there is no other money available for this purpose.

It must be observed in this connection that the flood emergency fund, as created by the county commissioners under the provisions of the aforesaid flood emergency act, can only be used in so far as permanent improvements made under the provisions of said act are concerned, for the permanent repair, reconstruction or replacement of public property or public ways destroyed or injured in the manner and at the time described in section 1 of this act,'' which section by its terms limits such improvements to public property or public ways which were destroyed or injured by floods occurring in March and April, 1913. Unless the repair of the road in question comes within the meaning of the above provision of section 3 of said act, the cost and expense of making such repair should properly be paid out of the road repair fund and not out of said flood emergency fund.

It remains to be determined, therefore, whether said county commissioners may, in the exercise of their discretion, place the aforesaid sum of $20,000 in the county treasury to the credit of said flood emergency fund or to the credit of the road repair fund, depending on the nature of the repair work which they desire to make.

While it may be argued that, inasmuch as the disposition of the money in question is not governed by any provision of the statute, said money should be paid into the general county fund, I find that the right of the county commissioners to determine the fund to the credit of which a sum of money in a case of this kind may be placed is recognized by the supreme court in the case of the State ex rel. Board of County Commissioners of Marion County v. Charles L. Allen, County Auditor, 86 O. S., 244.

The third branch of the syllabus provides:

> ''Where funds reach a county treasurer, either by gift or otherwise, that belong to no particular fund, or where there is nothing whatever to

show in which fund the money belongs, the board of county commissioners has authority to determine and direct the fund to which such moneys shall be credited."

From the statement of facts in this case it appears that an unknown person forwarded by mail to the county treasurer of Marion county the sum of $500.00 and requested that said sum be placed in the county treasury. The matter was called to the attention of the county commissioners of said county and that board entered on its journal an order directing the county auditor to certify said sum into the county treasury of said county to the credit of the pike fund of said county. The county auditor refused to do this and an action in mandamus was brought to compel him to comply with the order of the county commissioners so made in reference to this fund.

At page 251 the court in its opinion said:

"This money is now the property of the county. It should be returned to the particular fund from which it was withdrawn, but it is impossible from the evidence at hand to determine that fund. The suggestion found in the brief of counsel for the auditor that in that case it should pass into the general fund, would appeal very strongly to this court if it had the authority to determine the question, but in the absence of any proof whatever as to the fund from which it was withdrawn, its legal status is the same as if it had never been the property of the county, and never had been withdrawn from its treasury. It is now money belonging to the county, to be expended by the county *for any lawful purpose,* and that purpose must be determined by the county itself, or by those officers representing the county and authorized to act for it. In Ohio that authority is the board of county commissioners, in whom is vested by law the title to all the property of the county.

"It is the duty of this board, and the authority of this board, to determine and direct into which fund this money shall be placed, and, having so determined that question, it becomes the duty of the auditor under section 2567, General Code, to certify this money into the fund designated by the county commissioners to the credit of that fund, and charge the treasurer accordingly. He has no power or authority whatever to deal with the money of the county, except as directed by law, or by those having lawful authority and discretion to make such orders and directions."

I am of the opinion therefore that the county commissioners have the right, in the exercise of their sound discretion, to determine that the money, received from the aforesaid companies as a consideration for the franchise rights granted to said companies by said county commissioners, shall be placed in the county treasury to the credit of the flood emergency fund or to the credit of the road repair fund according to the nature of the improvement of the road in question, for the cost and expense of which it is desired that said sum of money shall be applied.

Respectfully,
EDWARD C. TURNER,
Attorney General.

957.

SECRETARY OF STATE—ST. URSULA LITERARY INSTITUTE OF BROWN COUNTY—TRANSCRIPTS FROM RECORDS OF RECORDER OF BROWN COUNTY ARE AUTHORIZED TO BE FILED IN OFFICE OF SECRETARY OF STATE.

The secretary of state is authorized to receive and record certified transcripts from the records of county recorders of proceedings filed in their office prior to the adoption of the present constitution relative to the formation and authorization of corporations.

COLUMBUS, OHIO, October 21, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of October 18, 1915, enclosing a certified transcript from the records of the recorder of Brown county, Ohio, containing what purports to be a copy of the proceedings filed with the recorder of that county August 17, 1846, by virtue of which the St. Ursula literary institute of Brown county, Ohio, secured its corporate authorization.

This corporation was created prior to the adoption of the present constitution, and under authority of an act of the general assembly passed March 8, 1845 (43 O. L., 70).

From the statement attached to the transcript enclosed in your letter it appears that the St. Ursula literary institute of Brown county has never elected under section 8732, General Code, to be governed by the provisions of laws enacted under authority of the new constitution, but is still, under section 8731, General Code, "governed and controlled by the laws in force" at the time of its organization; and it is specifically stated that it does not now desire to accept and be governed by the provisions of the present laws.

The certificate presented by the St. Ursula literary institute of Brown county neither adds to nor detracts from its corporate power and authority, and apparently the corporation's sole object is to secure the recording of its corporate authorization or franchise in the office of the secretary of state.

I am unable to find any provision of the General Code which makes it the duty of the secretary of state either to accept and record or to reject a certificate of the character of the one enclosed in your letter.

Section 8626, General Code, provides:

> "* * * Articles of incorporation shall be filed in the office of the secretary of state, who shall record them, and shall also record certificates relating to that corporation, thereafter filed in his office."

Although this section, when strictly construed, is probably applicable only to corporations organized since the adoption of the present constitution, yet it indicates the general legislative policy that all evidences of corporate authority shall be recorded in the office of the secretary of state.

I find, also, upon investigation that it has heretofore been the custom of the secretary of state to record certified copies of articles of incorporation of church and similar organizations taken from records in offices of county recorders.

In view of this custom and the expressed legislative policy, at least as to corporations organized under the present constitution, that all articles of in-

corporation and certificates relative thereto shall be recorded in the office of the secretary of state, I am of the opinion that you should accept and record the certificate presented for record by the St. Ursula literary institute of Brown county.

Respectfully,
EDWARD C. TURNER,
Attorney General.

958.

"BLUE SKY LAW"—WHEN IT IS DUTY OF COMMISSIONER TO REVOKE DEALER'S LICENSE—NO AUTHORITY TO ENTER INTO AGREEMENT *OF ANY KIND* WITH OFFENDING DEALER.

Under section 6373-6, G. C., when facts warranting the revocation of a dealer's license have been established to the satisfaction of the "commissioner," it is the duty of the "commissioner" to revoke such license.

The "commissioner" has no authority to enter into an agreement of any kind with an offending dealer.

The motive of a person preferring charges is material only when the testimony of such person is to be weighed against the testimony of the person accused. When facts are established otherwise than by the evidence of the complainant, the motive of the complainant is immaterial. The "commissioner" is concerned only with the truth or falsity of the charges.

COLUMBUS, OHIO, October 21, 1915.

HON. HARRY T. HALL, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your request for opinion, under date of October 18, 1915, reading as follows:

> "Section 6373-6, Revised Statutes of Ohio, reads:
>
> "'Section 6373-6. Such "commissioner" may at any time revoke any such license, or refuse to renew the same, upon ascertaining that the licensee:
>
> "'a. Is of bad business repute;
>
> "'b. Has violated any provision of this act, or
>
> "'c. Has engaged, or is about to engage, under favor of such license, in illegitimate business or in fraudulent transactions.
>
> "'No dealer whose license has been revoked shall be relicensed within six months from the date of such revocation.
>
> "'The "commissioner" shall at once lay before the prosecuting attorney of the proper county any evidence which shall come to his knowledge of criminality under this act.'
>
> "The section above quoted is one in a complete legislative enactment known as the Ohio blue sky law.
>
> "(1) Taking the law in its entirety, is the section above quoted mandatory upon the 'commissioner?'
>
> "(2) Does said section compel the 'commissioner' to revoke a dealer's license when facts warranting such revocation are established to his satisfaction?

"(3) Does said section lodge in the 'commissioner' a discretion empowering him to revoke or to refuse to revoke a dealer's license when facts warranting such revocation are established to his satisfaction?

"(4) What, under the provisions of the law above mentioned, should be the controlling purpose of the 'commissioner?'

"(5) Granting that facts warranting the revocation of a dealer's license have been established to the satisfaction of the 'commissioner,' and it is also established to his satisfaction that, if the dealer's license is revoked, the investors of the state will suffer a greater financial loss than they would suffer if a revocation was denied, has the 'commissioner' power under the law, and is it his first duty under the law, to assume, by agreement, such regulatory control of the offending dealer that abuses, in the future, will be impossible and the interests of prospective investors fully safeguarded?

"(6) Granting that facts warranting the revocation of a dealer's license have been established to the satisfaction of the 'commissioner' and it is also made to appear to his satisfaction that the investigation, resulting in the establishment of such facts, was inaugurated by individuals who seek to profit financially by the depreciation in the prices of the securities marketed by the offending dealer, but which are at present held by innocent investors throughout the state, and upon such investors and not upon the offending dealer will fall the burden of the financial loss, and to the individual instigators of the investigation will pass the financial profits, what, in the spirit of the whole law are the powers of the 'commissioner' and what is his duty on such a state of facts?

"I respectfully request your opinion on each one of the above questions."

For convenience in reference hereafter, I have taken the liberty of numbering your questions consecutively and shall refer to them hereinafter by number.

The nature of the questions you have propounded suggest a brief outline of the conditions sought to be corrected by the blue sky law.

The sole purpose of the blue sky law is the protection of the prospective investor. The enactment of such a law in Ohio and other states grew out of pressing necessity. The vulturous tribe, whose members have come to be known as "Wallingfords," had so successfully preyed upon society that the checking of their activities became imperative.

Men and women, who, by industry, thrift and economy, had been able to accumulate modest amounts of money from time to time, were being continually and continuously fleeced out of their savings through the glowing promises of absolutely safe returns on their investments.

Through the cupidity of men of apparently good standing in various communities, these vultures were able not only to find who had saved a little money for a "rainy day" but to get these same informants to quietly and "confidentially" "recommend" their so-called securities in institutions whose statements had been grossly padded and whose dummy directorates consisted of apparently respectable citizens.

The average small investor knows little or nothing about Dun or Bradstreet and, even if one had thought of getting such a report, the local "capper" who had furnished the "tip" would have advised against it.

Persons having but a few hundred or a few thousand dollars to invest could not afford to go to the expense of having an independent audit and appraisal

made, even if they had thought of such a thing; besides, they were always furnished with expensively printed prospectuses setting forth an alleged impartial audit and appraisal.

Thus the savings of the people were being coaxed from the banks and building and loan associations and exchanged for beautifully engraved or lithographed certificates of stocks and bonds, which soon proved worthless. Many of these investors, in middle life or old age, found themselves destitute not only of worldly goods, but of courage to continue the fight.

It was such conditions as I have outlined that led the legislative bodies of the various states to take some action. Hence the state of Ohio stepped in and for the protection of its citizens said:

(1) That, excepting public service company securities authorized by some public service commission, securities purchased in good faith by an underwriter at not less than ninety per cent. of the price afterwards to be charged the public, or the securities of a going manufacturing, coal mining or quarrying concern in this state, the sale of all securities is prohibited, even by a licensed dealer, until a certificate has been obtained from the state; that before such certificate may issue full detailed information concerning the institution must be furnished and it must affirmatively appear that the law has been complied with, that the business is not fraudulently conducted, that the issuer or vendor is solvent, and that the disposal is not on grossly unfair terms. Inquisitorial powers are given the "commissioner" to insure his possession of the necessary information, and the right is reserved the state to revoke the certificate.

(2) That, with certain exceptions, no person may dispose of securities evidencing title or interest in property without being first licensed.

(3 That, before such license to a dealer in securities may issue:

(a) The applicant must furnish full information concerning not only his business, but himself and his agents;

(b) The state, however, is not bound to be satisfied with the claims of the applicant in this respect, but the legislature went further and placed the positive duty upon the "commissioner" to confirm, by such investigation as may be necessary to establish, good repute in business of all concerned;

(c) The notice of the application for a license must be published and no action taken by the "commissioner" until a definite time thereafter has elapsed;

(d) If, after all this, the "commissioner" be satisfied of the good repute in business of the applicant and his agents, a license to sell securities may issue;

(4) That any person who, without disclosing that he is to profit thereby, advises or procures any person to purchase any security shall be liable in damages to the person so purchasing such security.

As stated above, the nature of your questions has called forth this epitome of the reasons for the blue sky legislation and a brief outline of the law, and these seem to me clearly to suggest the proper answer to each of your questions.

Taking up your first three questions: Section 6373-6 of the General Code of Ohio (not Revised Statutes, as stated by you) places a mandatory duty upon the "commissioner" to revoke a dealer's license when facts warranting such revocation are established to his satisfaction. The "commissioner's" failure to revoke a license, when facts warranting such revocation are established to his satisfaction, would be misconduct in office on the part of the "commissioner," for which he should be removed from office.

To hold otherwise would be not only to repeal the blue sky law, but to place the stamp of approval on illegitimate business and fraudulent transactions and to say that the "commissioner" had the right to protect a person, firm or cor-

poration, after the obtaining of a license, under the same facts and circumstances that would have prevented the "commissioner" from issuing the license in the first place.

The statute also provides the only condition upon which such licensee may resume business, in the following language:

> "No dealer whose license has been revoked shall be relicensed within six months from the date of such revocation."

In answer to your fourth question: The controlling purpose of the "commissioner" should be to protect the investors of the state by driving out of business every person, firm, or corporation that conducts the business of selling securities unfairly or fraudulently, to the end that when the citizens of this state deal with persons or concerns holding a license from your department to sell securities, they may rely upon the truth of the representations made as to existing facts and the promises made as to what shall obtain in the future in concerns whose securities are being offered.

In answer to your fifth question: In the first place, I do not know by what process of reasoning you can arrive at the conclusion that investors of the state who have purchased their securities from a concern against whom it has been clearly established that it has been conducting its business illegally and necessarily to the detriment of investors, are to suffer a greater financial loss by revocation of the dealer's license than they would suffer if a revocation was denied. I know of no authority for you to enter into any agreement of any kind with an offending dealer. The general answer to this question is in the negative.

Being at a loss to know how you have figured out the hypotheses contained in your sixth question, it is difficult to discuss said question. The first assumption you make in this question, as in all others, is: "Granting that facts warranting the revocation of a dealer's license have been established to the satisfaction of the 'commissioner,'" should be the end of the inquiry. When facts have been established to your satisfaction, you have a clear duty to perform and no consideration of any kind should swerve you.

The motive of the person or persons who prompted the investigation can become material only where his or their word, or the evidence offered by him or them, is to be weighed against the evidence offered by the licensee as to the truth or falsity of the charges. Where the truth of the charges is proven otherwise than by evidence of the complainant, the motive of the complainant is immaterial. You are concerned only with the truth or falsity of the charges; if false, you should say so; if true, you should act promptly, to the end that no other innocent person may suffer. I am unable, without more facts than contained in your letter, to see how investors are going to suffer by revocation of a license thus preventing a dealer from selling more securities, unless it be upon the theory that the losses will then be distributed over a greater number of persons.

Respectfully,
EDWARD C. TURNER,
Attorney General.

959.

COUNTY COMMISSIONERS—COUNTY SURVEYOR—WHEN APPOINTED TAX MAP DRAUGHTSMAN UNDER SECTION 5551, G. C.—NO ASSISTANT PROVIDED—SURVEYOR NOT AUTHORIZED TO APPOINT AN ASSISTANT UNDER SECTION 2788, G. C., OR SECTION 7181, G. C.

Where county commissioners appoint the county surveyor as tax map draughtsman under section 5551, G. C., and provide him no assistant as such, the county surveyor is not authorized to detail an assistant appointed under section 2788, G. C., or 7181, G. C., to do any of the tax map work.

COLUMBUS, OHIO, October 21, 1915.

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

GENTLEMEN:—I have your communication of October 18, 1915, in which you inquire as follows:

> "In the event that the county commissioners appoint the county surveyor as tax map draughtsman in accordance with the provisions of section 5551, General Code, and provide him no assistant as such, can the county surveyor detail an assistant in his office who has been appointed under the provisions of section 138 of the Cass highway law to do any of such tax map work?"

In order to fully answer your question, it should first be noted, as pointed out in an opinion rendered to you by this department on September 20, 1915, that section 2788, G. C., which authorizes the county surveyor to appoint such assistants, deputies, draughtsmen, inspectors, clerks and employes, as he deems necessary for the proper perforance of the duties of his office, and fix their compensation within certain limits, was not repealed by the Cass highway law. It was indicated in that opinion that while it may not be essential in practice to preserve for all purposes the distinction between the assistants, deputies, draughtsmen, inspectors, clerks and other employes necessary to enable the surveyor to properly perform such of his duties as are not connected with his work as county highway superintendent on the one hand, and the assistants necessary to enable him to properly perform his duties as county highway superintendent on the other hand, and while it may even be convenient and proper to disregard the distinction for certain purposes, yet such a distinction clearly exists.

Section 2788, G. C., is the governing section as to the assistants necessary to enable the county surveyor to properly perform the duties of his office other than those duties devolving upon him as county highway superintendent, while as to the assistants necessary to enable the county surveyor to properly perform his duties as county highway superintendent, the controlling law is section 138 of the Cass highway law, section 7181, G. C. In answering your question I will therefore consider whether, under the circumstances mentioned by you, the county surveyor can detail an assistant in his office who has been appointed either under the provisions of section 138 of the Cass highway law, section 7181, G. C., or under section 2788, G. C., to do any of the tax map work.

It should first be noted that section 5551, G. C., is not mandatory, and that as the law now stands the county commissioners may appoint the county surveyor as tax map draughtsman, or they may decline to take any action whatever as to the making, correcting and keeping up to date of tax maps. As pointed out in

the opinion referred to above, the county commissioners may, after January 1, 1916, have the tax maps made either by the county surveyor and his assistants provided for that purpose, or by outside parties, but not by both. It will also be noted that under section 5552, G. C., the county commissioners, if they appoint the county surveyor as tax map draughtsman, are required to fix the number of his assistants, not to exceed four, and also to fix the salary of such assistants at not to exceed fifteen hundred dollars per year. As the law stood prior to the going into effect of the Cass highway law, section 2787, G. C., required the county commissioners to fix an aggregate compensation to be expended during the year by the county surveyor for necessary assistants, etc. These assistants were manifestly those necessary to enable the county surveyor to discharge the duties cast upon him by law without any reference to his work as tax map draughtsman, and in acting under section 2787, G. C., the county commissioners were not warranted in taking into consideration, in the making of an allowance to the county surveyor for the compensation of assistants, etc., any assistants which he might require in the making of tax maps, if appointed to do that work, for the reason that authority to determine the number of assistants necessary in tax map work and to fix their compensation was conferred upon the county commissioners by a separate section of the General Code, to wit, 5552, G. C.

Since the going into effect of the Cass highway law, the commissioners, in acting under section 138 of that act, section 7181, G. C., in fixing the aggregate compensation to be expended for assistants by the county highway superintendent, are allowed to take into consideration only the number of assistants which the county surveyor will require to properly perform his duties as county highway superintendent. In other words, the county commissioners will not, when acting either under section 2787, G. C., or under section 138 of the Cass highway law, section 7181, G. C., be warranted in taking into consideration the number of assistants which the county surveyor will require as tax map draughtsman, in case he is appointed to that position by the county commissioners, for the reason that section 5552, G. C., which relates especially to the position of tax map draughtsman, provides a method by which the county commissioners are to determine the number of assistants to be allowed to the tax map draughtsman and the compensation of such assistants.

I am of the opinion that said section 5552, G. C., must be taken as furnishing the only method by which the county surveyor, acting as tax map draughtsman, can be allowed any assistants for tax map work and that if the county commissioners fail to act under section 5552, G. C., and do not fix any number of assistants for the tax map draughtsman, it must be presumed that the county commissioners, in the exercise of their discretion, determined that no assistants were necessary.

I therefore conclude, in answer to your specific question, that in the event that the county commissioners appoint the county surveyor as tax map draughtsman, in accordance with the provisions of section 5551, G. C., and do not, under the provisions of section 5552, G. C., allow any assistants to the tax map draughtsman, then the county surveyor must himself perform the duties of tax map draughtsman and cannot detail to assist him in his work as tax map draughtsman any assistant in his office appointed under section 2788, G. C., or under section 138 of the Cass highway law, section 7181, G. C. To hold otherwise would be to take from the county commissioners the discretion imposed in them by section 5552, G. C., of determining whether or not the county surveyor, acting as tax map draughtsman, is to be allowed any assistants, and would enable a county surveyor to use funds allowed to him for one class of assistants in compensating another and different class of assistants engaged on work which the county surveyor was required to personally perform.

I understand that a situation has been presented to you in which it is desired to appoint the county surveyor as tax map draughtsman and then detail an assistant appointed under either section 2788, G. C., or section 7181, G. C., to take care of the tax map work, the assistant in question being especially skilled in such work. I desire to suggest that the matter might under such circumstances, be worked out by appointing the county surveyor as tax map draughtsman, giving him only a nominal compensation sufficient to recompense him for supervising the work and allowing him one assistant under section 5552, G. C., at a substantial compensation to be fixed by the commissioners within the statutory limit.

The assistant in question upon resigning his position under section 2788, G. C., or 7181, G. C., could be appointed assistant to the tax map draughtsman and paid the compensation fixed by the commissioners for such assistant.

Respectfully,

EDWARD C. TURNER,
Attorney General.

960.

COUNTY AGRICULTURAL SOCIETY—WHEN SECTIONS 9880 AND 9884, G. C., ARE COMPLIED WITH, IT IS THE DUTY OF COUNTY AUDITOR UPON PRESENTATION OF CERTIFICATE IN PROPER FORM TO DRAW ORDER ON COUNTY TREASURER—WHEN REQUEST FOR LEVY IS MADE BY ONE SOCIETY, COMMISSIONERS CANNOT DESIGNATE THE USE OF SAME BY ANOTHER SOCIETY.

1. *When an agricultural society is organized in any county in this state under the provisions of section* 9880, *G. C., and receives a certificate from the president of the state board as therein provided and continues to receive said certificate annually thereafter under the provisions of section* 9884, *G. C., it is the duty of the county auditor, upon presentation of said certificate in proper form, to draw an order on the treasurer of his county for the per capita tax as provided in said section* 9880, *G. C.*

2. *The agricultural society authorized by section* 9894, *G. C., to request a levy of one-tenth of one mill as therein provided is the society recognized by the state board under sections* 9880 *and* 9884, *G. C., supra, and a board of county commissioners is without authority to make a levy as provided by said section* 9894 *upon the request of any society other than the one above designated.*

COLUMBUS, OHIO, October 22, 1915.

HON. LEVI B. MOORE, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—I have your letter of October 11, 1915, as follows:

"Pike county has two fair companies, each claiming to be the Pike County Agricultural Society recognized by the state board of agriculture, and each claiming the money levied by the county commissioners for agricultural purposes. The Pike County Agricultural Society of Piketon, Ohio, has received all moneys levied for agricultural purposes up to the present time, including the per capita tax.

"Since the August settlement, 1915, the Pike County Agricultural Society of Waverly, Ohio, have been claiming the money coming in for agricultural purposes on the strength of the enclosed resolutions heretofore passed by the county commissioners.

"Our county auditor refuses to turn over the August draw until he has your opinion as to which of these societies is entitled to receive it. I am also sending you a letter from the state board of agriculture in regard to the matter. Will you kindly return this letter to me together with your direction as to which one of these societies should receive this money? Your direction in the matter will settle the controversy."

It appears, from the statements in your foregoing letter, that two agricultural societies in your county are claiming a right to the funds provided by law for the assistance of a county agricultural society. It becomes necessary, therefore, to refer to the law under which agricultural societies may claim any public funds.

Your attention is first directed to section 9880, G. C., which provides as follows:

"When thirty or more persons, residents of a county, or of a district embracing one or more counties, organize themselves into an agricultural society, which adopts a constitution and by-laws, selects the usual and proper officers, and otherwise conducts its affairs in conformity to law, and the rules of the state board of agriculture, and when such county or district society has held an annual exhibition in accordance with the three following sections, and made proper report to the state board, then, upon presentation to the county auditor, of a certificate from the president of the state board attested by the secretary thereof, that the laws of the state and the rules of the board have been complied with, the county auditor of each county wherein such agricultural societies are organized, annually shall draw an order on the treasurer of the county in favor of the president of the county or district agricultural society for a sum equal to two cents to each inhabitant thereof, on the basis of the last previous national census. The total amount of such order shall not in any county exceed eight hundred dollars, and the treasurer of the county shall pay it."

Inasmuch as you state in your letter that the Piketon society has been receiving all moneys levied for agricultural purposes up to the present time, including the per capita tax, it must be assumed that it has in the past complied with the provisions of the foregoing statute and has received from the president of the state board the proper certificate entitling it to the payment of the funds so as aforesaid received by it. This being true and this society having first established its identity as the county agricultural society of Pike county, I incline to the opinion that so long as it observes and follows the statutory requirements and obtains from the state board the proper certificate it may continue so to receive said money, but the certificate mentioned and defined in the foregoing section is not continuing and does not serve to authorize but the one payment, as specified therein, and a succeeding section, viz., 9884, G. C., makes provisions for subsequent payments, as follows:

"County and district societies annually shall publish a list of awards, and an abstract of the treasurer's account, in a newspaper of the district, and make a report of their proceedings during the year, and a synopsis of the awards for improvement in agriculture and household manufactures, together with an abstract of the several descriptions of these improvements; also make a report of the condition of agriculture in their county or district, which shall be made in accordance with the rules and

regulations of the state board of agriculture, and be forwarded to the state board at its annual meeting in January of each year. *No subsequent payment* shall be made from the county treasury unless a certificate be presented to the auditor, from the president of the state board, showing that such reports have been made."

It will be observed that the foregoing statute expressly provides that no subsequent payment shall be made from the county treasury unless a certificate be presented, from the president of the state board, showing that the reports named in the foregoing statute have been made.

The letter from the state board to your county auditor, to which you refer and which purports to be an order or certificate from the state board to said auditor, is as follows:

"September 18, 1915.

"HON. L. B. EYLAR, *County Auditor, Waverly, Ohio.*

"DEAR SIR:—The records of this department show that the agricultural society operating at Piketon, Ohio, is the legally recognized fair for Pike county, and you are instructed to pay to this society whatever funds there are for distribution in Pike county for fair purposes.

"Yours very truly,

"(Signed) JOHN BEGGS,
"President.

"(Signed) R. W. DUNLAP,
"Secretary."

The foregoing falls very far short of the requirements for a certificate as provided in the section above quoted and your county auditor cannot legally pay any money thereon.

If this society has complied with the requirements specified in said section 9884, G. C., then, upon a proper certificate thereof from the president of the state board, your county auditor would be authorized to pay to said society the per capita money now in your county treasury for agricultural purposes. In this connection, however, I desire to call your attention to the provisions of a supplementary section to said section 9880, supra, as found in 106 Ohio laws, page 273, and which provides that:

"When thirty or more persons, residents of a county * * * * are organized into an independent agricultural society that has held annual fairs for agricultural advancement previous to January first, 1915, in a county wherein is located a county agricultural society, and when such independent society has held an annual exhibition in accordance with the three following sections, and made proper report to the state board, then, upon presentation to the county auditor of a certificate from the president of the state board attested by the secretary thereof, that the laws of Ohio and the rules of the board have been complied with, the county auditor of the county, if the fair board be residents of one county, shall draw an order in favor of the president of the independent agricultural society for a sum equal to the amount paid to the county fair and the treasurer shall pay said order."

Under the provisions of the foregoing supplementary statute, if the agricultural society of Waverly has complied with the requirements of the sections here-

tofore noted and receives from the president of the state board the certificate specified in said last named section, on presentation of said certificate to the county auditor it would be his duty to pay to said Waverly Agricultural Society a sum equal to the amount paid to the Piketon Agricultural Society. An inspection of the records of the state board of agriculture shows, however, that no reports as required by law or any reports have ever been filed by the Agricultural Society of Waverly and until the law in this regard has been observed, I am unable to see upon what legal ground said society may claim the benefit of any county fund.

Attached to your letter also are certified copies of an application made on January 13, 1913, by the Waverly society to your county commissioners to make a levy for its benefit of not to exceed one-tenth of a mill upon the taxable property of the county as provided by section 9894, G. C., and a similar application of the date of March 15, 1915. Attached to these applications are certified copies of resolutions adopted by said board of county commissioners recognizing the Waverly society as the county agricultural society and entitled to receive the aid contemplated by section 9894, and requesting the state board of agriculture to direct that said society receive the per capita tax.

You state in your letter that the Piketon society has heretofore received all funds levied for agricultural purposes in your county. You do not state, however, whether that society made application for a levy under said section 9894, or whether the levy was made on the application of the Waverly society, as hereinbefore noted.

Section 9894, G. C., provides as follows:

> "When a county or county agricultural society, owns or holds under a lease, real estate used as a site whereon to hold fairs, and the county agricultural society therein has control and management of such lands and buildings, for the purpose of encouraging agricultural fairs, the county commissioners shall on the request of the agricultural society annually levy taxes of not exceeding a tenth of one mill upon all taxable property of the county, but in no event to exceed the sum of one thousand five hundred dollars, which sum shall be paid by the treasurer of the county to the treasurer of the agricultural society, upon an order from the county auditor duly issued therefor. Such commissioners shall pay out of the treasury any sum from money in the general fund not otherwise appropriated, in anticipation of such levy."

A careful consideration of the provisions of the foregoing section convinces me that the county agricultural society therein authorized to apply for a county levy must be a society which has complied with all the provisions of law and has the official recognition of the state board of agriculture, and holds the certificate of said board for the per capita tax, under said section 9880. While there seems to be no express provision of law regulating the mode and manner by which the status of an agricultural society may be legally fixed, as the county agricultural society, yet the administration of the law as an entirety is inconsistent with any other procedure than to recognize as the county society the society adopted by the state board under the provisions of said section 9880, supra.

I am also convinced that the application of a county society under the above statute, namely 9894, G. C., is, in connection with the other qualifications therein named, a jurisdictional matter and necessary to authorize the county commissioners to make the levy therein specified, and that a levy made upon the application of any society other than such county society is void, and money paid under such appropriation is illegally expended.

Upon these considerations I conclude that no money appropriated under the application of the Waverly society, made on March 15, 1915, can be expended in behalf of any agricultural society, and your county auditor should be directed to regard and treat such appropriation as wholly void.

Respectfully,
EDWARD C. TURNER,
Attorney General.

961.

BOARD OF EDUCATION — SCHOOLS — TRANSPORTATION — WHERE IN RURAL SCHOOL DISTRICT AVERAGE DAILY ATTENDANCE WAS BELOW TEN FOR PRECEDING YEAR, SUSPENSION FOLLOWED, AND PUPILS OF SAID DISTRICT ASSIGNED TO ANOTHER DISTRICT— DUTY OF LOCAL BOARD OF EDUCATION TO PROVIDE TRANSPORTATION FOR *ONLY* THOSE PUPILS RESIDING IN SAID SUSPENDED DISTRICT WHO LIVE MORE THAN TWO MILES FROM SCHOOL TO WHICH THEY HAVE BEEN ASSIGNED.

Where the average daily attendance of a school in a rural school district was below ten for the preceding year and said school has been suspended by the board of education of said rural school district on the order of the board of education of the county school district directing such suspension and the pupils of said suspended district have been assigned to another school in the same rural district or to a public school in another district, it is the duty of said local board of education, under the provision of section 7731, *G. C., as amended in* 104 *O. L.,* 140, *to provide transportation for those pupils only, residing in said suspended district, who live more than two miles from the school to which they are assigned.*

COLUMBUS, OHIO, October 22, 1915.

HON. F. J. STALTER, *Prosecuting Attorney, Upper Sandusky, Ohio.*

DEAR SIR:—I have your letter under date of October 16th, which is as follows:

> "Section 7730, G. C., provides for the suspension of schools by the board of education. It also provides for the transportation of pupils.
>
> "In opinion number 1355, 1914, you hold that where a school is suspended because attendance is below twelve (104 O. L., 139) and the board of education annexes territory to contiguous district the rule for transportation is 7731 and the board is only compelled to haul the pupils who live more than two miles.
>
> "Where the average daily attendance is below ten and the school of a rural district is suspended (104 and 105 O. L., 398) and the board of education assigns the pupils of said district to another school in the same rural district but said territory of said suspended district is not annexed to another district does the rule then for transportation as provided in 7730 apply or the rule for transportation as provided in section 7731 apply?"

Section 7730, G. C., as amended in 106 O. L., 398 provides in part as follows:

> "The board of education of any rural or village school district may suspend any or all schools in such village or rural school district. Upon

such suspension the board in such village school district may provide, and in such rural school district shall provide, for the conveyance of pupils attending such schools, to a public school in the rural or village district, or to a public school in another district."

Under the above provision of the statute the board of education of a rural or village school district may, in the exercise of its discretion, suspend any or all of the schools of its district.

When the board of education of a rural school district suspends a school in its district, under authority of said provision of said statute, and transfers the pupils of said suspended school to another public school in its district or to a public school in another school district, it becomes the duty of such board to provide conveyance for the pupils of said suspended district to the school or schools to which they are transferred.

It will be observed that the legislature in amending section 7730, G. C., as found in 104 O. L., 139, carried the above provisions of said statute into the amendment without change. It follows, therefore, that the authority of the board of education of a rural school district to suspend a school in its district and to transfer the pupils to another school, and the duty of said board to provide transportation for such pupils is the same under said provisions of section 7730, G. C., as found in both of its amended forms.

Said section as amended in 106 O. L., further provides:

"When the average daily attendance of any school for the preceding year has been below ten, such school shall be suspended and the pupils transferred to another school or schools when directed to do so by the county board of education."

Under provision of said statute as amended in 104 O. L., it was made the duty of the local board of education to suspend a school in its district and transfer the pupils to another school or schools as said board might direct, when the average daily attendance of such school for the preceding year was below twelve.

It will be observed that while the amended provision of the statute, as above quoted, changes the corresponding provision of said statute as amended in 104 O. L., by reducing the minimum average daily attendance from twelve to ten and vests in the board of education of the county school district the discretion to direct the suspension of a school when the average daily attendance for the preceding year has been below ten, said changes, in so far as the question of the authority or duty of the local board of education to provide for the transportation of the pupils is concerned, are not material.

In the opinion referred to in your inquiry, rendered by my predecessor, Hon. Timothy S. Hogan, to Hon. Allen T. Williamson, prosecuting attorney of Washington county, under date of December 31, 1914, the question asked by Mr. Williamson was as follows:

"Under sections 7730 and 7731, General Code, where a school has been suspended because the average daily attendance during the preceding school year was less than twelve, and the territory comprising said district has been annexed to contiguous districts, is the board of education compelled to transport all pupils within the suspended district regardless of the distance they may reside from the school to which they are assigned, or is the board required to transport only those pupils residing in such suspended district where they live more than two miles from the school to which they are assigned?"

After quoting the provisions of sections 7730 and 7731, G. C., as amended in 104 O. L., at pages 139 and 140, and as then in force, Mr. Hogan observed that under the provisions of said section 7730, G. C., no reference is made relating to or requiring conveyance when a school is suspended because the average daily attendance of such school for the preceding year was below twelve, and that the provision as to conveyance in said section relates only to the suspension of a school by a board of education in the exercise of its discretion under authority of the provision contained in the first part of said statute.

Reference was made to the provision of section 7731, G. C., in the following language:

> "Said section 7731 provides in effect that in all rural or village school districts, where pupils live more than two miles from the nearest school the board of education shall provide transportation for such pupils to and from such schools and that transportation for pupils living less than two miles from the school house by the most direct public highway shall be optional with the board of education."

In conclusion it was held that when a school has been suspended because the average daily attendance for the preceding year was less than twelve, and the territory comprising said district has been annexed to a contiguous district, the board of education is compelled to furnish transportation to the pupils of such suspended district in accordance with the requirements of section 7731, G. C. In other words, such board is required to furnish transportation only to those pupils residing in such suspended district, who live more than two miles from the school to which they are assigned.

I concur in said opinion as I think it affords the proper construction of the provisions of section 7730, G. C., as found in both of its amended forms when taken in connection with the provisions of section 7731, G. C., and lays down the correct rule to be applied in determining the liability of the board of education of a rural or village school district to furnish transportation to pupils where a school of such district is suspended on the order of the county board of education acting under the above provision of section 7731, G. C., as amended in 106 O. L.

While in the case under consideration in said opinion it appears that after the suspension of the school in question the territory of the suspended school district was annexed to contiguous districts, it is evident that this fact was not material to the conclusion therein reached.

I am of the opinion therefore in answer to your question that, where the average daily attendance of a school in a rural school district was below ten for the preceding year and said school has been suspended by the board of education of said rural school district on the order of the board of education of the county school district directing such suspension, and the pupils of said suspended district have been assigned to another school in the same rural district or to a public school in another district, it is the duty of said local board of education, under the provision of section 7731, G. C., as amended in 104 O. L., 140, to provide transportation for those pupils only, residing in said suspended district, who live more than two miles from the school to which they are assigned.

Respectfully,

EDWARD C. TURNER,

Attorney General.

962.

BOARD OF EDUCATION—SCHOOL HOUSE ERECTED UPON LEASED LAND IS WITHIN RULE OF LAW APPLICABLE TO TRADE FIXTURES AND MAY BE REMOVED BY SAID BOARD *BEFORE* EXPIRATION OF ITS LEASE.

A school house erected by a board of education upon leased land is within the rule of law which controls as to trade fixtures and may be removed by said board before the expiration of its lease. Wittemeyer v. The Board of Education of Brooklyn, 10 *C. C.,* 119.

COLUMBUS, OHIO, October 22, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*
DEAR SIR:—I have your letter of October 2, 1915, as follows:

> "On the 10th day of January, 1862, a contract was entered into between the board of education of Chesterfield township, Fulton county, Ohio, and George P. Clark of same place. The contract reads as follows:
>
> " 'Article of agreement made this 10th day of January, 1862, by and between the board of education of Chesterfield township, Fulton county, Ohio, and George P. Clark of same place.
>
> " 'The said George P. Clark hereby agrees to lease for the time the said board of education shall desire to use it the (description of land), for the sum of ten dollars, the receipt of which is hereby acknowledged, for a school house site. To have and to hold said premises with the appurtenances unto the said board of education and their successors in office during the occupancy of said premises by said board of education.
>
> " 'GEORGE P. CLARK.
>
> " 'ATTEST:
>
> " 'A. C. HOUGH,
>
> " 'D. C. GILLIS.'
>
> "QUERY: The board of education under the terms of this lease wishes to remove the school building which stands upon the above mentioned land. Can it dispose of the building at public sale before returning the land to the owner?"

While your letter does not so state, it will be assumed that the school building in question was erected subsequent to the making of the contract aforesaid, upon the lands therein described, by the board of eduction named in said contract.

It is a familiar rule of the law that whatever becomes fixed to the realty thereby becomes accessory to the freehold and cannot be severed therefrom without the consent of the owner of the realty. In other words, personal property which becomes fixed to realty thereby loses its character as personal property and becomes realty and cannot be severed therefrom without the consent of the owner, or under some express agreement whereby it is to be removed at the end of the term of the lease. In the case presented, there being no such condition in the contract, and the school building in question being affixed to the land, it cannot be removed without the consent of the owner of the realty, unless it comes within some exception to the general rule above stated.

There are four exceptions to this general rule as follows:

> "1. Additions made by the tenant in the aid of his trade, called 'trade fixtures.'
> "2. Additions for ornament or more convenient use of the premises.
> "3. Additions made under contract with right of removal.
> "4. Additions removable by statute.
> "19 Cyc. 1065."

The only exception to said rule which may be applied in this case is that which is recognized in favor of what is termed "trade fixtures." As to such fixtures, although they may be securely fastened to the realty, they continue as the personal property of the lessee and may be removed by him at the end of the term of the lease, if such removal can be effected without material injury to the freehold.

It is said by the court in 142 U. S., 416, that:

> "Whatever is affixed to the land for the purposes of trade, whether it be made of brick or wood, is removable at the end of the term. Indeed, it is difficult to conceive that any fixture, however solid, permanent or closely attached to realty, placed there for the sole purposes of trade, may not be removed at the end of the term."

It was held in Wagner v. Railroad Company, 22 O. S., 563, that:

> "Stone piers built by a railroad company as a part of its railroad, on lands over which it has acquired the right-of-way for its road, do not, though firmly imbedded in the earth, become the property of the owner of the lands as a part of the realty and, on the purpose of completing the railroad being abandoned, the company may remove such structures as personal property."

The courts are extremely liberal in their interpretation of what constitutes "trade fixtures" and in their application of the rights of the tenant to remove the same at the end of his term. It is observed by Ewell on Fixtures, page 157, that:

> "In determining what is a trade within the meaning of the rule in question, the word is not used in a strict and literal signification but in a very liberal sense, and has been extended to include various occupations having an affinity or resemblance to trade, though hardly included in the usual definitions of that term."

The references above noted are made by way of explanation to the observations of the court in the case of Wittenmeyer v. The Board of Education of Brooklyn, Ohio, 10 C. C., 119, wherein it is held:

> "A building erected upon leased land by a lessee for use as a school house is, as to the right of removal, governed by the same rules of law which govern in the case of buildings erected by a lessee for the purposes of trade."

Without attempting to quote in full the remarks of the court in this case, it is sufficient to say that it is there held that the board of education, as lessees,

had the right to remove a school building which it had erected upon the premises leased because the same, as a trade fixture, came within that exception to the general law.

I therefore hold, upon the authority of this case, that under the agreement aforesaid the board of education may remove said building, but if it desires to dispose of the same at public sale, such sale and removal should be made before it surrenders the land to the lessor.

Respectfully,
EDWARD C. TURNER,
Attorney General.

963.

BOARD OF EDUCATION—PRINCIPAL OR TEACHER IN PUBLIC SCHOOL IS EMPLOYED FROM DATE OF ACCEPTANCE OF APPOINTMENT BY BOARD AND FOR FULL TERM FOR WHICH SUCH APPOINTMENT IS MADE—CANNOT THEN ACT AS SALES AGENT FOR SCHOOL TEXT BOOKS WHICH ARE FILED WITH SUPERINTENDENT OF PUBLIC INSTRUCTION.

A principal or teacher in a public school is employed within the meaning of the provision of section 7718, G. C., from the date of his acceptance of his appointment by the board of education of the school district and for the full term for which such appointment is made.

COLUMBUS, OHIO, October 23, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*
DEAR SIR:—I have your letter of October 18, 1915, which is as follows:

> "Under Sec. 7718, of the General Code, no superintendent, supervisor, principal or teacher employed by any board of education in the state shall act as sales agent for any firm or corporation whose school text books are filed with the superintendent of public instruction as provided by law.
>
> "Query: As applied to this section, is a teacher or principal who was hired in June, but whose services are to begin September 1st following, considered as an employe of the board of education from the date on which he was hired to September 1st?
>
> "In other words, is a teacher or principal considered as 'employed' only during the months for which he is paid to teach or is he also considered as 'employed' during the interregnum from the date on which his contract is made to the date when his services actually begin?"

Section 7718, G. C., as amended in 106 O. L., 447, provides as follows:

> "A superintendent, supervisor, principal or teacher employed by any board of education in the state shall not act as sales agent, either directly or indirectly, for any person, firm or corporation whose school text books are filed with the superintendent of public instruction as provided by law, or for school apparatus or equipment of any kind for use in the public schools of the state. A violation of this provision shall work a forfeiture of their certificates to teach in the public schools of Ohio."

Under provision of section 7690, G. C., each board of education may appoint

a superintendent of the public schools of its district and fix his salary. Section 7702, G. C., provides in part:

> "The board of education in each city school district at a regular meeting, between May 1st and August 31st, shall appoint a suitable person to act as superintendent of the public schools of the district, for a term not longer than five school years, beginning within four months of such appointment and ending on the 31st day of August."

Section 7703, G. C., provides that:

> "Upon his acceptance of the appointment, such superintendent, subject to the approval and confirmation of the board, may appoint all the teachers, and for cause suspend any person thus appointed until the board or a committee thereof considers such suspension, but no one shall be dismissed by the board except as provided in section 7701."

This section further provides that any city board of education, upon a three-fourths vote of its full membership, may re-employ any teacher whom the superintendent refuses to appoint.

Section 7701, G. C., provides that each board may dismiss any appointee or teacher for inefficiency, neglect of duty, immorality or improper conduct, but no teacher shall be dismissed by a board unless the charges are first reduced to writing and an opportunity be first given for defense before the board, or a committee thereof, and a majority of the full membership of the board vote upon roll call in favor of such dismissal.

Section 7705, G. C., 104 O. L., 133, provides:

> "The board of education of each village and rural school district, shall employ the teachers of the public schools of the district, for a term not longer than three school years, to begin within four months of the date of appointment. The local board shall employ no teacher for any school unless such teacher is nominated therefor by the district superintendent of the supervision district in which such school is located except by a majority vote. In all high schools and consolidated schools one of the teachers shall be designated by the board as principal and shall be the administrative head of such school."

Section 7699, G. C., provides:

> "Upon the appointment of any person to any position under the control of the board of education, the clerk promptly must notify such person verbally or in writing of his appointment, the conditions thereof, and request and secure from him within a reasonable time to be determined by the board, his acceptance or rejection of such appointment. An acceptance of it within the time thus determined shall constitute a contract binding both parties thereto until such time as it may be dissolved, expires, or the appointee be dismissed for cause."

It seems clear to my mind that under the provisions of section 7699, G. C., taken in connection with the above provisions of the statutes authorizing the employment of a superintendent, principal or teacher, such employment dates from the acceptance of the appointment of such superintendent, principal or teacher by the board of education of the school district and under the provision of section

7718, G. C., as above quoted, said superintendent, principal or teacher may not act as a sales agent, either directly or indirectly, for any person, firm or corporation whose school text books are filed with the superintendent of public instruction, as provided by law, or for school apparatus or equipment of any kind for use in the public schools of the state during such employment.

I am of the opinion therefore, in answer to your question, that a principal or teacher is employed within the meaning of the provision of said section 7718, G. C., from the date of his acceptance of his appointment by the board of education of the school district and for the full term for which such appointment is made.

Respectfully,
EDWARD C. TURNER,
Attorney General.

964.

COUNTY COMMISSIONERS—ALLOWANCE OF BILLS FOR TREATMENT OF RABIES IS DISCRETIONARY WITH SUCH BOARD.

The allowance of an account presented to a board of county commissioners under the provisions of section 5852, G. C., is discretionary with said board.

COLUMBUS, OHIO, October 23, 1915.

HON. JOHN M. MARKLEY, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your request for an opinion relative to the payment of a bill for medical services incurred on account of being bitten by a dog afflicted with rabies, your letter being as follows:

> "Sometime ago a man and his children, living in this county, were bitten by a dog afflicted with rabies. They took treatment at Columbus and sometime ago presented to the commissioners of this county bills for said treatment aggregating $500.00. These bills are presented under sections 5851 and 5852 of the General Code of Ohio.
>
> "Upon the authority of Attorney General Hogan's opinion as found at page 1163 of the attorney general's report of the year 1913, I have advised the commissioners that the question of payment of these bills is purely discretionary with them. The parties presenting the bills are reputed to be worth from ten to fifteen thousand dollars.
>
> "Kindly advise me at once whether they are within their rights in refusing to pay these bills."

Section 5852 of the General Code, which provides for the payment of the claims to which you refer, is as follows:

> "The county commissioners not later than the third regular meeting, after it is so presented, shall examine such account, and, if found in whole or part correct and just, may order the payment thereof in whole or in part, out of the general fund of the county; but a person shall not receive for one injury a sum exceeding five hundred dollars."

The section above quoted is a part of an act passed April 9, 1908, entitled

"An act to provide for the protection of persons injured by a mad dog" and is found in Vol. 99, O. L., page 82. That portion of the original act which now appears in the section above quoted provided as follows:

> "The county commissioners shall within a reasonable time, and not later than the third regular meeting after the presentation of said verified account as aforesaid, examine the same, and, if found in whole or in part correct and just, may *in their discretion* order the payment thereof, or such parts as they may have found in their judgment correct and just, to be paid out of the general fund of the county; but no person shall receive for any one injury under this act a sum exceeding five hundred dollars."

In your letter you state that upon the authority of Attorney General Hogan's opinion, found at page 1163 of the attorney general's report of the year 1913, you have advised the commissioners that the payments of the bills in the case under consideration is purely discretionary.

It is sufficient to say that I am in harmony with said opinion and hold that the payment of such claims, under the provision of said section 5852 as above quoted, is discretionary with the board of county commissioners. This conclusion is reached because: (1) The language of said section 5852 authorizing such payment is ordinarily to be construed as permissive, and (2) because said law in its original form, as hereinbefore quoted, expressly provided that the commissioners *"in their discretion"* may order the payment thereof. The revision of this law by the codifying commission and the omission of the phrase just quoted, when considered in connection with the law as it now stands, does not make it manifest that the legislature intended any change in its application or construction in this regard.

It follows, therefore, under the familiar rules of interpretation of revised laws that the same construction must be given this law now as obtained before its revision. State v. Wiehle, 78 O. S., 41, and cases there cited.

Upon these considerations I therefore hold that the payment of claims under section 5852, supra, is within the discretion of the board of county commissioners.

Respectfully,
EDWARD C. TURNER,
Attorney General.

965.

BOARD OF EDUCATION—COMPULSORY EDUCATION LAW—BOY BETWEEN AGES OF FOURTEEN YEARS AND FIFTEEN YEARS WHO HAS PASSED FIFTH GRADE AND WHO NEGLECTS TO ATTEND SCHOOL BUT INSTEAD ASSISTS HIS FATHER ON FARM SHOULD BE DISPOSED OF UNDER PROVISIONS OF SECTION 7773, G. C.—MATTER ADJUSTED OUT OF COURT IF POSSIBLE.

Case of boy between age of fourteen and fifteen years who has passed the fifth grade, and who neglects to attend school, but instead thereof assists his father on the farm, should be disposed of under provisions of section 7773, G. C., as amended, 104 O. L., 233. A case of the kind under consideration should only be taken into the courts as a last resort.

COLUMBUS, OHIO, October 23, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge the receipt of your request for an

opinion on the question of compulsory attendance at school of a boy between the ages of fourteen and fifteen years, under conditions described in your letter, which is as follows:

> "A boy who is between the ages of fourteen and fifteen years is helping his father on his farm. Can the boy, who has completed the work in the fifth grade, be compelled to go to school?
>
> "Can a fine or prison sentence be imposed upon either the father or the boy for refusing to attend school?
>
> "If no fine can be imposed upon either father or son, what means could be adopted to force the son to go to school?"

Section 7768, of the General Code, 103 O. L., 902, is as follows:

> "Every child between the ages of eight and fifteen years, if a male, or between the ages of eight and sixteen years, if a female, and every male child between the ages of fifteen and sixteen not engaged in some regular employment, who is an habitual truant from school, or who absents itself habitually from school, or who, while in attendance at any public, private or parochial school, is incorrigible, vicious or immoral in conduct, or who habitually wanders about the streets and public places during school hours having no business or lawful occupation, or violates any of the provisions of this act, shall be deemed a delinquent child, and shall be subject to the provisions of law relating to delinquent children."

The section just quoted fixes the status of truants as delinquent children and brings them within the jurisdiction of the juvenile court. However, in my mind, in the absence of a showing to the effect that the boy referred to rebelled against attending school, it would do violence to reason to assume that he was in any sense a truant as contemplated by the statute, especially when we find him at home assisting his father on the farm. In order to bring the matter under the jurisdiction of the juvenile court as suggested by you personally, it would be necessary to make a showing of delinquency, and then follow up that feature of the case by showing that the delinquency was aided, caused, abetted, induced, encouraged or contributed to by the father, before he could be held liable therefor in juvenile court.

However, if the child be willing to attend school and he is prevented from so doing by the father, then complaint made to the juvenile court under the provisions of section 1654 of the General Code, on the ground that such action tended to cause delinquency, would in all probability result in an order of the court which would result in the school attendance required by section 7763 of the General Code, 104 O. L., 232, which is as follows:

> "Every parent, guardian or other person having charge of any child between the ages of eight and fifteen years of age if a male, and sixteen years of age, if a female, must send such child to a public, private or parochial school, for the full time that the school attended is in session, which shall in no case be for less than twenty-eight weeks. Such attendance must begin within the first week of the school term, unless the child is excused therefrom by the superintendent of the public schools, or by the principal of the private or parochial school, upon satisfactory showing either that the bodily or mental condition of the child does not permit of its attendance at school, or that the child is being instructed at home

by a person qualified, in the opinion of such superintendent or clerk, as the case may be, to teach the branches named in the next preceding section.''

My predecessor, Mr. Hogan, dealt with this same question in opinion No. 611, to be found in volume II of the 1913 report of the attorney general, at page 1588, which opinion was addressed to Hon. David H. James, city solicitor, Martins Ferry, Ohio, and I suggest that it be considered by you in connection with the question under consideration.

In the opinion referred to Mr. Hogan directed attention to section 12983 of the General Code, which is a general provision relative to violations of the compulsory education law, and the reference is pertinent here in view of the fact that no penalty is provided in section 12977 which will apply to a boy who is between the ages of fourteen and sixteen years, and, as in this case, has passed a satisfactory fifth grade test.

Section 7773 of the General Code, as amended 104 O. L., 233, is as follows:

''On the request of the superintendent of schools or the board of education or when it otherwise comes to his notice, the truant officer shall examine into any case of truancy within his district, and warn the truant and his parents, guardian or other person in charge, in writing, of the final consequence of truancy if persisted in. When any child between the age of eight and fifteen years, or between the ages of fifteen and sixteen years, in violation of the provisions of this chapter is not regularly employed and is not attending school, the truant officer shall notify the parent, guardian or other person in charge of such child, of the fact, and require such parent, guardian or other person in charge, to cause the child to attend some recognized school within two days from the date of the notice; and it shall be the duty of the parent, guardian or other person in charge of the child so to cause its attendance at some recognized school. Upon failure to do so, the truant officer shall make complaint against the parent, guardian or other person in charge of the child, in any court of competent jurisdiction in the city, village or rural district in which the offense occurred for such failure.''

It is my opinion in the case presented that every effort should be exerted to the end of adjusting the matter without resorting to the courts, and if unable to induce the attendance of the boy at school, action may be taken as provided in section 7773, G. C., as amended supra.

Respectfully,
EDWARD C. TURNER,
Attorney General.

966.

APPROVAL OF BOND, ROBERT N. WAID, DIVISION ENGINEER, STATE HIGHWAY DEPARTMENT.

COLUMBUS, OHIO, October 23, 1915.

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

DEAR SIR:—I have your communication of October 21, 1915, transmitting to me for examination bond of Mr. Robert N. Waid, recently appointed division engineer in the state highway department.

I find that this bond has been drawn substantially in accordance with the suggestions made to you in opinion No. 940 of this department, rendered October 16, 1915, and I am therefore returning to you the bond in question with my approval as to form endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

967.

INDUSTRIAL COMMISSION—SECRETARY APPOINTED UNDER PROVISIONS OF SECTION 871-14, G. C.—BEING ONE OF TWO SECRETARIES, IN UNCLASSIFIED SERVICE OF CIVIL SERVICE—MAY BE REMOVED AT PLEASURE OF INDUSTRIAL COMMISSION.

A secretary appointed by the industrial commission under the provisions of section 871-14, *G. C.,* 103 *O. L.,* 99, *and being one of the two secretaries in the unclassified service as provided by paragraph* 8 *of section* 486-8, *G. C.,* 106 *O. L.,* 405, *may be removed by said commission at its pleasure.*

COLUMBUS, OHIO, October 25, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of October 22d, in which you make the following statement and inquiry:

> "Would like your opinion on the status of Lloyd Teeters, assistant secretary to our commission. Mr. Teeters has held this position for a year or so, having been appointed by the old board. Do we have to take action to remove him if we so desire, or is his position such that automatically under the new law it will be necessary to reappoint or fill. Under the new civil service law his position is exempt."

The authority to appoint and to remove the secretary in question is found in section 14 of the act creating the industrial commission of Ohio, found on page 95, et seq., Vol. 103, O. L. Said section is now section 871-14, G. C., and provides as follows:

> "The commission is authorized and empowered to employ, promote and remove a secretary, or secretaries, deputies, clerks, stenographers, and

other assistants, as needed; to fix their compensation, and to assign to them their duties. Such employments and compensation to be first approved by the governor.''

You state in your letter that said secretary is not under the protection of the civil service law and in connection with that statement I learn from you further that he is one of the two secretaries specified in paragraph 8 of section 486-8, 106 O. L., 405, and the position held by him therefore is in the unclassified service. This being so and the law under which he was appointed not fixing any term or tenure of office, there is nothing to limit or qualify its provisions which empower you to appoint, promote and remove a secretary, which in effect makes such appointment and removal a matter subject entirely to your will and pleasure, the appointment, however, being subject to the approval of the governor.

While there is full authority under the statute quoted to authorize you to remove the secretary in question, yet the fact as before observed that no term of service is fixed by law in his case is sufficient in itself to authorize his removal. In other words, the rule would apply which makes the power to remove incident to the power to appoint in cases where no tenure of office is fixed.

I know of no law that automatically or in any other way relates to the position in question except the provisions of the civil service law above quoted.

In answer, therefore, to your inquiries I can only say that said secretary may retain his position until removed by your commission, which removal may be made by you upon your own motion and at your pleasure.

Respectfully,
EDWARD C. TURNER,
Attorney General.

968.

DISAPPROVAL OF LEASES OF CERTAIN CANAL AND RESERVOIR LANDS —NO PLAT ATTACHED TO LEASE.

COLUMBUS, OHIO, October 25, 1915.

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

DEAR SIR:—I have your communication of October 20, 1915, transmitting to me for examination the following leases of canal land and reservoir land:

	''Valuation.
''Clifford Fling, canal lands at Nelsonville	$1,000 00
Harry C. Mansfield, reservoir land at Indian lake	200 00
C. L. McLaughlin, canal lands at Newark	1,000 00''

It is recited in the body of each one of these leases that a plat of the lands leased is attached to and made a part of the lease, but I find upon an examination of the leases that no plat is attached. I am therefore returning these leases without my approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

969.

APPROVAL OF LEASES FOR CERTAIN CANAL AND RESERVOIR LANDS.

COLUMBUS, OHIO, October 25, 1915.

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

DEAR SIR:—I have your communication of October 20, 1915, transmitting to me for examination the following leases of canal and reservoir lands:

	"Valuation.
"Samuel VanVoorhis, canal lands at Newark	$4,166 66
The Quaker Oats Co., canal lands at Akron	4,166 66
John Brady, canal lands at Akron	2,000 00
John Brady, canal lands at Akron	1,000 00
Geo. S. and Carrie E. Hughes, canal lands at Newark	1,333 33
E. R. Haines, lands at Loramie reservoir	200 00
J. M. Brucken, lands at Loramie reservoir	200 00
Dr. F. W. Everest, lands at Loramie reservoir	200 00
Henry Conkle, canal lands at Logan	200 00
J. M. Conkle, canal lands at Logan	133 33
J. M. Conkle, canal lands at Logan	100 00
H. H. Conkle, canal lands at Logan	133 33
W. R. Reese, lands at Buckeye lake	100 00
L. H. Weirauch, canal lands at Troy	333 33
Frank P. and Nora B. Corbett, canal lands in Franklin county	350 00"

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

970.

OHIO STATE SANATORIUM—SUPERINTENDENT MAY ACCEPT PAYMENTS REQUIRED BY LAW FROM APPLICANTS FOR ADMISSION TO OR INMATES IN SUCH INSTITUTION—WHEN SUPERINTENDENT REPORTS APPLICANT OR INMATE NOT FINANCIALLY ABLE TO PAY AMOUNT FIXED BY LAW, IT IS DUTY OF BOARD OF STATE CHARITIES TO INVESTIGATE SUCH CASE.

Applicants for admission to or inmates of the Ohio state sanatorium may pay the amount fixed by law under section 2068, *G. C., as amended, to the superintendent of the sanatorium.*

Board of state charities is only required to make investigation of such cases as may be reported by the superintendent for reasons provided by law.

Sections 1815-13, 1815-14 *and* 1815-15, *G. C., are to be read in connection with section* 1815-9, *G. C.*

COLUMBUS, OHIO, October 27, 1915.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge the receipt of your request for an opinion, which is as follows:

"September 8, 1915.

"Dear Sir:—At a meeting of our board last night we considered the relation of house bill No. 154 to senate bill No. 297, which appear on pages 558 and 500, respectively, of Ohio Laws, 106.

"You will note that the first mentioned act was filed in the office of the secretary of state one day after the other was filed.

"Section 2068, as amended, provides for the advance payment of five dollars each week by patients at the state sanatorium, seemingly intended to those who volunteer to do so.

"Section 1815-13 seems to imply that it is the duty of this board to make collections for the support of *all* patients, whether received at the institution on voluntary agreement to pay, or upon order to pay after investigation by agents of this board.

"It seems to be very definite from the terms of senate bill No. 297, that the board of state charities cannot receive funds except as provided in sections 1352-5 and 1653, unless you hold that house bill No. 154, because of later legal enactment takes precedence over senate bill No. 297.

"Further, section 1816 seeks to make certain changes in the practice, common for many years, in regard to incidental and other expenses of inmates of state institutions.

"We desire to ascertain from you the following:

"1. Have officers of the state sanatorium the right, or is it their duty to accept payments under section 2068?

"2. If you hold that they have no such right or duty, and inasmuch as it seems desirable in some cases to secure payment in advance, would it be legal or practicable for the treasurer of state to designate some officer of the said institution to act as agent for him in making advance collections each week?

"3. If either of the above are not possible, has the state by certification to the treasurer of state by this board through the office of the auditor of state the right to render bills in advance of service rendered to carry out the provisions of section 2068?

"4. Do you consider the provisions of section 1815-9, in regard to liability for support, to apply to house bill No. 154? If this section does not apply, in what manner can you construe the expression: 'Person legally responsible for his support,' as found in sections 1815-13 and 1815-14?

"5. If house bill No. 154 is construed as amending or repealing certain portions of senate bill No. 297, please set forth as fully as possible the extent to which the latter act repudiates or changes the provisions of the former.

"Inasmuch as these acts are already in effect, but we have not been able to satisfactorily reconcile the same to some of the seeming conflicts either before or at the meeting of the board, it is important that as early a reply as possible be made, consistent with a thorough study of the whole situation.

"Yours very truly,

"H. H. SHIRER, Secretary."

Section 2068 of the General Code, as amended, page 558 of 106 Ohio Laws, is as follows:

"Any citizen of this state of more than seven years of age, suffering from pulmonary tuberculosis in the incipient or early stage, as deter-

mined by the superintendent, may be admitted to the sanatorium upon payment in advance of five dollars each week, which charge shall fully cover all expenses for medical treatment, medicine, nursing, board, lodging and laundry. Payment for the support of patients in the sanatorium shall be made in accordance with the provisions of section 1815-13, 1815-14, and 1815-15 of the General Code."

Sections 1815-13, 1815-14 and 1815-15, which are supplemental provisions to be found on page 559 of 106 Ohio Laws, are as follows:

"Sec. 1815-13. It shall be the duty of the board of state charities to make collections for the support of patients at the Ohio state sanatorium. When the superintendent of the Ohio state sanatorium shall report to the board of state charities that an applicant for admission to or an inmate of that institution or any person legally responsible for his support is not financially able to pay the amount fixed by section 2068 of the General Code, it shall be the duty of the board of state charities by its authorized agents to make a thorough investigation as is provided by law for such investigations in other institutions.

"Sec. 1815-14. If after the investigation provided in the next preceding section it shall be found that said applicant or inmate or any person legally responsible for his support is unable to pay the amount fixed by law, said board of state charities shall determine what amount, if any, said applicant or inmate or any person legally responsible for his support shall pay. The difference between the amount so determined and the amount fixed by section 2068 of the General Code shall be paid by the county in which said applicant or patient has a legal residence. The amount so determined to be paid by the county shall be paid from the poor fund on the order of the county commissioners."

"Sec. 1815-15. No county that is maintaining a county tuberculosis hospital or has joined in the erection or maintenance of a district tuberculosis hospital or has contracted with the proper authorities of a county, district or municipal tuberculosis hospital for the care and treatment of residents of that county suffering from tuberculosis shall be compelled to support patients in the Ohio state sanatorium, but the county commissioners of any such county may agree to support or aid in the support of a resident of that county in the Ohio state sanatorium."

To arrive at a proper solution of the questions propounded it will be necessary to review briefly the history of the law with reference to the duties cast on the board of state charities to investigate as to the financial condition of inmates of benevolent institutions of the state, and also as to the financial condition of those persons liable for their support.

Prior to the enactment of house bill No. 108 (sections 1815 to 1815-10 of the General Code), to be found at page 157 of the 101 O. L., inmates of benevolent institutions were maintained by the state as a general proposition.

House bill 108, referred to above, had for its purpose the inauguration of a plan whereby either the estate of the inmate or other person liable for his support should be charged for said support not to exceed a fixed maximum amount.

Machinery was provided for the carrying out of the purpose of the act by providing that the board of state charities, through its authorized agents, should conduct the necessary investigations so that the information as to the financial conditions of the inmates or persons liable for their support might be available

as the basis of an order for payment for support either from the estate of the inmate or by some other person liable for his support. Upon receipt of a copy of the order the proper superintendent was charged with the duty of collecting the amount fixed in the order.

Section 2068 of the General Code, as amended, *supra,* provides for the payment *in advance* of five dollars per week as a condition for the admission of a patient to the Ohio state sanatorium, and your first question is as to the right or duty of the officers of the sanatorium to collect the amount stated.

Reference is made to section 1815-13 as amended, *supra,* and it is observed by you that the section referred to seems to imply that the board of state charities is to make collections for the support of *all* patients whether received at the institution on voluntary agreement to pay, or upon order to pay after investigation by agents of the board.

Section 2068 of the General Code, as amended, *supra,* provides, among other things, that "payments for the support of patients in the sanatorium shall be made in accordance with the provisions of sections 1815-13, 1815-14 and 1815-15."

Under the provisions of section 1815-13 of the General Code, *supra,* it is provided that "it shall be the duty of the board of state charities to make collections for the support of patients at the Ohio state sanatorium," however, the question that suggests itself is when should that duty attach. It seems to be clear that the duty of the board of state charities to act only attaches under the further provisions of the statute which are as follows:

> "When the superintendent of the Ohio state sanatorium shall report to the board of state charities that an applicant for admission to or an inmate of that institution or any person legally responsible for his support is not financially able to pay the amount fixed by section 2068 of the General Code, it shall be the duty of the board of state charities by its authorized agents to make a thorough investigation as is provided by law for such investigations in other institutions."

Upon inquiry I find that the practice is and has been for the managing officer of the sanatorium to make the collection of the amount fixed by statute in cases where the patient is able to pay, and I am of the opinion, in answer to your first question, that so long as the patient applying for admission is financially able to pay and until the superintendent report inability to so pay, that the board of state charities has no function to perform, and that the superintendent has the authority, and it is his duty, to collect in advance the charges stipulated as a weekly charge for the support of a patient.

The answer to your first question obviates the necessity of further consideration of your second and third questions.

Your fourth question is as follows:

> "Do you consider the provisions of section 1815-9, in regard to liability for support, to apply to house bill No. 154? If this section does not apply, in what manner can you construe the expression: 'Person legally responsible for his support,' as found in sections 1815-13 and 1815-14?"

Section 1815-9 of the General Code is as follows:

> "It is the intent of this act that a husband may be held liable for the support of a wife while an inmate of any of said institutions, a wife for a husband, a father or mother for a son or daughter, and a son or daughter, or both, for a father or mother."

In answer to your fourth question it is my opinion that section 1815-9 is to be read in connection with house bill No. 154, the last three paragraphs thereof, namely, sections 1815-13, 1815-14 and 1815-15, being supplements to section 1815 of the General Code. Section 1815-9 of the General Code, *supra,* provides a guide for the state board of charities in fixing the responsibility of the proper persons in such cases as an investigation may be made necessary for that purpose, and in the present case such a condition would only arise when the superintendent of the sanatorium made the report provided for in section 1815-13 of the General Code, *supra.*

Your Mr. Shirer has asked that the fifth question in your letter be withdrawn, hence no attention will be given the same.

It is my opinion, therefore, that under section 2068 of the General Code, as amended, *supra,* patients may be admitted to the Ohio state sanatorium and maintained there on payment in advance of five dollars per week, and in case the superintendent of the sanatorium reports to the board of state charities that an inmate or an applicant for admission, or anyone legally responsible for his support is not financially able to pay the amount fixed by law, it *then* becomes the duty of the board to investigate, as provided in section 1815-13 of the General Code, supra. Sections 1815-13 and 1815-14 of the General Code are to be read in connection with section 1815-9 of the General Code, *supra.*

Respectfully,
EDWARD C. TURNER,
Attorney General.

971.

AGRICULTURAL COMMISSION—FORM OF BOND—DEPUTY STATE WARDENS—SPECIAL WARDENS.

COLUMBUS, OHIO, October 27, 1915.

HON. JOHN C. SPEAKS, *Chief Warden, Fish & Game Department, Board of Agriculture, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department a form of bond, with the request that I advise you as to certain language therein.

In answering your letter I have deemed it more proper to prescribe a form of bond to be used under sections 1391 and 1392, of the General Code (106 O. L., 170), for deputy state wardens and special wardens.

Section 1391, G. C., provides as follows:

> "The board of agriculture shall appoint a chief warden and such number of deputy state wardens and special wardens as it deems necessary. The chief warden and each deputy state warden shall hold his office for a term of two years unless sooner removed by the board. Each special warden shall have the same powers and perform the same duties as a deputy state warden."

Section 1392, G. C., provides as follows:

> "Before entering upon the discharge of the duties of his office, each warden shall give bond to the state; the chief warden in the sum of two

thousand dollars, each deputy state warden in the sum of two hundred dollars, and each special warden in the sum of five hundred dollars, with two or more sureties approved by the board of agriculture, conditioned for the faithful discharge of the duties of his office. Such bond, with the approval of the board and the oath of office indorsed thereon, shall be deposited with the board and kept in its office."

The following form of bond will comply with the statutes foregoing quoted:

"'DEPUTY STATE WARDEN'S BOND.

"(Section 1392, 106 O. L., 170.)

"KNOW ALL MEN BY THESE PRESENTS: That we,---------- ---------- as principal, and ---------- ---------- ---------- as sureties, are held and firmly bound unto the STATE OF OHIO in the penal sum of two hundred dollars ($200.00), for the payment of which well and truly to be made we jointly and severally bind ourselves, our heirs, executors, administrators, successors and assigns.

"Signed by the said---------- as principal and by the said---------- ---------- as sureties, and their seals attached, this -------- day of ----------, 19---.

"The condition of the above obligation is such that, whereas, the said ---------- ----------has been duly appointed by the board of agriculture of Ohio under the provisions of section 1391, of the General Code of Ohio, a deputy state warden for a term of two years, commencing on the -------- day of----------, 19---.

"NOW, THEREFORE, if the above named---------- shall faithfully perform his duties as such deputy state warden, then this obligation to be void, otherwise, to be and remain in full force and virtue in law.

----------(Seal)
Principal.
----------(Seal)
----------(Seal)
----------(Seal)
Sureties.

Approved: ----------19---.

Board of Agriculture."

"OATH OF OFFICE OF DEPUTY STATE WARDEN

"I, ----------
do solemnly swear (affirm) that I will support the constitution of the

United States and the constitution of the state of Ohio, and will faithfully and impartially discharge the duties of deputy state warden during my continuance in office to the best of my skill and ability.

"Sworn to before me and subscribed in my presence this ---------- day of ----------, 19---.

(Title of officer.)"

"The bond must be approved by the state board of agriculture. If personal bond is given there must be at least two sureties so approved.

"If surety company bond is given, the authority of the agent to sign such bond must be attached thereto, and likewise the last financial statement of the surety company."

The above bond is prescribed for the deputy state warden. If a special warden is appointed, the amount of the bond should be $500.00, and the condition of such bond should read as follows:

"The condition of the above obligation is such that, whereas, the above named ----------has been duly appointed by the board of agriculture of Ohio under the provisions of section 1391, of the General Code of Ohio, a special warden,

"NOW, THEREFORE, if the above named---------- ----------shall faithfully perform his duties as such special warden, then this obligation to be void, otherwise to be and remain in force and virtue in law."

and the oath of office should be as follows:

"OATH OF OFFICE OF SPECIAL WARDEN

"I, ----------
do solemnly swear (affirm) that I will support the constitution of the United States and the constitution of the state of Ohio, and will faithfully and impartially discharge the duties of special warden during my continuance in office to the best of my skill and ability."

The rest of the two bonds, except as otherwise mentioned, is identical.

Respectfully,

EDWARD C. TURNER,

Attorney General.

972.

INDUSTRIAL COMMISSION—WORKMEN'S COMPENSATION ACT—COMPENSATION PAID TO EMPLOYES OR THEIR DEPENDENTS—SECTION 41, OF ACT, NOT ONLY PROHIBITS ATTACHMENT OF COMPENSATION DUE EMPLOYE BY HIS CREDITORS, BUT ALSO PREVENTS VOLUNTARILY ASSIGNING HIS RIGHT TO RECEIVE COMPENSATION TO ANOTHER—DUPLICATE WARRANTS CAN ONLY BE ISSUED TO INJURED EMPLOYE.

1. *An employe entitled to compensation from the state insurance fund cannot assign his right to receive such compensation.*

2. *The industrial commission of Ohio cannot issue duplicate warrants in payment of compensation out of the state insurance fund to any person other than the injured employe or the dependents of a killed employe.*

COLUMBUS, OHIO, October 27, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of a communication under date of October 20, 1915, which is as follows:

> "Section 41 of the workmen's compensation act provides as follows:
>
> " 'Compensation before payment shall be exempt from all claims or creditors and from any attachment or execution, and shall be paid only to such employes or their dependents.'
>
> "On the 11th day of August, 1913, the state liability board of awards made an award amounting to the sum of $10.29 to one John Gordan. Prior to this date, it was necessary that Mr. Gordan go to New York city. He was without funds, and his employer paid to him a sum of money equivalent to the award made in his claim by the liability board of awards. The employer took from this employe a receipt or assignment, which reads as follows:
>
> " 'August 11th, 1913.
>
> " 'Received from B. F. Smith, $10.29, payment in full.'
>
> "Warrant covering the award made by the commission was forwarded to the employer in order that he might have same endorsed by the claimant so that it could be cashed by him. However, he has been unable to locate Mr. Gordan, and has made application to the commission for the issuance of another warrant to replace the one sent him.
>
> "Your opinion is desired as to whether, in view of the provisions of section 41 above quoted, the commission can properly issue a duplicate warrant in favor of the employer, in the same amount as the warrant issued in this case in favor of the claimant."

The question which you propound is as to whether, in view of the provisions of section 41 of the workman's compensation law, or section 1465-88, G. C., the commission can properly issue a duplicate warrant in favor of the employer in the same amount as the warrant issued in this case in favor of the claimant.

I beg to call your attention to section 21 of the workman's compensation law, or section 1465-68 of the General Code, in which the following language is used, referring particularly to the second paragraph of this section:

*"Every employe mentioned in subdivision two of section fourteen hereof, who is injured, and the dependents of such as are killed in the course of employment, * * * shall be entitled to receive, either directly from his employer as provided in section twenty-two hereof, or from the state insurance fund, such compensation for loss sustained on account of such injury or death."*

I also refer to section 25 of the workmen's compensation law, or section 1465-72, G. C., from which the following is quoted:

"The state liability board of awards shall disburse the state insurance fund to such employes of employers as have paid into said fund the premiums applicable to the classes to which they belong, who have been injured in the course of their employment."

These sections clearly set forth the intent and spirit of the workmen's compensation law in that it would appear from the reading of the two sections above referred to that it was the purpose and intent of the legislature, in the enactment of this law, to have compensation paid only to the injured employe or to the dependents of a killed employe. Nowhere can it be found in this statute where any other person or persons are authorized to receive the benefits under the workmen's compensation law other than the employe or his dependents in case he is killed.

Section 41 of the workmen's compensation law, section 1465-88, G. C., provides as follows:

"Compensation before payment shall be exempt from all claims or creditors and from any attachment or execution, and shall be paid only to such employes or their dependents."

The language used in section 41 is clear, plain and explicit and provides that compensation shall be paid only to such employes or their dependents.

In view of section 41, and the sections referred to above, I am constrained to the belief that compensation can be paid only to the injured employe himself or to his dependents in case he is killed.

I call your attention to the case of in re Berg, claim No. 47,170, which was decided by the industrial commission of Ohio on August 24th, 1914, containing a construction and interpretation of section 41, the section in question in your inquiry. This case is reported in 6 N. C. C. A., page 1238. The commission, in passing upon section 41, used the following language:

"This section seems to not only prohibit the attachment of compensation due to an injured employe by his creditors, but to prevent the applicant from voluntarily assigning his right to receive compensation to another. The provision with reference to the payment of compensation, that it shall be paid only to such employes or their dependents, would seem to preclude the commission from authorizing such payment even in cases in which voluntary assignment of their rights are made by injured employes. We feel there is no doubt about the construction we have given this section being the correct one. The assignment of claimant's right to Mrs. Bevington will not be recognized, but compensation due to claimant will be paid direct to him, as the statute directs."

I concur with your commission in its interpretation of section 41, supra. My conclusion, therefore, is that the commission does not have authority to issue a duplicate warrant in payment of compensation to any person other than to the injured employe.

Respectfully,
EDWARD C. TURNER,
Attorney General.

973.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS IN WYANDOT COUNTY, OHIO.

COLUMBUS, OHIO, October 27, 1915.

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

DEAR SIR:—I have your communication of October 25, 1915, enclosing for my examination final resolutions as to the following roads:

"Bucyrus-Upper Sandusky, Wyandot county, Pet. No. 1212, I. C. H. No. 200;

"Upper Sandusky-Bellevue rd., Wyandot county, Pet. No. 1217, I. C. H. No. 267."

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

974.

BOARD OF EDUCATION OF RURAL SCHOOL DISTRICT—HAS AUTHORITY TO TRANSFER PUPILS IN ANY GRADE FROM ONE SUBDISTRICT SCHOOL TO ADJOINING SUBDISTRICT SCHOOL WITHIN SAID RURAL DISTRICT SUBJECT TO PROVISIONS OF SECTIONS 7731, G. C., AND 7735, G. C.—RIGHT OF BOARD TO ASSIGN EIGHTH GRADE PUPILS TO ADJOINING SCHOOL—PUPILS LIVING MORE THAN ONE AND A HALF MILES CANNOT DEMAND SUCH GRADE BE MAINTAINED IN NEARER SCHOOL—RIGHT OF PUPILS WHO LIVE MORE THAN TWO MILES—WHEN TRANSPORTATION DEMANDED, PUPILS MAY NOT DEMAND THAT SAID GRADE BE MAINTAINED IN SUBDISTRICT—SECTION 7731-1, G. C., 106 O. L., 496, DOES NOT REPEAL BY IMPLICATION SECTION 7731, G. C., 104 O. L., 140.

Under the provisions of section 7684, G. C., taken in connection with the provisions of sections 7644 and 7646, G. C., the board of education of a rural school district has authority, in the exercise of its discretion, to transfer all the pupils in any grade from one subdistrict school to an adjoining subdistrict school within said rural district by giving sufficient notice to said pupils of such assignment, subject, however, to the provision of the first part of section 7731, G. C., and to the further provisions of section 7735, G. C. If, however, said board of education, acting under authority of section 7731, G. C., provides transportation for all of the pupils affected by such order of assignment, said pupils may not exercise the right conferred by the provisions of section 7735, G. C.

Where the board of education of a rural school district assigns the pupils of the eighth grade in one school to the same grade in an adjoining school within said rural school district the pupils of said grade, living more than one and one-half miles from the school to which they are assigned, have not the right to demand that such grade be maintained in the school nearer to them in their own subdistrict, but said pupils may exercise the right conferred by the provisions of section 7735, G. C., unless transportation be provided by the board of education to the school to which said pupils have been assigned.

If any of the pupils of said grade live more than two miles from the school to which they are assigned, section 7731, G. C., makes it mandatory on said board of education to furnish transportation for such pupils.

If transportation is provided for the pupils of said grade said pupils may not demand that said grade be maintained in the school in the subdistrict in which they reside.

The provisions of section 7731-1, G. C., as found in 106 O. L., 496, do not repeal by implication the provision of section 7731, G. C., as amended in 104 O. L., 140, which requires that where transportation is provided the conveyance must pass within one-half mile of the respective residences of all pupils, except when such residences are situated more than one-half mile from the public road.

COLUMBUS, OHIO, October 27, 1915.

HON. GEORGE C. VON BESELER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—In your letter under date of October 15th you state that in one of the rural school districts of your county the board of education of said district has discontinued the first four grades in one of the subdistrict schools and the fifth, sixth, seventh and eighth grades in the school in the adjoining subdistrict; that the pupils in said first four grades in the former school have been assigned

to the latter school and the pupils in the last four grades of the latter school have been assigned to the former school, and that transportation has been provided for said pupils in accordance with such assignment, the purpose being to give the teacher in each of said subdistrict schools four grades.

You further state that in another rural school district the board of education of such district has discontinued the eighth grade in one of the subdistrict schools and has assigned the pupils of such grade to a consolidated school in an adjoining subdistrict, each teacher in said consolidated school having charge of only two grades.

You request my opinion on several questions which may be stated as follows:

> "1. Had the board of education of the rural school district, first above referred to, authority to make such an assignment of the pupils residing in the subdistricts under its control?
>
> "2. In the case in which the pupils of the eighth grade in one school were assigned to the same grade in an adjoining consolidated school, have those pupils of said grade living more than one and one-half miles from said consolidated school the right to demand that said grade be maintained for them in the school nearer to them in their own district or may they attend the nearest school in another school district under provision of section 7735, G. C.?
>
> "3. If any of the pupils of said grade live more than two miles from the school to which they have been assigned, is it mandatory on said board of education to furnish transportation for such pupils?
>
> "4. May said pupils demand that an eighth grade be maintained in the school in the subdistrict in which they reside, even though transportation should be provided for them?
>
> "5. Do the provisions of section 7731-1, G. C., as found in 106 O. L., 496, repeal by implication the provision of section 7731, G. C., as found in 104 O. L., 140, which requires that where transportation is provided, the conveyance must pass within one-half mile of the respective residences of all pupils, except when such residences are situated more than one-half mile from the public road?"

Preliminary to a consideration of the questions submitted by you I wish to note that section 4716, G. C., was repealed by the act of the general assembly as found in 104 O. L., 133-145, which became effective May 20, 1914. This statute provided in part as follows:

> "The division of township school districts into subdistricts as they exist shall continue and be recognized for the purpose of school attendance, but the board of education may increase or diminish the number or change the boundaries of the subdistricts at any regular meeting."

It must be observed, however, that while these provisions of section 4716, G. C., were not re-enacted, section 7646, G. C., as amended in 104 O. L., 225, is still in force and provides:

> "The board of education of each rural school district shall establish and maintain at least one elementary school in each subdistrict under its control, unless transportation is furnished to the pupils thereof as provided by law."

Section 7644, G. C., provides:

> "Each board of education shall establish a sufficient number of elementary schools to provide for the free education of the youth of school age within the district under its control, at such places as will be most convenient for the attendance of the largest number thereof. Every elementary day school so established shall continue not less than thirty-two nor more than forty weeks in each school year. All the elementary schools within the same school district shall be so continued."

It seems clear, therefore, that while the provisions of section 4716, G. C., requiring that the subdistricts of a township school district (now known as rural school districts under provision of section 4735, G. C., as amended in 104 O. L., 138), as established at the time said section as amended in 97 O. L., 343, became effective, be continued and recognized for the purpose of school attendance, but authorizing the board of education of such township district to increase or diminish the number or change the boundaries of the subdistricts at any regular meeting, are no longer in force, it was the intention of the legislature in re-enacting the provisions of section 7646, G. C., as above quoted, that the subdistricts of a township district as established under authority of section 7644, G. C., prior to the enactment of the so-called new school code in 1914, should continue as subdistricts or subdivisions of the rural school district and be recognized for the purpose of school attendance, until such time as the schools in such subdistricts should be centralized under provision of section 4726, G. C., as amended in 104 O. L., 139, and as supplemented in 106 O. L., 444, or suspended by the board of education of such rural school district in the exercise of its discretion under provision of the first part of section 7730, G. C., as amended in 104 O. L., 139, and as again amended in 106 O. L., 396; or until such school or schools should be suspended by said local board of education under the mandatory provision of the latter part of said section 7730, G. C., as amended in 104 O. L., when the average daily attendance for the preceding year was below twelve, or upon the order of the county board of education directing such suspension under said provision of section 7730, G. C., as amended in 106 O. L., 396, when the average daily attendance for the preceding year has been below ten.

Section 7730, G. C., as amended in 106 O. L., further provides that:

> "Any suspended school as herein provided, may be re-established by the suspending authority upon its own initiative, or upon a petition asking for re-establishment, signed by a majority of the voters of the suspended district, at any time the school enrollment of the said suspended district shows twelve or more pupils of lawful school age."

The term "suspended district" as above used clearly refers to the subdistrict of the rural school district and is evidence, I think, of the legislative intent hereinbefore referred to.

It should be observed in this connection that since the new school code has been in force the county board of education has had authority, under provisions of section 4736, G. C., as found in 104 O. L., 138, and as carried into section 4692, G. C., as amended in 106 O. L., 397, to change district lines and transfer territory from one rural or village school district to another, and under provision of section 4736, G. C., as amended in 106 O. L., 397, the county board may create

a new school district from one or more rural or village school districts or parts thereof. In making such changes the county board is not confined to the boundary lines of subdistricts heretofore established.

However, until such changes have been made in the manner above set forth, either by the local board of education or by the county board, it seems clear that the subdistricts of the rural school district as established by the board of education of said rural district under provision of section 7644, G. C., are still recognized as the basis in determining the residence of pupils for the purpose of school attendance.

Coming now to a consideration of your first question it is necessary to determine the proper construction to be given to the provisions of section 7684, G. C., having in mind the provisions of sections 7644 and 7646, G. C., as above quoted.

Section 7684, G. C., provides:

> "Boards of education may make such an assignment of the youth of their respective district to the schools established by them as in their opinion best will promote the interests of education in their districts."

In view of the provisions of section 4726, G. C., as found in 104 O. L., 139, and section 4726-1, G. C., as found in 106 O. L., 442, authorizing the centralization of schools in the manner therein provided, and in view of the provisions of section 7730, G. C., as amended in 104 O. L., 139, and as again amended in 106 O. L., 398, authorizing the suspension of any or all of the schools of a rural or village district and making such suspension compulsory under the conditions therein provided in so far as the local board of education is concerned, taken in connection with the provisions of sections 4735-1 and 4735-2, G. C., as found in 104 O. L., 138, authorizing the dissolution of a rural school district in the manner prescribed by said sections, it seems clear that it was the intention of the legislature in the enactment of the so-called new school code to give ample authority to county boards of education to change district lines and to combine territory, and to local boards of education to combine the schools of their respective districts and to assign the pupils of said districts to said schools as combined or as centralized in the manner hereinbefore provided, to the end that said schools may be standardized and that educational advantages may be made as nearly uniform as possible throughout the state.

The provisions of section 7684, G. C., as well as the provisions of sections 7644 and 7646, G. C., must be so construed as to give effect to said legislative intent.

I am of the opinion therefore in answer to your first question that, under the provisions of said section 7684, G. C., taken in connection with the provisions of said sections 7644 and 7646, G. C., the board of education of the rural school district first referred to in your inquiry had authority in the exercise of its discretion to transfer all the pupils of any grade from one subdistrict school to an adjoining subdistrict school within said rural district, by giving sufficient notice to said pupils of such assignment, subject however to the provisions of section 7735, G. C., that:

> "When pupils live more than one and one-half miles from the school to which they are assigned in the district where they reside, they may attend a nearer school in the same district, or if there be none nearer therein, then the nearest school in another school district, in all grades below the high school,"

and the further provision of section 7731, G. C.:

> "In all rural and village school districts where pupils live more than two miles from the nearest school the board of education shall provide transportation for such pupils to and from such school."

Section 7731, G. C., further provides that:

> "The transportation for pupils living less than two miles from the school house, by the most direct public highway shall be optional with the board of education."

Inasmuch, however, as the board of education of said rural school district, acting under authority of section 7731, G. C., provided transportation for all of the pupils affected by this order of assignment, I do not think any of said pupils could exercise the right conferred by the provision of section 7735, G. C., as above quoted.

I am of the opinion, however, in answer to your second question that while the eighth grade pupils, therein referred to, living more than one and one-half miles from the school to which they were assigned, would not have the right to demand that such grade be maintained in the school nearer to them in their own subdistrict, nevertheless said pupils may exercise the right conferred by the above provision of section 7735, G. C., unless transportation be provided by the board of education to the school to which said pupils have been assigned.

From what has already been said it follows that if any of the pupils of said grade live more than two miles from the school to which they have been assigned, section 7731, G. C., makes it mandatory on said board of education to furnish transportation for such pupils. Your third question must, therefore, be answered in the affirmative.

If transportation is provided for the pupils of said eighth grade, it follows from my holding in answer to your first question that said pupils may not demand that said grade be maintained in the school in the subdistrict in which they reside and this is especially true in view of the provisions of the first part of section 7730, G. C., as found in both of its amended forms, authorizing said board of education in the exercise of its discretion to suspend all of the grades of said subdistrict school and requiring said board, in case of such suspension, to provide transportation for the pupils of such school to another school in the district or to a school in another district. I am of the opinion, therefore, that your fourth question must be answered in the negative.

Your fifth question calls for a proper construction of that part of section 7731, G. C., as amended in 104 O. L., 140, which provides that:

> "When transportation of pupils is provided, the conveyance must pass within one-half mile of the respective residences of all pupils, except when such residences are situated more than one-half mile from the public road,"

taken in connection with the supplement to said section as found in 106 O. L., 496, which provides:

> "Sec. 7731-1. The boards of education of city, village or rural school districts may by resolution designate certain places as depots from which to gather children for transportation to school, when such districts pro-

vide transportation. The places designated as depots shall be provided with a shelter and be made comfortable during cold and stormy weather. Such depots shall in no case be more than one and one-half miles from any home having children within such district."

As I view it there is nothing in the provisions of section 7731-1, G. C., which in any way contradicts or is inconsistent with the above provision of section 7731, G. C.

The effect of the provision of section 7731-1, G. C., is to merely give to the board of education of a school district, in carrying out the mandatory provision of section 7731, G. C., the right, in the exercise of its discretion, to establish depots at certain points along the route of transportation for shelter for the pupils during cold or stormy weather while waiting for the conveyance.

The provision of said section 7731-1, G. C., that:

"Such depots shall in no case be more than one and one-half miles from any home having children within such district,"

fixes the maximum distance as a condition to the establishment of such depots and in no way modifies the above provision of section 7731, G. C.

I am of the opinion therefore, in answer to your fifth question, that the provisions of said section 7731-1, G. C., do not repeal by implication the above provision of said section 7731, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney General.

975.

COUNTY BOARD OF EDUCATION—WITHOUT AUTHORITY TO LEVY TAX FOR ANY PURPOSE—NOR HAS SAID BOARD AUTHORITY TO BORROW MONEY TO PAY TRANSPORTATION OF PUPILS.

A county board of education has no authority in law to levy a tax for any purpose and may not, therefore, borrow money under section 5656, *G. C., for the purpose of paying for the transportation of pupils, furnished by said county board under provision of the latter part of section* 7731, *G. C., as amended in* 104 *O. L.,* 140.

COLUMBUS, OHIO, October 27, 1915.

HON. J. W. WATTS, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—I have your letter under date of October 21st, which is as follows:

"Our county board of education has asked me to submit to you, for your opinion, the following question:

"Has a county board of education authority to borrow money for

the purpose of paying for the transportation of pupils to school where the local board has refused both to transport such children and to pay for the same?

"Our county board of education at the beginning of the current school year entered into a contract for the transportation of certain children of school age living more than two miles from the nearest school. This contract was not made until after the local board had refused to haul such children to school, and now when there is one month's pay due the persons who have been hauling these children, the local board refuses to take any steps towards the payment of the sums due for transportation, and the question is now up to the county board as to whether they have the right to borrow money, not having any funds on hands for that purpose, to pay the persons whom they have employed to transport these children or whether they should bring suit in mandamus to compel the local board to pay these charges.

"The latter part of section 7731 provides that:

" 'When local boards of education neglect or refuse to provide transportation for pupils, the county board of education shall provide such transportation and the cost thereof shall be charged against the local school district.'

"Your department has already held in opinion No. 1226 and in a letter to me of July 15th, that a board of education may borrow money under section 5656, General Code, to pay for the transportation of pupils, but the opinion in that case related only to the right of a rural district to borrow money for that purpose. It seems to me that a county board would have the right to borrow money under section 5656, G. C., to carry out a contract which the law made it obligatory upon such board to make and, particularly so, since a person who has been hired to transport children to school has been held by your department to be an 'employe of a board of education.' "

In case the board of education of a rural or village school district neglects or refuses to provide transportation for pupils living more than two miles from the nearest school in such rural or village district, as required by the first part of section 7731, G. C., as amended in 104 O. L., 140, which provides that:

> "In all rural and village school districts where pupils live more than two miles from the nearest school the board of education shall provide transportation for such pupils to and from such school,"

the above provision of said statute, as quoted by you, makes it the duty of the board of education of the county school district to provide such transportation and charge the cost thereof against the local school district.

From your statement of facts it appears that after the local board of education of one of the school districts within your county school district refused to provide transportation for those pupils residing in said school district entitled to such transportation under provision of the first part of said section 7731, G. C., the county board of education entered into a contract for the transportation of said pupils and that said local board of education now refuses to take any steps toward the payment to the person or persons furnishing such transportation of the amount due for the first month according to the terms of said contract.

You inquire whether said county board of education may, under authority of section 5656, G. C., borrow money for this purpose.

The only fund under the control of the county board of education is the "county board of education fund" established under authority of section 4744-3, G. C., as found in 104 O. L., 143, which section prior to its amendment in 106 O. L., 399, provided as follows:

> "The county auditor when making his semi-annual apportionment of the school funds to the various village and rural school districts shall retain the amounts necessary to pay such portion of the salaries of the county and district superintendents as may be certified by the county board. Such amount shall be placed in a separate fund to be known as the 'county board of education fund.' The county board of education shall certify under oath to the state auditor the amount due from the state as its share of the salaries of the county and district superintendents of such county school district for the next six months. Upon receipt by the state auditor of such certificate, he shall draw his warrant upon the state treasurer in favor of the county treasurer for the required amount, which shall be placed by the county auditor in the county board of education fund."

The only change made in said statute as amended in 106 O. L., is to make it the duty of the county auditor, when making his semi-annual apportionment of the school funds to the various village and rural school districts, to retain, in addition to the amount necessary to pay such portion of the salaries of the county and district superintendents as may be certified by the county board, the amount necessary for the contingent expense of the county board of education as certified by said board to said county auditor.

That part of said county board of education fund retained by the county auditor out of the school funds of the local school districts for the payment of that portion of the salaries of the county and district superintendents, as certified by the county board of education to said county auditor, may only be applied to that purpose.

The contingent fund of said county board of education fund, as above established, may be increased by the surplus transferred from the dog tax fund under provision of section 5653, G. C., as found in 104 O. L., 145, and by fees collected from applicants for examination by the board of county school examiners, paid into the county treasury by the clerk of said board and set apart by the county auditor to the credit of the county board of education fund under provision of section 7820, G. C., as amended in 104 O. L., 104.

If, therefore, there was money in the contingent fund of the county board of education fund available for the purpose mentioned in your inquiry, I am of the opinion that said money could be applied by the county board of education to the discharge of the obligation of said county board according to the terms of its contract with the person or persons furnishing said transportation. It would still be the duty of said county board, however, to charge the amount so expended against the local board of education and require said local board to reimburse the county board of education fund in said amount.

The county board of education has no authority in law to levy a tax for any purpose. The only sources of the county board of education fund as provided by statute are those above set forth.

I am of the opinion therefore, in answer to your question that the county board of education may not borrow money under provision of section 5656, G.

C., for the purpose of paying for the transportation of the pupils, referred to in your inquiry according to the terms of the aforesaid contract.

In opinion No. 612 of this department, rendered to you under date of July 15, 1915, it was held that a contract for furnishing transportation is a contract of employment within the meaning of te latter part of section 5661, G. C., and is therefore exempt from the provision of section 5660, G.C., which requires the filing of a certificate of available funds by a board of education as a condition precedent to the making of a contract, and that the board of education of a rural school district may borrow money under authority of section 5656, G. C., to pay the charge against said district made by the county board of education, in case said county board furnishes transportation to pupils of said district as required by section 7731, G. C., as amended in 104 O. L., 140, when said local board fails or neglects to furnish such transportation, or to pay for services actually rendered in a contract of employment for this purpose.

In keeping with my former holding I am of the opinion that it would clearly be the duty of the local board of education of the school district, referred to in your inquiry, to reimburse the county board of education fund of your county school district in an amount equal to the sum which the county board would expend from month to month out of its contingent fund for the transportation of the pupils residing in said local school district and entitled to such transportation under the above provision of section 7731, G. C., according to the terms of its contract with the person or persons providing said transportation, if there were money in said fund available for said purpose.

Inasmuch as said county board has no money in said contingent fund available for said purpose, and may not borrow money for said purpose, I am of the opinion that said county board has authority, under provision of the latter part of said section 7731, G. C., to demand from said local board of education payment of the amount now due under the terms of the aforesaid contract and if said local board has funds available for said purpose and refuses to make said payment, or if said local board is without available funds and refuses to borrow money, under authority of said section 5656, G. C., for the purpose of providing the necessary fund to make such payment, said county board of education may, by an action in mandamus compel said local board to take such action as may be necessary to make said payment.

Respectfully,
EDWARD C. TURNER,
Attorney General.

976.

ROADS AND HIGHWAYS—WHEN TOWNSHIP TRUSTEES HAVE ISSUED BONDS OF RURAL SCHOOL DISTRICT CREATED UNDER SECTION 7033, G. C., BEFORE ITS REPEAL AND WHERE ON SEPTEMBER 6, 1915, A PART OF PROCEEDS OF SAID BONDS REMAINS UNEXPENDED, TOWNSHIP TRUSTEES ARE AUTHORIZED TO EXPEND SAID BALANCE AS THOUGH SECTIONS 7033 TO 7052, G. C., HAD NOT BEEN REPEALED.

Where township trustees have issued the bonds of a road district created under section 7033, G. C., and where, on the sixth day of September, 1915, a part of the proceeds of such bond issue remains in the treasury unexpended, the right of the township trustees to expend said balance in the same manner as though sections 7033 to 7052, G. C., inclusive, had not been repealed is preserved by the saving provisions of the first part of section 303 of the Cass highway law.

COLUMBUS, OHIO, October 27, 1915.

HON. ARCHER L. PHELPS, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—I have your communication of October 19, 1915, in which you state that in Trumbull county there are ten or twelve townships organized into road districts under the provisions of sections 7033 to 7052, inclusive, of the General Code; that these townships have, by a vote of the electors, authorized and sold bonds for road improvements, running in amounts from twenty-five thousand dollars to one hundred thousand dollars; that prior to September 6, 1915, on which date the Cass highway law went into effect, the majority of these townships had expended the amount of their bond issues, but some of them had not and had balances remaining from said bond issues ranging in amounts from five thousand dollars to twenty thousand dollars. You also call attention to the fact that sections 7033 to 7052, inclusive, of the General Code, were repealed by the Cass highway law, and you inquire as to the effect, under the above stated circumstances, of the following provision found in section 303 of the Cass law:

> "* * * wherever under any law repealed by this act any organization now exists for the purpose of improving, repairing or maintaining any public road or roads, such organization shall not be affected by this act and all officers of such organization or organizations shall continue to hold office and exercise the powers heretofore exercised by them. Their successors in office with like powers shall be elected or appointed as heretofore till all contracts and obligations of such organization shall be fully met and complied with and all rights fully conserved. For such purposes such organization or organizations shall have all the rights heretofore exercised by them to hire necessary assistance, clerical or otherwise; to fund or refund any indebtedness and to levy and collect taxes or certify the same for levy and collection; to pay such debts and expenses together with salaries and other expenses of such organization or organizations; but no such organization or organizations shall contract any new obligation or obligations after the taking effect of this act, for the construction or repair of additional road or roads or the maintenance or repair of roads already improved. When all obligations existing at the time of the taking effect of this act have been fully met and complied with, such organization or organizations shall cease to exist and all property or funds

of such organization or organizations shall be and become a part of the road fund of the county in which such organization or organizations exist."

You express the view that under the above quoted provision a road district organized under sections 7033 to 7052, inclusive, of the General Code, might be prohibited from contracting any new obligation for the construction or repair of roads, remaining in existence solely for the purpose of levying taxes and paying its bonds. Assuming that such is the effect of the language above quoted and found in section 303 of the Cass highway law, you inquire as to whether the provision of section 303, transferring balances in a township road district fund to the county road fund, is constitutional and, if not constitutional, as to what is to be done with these balances.

A discussion of this matter is best introduced by a reference to sections 7033 to 7052, inclusive, of the General Code, as those sections stood prior to the going into effect of the Cass highway law.

Section 7033, G. C., authorized township trustees to create a township, or that part of a township not included within the limits of a municipal corporation therein situated, or an election precinct or part thereof within a township, into a road district. Subsequent sections provided that the road district so created should be given an appropriate name and that the township trustees might issue bonds of the road district, within a certain limitation as to amount, provided a favorable vote of the electors of the road district be first had upon the question of improving the public ways of the district and of issuing bonds. In the event of a favorable vote, the trustees were not only authorized to issue bonds, but also to employ a competent engineer and necessary assistants, determine the order and manner of the improvement, let contracts for furnishing materials and performing the labor, make payments upon the same and levy taxes to meet the bonds and interest thereon. The trustees were also authorized to designate one of their number to supervise the improvement of each working section of the public ways. Bonds issued by the township trustees were to be signed by them and attested by the township clerk.

It will be noted that the portion of section 303 of the Cass highway law referred to by you and quoted above refers to an "organization" existing "for the purpose of improving, repairing or maintaining any public road or roads." I am unable to say that sections 7033 to 7052, inclusive, of the General Code, as those sections stood prior to the going into effect of the Cass highway law, provided for an organization within the meaning of the provision referred to by you. The work of improving roads under sections 7033 to 7052, inclusive, of the General Code, was carried on by the township trustees, and the scheme of road improvement in question did not require or authorize the appointment of road commissioners or the creation of an organization other than the regular township organization consisting of the township trustees, township clerk, etc. To my mind the organization referred to in the language quoted is such an organization as was provided by sections 7095, et seq., of the General Code, as those sections stood prior to the going into effect of the Cass highway law. Under those sections not less than two nor more than four adjacent townships were authorized to organize into road districts and a separate and distinct organization for such road districts was required by the statutes. One road commissioner was appointed by the county commissioners for each township, and these road commissioners were required to take an oath of office and give a bond. All proceedings for the improvement of roads within the district, including the issue of bonds, were placed in the hands of the road commissioners appointed by the county commissioners. It will thus

be seen that under sections 7095, et seq., of the General Code, an organization was created with its own officers, while under the sections referred to by you no such organization is created, all the duties to be performed in connection with the road districts referred to by you being enjoined upon the regular township officials.

I am therefore of the opinion that the provision of that part of section 303 of the Cass highway law, above quoted, has no application to the state of facts set forth in your letter, and that as to such state of facts the controlling provision is to be found in the first part of section 303 of the Cass highway law, which reads as follows:

> "This act shall not affect or impair any contract or any act done, or right acquired of any penalty, forfeiture or punishment incurred prior to the time when this act or any section thereof takes effect, under or by virtue of any law so repealed, but the same may be asserted, completed, enforced, prosecuted or inflicted as fully and to the same extent as if such laws had not been repealed. The provisions of this act shall not affect or impair any act done or right acquired under or in pursuance of any resolution adopted by the board of commissioners of any county, the trustees of any township, or the commissioners of any road district prior to the time of the taking effect of this act, * * *"

It is my opinion that under the above quoted provision the right of the township trustees, under the circumstances set forth by you, to expend, in accordance with the provisions of sections 7033 to 7052, inclusive, of the General Code, as those sections stood prior to September 6, 1915, any balances remaining in the treasury and derived from a bond issue under section 7035, G. C., is fully preserved. It therefore becomes unnecessary to consider, in this connection, the further questions raised by you.

Answering your specific question, it is my opinion that where township trustees have issued the bonds of a road district created under section 7033, G. C., and where, on the sixth day of September, 1915, a part of the proceeds of such bond issue remains in the treasury unexpended, the township trustees are authorized to expend said balance in the same manner as though sections 7033 to 7052, inclusive, of the General Code, had not been repealed. Respectfully,

EDWARD C. TURNER,
Attorney General.

977.

BOARD OF ADMINISTRATION—CONSTITUTIONAL PROHIBITION; BOARD PRODUCING PAVING BRICK BY CONVICT LABOR AND SELLING SAME IN OPEN MARKET—CONVICT LABOR.

The Ohio Board of Administration is prohibited by section 41 of article II of the constitution of Ohio from producing paving brick by convict labor and selling the same in the open market.

COLUMBUS, OHIO, October 27, 1915.

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

DEAR SIR:—Under dates of October 4th and October 23rd, 1915, I have two communications from Mr H M Sharp, chief highway engineer, relative to certain

matters that have developed in connection with the construction of the Lancaster-New Lexington Road, I. C. H. No. 357, section "I," in Perry county.

In Mr. Sharp's first communication it is stated that the contractors for this road, Beatrice & Kinear, had ordered brick from the state brick plant at Junction City, Ohio, under the control of the Ohio Board of Administration, the brick in question to be used in the construction of this road. It was further stated that, in the opinion of some of the men at the highway department, the purchase price of the brick in question must be paid directly from the highway department to the Ohio Board of Administration and that the contractors could not pay the Ohio Board of Administration directly for the brick. Mr. Sharp further stated that he wished to be advised as to what arrangements the highway department should make with the Ohio Board of Administration in paying for these brick; that the contract was let in the regular way; that, in so far as he was advised, the state highway department was not informed at the time the contract was negotiated with the Ohio Board of Administration for the brick and that the board of administration is asking that the state highway department make payment upon the brick delivered to the contractors.

In his communication of October 23rd Mr. Sharp, in reply to a request for additional information, states that the contract between the state highway department and Beatrice & Kinear requires the contractors to furnish the brick to be used in building the road in question. In other words, the contractors are required to do all the work and furnish all the materials for the road in question, and the consideration named in their contract covers all labor and all materials. Mr. Sharp states that the state highway department has no knowledge of any arrangement, either verbal or written, with the board of administration, for the purchase of brick for the road in question and that the contractors were not given permission to purchase brick from the board of administration upon the understanding that the same should be charged to and paid by the state highway department and that the cost of the brick should be deducted from the contract price, which would otherwise be payable to the contractors. It is further stated that the state highway department has not placed with the board of administration an order for any brick to be delivered to Beatrice & Kinear for use on the road in question.

I am informed by an employe of the Ohio Board of Administration that the board received an order for the brick in question from some inspector or other employe of the state highway department and that an inspector, claiming to represent the state highway department, inspected the brick in question, at the state brick plan at Junction City, Ohio. There is no claim made, however, so far as I have been able to learn, that the state highway commissioner or any of his deputies authorized or knew of the order in question, or directed the inspection made at the plant. I am informed by the contractors that the brick in question, about ninety thousand, have been shipped to and delivered upon the site of the improvement and that the concrete base has been laid, so that the removal of these brick and the delivery of other brick would be a somewhat difficult operation.

The facts above set forth raise a question as to the right of the Ohio Board of Administration to produce, through convict labor, and sell paving brick and other similar materials. A well-nigh identical question was passed upon by my predecessor, Hon. Timothy S. Hogan, in an opinion rendered to the Ohio Board of Administration on August 27, 1913, and found at page 989 of the attorney general's report for that year.

The question passed upon in that opinion was as to the right of the board of administration, under section 2235-1, G. C., to produce and sell, through convict labor, road building and other similar materials in the open market. Section

2235-1, G. C., (102 O. L., 106) provides that the board of managers of the Ohio penitentiary, to whose powers the Ohio Board of Administration is successor, should erect certain buildings and equip the same for the manufacturing and production of crushed stone and the preparation of road building and ballasting materials to be sold in the open market.

It was held that this statute, in so far as it sought to authorize the sale of convict-made articles in the open market, was rendered inoperative by the amendment of section 41 of article II of the constitution of Ohio, adopted September 3, 1912, which amendment reads as follows:

> "Laws shall be passed providing for the occupation and employment of prisoners sentenced to the several penal institutions and reformatories in the state; and no person in any such penal institution or reformatory while under sentence thereto, shall be required or allowed to work at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be sold, farmed out, contracted or given away; and goods made by persons under sentence to any penal institution or reformatory without the state of Ohio, and such goods made within the state of Ohio, excepting those disposed of to the state or any political subdivision thereof or to any public institution owned, managed or controlled by the state or any political sub-division thereof, shall not be sold within this state unless the same are conspicuously marked 'prison made.' Nothing herein contained shall be construed to prevent the passage of laws providing that convicts may work for, and that the products of their labor may be disposed of to, the state or any political subdivision thereof, or for or to any public institution owned or managed and controlled by the state or any political subdivision thereof."

I concur in the opinion expressed by my predecessor upon the facts presented to him, and it is my opinion that under the constitutional amendment referred to above the Ohio Board of Administration is not authorized to sell in the open market brick manufactured at its plant at Junction City, and that it is limited in the sale of such brick to the state and its several political subdivisions and the public institutions owned, managed or controlled by the state and its political subdivisions.

It remains to determine whether the sale referred to in Mr. Sharp's communication is a sale in the open market or a sale to the state. Inasmuch as the contract between the state highway department and Beatrice & Kinear, contractors, requires the latter to furnish all the materials for the road in question, I am of the opinion that the sale in question cannot be regarded as a sale to the state but must be regarded as a sale in the open market and that such sale is prohibited by section 41 of article II of the constitution of Ohio. I am further of the opinion that to sanction an arrangement by which a contractor required to furnish road building materials might purchase the same from the Ohio Board of Administration and have the materials billed to the state highway department, the state highway department to deduct the contract price thereof from the amount due the contractor and pay the same to the Ohio Board of Administration, would be illegal and a manifest effort to avoid the effect of the constitutional provisions above quoted, and that such an arrangement should not be sanctioned by your department.

In other words, under the facts set forth by you, the Ohio Board of Administration is without authority to sell the brick in question to the contractors, Beatrice & Kinear, for the reason that such sale would be a sale in the open market and not a sale to the state and, therefore, in violation of section 41 of article II of the

constitution of Ohio. Furthermore, your department should not make itself a party to any arrangement designed to circumvent the constitutional provisions in question and should not recognize any contract between the Ohio Board of Administration and Beatrice & Kinear by the terms of which the latter are to purchase brick from the former, the brick to be billed to you and paid for by your department and the cost thereof deducted from any sums due to the contractors.

I understand from the contractors that they have been notified by the Ohio Board of Administration not to lay the brick in question until this matter is determined and that they do not intend to lay the brick until advised that the board of administration can lawfully sell the same to them and will, if advised that no such right exists, remove the brick in question and purchase other brick from private manufacturers.

Respectfully,
EDWARD C. TURNER,
Attorney General.

978.

ROADS AND HIGHWAYS—BONDS AUTHORIZED BY VOTE OF ELECTORS OF TOWNSHIP PRIOR TO TAKING EFFECT OF CASS HIGHWAY LAW—TOWNSHIP TRUSTEES AUTHORIZED TO ISSUE SAME BY SAVING CLAUSE, SECTION 303 OF CASS HIGHWAY LAW.

The township trustees of Washington township, Belmont county, Ohio, are authorized by the saving clause of section 303 *of the Cass road law,* 106 *O. L.,* 663, *to sell bonds of the said township, the issuance of which was authorized by a vote of the electors of the said township taken May* 5, 1915, *under authority of sections* 7033 *to* 7052, *G. C., which sections were repealed by the provisions of said Cass highway law, which went into effect September* 6, 1915.

COLUMBUS, OHIO, October 27, 1915.

HON. GEORGE THORNBURG, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—I have your request for my opinion, dated September 3, 1915, which request is as follows:

> "Under the provisions of sections 7033 to 7052, of the General Code, inclusive, on May 5, 1915, Washington township, Belmont county, Ohio, voted to sell $50,000.00 worth of bonds for the improvement of the roads of that township. On June 15, 1915, a resolution was passed by the trustees authorizing the sale of $10,000 worth of bonds under said vote, and they have advertised said $10,000 worth of bonds for sale on September 8, 1915.
>
> "Since the passage of the new Cass road law, which goes into effect on September 6th, the trustees of Washington township desire to know whether they have authority to sell the $10,000 worth of bonds, advertised, and to then advertise and sell the balance of $40,000 worth of bonds, all voted for at the election on May 5, 1915, and use the proceeds of the $10,000 worth of bonds and the remaining amount unsold for the purpose of improving the roads of Washington township.
>
> "In other words, have they gone far enough with their procedure to permit them to carry out the intention of the people under their vote, or does the change of the law prevent it?

"Please reply to this at once, as they would like to know before the sale of their bonds on September 8, 1915."

Section 303 of the Cass road law, to which you refer, (106 O. L., 663) is, in part, as follows:

"This act shall not affect or impair any contract or any act done, or right acquired of any penalty, forfeiture or punishment incurred prior to the time when this act or any section thereof takes effect, under or by virtue of any law so repealed, but the same may be asserted, completed, enforced, prosecuted or inflicted as fully and to the same extent as if such laws had not been repealed. The provisions of this act shall not affect or impair any act done or right acquired under or in pursuance of any resolution adopted by the board of commissioners of any county, the trustees of any township, or the commissioners of any road district prior to the time of the taking effect of this act. * * *"

By virtue of the vote of the electors of Washington township on May 5, 1915, as stated in your letter, the township trustees of that township acquired the right to sell bonds to the amount of $50,000.00. Authority to exercise that right and to carry out the will of the electors has been specifically preserved by the language of the section above quoted.

I am therefore of the opinion, and advise you, that the township trustees may sell the $10,000 of bonds which were authorized by them to be sold under the resolution of June 15, 1915, and that they may also proceed, at least within a reasonable time, to sell the remaining $40,000 of the said bonds. This opinion is of course based on the assumption that the board of trustees of Washington township, prior to May 5, 1915, regularly created the township into a road district under section 7033 of the General Code, that the election held on May 5, 1915, was properly conducted, and that the amount of the proposed bond issue added to the amount of any bonds previously issued by such road district and still outstanding does not exceed one hundred thousand dollars, as provided by section 7036 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

979.

PANAMA-PACIFIC INTERNATIONAL EXPOSITION—HOW DISPOSITION MAY BE MADE OF FURNITURE IN OHIO BUILDING.

The furniture at the Ohio building at the Panama-Pacific International Exposition should be sold by the commission representing the state in its participation in said exposition and the proceeds thereof turned into the state treasury.

COLUMBUS, OHIO, October 27, 1915.

HON. NEWTON M. MILLER, *Directing Commissioner, Ohio Building, Panama-Pacific International Exposition, San Francisco, Cal.*

DEAR SIR:—I acknowledge receipt of yours under date of October 8, 1915, as follows:

"Kindly inform me whether the furniture at the Ohio State House, P. P. I. E., can be sold by the members of the commission, or whether the same will have to be turned over to the adjutant general?

"We are having inquiries for furniture and many of the buildings are now contracting for the sale of theirs."

A careful examination of the statutes fails to disclose specific authority conferred upon any public official to sell the furniture in question or any part thereof.

Upon investigation, however, it is learned that there has been established a uniformly observed rule in similar cases, which is in every way consistent with sound business sense and the proper protection of the public interest. It has heretofore been the practice for the commission representing this state, when participating in expositions of a character similar to that to which you refer, to sell the building and its equipment at the close of such exposition and to turn the proceeds thereof into the state treasury.

Since, as stated above, this course would seem to be clearly in accord with the dictates of sound business judgment and a proper regard for economy, I suggest that it be followed in the matter of disposing of the furniture belonging to the state now in the Ohio state building at the Panama-Pacific International Exposition, San Francisco, California, and that the same be sold by the commission and the proceeds thereof turned into the state treasury.

Respectfully,
EDWARD C. TURNER,
Attorney General.

980.

BOARDS OF DEPUTY STATE SUPERVISORS OF ELECTIONS—LIMITED TO RATE OF ONE HUNDRED DOLLARS PER MONTH FOR TIME ACTUALLY EMPLOYED FOR NECESSARY TEMPORARY ASSISTANTS TO ITS CLERK—MAXIMUM COMPENSATION OF DEPUTY CLERK OF BOARD.

Boards of deputy state supervisors and boards of deputy state supervisors and inspectors of elections are not authorized to pay for necessary temporary assistants to the clerk in excess of the rate of one hundred dollars per month for the time actually employed.

The maximum compensation of the deputy clerk of boards of deputy state supervisors and inspectors authorized by law is one hundred and fifty dollars per month as prescribed by section 4799, G. C.

COLUMBUS, OHIO, October 27, 1915.

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

GENTLEMEN:—I have your request for opinion, which is as follows:

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

"What is the meaning of the language used in section 4877, General Code, as amended 103 O. L., page 544, which reads:

"'At a salary of not to exceed the rate of one hundred dollars per month each.'

"Does this mean that where persons are temporarily employed as assistants to the clerk of the board of deputy state supervisors of elections, that the sum of one hundred dollars should be divided by the total number of days, or the number of working days, of the month in which temporary employment of the assistants is made in order to get a per diem rate to apply to the number of days less than a month that the temporary assistants work; or may it be construed so as to permit the deputy state supervisors of elections to pay the full one hundred dollars, notwithstanding that said assistant clerk serves only a part of said month?

"Does section 4877, as amended 103 O. L., 544, repeal by implication because of being later legislation on the subject, the salary provided for deputy clerk as stated in section 4799, G. C.?

"Because our examiners are now working on election matters in Hamilton county, we would appreciate an early reply to the above questions."

Section 4877, G. C., as amended in 103 O. L., page 544, and section 4799, G. C., to which you refer, provide as follows:

"Section 4877. When necessary, the board may employ a deputy clerk and one or more clerks as temporary assistants of the clerk at a salary of not to exceed the rate of one hundred dollars per month each and prescribe their duties. * * *

"Section 4799. The deputy clerk of the board of deputy state supervisors and inspectors shall perform such duties and receive such compensation, not exceeding one hundred fifty dollars each month, as shall be determined by the board."

Your second inquiry relative to the repeal of section 4799, G. C., invites first a consideration of the act of April 23, 1904, 97 O. L., 185.

Prior to the passage of this act, the provisions of section 4877, G. C., then section 2926-c, R. S., were applicable only to city boards of elections. By this act city boards of elections were abolished and there was created in all counties containing cities in which annual registration was required, boards of deputy state supervisors and inspectors of elections (97 O. L., 192).

In this act (97 O. L., 220) it was provided that:

"The board of deputy state supervisors and inspectors of elections shall also appoint a deputy clerk who shall perform such duties and receive such compensation, not exceeding one hundred dollars per month, as shall be determined by the board,"

and in the same section the manner of selecting such deputy clerk was prescribed. This provision was amended in 98 O. L., 290, in one particular only, viz.: the maximum compensation was there increased to one hundred fifty dollars and in this form this provision was carried into the General Code as section 4799.

In the act first authorizing the selection of a deputy clerk of the board of deputy state supervisors and inspectors of elections, (97 O. L., 194) section 2926-c, R. S., clearly including within its terms deputy state supervisors and inspectors of elections, and relating thereto, provided in part as follows:

"When necessary, they may employ a deputy clerk and one or more clerks as temporary assistants of their clerk, at a salary not to exceed the rate of $100.00 per month and prescribe their duties. The period for which they are employed must always be fixed in the order authorizing

their employment, but they may be discharged sooner at the pleasure of the board. Such deputy clerk and all such assistants shall take the same oath for the faithful performance of their duties as required of the clerk of such board."

This provision, it will be observed, was carried into the General Code as section 4877, supra. If this latter provision, when originally enacted and as carried into the General Code, be construed to apply only to boards of deputy state supervisors and inspectors of elections, and that is a question not necessary of determination at this time, it cannot be said to be at all inconsistent with the provision requiring the selection and fixing the compensation of a deputy clerk by such boards, merely by reason of that part thereof which provides that: "they may employ a deputy clerk." It seems clear that a court in construing these provisions of the same act together would, of necessity, hold either that as to boards of deputy state supervisors and inspectors of elections this provision—"they may employ a deputy clerk"—was only surplusage or that it gave authority to employ an additional temporary deputy clerk whose compensation would be governed by the provisions of this section as distinguished from the compensation of the permanent deputy clerk provided for under section 4799, G. C. That is to say, prior to the amendment of section 4877, G. C., 103 O. L., 544, the appointment and compensation of a permanent deputy clerk of boards of deputy state supervisors and inspectors of elections was authorized and governed solely by the provisions of section 4799, G. C. No change whatever was made in the provisions of section 4877, G. C., by the amendment in 103 O. L., 544, except to add thereto the following:

"The compensation of the deputy clerk and the assistant clerks shall be equally divided between the city and county."

There was in this amendment manifestly no purpose to effect a change in the application of the original provisions of this section, nor was there any purpose to in any way thereby affect the operation or to repeal the provisions of section 4799, G. C., which are applicable only to the permanent deputy clerk required to be chosen at the organization of the board, under the provisions of the act of April 23, 1904, 97 O. L., 220, as amended by the act of April 2, 1906, 98 O. L., 290-291, which were carried into and now constitute section 4795, G. C. From this it follows that the permanent deputy clerk of boards of deputy state supervisors and inspectors of elections, chosen under authority of section 4795, G. C., may receive compensation to be fixed by the board, not in excess of one hundred fifty dollars per month, under the provisions of section 4799, G. C.

Answering your second inquiry specifically, I am of the opinion that section 4799, G. C., is not repealed by the provisions of section 4877, G. C., as amended in 103 O. L., 544.

You first inquire as to the construction of the provisions of section 4877, G. C., as amended, supra, relative to the compensation of the deputy clerk and clerks therein authorized to be employed, fixing the same "at a salary not to exceed the rate of one hundred dollars per month each." This phrase, it seems, is quite clear and unambiguous, and to my mind imposes upon the board making such temporary employment, the duty of fixing a monthly compensation of all persons employed under authority of section 4877, G. C., 103 O. L., 544, at a rate not in excess of one hundred dollars per month, and it is the purpose and intent of this provision that such employe shall be paid only for the time actually employed, at a rate not in excess of one hundred dollars for a full month's service. That is to say, if the service of such cerk or deputy clerk is required for only a part of a

month, he would be entitled to only such proportion of his monthly salary as the time of his actual service bears to one month. More specifically answering your question, if the board in making such employment determines that the compensation shall be the maximum of one hundred dollars per month, and the service of such clerk or deputy clerk is required for only one-third of a month, he would then be entitled to receive for such services but one-third of one hundred dollars and the board of elections would not, therefore, be authorized to pay one hundred dollars or any other such sum by it so fixed, as the monthly compensation of such clerk or deputy clerk, except when the services of such clerk or deputy clerk are rendered for the full period of one month.

The calculation of the portion of the monthly compensation which may be paid for a period of less than a month should be based upon the actual number of days in the calendar month in which such service is rendered.

A further question suggests itself, however, as to whether deputy state supervisors and inspectors of elections and deputy state supervisors of elections may employ expert help outside of the authority and limitations upon compensation found in section 4877, G. C., supra. This question involves a consideration of the act of April 23, 1904, in the light of the state of the law upon this subject at that time.

Without undertaking an exhaustive review of the history of the legislation upon this subject, it is sufficient to observe here that in 83 O. L., 211, city boards of elections were authorized to be appointed in certain cities. In this act and on the same page, and as applicable only to such boards of elections, was originally enacted the provision of section 4877, G. C., in exactly the same language as appears in the General Code except that "secretary" was used instead of "clerk." In that act and on the same page will also be found the following provision:

> "The costs and charge of salaries of members of such boards of elections in any such city, and the secretary and his deputy and assistants, and *all necessary expenses of the board* for the purposes herein authorized," shall be borne by the city, etc.

This provision was carried into the act found in 86 O. L., 84, and was, as above stated, clearly applicable only to city boards of elections. It seems conclusive that the enactment of the provisions of section 4877, G. C., in 83 O. L., 211, in view of a contemporaneous provision for the payment of "all necessary expenses of the board" can be based upon no other than one or both of two reasons. Manifestly the legislature either conceived that the employment of temporary clerks and assistants did not come within the authority to pay "all necessary expenses of the board," or if such employment was within the authority to pay all necessary expenses, the sole purpose of the enactment of what is now section 4877, G. C., was to limit the expenditure for such temporary clerks and assistants.

These provisions as to city boards of elections continued without substantial change until 1904. At this time it was provided as to boards of deputy state supervisors of elections that:

> "The compensation above provided for, and all proper necessary expenses in the performance of the duties of such deputy supervisors, shall be defrayed out of the county treasury as other county expenses and the county commissioners shall make the necessary levy to meet the same." (93 O. L., 178 and 353.)

There was previous to 1904 no provision other than this applicable to boards of deputy supervisors of elections for the employment of temporary assistants or clerks for such boards.

Under this provision it was held in the case of State ex rel. v. Craig, 21 C. C., 180, that:

> "The compensation for a necessary assistant to the board of deputy supervisors of elections may be allowed and paid as necessary expenses."

Now it is believed that this construction would, with equal force, reason and aptness, attach to the provision for the payment of all necessary expenses of city boards of elections and from this it follows that, as above suggested, the sole purpose of the original enactment of the provisions of section 4877, G. C., was to limit the amount of expenditures for such temporary clerks and assistants to such city boards. Under these statutes as construed by the circuit court in the case above cited, we find that immediately prior to the passage of the act of April, 1904, 97 O. L., 185, et seq., city boards of elections and boards of deputy supervisors of elections were authorized to employ temporary clerks and assistants when necessary, and that city boards were limited to the payment of such employes at a rate not in excess of one hundred dollars per month, while boards of deputy supervisors were limited only by the allowance of the county commissioners for such expenses.

With this state of the law the legislature passed the act of April 23, 1904, above mentioned, abolishing city boards of elections and creating in counties in which annual registration was required, boards of deputy state supervisors and inspectors of elections, and from the provisions of this act the codifying commission incorporated into the General Code the provisions of section 4821 and section 4877, G. C. In this act it was provided also that "deputy state supervisors of elections" should, in all cases where not otherwise provided, be construed to include "deputy state supervisors and inspectors of elections." (97 O. L., 220.)

At page 222 of 97 O. L., in the same act, the provisions found in section 4821, G. C., were enacted verbatim and by virtue of 2966-3, R. S., therein (97 O. L., 220) were equally applicable to boards of deputy state supervisors and inspectors of elections and to deputy state supervisors of elections.

Under the construction given this language by the circuit court in the case of State ex rel. vs. Craig, supra, both deputy supervisors and deputy supervisors and inspectors of elections were authorized to employ necessary clerks and assistants, and without further provision relative thereto would have been limited in their expenditures for such purposes only by the discretion of the county commissioners in allowing claims therefor. We find, however, carried into this act, 97 O. L., 195, the provisions of the act found in 83 O. L., 211, above quoted, and applicable to city boards only, that "all necessary expenses of the board" should be paid by the city, etc. Since there was then full authority in the act for the employment and payment of necessary clerks and assistants to all boards, no purpose could have prompted the contemporaneous enactment of the provisions which were afterwards incorporated in section 4877, G. C., as appear at page 194 of 97 O. L., other than to put a limitation upon the expenditures for that purpose. To what does this limitation apply?

Section 2926-c, R. S., 97 O. L., 193-4, provides as follows:

> "The members of the board of deputy state supervisors shall meet within fifteen days after their appointment, and organize by the election of a chief deputy and clerk as provided in section 4 of the supervisory election law, section 2966-4 of the Revised Statutes. No order, resolution or action of such board shall be valid without the vote of three of the four members. Such board shall appoint all registrars of electors, judges

and clerks of election and other clerks, officers and agents herein provided for, and designate the ward and precinct in which each shall serve. All deputy clerks, assistants, registrars and judges and clerks of election, now in office, in registration cities, shall remain in their respective offices and employments and continue to perform the several duties thereof and receive the compensation therefor, under existing laws, and under the direction and control of the board of deputy state supervisors, or the board of deputy state supervisors and inspectors, as the case may be, until their successors are chosen or appointed and qualified or until removed by the proper authority in accordance with the provisions of this act. The board of deputy state supervisors shall also appoint the places of registration of electors, and holding elections in each ward or precinct, and provide suitable booths or hire suitable rooms for such purpose and for their own office, at such rents as they deem just; they shall also provide the necessary and proper furniture and supplies for such rooms, and for the purchase, preservation and repair of all booths and ballot boxes, necessary for use at elections in such city, and all books, blanks, and forms necessary for the registrations and elections herein designated, and for duly issuing all notices, advertisements or publications required by law. The board of deputy state supervisors of elections or the board of deputy state supervisors and inspectors of elections, as the case may be, of counties containing registration cities and the clerk thereof shall, upon the taking effect of this act, have the custody, care and control of all registers, lists, books, maps, forms, oaths, certificates, blanks, booths, and ballot boxes, and all other property and supplies heretofore under the custody and control of the city boards of elections and the secretary thereof.

"The board may, from time to time, make and issue all such rules, regulations and instructions, not inconsistent with law, as they shall deem necessary for governing and guiding their clerk and his deputy or assistants, and the registrars of electors and judges, and clerks of elections, or other persons under their control in the proper discharge of their respective offices and duties. They shall divide, define and proclaim the election precincts of such city, authorized in section two thousand nine hundred and twenty-six, and the boundaries thereof, and provide for furnishing to each registrar of electors and judges of elections a map and pertinent description of such divisions and boundaries, and of any changes which from time to time are made by them. When necessary, they may employ a deputy clerk and one or more clerks as temporary assistants of their clerk, at a salary not to exceed the rate of one hundred dollars per month, and prescribe their duties. The period for which they are employed must always be fixed in the order authorizing their employment, but they may be discharged sooner at the pleasure of the board. Such deputy clerk and all such assistants shall take the same oath for the faithful performance of their duties as required of the clerk of said board."

This section is not altogether free from ambiguity, but after a careful consideration of the same I am inclined to the view that in the last paragraph thereof the phrase "the board" and the term "they" include within their meaning deputy supervisors as well as deputy state supervisors and inspectors of elections, except in such cases as the act in its entirety renders that contruction inapplicable.

That is to say, since this enactment that provision of section 2926-c supra, which is introduced by the phrase "when necessary" is applicable to boards of deputy state supervisors of elections, as well as to boards of deputy state super-

visors and inspectors of elections, and the purpose in its enactment was, and its force and effect is, to limit the amount such boards may lawfully pay to persons employed as temporary clerks and assistants. The view that this provision applies to boards of deputy state supervisors of elections since the act of April 23, 1904, above referred to, is supported by the inclusion of "a deputy clerk" therein, when it is remembered that at that time, as now, there was no other authority for a deputy clerk of boards of deputy state supervisors of elections, and in the same act (97 O. L., 220) there was an imperative requirement of the selection of a permanent deputy clerk of deputy state supervisors and inspectors of elections. That is, the purpose of this particular phrase was to authorize supervisors of elections to employ, when necessary, a temporary deputy clerk in the absence of authority to make such employment permanent.

I am therefore of opinion that section 4877, G. C., as amended, 103 O. L., 544, since that amendment did not affect its application, is equally applicable to boards of deputy state supervisors of elections and boards of deputy state supervisors and inspectors of elections, and that under its provisions the compensation of all temporary clerks and assistants of either of such boards is limited to the rate of not to exceed one hundred dollars per month for the time actually employed, to be computed upon the basis of the actual number of days in the calendar month in which such services are rendered.

Respectfully,
EDWARD C. TURNER,
Attorney General.

981.

COMBINED NORMAL AND INDUSTRIAL DEPARTMENT AT WILBERFORCE UNIVERSITY—BIDS RECEIVED ON DIFFERENT ITEMS—SOME ABOVE AND BELOW ESTIMATE—CONTRACTS MAY BE AWARDED ON BIDS BELOW ESTIMATE—REJECT THOSE ABOVE—WHEN NEW ESTIMATE MAY INCLUDE DIFFERENCE BETWEEN ESTIMATE AND BIDS BELOW ESTIMATE.

If bids are received on different items of an improvement under section 2314, et seq., G. C., and as to certain items the bids were below the estimate and as to certain other items above the estimate, contracts may be awarded on those bids below the estimate, but those bids above the estimate must be rejected.

A new estimate as to those bids which were above the estimate may be filed, and may include the difference between the estimate and the bids below the estimate, if contracts are awarded on such bids.

No contract should be awarded until it is definitely ascertained that the cost of the entire improvement, including architect's fees, etc., will be within the appropriation.

COLUMBUS, OHIO, October 27, 1915.

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

DEAR SIR:—Your department has submitted to me a certain statement of facts which I will hereinafter set forth and requested my opinion thereon.

The combined normal and industrial department at Wilberforce University advertised for bids on a certain water supply system, the plans, specifications and estimates having been theretofore approved and placed on file in your office. The

engineer in charge of the work divided the said work into five different items, and when bids were received and opened it was found that on three of the items the amounts bid were below the estimate, but that on two of such items the amounts bid exceeded the estimate. It became necessary, therefore, in view of the provision of section 2323 of the General Code that "no contract shall be made for labor or material at a price in excess of the entire estimate thereof," that the bids on the two items foregoing mentioned should be rejected. Subsequently, the engineer submitted a new estimate on said two items, increased in amount by the amount that was saved on the difference between bid and estimate of the other three items. In submitting the new estimate the engineer submitted a new estimate on all five items, reducing the estimate on the three items to the exact amount of the bid theretofore received and increasing by such amount the estimate on the other two items, and your department has taken exception to receiving such new estimate, on the ground that it is not proper to amend a former estimate on which bids have been received and contracts on a part of the work entitled to be let; that if new estimates are received no contract should be let on the former estimate, but the work should be readvertised in its entirety.

This brings us to a general running commentary on the statutes governing building regulations for public buildings, found in sections 2314, et seq., of the General Code.

Section 2314 provides that before entering into a contract for the erection, alteration or improvement of a state institution or building or addition thereto, excepting the penitentiary, or for the supply of materials therefor, costing in the aggregate more than three thousand dollars, the board or other authority having the supervision of such building shall make or cause to be made full and accurate plans, accurate bills showing the exact amount of different kinds of material necessary to the construction under such plans, full and complete specifications of the work and a full and accurate estimate of each item of expense and the aggregate cost thereof.

After the board or other authority has prepared such plans, the same are then submitted to a board consisting of the governor, auditor of state and secretary of state for its approval. This board is to look over the papers so submitted, including the plans, and ascertain that the building to be constructed is reasonably adapted for the uses to which it is to be put and for which the legislature has appropriated, and should at that time consult the appropriation in order to see how much construction is to be done under such appropriation. Having so determined that matter, the said board should see whether or not the building called for by the plans, specifications, etc., can according to the estimate, be constructed within the amount provided therefor. Thereupon, said plans, etc., should be approved and filed in your office.

As I view said statutes, the above board was constituted a board to see to it that the intent of the legislature is carried out in the plans, etc., for the construction of the improvement appropriated for, provided, of course, that the cost of the improvement exceeds three thousand dollars.

After the approval has been made it is then the duty of the board, department or institution that is to construct the building or improvement to advertise for bids, and on the day named said board, or other authority, is to open the proposals and award the contract *to the lowest bidder.* After having accepted a proposal and entered into a contract, the same is not to be binding until certified to by the attorney general.

However, under the provisions of section 2323, G. C., no contract shall be made for labor or materials at a price in excess of the entire estimate thereof; and the section further provides that the entire *contract or contracts,* including

estimates of expenses for architects and otherwise, shall not exceed in the aggregate the amount authorized by law for such institution, building or improvement, addition thereto or alteration thereof.

As soon as the proposals are opened, therefore, it becomes the duty of the board to examine the estimates to see whether or not the bids are in excess of such estimates. If the estimates are divided, as in the case in question, each estimate should be considered as a separate matter and the bid upon any item thereof should be measured by the estimate of such item.

Now in the case in question that has been done, and it has been determined that as to two of the items bid upon the bids are in excess of the estimate, but that as to the remaining three items the bids are not in excess of the estimate.

The provision that the awarding of the contract shall not be in excess of the estimate is a limitation on the right of the board to award contracts, but when said board has received a bid on a particular item below the estimate thereof, I can see no reason why the money thus released may not be used in increasing the estimate on other parts of the work, without the necessity of having to reject all the bids and re-advertise the work in its entirety, but may retain the bids on those items which were below the estimate.

It is provided, however, that all the contracts taken together, including the estimates of expenses for architects and otherwise, shall not exceed in the aggregate the amount authorized by law for the particular improvement, and, therefore, a board should not enter into a contract for that part of the work which it is entitled to let until it definitely ascertains that the entire work can be let within the appropriation.

Of course, in submitting the new estimate the same must receive the approval of the governor, auditor of state and secretary of state and, therefore, if the same is grossly in excess such estimate should not be approved.

Respectfully,

EDWARD C. TURNER,

Attorney General.

982.

FOREIGN CORPORATION — SECTION 183, G. C., HAVING BEEN COMPLIED WITH CORPORATION NOW OFFERS TO FILE CERTIFICATE INCREASING CAPITAL STOCK, ASSERTING NO PART OF SUCH INCREASE IS REPRESENTED BY PROPERTY OWNED AND USED AND BUSINESS TRANSACTED IN OHIO—CERTIFICATE INSUFFICIENT.

A foreign corporation which has complied with section 183, *G. C., subsequently increases its total authorized capital stock and offers to file a certificate stating the amount of such increase and asserting that no part thereof is represented by property owned and used and business transacted in Ohio, HELD:*

Such certificate is not sufficient under section 185, *G. C., but should show the amount of the company's property and business in Ohio and the total amount of the company's property and business everywhere at the time of the increase in the authorized capital stock.*

Where the proportion of the capital stock of a foreign corporation, represented by property owned and used and business transacted in Ohio, is not increased, but the company has increased its total authorized capital stock, the secretary of state may accept and file a certificate showing the facts and charge the minimum fee therefor.

COLUMBUS, OHIO, October 28, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge the receipt of your letter of October 22nd, requesting my opinion upon the question presented by the tender to you of a certificate of The May Department Stores Company, in which it is recited that said company has increased its issue of preferred stock from the sum of $5,000,000.00 to the sum of $8,250,000.00, and that no portion of the said increase of capital stock was or is represented by property owned or used or business done or transacted in the state of Ohio.

Stated as a question of law the facts present the following issue:

> "Where a foreign corporation which has complied with section 183 of the General Code of Ohio increases its total authorized capital stock, but is able to certify that no part of the increased capital stock is represented by property owned and used and business transacted in the state of Ohio, is the company liable to compliance with section 185, G. C., and, if so, how should the fee payable under that section be computed?"

This question is answered by proper application of the principles laid down in opinion No. 699 sent to you under date of August 6, 1915. In that opinion it was held that the word "proportion" as used in sections 183 and 185, G. C., means an amount ascertained by applying to the total authorized capital stock of the company, at a given time, the percentage indicated by dividing the business transacted and property owned and used by the company in the state of Ohio by the total business and property at such time. That is to say, if at a given time the total authorized capital stock of the company is $1,000,000.00 and the company's business and property everwhere is $500,000.00 and its business and property in Ohio is $50,000.00, then the "proportion" for the purposes of these sections is 50/500 of $1,000,000.00, or $100,000.00.

In said opinion it was also held that if a foreign corporation should increase its total authorized capital stock, the question of its liability to comply with section 185, G. C., and the calculation of the fee thereunder would both be determined by

applying the aforesaid formula. That is to say, taking the property and business of the company everywhere and dividing it into the property and business of the company in Ohio as of the date of the increase of the total authorized capital stock, and then taking the resultant percentage of the new total authorized capital stock, is the amount thus obtained greater than the amount similarly calculated at the time of the company's original compliance? If it is, then the certificate under section 185 should be filed and the basis of the computation of the fee is the difference between the two amounts.

It will be observed that the question of liability and that respecting the computation of the fee are both based upon the *authorized* capital stock—not the actually issued stock. A company may have an authorized capital stock of $10,000,000.00 and never have issued more than half of that amount in par value—that is, though the stock which it is authorized to issue is $10,000,000.00, the capital actually going into the property and business of the company may be much less than that sum; nevertheless, the liability of the company and the fee are alike determined on the basis of the authorized capital stock, and not on the basis of the stock actually issued or the capital actually employed.

These things being true, it follows, I think, that the certificate which has been tendered to you by The May Department Stores Company cannot be accepted by you because its recitals are not sufficiently specific for you to determine whether or not there has been an actual increase within the meaning of section 185 of the General Code, and what the amount of that increase, should it exist, is; for it is not enough to certify that no part of the new authorized capital has gone into the property and business in Ohio. Indeed, the newly authorized capital stock may not have been issued at all, and yet the facts might be such as to necessitate the filing of a certificate of increase and the payment of a substantial fee therefor.

The facts which such a certificate should disclose, in a word, are those showing the total value of the property of the company owned and used in Ohio and the value of the property owned and used outside of Ohio, and the proportion of the new total authorized capital stock—not the new issue itself, but the whole stock as thus increased— represented by property owned and used by business transacted in Ohio at the date of the increase in authorized capital stock.

If the certificate thus properly filled out shows that at the time of the increase of the authorized capital stock, the result arrived at by applying to the authorized capital stock, as increased, the percentage ascertained by dividing the Ohio property and business by the total property and business of the company is no greater than the result similarly arrived at at the time of the initial compliance of the company with the laws of Ohio, then, technically, no certificate is due, but I would be of the opinion, as contended for by counsel representing the company, that a certificate might lawfully be received and filed by you as a certificate of increase upon the payment of the minimum fee for filing such certificate, so that your records might show the exact effect of the company's increase of its authorized capital stock.

Should such certificate so properly filled out, however, show that the amount arrived at by going through the calculations above described, based upon the total authorized capital stock as enhanced by the increase thereof, is greater than the amount representing the "proportion" ascertained at the time of the original compliance or the last previous increase under section 185 of the General Code, then the difference between the two amounts, which constitute the respective "proportions" for the purposes of the related statutes, would represent the "increase" in "the proportion of its capital stock represented by property used and business done in this state," within the meaning of section 185, G. C., and the fee payable in such case should be computed on this difference.

This opinion is based upon principles which are more fully disclosed in opinion No. 699, above referred to.

I herewith return the correspondence submitted to me, with the check of Mr. Nathan Loeser for $5.00 attached thereto, advising that the certificate of The May Deparment Stores Company is not sufficiently specific to permit you to receive and file it for any purpose, and that, of course, it is impossible to determine therefrom what, if any, fee is due to the state of Ohio from The May Department Stores Company on account of the increase of its total authorized capital stock.

Respectfully,
EDWARD C. TURNER,
Attorney General.

983.

VILLAGE CLERK—COMPENSATION—CANNOT RECEIVE ANY COMPENSATION FOR ACTING AS LEGAL ADVISER TO VILLAGE IN ADDITION TO AMOUNT RECEIVED BY HIM AS CLERK.

A village clerk cannot be employed and paid compensation for acting as legal adviser to the village in addition to the compensation received by him as clerk of the said village.

COLUMBUS, OHIO, October 28, 1915.

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

GENTLEMEN:—Permit me to acknowledge your request for an opinion which is as follows:

> "We would respectfully request your written opinion upon the following question:
>
> "Is it legal for the village clerk to be employed by council as legal adviser to village officials?
>
> "The council of the village of Bratenahl desires to employ their clerk, who is an attorney at law, as their legal adviser if there be no incompatibility."

Section 4279 of the General Code, which refers to the election of a clerk of a village, is as follows:

> "The clerk shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation."

Under the terms of the section just quoted, the clerk of a village is an officer of the corporation.

Section 3808 of the General Code, which relates to municipal corporations, is as follows:

> "No member of the council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the

part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other things he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom."

The relations existing between the legal adviser of a village and the village is contractual and is provided for in section 4220 of the General Code, which is as follows:

"When it deems it necessary, the village council may provide legal counsel for the village, or any department or official thereof, for a period not to exceed two years, and provide compensation therefor."

It will be noted from reading of section 3808 of the General Code, *supra*, that an officer of a village is prohibited from having any interest in the expenditure of money on the part of the corporation other than his fixed compensation.

It is my opinion therefore that while there is no incompatibility between the office of village clerk and the legal adviser of the village on account of conflicting duties of the two positions, yet in view of the provisions of section 3808 of the General Code, supra, a village clerk could not receive any compensation for acting as legal adviser to the village in addition to the compensation received by him as clerk of the village.

Respectfully,
EDWARD C. TURNER,
Attorney General.

984.

STATE MEDICAL BOARD—FEE OF TWENTY-FIVE DOLLARS SHOULD BE CHARGED FOR EACH EXAMINATION REQUIRED TO QUALIFY APPLICANT FOR CERTIFICATE TO PRACTICE ANY BRANCH OF MEDICINE OR SURGERY REGARDLESS OF GROUPING OF BRANCHES THAT BOARD MAY INCLUDE IN ONE CERTIFICATE—WHERE SEPARATE EXAMINATIONS ARE REQUIRED IN SEPARATE BRANCHES, FEE OF TWENTY-FIVE DOLLARS MUST BE CHARGED FOR EACH BRANCH.

The provisions of section 1277, G. C., apply to and control examinations for a certificate to practice one or more limited branches of medicine and surgery as defined in section 1274-1, et seq., G. C., 106 O. L., 202, and require a fee of twenty-five dollars for each examination, whether the subjects of such examination are appropriate to only one limited branch or more than one.

COLUMBUS, OHIO, October 29, 1915.

The State Medical Board, Columbus, Ohio.

GENTLEMEN:—I have your letter of October 22, 1915, bearing the following statement and inquiry:

"Acting under section 1274-1 of the General Code, the state medical board has established rules and regulations to govern those who practice

any limited branch or branches of medicine or surgery in Ohio. The limited branches of medicine or surgery recognized by the board, in the rules and regulations, have been grouped and the groupings explained as follows:

"The following groups of such limited branches have been adopted:

"(1) Chiropractic, naprapathy, spondylotherapy, electro-therapy, hydro-therapy, mechano-therapy and neuropathy, or any other similar branch of medicine or surgery that may now or hereafter exist, and not here specified.

"(2) Suggestive-therapy, psycho-therapy, magnetic healing, or any other similar branch of medicine or surgery that may now or hereafter exist and not here specified.

"(3) Massage, Swedish movement, or any other similar limited branch of medicine or surgery which involves manual, physical or mechanical methods of exercise or operation, appliance or treatment that may now or hereafter exist and not here specified.

"(4) Chiropody.

"(5) Optometry.

"Certificates will be issued to those qualifying in any of the limited branches mentioned in any single group:

"(Example) A certificate will be issued to one who qualifies to practice 'chiropractic' or 'chiropratic and spondylotherapy' **(group 1), or** to practice 'suggestive-therapy' or 'suggestive-therapy and magnetic healing' (group 2).

"A certificate will not be granted to practice chiropractic and suggestive-therapy. In other words, to practice more than one group, more than one certificate will be required for those who qualify.

"A fee of $25.00 will be required for each certificate granted.

"The first group includes those practices which involve the doing of material things, or the use of something material as a therapeutic measure. The second group involves those branches which have to do with the treatment of the mind.

"Both the first and second group will permit applicants to examine and diagnose. Those practicing in the third group will not be permitted to examine and diagnose. All concede that chiropody and optometry should stand alone upon their own merits.

"In adopting these groupings, the board believes that it can more intelligently regulate the various practices.

"It will be observed that a certificate is required to practice any branch or branches specified in a single group, and that a fee of $25.00 is required for each certificate granted.

"Please advise whether the board's action in requiring the fee of $25.00 for each certificate, in case an applicant qualifies to practice in more than one group, is proper."

The question presented by you involves a consideration and construction of the following sections of the General Code as found in house bill No. 220, 106 O. L., 202, et seq.

"Section 1274-1. The state medical board shall also examine and register persons desiring to practice any limited branch or branches of medicine or surgery, and shall establish rules and regulations governing such limited practice. Such limited branches of medicine or surgery shall

include chiropractic, naprapathy, spondylotherapy, mechano-therapy, neuropathy, electro-therapy, hydro-therapy, suggestive-therapy, psycho-therapy, magnetic healing, chiropody, Swedish movements, massage, and such other branches of medicine or surgery as the same are defined in section 1286 of the General Code that may now or hereafter exist, except midwifery and osteopathy.

"Section 1274-2. For the purpose of establishing the practice of such limited branches the state medical board shall call to its aid the designated persons as provided in section 1274-3 of the General Code, and such designated persons shall examine any person who has practiced any such branch in Ohio for a period of at least one year prior to June first, 1915, and who makes application prior to October first, 1915, on a form prescribed by the board, in those subjects only which are appropriate to the limited branch of medicine or surgery, for a certificate to practice which his application is made. No such applicant shall be required to comply with the preliminary educational qualifications provided for in section 1274-5 of the General Code. Any person, practicing in Ohio who at the time of the passage of this act shall actually be engaged in this state for a period of five years continuously prior to October first, 1915, in the practice of any one or more of the limited branches of medicine or surgery hereinbefore enumerated, and who shall present to and file with the state medical board an affidavit to that effect after the passage of this act shall be exempted from the examination, and shall be entitled to receive from said board a license to practice, upon the payment to said board of a fee of twenty-five dollars. The examination of all other applicants shall be conducted under rules prescribed by the board and at such times and places as the board may determine. Such examination shall be given in anatomy, physiology, chemistry, bacteriology, pathology, hygiene, diagnosis, and in such other subjects appropriate to the limited branches of medicine or surgery, certificate to practice which is applied for, as the board may require; provided, however, that applicants for certificates to practice massage or Swedish movements shall not be examined in pathology and diagnosis.

"Section 1274-3. For the purpose of conducting such examinations the state medical board shall call to its aid any person or persons of established reputation and known ability in the particular limited branch in which the examination is being held; and in the event that there is in existence a state association or society of practitioners of any such limited branch of medicine or surgery, such association or society, except a state association or society of chiropodists, shall recommend the person or persons to be designated for this service by the board. Any person called by the state medical board to its aid, as provided in this section, shall receive for his services not more than ten dollars per day and his actual and necessary expenses to be fixed and allowed by the state medical board.

"If the applicant passes such examination and has paid the fee of twenty-five dollars as required by law, the state medical board shall issue its certificate to that effect. Such certificate shall authorize the holder thereof to practice such limited branch or branches of medicine or surgery as may be specified therein, but shall not permit him to practice any other branch or branches of medicine or surgery nor shall it permit him to treat infectious, contagious or venereal diseases, nor to prescribe or administer drugs, or to perform major surgery."

You state in your letter that your board has divided the limited branches of medicine and surgery, named in section 1274-1, supra, into five groups and divi-

sions and that it is your purpose to include in one certificate any one or all the branches named in a single group and to charge therefor a fee of twenty-five dollars, but that an applicant desiring to practice two branches, one of which is in one group and the other in another group, must procure a certificate for each branch and pay for each certificate the sum of twenty-five dollars. To state the matter more concisely you propose to charge a fee of twenty-five dollars for a certificate for each group, which certificate may authorize its holder to practice one or any number of branches included in that group.

The matter of dividing the various limited branches aforesaid into said groups or divisions is within the discretion of your board, under the provisions of section 1274-1, supra, and is to be determined by a professional and technical knowledge of the relation between said branches included in each group. The question, therefore, of the appropriateness of this division is one of fact and for the purposes of this opinion said division must be regarded as properly made. The question, however, of the charge to be made for certificates to practice is a question of law to be determined by the statutory provisions above quoted and by section 1277, G. C., which is the general section fixing the charge of twenty-five dollars. This section provides as follows:

> "Each applicant for a certificate to practice medicine or surgery in this state shall pay a fee of twenty-five dollars for an examination. On failure to pass such examination the fee shall not be returned to the applicant, but within a year after such failure he may present himself and be again examined without the payment of an additional fee. All fees for examination shall be paid in advance to the treasurer of the board and by him paid into the state treasury to the credit of a fund for the use of the state medical board."

It must be observed that under the provisions of the foregoing section each applicant for a certificate to practice medicine or surgery in this state shall pay a fee of twenty-five dollars *for an examination.* Clearly this provision makes the examination and not the certificate the basis for the charge of twenty-five dollars. An applicant must pay twenty-five dollars for an examination. If he passes successfully the certificate follows; if he fails to pass said examination, nevertheless, he pays the charge of twenty-five dollars subject to his right to take another examination within a year after such failure without payment of an additional fee.

Keeping the provisions of this section in mind, we will now consider the later sections first above quoted. It is provided in section 1274-2, supra, that any person who has practiced any branch named in section 1274-1, supra, for at least one year prior to June 1, 1915, and who makes application prior to October 1, 1915, shall be examined in those subjects only which are appropriate to the limited branch of medicine or surgery for a certificate to practice which his application is made. Here again it is manifest that the examination therein provided for must be confined to those subjects only which are appropriate to the branch for which the applicant asks a certificate. If such examination may apply to two or more branches, that is, if the subjects covered by said examination are appropriate to two or more branches, and an applicant may qualify by passing said examination to practice in two or more branches, I know of no legal objection to his certificate so authorizing him and for a single fee of twenty-five dollars.

It is also provided in this section for the examination of all other applicants under such rules as may be prescribed by the board.

It is then provided in section 1274-3, supra, that if an applicant passes and has paid the fee of twenty-five dollars as required by law the said board shall issue

its certificate to that effect, which shall authorize the holder thereof to practice such limited branch or branches as may be specified therein. I am convinced, however, that the reference here made to the payment of twenty-five dollars as required by law is directed to the provisions of section 1277, G. C., and that under these statutes, as well as under section 1277, it is the examination and not the certificate which determines the fee.

The only exception to this application and construction of the law is found in those provisions of section 1274-2, supra, by which under certain conditions a certificate to practice in one or more branches may be issued without examination upon payment of twenty-five dollars. These provisions, however, not involving any examination, cannot overcome the plain purpose of the law as declared in section 1277, supra.

For the foregoing considerations I, therefore, conclude that it is the purpose of the law to require a fee of twenty-five dollars for each examination and that a certificate may be issued for each examination which may include one or more branches, but where separate examinations are required in separate branches a fee of twenty-five dollars must be charged for each examination.

Coming now to consider your specific question, it is apparent that unless one examination may cover all the limited branches which you have included in one group, a fee of twenty-five dollars as proposed by you will not meet the requirements of the law. I learn from you in this connection that as a matter of fact it will require a separate examination in practically every limited branch named in each of the groups specified by you. This being so, it is my opinion that a fee of twenty-five dollars should be charged for each examination required to qualify an applicant for a certificate to practice any branch regardless of the grouping or divisions made by your board or the number of branches you may include in one certificate.

Respectfully,
EDWARD C. TURNER,
Attorney General.

985.

STATE CIVIL SERVICE COMMISSION—FEES AND MILEAGE OF WITNESSES APPEARING IN HEARINGS BEFORE SUCH COMMISSION —FUND MUST BE APPROPRIATED FOR THAT SPECIFIC PURPOSE.

The fees and mileage of witnesses attending under the provisions of section 486-7, *G. C.*, 106 *O. L.*, 403, *when duly certified and audited may be paid by the state treasurer only from a fund appropriated for that specific purpose.*

COLUMBUS, OHIO, October 29, 1915.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of October 22, 1915, as follows:

> "The fifth paragraph of section 486-7 provides that—
>
> "'Fees shall be allowed to witnesses, and on their certificate, duly audited, shall be paid by the state treasurer, * * * for attendance and traveling, as is provided in section 3012 of the General Code.'
>
> "Query: From what fund shall these fees be paid?"

Section 3012, G. C., which is referred to in the statute quoted by you, is the general section of the code providing for the fees and mileage of witnesses

attending in civil cases in any court of record in this state. The provisions of section 486-7, supra, make such fees and mileage, as fixed by section 3012, supra, upon your certificate duly audited, payable by the state treasurer. It appears, however, that no appropriation has been made by the general assembly for this purpose and in consequence thereof there is no fund in the state treasury legally available for the payment of these claims. This is so because under section 22 of article II of the constitution, it is provided that:

> "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law."

Answering your question specifically said witness fees, mileage and costs are payable from a fund appropriated by the legislature for that specific purpose, and as such fund has not been so provided, there is no money in the state treasury now available for the payment of such claims.

Respectfully,
EDWARD C. TURNER,
Attorney General.

986.

TRUSTEES OF COUNTY CHILDREN'S HOME—NOT AUTHORIZED TO BE APPOINTED UNTIL BUILDINGS ARE PROVIDED (SEE SECTION 3081, G. C.)—SAID BUILDINGS MUST BE READY FOR OCCUPANCY BEFORE APPOINTMENTS ARE MADE—IF MADE PRIOR, ACTION OF COUNTY COMMISSIONERS VOID.

1. *A necessary site and buildings are provided within the provisions of section* 3081, *G. C., when they are ready for use and occupancy as a children's home, and until so provided, the appointment of trustees as therein prescribed is not authorized by the provisions of said statute.*

2. *The appointment of trustees of a children's home under section* 3081, *G. C., supra, before the neccssary buildings and site are provided as required by the said statute, if made by county commissioners, whose terms expire before said buildings and site are or may be provided, is without authority of law and is void.*

The State ex rel. Morris v. Sullivan, 81 *O. S.,* 79.

COLUMBUS, OHIO, October 29, 1915.

HON. CHARLES L. BERMONT, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—I have your letter of October 26th as follows:

> "On August 23, 1915, the commissioners of Knox county, appointed a board of trustees for the new County Children's Home, under the provisions of section 3081, G. C.
>
> "At the time this appointment was made it was thought that two Democrats and two Republicans were being appointed, but it was later ascertained that three of them were from the same political party.
>
> "On September 20, 1915, the board of county commissioners changed, two old members retiring, which also changed the politics of the board.
>
> "A short time after the new board of commissioners took office, one

of the appointed trustees, about whose politics there was some question, came to the commissioners and requested that he be relieved from further service upon said board.

"At the time, August 23, this board of trustees was appointed the children's home was not ready to be turned over to them and probably will not be ready before November 15, 1915. The building itself was completed, but it was not furnished ready for occupancy.

"The board of county commissioners as now constituted, is insisting upon appointing an entire new board of trustees on the ground that the action of the former board of commissioners was premature and further that because three of the members of the board of trustees belonged to the same political party that the appointment of the whole board would be void.

"I therefore desire your opinion upon the question as to whether the appointment by the former board of county commissioners was made before it should be and therefore void, and whether the mistake in selecting three from the same political party would render the action void?"

Section 3081 of the General Code, to which you refer in your letter, provides in part as follows:

"When the necessary site and buildings are provided by the county, the commissioners shall appoint a board of four trustees, as follows: One for one year, one for two years, one for three years, and one for four years, from the first Monday of March thereafter. Not more than two of such trustees shall be of the same political party."

From your statements it appears that your board of county commissioners on August 23, 1915, under the provisions of the foregoing section, appointed a board of trustees for your children's home, which said home will not be ready for occupancy before November 15, 1915.

It further appears that on September 20, 1915, two members of the board making said appointments aforesaid retired from office and were succeeded by two new members thereby changing the political complexion of said board, which fact affords very potent reasons for the apparent haste shown in making said appointments.

You now inquire if the appointment of said trustees so made on August 23rd is valid. The answer to your question depends entirely upon the fact whether or not the provisions of section 3081, above quoted, required said appointments to be made prior to or on that date, or at any time before said two members retired from the board of county commissioners on September 20, 1915. The provisions of said section require the county commissioners to appoint a board of trustees when the necessary site and buildings are provided by the county. The requirement in this behalf is as definite and specific as it would be if the statute named and fixed a certain calendar date for said appointment. The commissioners, therefore, could not appoint before that date in anticipation of their leaving office, nor could they make a valid appointment until the actual necessity for the appointment existed as provided by said law.

State ex rel. v. Sullivan, 81 O. S., 79.
State ex rel. v. Ernston, 14 C. C., 614.

The difficulty in this matter is not so much to determine upon what date said

appointment shall be made as it is to determine when the proper conditions exist which under the statute aforesaid fix that date. Manifestly the providing of a site and buildings, as defined in section 3081, supra, means more than procuring a plat of land upon which stands a building with bare walls and empty rooms. It means a site upon which stands a structure furnished and equipped for the care and entertainment of the unfortunate waifs for whom it is to be a home.

It was held in an opinion to you under date of June 16, 1915, that it was the duty of your board of county commissioners to furnish and equip the home in question with furniture. I desire now to make it plain that the building is not "provided" as required by section 3081, supra, until it is equipped and furnished and ready for use and occupancy.

From your statements it appears that at this time said home is not ready for occupancy and will not be until about November 15, 1915. No building, therefore, as yet has been provided as required by section 3081, supra. No building having been provided, the appointment of trustees even at this time is not required by the provisions of said section and the appointments made on August 23, 1915, were made wholly without warrant or authority of law, and were and are void. Said appointments being void in the first instance, it is not necessary to notice the other phases of the matter as presented in your inquiry.

Respectfully,
EDWARD C. TURNER,
Attorney General.

987.

STATE HIGHWAY COMMISSION—CONTRACT FOR LEASE OF MACHINERY FOR USE OF HIGHWAY DEPARTMENT CONSTRUED—DEFECTIVE CONDITION OF LEASED MACHINERY.

One who leases machinery to the state highway commissioner and agrees to furnish an expert engineer to operate the same, is not entitled to full compensation for those days on which the machinery is not in use for eight hours, where the failure to use the machinery during an entire day is due to its defective condition or to lack of skill on the part of the engineer furnished by the lessor.

COLUMBUS, OHIO, October 29, 1915.

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

DEAR SIR:—I have your communication of October 19, 1915, transmitting to me copy of agreement dated September 7, 1915, between C. Taylor Handman and the state highway commissioner, covering the rental, by your department, of certain machinery the property of Mr. Handman.

So much of said agreement as is pertinent to your inquiry reads as follows:

> "The contract price per day on this equipment is fifteen dollars ($15.00) net for every day that the machinery is in operation or even when steam has been gotten up in the morning with the expectation of running."

The agreement also bound Mr. Handman to furnish an expert engineer to have charge of the leased machinery.

Attached to your communication is a statement showing the number of hours during which the machinery referred to in the agreement with Mr. Handman was

operated, together with the reasons for the failure to perform eight hours' work with the machinery on several of the days during which the machinery was in use.

From this statement it appears that the leased machinery was used by your department on twelve days. On five of these days the machinery was used for eight hours each day; on seven of these days the machinery was used less than eight hours, and the fact that the machinery was in use for less than eight hours on each of the seven days in question is set forth in the statement as being due to several different causes, to wit:

> Late arrival of the machinery on the site of the work;
> Inability to get sufficient steam pressure in the engine;
> Breaking of a stone bin; and
> Engine trouble.

It does not appear that in any instance where the engine was used for less than eight hours on any given day the fault was that of the employes of the state highway department, but in every instance such failure was due to the defective condition of the leased machinery, or to the breaking of the same, or its late arrival, or to lack of skill on the part of the engineer furnished by Mr. Handman.

You state that in endeavoring to settle with Mr. Handman you allowed to him the full contract price of fifteen dollars for each day on which the machinery was used for eight hours and made him a pro rata allowance for the days on which the machinery was used less than eight hours, and that you forwarded to him a voucher covering the compensation so calculated, said warrant calling for $155.63, but that Mr. Handman refuses to accept this warrant and demands compensation at the full rate of fifteen dollars for each day on which the machinery was used for any number of hours. He bases his claim on the provision in his contract that he is to receive "fifteen dollars ($15.00) for each day that the machinery is in operation or even when steam has been gotten up in the morning with the expectation of running."

You request my opinion as to whether Mr. Handman's contention is correct or whether you have properly computed his compensation.

It is impossible to reach the conclusion that a man who contracts to furnish machinery and who also contracts, as Mr. Handman did, to furnish an expert engineer to take charge of such machinery and operate the same, is entitled to full compensation for those days on which the machinery is not operated during the entire day, when the failure to operate is due to the defective condition of the machinery or to lack of skill on the part of the engineer in charge of the same.

I therefore conclude that you have offered Mr. Handman the most favorable settlement to which he is entitled in any possible view of the facts and that his claim for any sum in excess of $155.63, covered by the warrant which you have tendered him, is not well founded.

Another question presented by this contract is not considered above. The contract provides that it is for a period of not less than eighteen days. Under this provision Mr. Handman would be entitled to an opportunity to furnish the machinery for the full eighteen days and to be compensated accordingly in case he fulfilled his contract, subject, of course, to the right of the parties to the contract to modify or terminate the same by a subsequent agreement.

Respectfully,

EDWARD C. TURNER,
Attorney General.

988.

ROADS AND HIGHWAYS—SUBORDINATES IN STATE HIGHWAY DEPARTMENT WHO HAVE FAILED TO FURNISH BONDS IN REGULAR FORM—REQUIRED TO FURNISH PROPER ONES.

Where deputies and employes of the state highway department have failed to furnish bonds in regular form, the deputies should be required and the employes may be required to furnish proper bonds.

COLUMBUS, OHIO, October 29, 1915.

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

DEAR SIR:—Under date of October 22, 1915, you addressed a communication to me as follows:

> "In looking over the surety bonds of appointees in this department given under my predecessor, I note that some of these bonds are not signed by the principal and do not bear the approval of the then highway commissioner.
>
> "Would it be proper for these appointees to attach their signatures to these bonds at this time and for the present state highway commissioner to attach his approval to same, or will it be necessary to have these appointees furnish new bonds in accordance with form which you prescribe in your opinion No. 940?"

Under date of October 26, 1915, supplementing your previous communication, you submitted for my examination the bonds in question, being the bonds of the following officers and employes, to wit:

H. M. Sharp.....Deputy Construction
A. H. Hinkle.....Deputy Maintenance and Repair
Jno. R. Chamberlin.....Deputy Bridges and Culverts
Walter G. Smith.....Division Engineer
T. T. Richards.....Division Engineer
D. W. Seitz.....Division Engineer
N. Koehler.....Division Engineer
H. D. Bruning.....Division Engineer
H. Lersch.....Division Engineer
J. R. Burkey.....Engineer
R. H. Spidel.....Engineer
Glenn R. Logue.....Engineer
Frank Withgott.....Engineer
P. K. Scheidler.....Engineer
Abel S. Rea.....Testing Engineer
Wm. Paullin.....Superintendent
A. L. Fuestal.....Superintendent
W. W. Deitrich.....Bookkeeper

I have examined the bonds in question and find that the bond of Mr. Sharp is signed by the principal and bears your approval. This bond, however, recites that Mr. Sharp was appointed for a term commencing on the first day of April, 1915, and continuing until his successor is appointed and qualified. Deputy highway commissioners are not appointed for any definite term and there is no

provision of law authorizing them to hold office until their successors are appointed and qualified. This is true both under the Cass highway law and under the former statute, it being provided that deputy highway commissioners shall hold office during the pleasure of the highway commissioner.

The bonds of Messrs. Chamberlain and Hinkle also refer to those appointees as having a term of office. The bonds of Messrs. Chamberlain, Richards, Seitz, Koehler, Spidel, Logue, Withgott, Scheidler and Fuestal have been signed by the principals, but have never been approved by the state highway commissioner.

The bonds of Messrs. Hinkle, Smith, Bruning, Lersch, Burkey, Rea, Paullin and Deitrich not only lack the approval of the state highway commissioner, but they have never been signed by the principals. I have already alluded to certain inaccurate expressions in the bonds of Messrs. Sharp, Hinkle and Chamberlain, deputy highway commissioners, who are properly styled officers but who do not have any definite term of office. All of the bonds other than those of Messrs. Sharp, Hinkle and Chamberlain contain references to the principals as officers, whereas such principals are, properly speaking, employes and not officers.

In view of the above considerations and bearing in mind the conclusions expressed in opinion No. 940 of this department relating to the bond of Robert N. Waid, division engineer, rendered to you on October 16, 1915, it will be seen that all of the bonds referred to by you contain recitals that are incorrect and therefore none of the bonds would, strictly speaking, be entitled to approval as to their form. I therefore advise you that your proper course of procedure in the matter is to require the execution of new bonds by the deputies and employes of your department referred to by you.

The three deputy highway commissioners are each required to give a bond in the sum of $5,000, with such sureties as you approve, but the statute does not require my approval as to the form of these bonds. The bonds of all employes, where you require such employes to give bond, should be approved by you as to the amount and sureties and submitted to this department for approval as to form. The form of bond suggested for a division engineer in opinion No. 940 of this department, referred to above, will serve as a guide in the preparation of these bonds, although some changes will be required to meet the particular situation existing as to each one of the employes referred to by you.

Respectfully,

EDWARD C. TURNER,

Attorney General.

989.

SECRETARY OF STATE—THE PERFECTION SPRING COMPANY—PERMISSION GRANTED TO WITHDRAW CERTIFICATE INCREASING CAPITAL STOCK AND TO FILE INSTEAD TWO CERTIFICATES INCREASING PREFERRED STOCK AND COMMON STOCK, IRRESPECTIVELY—NOT PERMITTED NOW TO INCREASE CAPITAL STOCK BY AMENDMENT TO ARTICLES OF INCORPORATION.

Upon the facts shown, the secretary of state may permit The Perfection Spring Company to withdraw a certificate increasing its capital stock from $1,000 *to* $2,500,000, *and to file instead a certificate increasing preferred stock from* $1,000 *to* $1,499,000, *and certificate authorizing issuance of* $1,000,000.

COLUMBUS, OHIO, October 30, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of October 29th, with enclosures, in which you request my opinion as follows:

> "We are herewith enclosing a communication from Gage, Day, Wilkin and Washburn and Bennett and Westfall, relative to a certificate of increase of capital stock of THE PERFECTION SPRING COMPANY, filed in this office on the morning of October 27, 1915, increasing the stock of said company from $1,000 to $2,500,000.00, all common stock.
>
> "In the afternoon of October 27, 1915, after the aforesaid certificate of increase of capital stock had been recorded and the certified copy made, all records being complete, and a check for $2,499.00 entered on the fee book, said company attempted to file a certificate of amendment to the articles of incorporation for the purpose of changing $1,000,000 of said common stock of said company into preferred stock, and under a ruling of the attorney general we refused to accept and file said amendment.
>
> "On the 28th day of October, 1915, said company again presented said amendment to the office of the secretary of state and requested us to submit the same to the attorney general for a ruling, which we agreed to do.
>
> "On the 29th day of October, 1915, Mr. Westfall, one of the attorneys for the aforesaid company, requested us not to submit said amendment to the attorney general, and has requested us to submit the enclosed communication to you for an opinion as to the duties of the secretary of state in the aforesaid matter.
>
> "Will you please give us your opinion on the question submitted in the enclosed communication as to whether or not the secretary of state is authorized to permit the withdrawal of said certificate of increase of capital stock of the aforesaid company and cancel the record of said increase of capital stock and allow said company to file certificates of increase of capital stock, to wit: $1,400,000.00 common, and $1,000,000 preferred, and consider the proper fee as already paid for the filing of said certificates to have been made without any additional fee whatsoever?"

The letter of Messrs. Gage, Day, Wilkin and Washburn, and of Messrs. Bennett and Westfall, enclosed and referred to in your communication, contains a further statement of the facts pertinent to the question asked, and is as follows:

> "On the morning of the 27th inst., we filed with you a certificate of increase of the capital stock to The Perfection Spring Company author-

izing and providing for an increase of the capital stock of that company to $2,500,000. On the afternoon of the same day, namely, the 27th inst., we offered to you for filing and record an amendment to the articles of incorporation of the same company, making preferred stock of $1,000,000 of the aforesaid $2,500,000 of capital stock provided for in said certificate of increase.

"This certificate of increase and amendment was for the purpose of making the capital stock of said company consist of $1,500,000 common, and $1,000,000 of preferred stock, and was done pursuant to the practice and procedure which has been observed, followed and sanctioned by your department since the opinion of attorney general Ellis rendered to the secretary of state on the 21st day of November, 1904. You now advise us that such a plan is not now sanctioned in your office and decline to accept for record the amendment as aforesaid, which provides for the change to preferred stock of $1,000,000 of the $2,500,000 authorized capital stock of the company, and suggest that in order to accomplish our purpose as hereinbefore indicated that we should have filed two certificates of increase,—one under the provisions of G. C., 8698, authorizing an increase of common stock, and another under the provisions of G. C., 8699, authorizing an increase of preferred stock.

"In view of the fact that our procedure in this matter was taken under a misapprehension of the present ruling in your department we respectfully request that we be permitted to withdraw the certificate of increase filed on the 27th inst., as the same is hereinbefore referred to, together with our check covering filing fee for the same, in order that we may pursue the plan provided for under the present ruling of your department.

It is entirely agreeable to us that you retain the check of $2,499.00 and apply proceeds of same against fees for filing documents pursuant to the plan suggested by you."

It is apparent from the facts stated in the two letters above quoted that the intention and purpose of The Perfection Spring Company was to increase its capital stock by the issuance of $1,499,000 par value of common stock and $1,000,000 of preferred stock. To accomplish this result it followed a policy approved and followed for a number of years of making the entire increase common stock and then by subsequently filing a certificate of amendment to change such portion of the increased common stock as desired to preferred stock. Under the rule recently adopted in your office, at my advice and at present being followed, a corporation cannot change common stock to preferred stock by an amendment of its articles of incorporation. The Perfection Spring Company, in ignorance of this ruling and change of policy, proceeded under the old plan and filed a certificate of increase, making the entire issue common stock, and paying therefor the required fee of $2,499.00. It now finds that it cannot, under your present ruling, by amendment change $1,000,000 common stock to preferred stock, and requests that it be permitted to withdraw its certificate of increase and proceed in accordance with the present ruling to accomplish its original purpose.

Upon enquiry I find that the $2,499.00 filing fee paid by the company has not been paid into the state treasury, but still remains in your hands.

Under the facts presented it is certainly a matter of justice, at least, to comply with the request made by The Perfection Spring Company. If its request be refused the company it will result in a complete loss to it of $1,000.00 of its fees heretofore paid, for which the company would receive no return. In other words, the company would be compelled to bear a penalty of $1,000.00 by reason of

attempting to follow the ruling and policy of your office of long standing which has but recently been changed and of which change the company evidently had no notice.

I therefore advise you, under the facts presented in your letter and in the letter of Messrs. Gage, Day, Wilkin and Washburn, and Bennett and Westfall, that you should as a matter of justice comply with the request made to you and permit The Perfection Spring Company to withdraw the certificate of increase of its capital stock filed on October 27th, 1915, and permit the company to accomplish its purpose by following the procedure suggested in your letter.

Respectfully,
EDWARD C. TURNER,
Prosecuting Attorney.

990.

APPROVAL OF TRANSCRIPT OF BOND ISSUE FOR VILLAGE OF CENTERBURG, OHIO.

COLUMBUS, OHIO, November 1, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—IN RE: Bonds of the village of Centerburg, Ohio, conditionally purchased by the Industrial Commission of Ohio under resolution adopted June 21, 1915.

Issue of $3,400.00 of bonds, dated April 1, 1915, being ten bonds of $300.00 each, and one bond of $400.00, falling due one each year from April 1, 1916, to April 1, 1926. Issue of $350.00, dated October 1, 1915, being three bonds of $100.00 each and one of $50.00, falling due one year each from October 1, 1916, to October 1, 1919.

I have examined the transcript submitted by the clerk of the village of Centerburg relative to the proceedings of council and other officers of the said village in the issuance of the two series of bonds above described, and I find that the purpose for which said bonds are issued is authorized by law; that the proceedings of the said village council and other officers relative thereto have been regular and in conformity with statutory requirements; that the amount of said bonds and the tax levy which will be necessary to pay interest thereon and create a sinking fund for their redemption when due exceeds no statutory limitation; and that the bond forms, as indicated by the specimen copies attached to said transcript, are properly drawn.

I therefore certify that the said bonds, when properly executed and delivered, will constitute valid obligations of the village of Centerburg.

My delay in reporting to you relative to these bonds is due to the fact that information which I requested from the clerk of the village of Centerburg was not furnished until October 29, 1915.

Respectfully,
EDWARD C. TURNER,
Attorney General.

991.

PUBLIC AUCTIONS—INTERPRETATION OF LAW WHICH LICENSES AUCTIONEERS AND IMPOSES DUTIES UPON PROPERTY SOLD AT AUCTION—SAID LAW CONSTITUTIONAL FOR REASON THAT SUCH IMPOSITION OF DUTIES UPON GOODS SOLD AT AUCTION IS BASED UPON POLICE POWER OF STATE.

The imposition of duties upon goods sold at auction, as provided in section 5870, G. C., and related sections, is based upon the police and not the taxing power of the state and is not in contravention of the provisions of section 2 of article XII of the constitution.

COLUMBUS, OHIO, November 4, 1915.

HON. ROBERT P. DUNCAN, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—I have your letter of October 27, 1915, as follows:

"The attention of this office has very recently been called in a concrete way to the question of the constitutionality of certain provisions in the General Code relating to the matter of auction sales. The provisions in question are contained in chapter 3 of title II of the Code, which embraces sections 5866 to 5882, inclusive.

"Briefly, sections 5866 to 5869, inclusive, prohibit the exercise of the occupation of auctioneer and sales by public auction otherwise than by virtue of judicial process, unless the person conducting such auction be licensed as an auctioneer, as provided by these sections, which likewise prescribe the manner of his appointment and qualification. I do not understand that any question is made with reference to the constitutionality of these particular statutory provisions providing for the licensing of auctioneers, as it seems this is a matter quite clearly within the police power of the state.

"The particular provisions to which objection is made are those of section 5870 providing that property exposed to sale at public auction, otherwise than in the execution of judicial process, shall be subject to certain rates or duties, which rates or duties vary according to the classification of the property. Sections 5875 and 5876 provide for quarterly accounts to be filed by licensed auctioneers, setting forth a full and true statement and exhibit of all property of every class sold or struck off by them, and further provide that within fifteen days from the date of any such account so filed the auctioneer shall pay to the county treasury the duties accruing on the sales mentioned in such account according to the provisions of said section 5870; while section 5877 makes the auctioneer liable to penalty for neglecting or refusing to file said account or refusing to pay the duties provided for.

"It seems that not much attention has been paid by the administrative officers of this county to the provisions of section 5870, and upon consultation with Mr. Halbedel of the county department of the bureau of inspection, and upon examination, in company with Mr. Halbedel, of returns made to the state auditor, the same situation is more or less apparent with respect to the non-observance of this law in all the other counties of the state.

"Taking the view that if the provisions of section 5870 and related sections of the General Code are constitutional they should be enforced, and

deeming the question one of statewide importance, Mr. Halbedel expressly requested me to put to you the question as to the constitutionality of these provisions. I am aware that it is not the policy of your office to invite inquiries which do not call for the construction of application of statutes, but which present bare questions as to their constitutionality. However, as Mr. Halbedel, as I have before stated, has expressly requested me to submit this matter to you, I do not feel that I can do otherwise than accede to his request.

"Without discussing the matter at length, I suppose the first question presented is whether the rates or duties provided for in section 5870 are to be considered a tax upon the property sold or an occupational tax upon the auctioneer (97 U. S., 566; Cooley on Taxation, 1106). If the former, it will be manifestly difficult to sustain the constitutionality of the statute in face of the provisions of section 2 of article XII of the constitution, which provides that laws shall be passed taxing by uniform rule all real and personal property according to its true value in money. If, on the other hand, these duties are to be considered a tax on the occupation of the auctioneer, the question as to the constitutionality of these provisions may be more open.

"Historically, it may be noted that the statutory provisions in question were originally enacted March 16, 1840, taking effect March 1, 1841. Thereafter this act of the legislature was published in Swan's Revised Statutes, page 56, but later intentionally omitted from Swan & Critchfield's statutes. On April 3, 1867, the legislature by joint resolution declared this law valid and directed said act as originally enacted to be brought forward and republished in volume 64 Ohio Laws. Subsequent to this, the act was incorporated in Swan and Sayler's supplement to the Revised Statutes of Ohio, and since that time has found a place in our published statutory law. The existence of these statutes was recognized by the supreme court in the case of Sipe v. Murphy, 49 Ohio St., 536, but as far as I know, the constitutionality of any of the provisions of this act has never been presented as a question in any reported case."

As your letter contains a complete history of the law involved in your inquiry, it is not necessary to more than observe that since it appears that it was enacted in 1840, and no question of its constitutionality having heretofore been raised, it would seem to be rather late now to question its validity. The provisions of this law which I desire to consider in connection with my answer to your inquiry are sections and parts of sections 5866, 5870, 5876 and 5877 of the General Code.

It is provided in section 5866 aforesaid that a person shall not exercise the occupation of auctioneer or sell by public auction, vendue or outcry, any property or effects, except utensils of husbandry, household furniture, real estate, produce, horses, sheep, hogs and neat cattle, without a license as herein provided.

It is further provided in said section that whoever exercises such occupation or attempts to sell, by public vendue, auction or outcry, any property or effects, except as herein provided, without such license, shall forfeit and pay not more than five hundred dollars or less than one hundred dollars, to be recovered in the name of the state.

Section 5870 aforesaid, under which your question is directly raised, provides as follows:

"Property exposed to sale by public auction with the exceptions mentioned in sections fifty-eight hundred and sixty-six and fifty-eight hun-

dred and sixty-seven, shall be subject, each time they are struck off, to duties at the following rates, calculated on the sums for which such property is struck off, namely:

"1. Sugar, molasses, coffee, tea, spice, salt, fish, oil and wine, at the rate of seventy-five cents for each hundred dollars.

"2. Vessels and boats, including engines, tackle, apparel, and furniture belonging to boats and vessels, at the rate of one dollar for each hundred dollars.

"3. Queensware, glassware and ardent spirits, at the rate of one dollar and fifty cents for each hundred dollars.

"4. Dry goods, hardware and cutlery, and other articles not included in the foregoing classes, at the rate of two dollars for each hundred dollars."

It is further provided in section 5875 aforesaid, that a licensed auctioneer shall make a written quarterly account, dated on the first days of March, June, September and December in each year, in which he shall state in detail: (1) The sums for which property has been sold at each auction held by him from the date of his license, or from the date of his last quarterly account, the names of the persons on whose account the sale was made, the day of sale, and the amount of each day's sale. (2) The amount of other sales made by him, or any person associated with him or in his employ, of property liable to auction duties. (3) The amount of duties chargeable under the provisions of this chapter on sales, public and private, of property subject to duties under the provisions of this chapter.

Section 5876 provides in what manner said account shall be verified and then provides that said auctioneer, within fifteen days from the date of such account, shall deliver to the county treasurer, and a duplicate copy thereof to the county auditor, and, *at the same time,* shall pay to such treasurer the amount of duties accruing on the sales mentioned in such account.

By the provisions of the succeeding section, 5877, any auctioneer neglecting or refusing to exhibit his quarterly account and deliver it properly verified, or who neglects or refuses to pay the duties required to the treasurer of the proper county within the time required, shall forfeit his license and not exceeding one thousand dollars, with the costs of prosecution, and be liable for such duties, to be recovered by an action in the name of the state.

It appears from your letter that you have some doubts as to the constitutionality of the foregoing provisions of the law regulating auctions and especially of the provisions of section 5870, supra.

I learn in this connection that a matter is now pending before you involving the imposition of the duties provided for in said section and the collection thereof by your office, and in which it is contended that said provisions are in conflict with section 2 of article XII of the constitution, which provides, among other things, that:

"Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money."

The real and only question to be considered in this connection is whether the foregoing provisions of section 5870, considered and interpreted in connection with the other provisions of law above quoted, are based upon the police power of the state or its taxing power. In other words, do the provisions of said section impose a tax upon said property therein specified for the purpose of raising a

general revenue, or are the provisions of said section intended to regulate the auction of goods under the police power of the state? Manifestly if the duties imposed by said section are intended for the purpose of revenue in the exercise of the taxing power of the state, they are unconstitutional under section 2 above quoted. It is immaterial under what name the money specified in said section is levied upon the property therein described. As has been frequently observed by our courts, "there is no magic in names." If this money is charged against the property described in said section as property to raise a revenue for general purposes, it is a tax notwithstanding the legislature has denominated it a duty. Upon the other hand, if it is an exercise only of the police power of the state as a matter of regulation of auction sales and as a means of safeguarding the public against any fraud and deception that may be practiced in such sales, or for any reason which may substantially affect public interest, in the judgment of the law making power, it is not a tax and does not come within the inhibition of section 2 of article XII of the constitution. It may be stated as a general rule of law that the legislature has the discretion to levy license taxes upon any occupation it may select and it has the right to classify occupations and businesses and license some while omitting others and providing for a different amount assessed against each class. All vocations within the state may be licensed or some may be spared. Some may be required to pay a small fee and others a heavy license. The legislature has a wide discretion in this matter and the courts will not review its action unless the classification is arbitrary and unreasonable or in effect no classification.

"The constitutional rule that taxes shall be equal and uniform is regarded as having no direct application to license or occupation tax, or if applicable at all, as not depriving the legislature of the power of dividing the subject of license taxation into classes. The only constitutional limitation upon the imposition of license taxes, so far as it concerns their equality and uniformity, is that they shall be equal and uniform on all persons and subjects within a certain class. A license tax is uniform and equal when it bears equally upon each individual belonging to a described class upon which the tax is imposed. Constitutions do not require that all occupations, professions and businesses be taxed equally and uniformly; they simply require that all persons or subjects within the same class be taxed equally and uniformly." Hager v. Walker, 129 American State Report, 255, note "B" and cases there cited.

It has long and frequently been decided by the supreme court of this state that occupations may be regulated by license with the exception, until recently, of the liquor traffic, which until 1914 was specially exempted by schedule 18 of the constitution. The right to so license occupations is perhaps more exhaustively discussed in Marmet v. The state, 45 O. S., 63, than in any other reported case, and I am convinced that a careful consideration of the conclusions reached by the court in this case and of the reasons as therein given for such conclusions will furnish a solution for the question now before us.

This was a case in which a law imposing a license fee on the occupation of the keepers and owners of livery sale or boarding stables and the owners of all vehicles used upon the streets, and other occupations, in cities of the first grade of the first class in this state, was under consideration. In that case the court expressly held, that:

> "The general assembly has power to regulate occupations by license, and to compel, by imposition of a fine, payment of a reasonable fee, where a special benefit is conferred by the public upon those who follow an occupation, or where the occupation imposes special burdens on the public, or where it is injurious to or dangerous to the public."

Commenting upon the provision of this law in connection with the claim that its provisions were in conflict with section 2 of article XII of the constitution, the court said:

> "It is further urged that the sections quoted are in conflict with section 2, of article XII, of the constitution, which provides that 'laws shall be passed taxing by a uniform rule all moneys,' etc., 'according to its true value,' and is an attempt, under form of license, to raise money for general revenue. Section 20, if regarded as imposing a tax, does not purport to tax property; neither does it. An owner may use upon his own premises, and he may manufacture, and may sell any number of vehicles without coming within the provisions of this section. Only when he desires to use such vehicles *upon the streets* must he pay the annual license fee. * * * The power to tax or regulate by license arises from the general legislative power given by section 1, of article II of the constitution, and is not derived from section 2, of article XII. The latter section is but a limitation upon the taxing power, and it has been often held that the requirement of this section is simply that taxes upon property, as such shall be by a uniform rule, but that this does not impair the power of the general assembly to use its discretion *when the burden is not placed upon property.*"

The court, in considering the question of whether the money received for licenses under this law could be considered as money raised for general revenue, further says:

> "So other moneys arising from licenses, though required to be placed to the credit of the general fund, do not, by reason of that fact, become general revenue. If revenue is necessarily beneficial to all the people within the jurisdiction in which it is raised, it may then be classed as general revenue; otherwise, it is special."

Manifestly the foregoing remarks of the court apply with equal force to the provisions of section 5870, supra. The duty imposed upon the property specified therein is not levied upon it as property, nor does it purport so to do. *If it was a tax upon the property as such,* it would be immaterial where or how or in what manner it was offered for sale or sold, or whether it was offered for sale or sold at all. The statute, however provides that it is to be levied only when it is sold at auction. So long, therefore, as it remains in the hands of its owner or so long as it is not sold at auction it is not subject to the payment of any of the duties imposed by the provisions of said section. What then is the basis of the charge, or what is the condition which brings into force the provision of this law? It is the selling at auction and it alone which invokes the application of the duty, and the tax thus imposed is not upon the property but upon the selling of the property.

As the court remarked in Marmet v. The State, supra, the owner of a vehicle may use it upon his own premises without a license. It is only when he desires to use it upon the street that he must pay a fee. A very familiar illustration of this distinction may be found in the law requiring the registration of automobiles. The owner of an automobile is not required to register and procure a license unless he intends to operate and drive his machine upon a public highway. So long as it remains upon the owner's premises it is not subject to the registration law and no one for a moment would contend that this law imposed a tax upon the machine itself.

If, however, there were any doubts remaining regarding this feature of this section, its provisions when considered in connection with the other provisions herein quoted are wholly inconsistent with the theory that the duties imposed thereon are a tax. It is apparent that this section was enacted by the legislature as a basis or measure by which it undertook to make an assessment against the auctioneer and his business in addition to the license required by section 5866. There are no provisions to be found in this law whereby the property or the owner of the property may be held for the duties imposed by section 5876. Upon the contrary, it is expressly provided by section 5876 that the auctioneer shall report and pay the amounts due under the provisions of this section and, in the event of his failure so to do, it is further provided by the succeeding section that he shall not only forfeit his license, but in addition a sum of not to exceed one thousand dollars and *that duties so assessed may be recovered from him by an action in the name of the state.* Here is a clearly expressed purpose to make the auctioneer responsible, and him only, for the payment of these duties. This method of assessing occupations has been universally approved by the courts and it may be stated as a general rule that capital invested, the amount of stock in trade, or the monthly or annual sales, or the receipts of business constitute a proper basis for graduating license taxes.

It is said in Hager v. Walker, 129 American State, Report, 255, that:

> "No constitutional objection can be urged against such classification, when reasonably made. Taxes thus imposed are none the less occupation taxes as distinguished from property taxes because graduated according to the magnitude of the business done or capital invested."

In the case of Kittaning Coal Co. v. Commonwealth, 79 Pa. St. 100, it was held that a tax of three cents for every ton of coal mined by every company incorporated or organized by or under any law of the state was not a tax on the coal but on the business.

In Sacremento v. Crooker, 16 Cal. 119, it was held that a tax based upon the monthly sales of retail merchants was a tax upon the business and not upon the property used in such business.

In Goldsmith v. Huntsville, 120 Ala. 182, it was held:

> "A tax on the gross amount of sales of a retail merchant, imposed by ordinance of the city, is not a tax on the goods themselves or on the fruits of the sale, but upon the business of selling and is not therefore a property tax but an occupation or privilege tax."

In view of the foregoing considerations I conclude that the duties imposed by section 5870, supra, are a tax upon the business of selling the property specified in said section and not upon said property.

While it is not necessary to consider further elements involved in the determination of the question submitted, yet I do not hesitate to say that the elements of intention to produce a general revenue by the provisions of the law in question is also wholly lacking and therefore necessarily fatal to the claim that the law imposes a tax. This conclusion is based upon the authority of Cincinnati Gas Light & Coke Co. v. State, 18 O. S., 238, in which a law providing for the inspection of gas meters, the protection of gas consumers and the protection and regulation of gas and light companies was under consideration by the court. This law provided for an assessment upon the several gas companies of the state in proportion to the amount of capital invested. The court in considering the claim that this law was in contravention of section 2 of article XII, said:

"It is settled by the repeated decisions of this court, in Hill v. Higdon, 5 Ohio St., 243; Reeves v. The Treasurer of Wood Co., 8 Ohio St., 333; and Baker v. the City of Cincinnati, 11 Ohio St., 534, that the section of the constitution just referred to is only applicable to, and furnishes the governing principle for, all laws levying taxes for *general revenue,* whether for state, county, township, or municipal corporation purposes.

"Now, although the assessment or charge upon the gas companies of the state imposed by the statute in question may be a tax, in the widest import of the word, it certainly is not a tax for purposes of general revenue. It is the assessment of a charge for a special purpose growing out of the exercise of the supervisory power of the government over the business in which these companies are engaged. The above section of the constitution is, in effect, a mandate upon the legislature that all property, of every nature, shall be taxed by a uniform rule; but the charge or assessment here complained of is not a tax on property, but rather a charge upon individual corporations—artificial persons—and the business in which they are engaged; and it by no means follows, that because the state is compelled to tax all property by a uniform rule, that it is therefore cut off from all power to lay assessments and charges for exceptional and special purposes coming clearly within the general legislative power conferred by the constitution upon the general assembly.

"It is settled by authoritative decision that, under the present constitution of the state, local assessments may be made to pay for lands appropriated for streets within the limits of municipal corporations, and for their improvement and repair; for the making of ditches and drains, and free turnpike roads outside of such corporations; and that charges may be imposed for licenses to theaters. We have several other laws imposing and authorizing charges on particular branches of business, through the medium of licenses, which can be obtained only by paying for them; which laws are supposed to be in full force, and the validity of which, so far as I know, have never been questioned. *And the same may be said of the levying of duties on auction sales."*

We have in this case not only authority for the proposition that the duty imposed in section 5870, supra, is not for general revenue as required in the case of the levying of a tax as contemplated by the constitutional provision in question, but we have in the concluding remarks of the court an express reference to the law we are now considering, by which the court indicates that it is an illustration of the levying of a duty for a special purpose. This reference, while not conclusive of the question before us, indicates very strongly the view entertained by the court of the object and purpose of section 5870 and related sections.

One more proposition may be important in connection with this discussion, although not adverted to in your inquiry: Are the duties imposed by section 5870 a reasonable exercise of the police power of the state? Again, it may be stated as a general rule of the law that when police regulation is the object of a license, the nature of the business or occupation upon which the burden is laid must necessarily to a great degree determine the reasonableness of the amount charged. Ordinarily the amount so charged is determined by the relation any business or occupation may bear to the general public good or interest of the community. The cost of police surveillance as well as the expense of issuing a license and the keeping of official records thereof are material items to be considered, and usually furnish the basis of the charge made. In cases where the business is admittedly harmful to the public or may become a nuisance by affording a means

of deceiving and defrauding the public, a charge may be made which tends to limit and discourage the business. Gray on Limitations of Taxing Power, section 1452; Cooley on Taxation, section 1142.

Without any reflection upon the integrity or reputation of the high-class firm of auctioneers, whose case you have under consideration, it may be said that in many instances auction sales are conducted in the cities of this state by non-resident auctioneers and fake bidders, who depend largely upon the "stranger within the gates" for business and who would certainly come within the extreme requirements of the rule I have just stated.

In view of these considerations, therefore, I am not prepared to say that as a police regulation the duties imposed by said section 5870 are unreasonable. However, this is properly a question for judicial determination and until so determined it is the duty of administrative officers to enforce the law as they find it.

I conclude, therefore, that the duties imposed by section 5870, supra, are based upon the police and not the taxing power of the state and are not in contravention of section 2 of article XII of the constitution.

Respectfully,
EDWARD C. TURNER,
Attorney General.

992.

MUNICIPAL CORPORATION—MAYOR—DUTY OF SUCH OFFICER IS TO CARRY OUT MANDATE OF APPELLATE COURT TO CARRY SENTENCE IMPOSED BY FORMER MAYOR INTO EXECUTION—NO AUTHORITY TO REMIT OR SUSPEND FINE.

A mayor has no duty to perform except to carry out mandate of appellate court to carry sentence imposed by former mayor into execution. No authority vested in him to remit or suspend fine.

COLUMBUS, OHIO, November 4, 1915.

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

GENTLEMEN:—Permit me to refer to your request for an opinion which is as follows:

> "We would respectfully request your written opinion upon the following question:
>
> "In 1912 the mayor imposed a fine of $100.00 and costs against a party for violation of the Sunday closing law. The case was appealed to the common pleas and appellate courts. Said courts confirmed the judgment of the mayor's court, the appellate court remanding the case back to the mayor's court for execution. The present mayor refuses either to commit the defendant to prison for non-payment of fine and costs, or to take any action looking to the collection of said fine and costs.
>
> "What, if any, legal procedure may be invoked by the city solicitor, or the council, to compel said mayor to perform his official duty?"

In addition to your letter I am in receipt of a copy of the Bill of Exceptions in the case of the State of Ohio v. Jerome Shine, signed by C. N. Shook, mayor, whose term of office expired under date of December 31, 1913; also a copy of

the journal entry in the error proceedings in the court of appeals of Allen county, Ohio, in the case of Jerome Shine v. The State of Ohio, which journal entry is as follows:

COURT OF APPEALS—ALLEN COUNTY, OHIO.

January Term, 1915.

Jerome Shine,		July 6, 1915.	
Plaintiff		No. 59.	
vs.	Journal Vol. 1.		Page_____
The State of Ohio,		ERROR.	
Defendant			

CERTIFIED COPY OF JOURNAL ENTRY.

"At a former day of the January term of court for said year, this cause came on to be heard upon the petition in error, bill of exceptions, original papers, pleadings and the transcripts of the journal and docket entries of the Allen county court of common pleas, and the court of the mayor of the city of Lima, Ohio, was argued by counsel and taken under advisement by the court.

"Thereafter, this 30th day of June, 1915, and at the January term of court for said year, coming further to consider said cause and being duly advised in the premises and in consideration of the petition in error, bill of exceptions, original papers, pleadings and the transcripts of the journal and docket entries of the Allen county court of common pleas and the court of the mayor of the city of Lima, Ohio, and the arguments of counsel, the court finds no error apparent in the record of said proceedings and judgment.

"It is therefore considered, ordered and adjudged that the said judgment of the Allen county court of common pleas and the said judgment of the court of the mayor of the City of Lima, Ohio, be, and the same are hereby affirmed and that the defendant in error recover of said plaintiff in error its costs herein expended for all of which execution is hereby awarded.

"It is further ordered that a special mandate be sent to the court of the mayor of the city of Lima, Ohio, to carry this judgment and order into execution and the plaintiff in error, Jerome Shine, is remanded to the custody of the city of Lima, Ohio, to all of which the plaintiff in error excepts.

"O. K. John H. Klatte,
"Counsel for Plaintiff in Error.
"O. K. W. S. Jackson,
"Counsel for Defendant in Error."

In view of the question presented I communicated with the mayor of the city of Lima, with a view to ascertaining why he did not carry out the mandate of the court of appeals of Allen county, and under date of October 20th, he advised me as follows:

> "Answering your esteemed favor of recent date in which you ask for further data concerning the case of the State of Ohio v. Jerome Shine, permit me to say that I went into the fullest detail with State Inspector Will E. Heck, who notified me that he preferred to take the legal end of the subject up with you, as to what my official rights are. Have I the right to suspend a fine or not, that is what I want to know. If not, I will proceed at once to issue execution against all of the defendants in the

cases now pending, and in case they can not pay I will commit them to the county jail. There are six cases pending, one of the defendants, Charles Athy, is dead. Three of them have no money, and the other two have no real estate. Athy, Shine and Ryan were bartenders. Awaiting an early reply, I am,

"Respectfully,

"(Signed) Miles O. Standish,
"Mayor of the City of Lima."

Since the conviction of the defendant involved in the case under consideration the city of Lima has had two mayors, and the question presented by the present mayor is whether or not he has the right to suspend the fine imposed by Mayor C. N. Shook in 1912, he stating that if he has not such right he will proceed to issue execution without delay.

Nowhere in the law do I find any provision which authorizes the mayor to remit a fine in whole or in part. In the case under consideration, which appears to be one of a number of cases of a similar character now before the mayor of Lima, the jurisdiction of the upper courts was invoked in accordance with law, and the intention of the mayor in assessing the fine of one hundred dollars and costs as a sentence was clearly manifested as a final order by the signing of the Bill of Exceptions; and it is my opinion that the present mayor of the city of Lima has no further power to exercise nor duty to perform than to carry out the mandate of the court of appeals, which is to carry the judgment of the mayor's court of the city of Lima into execution.

The question of legal procedure which might be invoked by the city solicitor or the council has not been gone into in view of the statement of the mayor as to his being in readiness to issue execution in case he has no right to suspend the fine.

Respectfully,
EDWARD C. TURNER,
Attorney General.

993.

APPROVAL OF TRANSCRIPT FOR SEVERAL BOND ISSUES, CITY OF MIDDLETOWN, OHIO.

COLUMBUS, OHIO, November 4, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—IN RE: Bonds purchased by the Industrial Commission from the city of Middletown, Ohio, aggregating $47,000, consisting of three issues as follows:

$7,000.00 of park bonds, being fourteen bonds of $500 each, falling due two each year on the first day of October from 1916 to 1922, both inclusive.

$25,000.00 of waterworks bonds, being fifty bonds of $500 each, falling due two each year on the first day of October from 1916 to 1939, both inclusive.

$15,000.00 of sewer bonds, being thirty bonds of $500 each, falling due two each year on the first day of October from 1916 to 1925, both inclusive.

I have examined the several transcripts of the bond issues above described and I find that the purposes for which the several issues are made are authorized

by law; that the proceedings of the city commission of Middletown and other officers relative thereto have been regular and in conformity with statutory and charter requirements; that the total amount of said bonds and tax levy which will be necessary to pay interest thereon and create a sinking fund for their redemption when due exceeds no statutory or charter limitation.

I therefore certify that said bonds, when properly executed and delivered, will constitute valid obligations of the city of Middletown.

Respectfully,
EDWARD C. TURNER,
Attorney General.

994.

BOARD OF STATE CHARITIES—COUNTY'S SHARE OF EXPENSE OF MAINTAINING CHILDREN COMMITTED BY JUVENILE COURT TO SAID BOARD FOR PLACING IN HOMES TO BE PAID FROM GENERAL COUNTY FUND.

The county's share of expense of maintaining children committed by the juvenile court to the Ohio Board of State Charities for placing in homes to be paid from general county fund.

COLUMBUS, OHIO, November 5, 1915.

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

GENTLEMEN:—Permit me to acknowledge receipt of your request for an opinion which is as follows:

> "We would respectfully request your written opinion upon the following question:
>
> "Section 1352-3 permits the Ohio Board of State Charities to receive under its care for placement in family homes, certain children.
>
> "Section 1352-4 provides that the county from whence the child came, shall be responsible for actual maintenance and necessary personal expenses until his placement in a suitable family home.
>
> "Will you kindly advise us from what fund the county treasurer is to pay for his service in respect to children committed under the following conditions:
>
> "1. When children are committed by the juvenile court judge from a county where there is no county children's home.
>
> "2. Where children are committed from a county where there is a county children's home, but where for various reasons the child may not be eligible for admission to that home."

Section 1653 of the General Code, as amended, (103 O. L., page 872) is as follows:

> "When a minor under the age of eighteen years, or any ward of the court under this chapter, is found to be dependent or neglected, the judge may make an order committing such child to the care of the children's home if there be one in the county where such court is held, if not, to such a home in another county, if willing to receive such child, for which

the county commissioners of the county in which it has a settlement, shall pay reasonable board; or he may commit such child to the board of state charities or to some suitable state or county institution, or to the care of some reputable citizen of good moral character, or to the care of some training school or an industrial school, as provided by law, or to the care of some association willing to receive it, which embraces within its objects the purposes of caring for or obtaining homes for dependent, neglected or delinquent children or any of them, and which has been approved by the board of state charities as provided by law. When the health or condition of the child shall require it, the judge may cause the child to be placed in a public hospital or institution for treatment or special care, or in a private hospital or institution which will receive it for like purposes without charge. The court may make an examination regarding the income of the parents or guardian of a minor committed as provided by this section and may then order that such parent or guardian pay the institution or board to which the minor has been committed reasonable board for such minor, which order, if disobeyed, may be enforced by attachment as for contempt."

This section provides for the commitment of certain dependent or neglected children to the Board of State Charities for the purpose of having them placed in suitable homes under the direction and control of the board.

Section 1352-3 of the General Code, (103 O. L., 866) authorizes the board to receive children committed to it by the juvenile court; and section 1352-4 of the General Code, (103 O. L., 867) which provides for the payment of expenses in placing such child and one-half of the amount of board, if any, paid by said Board of State Charities by the county in which the child had legal residence when received by the State Board of Charities, is as follows:

"The actual traveling expenses of such child and that of the agents or visitors of said board in connection with placing such dependent or neglected child in a home and of subsequent visitation of such child, together with half the amount of board, if any, paid by said board on account of the child to the owners of such home shall be charged by the board of state charities to the county in which the child had a legal residence when received by such board. The treasurer of each county shall pay the quarterly draft of the board of state charities for the amount so chargeable against such county for the preceding quarter. The sums so received as well as payments for board as provided by sections 1352-5 and 1653 of the General Code, shall not be turned into the state treasury but shall be credited to a fund to be known as the child placing fund to be used to maintain the child-placing work of the board as provided by this chapter, but such money received for children's board shall be used only to pay the board of the child for which it may be paid by the individuals liable therefor."

Section 3092 of the General Code, as amended (103 O. L., 891) is as follows:

"In any county where such home has not already been provided, the board of commissioners shall make temporary provision for destitute children by transferring them to the nearest children's home where they can be received and kept at the expense of the county, or by leasing suitable premises for that purpose, which shall be furnished, provided and

managed in all respects as provided by law for the support and management of children's homes, but if such child be not abandoned or surrendered by its parents, a complaint must first be filed with the juvenile court setting forth the facts as to such children, and if such court commits such children to an institution or agency for the care of children, then said commissioners may pay reasonable board for such child, whether placed in an institution or with a private family. But the commissioners may provide for the care and support of such children within their respective counties, in the manner deemed best for the interest of such children, which may include the payment of board for such children in a private home, when placed therein by an institution or society certified by the board of state charities as provided by section 1352-1 of the General Code, and they shall levy an additional tax, which shall be used for that purpose only."

By referring to the latter part of section 3092, as amended, supra, it will be noted that provision is made for the creation of a fund to be used by the county commissioners to provide for the care and support of neglected or dependent children in counties where no children's home has been provided when such care and support is provided within the county. The case presented, however, deals solely with the payment of expenses incurred in connection with children committed to the care of the State Board of Charities in the first instance where there is no county children's home, and in the second place, for various reasons, the child may not be eligible for admission to the county children's home which has been provided. The fund appropriated for a county children's home may not be used for such purpose in view of the provisions of section 3105 of the General Code, which provides that the expenditure of such fund shall be on the order of the trustees of the home, whereas under the provisions of section 1352-4 of the General Code, supra, the payment of the amount chargeable against the county is made to the Board of State Charities direct, there being no provision for the approval of the trustees of the children's home.

It is my opinion, therefore, that the expenditure for the care and support of children committed by the Board of State Charities by the juvenile court in the county where there is no children's home or in a county where the child may not be eligible to admission to the children's home is to be paid out of the general county fund, attention, however, being directed to the provisions of section 1653 of the General Code, as amended, supra, to the effect that an order may be made by the court directing the parents or guardian to pay to the Board of State Charities reasonable board for the minor committed, under pain of attachment or contempt proceedings.

Respectfully,
EDWARD C. TURNER,
Attorney General.

995.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF MARIETTA-McCONNELLSVILLE ROAD IN WASHINGTON COUNTY, OHIO.

COLUMBUS, OHIO, November 5, 1915.

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

DEAR SIR:—I have your communication on November 3, 1915, transmitting to me for examination supplementary final resolution relating to the improvement of the Marietta-McConnellsville road in Washington county, petition No. 1357, I. C. H. No. 393.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

996.

STATE ARMORY BOARD—APPROVAL OF ABSTRACT OF TITLE FOR REAL ESTATE IN ZANESVILLE, OHIO.

COLUMBUS, OHIO, November 5, 1915.

HON. BYRON L. BARGAR, *Secretary, Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—At your request I have examined the abstract of title to the following described real estate situated in the county of Muskingum and in the city of Zanesville, and bounded and described as follows:

> "Being lots 18, 19 and 20 of Van Horne's addition to the city of Zanesville, as the same is recorded in vol. V, page 504 of the deed records of Muskingum county, and being situated in Elberon avenue in said city."

The abstract of title shows an estate in fee simple in said premises in the city of Zanesville as of the date when said abstract was made.

In addition to the abstract you also submitted two transcripts of the minutes of the board of education of Zanesville, Ohio, the first of said transcripts being of date August 30, 1915, and the second, October 20, 1915. In addition to these transcripts you submitted two deeds, one from the board of education of the Zanesville city school district to Charles Underhill, which deed is dated October 21, 1915, and the other deed from Charles E. Underhill and Myrtle Underhill, his wife, to the state of Ohio.

An examination of the transcripts above referred to shows that in the sale of the premises by the board of education of the Zanesville city school district all provisions of law relative to such sales have been carefully complied with.

The deeds above referred to have been properly executed, and when the same are placed on record will convey to the state of Ohio an estate in fee simple to the premises hereinbefore described. The deed from the board of education to Charles E. Underhill should be placed on record before the deed from Charles E. Underhill to the state is filed for record.

I am returning herewith the abstract of title, the transcripts and the deeds above referred to.

Respectfully,
EDWARD C. TURNER,
Attorney General.

997.

CIVIL SERVICE—FILING OF FORMAL APPLICATION WITHIN A REASONABLE TIME PRIOR TO PROPOSED EXAMINATION IS MANDATORY—IF APPLICANT PERMITTED TO TAKE EXAMINATION, BOARD CANNOT SUBSEQUENTLY QUESTION HIS RIGHT.

The provision of section 486-11, *G. C.,* 106 *O. L.,* 407, *requiring an applicant to file a formal application within a reasonable time prior to a proposed civil service examination, considered in connection with other provisions of said section, is mandatory.*

When, however, the commission permits an applicant to take the examination without filing his application as so required, and accepts his application during said examination, it cannot thereafter question his right to be examined or withhold from him the benefits thereof.

COLUMBUS, OHIO, November 6, 1915.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I have your favor of November 5, 1915, as follows:

"On September 29th, we conducted an examination for superintendent of the women's reformatory at Marysville.

"The board of administration urged that this examination be conducted at the earliest possible date. A special bulletin was issued advertising this examination, but the time within which applications could be received prior to the date of the examination was so short that the commission felt it advisable, in order to secure as large a number of applicants as possible, to waive an established rule in regard to the filing of applications. One application was filed at noon on the day of the examination; two applications were filed on October 1st, and one application on October 4th, by persons who stated at the time that they had not understood the rule of the commission.

"When the results of this examination were made known, it appeared that certain individuals who stood high on the list had not filed applications before the date of the examination, and a question has been raised as to the legality of their standing in view of this fact.

"Pursuant to section 486-11 of the civil service law, the commission has been acting in accordance with the rule established by the former civil service commission under the same section of the former law, requiring that all applicants shall file applications not less than three days prior to the date of examination. However, since the time for filing such application was short, the commission felt it advisable to receive the applications that came in late. No formal action was taken, or minutes made, authorizing the filing of late applications."

Section 486-11 of the General Code, 106 O. L., page 407, to which you refer in your letter, provides as follows:

> "The commission shall require persons applying for admission to any examination, provided for by this act or by the rules of the commission prescribed thereunder, to file with the commission within a reasonable time prior to the proposed examination a formal application in which the applicant shall state under oath or affirmation:
>
> "(1) Full name, residence and postoffice address.
>
> "(2) Nationality, age and place and date of birth.
>
> "(3) Health and physical capacity for the public service sought.
>
> "(4) Business and employments and residences for five previous years.
>
> "(5) Such other information as may be reasonably required touching the applicant's merit and fitness for the public service sought; but no inquiry shall be made as to any religious or political opinions or affiliations of the applicant."

It is further provided in the last clause of the said section that blank forms for applications shall be furnished by the commission and that it may require in connection with the application certificates of persons having knowledge of the applicant as the good of the service may demand. It further provides that the commission may refuse to examine an applicant, or after an examination to certify an eligible, who is found to lack any of the preliminary requirements for the examination or who is physically so disabled as to be rendered unfit for the performance of the duties of the position which he seeks, or who is addicted to the habitual use of intoxicating liquors or drugs to excess, or who has been guilty of any crime or of infamous or notoriously disgraceful conduct, or who has been dismissed from either branch of the civil service for delinquency or misconduct, or who has made false statements of any material fact, or practiced or attempted to practice any deception or fraud in his application or in his examination, in establishing his eligibility or securing his appointment. The requirement that the application shall be filed within a reasonable time prior to a proposed examination I regard as mandatory when considered in connection with the other provisions of the section in question. The plain purpose of the law in this regard is to require the application to be filed at such a time prior to the examination as to afford the commission the opportunity to examine it and to investigate as fully as it may deem proper regarding the applicant in connection with the other requirements of this section.

You state in your letter that under the rules established by the commission applicants have heretofore been required to file their applications not less than three days prior to the date of examination, but in the examination in question this provision was waived by the commission. In view of the mandatory provisions of the law, it is apparent that the reasonable time as therein required may not depend upon the exigencies that may arise in any particular examination. Regardless, however, of these facts, it appears from your communication that the commission, in the examination in question, with full knowledge of all the facts, permitted applicants to take the examination without complying with the foregoing requirements as to the time of filing their applications. The commission thereby not only recognized their right to take the examination without complying with such requirements, but it dealt with them in the capacity, character or status of persons duly qualified to take said examination. The commission is, therefore, now estopped to deny that such applicants had this right or that they had the capacity or status of duly qaulified applicants, it must continue to recognize the

qualifications it attributed to them in the first instance and cannot now deprive them of the benefits they have earned and must certify them as eligibles in the order of their standing as a result of such examination. If other applicants feel that they have any rights which are inconsistent with this attitude or course of the commission, they must appeal to some authority other than the commission for relief.

Respectfully,
EDWARD C. TURNER,
Attorney General.

998.

ROADS AND HIGHWAYS—FOLLOWING FORMS APPROVED—(a) PETITION OF LAND OWNERS—(b) RESOLUTION AND APPLICATION OF COUNTY COMMISSIONERS—(c) APPLICATION FOR STATE AID FUNDS—(d) RESOLUTION OF TOWNSHIP TRUSTEES—(e) RESOLUTION AND APPLICATION OF TOWNSHIP TRUSTEES (f) FINAL RESOLUTION, TOWNSHIP TRUSTEES.

COLUMBUS, OHIO, November 6, 1915.

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

DEAR SIR:—I have your communication of October 22, 1915, in which you submit for approval a number of forms for the use of your department, which forms you have designated as follows, to wit:

"(1) Petition of land owners.
"(2) Resolution and application of county commissioners.
"(3) Application for state aid funds.
"(4) Resolution of township trustees.
"(5) Resolution and application of township trustees, and
"(6) Final resolution (township trustees)."

The first form referred to by you and of which you submit a draft is that required under section 197 of the Cass highway law, section 1204, G. C., where the owners of land abutting on an inter-county highway or main market road petition county commissioners for the construction, improvement, maintenance or repair of the same under the provisions of the chapter of the Cass highway law relating to the construction, improvement, maintenance and repair of roads and bridges by the state highway department.

Section 1204, G. C., insofar as it is pertinent, reads as follows:

> "If the owners of twenty-five per cent. or more of the lineal feet abutting on an inter-county highway or main market road, petition the county commissioners for its construction, improvement, maintenance or repair under the provisions of this chapter, the county commissioners shall grant the petition if they are of the opinion that the improvement will be for the best interest of the public, and shall thereupon make application to the state highway commissioner for state aid as hereinbefore provided."

The form submitted by you is applicable only to inter-county highways and not to main market roads, and certain changes in the phraseology suggest themselves as desirable, in view of the language of section 1204, G. C., I therefore suggest the following as a proper form for use under the section in question:

RECEIVED _____
Pet. No. _____
Name of Road_____

PETITION OF LAND OWNERS TO COUNTY COMMISSIONERS.
(Sec. 1204, G. C.)

Form 1.—To be used by land owners when petitioning the county commissioners to apply for state aid.

Inter-county Highway / Main Market Road No. _____

TO THE COMMISSIONERS OF _____ COUNTY OHIO:

We, the undersigned, being the owners of real estate situated in _____ County, State of Ohio, and said real estate so owned by us being at least twenty-five per cent. of the lineal feet abutting on that part of {inter-county highway / main market road} No. _____ hereinafter described, hereby respectfully petition your honorable board for the {construction / improvement / maintenance / repair} under the provisions of sections 1178 to 1231-4 inclusive of the General Code of Ohio of the following described portion of said {inter-county highway / main market road} No. _____, to wit:

_____
_____
_____

in _____ Township _____, in all a distance of _____miles.

We hereby respectfully represent that the {construction / improvement / maintenance / repair} of said portion of highway above described will be for the best interest of the public, and request that your board makes application to the state highway commissioner for state aid in the {construction / improvement / maintenance / repair} of said above described portion of highway as provided by law.

We further represent, each for himself, that the real estate owned by us as aforesaid abuts on said described portion of said {inter-county highway / main market road} No. _____ for the number of lineal feet set opposite our respective signatures.

Names.	Lineal feet abutting.	Names.	Lineal feet abutting.

The second form referred to by you is that required where county commissioners apply for state aid. The draft submitted by you is applicable only to intercounty highways, whereas county commissioners may now apply for state aid on both intercounty highways and main market roads. The pertinent provisions of law are now found in sections 184, 186 and 197 of the Cass highway law, being sections 1191, 1193 and 1204, G. C. Said sections in so far as they relate to this matter read as follows:

"Section 184. The commissioners of any county may make application to the state highway commissioner for aid from any appropriation by the state, from any fund available for the construction, improvement, maintenance or repair of inter-county highways. * * *

"Section 186. Each application for state aid in the construction, improvement, maintenance or repair of inter-county or main market roads, shall be accompanied by a properly certified resolution of the county commissioners * * * stating that the public interest demands the improvement of the inter-county or main market roads therein described, which may include any portion of a highway in the limits of any village, when the same is a continuation of the proposed improvement and the consent of the village has been first obtained. * * * Each application for state aid shall also contain an agreement on the part of the county commissioners * * * to pay one-half of the cost and expense of surveys and other expenses preliminary to the construction, improvement, maintenance or repair of said highway.

"Section 197. * * * The county commissioners may, without the presentation of any petition, make application to the state highway commissioner for aid in the construction of inter-county highways or main market roads under the provisions of this chapter and nothing herein shall in any way restrict their right to make such application."

In view of the provisions above quoted, I suggest the following as a proper form of application by county commissioners for state aid:

Received _____
Pet. No. _____
Name of Road _____
_____

RESOLUTION OF COUNTY COMMISSIONERS APPLYING FOR STATE AID.

Form 2—To be used by county commissioners in applying for state aid.

Inter-county Highway / Main Market Road } No.____

Be it Resolved, By the board of commissioners of _____ county, Ohio, that the public interest demands the improvement under the provisions of sections 1178 to 1231-4, inclusive, of the General Code of Ohio of that part of {inter-county highway / main market road} No._____ situated in the county of_____ and described as follows:

Beginning at _____
_____
_____
in _____ township _____, in all a distance of _____ miles, and be it further

Resolved, That we, the commissioners of said county, do hereby make application to the state highway commissioner for aid from any appropriation by the

state from any fund available for the {construction / improvement / maintenance / repair} of {inter-county highways / main market roads}

and we do hereby agree for and on behalf of said county to pay in the first instance from the funds of said county one-half of the cost and expense of surveys and other expenses preliminary to the {construction / improvement / maintenance / repair} of said highway.

(Signed) _____

_____

_____

Commissioners of _____ County.

The following is suggested as a proper form for the clerk's certificate to said resolution:

Office of the County Commissioners.

State of Ohio, _____ County.

This is to certify that I, _____, as clerk of the board of commissioners of said county of _____, have compared the foregoing copy of resolution with the original resolution now on file in this office and which was duly passed by the board of commissioners of said county of _____ on the _____ day of _____, 19__, and that the same is a correct and true copy of said resolution.

In witness whereof I have hereunto set my hand this _____ day of _____, 19__.

_____

Clerk of the Board of Commissioners
of _____ County, Ohio.

The third form to which you refer is that required under section 196 of the Cass highway law, section 1203, G. C. So much of the section as is pertinent reads as follows:

> "* * * Whenever forty per cent. of the mileage of all the roads of any county are improved by the use of gravel, broken stone, slag, brick, cement and bituminous products or the aggregate of any of these, to a standard established by the county commissioners and approved by the county highway superintendent and the county commissioners appropriate an equal sum for the purpose of constructing, improving, maintaining or repairing all or any part of the inter-county highways within such county, then, on request of the county commissioners, which request shall be accompanied by a certificate signed by the county highway superintendent and reciting that at least forty per cent. of the mileage of all the roads of the county have been improved, as provided herein; and a certified copy of a resolution duly adopted by the county commissioners, which resolution shall contain an agreement upon the part of the county commissioners to expend the sum realized therefrom, and the sum appropriated by the county commissioners in accordance with plans and specifications approved by the state highway engineer, as herein provided; and a certificate signed by the county auditor and reciting that the sum appropriated by the county com-

missioners is in the county treasury and has not been otherwise appropriated, or has been levied, placed upon the duplicate and is in process of collection, the state highway commissioner shall order the apportionment of any appropriation by the state or of any funds available for the construction, improvement, maintenance or repair of inter-county highways due or to become due and available for such county as state aid, paid into the treasury of said county. The state highway commissioner shall issue his voucher therefor upon the auditor of state against any such fund and the auditor shall issue his warrant therefor upon the state treasurer and deliver the same to the treasurer of such county. The sum realized therefrom shall be deposited to the credit of the road fund of said county together with the sum appropriated by said county and both sums shall be used by the commissioners in the construction, improvement, maintenance or repair of such inter-county highways within the county, in accordance with plans and specifications approved by the state highway engineer as herein provided."

The following is suggested as a proper form for the application and attached certificates under the above quoted provision:

APPLICATION BY
COUNTY COMMISSIONERS FOR
INTER-COUNTY HIGHWAY
FUNDS.
(Sec. 1203, G. C.

Form 4—To be used by county commissioners in applying for inter-county highway funds.

Received _____
_____ County.

Whereas: Forty per cent. of the mileage of all the roads of_____ county, Ohio, have been improved by the use of gravel, broken stone, slag, brick, cement or bituminous products to the standard heretofore established by the commissioners of said county and approved by the highway superintendent thereof, and,

Whereas: The commissioners of said county have heretofore appropriated the sum of_____dollars ($_____) for the purpose of constructing, improving, maintaining and repairing the inter-county highways or parts thereof within said county; now, therefore,

BE IT RESOLVED: By the board of commissioners of_____ county, Ohio, that said board of county commissioners hereby makes application for the apportionment of any appropriation by the state or of any funds available for the construction, improvement, maintenance or repair of inter-county highways, due or to become due and available for such county as state aid, amounting in all to_____dollars ($_____), and requests that the state highway commissioner order such funds paid into the treasury of said county, and be it further

RESOLVED: That we do hereby agree for and on behalf of said county to expend said sum appropriated by us as aforesaid and said sum paid into the county treasury upon the order of the state highway commissioner in the construction, improvement, maintenance or repair of the inter-county highways or parts thereof within said county in accordance with plans and specifications approved by the chief highway engineer.

(Signed)

_____
_____
_____
Commissioners of_____County.

Office of the County Commissioners.

State of Ohio
----------County, ss.

This is to certify that I, ----------as clerk of the board of commissioners of said county of----------, have compared the foregoing copy of resolution with the original resolution now on file in this office and which was duly passed by the board of commissioners of said county of----------on the----------day of----------, 19--, and that the same is a correct and true copy of said resolution.

In witness whereof I have hereunto set my hand this---------- day of ----------, 19--.

Clerk of the Board of commissioners
of----------county, Ohio.

Office of the County Auditor.

State of Ohio
----------County, ss.

I hereby certify that the sum of----------dollars ($----------) appropriated by the commissioners of----------county, as set forth in the foregoing resolution, is in the county treasury and has not been otherwise appropriated, or has been levied, placed upon the duplicate and is in process of collection.

In witness whereof I have hereunto set my hand and the official seal of said county auditor this----------day of----------,19--.

Auditor of----------County, Ohio.

Office of the County Highway Superintendent.

State of Ohio
----------County, ss.

I hereby certify that at least forty per cent. of the mileage of all the roads of ----------county have been improved by the use of gravel, broken stone, slag, brick, cement or bituminous products to a standard established by the commissioners of said county on the----------day of----------, 19--, and approved by the highway superintendent of said county on the----------day of ----------,19--.

In witness whereof I have hereunto set my hand as highway superintendent of said county this----------day of----------, 19--.

Highway Superintendent
of----------County.

I understand that your request for an opinion as to a proper draft of the fourth form referred to by you, and which you have denominated "resolution of township trustees" is withdrawn.

The fifth form referred to by you is that required where county commissioners fail to apply for state aid and the application is made by township trustees.

Section 185 of the Cass highway law, being section 1192, G. C., reads as follows:

"In case the county commissioners do not file any application for state aid before January first of any year in which the funds will be available

for the construction, improvement, maintenance or repair of some one or more of the inter-county highways or main market roads, then the board of township trustees of any township within the county may file such application, and the state highway commissioner may co-operate with such trustees in the construction or improvement of said highway in the manner hereinafter provided in cases where the county commissioners make such application."

I suggest the following as a proper form of application under the above quoted section:

Received_____ RESOLUTION OF TOWNSHIP
Pet. No._____ TRUSTEES APPLYING
Name of Road_____ FOR STATE AID.
_____ (Sec. 1192, G. C.)

Form 6—To be used by township trustees in applying for state aid where county commissioners do not apply.

Inter-county Highway / Main Market Road } No_____

BE IT RESOLVED, By the board of trustees of_____ township_____county, Ohio, that the public interest demands the improvement under the provisions of sections 1178 to 1231-4 of the General Code of Ohio, of that part of {inter-county highway / main market road} No._____, situated in the township of_____in the county of_____, and described as follows:

Beginning at _____
_____
_____
in all a distance of_____miles, and be it further

RESOLVED, That whereas the county commissioners of_____ county, Ohio, failed to file before January 1, 19__, any application for state aid in the construction, improvement, maintenance or repair of highways from funds which will be available for said purpose during the present year,

NOW, THEREFORE, we, the trustees of said township of_____ in said county, do hereby make application to the state highway commissioner for aid from any appropriation by the state from any fund available for the construction, improvement, maintenance, repair of {inter-county highways / main market roads}, and we do hereby agree for and on behalf of said township to pay in the first instance from the funds of said township one-half of the cost and expense of surveys and other expenses preliminary to the {construction / improvement / maintenance / repair} of said highway.

(Signed)

_____
_____
_____
Trustees of_____Township,
_____County.

The following is suggested as a proper form for the clerk's certificate to said resolution:

CERTIFICATE OF CLERK

This is to certify that I, _____, as clerk of_____township, _____county, Ohio, have compared the foregoing copy of resolution with the original resolution now on file in this office and which was duly passed by the board of trustees of said township of_____ on the_____day of_____, 19__, and that the same is a correct and true copy of said resolution.

In witness whereof I have hereunto set my hand this_____day of _____, 19__.

_____
Clerk of_____Township,
_____County, Ohio.

The sixth and last form referred to by you is that required under section 211 of the Cass highway law, being section 1218, G. C., where the original application was made by township trustees instead of county commissioners. The section in question provides that no contract shall be let by the state highway commissioner where county commissioners or township trustees are to contribute a part of the cost, unless an agreement be made on the part of the county or township to assume in the first instance that part of the cost and expense over and above the amount to be paid by the state.

I suggest the following as a proper form of agreement or so-called final resolution, to be used in those instances where the original application is made by township trustees:

Received_____
Pet. No._____
Name of Road_____
_____

FINAL RESOLUTION
(Township Trustees)

Form 7.
_____ County
_____ Township
_____No. _____ Sec.

Whereas, at a meeting of the board of trustees of_____township, _____county, Ohio, held in the office of the trustees of said township on the_____day of_____, 19__, the improvement of that part of {inter-county highway / main market road}, No._____, hereinafter described, under the provisions of sections 1178 to 1231-4 inclusive of the General Code of Ohio, came on for further consideration; said section of road, as described in the preliminary application of this board to the state highway department on the_____day of _____19__, being as follows:

_____
_____
_____
in all a distance of_____miles, and

WHEREAS, the state highway commissioner has approved said application and has caused a map of the following described section of said highway to be made in outline and profile, to wit:

_____
_____
_____

and has caused plans, specifications, profiles and estimates to be made for the improvement above described and has transmitted the same to this board, therefore be it

RESOLVED, That the section of highway above descibed in paragraph 2 be improved under the provisions of the aforesaid law; that said work be done under the charge, care and supervision of the state highway commissioner and that said maps, plans, specifications, profiles and estimates for this improvement, as approved by the state highway commissioner, are hereby approved and adopted by this board.

RESOLVED, That the sum of_____dollars ($_____), being_____of the total estimated cost and expense of said improvement (which total estimated cost and expense amounts to $_____, be and the same is hereby appropriated for improving, under the provisions of said law, the highway described in paragraph 2 above, and the township clerk is hereby authorized and directed to issue his order on the township treasurer for said sum or part thereof, upon the requisition of the state highway commissioner, to pay the cost and expense of said improvement as the same may become due under the provisions of said law. We hereby agree to assume in the first instance the share of the cost and expense over and above the amount to be paid by the state, and guarantee the state highway commissioner that such money shall be available at such time or times as it may be needed in the construction of said highway.

(Signed)

_____

_____

_____

Trustees of_____Township,

_____County.

Office of the Township Clerk.

State of Ohio

_____County, ss.

_____Township

This is to certify that I, _____, as clerk of the board of trustees of said township of_____, have compared the foregoing copy of resolution with the original resolution now on file in this office and which was duly passed by the board of trustees of said township of_____, on the_____day of_____, 19__, and that the same is a correct and true copy of said resolution.

IN WITNESS WHEREOF, I have hereunto set my hand this_____day of_____, 191__.

_____

Clerk of_____Township,

_____County, Ohio.

I hereby certify that the money required for the payment of the township's portion of the aforesaid improvement is in the township treasury to the credit of the township road fund or has been levied and placed on the duplicate and in process of collection for said fund, and not appropriated for any other purpose.

IN WITNESS WHEREOF, I have hereunto set my hand this_____day of _____, 19__.

_____

Clerk of_____Township,

_____County, Ohio.

TO THE ATTORNEY GENERAL:

I do hereby certify that there has been appropriated from the_____ fund of the state highway department of Ohio the sum of $_____to the credit of_____township, _____county.

Dated_____

_____

Chief Clerk, State Highway Department.

DEPARTMENT OF ATTORNEY GENERAL:

Pursuant to the requirements of sections 1178 to 1231-4 inclusive, of the General Code of Ohio, the foregoing agreement of the board of trustees of _____township, _____county, Ohio, is approved as to form and legality.

Dated_____

_____

Attorney General of Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.

999.

ROADS AND HIGHWAYS—FAILURE OF CONTRACTOR TO COMPLETE A ROAD IMPROVEMENT—HIGHWAY COMMISSIONER UNABLE TO COMPLETE WORK OUT OF MONEYS DUE CONTRACTOR—CONTRACTOR'S BONDSMEN SHOULD FURNISH ADDITIONAL FUNDS, OTHERWISE LIABILITY SHOULD BE ENFORCED BY SUIT.

Where a contractor on state highway work has abandoned or failed or refused to complete his contract and the state highway commissioner is unable to complete the work out of moneys due or becoming due the contractor, the highway commissioner should require the contractor or his bondsmen to furnish such additional funds as are needed. If they fail so to do the first step to be taken is to attempt to enforce their liability by suit.

COLUMBUS, OHIO, November 8, 1915.

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

DEAR SIR:—I have your communication of September 2, 1915, which reads as follows:

> "On the 11th day of October, 1912, a contract was entered into between the state and A. Fry for the construction of Pike county state highway 'E' of the Big Basin road in Newton township under petition No. 651, of the commissioners of Pike county. The amount of contract was $2,800.29. Bond for the performance of the contract, in the amount of $2,800.29, was executed by Charles Ault and N. E. Ice, of Gillespieville, Ohio, as sureties.
>
> "Mr. Fry started the work on the road late in the season of 1912, and continued to work spasmodically until October 15, 1913, on which date he wrote the following communication to this department:

"'I have this day, October 15, 1913, notified your resident engineer, Harold McCormick, in person that I have given up my contract and abandoned my work on the Big Basin road, petition No. 612.'

"On October 17, 1913, the following letter was sent to bondsmen of Mr. Fry:

"'You are bondsmen for Mr. A. Fry for the proper completion of the construction of the Big Basin road, state highway "E," petition 651, in Newton township, Pike county. We have a letter from Mr. Fry, dated October 15th, in which he states that he has abandoned this contract.

"'It is imperative that this work be completed at an early date, and as Mr. Fry has abandoned the work, we do hereby extend to you as bondsmen the privilege of taking over the contract and completing the same in accordance with the plans and specifications. This communication is being sent by registered letter and we shall expect a reply as to your pleasure in the matter not later than October 22nd.

"'Should you decide to take over the contract and complete the same, future estimates will be sent to you as surety for Mr. A. Fry.

"'Hoping you will be able to undertake the work at once and prosecute it to an early completion, we are,'

"To the above letter, Mr. Ice replied on October 21st, as follows:

"'Yours of the 17th inst. at hand. Would like to know the amount of money still back on the Big Basin job. I put in several days' work on the job after Mr. Fry quit, and Mr. McCormick, the engineer at Waverly, informed me that he was going to give it to another man and wouldn't allow me any estimation on the work I did. I will go ahead and finish the job. Let me know at once what to do. Is Mr. McCormick the one to give the estimation of work done?'

"On October 23, 1913, the following letter was written to Mr. Ice:

"'In reply to yours of October 20th, must say that you have probably misunderstood Mr. McCormick when he is quoted as having said that he was going to give the work of the contract to another man. Undoubtedly Mr. McCormick would not assume to take such authority as it really is not within his power and he well knows the same.

"'We will be pleased to have the bondsmen complete the contract and I assure you that if you can undertake it and will do so, we will pay to the bondsmen, as surety, the balance still due on the contract. This balance amounts to $2,070.39.

"'Please understand that we will not allow any partial estimate or pay any money until the work is completed in its entirety. If you are not in a position to undertake the work according to this proposition, please let us know at once and we will proceed to have the work done at the expense of the contractor and his bondsmen if there is not sufficient in the funds to complete it.'

"After that no work was accomplished and both contractor and bondsmen abandoned the work.

"On November 10, 1913, the following proposal was submitted to Mr. Marker by Galbraith and Shoemaker, contractors of Piketon, Ohio:

"'Pursuant to your request of a few days ago, I hereby submit my proposal for the completion of the Big Basin state aid road in Pike county.

"'I will take the work as it is at present, and complete it in every detail in accordance with the plans and specifications for the sum of $2,070.39.

"'It is to be distinctly understood that I do not assume any outstanding obligations which may have been incurred in the construction of the work to the present time.'

"No signed agreement with Galbraith and Shoemaker is on file and contractor cannot produce any. We have on file, however, original and duplicate bond in the sum of $2,000.00 signed by Galbraith and Shoemaker as principals, and Royal Indemnity Co. (by John A. Detmars, attorney in fact) as surety, under date of November 22, 1913.

"The work on the road was carried to completion by Galbraith and Shoemaker, and final estimate issued July 21, 1915.

"Galbraith and Shoemaker now claim that they are entitled to $2,070.39 for all work performed by them, while only $1,694.41 was available from original contract price of $2,800.29 after deducting payments made to A. Fry.

"Following is a statement of estimates issued:

"Est. No. 1 issued Dec. 5, 1912, to A. Fry in amount of	$381.60
"Est. No. 2 issued Feb. 24, 1913, to A. Fry in amount of	348.30
"Est. No. 3 issued June 1, 1913, to A. Fry in amount of	375.98
"Est. No. 4 issued July 1, 1914, to Galbraith and Shoemaker	401.62
"Est. No. 5 issued Nov. 16, 1914, to Galbraith and Shoemaker	660.02
"Est. No. 6 issued July 21, 1915, to Galbraith and Shoemaker	632.77
"Total	$2,800.29

"With the above facts before you, I ask for your opinion in the following:

"1st. Have Galbraith and Shoemaker a just claim for the amount of $375.98, which they claim is due them?

"2nd. If above claim is due them, from what source and how must the claim be satisfied?"

I have ascertained from the files in your office that the original final resolution providing for the construction of this road was adopted by the county commissioners of Pike county, September 10, 1912, and provided for an expenditure of $3,220.00, one-half of which was to be paid by the state and one-half by the county. On May 5, 1913, a supplementary final resolution was adopted providing for an additional expenditure of $200.00 to be divided equally between the state and the county, making a total of $3,420.00 available for the construction of the road. Prior to November 10, 1913, the date upon which Galbraith and Shoemaker submitted their proposition, the sum of $1,105.88 had been paid to the original contractor, A. Fry, and $471.55 had been expended for engineering expense, making a total expenditure prior to November 10, 1915, of $1,577.43. Inasmuch as the total amount available for the construction of the road was $3,420.00, there was left in the fund applicable for the completion of the road on November 10, 1913, only $1,842.57. The state highway commissioner, in his efforts to complete the road, found it necessary, however, to enter into a contract with Galbraith and Shoemaker for an amount not only in excess of the unpaid balance of the original contract price, but also in excess of the amount left in the fund available for the completion of the road.

Section 1203-1, G. C., as that section stood at the time the original contract was entered into, provided among other things that if the contractor abandoned or failed or refused to complete a contract, the state highway commissioner should re-let the work or complete the same by force account and in either case deduct the cost and expense thereof from any moneys due or becoming due the contractor

and in case there were not sufficient moneys due the contractor to pay for the work, it became the duty of the highway commissioner to require the contractor or his bondsman to pay for it.

I am advised by a representative of Galbraith and Shoemaker that as a matter of fact no written contract was ever executed between the State of Ohio and Galbraith and Shoemaker for the reason that when Galbraith and Shoemaker filed their bond they were under the impression that they had filed all the documents required by the department. It appears from your files that Galbraith and Shoemaker made a written proposition to the state highway commissioner and that they thereafter filed a bond covering the faithful performance of the work which they had offered to do and that the state highway department thereafter recognized the existence of a contract between the state and this firm, and paid a number of estimates on account of the same.

In view of all these circumstances it is my opinion that the first step to be taken in this matter is to make an effort to collect from A. Fry, the original contractor, and his bondsmen, the difference between the amount due or becoming due to them and the cost of completing the work. In case the contractor and his bondsmen should prove insolvent, or for any other reason it should be found impossible to enforce the obligation on the part of the contractor and his bondsmen, I am of the opinion that an appropriation by the general assembly will be necessary before the claim of Galbraith and Shoemaker can be paid. Their claim is a just one and, upon being furnished with the necessary facts, this department will undertake to enforce the obligation of the contractor and his bondsmen. In case that obligation cannot be enforced on account of insolvency, or for any other cause, the facts should be brought to the attention of the general assembly at its next session in order that an appropriation may be made and that justice may be done to the contractors in question.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1000.

DENTAL BOARD—WITHOUT AUTHORITY TO REINSTATE DENTIST WHEN LICENSE HAS BEEN REVOKED FOR CAUSE—HOW PERSON MAY BE RESTORED TO RIGHT TO PRACTICE DENTISTRY.

1. *The state dental board is without authority to reinstate a dentist in practice or restore his license when it has revoked the same as provided by law for a cause or causes specified in section* 1325, *G. C.*

2. *Said board, however, after a reasonable time has elapsed and upon satisfactory proof of the complete reformation of the party in question and that he now possesses a good moral character, may permit him to take an examination as provided in section* 1321, *G. C., and succeeding sections, and may again grant him a license if he successfully passes said examination.*

COLUMBUS, OHIO, November 8, 1915.

The Ohio State Dental Board, Toledo, Ohio.

GENTLEMEN:—I have your letter of November 1, 1915, bearing the following statement and inquiry:

"We have before the Ohio State Dental Board the case of Dr. T. H. R., asking for reinstatement into the practice of dentistry.

"His license was revoked five years ago by the board, upon the charge of using intoxicants to excess and immoral conduct.

"Will you please give us your opinion as to whether the board can legally reinstate or restore him back into the practice of dentistry again and thus give him another chance?"

The sections of the General Code under which the license named in your letter was prevoked provided at the time of said revocation as follows:

"Sec. 1325. The state dental board may revoke a license obtained by fraud or misrepresentation, or if the person named therein uses intoxicants or drugs to such a degree as to render him unfit to practice dentistry, is guilty of immoral conduct, or has been convicted of a felony subsequent to the date of his license. If such conviction is vacated, reversed or set aside, or the accused pardoned, his license shall be operative from the date of the vacation, reversal or pardon.

"Sec. 1326. No action to revoke a license shall be taken until the accused has been furnished a statement of the charges against him and notice of the time and place of a hearing thereof. The accused may be present at the hearing in person, by counsel, or both. The statement of charges and notice may be served personally upon such person or mailed to him at his last known address at least twenty days prior to the hearing. If upon such hearing the board finds the charges are true, it may revoke the license. Such revocation shall take from the person named in a license all rights and privileges acquired thereby."

It was further provided in the succeeding section for a stenographic report of the proceeding and a review of the same by the governor and attorney general and their decision affirming or overruling the action of the board was made final.

While the state dental board, in proceeding under the foregoing provisions of law, may be said to act quasi-judicially, it is not a judicial tribunal and has no inherent common law powers, and is only an administrative board, and can revoke a certificate for the causes provided for in the statute and for no other cause. Further, it can only administer the law as it finds it and can exercise no authority except as provided in the law which constitutes and establishes it as a board and prescribes its duty and authority. There was no provision in said law at the time the certificate named in your letter was revoked, nor is there now any provision whereby the state dental board may set aside its action in revoking a certificate for the causes named in the statute. It follows, therefore, that it is wholly without such authority.

As the law now stands, in sections 1326 and 1327 of the General Code, (106 O. L., 299) the stenographic record of the proceedings when a certificate is revoked is made reviewable by the court of common pleas, and the judgment of that court may be reviewed in the court of appeals. This now gives the action of your board, when affirmed by the courts named, all the force and effect of a judgment of a court of final jurisdiction. It also indicates that it was the purpose of the legislature, when a person whose certificate was revoked by you had exhausted all his legal rights, to regard the revocation as final.

I conclude, therefore, that your board is without authority to reinstate the party named in the practice or restore to him his certificate.

I desire, however, to observe further in this connection that I know of no statutory provisions precluding the party in question from making an application

for a license to practice dentistry as provided by section 1301, G. C., and related sections. If upon such application the applicant, in view of the lapse of time since the revocation of his former license, can satisfy your board of his complete reformation and that he now possesses a good moral character, his application may be treated by your board as an original application. If, under these conditions, he successfully meets the requirements of the law entitling him to a license, it may be granted to him as and for an original license.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1001.

TAXES AND TAXATION—FORM OF BONDS PRESCRIBED FOR ASSESSOR, ASSISTANT ASSESSOR AND MEMBER OF COUNTY BOARD OF REVISION.

COLUMBUS, OHIO, November 8, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In accordance with your request of October 28, 1915, and in compliance with the provision of section 3351, G. C., as amended, 106 O. L., 251, I hereby prescribe forms of bonds for assessor, assistant assessor and member of the county board of revision as follows:

BOND OF ASSESSOR.

KNOW ALL MEN BY THESE PRESENTS, That we_____ of_____, _____county, Ohio, as principal, and _____ of _____, as surety, are held and firmly bound unto the State of Ohio, in the penal sum of one thousand dollars ($1,000), for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally and firmly by these presents.

THE CONDITION of the above obligation is such that, whereas, the said _____has been duly elected as assessor in and for _____ (here insert name of ward or district of the city, or of the village or township, for which said assessor has been elected.) _____county, Ohio, for the term of two years commencing the first day of January, 191__;

NOW, THEREFORE, if the said_____ shall faithfully perform the duties of said office, as provided by law or by the orders, rules and regulations of the tax commission of Ohio and the county auditor in and for said county, during his term of office, and shall not, while acting within the scope of his official duties or under color of his official authority, be guilty of any neglect, default, fraud or unlawful act causing damage to any person, then these presents shall be void; otherwise to be and remain in full force and effect in law.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this _____day of_____A. D., 191__

_____
_____
_____
_____

I hereby certify that the form of the above bond is that prescribed by me.

EDWARD C. TURNER,
Attorney General of Ohio.

The execution of the above bond is hereby approved this_____ day of _____, A. D., 191__.

_____Prosecuting Attorney.
_____County, Ohio.

(If this bond is signed by a surety company, a certified copy of the authority of the agent of said company to sign said bond, together with the latest statement of the assets and liabilities of said company, should be attached thereto.)

I hereby certify that I have approved the surety on the within bond, and that I have filed the same in my office this_____day of_____ A. D., 191__.

_____County Auditor,
_____County, Ohio.

OATH OF OFFICE.

State of Ohio,
_____County, ss.

I, _____, do solemnly swear (or affirm) that I will support the constitution of the United States, the constitution of the State of Ohio, and that in the capacity of assessor for_____ (here insert name of ward or district of city, or of the village or township for which said assessor has been elected), _____county, Ohio, to which office I have been elected, I will faithfully and impartially assess the property in the above named district, and that I will otherwise faithfully perform the duties imposed upon me and impartially exercise the powers vested in me by law.

_____

Sworn to before me and subscribed in my presence this _____ day of _____A. D., 191__.

_____
_____

BOND OF ASSISTANT ASSESSOR

KNOW ALL MEN BY THESE PRESENTS, That we_____ of_____, _____county, Ohio, as principal, and _____, _____as surety, are held and firmly bound unto the state of Ohio in the penal sum of five hundred dollars ($500.00) for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally and firmly by these presents.

THE CONDITION of the above obligation is such that, whereas, the said _____has been duly appointed assistant assessor for _____, (here insert name of ward or district of the city, or the village or township for which said assistant assessor has been appointed), _____county, Ohio, for a period of _____ (here insert the time for which said assistant assessor has been appointed), beginning on the _____day of_____, 191__.

NOW, THEREFORE, if the said_____ shall faithfully perform the duties of said office, as provided by law or by the orders, rules and regulations of the tax commission of Ohio and the county auditor in and for said county during the time for which he has been appointed, and shall not, while acting within the scope of his official duties or under color of his official authority, be guilty of any neglect, default, fraud or unlawful act causing damage to any person, then these presents shall be void; otherwise to be and remain in full force and effect in law.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this _____day of_____A. D., 191__.

_____
_____
_____
_____

I hereby certify that the form of the above bond is that prescribed by me.

EDWARD C. TURNER,
Attorney General of Ohio.

The execution of the above bond is hereby approved this_____ day of_____A. D., 191__.

_____
Prosecuting Attorney,
_____County, Ohio.

(If this bond is signed by a surety company, a certified copy of the authority of the agent of said company to sign said bond, together with the latest statement of the assets and liabilities of said company, should be attached thereto.)

I hereby certify that I have approved the surety on the within bond and that I have filed the same in my office this_____day of_____, A. D., 191__.

_____County Auditor,
_____County, Ohio.

OATH OF OFFICE.

State of Ohio,
_____County, ss.

I, _____, do hereby solemnly swear (or affirm) that I will support the constitution of the United States, the constitution of the state of Ohio, and that in the capacity of assistant assessor for_____ _____ (here insert the name of the ward or district of the city, or of the village or township for which said assistant assessor has been appointed), _____ County, Ohio, to which office I have been appointed, I will faithfully and impartially assess the property assigned to me by the county auditor in and for said county, and that I will otherwise faithfully perform the duties imposed upon me and impartially exercise the powers vested in me by law.

_____

Sworn to before me and subscribed in my presence this_____ day of_____A. D., 191__.

_____
_____

BOND OF MEMBER OF COUNTY BOARD OF REVISION.

KNOW ALL MEN BY THESE PRESENTS, That we_____, of_____, _____ county, Ohio, as principal, and_____ _____of _____, as surety, are held and firmly bound unto the state of Ohio in the penal sum of two thousand dollars ($2,000), for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally and firmly by these presents.

THE CONDITION of the above obligation is such that, whereas, the said _____has been duly appointed a member of

the county board of revision in and for_____county, Ohio, for the period of one year commencing on the_____day of June, A. D., 191__.

NOW, THEREFORE, if the said _____ shall faithfully perform the duties of said office, as provided by law or by the orders, rules and regulations of the tax commission of Ohio, during his said term, and shall not, while acting within the scope of his official duties or under color of his official authority, be guilty of any neglect, default, fraud or unlawful act causing damage to any person, then these presents shall be void; otherwise to be and remain in full force and effect in law.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this _____day of_____ A. D., 191__.

_____

_____

_____

_____

I hereby certify that the form of the above bond is that prescribed by me.

EDWARD C. TURNER,
Attorney General of Ohio.

The execution of the above bond is hereby approved this_____ day of_____ A. D., 191__.

_____Prosecuting Attorney.
_____County, Ohio.

(If this bond is signed by a surety company, a certified copy of the authority of the agent of said company to sign said bond, together with the latest statement of the assets and liabilities of said company, should be attached thereto.)

I hereby certify that I have approved the surety on the within bond, and that I have filed the same in my office this_____day of_____, A. D., 191__.

_____County, Auditor,
_____County, Ohio.

OATH OF OFFICE.

State of Ohio,
_____County, ss.

I, _____do hereby solemnly swear (or affirm) that I will support the constitution of the United States, the constitution of the state of Ohio, and that in the capacity of member of the county board of revision for_____county, Ohio, to which office I have been appointed, I will faithfully and impartially discharge the duties of said office.

_____

Sworn to before me and subscribed in my presence this _____ day of_____, A. D., 191__.

_____

_____

Respectfully,
EDWARD C. TURNER,
Attorney General.

1002.

ARMORY BOARD—CITY NOT AUTHORIZED TO DONATE SITE TO STATE FOR PURPOSE OF ERECTING AN ARMORY THEREON—AKRON AUDITORIUM ARMORY.

A city is not authorized to donate site on which to erect armory to state, in spite of provisions of section 3631, G. C.

COLUMBUS, OHIO, November 9, 1915.

Ohio State Armory Board, Columbus, Ohio.

GENTLEMEN:—Under date of November 3, 1915, you advise me that your board had duly advertised for bids for the construction, complete, of the auditorium armory at Akron, to be paid for from the following funds:

"Appropriation, see page 844, Vol. 105-6 O. L.----------$75,000
"Appropriation, see page 711, Vol. 105-6 O. L.,---------- 40,000
"Donation through Akron Chamber of Commerce---------- 50,000"

You further advise me as follows:

"This armory is proposed to be built upon the site referred to in your opinion to this board dated April 28, 1915."

You then set forth the various bids that were received by your board for the construction, complete, of said armory, and also set forth in your letter of transmission the minutes of your board of October 22, 1915, and October 30, 1915, as follows:

"AKRON ARMORY: The adjutant general made a statement covering the history of the appropriation now available for the Akron armory and the condition upon which same were approved by the governor, and thereafter the question of action on said bids was discussed by members at length with reference to reducing cost; action of the state inspector of workshops and factories and other details, it was then

"RESOLVED: That the board recess until Saturday, October 30, 1915, in order to give the architects time to make certain investigations with reference to reducing the cost of said armory."

"AKRON, OHIO, AUDITORIUM ARMORY: That board again considered in detail the bids for the Akron, Ohio, auditorium armory and found that the firm of The Clemmer & Johnson Co., of Hicksville, Ohio, was the lowest bidder in every detail and every alternate that complied with the plans and specifications and therefore approved the award of a contract if made to them, based upon the examination of tabulation of bids. It was thereupon unanimously

"RESOLVED: That the bid of The Clemmer & Johnson Co., of Hicksville, Ohio, for the Akron, Ohio, auditorium armory being the lowest bid which complies with the plans and specifications and being regular in form and in accordance with the advertisement for said bids be accepted; and that a contract for the construction of said armory be awarded said The Clemmer & Johnson Co., at the lowest price including alternates D-E-F-G-H, namely one hundred forty-two thousand, one hundred ninety-

four dollars ($142,194.00) on condition that said bidder file with said contract a good and sufficient bond in the sum of seventy-two thousand dollars ($72,000.00) conditioned according to law and its faithful performance of said contract, IT IS EXPRESSLY UNDERSTOOD that this acceptance of bid and award of contract are both conditioned upon the approval of the attorney general of Ohio."

With your letter you transmit the papers and request my approval or disapproval of the conditional award of contract made October 30, 1915, and request me, if the award is approved, to prepare contract and contract bond as prescribed by section 5259, of the General Code.

I have examined the advertisement for bids and the action of your board in letting the contract to The Clemmer & Johnson Co., of Hicksville, Ohio, and find that all steps necessary to the letting of said contract have been followed, and that said The Clemmer & Johnson Co. are, under the terms of the letting, the lowest bidders.

Section 5259 of the General Code, provides that the attorney general shall prepare the contract and bond. This I decline to do, for the following reasons:

In your letter you state that the armory is proposed to be built upon the site referred to in my opinion to your board under date of April 28, 1915. Said opinion, being No. 299, discloses that the city of Akron is the owner of the premises described, with power to convey the same in fee simple, and that a deed is tendered by said city to the state of Ohio for said premises. Under the provisions of section 3631 of the General Code, the municipality is authorized

"to acquire by purchase, lease, or lease with privilege of purchase, gift, devise, condemnation or otherwise and to hold real estate or any interest therein and other property for the use of the corporation and to sell or lease it, *or to donate the same by deed in fee simple to the state of Ohio as a site for the erection of an armory.*"

However, I am clearly of the opinion that under the decisions of the supreme court the said section, insofar as it authorizes a municipality to donate a piece of property owned by it to the state of Ohio as a site for the erection of an armory, is unconstitutional. See

Wasson v. Commissioners, 49 O. S., 622.
Hubbard v. Fitzsimmons, 57 O. S., 436.

Such being the case, I am of the opinion that the city is not authorized to donate the site mentioned to the armory board for the purpose of erecting an armory and, consequently, no contract for the erection of an armory upon said site should be awarded.

Another reason why I refuse to prepare the contract and contract bond is the following: The contract is to call for the payment to the contractor of the sum of $142,194.00; this amount is to be paid by the donation of $50,000.00 to the armory board by the citizens of Akron, and the balance is to be paid from the appropriation made for the use of your board. In section 2 of the house bill No. 701, passed May 27, 1915, $40,000.00 is appropriated to your board for the purpose of building an armory at Akron; in house bill No. 721, passed May 27, 1915, 106 O. L., page 844, the sum of $75,000.00 is appropriated to your board for such purpose, in the following language:

"Adjutant general—to construct, enlarge and furnish an armory building in the city of Akron, $75,000.00.

"Provided however, that the above sum shall not be available until the *citizens* of Akron shall have deeded to the state of Ohio a lot suitable for a site for such armory and until the state board shall have accepted the same; and provided further that the above sum shall not be available until the citizens of Akron shall have contributed $50,000.00 toward the construction, enlargement and furnishing such armory."

It is to be seen that the above appropriation of $75,000.00 is conditioned upon the citizens of Akron deeding to the state of Ohio a lot suitable for an armory site.

As I have said in the earlier part of this opinion, it appears that the site in question does not come from "the citizens of Akron," but from the city itself. Therefore the $75,000.00 appropriation could not be available. As the contract with The Clemmer & Johnson Co. calls for the sum of $142,194.00, it will require at least a part of the above appropriation to pay the contract price provided for in this contract and, as the $75,000.00 would not be available, I refuse to prepare a contract calling for a sum which would include a part of the above appropriation.

I am herewith returning to you the papers which you left with me.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1003.

VILLAGE OF MENTOR—BONDS DISAPPROVED—AUTHORIZATION BY COUNCIL IN EXCESS OF SMITH ONE PER CENT. LIMITATIONS.

Bonds of the village of Mentor disapproved because the amount of the issue, $25,000 authorized by vote of council and without a vote of the electors, is in excess of one per cent. of the total tax valuation of the municipality.

Bonds issued by a municipal corporation to pay its share of street improvements are subject to the one per cent. limitation provided in section 3940, G. C.

COLUMBUS, OHIO, November 10, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—IN RE:—Bonds of the village of Mentor, Ohio, in the sum of $25,000.00, purchased by the Industrial Commission of Ohio under resolution dated October 15th, 1915.

The transcript of the proceedings of the village of Mentor relative to the issuance of the said bonds submitted to me for examination reveals that the total value of all property of said village assessed for taxation in the current year is $2,168,830.00. The bonds under consideration amounting to $25,000.00 are in excess of one per cent. of the total value of all property in such village as listed and assessed for taxation. The transcript shows that these bonds are authorized by the action of council and without a vote of the electors of the corporation.

Municipal corporations are authorized to issue bonds for the purpose of paying the corporation's share of the cost of a street improvement under the provisions

of either section 3821 of the General Code, or of section 3939, of the General Code. Bonds issued under section 3821 of the General Code, cannot be issued until an ordinance to proceed with the improvement has been passed, but for the issue under section 3939 such ordinance is not necessary. (Heffner v. City of Toledo, 75 O. S., 413.) The transcript does not state under which of the two sections above named the bonds in question are being issued, but I assume that they are issued under section 3939, because the transcript does not set forth nor refer to the ordinance to proceed with the improvement for the partial cost of which the bonds are issued.

Section 3940 of the General Code, provides that:

> "* * * the total indebtedness created in any one fiscal year by the council of a municipal corporation under the authority conferred in the preceding section (Sec. 3939, G. C.) shall not exceed one per cent. of the total value of all property in such municipal corporation as listed and assessed for taxation. * * *"

The language just quoted, standing alone, would indicate that only bonds issued under the authority of section 3939 of the General Code, were subject to the limitations of section 3940, General Code. In view, however, of the language of section 3949 of the General Code, which specifically mentions certain bonds as not coming within such limitation, a part of which excepted bonds are authorized by sections other than section 3939 of the General Code, I am of the opinion that it was the legislative intent that all bonds issued by a municipal corporation other than those specifically excepted under the language of section 3949 of the General Code, come within the limitation of one per cent. prescribed in section 3940, *supra.*

This conclusion is, supported, I think, by the case of Smith v. Rockford, 9 C. C., N. S., 465, affirmed without report, 81 O. S., 516.

I therefore advise you that the council of the village of Mentor acted beyond their authority in attempting to issue bonds to the amount of $25,000.00, for the purpose indicated, in the fiscal year of 1915, and that the bonds are for that reason invalid and should not be accepted by you.

I am informed by Mr. T. P. Cadle, solicitor of the village of Mentor, that action will probably be taken by the village authorities to correct the proceedings and authorize the issuance of bonds in an amount which comes within the limitations of section 3940 of the General Code, in which event the bonds will again be offered for sale to your commission.

I am returning to Mr. Cadle, solicitor of the village of Mentor, the transcript submitted to me.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1004.

COUNTY BOARD OF EDUCATION—WITHOUT AUTHORITY TO PURCHASE SUPPLIES FOR COUNTY SUPERINTENDENT—SUPERVISORY AND CLERICAL WORK OF SUCH OFFICES DISTINGUISHED—MOVING PICTURE MACHINE EXAMPLE OF FORMER—SAME MAY NOT BE PURCHASED FROM "COUNTY BOARD OF EDUCATION FUND."

The county board of education is without authority in law to purchase supplies, including a moving picture machine, for the purpose of aiding the county superintendent in his official supervisory work and pay for the same out of the "county board of education fund."

COLUMBUS, OHIO, November 10, 1915.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—I have your letter under date of November 4, 1915, which is as follows:

> "The school code seems to be silent upon the question of to what extent county boards of education may purchase supplies for the county superintendent.
>
> "Has a county board of education the implied authority to purchase for the county superintendent any and all supplies which may be aids in his official supervisory work, limited of course by funds on hand applicable to such purpose? If so, does that authority extend to their purchasing a moving picture machine for the use of the county superintendent of schools, in his travels over the county, to be used for the purpose of instructing the pupils and patrons along his line of work?
>
> "It seems to me the county board has this implied authority, if it deems it necessary and expedient so to do, but I do not feel at liberty to so advise them without first having your opinion."

I do not deem it necessary to quote the various provisions of the statutes of the so-called new school code relating to the election and qualification of the members of the county board of education, the organization of said board, its powers and duties, the election of the county superintendent, his powers and duties, and the establishment of the county board of education fund.

It is sufficient to observe that the county board of education, in the organization of the schools of the county school district, has power to change district lines and to transfer territory from one school district to another within said county school district, and to supervise and control the schools of said district.

In the exercise of its supervisory power, said county board is required to publish, with the advice of the county superintendent appointed by it under authority of section 4744, G. C., 104 O. L., 142, a minimum course of study which shall be a guide to local boards of education in prescribing the courses of study for the schools under their control, and said county board may publish different courses of study for village and rural school districts. (See section 4737, G. C., 104 O. L., 140.)

Under provision of said section 4744, G. C., the county superintendent is made the executive officer of the county board of education and is required to attend all meetings of said board for the purpose of informing the members thereof of the needs of the schools of the county school district and of advising

said members so that they may, from time to time, take such action as will further the best interests of the schools.

It is the further duty of the county superintendent, acting under the direction of the county board of education and with the assistance of the district superintendents elected under authority of and in the manner provided by section 4739, G. C., as amended in 104 O. L., 140, to carry into effect the orders, rules and regulations of the county board of education.

However, the statutes nowhere provide that the county board of education or the county superintendent, acting as the executive officer of said board, may purchase books, apparatus, equipment or supplies of any kind for the use of the schools of the county school district, and pay for the same out of the county board of education fund.

I find upon investigation that the Bureau of Inspection and Supervision of Public Offices, in a letter to Mr. Charles Barthelmeh, your county superintendent of schools, under date of September 14, 1915, advised that the county board of education acts simply in a supervisory capacity and that it has no legal power whatever to furnish anything for the schools of the county school district. Mr. Barthelmeh was further advised by the bureau that the county board may purchase such supplies, stationery, etc., as may be needed in the office of the board and county superintendent, who is the clerk of the board, but that the statutes nowhere authorize anything to be furnished to the schools under the supervision of said county board from the county board of education fund, and that supplies needed by a school in any local district should be paid for out of the funds of such district.

The question raised by Mr. Barthelmeh was practically the same as the one now presented by you, and I am of the opinion that the ruling made by the bureau, in answer to said question, is correct.

Said ruling, in so far as it applies to the purchase of supplies, stationery, etc., for the office of the county superintendent, is based on opinion No. 144, of this department, rendered to Hon. A. L. Duff, prosecuting attorney of Ottawa county, under date of March 17, 1915, in which it was held that bills for stationery, telephone services and other expenses incident to the clerical work of the office of the county superintendent may, when approved by the county board of education, be paid out of the county board of education fund on the warrant of the county auditor.

While section 4744-3 of the General Code, as amended in 104 O. L., 143, was again amended in 106 O. L., 396, so as to provide for a contingent as well as a tuition fund in the "county board of education fund," I am of the opinion that, in the absence of any provision of the statutes authorizing an expenditure from said contingent fund for the purchase of supplies referred to in your first question, your county board has no implied authority to make such expenditure, and it follows that said county board has no implied authority to purchase a moving picture machine to be used by the county superintendent for the purposes mentioned in your second question and pay for the same out of said contingent fund.

In keeping with my former holding, I am of the opinion, in answer to both of the questions submitted by you, that the authority of the county board of education to purchase supplies for the county superintendent and pay for the same out of the county board of education fund must be limited to those items mentioned in the aforesaid opinion, and that said county board is without authority to make expenditures out of said county board of education fund for the purposes mentioned in your inquiry.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1005.

APPROVAL OF ABSTRACT OF TITLE FOR ARMORY AT HICKSVILLE, OHIO.

COLUMBUS, OHIO, November 10, 1915.

HON. BYRON L. BARGAR, *Secretary Ohio State Armory Board, Columbus, Ohio.*

DEAR SIR:—On September 21, 1915, you submitted to me an abstract of title for certain premises situated in Hicksville, Defiance county, Ohio. It became necessary for me to return the abstract to Mr. L. L. Hoff, who compiled the same, for certain additions thereto. On November 8, 1915, I again received the abstract from Mr. Hoff and since that time have carefully examined the same. The premises are described as follows:

> "Situated in the village of Hicksville, county of Defiance, and state of Ohio, and known as the whole of lots Nos. 145 and 146, and a part of lots Nos. 147 and 148 of the original plat of the village of Hicksville, Defiance county, Ohio; also a part of lots Nos. 143½ and 144½ of the vacated streets of said village of Hicksville as numbered on the auditor's plat thereof; also a part of lots Nos. 14, 15 and 16 of the first addition of said village of Hicksville, and which said entire premises are described by metes and bounds as follows, to wit:
>
> "Commencing at a point on the northwesterly line of High street in said village of Hicksville, 23 feet distant northeasterly from the most southerly point of lot No. 147 of the original plat of said village and which point is 27 feet southwesterly from the most northerly point of said lot on said street; thence from said point of beginning, northeasterly along the northwesterly line of said high street, 127 feet to a point 10 feet southwesterly from the most northerly point on said street of said lot No. 143½ of the vacated streets, aforesaid; thence northwesterly at right angles with High street and on a line parallel with the northeasterly line of lots Nos. 143½ and 144½ of said vacated streets, and in continuation thereof, 260 feet; thence southwesterly and parallel with High street 127 feet; thence, southeasterly and in a direct line, 260 feet to the place of beginning. Said premises being 27 feet off from the northeasterly sides of lots Nos. 147 and 148, the whole of lots Nos. 145 and 146, and 50 feet off from the southwesterly sides of said lots Nos. 143½ and 144½ of the vacated streets of said village, and sufficient off from the rear ends of lots Nos. 14, 15 and 16 of said first addition to make the entire premises herein conveyed 127 feet frontage on High street by 260 feet back therefrom northwesterly at right angles."

From my examination I am satisfied that on November 3, 1915,—the date when said abstract was re-certified,—Lucy A. Pugh was seized of an estate in fee simple to said premises, and that the same were free of all incumbrances whatsoever except taxes for the year 1915, the amounts of which is not shown in the abstract.

I have also examined a deed for said premises, executed by Lucy A. Pugh and Edwin J. Pugh, her husband, on May 29, 1915, and find said deed regular in

form, containing also necessary revenue stamps. This deed covenants that said premises are clear and free from all incumbrances, and you should see that the taxes above referred to are paid by the grantors.

I am herewith returning both deed and abstract of title.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1006.

HAYES COMMEMORATIVE LIBRARY AND MUSEUM BUILDING—COVENANT IN CONTRACT TO COMPLETE IT WITHIN SPECIFIED TIME—FAULT OF CONTRACTOR MUST BE PROXIMATE CAUSE OF DELAY.

A covenant in a contract with the state to complete a building within a specified time or forfeit $15.00 *per day for each and every day thereafter, becomes operative and may be enforced against the covenantor only when his fault or failure is the proximate cause of the delay. If such delay is caused by a change of plans and other interferences with the work of construction for which the state is responsible it may not enforce said covenant.*

COLUMBUS, OHIO, November 10, 1915.

HON. E. O. RANDALL, *Secretary Ohio State Archaeological and Historical Society, Columbus, Ohio.*

DEAR SIR:—I have your letter of October 6th bearing the following statement and inquiry:

> "The trustees of the Ohio State Archaeological and Historical Society, September 24th, accepted from the hands of the building committee, the building known as the 'Hayes Commemorative Library and Museum Building,' but declined to authorize the final payment by the society, in settlement with the contractor, the Steinle Construction Company. There was due at that time, on the two separate contracts made with the Steinle Construction Company, the total amount of $2,355.50.
>
> "In the contract made with the Steinle Construction Company there was a penalizing clause, by which the contractor was to forfeit $15.00 a day for delay in not completing the building within the specified time, viz., by July 1, 1913.
>
> "The question we desire the attorney general to answer is:
>
> "Is it at the option of the society whether it enforces the penalizing clause or not?
>
> "It is but justice to all parties to say that the excessive delay in the completion of the building was caused partially by the change of plans on the part of the society, and strikes by the laborers on the building, and inability on the part of the contractor to secure material as per agreement with subcontractors. The Steinle Construction Company is prepared to make stated and itemized claims in justification of the delay, should the society endeavor to enforce the penalizing features of the contract."

In connection with the information given in your letter I learn from other sources that on August 19, 1912, a contract was entered into between the con-

struction company named in your letter and your society for the construction of the building described at a cost of $36,656.00. In this contract it was stipulated that the contractor was to complete all work contemplated under said contract on or before July 1, 1913.

I learn further that another contract was made by your society with the same contractor on September 19, 1913, for the sum of $4,760.00, which contract was for the specific purpose of making certain changes in the construction of said building named in your letter. This contract was to be completed on or before January 1, 1914.

As this last contract provided for changes in the original plans and specifications covered by the original contract, it necessarily follows that the completion of the building covered by both contracts was thereby extended to January 1, 1914. If, therefore, any liability attaches to the contractor in this case, it must begin after said date of January 1, 1914.

Both contracts contain precisely the same provision requiring the payment of fifteen dollars a day for each and every day after the time fixed in the contract said work remains unfinished. Said conditions are found in article 6 thereof which provides as follows:

> "The contractor is to complete all work contemplated under this contract on or before January 1, 1914. Upon failure to have all work fully completed by the date above mentioned, the contractor shall forfeit and pay or cause to be paid to the owner the sum of fifteen dollars per day for each and every day thereafter the said work remains in an unfinished condition for and as liquidated damages, and to be deducted from any payments due or to become due to said contractor."

Preliminary to a discussion of the provisions of article 6 of the foregoing contract, it must be observed that the direct or approximate cause of any delay in the completion of said building must be the fault of the contractor to give your society any right of action upon said covenants to complete within the specified time. Therefore, I am not so much concerned with the question whether your society may waive the foregoing provisions of your contract as I am as to whether it may enforce, under the admitted facts in this case, said provisions against the contractor. If under the law and the facts here your society has no legal right it may enforce, it has nothing to waive. In other words, if you have no substantial rights involved under the covenant aforesaid, you have no option to exercise in reference thereto. The facts, as disclosed by your letter and correspondence thereto attached, show that after the first contract was made the building committee became dissatisfied with the original plans and specifications, and especially as to the appearance of the rotunda, and asked the contractor to delay the work until the matter could be presented to the legislature. This was done and an additional appropriation of $5,000 was made by the legislature with which to complete the building under the amended plans and specifications. Then followed the making of the second contract, dated September 19, 1913. However, it then appeared that this sum of $5,000 was not sufficient to complete the building in the manner desired and a further sum of $1,252.00 was contributed by a private party to the building fund, and a separate contract was made for the expenditure of this last amount. These various arrangements interrupted the regular process of the work of the contractor and they were followed by other delays for which, under the statements made in the correspondence attached, he was not responsible. It is admitted also that while the building was not finaly accepted until September 24, 1915, it was ready for acceptance long prior to that date, but on account of the

absence in Europe of the contributor of the private fund aforesaid, the building committee did not wish to accept it until his return. It further appears that as a matter of fact the building was actually occupied and in use by the state for more than a year prior to its formal acceptance.

Taking into consideration all these facts, as well as the attitude of all the parties concerned toward each other in the matter of the changes made in the contracts and in the plans and specifications, and especially with reference to the time so taken when considered with reference to the covenant to complete within a specified time, I am compelled to conclude that you have no claim here which could be established at law. Having, therefore, no right of action under this covenant to complete, you have nothing to waive.

Answering your question specifically, my conclusion is that while your society may waive no provisions of said contract, yet under all the facts, circumstances and surroundings in this case, the covenant to complete within the time specified in the contract is not operative against the contractor and your society has nothing in that behalf to waive.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1007.

THE HOTEL SAVOY COMPANY—CERTIFICATE OF REDUCTION OF STOCK DISAPPROVED—NOMINAL VALUE OF ALL SHARES OF STOCK NOT REDUCED.

The secretary of state advised to refuse to file and record certificate of reduction of the stock of The Hotel Savoy Company, because the provisions of section 8700, G. C., were not complied with by reducing the nominal value of all shares of stock.

COLUMBUS, OHIO, November 11, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of November 6th, requesting my opinion as follows:

> "We are enclosing ten cent internal revenue stamp uncanceled, check of five dollars, and certificate of reduction of capital stock of THE HOTEL SAVOY COMPANY, also communication from Frank J. Dorger.
>
> "The certificate of reduction reduces the capital stock of the above corporation without reducing the nominal value of all of the shares thereof, which in our opinion does not conform with section 8700 of the General Code. We would like your opinion on whether the enclosed certificate is in proper form."

The pertinent part of the certificate of reduction of capital stock enclosed in your letter is as follows:

> "THE HOTEL SAVOY COMPANY hereby certifies that at a meeting of the directors of said company, held on July 28, 1915, the written consent of the persons in whose names a majority of the shares of the capital stock of said company stood on the books of the company having first been obtained, the capital stock of said company was reduced from

one hundred and fifty thousand dollars ($150,000.00) to eighty-five thousand dollars ($85,000.00) by redeeming, retiring and cancelling fifty thousand dollars ($50,000.00) of the preferred stock and fifteen thousand dollars ($15,000.00) of the common stock."

You also enclose a letter from Mr. Frank J. Dorger, attorney at law, Cincinnati, Ohio, which adds additional information to that contained in the letter and the certificate of reduction.

The information furnished does not reveal by what authority or how the $50,000.00 of preferred stock has been retired. I assume that it was done in pursuance of a provision for its redemption at a certain date made under authority of section 8669 of the General Code, at the time this preferred stock was issued. So far, therefore, as concerns the $50,000.00 of preferred stock the certificate of reduction is unnecessary as the reservation of the right to redeem the same followed by actual redemption accomplished its retirement and a consequent reduction of the entire capital stock of the corporation to that extent without further action.

As to the $15,000.00 of common stock, however, the situation is materially different, because no right to redeem or retire such stock was or could have been reserved when it was issued and authority for any subsequent action to accomplish its reduction must be found elsewhere.

Apparently, from the information furnished, the corporation has simply purchased from some of its stockholders $15,000.00 of its common stock and now seeks to reduce its authorized capital stock to that extent.

Quoting from "Thompson on Corporations," section 3661:

> "It is a fundamental rule that the capital stock of a corporation cannot be reduced except by express statutory authority."

Again, at section 3663:

> "As there can be a reduction of the capital stock of a corporation only on express statutory authority, the method prescribed by the statutes must be followed."

The only statutory authority in Ohio to reduce the capital stock of a corporation is found in section 8700 of the General Code, which provides as follows:

> "With the written consent of the persons in whose names a majority of the shares of the capital stock thereof stands on its books, the board of directors of such a corporation may reduce the amount of its capital stock and the nominal value of all the shares thereof, and issue certificates therefor. The rights of creditors shall not be affected thereby; and a certificate of such action shall be filed with the secretary of state."

The certificate presented by The Hotel Savoy Company does not comply with the above quoted section in that no provision is made for a reduction of the nominal value of all the shares of said company's stock. If the corporation desires to avail itself of the privilege of reducing its capital stock under the above quoted section, it must follow the method prescribed by the statute.

I therefore advise you that you should refuse to file and record the certificate of reduction of capital stock under consideration.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1008.

STATE HIGHWAY COMMISSIONER—WITHOUT AUTHORITY IN DECEMBER, 1914, TO PAY COUNTY COMMISSIONERS ANY PART OF COST OF *CONSTRUCTING* INTER-COUNTY HIGHWAYS UNDER CONTRACT LET BY COUNTY COMMISSIONERS.

Under the statutes in force in December, 1914, *the state highway commissioner was not authorized to pay to county commissioners any part of the cost of constructing inter-county highways under contracts let by the county commissioners, even where the plans were approved by the state highway commissioner and the state highway department exercised some supervision over the work.*

COLUMBUS, OHIO, November 11, 1915.

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

DEAR SIR:—I have your communications of October 20 and November 4, 1915, relating to an arrangement which the state highway commissioner endeavored to enter into with the commissioners of Erie county during the latter part of 1914, relating to certain inter-county highway improvements in that county. In your communication of October 20th you stated merely that you were forwarding to me a copy of what purported to be an agreement on the part of the state highway department to pay ten per cent. of the cost of construction of certain sections of inter-county highways in Erie county, together with copies of the correspondence relating thereto. You requested me to examine the papers submitted and advise you as to what action could properly be taken by the state highway department.

From the attached correspondence it appears that on December 11, 1914, Mr. H. M. Adams, county auditor of Erie county, transmitted to the then highway commissioner, Hon. James R. Marker, a document which the county auditor described as an agreement for the state highway department as to bearing a portion of the cost of certain road improvements in Erie county. This agreement was evidently transmitted in duplicate and the state highway commissioner was asked to sign and return one copy for the files of the Erie county commissioners. The document in question reads as follows:

"AGREEMENT OF STATE HIGHWAY DEPARTMENT.

"The highway department of the state of Ohio hereby ratifies and approves the plans and specifications for the construction of certain sections of inter-county highway, in Erie county, to wit:

"I. C. H. 276 in Margaretta township ---------- 6,336 feet
"I. C. H. 294 in Milan township, ---------- 9,783 feet
"I. C. H. 294 in Perkins township ---------- 6,500 feet

"The estimated and actual cost of which are:

"I. C. H. 276, Margaretta township ----------$15,266.00
"I. C. H. 294, Milan township ---------- 6,508.78
"I. C. H. 294, Perkins township---------- 3,111.25

"The state of Ohio, through its highway department, agrees to pay 10 per cent. of the cost of said road construction and agrees to supervise the construction thereof.

"----------
State Highway Commisioner."

It further appears that on December 19, 1914, the then state highway commissioner approved the so-called agreement and returned a copy thereof to the

board of commissioners of Erie county. On July 16, 1915, the county auditor of Erie county made demand upon you for ten per cent. of the cost of improving one of the roads in question, the amount demanded being $1,576.18, and on October 19, 1915, this demand was repeated. It seems that in answer to the first demand for payment an employe of your department dictated a letter to the county auditor of Erie county to the effect that as soon as the work was completed, it would be inspected by a representative of the state highway department, and payment of the state's share would be promptly made. Certain reports by one of your division engineers were also attached to your first communication as was also a report by a bookkeeper in your department to the effect that he knew nothing of the agreement until payment thereunder was demanded. It also appears that a division engineer connected with your department inspected the work on the roads in question some seven or eight times.

In your communication of November 4, 1915, you state that part of the work in question consisted of construction and part of re-construction, and that the contracts for the improvements were let by the county commissioners and not by the state highway department.

From the above state of facts it follows that the question now presented for determination is as to the authority of the state highway commissioner, under the statutes in force in December, 1914, to enter into a contract with the commissioners of a county, by the terms of which contract the commissioners undertake the improvement of a section of inter-county highway and the state highway commissioner agrees to pay to them a certain proportion of the cost and expense of such improvement. I have carefully examined all the statutes in force at the time the state highway commissioner endeavored to enter into this arrangement with the county commissioners of Erie county, and can find no authority whatever for any agreement of this particular character.

Sections 1218 and 1219, G. C., as found in 99 O. L., 318, were as follows:

> "Section 1218. If permanent roads of not less than standard width have been constructed prior to the establishment of the state highway department and the materials thereof are gravel, brick, telford, macadam, or material of like quality, the county commissioners may make application to the state highway commissioner on or before January 1st of each year, for the amount of state funds apportioned to such county. Thereupon the amount so apportioned shall be paid to the county treasurer, if the county commissioners of such county have levied or will levy a tax on the duplicate of the county sufficient to equal the amount so appropriated. Such appropriation and levy shall become a part of the pike repair fund of the townships, and be apportioned to the townships or road districts of not less than one township each in proportion to the amount of the fund collected by such levy in each such township or road district. Township trustees or other authorities having charge thereof shall apply such fund to the repair of improved roads in the same manner as other pike repair funds are applied, but the material used therefor shall be equal to the material used in the original construction of such road.
>
> "Section 1219. If a township of a county specified in the preceding section has no improved roads as provided therein, it shall not use its portion of such funds for any other purpose than the construction of improved highways in the manner provided by this chapter. A county may use moneys lawfully transferred from another fund in place of the tax required by such section, but the county commissioners, with the consent of the state highway commissioner, may use a part of such apportionment for construction, and the remainder thereof for repairs,"

A repeal of these sections was contained in 102 O. L., 333, section 58, but said section 58 was not approved by the governor. It is unnecessary in this connection to consider, however, the question of whether or not sections 1218 and 1219 were repealed by implication by the act found in 102 O. L., 333, for the reason that under no possible construction can it be said that the alleged agreement now under consideration falls within the purview of the two sections in question or was authorized by them even if they were in force in December, 1914.

It is provided by section 1225, G. C., 103 O. L., 459, that the state highway commissioner may enter into a contract with * * * the county commissioners of any county for the repair and maintenance of inter-county highways and main market roads constructed by the state by the aid of state money or taken over by the state. It appears, however, from your statement of facts, that the operations carried on by the county commissioners of Erie county were in the nature of construction or re-construction, and were not in the nature of maintenance or repair work and it does not appear that the highways improved by the commissioners had been constructed by the state by the aid of state money or taken over by the state. The only possible theory upon which the contract now being considered might be sustained as valid would be that the highways covered by the improvements had been previously constructed by the state by the aid of state money or had been taken over by the state, and that the operations of the county commissioners consisted of maintenance and repair work. While the alleged agreement is informal in character and while the only evidence of its acceptance by the county commissioners of Erie county is the fact that they acted under it, yet it is my opinion that if the roads covered by the improvements had been previously constructed by the state by the aid of state money, or had been taken over by the state, then it would be your duty to recognize the contract in question as valid if the operations carried on by the county commissioners might properly be regarded as in the nature of maintenance and repair work. From your statement of facts, however, it appears, as before stated, that the work in question is in the nature of construction or re-construction and it does not appear that the roads covered by the work in question were ever improved or taken over by the state.

Basing my conclusions upon the state of facts set forth above and limiting it to the same, it is my opinion that the alleged contract between the state highway department and the commissioners of Erie county is invalid for lack of authority in law to make the same, and that you cannot recognize this agreement or make any payments to the county commissioners of Erie county from the funds of your department on account of the same. I reach this conclusion with some regret for the reason that the county commissioners of Erie county seem to have acted in the best of faith and to have made a large expenditure in reliance upon the agreement of the state highway commissioner to the effect that the state would meet a share of the expense, but I am unable to arrive at any other or different conclusion on account of the total lack of any statutory authority for such an agreement, especially in view of the provision of section 1222, G. C., 103 O. L., 458, to the effect that moneys appropriated by the state for the purpose of carrying out the provisions of law relating to the state highway department should not be used in any manner or for any purpose except as provided by law.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1009.

TOWNSHIP BOARDS OF EDUCATION—UNCOUNTED BALLOTS FOR MEMBERS OF SUCH BOARD SHOULD BE RETURNED WITH RETURNS OF ELECTION TO CLERK OF SUCH BOARD OF EDUCATION AND SUCH BOARD SHALL COUNT AND TALLY SUCH BALLOTS, IF ABLE TO DETERMINE VOTERS' CHOICE.

Ballots for members of township rural district boards of education upon which the judges of elections are unable to agree as to how they should be counted should be sealed in an envelope for that purpose and returned with the returns of the election to the clerk of the board of education of the district for which such election is held.

The board of education of the district in canvassing the returns and determining the result of such election should open and count such ballots if the choice of the voter can be determined therefrom, and preserve the same for further judicial or other investigation. If it is impossible for the board of education to determine the choice of the voter from the ballot the result of the election should then be determined exclusive of such ballots and the same preserved in like manner.

COLUMBUS, OHIO, November 11, 1915.

HON. E. A. SCOTT, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—Your request for an opinion under date of November 8, 1915, may be summarized as follows:

> "The judges of elections for Monroe township, Adams county, Ohio, were unable to agree as to how certain ballots for members of the township board of education should be counted, and you make inquiry (1) to whom should these ballots be returned, (2) should they be counted except in case of contest of election, and (3) if so, by whom?"

Section 5003, G. C., provides in part as follows:

> "In the event the judges do not agree as to how any part of the ballot shall be counted, such ballot shall not be counted but shall be placed in an envelope provided for the purpose."

Section 5090, G. C., 103 O. L., 266, referred to in your inquiry, provides as follows:

> "If there are any ballots placed in the envelopes for uncounted ballots, such envelopes shall be sealed and returned to the deputy state supervisors with the returns of the election, to be by him counted. At least one day before the beginning of the official count, the board of deputy state supervisors, in the presence of one person duly authorized by the chairman of each county controlling committee and the chairman of the committee of each set of candidates nominated by petition, shall open the envelopes containing the uncounted ballots and determine what part and for whom each such ballot shall be counted, and proceed to count and tally the same. Said ballots shall be further preserved for such judicial or other investigation as may be necessary."

In consideration of the first question above stated, it will be noted that under the provisions of section 5090, G. C., supra, it is required that if any ballots are placed in the envelope for uncounted ballots, such envelope shall be sealed and returned to the deputy state supervisors *"with the returns of the election to be by them counted,"* and it is therein further specifically provided that such ballots shall be counted, tallied and "preserved for such judicial and other investigation as may be necessary."

From a consideration of this section little difficulty, if any, will be met in those elections, the returns of which are required to be made to the deputy state supervisors of elections. The difficulty of your question arises, however, from the application of the provisions of section 5111 and section 5120, G. C., as follows:

> "Section 5111. In November elections held in odd numbered years for township officers, justices of the peace, municipal officers and members of boards of education, the judges and clerks of elections in each precinct shall make and certify the returns to the clerk of the township or the clerk or auditor of the municipality in or for which the election is held or the clerk of the board of education of the school district, respectively, instead of to the boards of deputy state supervisors of the county. This provision shall not apply to the returns of elections for assessors of real property.
>
> "Section 5120. In school elections, the returns shall be made by the judges and clerks of each precinct to the clerk of the board of education of the district, not less than five days after the election. Such board shall canvass such returns at a meeting to be held on the second Monday after the election, and the result thereof shall be entered upon the records of the board."

The provisions of these sections give rise to an apparent conflict or inconsistency, in the provisions of section 5090, G. C., supra, that the envelopes shall be "returned to the deputy state supervisors" and the further requirement that they shall be returned "with the returns of the election." Since under sections 5111 and 5120, G. C., supra, the returns of the election about which you inquire are not made to the deputy state supervisors of elections, it follows that in the very nature of things such envelopes cannot be returned to the "deputy state supervisors" and "with the returns of the election" at one and the same time.

The question as to whom the return of such envelope shall be made, under a similar state of facts, was considered in opinion No. 577 of this department, rendered to Hon. Irving Carpenter, prosecuting attorney, under date of July 2, 1915, a copy of which is herewith enclosed, in which opinion it was held that as to those elections, returns of which are not made to the deputy state supervisors, the provision for the return of such envelopes *"with the returns of the elections"* will control to the exclusion of the provision that the same shall be returned *"to the deputy state supervisors."*

On the reasoning of that opinion I therefore hold that the envelopes containing uncounted ballots for members of township boards of education should be returned with the returns of the election to the clerk of the board of education of the township rural school district in which such elections are held.

Coming to a consideration of the second question stated, it seems manifest from the provisions of section 5090, G. C., 103 O. L., 266, that it was the legislative intent that these ballots should be counted, in officially determining the result of the election and canvassing the returns thereof, in every election without awaiting a contest or other investigation.

The board of education is charged with the duty of canvassing the returns of the election about which you inquire, under the provisions of section 5120, G. C.,

supra. Since such ballots are required to be counted and the board of education must canvass the returns and determine the results of the election, it of necessity becomes the duty of the board of education to open the envelopes referred to, count the ballots and tally the same in so determining the result of such election.

The board of education in counting such ballots shall be governed by subdivision 9 of section 5070, G. C., which is as follows:

> "No ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice."

Whether or not these ballots shall be ultimately counted then depends upon the facts in each particular case and no more definite rule for the determination of that question can be laid down than to state that if it is not impossible for the board of education canvassing the returns to determine the voter's choice from the ballots in question, it is their duty to count and tally such ballot in accordance with the choice of the voters as determined by the board. After the opening and counting of these ballots they should be preserved for the purpose of such judicial or other investigation as may be necessary.

Boards of education under section 4752, G. C., in the general rule of law governing boards or public officers and deliberative bodies, act by or through a majority vote of a quorum, except in case of special provision to the contrary.

If, then, a majority of a quorum of such board fails to agree as to how ballots returned as above set forth shall be counted, the effect of such action would be a determination that such ballots should not be counted at all and therefore conclude the question as to all parties in so far as election officers, or those charged with the duty of determining the result of the election in the first instance, is concerned.

Answering then your inquiry more specifically, I am of the opinion that envelopes containing uncounted ballots for members of township boards of education should be returned to the clerk of the board of education of the rural township school district in which such election is held and that such board of education, when canvassing the returns of such election should open such ballots and if from the same they are able to determine the voters' choice, such ballots should be counted and tallied in accordance with such determination and all such ballots preserved for the purposes of such judicial or other investigation as may be necessary. In the event that the board of education is unable to determine from the ballots the voters' choice, the result of the election should be by such board determined, exclusive of such ballots and the same in like manner preserved.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1010.

APPROVAL OF RESOLUTION FOR IMPROVEMENT OF COLUMBUS-SANDUSKY ROAD IN DELAWARE COUNTY, OHIO.

COLUMBUS, OHIO, November 11, 1915.

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

DEAR SIR:—I have your communication of November 10, 1915, transmitting to me for examination final resolution relating to the Columbus-Sandusky road in Delaware county, petition No. 783, I. C. H. No. 4.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

1011.

COUNTY COMMISSIONERS—WITHOUT AUTHORITY TO MAKE DONATION TO VOLUNTEER FIRE DEPARTMENT.

County commissioners have no authority to make a donation to the volunteer fire department for the purpose of providing a fund with which to buy rubber coats and helmets.

COLUMBUS, OHIO, November 11, 1915.

HON. A. B. UNDERWOOD, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your letter of November 8, 1915, in which you request my opinion as follows:

> "I submit the following facts for an opinion: The court house and jail for Medina county are located in Medina village. Medina village has a volunteer fire department. In case of fire this volunteer fire department would protect the county buildings. This fire department is now circulating a subscription paper to raise funds with which to purchase rubber coats and helmets. Can the county commissioners donate money from the county funds to the volunteer fire department for this purpose?"

For your information I will state that there is no provision of law which authorizes the county commissioners to make donations for the purpose mentioned in your letter, and I am therefore of the opinion that it cannot be done.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1012.

TRANSMISSION OF MESSAGES—WHEN BOYS OVER AGE OF FIFTEEN YEARS AND UNDER AGE OF SIXTEEN YEARS MAY BE EMPLOYED —GIRLS UNDER AGE OF TWENTY-ONE YEARS MAY NOT BE EMPLOYED IN TRANSMISSION OF MESSAGES—AGE AND SCHOOLING CERTIFICATE.

Boys over the age of fifteen years and under the age of sixteen years may be employed in the transmission of messages, provided an age and schooling certificate be secured as required under the provisions of section 12994, *G. C., amended,* 103 *O. L.,* 907.

Girls under the age of twenty-one years may not be employed in the transmission of messages.

COLUMBUS, OHIO, November 12, 1915.

The Industrial Commission of Ohio, Department of Inspection, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge receipt of your letter of November 6th, requesting an opinion as follows:

"Sections 12993 and 12994 of the General Code seem to be in conflict. You will note that section 12993 provides, among other things, that no female under twenty-one years shall be employed in the transmission of messages. (103 O. L., 907.)

"Section 12994 conflicts in that it permits females under eighteen years of age to be employed in the transmission of messages if the employer first procures from the proper authority the age and schooling certificate provided by law. (103 O. L., 907.)

"I should thank you for an opinion for the guidance of this department."

Sections 12993 and 12994 of the General Code, as amended (page 907 of 103 O. L.), are as follows:

"Section 12993. No male child under fifteen years or female child under sixteen years of age shall be employed, permitted or suffered to work in, about or in connection with any (1) mill, (2) factory, (3) workshop, (4) mercantile or mechanical establishments, (5) tenement house, manufactory or workshop, (6) store, (7) office, (8) office building, (9) restaurant, (10) boarding house, (11) bakery, (12) barber shop, (13) hotel, (14) apartment house, (15) bootblack stand or establishment, (16) public stable, (17) garage, (18) laundry, (19) place of amusement, (20) club, (21) or as a driver, (22) or in any brick or lumber yard, (23) or in the construction or repair of buildings, (24) or in the distribution, transmission or sale of merchandise, (25) nor any boy under fifteen or female under twenty-one years in the transmission of messages.

"It shall be unlawful for any person, firm or corporation to employ, permit or suffer to work any child under fifteen years of age in any business whatever during any of the hours when the public schools of the district in which the child resides are in session.

"Section 12994. No boy under sixteen years of age and no girl under eighteen years of age shall be employed or permitted to work on or in connection with the establishments mentioned in section 12993 of the General

Code, or in the distribution or transmission of merchandise or messages unless such employer first procures from the proper authority the age and schooling certificate provided by law."

A reading of the two sections quoted shows that while under the provisions of the first a boy under the age of fifteen or a female under the age of twenty-one years may not be employed in the transmission of messages, an exception is made in the second relative to the employment of a boy under the age of sixteen years and an apparent exception as to the employing of a girl under the age of eighteen years in connection with employment in the distribution and transmission of merchandise or messages. The exceptions which are made in section 12994 of the General Code, supra, are dependent upon the procuring by the employer from the proper authorities of an age and schooling certificate. The issuance of an age and schooling certificate is provided in section 7765 of the General Code, as amended (103 O. L., 899), and is based on certain conditions imposed under section 7766 of the General Code, as amended (103 O. L., 899), which, in part, is as follows:

"An age and schooling certificate shall be approved only by the superintendent of schools, or by a person authorized by him, in city or other districts having such superintendent, or by the clerk of the board of education in village, special and township districts not having such superintendent, upon satisfactory proof that such child, if a male, is over fifteen years of age, or, if a female, is over sixteen years of age and that such child has been examined and passed a satisfactory sixth grade test, if a male, and seventh grade test, if a female, in the studies enumerated in section seventy-seven hundred and sixty-two, provided, that residents of other states who work in Ohio must qualify as aforesaid with the proper school authority in the school district in which the establishment is located, as a condition of employment or service, and that the employment contemplated by the child is not prohibited by any law regulating the employment of such children. Every such age and schooling certificate shall be signed in the presence of the officer issuing the same by the child in whose name it is issued. * * *"

It will be noted from a reading of section 7766 of the General Code, as amended, supra, that one of the conditions provided for the issuance of an age and schooling certificate is that the employment contemplated by the child is not prohibited by any law regulating the employment of such children. Under the provisions of the law an age and schooling certificate may be issued to a boy between the age of fifteen and sixteen years, and it will be noted that under the provisions of section 12993 of the General Code, as amended, supra, a boy between the age of fifteen and sixteen years is not prohibited from engaging in the business of transmitting messages; and under the provisions of section 12994 of the General Code, as amended, supra, a boy under sixteen years of age may be employed in the transmission of messages, provided the age and schooling certificate referred to above be secured by the employer. In other words, there is no law prohibiting a boy between the age of fifteen and sixteen years being engaged in the transmission of messages, provided he has the age and schooling certificate referred to.

On the other hand it will be observed the positive prohibition of section 12993 of the General Code is that no girl under the age of twenty-one years shall be employed, permitted or suffered to work in connection with the transmission of messages, and while under the provisions of section 12994 of the General Code, as amended, supra, a girl under the age of eighteen years may be employed in the transmission of messages, provided certain conditions have been met, namely, the

procuring of an age and schooling certificate, it will be at once observed that as section 12993 of the General Code prohibits such employment, it would be impossible for a girl under the age of eighteen years to secure an age and schooling certificate for the employment referred to, and there is no provision of law for the procuring of an age and schooling certificate over the age of eighteen years and under the age of twenty-one years.

In view of the positive prohibition contained in section 12993 of the General Code, as amended, supra, which would render section 12994 of the General Code, as amended, supra, ineffective as affording any relief for a female under the age of eighteen years, it is my opinion that while a boy under the age of sixteen and over the age of fifteen years, supra, upon procuring an age and schooling certificate, may be employed in the transmission of messages, that field of work is closed to females under the age of twenty-one years.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1013.

ASSESSOR—AN ELECTOR OF A MUNICIPAL CORPORATION LOCATED WITHIN A TOWNSHIP IS NOT AN ELECTOR OF SAID TOWNSHIP AS CONTEMPLATED BY SECTION 3349, G. C., 106 O. L., 250.

An elector of a municipal corporation located within a township is not an elector of said township as contemplated by the following provision of section 3349, *G. C.,* 106 *O. L.,* 250, *viz.*:

"An assessor shall be a citizen possessing the qualifications of an elector of such ward, district, city, village or township" and may not qualify as an assessor of said township.

COLUMBUS, OHIO, November 12, 1915.

HON. D. F. MILLS, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 9, 1915, containing the following statement and inquiry:

> "The village of Jackson Center, a municipal corporation, is located in Jackson township, Shelby county, Ohio.
>
> "Two persons filed their petitions, as required by law, as candidates for assessor in the township. One of these candidates lived within the municipal corporation. The names of both candidates were printed on the township ballot. The person who lived within the corporation received the highest number of votes and the clerk of the township has certified his name to the county auditor as being the duly elected assessor for Jackson township outside of the municipal corporation. The candidate who lived within the municipal corporation has lived there for several years and possesses the necessary qualifications of an elector of a township for any other office.
>
> "I would like to have your opinion as to whether or not this party can hold the office of assessor, or if it is necessary that the man who is elected must live outside of the corporation."

A complete answer to your question is found in the provisions of section 3349, G. C., as amended in 106 O. L., page 250. This section, among other provisions, provides that in villages one assessor shall be elected; in townships not having a municipal corporation therein one assessor shall be elected in such township; in townships composed in part of a municipal corporation one assessor shall be elected in the territory outside such municipal corporation. The section further provides:

> "An assessor shall be a citizen possessing the qualifications of an elector of such ward, district, city, village or township."

While the party named in your inquiry may have the qualifications of an elector of the township as to some township offices, he did not, as stated in your letter, possess the qualifications of an elector for the office to which he now claims election. This fact alone completely impeaches his claim to the qualifications of an elector as required by the provisions quoted aforesaid. The plain import of the law in this respect requires an assessor to be an elector for all purposes of the ward, city, village or township in which he serves. His qualifications as an elector may not be limited. Not only, as stated by you in your letter, is the party in question disqualified as an elector of the township in the election of a township assessor, but he may not vote for members of the township board of education; and other examples might be given of elections held in the township under the laws of this state in which he could not participate as an elector.

Further, a consideration of all the provisions of said section 3349 shows that it is the manifest purpose of this law to give to each taxing district an assessor of its own selection, who is a citizen and elector of said district. This purpose is not met in the case named in your letter.

I conclude, therefore, that an elector of a municipal corporation within a township is not an elector of said township as contemplated by the provisions of section 3349, supra, which requires that an assessor in said township shall possess the qualifications of an elector thereof, and therefore he may not qualify as assessor for said township.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1014.

PROCEEDINGS UNDER SECTIONS 3399 TO 3402, G. C.—AN AFFIRMATIVE VOTE OF TWO-THIRDS OF THOSE VOTING IN INCORPORATED VILLAGE AND AN AFFIRMATIVE VOTE OF TWO-THIRDS OF THOSE VOTING IN TOWNSHIP OUTSIDE OF VILLAGE ARE REQUIRED FOR SUCH PROCEEDINGS.

Under the provisions of sections 3399 to 3402, G. C., inclusive, it is required that there shall be an affirmative vote of two-thirds of those voting in the incorporated village and an affirmative vote of two-thirds of those voting in the township outside of the village to authorize further proceedings thereunder for enlargement, improvement or erection of a public building.

COLUMBUS, OHIO, November 12, 1915.

HON. FRANK L. JOHNSON, *Prosecuting Attorney, Xenia, Ohio.*

DEAR SIR:—Your request for an opinion under date of November 8, 1915, is as follows:

> "Section 3399, General Code, provides as follows:
>
> "'The electors of a township in which a village is situated, and the electors of such village may if both so determine, as hereinafter provided, unite in the enlargement, improvement or the erection of a public building.'
>
> "Then sections 3400 and 3401 provide as to how an election shall be called to determine the question, and section 3402 provides:
>
> "'If at such election two-thirds of the electors of the township and of the village voting, vote in favor of such improvement, the trustees of such township and the council of the village shall jointly take such action as is necessary to carry out such improvement.'
>
> "The question then is this: Does it take two-thirds of the electors of a township and two-thirds of the electors of the village voting or is it only necessary to have two-thirds of the total vote of the township and village to authorize the township trustees and the council of the village to proceed with the improvement?
>
> "Sugarcreek township this county and the village of Bellbrook voted under this section, and two-thirds of the electors in the village favored the improvement, but it didn't receive a two-thirds vote in favor of the improvement in the township but the total affirmative vote of the village and the township is two-thirds of the total vote.
>
> "I am of the opinion that it is necessary to have an affirmative vote of two-thirds of the township and two-thirds of the village before they are authorized to go ahead with the improvement for the reason that the statute specifically provides for two-thirds of the electors of the township and of the village, and if it meant two-thirds of the total vote all that would have been necessary to have provided in the statutes would have been two-thirds of the total vote. You will also notice that in section 3399 provides if both so determine, etc.
>
> "The township trustees have a meeting on November 20, 1915, and if possible I would like to have your opinion on the matter by that time."

Sections 3399 and 3402, G. C., to which you refer, were originally enacted as sections 1 and 4 of house bill No. 560, 97 O. L., 483, in the following form:

"Sec. 1. The electors of an incorporated village and the electors of the township in which the village is situated may, if both so determine, as hereinafter provided, unite in the enlargement, improvement or erection of a public building.

"Sec. 4. If at such election two-thirds of the electors of said village and township voting, vote in favor of such improvement, the council of such village and the trustees of said township shall jointly take such action as is necessary to carry out the improvement contemplated."

The slight changes in phraseology to be observed were made in the codification of 1910 and are not deemed to have in any way affected the meaning or construction to be given the provisions of the statutes under consideration.

It will be observed that in the original enactment, as well as in the code form of these two sections, some degree of care is manifest on the part of the legislature to maintain a clear distinction and separate designation of the "electors of the township" and "the electors of the village."

Such purpose is further emphasized in section 2 of the original act, being section 3400 of the General Code, wherein it will be noted that it is required that there shall be filed with the trustees an application "signed by not less than twenty-five resident freeholders of such township *who are not residents of the village,*" and an application filed with the mayor of the village "signed by not less than twenty-five resident freeholders of the village."

The legislative intent that there should be a complete and independent application on the part of the citizens of each political subdivision could not be more clearly expressed. It seems that the reason and purpose which prompted the requirement of an independent application of freeholders of each subdivision, would apply with even stronger force to the approval of the scheme by the electors. Indeed, it would be idle to prescribe with particularity an independent action in application, if the ultimate approval were to be considered as a joint action.

There is much force also in your suggestion as to the language of section 3402, G. C., supra. The terms of that section to my mind indicate a careful avoidance of the use of the language suggested by you, which would have so aptly expressed the legislative will to make two-thirds of the joint vote of the village and township sufficient, had that been the end sought.

I am therefore of opinion, in answer to your question, in consideration of the context of the whole act in which the provisions especially referred to are found, that it was the legislative intent to require an affirmative vote by two-thirds of those voting in the incorporated village, and an affirmative vote by two-thirds of those voting in the township outside of such incorporated village, in order to authorize further proceedings under sections 3399 to 3402.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1015.

COUNTY COMMISSIONERS—MAY ISSUE BONDS TO REFUND TURNPIKE AND BRIDGE BONDS, NOTWITHSTANDING TAX RATE OF COUNTY HAS REACHED LIMIT PROVIDED BY SMITH LAW.

A county in which original turnpike and bridge bonds in the amount of twenty thousand dollars are soon to become due may refund said bonds under the provisions of sections 5656, *G. C., et seq., and this may be done without regard to the fact that the tax rate in said county has reached the limit of fifteen mills. The levy to provide a sinking fund for said bonds so refunded is controlled by sections* 5649-1 *and* 5649-1*a, G. C., as amended and supplemented in* 104 *O. L.,* 12.

COLUMBUS, OHIO, November 12, 1915.

HON. HENRY W. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 8, 1915, containing the following inquiry:

> "In a short time $20,000.00 of turnpike and bridge bonds of this county will become due. These bonds are the original issue. Can redemption bonds be issued to take care of these original bonds when they become due, in face of the fact that Gallia county is already taxed to the limit under the Smith 1½% law?
>
> "Can bonds be issued without submitting the question to the electors of the county, when the county commissioners under the provisions of the Smith law, can make no provision by tax levy to take care of the principal and interest of said bonds?"

It appears from your letter that turnpike and bridge bonds of your county to the amount of $20,000 will soon become due. You inquire if these bonds may be refunded by issuing redemption bonds in face of the fact that the tax rate in your county has reached the limit of fifteen mills.

I will first consider the question whether said bonds may be refunded, and in that connection desire to call your attention to the provisions of the following sections of the General Code:

> "Section 5656. The trustees of a township, the board of education of a school district and the commissioners of a county, for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation such township, district or county is unable to pay at maturity, may borrow money or issue the bonds thereof, so as to change, but not increase the indebtedness in the amounts, for the length of time and at the rate of interest that said trustees, board or commissioners deem proper, not to exceed the rate of six per cent. per annum, payable annually or semi-annually."
>
> "Section 5658. No indebtedness of a township, school district or county shall be funded, refunded or extended unless such indebtedness is first determined to be an existing, valid and binding obligation of such township, school district or county by a formal resolution of the trustees, board of education or commissioners thereof, respectively. Such resolution shall state the amount of the existing indebtedness to be funded, refunded or

extended, the aggregate amount of bonds to be issued therefor, their number and denomination, the date of their maturity, the rate of interest they shall bear and the place of payment of principal and interest.

"Section 5659. For the payment of the bonds issued under the next three preceding sections, the township trustees, board of education or county commissioners shall levy a tax, in addition to the amount otherwise authorized, each year during the period the bonds have to run sufficient in amount to pay the accruing interest and the bonds as they mature."

Under the provisions of the sections aforesaid ample authority is conferred upon your board of county commissioners to refund the bonds in question by issuing redemption bonds therefor. It would seem unnecessary to discuss in this connection in further detail the provisions of the sections above quoted. It appears, however, from your inquiry that the rate of taxation in your county has reached the limit of fifteen mills, and that by reason of that fact you inquire whether said bonds may be refunded. A complete answer to your inquiry in this regard is found in the provisions of sections 5649-1 and 5649-1a, G. C., as amended and supplemented in 104 O. L., page 12.

"Section 5649-1. In any taxing district, the taxing authority shall, within the limitations now prescribed by law, levy a tax sufficient to provide for sinking fund and interest purposes for all bonds issued by any political subdivision, which tax shall be placed before any in preference to all other items, and for the full amount thereof.

"Section 5649-1a. All bonds heretofore issued by any political subdivision for a lawful purpose which have been sold for not less than par and accrued interest and the proceeds thereof paid into the treasury, shall be held to be legal, valid and binding obligations of the political subdivision issuing the same."

By the provisions of the foregoing sections a levy for a sinking fund and interest purposes takes precedence over all other levies and in effect makes it mandatory upon the proper authority to provide a sinking and interest fund for all bonds, even to the extent of precluding levies for other purposes altogether.

In your case, therefore, the fact that your rate of taxation has reached the limit as provided by the Smith law presents no obstacle to the refunding of the bonds named in your letter. Reductions should be made in other levies sufficient to provide a sinking fund for the payment of these bonds and the interest thereon.

In view of the situation in your county, it would be advisable for you to refund the bonds in question by issuing redemption bonds in small amounts and payable at such times and in such amounts as not to seriously affect the levies made by you for other purposes.

Your second question, being simply a re-statement of the matters contained in your first inquiry, is fully answered by the observations heretofore made.

I conclude, therefore, under the facts stated in your letter, that the $20,000 of turnpike and bridge bonds of your county, soon to become due, may be refunded by issuing redemption bonds to the same aggregate amount as the bonds so to become due and that this may be done without regard to the fact that the tax rate in your county has reached the limit provided by the so-called Smith law.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1016.

APPROVAL OF ABSTRACT OF TITLE AND DEED FOR CONVEYING CERTAIN LAND IN TOLEDO, OHIO, TO STATE OF OHIO.

COLUMBUS, OHIO, November 12, 1915.

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

DEAR SIR:—Under date of November 4, 1915, you transmitted to me a deed executed in behalf of the city of Toledo to the state of Ohio, conveying said land in the city of Toledo, together with an abstract of title for said property. Said premises are described as follows:

> "Situated in the state of Ohio, county of Lucas and city of Toledo, and described as follows:
>
> "All that part of the new side cut canal constructed by the city of Toledo, extending from the northeasterly line of Clayton street, extended, to the southeasterly line of St. Clair street, and the entire width thereof, including the usual width for a towing path on the southerly side of said cut-off canal being fifteen and sixty-eight hundredths feet (15.68) in width and the usual width for a berme bank embankment on the northerly side of said cut-off canal, being twelve and twelve-hundredths (12.12) feet along the entire length of said cutoff; said cutoff canal being constructed upon lands, parts of which were comprised in the former cut-off canal constructed by the state of Ohio, parts of lots number 112, 113, 114, 115, 116 and 117, Oliver's division to the city of Toledo, Lucas county, Ohio, and the triangular piece of land lying between the southerly line of the ten (10) acre tract in the northeast corner of River Tract No. three (3) of the United States Reserve, the dock line of Swan Creek and the side cut of the Miami and Erie Canal * * *."

I have carefully examined said abstract of title, and from such examination I am of the opinion that on October 2, 1915, the date of said abstract, the city of Toledo, Ohio, was seized of an estate in fee simple in said premises, and from the abstract of proceedings contained in said abstract I am of the opinion that on the 3rd day of November, 1915, Carl H. Keller, mayor, and Albert Neukom were fully authorized to execute and deliver on behalf of said city of Toledo a deed of said premises conveying the same to the state of Ohio in fee simple.

I have also carefully examined the deed above referred to, which was executed on November 3, 1915, for the city of Toledo by Carl H. Keller as mayor, and Albert Neukom as director of public service. I find that said deed is regular in form and conveys to the state of Ohio an estate in fee simple to the premises described therein, which premises are the same as those described in said abstract.

Said deed contains all the conditions and covenants provided for by the act of the general assembly passed May 27, 1915, and filed in the office of the secretary of state on June 4, 1915, which is found in 105-106 O. L., at page 499.

Said abstract and deed are herewith returned to you with my approval.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1017.

SUPERINTENDENT OF PUBLIC WORKS—ACT OF GENERAL ASSEMBLY FOUND IN 106 O. L., 498, INVALID—SUPERINTENDENT WITHOUT AUTHORITY TO SELL LAND THEREIN DESCRIBED.

The act of the general assembly, found in 106 *O. L.,* 498, *is invalid and confers no authority on the superintendent of public works to sell the land therein described.*

COLUMBUS, OHIO, November 12, 1915.

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

DEAR SIR:—I have your communication of October 27, 1915, in which you submit certain resolutions looking to the sale of a state lot in the city of Cleveland now held under a lease by one C. H. Gale. You state that this lot is to be sold in accordance with the terms of the special act of the general assembly of Ohio, passed May 27th, 1915, and found in 106 O. L., 498. The following is quoted from your communication:

> "This act provides that the lot shall be sold at public sale after due advertisement. The lot must be sold subject to the existing leasehold, which expires on the 10th day of October, 1925. The appraisement I think is all that the land is worth even if it has a lease which runs for practically ten years. This lot is an isolated tract and is all that the state has left of the abandoned portion of the Ohio canal through the city of Cleveland."

The act referred to by you and found in 106 O. L., 498, reads in part as follows:

> "Section 1. The superintendent of public works, subject to the approval of the governor and attorney general, is hereby authorized to sell at private sale to the highest responsible bidder, after having caused notice of said sale to be given at least thirty days prior thereto in a newspaper printed and of general circulation in the city of Cleveland, Ohio, the following described real estate, situated in the city of Cleveland, Cuyahoga county, Ohio, bounded and described as follows: * * * the two tracts above described being the same property that was leased by the state of Ohio to Mary Ann Manning by lease, dated April 1, 1882, and re-leased to Daniel Connelly by the state of Ohio, by lease dated October 11, 1910.
>
> "Section 2. As a preliminary to such sale, the superintendent of public works shall appraise said land in accordance with the provisions of section 13971 of the General Code, and if such appraisement is satisfactory to the governor and attorney general, and provided said real estate is sold for not less than the appraised value thereof, the governor, upon payment of the purchase money into the state treasury, shall execute a deed therefore to the purchaser.
>
> "Section 3. Upon the consummation of the sale of said land and the execution of a deed therefor by the governor, the superintendent of public works is hereby authorized to cancel the existing lease for said land, that is now held by the said C. H. Gale."

You observe in that part of your communication quoted above that the land

in question must be sold subject to the existing leasehold which expires on the 10th day of October, 1925. This observation runs counter to the provisions of section 3 of the act authorizing the superintendent of public works to cancel the existing lease upon the consummation of the sale of the land. The observation that the land must be sold subject to the existing leasehold is also out of harmony with your statement that the appraisement made by you is all that the land is worth, in view of the information furnished me by Mr. Booton to the effect that the appraisement made by your department was intended to represent the full value of the land without any reference to the existing lease; or, in other words, that the land was not appraised subject to the lease held by Mr. Gale, who is the assignee of Daniel Connelly. I am of the opinion, however, that your observation to the effect that the land must be sold subject to the existing leasehold is correct to this extent: that if the act found in 106 O. L., 498, confers any authority whatever, to sell the land in question, then the sale is to be made subject to the leasehold estate of Mr. Gale.

This brings me to a consideration of the validity of the act in question, and to the question of whether the act can be so construed as to confer any authority whatever upon you to make a sale. The land in question is under lease, the rent being calculated at a six per cent. basis upon the valuation and therefore cannot be sold under the general provisions of section 13971 of the appendix of the General Code of Ohio, which is referred to in the act as section 13971 of the General Code. If any authority whatever to sell the land in question is lodged in you, the same must therefore be derived from the act in 106 O. L., 498. The first section of this act, while in terms authorizing a private sale of the land in question, nevertheless requires notice of the sale, and further requires that the land be sold to the highest responsible bidder. It cannot be assumed, as a matter of law, that the present lessee will be the only bidder, or that he will be the highest responsible and therefore the successful bidder. The act must be construed with reference to the contingency that the highest responsible and therefore the successful bidder may be some person other than the holder of the existing lease, Mr. Gale. It therefore becomes important to consider the effect of section 3 of the act, conferring authority upon the superintendent of public works to cancel the existing lease of Mr. Gale upon the consummation of the sale. Mr. Gale is the holder of the lease by assignment from Daniel Connelly, the original lessee, which assignment was assented to by the state of Ohio acting by and through your department. This lease was made for the statutory term of fifteen years and therefore constitutes a contract between the holder of the lease and the state of Ohio. So long as the lessee pays the rents and observes the other covenants contained in the lease, he is entitled to the peaceable possession and occupancy of the leased premises for the full statutory term of fifteen years. This contract is as sacred as though made between two private individuals, or, in other words, the fact that the state of Ohio is a party to the contract does not change the situation.

It is provided by section 10 of article 1 of the constitution of the United States that no state shall pass any law impairing the obligation of contracts, and it therefore follows that the general assembly of Ohio was without authority to pass a law providing for the cancellation, without the consent of the lessee, of a lease made to a private individual for a definite term of years. In other words, section 3 of the act under consideration, is unconstitutional and void for the reason that it is in contravention of section 10 of article I of the Federal constitution. No question of the inability of the holder of the lease to enforce his rights on account of his incapacity to bring a suit against the state either in the state or Federal courts arises, for the reason that he is in possession of the premises, and

any litigation would have to be brought by either the state or the purchaser, and in such litigation the defense of the unconstitutionality of section 3 of the act, under consideration, would be available to the holder of the lease.

It remains to consider whether sections 1 and 2 of the act can be sustained as a valid enactment in view of the manifest unconstitutionality of section 3. It is apparent from a consideration of the entire act that the legislature had in mind and intended that the premises in question should be appraised at their full value without any reference to the existing lease thereon, and that the successful purchaser—be he the present lessee or a stranger—would, upon the payment of the purchase price and the receipt of a deed, be entitled to the immediate possession of the premises. It cannot be assumed, and indeed could scarcely be true, that the same considerations which would move the legislature to authorize the sale of a parcel of canal land free of incumbrances and for full value and in a manner conveying the right of immediate possession to the purchaser, would also operate to induce the legislature to authorize a sale of such land if the land were under an existing lease and the purchaser could acquire only such title as would give him the right of possession after the expiration of ten years. In other words, while it might be highly advantageous to the state to sell an unincumbered piece of real estate, yet common business prudence would not dictate the sale of land under an existing lease where the purchaser could acquire immediate possession only by thereafter dealing with the lessee and procuring an assignment of his lease and the assent of the superintendent of public works to such assignment.

I am unable, upon a consideration of the entire act, to reach the conclusion that the legislature would have passed sections 1 and 2 of the act had it been advised of the unconstitutionality of section 3, and am therefore of the opinion that the entire act is without force and effect, and that you should not attempt to exercise the authority therein conferred.

While every presumption is in favor of the constitutionality of a law duly passed by the general assembly, and while administrative officials should ordinarily be slow to raise any question as to the constitutionality of a measure duly enacted by the legislature, yet where the defect is so patent as in the present case, it would be unsafe and unwise to make any effort to exercise the authority which it was attempted to confer in the act herein considered. Another valid reason against proceeding under the act is found in the fact that the purchaser might be led to believe he would be entitled to immediate possession, only to find after parting with his money that he could not obtain possession for some ten years. The state ought not to make a sale which might result in deceiving or defrauding the purchaser.

I am, therefore, returning without my approval the resolutions submitted by you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1018.

COUNTY COMMISSIONERS—CANNOT EMPLOY ATTORNEY TO ASSIST PROSECUTING ATTORNEY, EXCEPT UPON WRITTEN REQUEST OF LATTER—SEE SECTION 2412, G. C.—RESOLUTION OF SUCH EMPLOYMENT SHOULD BE ADOPTED AND ENTERED UPON JOURNAL AT TIME OF EMPLOYMENT, BUT COMPENSATION MAY BE FIXED AT A LATER DATE.

The written request of the prosecuting attorney specified in section 2412, G. C., is a condition precedent to the employment of legal counsel, without which the county commissioners may not employ such counsel as therein provided.

When counsel is employed to assist the prosecuting attorney as provided in said section, a resolution of such employment should be adopted by the county commissioners and entered upon their journal. It is not necessary at the time of said employment to fix the compensation of said counsel but the matter of compensation may be left to the future consideration and determination of the county commissioners. When, however, the compensation is fixed, it may also be done by resolution entered upon the journal of the county commissioners.

COLUMBUS, OHIO, November 12, 1915.

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

GENTLEMEN:—I have your letter of November 8, 1915, enclosing the following inquiries:

> "When an attorney is employed to represent a county officer, or to assist the prosecuting attorney, is it essential to the validity of his employment and payment that said employment be made upon the written request of the prosecuting attorney, and when such employment is made, is it necessary that the compensation to be paid be fixed at the time of the employment, and that said employment and compensation to be paid be entered upon their journal at the time of said employment? See section 1274, R. S., and sections 2412, 2413 and 2917, General Code."

The sections of the General Code under which your inquiries arise provide as follows:

> Section 2412. If it deems it for the best interests of the county, upon the written request of the prosecuting attorney, the board of county commissioners may employ legal counsel to assist the prosecuting attorney in the prosecution or defense of any suit or action brought by or against the county commissioners or other county officers and boards, in their official capacity.
>
> "Section 2413. The board of county commissioners shall fix the compensation of all persons appointed or employed under the provisions of the preceding sections, which, with their reasonable expenses shall be paid from the county treasury upon the allowance of the board. No provisions of law requiring a certificate that the money therefor is in the treasury shall apply to the appointment or employment of such persons."

In an opinion of this department, under section 2412 above quoted, reported at page 500 of the attorney general's report for the year 1909, it was held as follows:

"The above quoted section only authorizes the county commissioners to employ legal counsel upon the written request of the prosecuting attorney. It follows therefore that the county commissioners are without authority to employ legal counsel, as provided in said section, until a written request for such employment is first made by the prosecuting attorney."

This opinion was quoted with approval and adopted by my predecessor in an opinion under date of August 14, 1911, and reported at page 347 of the reports of this department for the years 1911-1912.

I am not in conflict with the conclusion stated in the foregoing opinion, and therefore advise you that the "written request" specified in said section 2412 is a condition precedent to said employment, without which county commissioners may not employ legal counsel to assist the prosecuting attorney.

Your second inquiry involves a consideration of the provisions of both sections. It is provided in section 2412, as above noted, that county commissioners may employ counsel to assist the prosecuting attorney and by the provisions of section 2413 they are authorized and empowered to fix his compensation. When an employment is made under the first section, a resolution to that effect must be spread upon the commissioners' journal. This is required to consummate the contract and to make the employment valid. The compensation, however, which may be fixed under the provisions of section 2413, is not required to be fixed at that time, nor be made a part of the resolution of employment. The matter of compensation may in some cases depend upon contingencies that may subsequently arise in the course of the employment, and the section does not specify the time when said compensation shall be fixed.

It is also expressly provided in the last clause of said section 2413, that employments of the kind under consideration here are excepted from the operation of the law requiring a certificate that the money is in the treasury for the payment therefor.

In view of these considerations, I am therefore of the opinion that while a resolution of employment should be adopted and entered upon the journal of the county commissioners at the time said employment is made, it is not necessary at said time to fix the compensation, but said last named matter may be left to the future consideration and determination of the board of county commissioners. When, however, the compensation is fixed, a resolution should be entered upon the journal showing that fact.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1019.

MIAMI UNIVERSITY—APPROVAL OF CONTRACT FOR CENTRAL PAVILION OF OHIO STATE NORMAL COLLEGE.

COLUMBUS, OHIO, November 12, 1915.

HON. R. M. HUGHES, *President Miami University, Oxford, Ohio.*

DEAR SIR:—The board of trustees of Miami University, through its special building committee, presented to me for approval the contract entered into between the board of trustees of Miami University and A. W. Sims and Andrew Benzing,

of Hamilton, Ohio, doing business as Sims & Benzing, for the construction and completion of the central pavilion of the Ohio State Normal College to be erected on the college campus at the Miami University, Oxford, Ohio, together with bond to cover such contract, the proofs of publication of notice to bidders, and the bids received from various contractors for such work.

An examination of the proofs of publication shows that the advertisements for bids were published weekly for four consecutive weeks in the proper newspapers. Said advertisements were published five times. I do not believe that it is necessary to publish the same five times, and that the fifth and last publication was not required. However, due notice was given of the date on which bids were to be received.

From an examination of the bids received it is clear that the firm of Sims & Benzing was the lowest bidder on the work specified in the specifications, as well as the alternates which were exercised by the board of trustees.

On examination of the specifications I note that bids were called for on alternates, which alternates were lettered and numbered as follows: B-C-D-G and G1; also Nos. 1, 2, 3, 4 and 5.

On examination of the estimates filed by the architect I do not find that any of the alternates were estimated. However, alternate "B" asks that the bidder state the additional cost, as do alternates "C" and "D." Alternates "G" and "G1" simply request a statement of the difference in cost, and do not indicate whether or not the exercising of such alternates would result in an addition to or a deduction from the original estimate. Alternates Nos. 1, 2 and 4 desire a statement as to the difference in cost; and alternates Nos. 3 and 5 call for additional plumbing fixtures.

On examination of the various bids offered I do not find that any of the bidders deducted anything from the original price for the various alternates. In all of them where the figures were placed on the proposal blank after the alternate, the figures were placed as additions.

The entire estimated cost of the building, exclusive of "420 lineal feet blackboards," which was not bid upon, the estimate of which was $335.00, was $50,522.00. The bid of Sims & Benzing, including all of the alternates exercised by the board of trustees, was $44,537.10. It can be readily seen, therefore, that the contract let, including all the alternates, does not exceed the estimate of the architect for the work.

The bond presented by the contractors is a personal bond in the sum of $22,275.00, which is more than fifty per cent. of the contract price, but not quite equal to fifty per cent. of the bid submitted when the alternates are included therein. We assume, of course, that the board has duly investigated as to the responsibility of the sureties offered on the bond.

I have carefully examined the contract as submitted, and find that the same is in all respects proper. In accordance with an opinion rendered by this department to Hon. Carl E. Steeb, secretary board of trustees Ohio State University, under date of September 8, 1915, being opinion No. 805, the $15,000 appropriated in section 2 of house bill No. 701, and the $38,500 appropriated in section 3 of said bill are both now duly appropriated for the purpose, and a contract can be entered into covering both appropriations. However, the money appropriated under section 3 of said bill, will not be available until after July 1, 1916.

I have approved the contract, in triplicate, and have filed the original, together with the bond, in the office of the auditor of state, and have delivered the balance of the papers submitted to your architect, Mr. Frank L. Packard, of Columbus, Ohio, who handed the papers to me.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1020.

FOREIGN CORPORATION—SECTION 8628, G. C., NOT APPLICABLE TO SUCH CORPORATION—SECRETARY OF STATE WITHOUT AUTHORITY TO REFUSE CERTIFICATE FOR REASON THAT CORPORATION'S NAME IS SIMILAR TO EXISTING CORPORATION.

The provisions of section 8628, *G. C., are not applicable to a foreign corporation seeking admission to do business in Ohio, and the secretary of state has no authority to refuse such corporation a certificate under the provisions of sections* 178 *and* 179 *upon the ground that its name is that of an existing corporation or so similar thereto as to be likely to mislead the public.*

COLUMBUS, OHIO, November 13, 1915.

HON. C. Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of November 8th, requesting my opinion as follows:

> "Mr. W. B. Cockrell, of Columbus, Ohio, submitted statement of a foreign corporation desiring to do business in Ohio under section 178 of the General Code, which was not filed by us for the reason that the name of the corporation conflicted with that of a domestic corporation now in existence.
>
> "He requested us to submit the question to you for an opinion as to whether the statement of a foreign corporation under section 178 of the General Code, should be filed by us although the name conflicts with that of a domestic corporation now in existence."

Sections 178 and 179 of the General Code, providing the method or proceedings by foreign corporations for profit by which they may be admitted to do business in Ohio, are as follows:

> "Sec. 178. Before a foreign corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this state, and that the business of such corporation to be transacted in this state is such as may be lawfully carried on by a corporation organized under the laws of this state for such or similar business by two or more corporations so incorporated for such kinds of business exclusively. No such foreign corporation doing business in this state without such certificates shall maintain an action in this state upon a contract made by it in this state until it has procured such certificate. This section shall not apply to foreign banking, insurance, building and loan, or bond investment corporations.
>
> "Sec. 179. Before granting such certificate, the secretary of state shall require such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal setting forth the following: The amount of capital stock of the corporation, the business in which it is engaged or in which it proposes to engage within this state: the proposed location of its principal place of business within this state; and the name of a person designated as pro-

vided by law, upon whom process against the corporation may be served within this state. The person so designated must have an office or place of business at the proposed location of the principal place of business of the corporation."

Although you do not so state in your letter, yet I infer that you refused to file the statement of the foreign corporation in question and to issue to it the certificate mentioned in section 178 under authority of the provisions of section 8628 of the General Code, which latter section is as follows:

"The secretary of state shall not file or record any articles of incorporation wherein the corporate name is likely to mislead the public as to the nature or purpose of the business its charter authorizes, nor if such name is that of an existing corporation, or so similar thereto as to be likely to mislead the public, unless the written consent of the existing corporation, signed by its president and secretary, be filed with such articles."

A careful examination of the language of this last section, together with other related sections, leads to the certain conclusion that its provisions were intended to apply only to domestic corporations. It is a part of the chapter relative to the organization and powers of domestic corporations; it deals with the filing and recording of articles of incorporation which are an essential step in the formation of a corporation, and can have no relation to the admission to do business in Ohio of a foreign corporation which has of necessity received its corporate existence and authorization from another state. The discretion conferred upon the secretary of state by the provisions of sections 8628, G. C., relative to the name which may be adopted by a corporation is to be exercised by him before the proposed corporation has acquired any legal existence or standing, and while it is yet possible to so change its proposed name so as to conform to the ruling of the secretary of state. In the admission of a foreign corporation for profit to do business in Ohio, however, no discretion is given to the secretary of state, but upon the filing of the statement provided in section 179 of the General Code, (assuming that such statement is true) it becomes the ministerial duty of the secretary of state to issue the certificate for its admission.

The language of section 8628, G. C., I think, clearly indicates this legislative intent. It provides that the secretary of state shall not file or record any articles of incorporation where the corporate name is likely to mislead the public, etc. This discretion conferred upon him relative to the name of the corporation only exists when articles of incorporation are presented to him for filing and recording. A foreign corporation for profit seeking admission does not file articles of incorporation, nor does it receive from the secretary of state a certified copy of articles of incorporation; instead, it files a sworn copy of its charter or certificate of incorporation and a statement setting forth the facts required in section 179 of the General Code, and it then receives from the secretary of state a certificate authorizing it to engage in business in Ohio.

I therefore advise you that it is your duty to file the statement of the foreign corporation referred to in your letter and issue the certificate of admission provided for in section 178 of the General Code, assuming, of course, that such statement complies with and contains the information required in section 179 of the General Code, and that the proper fee is tendered.

In giving my opinion upon the question asked, I have assumed the truth of the information furnished me by Mr. Cockrell, that the foreign corporation seeking

admission is an Alabama corporation which has been incorporated and has been doing business for a number of years, and that the similarity of its name to that of an Ohio corporation is not due to fraudulent design but is merely a coincidence.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1021.

WHERE CONTRACTOR HAS AN UNLIQUIDATED DEMAND AGAINST STATE AND ACCEPTS FINAL PAYMENT TENDERED HIM, THE TRANSACTION AMOUNTS TO AN ACCORD AND SATISFACTION—CONSTITUTIONAL INHIBITION AGAINST ALLOWING ANY EXTRA COMPENSATION TO CONTRACTOR.

Where a contractor has an unliquidated demand against the state and accepts a final payment tendered to him, the transaction amounts to an accord and satisfaction, and the general assembly is prohibited by section 29 of article II of the constitution of Ohio from thereafter allowing any extra compensation to the contractor in question.

COLUMBUS, OHIO, November 13, 1915.

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

DEAR SIR:—I have your communication of October 21, 1915, in which you call attention to an opinion of this department rendered to your predecessor in office, Hon. John I. Miller, on June 21, 1915, being opinion No. 524, in which opinion it was held that the amount still due from the state on a contract with Frank J. Davis, of Middletown, Ohio, was $1,958.78, the contract in question being one for the furnishing of material and the building of an extension dam and buttress to the Middletown dam near Middletown, Ohio. You state you have offered the contractor's assignee, as a final settlement, said sum of $1,958.78, and that the assignee is willing to accept this sum provided it can be paid to him without affecting his right to take the matter before the next legislature and ask for further relief. You further state that you are anxious to have the matter settled in some way and have agreed with the contractor's assignee to submit the proposition to this department for an opinion.

Your statement that you have offered the contractor's assignee a definite sum *as a final settlement* is highly pertinent, and this action on your part is in full accord with the law applicable to the situation. The work has been fully completed and the only payments which you have any authority to make to the contractor's assignee is a payment in full satisfaction of the claims of the contractor or his assignee. The law attaches to any payment which you may now make to the contractor's assignee the condition that it shall be in full satisfaction of the debt claimed to be due. The question therefore is as to whether the contractor's assignee can accept such a payment from you and still have a claim against the state which it would be lawful for the legislature to allow.

It becomes important in this connection to consider whether the claim which the contractor's assignee now has against the state is liquidated or unliquidated, for different rules have been applied by the courts to these two classes of claims. The payment of a sum less than the amount due upon a liquidated demand does not satisfy it even though accepted as such, because there is no consideration.

Insurance Company v. Burke, 69 O. S., 294. On the other hand, where a payment is made on an unliquidated demand, upon condition that such payment shall be in full satisfaction of the claim, and the debtor accepts such payment, the entire demand is satisfied, the transaction being regarded as an accord and satisfaction. Grain and Hay Company v. Conger, 83 O. S., 169.

> "Where the debt or demand is liquidated or certain and is due payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be no release under seal or no new consideration given." (1 Cyc., 319.)
>
> "Where a claim is unliquidated or in dispute, payment and acceptance of a less sum than claimed, in satisfaction, operates as an accord and satisfaction, as the rule that the receiving of a part of the debt due under an agreement that the same shall be in full satisfaction, is no bar to an action to recover the balance, does not apply where the plaintiff's claim is disputed or unliquidated." (1 Cyc., 329.)

The word "liquidated" is defined in 25 Cyc., 1444, as follows:

> "LIQUIDATED—adjusted, certain, settled in respect to amount, that which is made certain and manifest."

In the case now under consideration it is agreed by both parties that something is due to the contractor's assignee, but the amount due is in dispute, the state claiming that it owes one sum and the contractor's assignee claiming that the state owes another and larger sum. The rule applicable in such a situation is well stated by the court in the case of Nassoly v. Tomlinson, 148 N. Y., 326, as follows:

> "A demand is not liquidated even if it appears that something is due, unless it appears how much is due, and when it is admitted that one of two specific sums is due but there is genuine dispute as to which is the proper amount, the demand is regarded as unliquidated."

I therefore conclude that the claim of the contractor's assignee must be regarded as unliquidated, and that if the contractor's assignee receives the amount tendered to him by you, the transaction will be an accord and satisfaction, for the reason that you have no authority to make any payments to him other than a final payment, and the law therefore attaches to your tender the condition that the amount which you have offered to pay shall be in full satisfaction of the debt claimed. If, therefore, the contractor's assignee accepts the amount tendered by you to him, said payment will extinguish all obligation on the part of the state to him on account of the contract in question.

It remains to consider whether in view of the above the legislature would, after a tender of the amount in question by you and the acceptance of the same by the contractor's assignee be warranted in making a further allowance to the contractor's assignee should it determine that such action ought to be taken. I am of the opinion that this question must be answered in the negative in view of the provision of section 29 of article II of the constitution of Ohio to the effect that no extra compensation can be made to any contractor after the contract has been entered into. This provision prohibits the allowing of extra compensation to a contractor for services which, under the terms of his contract, he was required to perform for an agreed compensation, and in view of the accord and satisfaction which would result in case the contractor's assignee accepted the $1,958.78 which

you have tendered to him, any allowance thereafter made to him by the legislature would be in the nature of extra compensation, the allowance of which is prohibited by the constitutional provision referred to above.

Answering your question generally, it is my opinion that if the contractor's assignee accepts the sum which you have tendered to him, the general assembly would thereafter be prohibited from allowing him any other and further compensation.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1022.

SUPERINTENDENT OF PUBLIC WORKS—MIAMI AND ERIE CANAL—LEASE OF SURPLUS WATER IN CANAL WHICH LEASE CONTAINS NO PROVISION AS TO ITS DURATION IS ONE FROM YEAR TO YEAR—HOW TERMINATED.

Where the department of public works is authorized to lease water from the canals either in perpetuity or for a limited number of years and makes a lease containing no provision as to its duration, but providing for an annual rental, such lease is a lease from year to year and may be terminated by the superintendent of public works at the end of any year by giving notice to the lessee.

COLUMBUS, OHIO, November 13, 1915.

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

DEAR SIR:—I have your communication of October 22, 1915, which reads as follows:

> "Rasche Brothers at Cincinnati, Ohio, are using water from the Miami and Erie Canal under authority of a certain permit granted them by the board of public works, under date of August 7, 1877. The following is a copy of their permit, as taken from the minutes of this department:
>
> "'Office of the Board of Public Works.
>
> "'Columbus, Ohio, August 7, 1877.
>
> "'Ordered, That Messrs. Rasche Brothers, proprietors of the "Mohawk Tannery," in the city of Cincinnati, be, and they are hereby authorized and permitted to reopen a two-inch pipe, (which was inserted in the bank of the Miami and Erie Canal, some years ago, by former proprietors of the "Mohawk Tannery") and use the water flowing through the same at their tannery, located between Findlay and Stark streets, in said city; and, be it understood, that the said Rasche Brothers are hereby held responsible for damages to the canal, if any should occur, by reason of the re-opening of said pipe, and shall be required to immediately repair the same. For the privilege hereby granted, the said Rasche Brothers shall pay an annual rent of sixty dollars to the collector of canal tolls in Cincinnati, semi-annually, in advance. A failure to comply with foregoing conditions shall work a forfeiture of this permit.'
>
> "Since the readjustment of water rates, several demands have been made of Rasche Brothers that they enter into a lease with the department for water and pay the new rate, which for a two-inch pipe is $96.00

instead of $60.00. This they have refused to do, claiming that their right to the use of a two-inch pipe is perpetual under the old permit of August 7, 1877.

"The question I wish decided is whether or not this department can revoke the permit under which they are claiming perpetual rights."

The law of Ohio relating to the sale or lease of surplus water in the canals of the state in force at the time of the alleged lease to Rasche Brothers is found in the act passed March 28, 1840. See 38 O. L., 87; section 7775, of the Appendix to the Revised Statutes of Ohio, edition of 1880.

The pertinent section of the act in question reads as follows:

"Whenever, in the opinion of the board of public works, there shall be surplus water in either of the canals, or in the feeders, or at the dams erected for the purpose of supplying either of said canals with water, or for the purpose of improving the navigation of any river, and constructed at the expense of the state, over and above the quantity of water which may be required for the purpose of navigation, the said commissioners may order such surplus water * * * to be sold for hydraulic purposes, subject to such conditions and reservations as they may consider necessary and proper, either in perpetuity or for a limited number of years, for a certain annual rental, or otherwise, as they may deem most beneficial for the interests of the state."

While the above quoted provision refers to the sale of surplus water, yet such transaction is more properly denominated a lease and later statutes refer to the disposal of surplus water from the canals of the state as a lease. It appears that the board of public works, acting under the above quoted authorization, granted to Rasche Brothers the right to re-open a certain pipe in the bank of the Miami and Erie canal, subject to certain conditions as to the payment of an annual rental and otherwise. It does not appear that Rasche Brothers ever executed a formal written instrument, but it does appear from your communication, and from certain correspondence had with Rasche Brothers, that both the board of public works and its successor in authority, the superintendent of public works, on the one hand, and Rasche Brothers on the other hand, have regarded the action taken in 1877 as in effect a lease to the latter. The question presented may therefore be stated as follows:

Where a lease is authorized to be made either in perpetuity or for a limited number of years, and the lease contains no provision as to its duration, is it to be regarded as a lease in perpetuity or for a limited number of years, and if for a limited number of years how is its duration to be determined?

This question is answered by the general proposition of law well stated in 24 Cyc., 1028, as follows:

"A lease for no definite term with an annual rental which may be payable quarterly or monthly, is a lease from year to year. The fact that rent is payable monthly does not make it any the less a yearly holding."

The above quoted statement of the law is supported by a large number of authorities cited in the volume of Cyc. from which the same is quoted. Applying

this principle to the facts now under consideration, it follows that the lease of Rasche Brothers is a lease from year to year, not being made for any definite term and containing a stipulation for an annual rental, and this conclusion is not affected by the fact that the rent is payable semi-annually.

It is therefore within your power as superintendent of public works to terminate the lease in question at the end of any year, by giving notice to the lessees.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1023.

COLLATERAL INHERITANCE TAX—A PUBLIC INSTITUTION OF LEARNING OF ANOTHER STATE RECEIVING PROPERTY UNDER PROVISIONS OF SECTION 5331, G. C., IS REQUIRED TO PAY INHERITANCE TAX—PROSECUTING ATTORNEY CANNOT SETTLE CLAIM FOR SUCH TAXES FOR SUM LESS THAN AMOUNT TAXABLE.

In receiving property in the manner provided by section 5331, *G. C., as amended,* 103 *O. L.,* 463, *a public institution of learning, incorporated under the laws of another state, is not exempt from the collateral inheritance tax provided in said statute, following Humphrey v. State,* 70 *O. S.,* 67.

The prosecuting attorney of a county is without authority in law to settle a claim for collateral inheritance taxes for a sum less than the amount taxable.

COLUMBUS, OHIO, November 15, 1915.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I have your letter under date of November 3d, which is as follows:

> "We desire to submit for your opinion the following question arising under collateral inheritance tax law of this state:
>
> "'Is a bequest or devise under a last will and testament of a resident of Ohio, of property to a non-resident institution of learning, assuming the devisee to be an institution created and maintained by private endowments, though public in character in that the institution is open to all, taxable under the collateral inheritance tax law of this state?
>
> "'Has the prosecuting attorney the right to settle claims for collateral inheritance tax, for a sum less than the amount taxable, where there is a dispute as to the liability of the person sought to be taxed, assuming the liability of the person to be doubtful, where the meaning of the statute is doubtful or the construction thereof has not been settled?'
>
> "In connection with the above permit me to say that under the will of a person a resident of Ohio there is bequeathed and devised certain property to a college in Kentucky. Counsel for the devisee is claiming that the exemption from the tax provided for in the statute 'or public institutions of learning' is not limited to public institutions of learning in this state but applies to all public institutions of learning within or without the state of Ohio.
>
> .... "The estate is an old one, the decedent dying before the passage of the late amendment to the collateral inheritance tax law and counsel in

view of the unsettled construction of the statute offered to settle and requests that we write you for an opinion as to our authority in the premises."

In your letter of November 9th you state that the college, above referred to, is an incorporated institution under the laws of the state of Kentucky.

Your first question calls for a proper construction of the first part of section 5332, G. C., taken in connection with the provisions of section 5331, G. C., as amended in 103 O. L., 463.

Section 5331, G. C., as amended, provides:

"All property within the jurisdiction of this state, and any interests therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which pass by will or by the intestate laws of this state, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to a person in trust, or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant or adopted child, shall be liable to a tax of five per cent. of its value above the sum of five hundred dollars. Fifty per cent. of such tax shall be for the use of the state; and fifty per cent. of such tax shall go to the city, village or township in which said tax originates. All administrators, executors and trustees, and any such grantee under a conveyance made during the grantor's life, shall be liable for all such taxes, with lawful interest as hereinafter provided, until they have been paid, as hereinafter directed. Such taxes shall become due and payable immediately upon the death of the decedent and shall at once become a lien upon the property, and be and remain a lien until paid."

The first part of section 5332, G. C., provides as follows:

"The provisions of the next preceding section shall not apply to property, or interests in property, transmitted to the state of Ohio under the intestate laws of the state, or embraced in a bequest, devise, transfer or conveyance to, or for the use of the state of Ohio, or to or for the use of a municipal corporation or other political subdivision thereof for exclusively public purposes, or public institutions of learning, or to or for the use of an institution in this state for purpose only of public charity or other exclusively public purposes."

From your statement of facts it appears that the college in question, while created and maintained by private endowments, is public in character in that said institution is open to all on the same conditions.

Inasmuch as it does not appear that the devise, mentioned in your inquiry, is for a particular purpose other than the maintenance of said college, I think the same may be regarded as one to or for the use of a public institution of learning; the word "public" as used in this connection being merely descriptive of the use to which the property of said college is applied and not to the ownership of said property. (See second branch of syllabus in case of Gerke v. Purcell, 25 O. S., 229.)

It remains to be determined whether the devise in question, being one to or for the use of a public institution of learning incorporated under the laws of the state of Kentucky, is subject to the provisions of section 5331, G. C., as above quoted. In other words does the provision of section 5332, G. C., that "the provisions of the next preceding section (5331, G. C.) shall not apply to property

* * * embraced in a bequest, devise, transfer or conveyance to or for the use of * * * public institutions of learning," limit the right of a public institution of learning to receive property in the manner set forth in said statute and exempt from the provisions of said section 5331, G. C., all public institutions of learning within the state of Ohio, or does said exemption apply to property so received by a public institution of learning regardless of whether the same is within or without the state?

In view of the repeated use of the words "to or for the use of" as they appear in said section 5332, G. C., it seems clear that the phrase "in this state" modifies the word "institution" as found next preceding said phrase, and that said phrase has no relation to, and in no way modifies the word "institutions" as the same appears in the phrase "to or for the use of * * * public institutions of learning". In other words the aforesaid exemption would seem to apply, in so far as the plain reading of the statute is concerned, to devises made to or for the use of public institutions of learning without the state as well as to such institutions within the state.

However, I call your attention to the holding of the supreme court in the case of Humphrey, executor et al. v. The State of Ohio, et al., 70 O. S. 67, which I think determines the answer to the question.

Upon a careful consideration of the facts appearing in the record of that case the court found that by the last will and testament of a person residing in this state bequests were made to certain institutions incorporated under the laws of other states and organized for the purposes of purely public charity or other exclusively public purposes, and that said institutions were not "institutions within this state" within the meaning of the latter part of section 2731-1, of the Revised Statutes (now section 5332 of the General Code). Two questions were passed upon by the court, one of these being "whether the legacies are taxable." As stated by the court at page 75:

> "The words in the exemption clause, 'to or for the use of any institution in this state for purposes of purely public charity or other exclusively public purposes,' are the subject of the present controversy."

Numerous authorities are cited by the court in support of its conclusion that:

> "The exemptions of charitable institutions, would relate only to domestic institutions of that class, even if the words 'in this state' had been omitted from the statute. It is not a tax upon property, but upon the right to receive property and have it transferred. Our statute does not impose the tax upon the property directly, because it provides that 'all administrators, executors and trustees * * * shall be liable for all such taxes, with lawful interest, as hereinafter provided.'"

One of the authorities cited by the court was the case of Matter of Estate of Prime, deceased, 136 N. Y., 347. From the statements of fact in that case it appeared that Prime, a resident of the state of New York, died in the state of New York on April 7, 1891, leaving a will disposing of real and personal property. By the terms of said will certain legacies were left to The American Board of Commissioners for Foreign Missions and the Presbyterian Board of Relief for Disabled Ministers. A collateral inheritance tax was levied against said legacies by the taxing authorities, which tax the legatees refused to pay and the controversy finally reached the court of appeals.

The court quoted from the opinion of Andrews, C. J.:

> "The claim that the test of liability of foreign corporations to a legacy tax is the liability of a domestic corporation of the same character to the payment of such tax, and that if one is exempt, the other is exempt also, has, we think, no foundation. In both cases, the question is the same; has the statute made the legacy taxable? * * * The argument that gifts for the promotion of charity, education and religion should be encouraged and should not be diminished by exactions of the state, presents a moral and political rather than a judicial question. It is the duty of courts in the interpretation of statutes, to declare the law as it is, and the interests of society are best subserved by a close adherence by courts to what they find to be their plain meaning, neither narrowing the application on one hand, nor extending the meaning on the other, to meet a case not specified, which may be within the reason of the law. * * * It is the policy of society to encourage benevolence and charity. But it is not the proper function of a state to go outside its own limits and devote its resources to support the cause of religion, education or missions for the benefit of mankind at large."

The court also quoted from the opinion of the same court of appeals in the case of Matter of Balleis, 144 N. Y., 132, where the Prime case was considered and its principles unanimously approved, as follows:

> "A statute of a state granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to corporations created by the state and over which it has the power of visitation and control. The legislature in such cases is dealing with its own creations, whose rights and obligations it may limit, define and control."

In answer to the argument that the conclusion, above expressed, is in conflict with that part of section 2 of the bill of rights, which provides:

> "* * * and no special privileges, or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly."

and that portion of the fourteenth amendment to the constitution of the United States which provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * * nor deny to any person the equal protection of the laws",

the court said:

> "Very much that we have already said and quoted, bears upon the interposition of these provisions, and we still fail to see how the statute under consideration discriminates against the institutions complaining here.
>
> "Section 2 of the bill of rights interdicts the conferring special privileges and immunities beyond the power of the general assembly to alter, revoke, or repeal. There is nothing occult or mysterious about this language in our declaration of fundamental principles.

"Our constitution was adopted by the people of Ohio as their charter of rights and restraints, and it is not charged with the care of non-resident persons or corporations; and the statute in question creates no privileges or immunities in favor of charitable institutions within the state, which the general assembly may not alter, revoke, or repeal; and surely it is competent for it to exempt the property of institutions, corporations, which it has created, which property is devoted to purely religious or charitable purposes. There are no Ohio institutions here complaining of any discrimination against them.

"Nor do we see any help for plaintiff in error, in the fourteenth amendment to our federal constitution. The statute we are considering, does not abridge the privileges or immunities of *citizens* of other states, nor does it deny to any person the equal protection of the laws.

"Within the meaning of this clause a foreign corporation is not a *citizen,* and cannot invoke its protection. By judicial construction of the constitution of the United States and the federal judiciary act, a corporation is a citizen for the purposes of federal jurisdiction, of the state by which its charter has been granted, and this without reference to the residence of the members or shareholders who compose the corporation. When a corporation chartered by or created under the laws of a foreign state is sued in a state court, it may remove the cause to the circuit court of the United States in like manner as a non-resident citizen may, without regard to residence of its members or shareholders. But it is a settled principle of constitutional law that a corporation is not a *citizen* within the meaning of that clause of the constitution of the United States which declares that 'the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.' 10 Cyc., 150; Ducat v. Chicago, 48 Ill., 172; Tatem v. Wright, 23 N. J. Law, 429; Ducat v. Chicago, 10 Wall., 410."

It will be observed that the court held that:

"The exemptions of charitable institutions would relate only to domestic institutions of that class, even if the words 'in this state' had been omitted from the statute."

While the phrase "to or for the use of * * * public institutions of learning," as found in section 5332, G. C., was not before the court for interpretation in the case of Humphrey v. State, supra, it is clear that the reasoning and conclusions of the court apply with equal force to said phrase.

Therefore, under the reasoning of the supreme court in the Humphrey case above referred to, I am compelled to advise you that the devise in question is taxable under the provisions of section 5331, G. C.

I do not deem necessary, in answering your second question, to quote the various provisions of the statutes governing the collection of collateral inheritance taxes, as found in sections 5335 to 5348, both inclusive, of the General Code. Section 5335, G. C., provides that if such taxes are not paid within one year after the death of the decedent interest at the rate of eight per cent. shall thereafter be charged and collected thereon, and if not paid at the expiration of eighteen months after such death, the prosecuting attorney of the county wherein said taxes remain unpaid shall institute the necessary proceedings to collect the taxes in the court of common pleas of the county, after first being notified in writing by the probate judge of the county, of the non-payment thereof.

Under provision of section 5344, G. C., the probate court, having either

principal or auxiliary jurisdiction of the settlement of the estate of the decedent, is given jurisdiction to hear and determine all questions in relation to such tax that arise, affecting any devise, legacy or inheritance under the subdivision of the chapter relating to collateral inheritance taxes, subject to appeal as in other cases, and said statute makes it the duty of the prosecuting attorney to represent the interests of the state in such proceedings.

In view of the provisions of the statutes, above referred to, taken in connection with the provision of the latter part of section 5331, G. C., as above quoted, it seems clear to my mind that the prosecuting attorney is without authority in law to settle claims for collateral inheritance taxes for a sum less than the amount taxable under the circumstances mentioned in your inquiry.

As has been already noted, section 5344, G. C., makes it the duty of the probate court to determine in the first instance all questions that arise in relation to said taxes, subject to appeal as in other cases.

I am of the opinion, therefore, that your second question must be answered in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1024.

CIVIL SERVICE—LABORERS EMPLOYED BY COUNTY COMMISSIONERS UPON HIGHWAYS ARE WITHIN UNSKILLED LABOR CLASS OF CIVIL SERVICE—ROADS AND HIGHWAYS.

Laborers employed by county commissioners upon public highways are within the unskilled labor class as defined in paragraph 2 of subdivision (b) of section 486-8, *G. C., of the civil service law,* 106 *O. L.,* 400.

COLUMBUS, OHIO, November 16, 1915.

HON. EARL K. SOLETHER, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—I have your letter of November 13, 1915, as follows:

> "I desire your opinion as to the construction of certain sections of the civil service statutes recently enacted by our legislature, and in particular, section 486-8, G. C. (b), paragraph 2.
>
> "We have in this county extensive stone road repairing and at the present time the commissioners are employing about one hundred men, consisting of teamsters, laborers and superintendents, who are engaged in the improvement of our stone roads.
>
> "Our auditor has asked me as to whether the civil service act, especially the paragraph above mentioned, will apply to the laborers above mentioned."

While you do not make the direct inquiry yourself, it appears from your letter that the question under consideration by you applies to the employment of certain laborers upon the public highways of your county, said employment being made by the county commissioners. It further appears from your letter that the county auditor has asked you whether the civil service law of the state applies to the employment of said laborers.

Taking this inquiry as your question in this matter, we must observe in the first place that under the provisions of paragraph 1 of section 486-1, G. C., as amended 106 O. L., 400, the term "civil service" includes all offices and positions of trust or *employment* in the service of the state and the counties, cities and city school districts thereof. It may be said, therefore, as a general proposition that all employments by the state or county authorities are covered by and included within the scope of the foregoing provisions.

It is further provided in paragraph 8 of said section that the term "employe" signifies any person holding a position subject to appointment, removal, promotion or reduction by an appointing officer.

It is manifest then as a basic proposition that the laborers in question are within some class of the civil service of the state, which class, I think, is defined in paragraph 2 of subdivision (b) of section 486-8 as amended in 106 O. L., 406, being the same section referred to in your letter. Without quoting this last named paragraph in full, it provides a method of administering civil service in the employment of the unskilled labor class, which it expressly provides shall include unskilled laborers. This class, while in the classified service, is not designated as a competitive class under the classification made in subdivision (b) of said section 486-8 aforesaid. This subdivision provides that the classified service shall be designated as the competitive, and the unskilled labor class thereby dividing the classified service into two classes. It is, however, provided in paragraph 12 of subdivision (a) of said section that such unskilled labor positions as the state or any municipal commission may find it impracticable to include in the competitive classified service, may be included in the unclassified service. It would seem from this provision of the civil service law that the legislature contemplated that some of the unskilled labor class was included within the competitive classified service, while under the provisions of subdivision (b), just quoted, it is clear that the unskilled labor class is excluded from the competitive class.

The result of these apparently inconsistent and conflicting provisions is to render the provisions of paragraph 12 aforesaid, wholly ineffective and inoperative if interpreted literally. This, however, should not be permitted if under any possible construction it can be given operative force and effect, and for this reason I conclude that the term *"competitive* classified service," as used in said paragraph 12 aforesaid, was intended to and does mean simply the *"classified* service."

It follows, therefore, that applying all the provisions of the law under this interpretation to the case presented the laborers in question are within the unskilled labor class as defined by paragraph 2 of subdivision (b) and subject to the provisions of said paragraph, unless they have been included in the unclassified service by order of the state commission. In other words, the laborers named by you in your letter are included in the unskilled labor class, as provided in paragraph 2 of subdivision (b) of section 486-8 aforesaid, and must remain there unless upon application to the state civil service commission they are ordered to be included in the unclassified service.

If, therefore, it should be deemed impracticable to apply the civil service provisions aforesaid to the employment of the laborers aforesaid, application should be made to the state civil service commission for an order exempting said laborers from said provisions, and including them in the unclassified service.

I conclude, therefore, in answer to the inquiry specified in your letter, that the laborers named and described therein are within the unskilled labor class as defined in paragraph 2 of subdivision (b) of section 486-8 aforesaid.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1025.

OFFICES INCOMPATIBLE—A TEACHER WHILE EMPLOYED BY BOARD OF EDUCATION MAY NOT BE ELECTED AS CLERK OF SUCH BOARD.

A teacher may not, while employed by the board of education of a school district, as a teacher in the schools of said district, be elected to the position of clerk of said board.

COLUMBUS, OHIO, November 16, 1915.

HON. GEORGE THORNBURG, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—In your letter under date of November 9th you request my opinion as follows:

> "On November 3rd E. E. Jackson was elected clerk of Smith township, Belmont county, Ohio, and on the same day was appointed clerk to fill the unexpired term of Oscar W. Gladden, who that day resigned.
>
> "Section 4747, G. C., provides that the clerk of the township shall be clerk of the board of education. E. E. Jackson is a teacher in the Smith township public schools. The board of education of Smith township refuses to permit Mr. Jackson to serve as clerk of the board of education, and base their decision upon an opinion of Attorney General Hogan, rendered in 1913, at page 1097.
>
> "Since that time a new school code has been enacted, and the clerk has nothing whatever to do with approving reports of teachers, that work all being done by the district superintendent of schools. Since this change in the law we see no reason why the clerk of the board of education may not be a teacher of the public schools of that township.
>
> "I would like to have your opinion upon the above matter answering the question, 'Can a teacher in the schools of a school district be the clerk of the board of education of the district in which he teaches?'"

Section 4747, G. C., as amended in 104, O. L., 139, provides:

> "The board of education of each city, village and rural school district shall organize on the first Monday of January after the election of members of such board. One member of the board shall be elected president, one as vice-president, and a person who may or may not be a member of the board shall be elected clerk. The president and vice-president shall serve for a term of one year, and the clerk for a term not to exceed two years. The board shall fix the time of holding its regular meeting."

You will observe that under the above provision of the statute as amended the township clerk is no longer ex-officio clerk of the board of education of the township rural school district. It follows therefore that the teacher, referred to in your inquiry, having been appointed to fill a vacancy in the office of township clerk of Smith township in Belmont county, is not on this account entitled to serve as clerk of the board of education of Smith township rural school district.

Under the above provision of section 4747, G. C., as amended said board of education had authority to organize on the first Monday of January, 1914, by electing one of its members as president, one as vice-president and a member or other person as clerk.

From your statement of facts it appears that said board of education failed to exercise its authority to elect a clerk and that there is now a vacancy in said position. You inquire whether a teacher in the schools of said school district may hold the position of clerk of said board of education.

Under provision of section 4747, G. C., as in force at the time the opinion of my predecessor, Hon. Timothy S. Hogan, referred to in your inquiry, was rendered, i. e., on January 30, 1913, the clerk of the township was ex-officio clerk of the board of education of the township rural school district, and one of the questions, in answer to which said opinion was rendered, was whether the township clerk, who has qualified both as township clerk and as clerk of the township school district might be employed as a sub-district teacher in said township school district by the board of education thereof.

Attention was called to that part of section 4757, G. C., which provides that:

> "No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board, or be employed in any manner for compensation by the board of which he is a member, except as clerk or treasurer."

It was assumed however, in answering the question above stated, that the clerk referred to in said inquiry was not a member of the board of education, but that he was clerk of said board by virtue of his qualification as township clerk under provision of section 4747, G. C., as then in force.

It was therefore held that said clerk did not come within the purview of said section 4757, G. C.

It was further observed that, inasmuch as there was no statute which expressly prohibited a clerk of the board of education, as such, from being employed as a teacher by said board, unless there was a conflict between the duties of the two positions, they could not be considered inconsistent.

Reference was made, however, to that part of section 7786, G. C., as then in force, which provided as follows:

> "No clerk of a board shall draw an order on the treasurer for the payment of a teacher for services until the teacher files with him such reports as are required by the state commissioner of common schools and the board of education, a legal certificate of qualification, or a true copy thereof, covering the entire time of the service, and a statement of the branches taught."

It was observed that the above provisions of section 7786, G. C., made it the duty of the clerk of the board of education to require teachers employed by the board to make the reports therein enumerated before an order might be drawn by the clerk for the payment of their salaries; that the clerk was the sole judge of the performance of said duties and that it would be within his power to draw an order for his own salary without having made such report and thereby violate the plain provisions of said statute. In conclusion the opinion held that one person may not be the clerk of the board of education of a school district and at the same time a teacher in the schools of said district.

You will observe that the above provision of section 4757, G. C., is still in force and, by its terms, prohibits a member of the board of education of a school district from serving as a teacher of said district. It still remains to be deter-

mined, however, whether a person other than a member of the board of education of a school district may, while teaching in the schools of said district, be elected to the position of clerk of said board of education.

While it is true that since the time said opinion was rendered the new school code has been enacted and that some of the duties formerly performed by the board of education are now performed by the district superintendent, I call your attention to section 7786, G. C., as amended in 104 O. L., 225, and as now in force, which provides in part as follows:

> "No clerk of a board shall draw an order on the treasurer for the payment of a teacher for services until the teacher files with him such reports as are required by the superintendent of pubic instruction, and the board of education, a legal certificate of qualification, or a true copy thereof, covering the entire time of the service, and a statement of the branches taught."

In an opinion rendered by Mr. Hogan to Hon. G. A. Starn, prosecuting attorney of Wayne county, under date of November 27, 1914, the question asked by Mr. Starn, and in answer to which said opinion was rendered, was as follows:

> "Can a teacher or principal of a high school as designated in section 7705, of the General Code, as amended Vol. 104 O. L., at page 144 thereof, be elected and act as clerk of the board of education as provided in section 4747 of the General Code, as amended in 104 O. L., at page 139?"

Reference was made to the provisions of said section 4747, G. C., as hereinbefore quoted and as now in force, as well as to section 7705, G. C., as amended and as now in force, which provides:

> "The board of education of each village, and rural school district shall employ the teachers of the public schools of the district, for a term not longer than three school years, to begin within four months of the date of appointment. The local board shall employ no teacher for any school unless such teacher is nominated therefor by the district superintendent of the supervision district in which such school is located except by a majority vote. In all high schools and consolidated schools one of the teachers shall be designated by the board as principal, and shall be the administrative head of such school."

It was observed that the foregoing provisions of the statutes do not, by their terms, prohibit a person while teaching in a school district, from serving as clerk of the board of education of such district; that the provisions of no other statute express such a prohibition, and that unless there is a conflict between the duties of the two positions, the same are not incompatible. Attention was called, however, to the provisions of section 7786, G. C., as above quoted, and it was observed that the provisions of said section make it the duty of the clerk of the board of education to require teachers employed by the board to make the reports therein enumerated, and to file the same with him before an order may be drawn by such clerk for the payment of the salaries of such teachers; that the clerk is the sole judge of the performance of his duty and that, if he were employed as a teacher in the schools of the district, it would be within his power to draw an order for the payment of his own salary without having made such report, and thereby violate the plain provisions of said section 7786, supra.

In conclusion the opinion held that one person may not be clerk of the board and teacher at the same time.

I concur in this opinion, and therefore hold that the teacher, referred to in your inquiry, may not, while employed by the board of education of Smith township rural school district, as a teacher in the schools of said district, be elected to the position of clerk of said board.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1026.

APPROVAL OF BONDS OF CHIEF CLERK AND A DIVISION ENGINEER IN HIGHWAY DEPARTMENT.

COLUMBUS, OHIO, November 16, 1915.

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

DEAR SIR:—I have your communication of November 12, 1915, transmitting to me for examination the bonds of Homer L. Hastings, chief clerk, and E. C. Blosser, division engineer, in your department.

I find these bonds to be properly drawn, and am therefore returning the same with my approval as to form endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1027.

SECTIONS 2609 AND 2441, G. C., NOT IN CONFLICT—COUNTY TREASURER MAY NOT WITHDRAW UPON WARRANT OF COUNTY AUDITOR ANY MONEY IN COUNTY TREASURY EXCEPT FOR PAYMENT OF CLAIMS COVERED BY SAID WARRANT AND NOT THEN UNTIL CLAIMS ARE DUE AND PAYABLE—WHEN TREASURER IS LIABLE UPON HIS BOND FOR FUNDS OF COUNTY PLACED IN BANK OF HIS OWN CHOOSING TO REDEEM BONDS AND INTEREST COUPONS COMING DUE—SEE OPINION NO. 1086, DECEMBER 9, 1915.

1. *There is no conflict between the provisions of sections* 2609, *et seq., and section* 2441, *G. C.*

2. *A county treasurer may not withdraw upon the warrant of the county auditor any money from the county debt fund in the county treasury or its depositary except for the payment of claims covered by said warrant, and not then until said claims are due and payable.*

3. *When a county treasurer, upon the warrant of the county auditor drawn upon the county debt fund of the county in anticipation of the maturity of a funded debt or interest thereon, withdraws the amount covered by said warrant from the treasury or its depositary, and thereafter deposits the same in a bank of his own choosing to his individual credit, said funds are not then trust funds within the provisions of section* 12875, *as amended* 106 *O. L.*, 556, *but are and continue to remain a part of the county debt fund of the county for which the treasurer is liable upon his bond.*

COLUMBUS, OHIO, November 16, 1915.

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

GENTLEMEN:—I have your letter of November 8, 1915, containing the following inquiries:

> "Is there any conflict between sections 2609, General Code, et seq., and section 2441, General Code?
>
> "In a certain large county of this state, the county treasurer is allowed, e. g., $800,000.00, at each semi-annual bond and interest period to redeem bonds and interest coupons maturing upon their dates of maturity. The county treasurer, allowed this sum upon the auditor's warrant, withdraws the money from the depositary and places it in a separate bank of his own choosing, and as the bonds and interest coupons are presented he issues his check against the fund as deposited by him. He requires the particular bank in which he makes this deposit to give security to him as county treasurer.
>
> "The question is, when he draws these funds and handles them in this manner, do they not become trust funds in his hands that he may deposit under the amendment of section 12875, General Code, as amended 106 O. L., 556? Should the bank, with which such deposit is made, default, would not the treasurer and his bondsmen be liable?
>
> "Should the county commissioners require the county treasurer to give additional bond sufficiently large to cover this kind of a fund, over and above his regular bond as county treasurer?"

Section 2609, G. C., to which you refer, provides as follows:

"The auditor of a county owing a funded debt, bearing interest payable at stated periods, shall draw at the proper times, his warrants upon the treasurer of the county for the payment of the gross sum of such installments of interest as may be then due, or for such sum of money in the treasury as may be applicable to that purpose, and deliver them to the treasurer of the county. Upon receipt of any such warrant, the treasurer shall pay the installment of interest of such debt, at the times and places of payment specified in the security therefor, from any money in his hands applicable to that use. Upon payment of the installment of interest, the treasurer shall take up and hold the interest warrant so paid until it is cancelled, as herein provided. If the interest is provided for in the obligation, and not by separate warrants, he shall indorse the payment thereof on the obligation and take from the holder a separate receipt, specifying the date, amount, number and time of maturity of the obligation, the date of the maturity of the installment so paid, and amount and date of the payment."

The succeeding section 2610, G. C., provides as follows:

"If such installment of interest is not paid at the time and place of maturity, the county treasurer, at any time afterward, shall pay it, as funds in his hands applicable to that purpose admit. If the treasurer was ready with funds, at the time and place of maturity thereof, to make payment of any installment of interest thereon, and the holder of the evidence thereof did not have it then and there present and in readiness to be surrendered, or to have the payment indorsed thereon, the county shall not thereafter be bound to pay interest thereon until payment is afterward demanded at the office of the county treasurer, and refused."

It is provided further in section 2614, G. C., as follows:

"If the principal of any of the obligations of the county is, by its terms, payable elsewhere than at the county treasury, payment thereof may be provided for and made by the means and in the manner prescribed for the payment of interest, and preparation shall be made by the treasurer for the payment at such place. Money provided or deposited at such place for that purpose, shall not be left there more than ten days after the maturity of such principal, but shall be replaced in the treasury, and thereafter such obligations shall be payable at the county treasury, and no interest shall be paid after maturity."

Section 2441, G. C., provides:

"All bonds issued shall be correctly numbered in the order in which issued, and registered by the county auditor in a book by him to be provided and kept in his office. All warrants drawn upon the treasurer for the payment of the principal and interest on such bonds shall specify the fund on which they are drawn. Upon delivering to the holder of any such bond a warrant upon the treasurer for its redemption, the auditor shall receive the bond and forthwith write across the face of it, in red ink, the word 'Redeemed,' with the proper date, and sign his name thereto.

> Upon receiving the warrant which contains the number of the bond for the redemption of which it is drawn, the treasurer shall proceed forthwith to the office of the auditor, and there, in the presence of the auditor, write in red ink across the registry of the bond the word 'Redeemed,' with the proper date, and sign his name thereto. Thereupon the auditor shall deliver to the treasurer the original bond, for which he shall be credited in his semi-annual settlements with the auditor and commissioners."

It must be observed that sections 2609 and 2610, G. C., aforesaid, relate only to the payment of interest on a funded debt, which interest may or may not be payable at the county treasury. Ample provision is made in said sections for the payment of interest made payable at places other than the county treasury. Section 2614, aforesaid, expressly provides for the payment only of principal sums made payable elsewhere than at the county treasury. Section 2441, G. C., makes special provision for the payment of bonds at the county treasury.

Keeping this distinction in mind a careful consideration of all the provisions of the section aforesaid and those of related sections impels me to conclude that there is no conflict between section 2609, et seq., and section 2441.

You further state in your letter that in a certain county of this state the county auditor at each semi-annual bond and interest period issues his warrant to the county treasurer for $800,000.00, which sum is thereupon withdrawn by the county treasurer from the depositary and placed in a bank of his own choosing, and as the bonds and interest coupons are presented to him thereafter he issues his personal check against the fund as deposited by him. You then inquire whether this money when so appropriated by him becomes a trust fund within the provisions of section 12875, G. C., as amended in 106 O. L., 556.

I must advise in the first place that the issuing of the auditor's warrant before maturity of any bond or interest thereon, for the payment of such bond or interest, is, to say the least, irregular. None of the provisions of the sections hereinbefore quoted contemplate the issuing of a warrant for the redemption of a funded debt, or the interest thereon, until said debt or interest is due. The fact that the auditor in question issues one warrant for the gross amount due and to become due within a certain succeeding period does not in the least change the character of the fund in the treasurer's hands upon which such warrant is issued. It yet remains a county fund and will continue so to remain until paid to the county's creditors entitled to receive it. It does not and cannot become a trust fund within the provisions of section 12875, G. C., to which you refer.

It is expressly provided in section 2614, G. C., that money withdrawn from the county treasury by the treasurer for the payment of a funded debt, made payable elsewhere than at the county treasury and deposited at such place by the county treasurer, *shall not remain there more than ten days after maturity of said debt, but shall be replaced in the treasury.* This provision evidences the purpose of the law to require the county debt fund to remain in the county treasury, or its depositary, until needed for the payment of claims against it. In the event said claims are not presented at the place of payment the money must be returned to the treasury or its depositary and cannot be returned to the private account of the treasurer, as appears to be the practice under the facts stated by you in this case.

It follows, therefore, that when the county treasurer in question, upon the warrant issued by the county auditor, withdraws from the county depositary or depositaries the amount covered by the warrant, for any purpose other than to pay the debt for which it is intended, he does so illegally. When he thereafter deposits it to his individual credit in a separate bank of his own choosing he

becomes criminally liable therefor under the provisions of section 12873, G. C. If thereafter the bank so selected by him should default he would be civilly liable for the amount so withdrawn from the treasury or depositary less any amount he may have paid therefrom on maturing bonds and interest claims.

You further inquire whether the county commissioners, under the facts stated in your letter, should require an additional bond from the treasurer sufficiently large to cover the amount of money so withdrawn. To this inquiry I must reply that the transaction being unlawful, it is the duty of the county commissioners to have such fund promptly returned to the county treasury, or its depositary or depositaries, and thereafter kept there.

I conclude, therefore, in answer to your several inquiries:

(1) There is no conflict between the provisions of sections 2609 et seq., and section 2441, G. C.

(2) A county treasurer may not withdraw upon the warrant of the county auditor any money from the county debt fund in the county treasury or its depositary except for the payment of claims covered by said warrant, and not then until said claims are due and payable.

(3) When a county treasurer, upon the warrant of the county auditor drawn upon the county debt fund of the county in anticipation of the maturity of a funded debt or interest thereon, withdraws the amount covered by said warrant from the treasury or its depositary and thereafter deposits the same in a bank of his own choosing to his individual credit, said funds are not then trust funds within the provisions of section 12875, as amended 106 O. L., 556, but are and continue to remain a part of the county debt fund of the county for which the treasurer is liable upon his bond.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1028.

JUVENILE COURT—EXPENSES OF REQUISITION IN APPREHENDING A PERSON CHARGED WITH COMMISSION OF FELONY WHO PROVES TO BE A JUVENILE AND IS TRIED IN JUVENILE COURT AND SENTENCED TO OHIO STATE REFORMATORY, SUCH EXPENSES CANNOT BE PAID BY STATE, BUT ARE PAID BY COUNTY.

Expenses of requisition in juvenile court case to be paid from county treasury. Costs in a criminal case may be paid by the state only in felony cases when a conviction has been secured.

COLUMBUS, OHIO, November 17, 1915.

HON. J. H. MUSSER, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—Permit me to reply to your request for an opinion which is as follows:

> "Some time ago an affidavit was filed before a justice of the peace, and a warrant issued, charging a person with felony. The defendant absconded, and requisition papers were secured from the governor of the

state, and defendant was extradicted from Kansas. Upon investigation it was found that the defendant was under the age of eighteen years, and the case was transferred to the juvenile court, under the law.

"Thereupon the defendant entered a plea of guilty, in the juvenile court, and was sent to the Ohio State Reformatory, at Mansfield.

"The county commissioners of our county allowed the expense bill of the agent, who went after the defendant and returned him to the state, and when the defendant was conveyed to the reformatory by our sheriff, the sheriff was informed by the officials that the expense of the agent in securing the prisoner's return to Ohio could not be paid by the state.

"In such a case if execution is issued and returned unsatisfied, are the expenses of the agent a part of the costs which should be re-paid by the state of Ohio?"

In a subsequent letter you advised that the action of the Ohio State Reformatory officials was taken for the reason that the defendant was committed by a juvenile court. The status of the prisoner in this case is that of a delinquent, it being provided in section 1652 of the General Code (103 O. L., 872):

"Where it appears at the hearing of a male delinquent child that he is sixteen years of age or over, and has committed a felony, the juvenile court may commit such child to the Ohio State Reformatory."

It is well understood that when a boy, under the provisions of section 1652 of the General Code, referred to above, is committed to the Ohio State Reformatory by the juvenile court judge he is committed as a delinquent, such commitment of course being based upon the fact that he has committed a felony; and it is only under the theory that he is in the juvenile court under a charge of delinquency that the juvenile court has jurisdiction to hear and determine the cause.

Sections 3016 and 3017, of the General Code, are as follows:

"Sec. 3016. In felonies, when the defendant is convicted, the costs of the justice of the peace, police judge, or justice, mayor, marshal, chief of police, constable and witnesses, shall be paid from the county treasury and inserted in the judgment of conviction, so that such costs may be paid to the county from the state treasury. In all cases, when recognizances are taken, forfeited and collected, and no conviction is had, such costs shall be paid from the county treasury.

"Sec. 3017. In no other case whatever shall any cost be paid from the state or county treasury to a justice of the peace, police judge or justice, mayor, marshal, chief of police, or constable."

It will be noted from a reading of the sections above quoted that the authority for the payment of the costs by the state in this connection is limited to *felony cases* only when the defendant is convicted. The law relative to the payment by the state of costs in criminal cases has not been changed materially since 1871, and based upon the law at that time Hon. John Little, attorney general, under date of February 21, 1874, rendered an opinion to Hon. S. B. Robinson, prosecuting attorney of Washington county, Marietta, Ohio, in which he held as follows:

"The state pays the costs and expenses incurred in apprehending fugi-

tives from justice on requisitions of the governor only in cases of felony, and then only after conviction and sentence to the penitentiary—the same to be taxed and paid as other costs."

The payment of fees and costs in juvenile court cases is provided for in section 1682 of the General Code, which is as follows:

"Fees and costs in all such cases with such sums as are necessary for the incidental expenses of the court and its officers, and the costs of transportation of children to places to which they have been committed, shall be paid from the county treasury upon itemized vouchers, certified to by the judge of the court."

Sections 1682 and 1683 of the General Code, have been made up from section 40, of an act approved April 24, 1908, to be found on page 202, Vol. 99, of the Ohio Laws. In its codified form section 1682 of the General Code, supra, omits the word "all" preceding the words: "fees and costs in all such cases."

On December 14th, 1908, Hon. U. G. Denman, then attorney general, rendered an opinion to Hon. E. M. Fullington, deputy auditor of state, on a matter very similar to the case under consideration, the question arising over the payment of costs in a prosecution in juvenile court on a charge of failure to support minor children. It was held in that opinion that the costs should be paid by the county owing to the fact that the prosecution was under the juvenile court law as distinguished from the other provisions of law punishing the same crime as a felony. The opinion is to be found at page 119 of the attorney general's report for 1908.

Under the provisions of section 2491 of the General Code, the county commissioners are authorized to pay requisition expenses from the county treasury.

I am therefore of the opinion that there is no provision of law authorizing the payment by the state of the costs in the case under consideration, in view of the fact that there has been no conviction for a felony.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1029.

JURY COMMISSIONERS—APPOINTED IN MAY, 1915, UNDER SECTION 11421, G. C., 106 O. L., 106, MAY SERVE NOT TO EXCEED TWENTY DAYS IN THE OFFICIAL YEAR WITHOUT REFERENCE TO PROVISIONS OF SECTION 3007, G. C., 106 O. L., 534—IF TWENTY DAYS HAVE BEEN SERVED BEFORE AMENDMENT BECAME EFFECTIVE, TEN ADDITIONAL DAYS CANNOT BE SERVED—SEE OPINION NO. 1030, NOVEMBER 17, 1915.

In counties having but one judge of the court of common pleas, jury commissioners appointed in May, 1915, to serve for the ensuing year, may be employed not to exceed twenty days in such year and are controlled in this behalf by the law in force at the date of their appointment, being section 3007, G. C., as found in 103 O. L., 512.

COLUMBUS, OHIO, November 17, 1915.

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

GENTLEMEN:—I have your request of September 24, 1915, as follows:

"(1) In counties where only one judge of the court of common pleas holds court, may jury commissioners, appointed under section 11421, G. C., (as amended 106 O. L., 106) be employed during this official year to exceed ten days in such year in view of the provisions of section 3007, G. C., (as amended 106 O. L., 534) in the following instances:

"(a) Where they were so employed prior to the going into effect of the amendment of section 3007, foregoing mentioned?

"(b) Where they had been employed, but not in excess of ten days prior to the going into effect of section 3007?

"(2) If such jury commissioners have been employed the full twenty days prior to the going into effect of section 3007, as amended, can they still serve an additional ten days under section 3007 as amended?"

Under the facts stated in your foregoing letter the same construction must be given the sections to which you refer as was applied to section 4715, G. C., as amended 104 O. L., 135, in opinion No. 570 of this department, dated July 1, 1915, and addressed to Hon. Hugh F. Neuhart, prosecuting attorney, Caldwell, Ohio, a copy of which said opinion is hereto attached.

While the questions presented are not without difficulty, the only practical solution requires an extension of the old law, or the law in force at the time of the appointment of jury commissioners, to the end of the year or term for which they were appointed. This would give the jury commissioners appointed on or before the fourth Monday in May, 1915, under the provisions of section 11421, G. C., as amended 106 O. L., 106, the benefit of the provisions of section 3007, G. C., as then in force. These provisions allowed jury commissioners not to exceed twenty days' employment in any year, and must be held to apply without reference to the amendment of said section which became effective September 4, 1915, and which limits their employment to ten days in any one year. 106 O. L., 534.

I am of the opinion, therefore, that your first inquiry must be answered in the affirmative and your second in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1030.

JURY COMMISSIONERS APPOINTED IN MAY, 1915—ENTITLED TO COMPENSATION FOR TWENTY DAYS—SEE OPINION NO. 1029, NOVEMBER 17, 1915.

Jury commissioners appointed in May, 1915, *in counties having but one common pleas judge are compensated under the provisions of section* 3007, *G. C., as found in* 103 *O. L.,* 512, *until the expiration of their term in May,* 1916.

COLUMBUS, OHIO, November 17, 1915.

HON. CHARLES E. BALLARD, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—I have your letter of November 13, 1915, submitting the following inquiry:

"The two jury commissioners of Clark county, Ohio, began their duties

as such commissioners in May, 1915. How should said jury commissioners be paid, under the provisions of section 3007, G. C., (105-106 O. L., 534) or under the provisions of section 3007, G. C. (103 O. L., 512)?"

In answer to your foregoing inquiry I must advise that in my opinion the only practical solution of the difficulty presented by the conflicting provisions in the sections named in your letter is to hold that said jury commissioners may be paid under the provisions of the law in force at the date of their appointments, being section 3007, G. C., as found in 103 O. L., 512.

The question involved here was fully considered in opinion No. 1029 to the Bureau of Inspection and Supervision of Public Offices, a copy of which I enclose herewith.

I also desire to direct your attention in this connection to an opinion of my predecessor, Hon. T. S. Hogan, reported at page 1510 of the attorney general's report for the year 1914, in which opinion precisely the same question is considered in reference to the compensation to be paid to members of township boards of education, and the same conclusion reached as I announce in this opinion.

I therefore conclude that jury commissioners, appointed in May, 1915, may be compensated for services under the provisions of section 3007 as found in 103 O. L., 512, until the expiration of their terms in May, 1916.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1031.

BOARD OF EDUCATION—WHEN SUBSTANTIAL COMPLIANCE WITH SECTION 4740, G. C., BY VILLAGE BOARD OF EDUCATION EXEMPTS SUCH BOARD FROM PAYING A SHARE OF DISTRICT SUPERINTENDENT'S SALARY—ACTION OF COUNTY BOARD OF EDUCATION IN ATTEMPTING TO RE-DISTRICT SO AS TO INCLUDE SAID VILLAGE SCHOOL DISTRICT WITHOUT EFFECT.

Where the board of education of a village school district in July, 1915, *certified to the board of education of the county school district in which said village school district is located, that said village school district maintains a first grade high school and employs a superintendent, and made application in writing to said county board to be exempt from district supervision and to have said village school district continue as a separate district under the direct supervision of the county superintendent, such action was in substantial compliance with the requirements of section* 4740, *G. C., as amended in* 106 *O. L.,* 439, *and the county board cannot require said board of education of said village school district to pay a proportionate share of the salary of the superintendent of the supervision district which said county board attempted to establish by its action in June,* 1915, *redistricting the schools of said county school district under authority and in compliance with the requirements of section* 4738, *G. C., as amended in* 104 *O. L.,* 140, *and which was intended to include said village school district.*

COLUMBUS, OHIO, November 17, 1915.

HON. EARL K. SOLETHER, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—In your letter under date of October 21st you request my opinion as follows:

"I desire your opinion on a question arising under section 4740, G. C., as amended in 104 v. 141.

"We have in this county the Bloomdale village school district which maintains a first grade high school and employs a superintendent as required in section 4740. In July, 1915, the board of education of the Bloomdale village school district, notified the county board of education in writing that they desired to be exempt from district supervision, and wished to constitute a separate district under the district supervision of the county superintendent.

"In June, 1915, the county board of education acting under section 4738, 104 v. 140, redistricted Wood county into supervision districts, and included the Bloomdale village school district in one of these supervision districts.

"The county board of education have refused to consider the application of the Bloomdale village school district for a separate supervision district, and are insisting that this village board pay its share of the salary of the district superintendent.

"The village board of education claim that by reason of their notice to the county board that they are not liable for any part of the district superintendent's salary.

"Will you kindly give me an opinion as to the law involved in this matter?"

In your letter of November 13th you state that your county board of education acted under provision of section 4738, G. C., as amended in 104 O. L., 140, when they redistricted the county school district in June of this year. Said section as amended and as then in force provided:

"The county board of education shall within thirty days after organizing divide the county school district into supervision districts, each to contain one or more village or rural school districts. The territory of such supervision districts shall be contiguous and compact. In the formation of the supervision districts consideration shall be given to the number of teachers employed, the amount of consolidation and centralization, the condition of the roads and general topography. The territory in the different districts shall be as nearly equal as practicable, and the number of teachers employed in any one supervision district shall not be less than twenty nor more than sixty.

"The county board of education shall, upon application of three-fourths of the presidents of the village and rural district boards of the county, redistrict the county into supervision districts."

I assume, therefore, that said action was taken upon the application of three-fourths of the presidents of the boards of education of the rural and village school districts within said county school district and that, in redistricting said county school district, the requirements of said statute were complied with.

However, section 4738, G. C., as amended in 106 O. L., 396, provides as follows:

"The county board of education shall divide the county school district, any year, to take effect the first day of the following September, into supervision districts, each to contain one or more village or rural school districts. The territory of such supervision districts shall be contiguous

and compact. In the formation of the supervision districts consideration shall be given to the number of teachers employed, the amount of consolidation and centralization, the condition of the roads and general topography. The territory in the different districts shall be as nearly equal as practicable and the number of teachers employed in any one supervision district shall not be less than thirty. The county board of education shall, upon application of three-fourths of the presidents of the vilage and rural district boards of the county, redistrict the county into supervision districts. The county board of education may at their discretion require the county superintendent to personally supervise not to exceed forty teachers of the village or rural schools of the county. This shall supersede the necessity of the district supervision of these schools."

In opinion No. 463 of this department, a copy of which was enclosed in my letter to you under date of October 27, 1915, it was held that the above provisions of said section 4738, G. C., as amended in 106 O. L., are mandatory, and that when the act amending said section would become effective (August 27, 1915) it would be the duty of the county board of education to divide the county school district into proper supervision districts in accordance with the terms of said provisions. It follows, therefore, that unless the action of your county board of education, in redistricting said county school district, was taken in anticipation of the probable going into effect of said section 4738, G. C., as amended in 106 O. L., and in compliance with the requirement of said amended statute that:

"The number of teachers employed in any one supervision district shall not be less than thirty,"

the supervision districts resulting from said action of the county board of education redistricting said county school district, are not lawfully established.

In your letter of October 21st you refer to section 4740, G. C., as amended in 104 O. L., 141, which as in force prior to August 27, 1915, the date when said section as amended in 106 O. L., 398, became effective, provided as follows:

"Any village or rural district or union of school districts for supervision purposes which already employs a superintendent and which officially certifies by the clerk or clerks of the board of education on or before July 20, 1914, that it will employ a superintendent who gives at least one-half of his time in supervision, shall upon application to the county board of education be continued as a separate supervision district so long as the superintendent receives a salary of at least one thousand dollars and continues to give one-half of his time to supervision work. Such districts shall receive such portion of state aid for the payment of the salary of the district superintendent as is based on the ratio of the number of teachers employed to forty, multiplied by the fraction which represents that fraction of the regular school day which the superintendent gives to supervision. The county superintendent shall make no nomination of a district superintendent in such district until a vacancy in such superintendency occurs. After the first vacancy occurs in the superintendency of such a district all appointments shall be made on the nomination of the county superintendent in the manner provided in section 4739. A vacancy shall occur only when such superintendent resigns, dies or fails of re-election.

"Any school district or districts, having less than twenty teachers, isolated from the remainder of the county school district by supervision

districts provided for in this section shall be joined for supervision purposes to one or more of such supervision districts, but the superintendent or superintendents already employed in such supervision district or districts shall be in charge of the enlarged supervision district or districts until a vacancy occurs."

However, from your statement of facts it clearly appears that the board of education of Bloomdale village school district, in certifying to the county board of education in July, 1915, that said village school district maintains a first grade high school and employs a superintendent, and in notifying the county board of education in writing that they desired to be exempt from district supervision, and to have said village school district continued as a separate district under the direct supervision of the county superintendent, were attempting to comply with the provisions of said statute as amended in 106 O. L., 439, and as now in force, which are as follows:

"Any village or rural school district or union of school districts for high school purposes which mantains a first grade high school and which employs a superintendent, shall upon application to the county board of education before September 10, 1915, or before June 1st of any year thereafter, be continued as a separate district under the direct supervision of the county superintendent. Such district shall continue to be under the direct supervision of the county superintendent until the board of education of such district by resolution shall petition to become a part of a supervision district of the county school district. Such superintendents shall perform all the duties prescribed by law for a district superintendent, but shall teach such part of each day as the board of education of the district or districts may direct. Such districts shall receive no state aid for the payment of the salaries of their superintendents, and the salaries shall be paid by the boards employing such superintendents."

In said opinion No. 463 careful consideration was given to the changes in section 4740, G. C., as amended in 104 O. L., 141, effected by the act of the general assembly amending said section as found in 106 O. L., 396, as well as to the changes made in said statute as amended in 106 O. L., 398, effected by the amendment to said statute as found in 106 O. L., 439. It was held in said opinion that in view of the changes effected by the last amendment to said statute, it was the intention of the general assembly that the amendment to said section as found in 106 O. L., 398, should never become effective.

It was further held in said opinion that as to a village or rural school district, or union of school districts, for high school purposes which maintains a first grade high school and employs a superintendent, it makes no difference when the contract for the employment of the superintendent is made, because such a contract would be valid under section 4740 in any of its forms except that application for continuance as a supervision district should be made after said statute as last amended should become effective and prior to September 10, 1915.

I am of the opinion, however, that the action of the board of education of Bloomdale village school district in July, 1915, in certifying to the county board of education that said village school district maintains a first grade high school and employs a superintendent, and in making application in writing to said county board to be exempt from district supervision and to have said village school district continued as a separate district under the direct supervision of the county superintendent, was a substantial compliance with the requirements of said section

4740, G. C., as amended in 106 O. L., 439, and as now in force, and that the request of the board of education of said village school district should have been granted by the county board.

It follows, therefore, that the county board cannot require the board of education of said village school district to pay a proportionate share of the salary of the superintendent of the supervision district, which said county board attempted to establish by its action in June, 1915, and which was intended to include said village school district. Respectfully,

EDWARD C. TURNER,
Attorney General.

1032.

APPROVAL OF LEASES OF CANAL AND RESERVOIR LANDS AT NELSONVILLE, INDIAN LAKE AND NEWARK.

COLUMBUS, OHIO, November 17, 1915.

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

DEAR SIR:—I have your communication of November 17, 1915, transmitting to me for examination the following leases of canal and reservoir lands:

	Valuation.
Clifford Fling—Canal lands at Nelsonville	$1,000.00
Harry C. Mansfield—Reservoir lands at Indian Lake	200.00
C. L. McLaughlin—Canal lands at Newark	1,000.00

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

EDWARD C. TURNER,
Attorney General.

1033.

CASS HIGHWAY LAW—INTERPRETATION OF SECTION 6948, G. C.—EXTRA WORK IN CONNECTION WITH UNIT PRICE CONTRACT.

The provision of section 127 of the Cass highway law, section 6948, G. C., to the effect that no contract shall be awarded for extra work at any price in excess of the original contract unit price for the same kind or class of work, if such there be, in connection with the original contract, applies only in those cases where the original contract was let on a unit price basis and where the estimate for the extra work is within such limits that the contract for the extra work may be and is let without advertisement and competitive bidding.

COLUMBUS, OHIO, November 17, 1915.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—This department is in receipt of a communication from Mr. Charles A. Groom of your office, under date of November 5, 1915, in which Mr.

Groom inquires as to the proper construction to be placed upon the following language found in section 127 of the Cass highway law, section 6948, G. C., to wit:

> "* * * but no contract shall be awarded for such extra work at any price in excess of the original contract unit price for the same class or kind of work, if such there be, in connection with such contract."

The following is quoted from Mr. Groom's letter:

> "We have an instance of extra work in connection with a contract and would like to know whether your department has decided whether the foregoing clause applies merely to the letting of a contract for extra work to the original contractor, or whether it prohibits the letting of a contract for extra work to any person whomsoever, if the price for such extra work is in excess of the original unit price specified in the successful bid. In the particular case I refer to the successful contractor refuses to do extra work at the unit price for grading on account of an unanticipated long haul and the language above quoted, apparently at least, prohibits contracting with any one for a greater price, and in this instance will prevent the completion of the work made necessary through change of grade of adjoining streets in a village abutting on the improvement."

Section 127 of the Cass highway law, referred to by Mr. Groom, reads as follows:

> "In case of an unforeseen contingency not contemplated by the contract, allowance for extra work may be made by the county commissioners, but they must first enter into a new contract in writing for such extra work. In all cases where the amount of the original contract price is less than ten thousand dollars, and the amount of the estimate for such extra work exceeds five hundred dollars, the preceding sections relating to advertising for bids shall apply to the letting of contracts for such extra work. If the amount of the original contract price is ten thousand dollars or more, the preceding sections relating to advertising for bids shall apply to all cases where the estimate for such extra work exceeds five per cent. of the original contract price for such work. If the estimate for such extra work is less than five hundred dollars, in all cases where the amount of the original contract price is less than ten thousand dollars, or if the estimate for such extra work is less than five per cent. of the original contract price in all cases where the original contract price is ten thousand dollars or more, the contract for such extra work may be let by the county commissioners at private contract without publication or notice, but no contract shall be awarded for such extra work at any price in excess of the original contract unit price for the same class or kind of work, if such there be, in connection with such contract. In case of any new class or kind of work the county commissioners and contractor shall agree as to the price to be paid. The contractor shall submit his bid in writing, and if accepted by the commissioners they shall immediately enter their acceptance on the journal. The costs and expenses of such extra work shall be paid by the county commissioners out of any funds available therefor, and the amount shall be charged to the cost of construction of said improvement and apportioned as the original contract price for the said improvement."

It will be noted that under the provisions of the above quoted section a contract for extra work may, under certain conditions, be let without competitive bidding, while under other conditions competitive bidding is required. The provision quoted by Mr. Groom to the effect that no contract shall be awarded for extra work in excess of the original contract unit price for the same class or kind of work, if such there be, in connection with such contract, is found in the sentence of the section in question relating to the letting of contracts for extra work without advertisement and was manifestly intended by the legislature to apply only in those cases in which it is permissible to let a contract for extra work without advertisement and the securing of competitive bids. This conclusion is supported not only by the language of the section in question, but also by the fact that the reason for such a rule does not exist where competitive bids are secured.

It is therefore my opinion that in all those cases where advertisement must be made and competitive bids secured for extra work on a road contract, the provision that the contract shall not be awarded for such extra work at any price in excess of the original contract unit price for the same class or kind of work, if such there be, in connection with the original contract, does not apply. It is only in those cases where the original contract was let on a unit price basis and where the estimate for the extra work is within such limits that the contract for the extra work may be and is let without advertisement that the phrase referred to by Mr. Groom has any application, and of course in such cases the unit price for the extra work cannot exceed the unit price for the same class or kind of work, if such there be, in connection with the original contract.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1034.

COUNTY BOARD OF EDUCATION—REMONSTRANCE AGAINST TRANSFER OF TERRITORY—TERM "QUALIFIED ELECTORS" FOR SUCH PURPOSE DOES NOT INCLUDE WOMEN—SECTION 4692, G. C., CONSTRUED—COUNTY BOARD MAY TRANSFER PART OR ALL OF SCHOOL DISTRICT TO AN ADJOINING DISTRICT OF SAME COUNTY SCHOOL DISTRICT.

The phrase "qualified electors" as found in that part of section 4692, G. C., as amended in 106 O. L., 397, relating to the filing of a remonstrance against the transfer of territory by the board of education of the county school district, does not include women.

The county board of education may, under authority and in compliance with all the requirements of said section 3692, G. C., as amended, transfer a part or all of a school district of the county school district to an adjoining district or districts of such county school district.

COLUMBUS, OHIO, November 17, 1915.

HON. HENRY W. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I have your letter of November 8, 1915, which is as follows:

"During the summer of 1915, the county board of education transferred territory from Addison township county school district to Cheshire special county school district. The board of education of Addison township and Cheshire special district had previously failed to agree on the transfer, and the transfer was violently opposed by the board of education of Addison township, and in my opinion it is in fact inequitable.

"After the county board by resolution made the transfer, a map was filed with the county auditor, and notice given as required by law. Within thirty days after the filing of the map with the county auditor, a remonstrance was presented to the county board of education signed by four of the eight male electors residing in the territory sought to be transferred, and six of the eight women electors of that territory. Women are entitled to vote for boards of education, sign petitions for nominations for members of the board, and hold some offices by election in school matters, and may have other rights as electors and tax payers in school affairs.

"Does the phrase 'qualified electors,' as used in section 4692, G. C., (O. L. 106 v. 396) include women who are entitled to vote in school matters? No resolution has been passed by the county board of education or the Cheshire special board as to division of funds as required by section 4696, G. C. What is your opinion as to whether or not this transfer can be made under the facts submitted?"

In your letter of November 13th you state that the transfer of territory above referred to was made on October 9, 1915.

Section 4692, G. C., as amended in 106 O. L., 397, provides:

"The county board of education may transfer a part or all of a school district of the county to an adjoining district or districts of the county school district. Such transfer shall not take effect until a map is filed with the auditor of the county in which the transferred territory is situated, showing the boundaries of the territory transferred, and a notice of such proposed transfer has been posted in three conspicuous places in the district or districts proposed to be transferred, or printed in a paper of general circulation in said county, for ten days; nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred, shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer. If an entire district be transferred the board of education of such district is thereby abolished, or if a member of the board of education lives in a part of a school district transferred the member becomes a non-resident of the school district from which he was transferred and ceases to be a member of such board of education. The legal title of the property of the board of education shall become vested in the board of education of the school district to which such territory is transferred. The county board of education is authorized to make an equitable division of the school funds of the transferred territory either in the treasury or in the course of collection. And also an equitable division of the indebtedness of the transferred territory."

From your statement of facts it appears that on October 9, 1915, the board of education of Gallia county school district, acting under authority and in compliance with the above provisions of the statute, passed a resolution transferring

territory from Addison township rural school district to Cheshire rural school district within said county school district, filed a map with the county auditor and gave the notice of the proposed transfer as required by said statute.

It further appears that within the thirty-day period prescribed by said statute, a written remonstrance against the proposed transfer was filed with the county board of education. You state that said remonstrance was signed "by four of the eight male electors residing in the territory sought to be transferred, and six of the eight women electors of that territory." You first inquire whether the phrase "qualified electors" as found in section 4692, G. C., as above quoted, includes women.

Section 4862, G. C., provides:

> "Every woman, born in the United States or who is the wife or daughter of a citizen of the United States, who is over twenty-one years of age and possesses the necessary qualifications in regard to residence hereinafter provided for men shall be entitled to vote and to be voted for for member of the board of education and upon no other question."

In view of the plain provision of section 4862, as above quoted, I am of the opinion that your first question must be answered in the negative. It follows that inasmuch as the remonstrance in question was not signed by a majority of the qualified electors residing in the territory sought to be transferred, said remonstrance failed to comply with the requirement of said section 4692, G. C., and was therefore without effect.

While you state that the boards of education of the rural school districts in question failed to agree on the transfer of the territory referred to in your inquiry, that the transfer of territory was violently opposed by the board of education of Addison township rural school district, that in your opinion said transfer is in effect inequitable, and that no resolution has been passed by the county board of education or by the board of education of Cheshire rural school district, as to the division of funds, it must be observed that the provisions of section 4692, G. C., as amended in 106 O. L., 397, relating to the transfer of territory from a county school district to an adjoining *exempted* village school district or city school district, or to another county school district, and have nothing to do with a transfer of territory by the board of education of the county school district from one school district to another within said county school district.

It follows therefore that the consent of the boards of education of the rural school districts in question to the transfer of the territory referred to in your inquiry is not jurisdictional of the right of the county board of education to make such transfer, nor does section 4692, G. C., as amended, require that the board of education of Cheshire rural school district shall agree with the county board of education as to the division of funds. However, under provision of the latter part of section 4692, G. C., as amended, the county board of education has authority, when transferring territory from one school district to another within the county school district, to make an equitable division of the school funds of the transferred territory either in the treasury or in the course of collection, and also an equitable division of the indebtedness of the transferred territory.

Inasmuch as your county board of education has not as yet made such a division of funds or indebtedness, I am of the opinion that such action may still be taken by said county board and that the transfer of the territory referred to in your inquiry will not be completed until such division of funds or indebtedness is made.

Replying to your second question, I am of the opinion that upon the facts stated

by you the proceedings of your county board of education have been legal, and that upon complying with the requirement of the latter part of said section 4692, G. C., the transfer of the territory in question will be lawfully effected.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1035.

COUNTY HIGHWAY SUPERINTENDENT—ONE-FIFTH PART OF SALARY TO BE PAID BY STATE—STATE LIABLE FOR ITS PROPORTION OF COMPENSATION OF ASSISTANTS EMPLOYED UNDER SECTION 1219, G. C.—ANY APPROPRIATION FOR INTER-COUNTY HIGHWAY WORK SHOULD BE DIVIDED EQUALLY BETWEEN COUNTIES—STATE'S PROPORTIONATE SHARE OF SALARY OF EACH COUNTY HIGHWAY SUPERINTENDENT SHOULD BE PAID FROM AMOUNT APPORTIONED TO HIS COUNTY.

The liability of the state highway department for salaries for engineering work in each county, is for the one-fifth part of the county highway superintendent's salary and the state's proportion of the compensation of assistants, superintendents and inspectors employed under section 1219, G. C.

Any sum appropriated for inter-county highway work should be equally divided between the counties of the state, and the state's proportion of the salary of each county highway superintendent should be paid from the amount apportioned to his county.

COLUMBUS, OHIO, November 17, 1915.

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

DEAR SIR:—I have your communication of November 10, 1915, which reads as follows:

> "Under date of September 24th this department outlined to the county highway superintendents throughout the state the system it proposed to follow in operating under the Cass highway act. I quote you this letter in full:
>
> "'In response to an inquiry from this department relative to the method to be pursued in making payments to county highway superintendents for services under the provisions of amended senate bill No. 125, an opinion has been received from the attorney general of Ohio to the effect that payment is to be made directly from the county treasury, and that the county treasury is to be reimbursed by warrant drawn by the state highway commissioner upon the treasury of the state of Ohio. In accordance with this opinion, therefore, warrants will be forwarded monthly to your county treasurer in the sum of one-fifth of your monthly salary as county highway superintendent, pro rated upon the basis of the amount of your yearly salary as computed by your board of county commissioners.
>
> "'Experience in all phases of constructive work has proven conclusively that the amount of the net return from an active investment is proportionate to the check kept upon the overhead expense. As the tax levy of the state for road improvement is the investment of its people in

good roads, it is our joint duty to secure the greatest net return upon that investment. With this in mind, the state highway department maintains a record of each piece of work done under its supervision, showing all expenses incurred from the commencement of the preliminary survey to the payment of the final estimate to the contractor upon the completion of the work. This department will continue this system under the law recently enacted and has determined upon the following plan of operation.

"'While the salary of the county highway superintendent will be paid in the manner stated in the first paragraph of this letter, he will nevertheless submit a monthly payroll for each piece of state work being improved under his supervision showing the number of days actually spent by him and his assistants on the work at the following rates per diem; with actual and necessary expenses:

"'County highway superintendent or deputy	$6.00
"'Instrument men	3.50
"'Rodmen, chainmen and flagmen	2.50
"'Laborers	2.00

"'The total payroll will be regarded as engineering expense and the state's proportionate share charged against the county, but when an amount equal to one-fifth of the county highway superintendent's salary has been charged against the county in the above manner, after such time the state and county will proportionately share such expense at the same per diem rates.

"'The provisions of section 1219 of the General Code of Ohio, are to be remembered in the appointment of necessary assistants on state work.

"'With best wishes for a successful administration, I remain,'

"The above letter was supplemented under date of October 12th, by the following letter, sent to all county highway superintendents:

"'Kindly refer to your letter under date of September 24th, in which we outlined the method of making up payrolls, the rates per diem, etc., of state work.

"'It is to be understood that the rates per day designated in our letter are the maximum rates allowed by this department, the minimum rate for each position being determined by you in the exercise of sound judgment as a representative of the state highway department.'

"This system was adopted with a view towards securing value received for the state's proportion of the salaries of county highway superintendents and for the purposes which our letter of September 24th patently indicates.

"I respectfully request an opinion from your office as to whether or not there are any legal difficulties in the path of such a system of accounting and use of the state's proportionate share of the salaries of the county highway superintendents as indicated in our letters.

"I also respectfully request an opinion from you on the following question:

"Is the state to divide the total sum available for the construction, improvement, maintenance and repair of inter-county highways by the number of counties in the state, thus arriving at the amount due each county, and then deduct from such county's proportion the state's share of the salary of its county highway superintendent, or is the total of the state's share of the salaries of all county highway superintendents to be deducted from the total amount available for the construction, improvement, maintenance and repair of inter-county highways and an equal division then made among the 88 counties in the state?"

Your first inquiry involves a consideration of sections 138, 139 and 212 of the Cass highway law, being sections 7181, 7182 and 1219, G. C.

Before referring to the provisions found in the above mentioned sections, it will be well to attempt a concise statement of the plan which your department has proposed to follow relative to the matter covered by your inquiry. Pursuant to opinion No. 844 of this department, rendered to the bureau of inspection and supervision of public offices, on September 20, 1915, it is your plan to make payment monthly to the several counties of the state of sums equal to one-fifth of the monthly salary of the county highway superintendents of the various counties. It is further proposed by you to require the county highway superintendent to submit a monthly payroll and to include therein his own time spent upon state work, making a charge therefor at the rate of $6.00 per day. The entire monthly payroll is to be paid by the county, under the plan proposed by you, until an amount equal to one-fifth of the county highway superintendent's salary, being the amount of his salary paid by the state, has been charged against the county, after which time the plan suggested provides for the state and county sharing proportionately in the payment of such payroll. You state that this system was adopted with the view of securing value received for the state's proportion of the salaries of county highway superintendents and also in order to keep accounts of the total engineering expenses upon all state work. I can readily understand the motives which have led you to propose this arrangement and the possible abuses which you seek to avoid, but am of the opinion that the plan is not authorized by the pertinent provisions of the Cass highway law, and that other methods will have to be devised by you in order to accomplish the result which you seek to obtain.

Under sections 138 and 139 of the Cass highway law, the county highway superintendent is given an annual salary, and no place in the act is there any provision for compensating him upon a per diem basis. The salary of the county highway superintendent varies in the different counties of the state, being dependent upon their population and the mileage of their roads, and I understand that the compensation received by county highway superintendents under the law will, in some counties, fall below $6.00 per day, while in other counties it will be substantially in excess of that amount. In those counties in which the county highway superintendent is designated to have charge of the highways, bridges and culverts under the control of the state, and therefore receives the full salary fixed by section 138 of the Cass highway law, it is provided that one-fifth of his salary shall be paid by the state but, as pointed out in the opinion referred to above, this one-fifth of the county highway superintendent's salary is paid by the state to the counties by way of reimbursement, inasmuch as it is provided that his compensation shall be paid to him out of the county treasury.

Under section 212 of the act, the county highway superintendent, with the approval of the chief highway engineer, may employ assistants in the preparation of plans, and superintendents and inspectors on construction work. This section further provides that the expense of plans and surveys shall be equally divided between the state and county, and that the expense of supervision and inspection shall be apportioned on the same basis as the cost of construction. It therefore follows that at the end of every month there will be due and owing from your department to the county in which the highway superintendent has been designated to have charge of state work a sum equal to one-fifth of the highway superintendent's salary for the month. In case the county highway superintendent, with the approval of the chief highway engineer, has employed assistants in the preparation of plans, one-half of the payroll for such assistants will have to be met by your department and the other half by the county. In case the county highway superintendent, with the approval of the chief highway engineer, has during the month

employed superintendents and inspectors on state work, the payroll for such superintendents and inspectors will be the obligation of the state highway department and the county, to be met in the same proportion as that previously agreed upon for the cost of construction. In other words, if the state and county have agreed to meet in equal proportions the cost of construction, then the payroll of superintendents and inspectors employed on construction work is to be met by the state and county, share and share alike.

The manifest object of the arrangement suggested by you is to insure that the county highway superintendent will, each month, spend such time upon state work as that his compensation for such time, figured on the arbitrary basis of $6.00 per day, will equal the fifth part of his salary paid by the state. In other words, you are seeking to avoid an increase of overhead expenses in your department by prescribing a system which is designed to secure from the county highway superintendent each month such attention to state work as could be secured by an expenditure of the fifth part of his salary at the rate of $6.00 per day. While this purpose is a laudable one, the machinery for carrying it into effect is not provided by the Cass highway law, and indeed the plan suggested by you runs counter to the provisions of that act, and would in many instances produce a division of the cost of engineering between the state and the several counties different from that contemplated by the Cass highway law.

As an illustration let it be assumed that in a given county the salary of the county highway superintendent is $3,000.00 per year, and that the payroll of assistants, inspectors and superintendents employed under section 212 of the Cass highway law is $100.00 per month or $1,200.00 for the entire year, and that the facts require an equal division of this latter payroll between the state and the county. Let it be further assumed that the county highway superintendent devotes five days of each month to state work, that being approximately one-fifth of his time. Under the provisions of the Cass highway law, above quoted, the obligation of the state highway department for salaries for engineering work in such county during the year would consist of two items, one of $600.00, being one-fifth of the highway superintendent's salary, and the other of $600.00 being one-half the payroll of assistants, superintendents and inspectors, a total of $1,200.00. Under the plan suggested by you you would charge the county with $600.00 at the beginning of the year and credit the county at the end of each month thereafter with $65.00, being one-half the payroll for assistants and one-half of the county highway superintendent's per diem of $30.00. At the end of the ninth month the total credits to the county would amount to $585.00. At the end of the tenth month the county would be credited with the remaining $15.00 and your department would pay $50.00, being one-half of the payroll for assistants, superintendents and inspectors for that month. At the end of the eleventh and twelfth months your department would pay one-half of the payroll referred to above, making a total expenditure for that purpose during the two months of $100.00, and would pay to the county one-half of the county highway superintendent's per diem allowance for the two months, or a total of $30.00. A monthly payment of $50.00, making a total for the year of $600.00, being an amount equal to one-fifth of the county highway superintendent's salary, would also be paid by your department to the county. By adding together the above items, it will be seen that whereas under the assumed facts the state highway department should, under the statutes, expend $1,200.00 for salaries for engineering work in the county in question, yet under the plan suggested by you its expenditure would be limited to $780.00, even though under the assumed facts the county highway superintendent devoted practically one-fifth of his time to state work. I therefore advise that no effort be made to carry out the plan suggested by you and that payment of the state's portion of the salaries of county

highway superintendents and assistants and inspectors be made in accordance with the suggestions herein contained. If any county highway superintendent should evince a disposition to neglect state work and to endeavor to cast the state work within his county upon assistants, one remedy for such a situation is suggested by the provision of section 212, to the effect that assistants, superintendents and inspectors on state work may be employed by the county highway superintendent only upon the approval of the chief highway engineer. Should the remedy suggested by the above provision prove inadequate, and should the neglect of a county highway superintendent in charge of state work be continued in defiance of the request and instructions of your department, ample remedy is provided by the provision of section 142 of the Cass highway law, section 7185, G. C., to the effect that if in the opinion of the state highway commissioner the county surveyor of any county neglects to perform his duties as county highway superintendent, the state highway commissioner shall file a written statement with the commissioners of such county, stating that in his judgment such surveyor has neglected to perform his duties as county highway superintendent, and upon the filing of such statement with the county commissioners the state highway commissioner may terminate the connection of the county highway superintendent with state work and designate some other engineer to have charge of the construction, improvement, maintenance and repair of the roads within the county under the control of the state.

The provisions of the Cass highway law also afford ample authority for you to obtain full and complete information as to the activities of the county highway superintendent and as to the amount of time employed by him upon state work. Under section 145 of the act, the county highway superintendent is required to make reports from time to time to the state highway commissioner in respect to such matters, as may be specified by the latter. Under this provision you have full authority to require the county highway superintendent to make a monthly report to you, showing the exact amount of time devoted by him to state work within his county. While the Cass highway law does not definitely fix the proportion of his time which the county highway superintendent must devote to state work, yet it is manifest from a consideration of the entire act that it was the intention of the legislature that the county highway superintendent, when designated to have charge of state work, should devote thereto all the time required for the proper handling of state work, having due regard to the rights of the county and townships. It is therefore apparent that a county highway superintendent, designated to have charge of state work, would be guilty of neglect to perform his duties within the meaning of section 142 of the act, if he did not each month devote to any state work on hand such time as might be required therefor, having due regard to the rights of his county and of the several townships thereof.

While unable to sanction the plan suggested by you, I am in full sympathy with the purposes you seek to accomplish and am confident that the provisions of sections 212 and 142 of the act referred to above, will enable you to secure value received for the outlay by the state necessary to meet the one-fifth part of the salaries of county highway superintendents.

Coming now to consider the second inquiry contained in your communication, your attention is directed to opinion No. 847, of this department, rendered to the bureau of inspection and supervision of public offices, on September 21, 1915, a copy of which has been forwarded to you, in which it was held that moneys appropriated by the legislature for the construction, improvement, maintenance and repair of inter-county highways and equally divided among the counties of the state in accordance with the provisions of section 214 of the Cass highway law, section

1221, G. C., are available for the payment of the state's portion of the salaries of county highway superintendents for the reason that the state's portion of such salaries is to be regarded as a part of the cost and expense of construction, improvement, maintenance and repair. In accordance with that opinion and with the provision of section 214 of the Cass highway law therein quoted, it is my opinion that any sum appropriated for the construction, improvement, maintenance and repair of inter-county highways should be divided into 88 equal parts, corresponding to the number of counties in the state, and that the state's proportion of the salary of each county highway superintendent should be paid from the amount apportioned to that county as above suggested. To follow the other course and to pay the total of the state's share of the salaries of all county highway superintendents out of the total amount appropriated for inter-county highway construction, improvement, maintenance and repair before making an equal division among the counties of the state, would be to violate the statutory provision requiring that inter-county highway funds be equally divided among the counties of the state, for the reason that the salaries of county highway superintendents vary in the several counties and it is possible, under the law, that in some counties no part of the salary of the county highway superintendents will be paid by the state for the reason that such county highway superintendents will not be designated to have charge of state work or will be removed from their control over the same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1036.

LIMA STATE HOSPITAL—COMMITMENT OF PERSONS ACCUSED OF CRIME FOUND BY GRAND JURY TO BE INSANE BEFORE INDICTMENT AND REPORTED TO COMMON PLEAS COURT, MAY BE MADE BY SECTION 13577, G. C.—CASE NEED NOT PASS THROUGH PROBATE COURT.

Commitment to the Lima State Hospital of persons accused of crime found by the grand jury to be insane before indictment and reported to the common pleas court may be made under provisions of section 13577, *G. C., without certifying matter to probate court as in other cases.*

COLUMBUS, OHIO, November 19, 1915.

DR. CHARLES H. CLARK, *Superintendent, Lima State Hospital, Lima, Ohio.*

DEAR DOCTOR:—Permit me to reply to your request for an opinion as to the regularity of the commitment of one Steve Kohler to the Lima State Hospital, which is as follows:

> "I desire an opinion from your office as to the legality of the commitment of one Steve Kohler from Ashtabula county. This man was arrested on the charge of burglary and indicted by the grand jury. During the investigation of the grand jury they found the accused to be insane and certified their findings to the common pleas court. The common pleas court then impaneled a jury and the accused was given a trial to determine his mental status. The jury returned a verdict of insanity. A copy of the journal entry in this case, together with copy of the findings of the

grand jury, were furnished me on admission of patient to this hospital. The case was not certified to the probate court and no further proceedings were held.

"Personally, I believe that the commitment was irregular and not in strict accordance with the statutes governing the proceedings for insane criminals. Enclosed you will find the following copies:

"Certified copy of the journal entry.

"Findings of the grand jury.

"Copy of my letter to the prosecuting attorney and his reply to the same.

"An early opinion would be greatly appreciated."

With your letter you enclosed copy of the journal entry finding the prisoner insane by the jury impaneled under the provisions of section 13577 of the General Code; copy of the findings of the grand jury declaring the prisoner insane and reporting said finding to the common pleas court of Ashtabula county; in addition to copies of correspondence between the prosecuting attorney of Ashtabula county and yourself.

Section 13577 of the General Code, which prescribes the proper procedure in connection with the disposition of a case wherein the accused is found to be insane before indictment, is as follows:

"If a grand jury upon investigation of a person accused of crime finds such person to be insane, it shall report such findings to the court of common pleas. Such court shall order a jury to be impaneled to try whether or not the accused is sane at the time of such impaneling, and such court and jury shall proceed in a like manner as provided by law when the question of the sanitay of a person indicted for an offense is raised at any time before sentence. If such person is then found to be insane, he shall be committed to the Lima State Hospital until restored to reason. This section shall not be in force and effect until the Lima State Hospital is ready for the reception of inmates as certified to the courts by the governor and secretary of state."

It will be noted that the section, among other things, provides that:

"such court and jury shall proceed in a like manner as provided by law when the question of the sanity of a person indicted for an offense is raised at any time before sentence."

In the case of a verdict of insanity rendered by a jury on the trial of a person indicted, and before trial on the indictment, it is provided in section 13610 of the General Code, that proceedings shall be had as follows:

"* * * If the jury find him to be not sane, that fact shall be certified by the clerk to the probate court, and the accused, until restored to reason, shall be dealt with by such court as upon request had. If he is discharged, the bond given for his support and safe-keeping shall contain a condition that, when restored to reason, he shall answer to the offense charged in the indictment, or of which he has been convicted, at the next term of the court thereafter and abide the order of such court."

A reading of section 13610 of the General Code, *supra,* will show that it

purpose of certifying the case to the probate court as provided is that the court may exercise its discretion as to the disposition of the prisoner, whereas in section 13577 of the General Code, *supra,* it is specifically provided that:

> "if such person is then found to be insane he shall be committed to the Lima State Hospital until restored to reason."

Section 13577 of the General Code, supra, under its terms provides that it shall not be in force until a certificate has been made to the courts by the governor and secretary of state that the Lima State Hospital is ready for the reception of inmates. Such certificate having been made under date of October 1, 1915, the section is in full force and effect.

Among the provisions of section 10492 of the General Code, is to be found the following:

> "Except as hereinafter provided, the probate court shall have exclusive jurisdiction: * * *
>
> "6. To make inquests respecting lunatics, insane persons, idots, deaf and dumb persons, subject by law to guardianship. * * *"

In the case of State ex rel. Palmer v. South, sheriff, decided in the Clinton county common pleas court, in 1898, to be found on page 442 of volume VII of the Ohio Nisi Prius Reports, it was held that where a person is indicted for crime the court has no jurisdiction to entertain an application for lunacy inquest over him before trial, that his sanity can only be determined by a jury in the common pleas court as provided by statute. This was a case wherein Palmer, who had been indicted for forgery, was brought before the probate court after indictment, adjudged insane by the court and the sheriff commanded to convey Palmer to the Athens State Hospital, and upon the refusal of the sheriff to convey the prisoner on the ground that he, the sheriff, was answerable to the common pleas court for the body of Palmer to answer for forgery, mandamus proceedings were instituted to compel the sheriff to carry out the mandate of the probate court; this the court refused to do, holding that the statutes provided that where a person is alleged to be insane and under indictment for a criminal charge he can have his sanity investigated by a jury in the common pleas court rather than in the usual manner in the probate court.

The same principle applies when a person is bound over to a common pleas court and whose case is to be considered by the grand jury, so that the question as to whether or not the probate court would have jurisdiction before the indictment by the grand jury would rest upon the same reasoning as the Palmer case, above referred to.

The provisions of law relating to the holding of an inquest in the probate court are to safeguard the liberty of persons so that they may not be committed to an institution without due process of law. The proceedings in the common pleas court as provided for in section 13577 of the General Code, *supra,* are formal and include the finding of a court and jury and when, after such procedure has been followed, a verdict of insanity has been rendered and commitment to the Lima State Hospital ordered there is no cause to complain that the rights of the person affected have in any manner been invaded.

While, under the provisions of section 13610 of the General Code, as stated above, some action is necessary by the probate court after the finding of the jury that the person is insane, such action is wholly unnecessary and unauthorized

under the provisions of section 13577 of the General Code, supra, by reason of the fact that the statute expressly provides that when under its provisions the person is found insane he shall be committed to the Lima State Hospital.

It is my opinion therefore that the proceedings in the case of Steve Kohler in Ashtabula county common pleas court were regular, and that it is unnecessary to have the case pass through probate court for commitment.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1037.

BOARD OF EDUCATION OF RURAL SCHOOL DISTRICT IS REQUIRED TO PAY TUITION OF PUPIL WHO ATTENDS HIGH SCHOOL MAINTAINED IN AN ADJOINING DISTRICT WHEN PUPIL HAS BEEN CERTIFIED AS ELIGIBLE FOR SUCH WORK—LOCAL BOARD MAINTAINS A COURSE OF STUDY EQUIVALENT TO FIRST YEAR OF HIGH SCHOOL AND PUPIL COMPLETES COURSE AND IS THEN CERTIFIED.

The board of education of a rural school district, which maintains a school in which a course of study equivalent to the work in the first year of a high school is offered, may, under provision of section 7747, G. C., as amended 104 *O. L.,* 125, *be required to pay the tuition of a pupil residing in said district who attends a high school maintained by the board of education of an adjoining school district, and who, having completed the course prescribed for the first year in said high school, has been certified as eligible for the second year's work.*

COLUMBUS, OHIO, November 19, 1915.

HON. C. H. CURTISS, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—In your letter of November 10th you request my opinion on a question which may be stated as follows:

> May the board of education of Nelson township rural school district in Portage county, which maintains a school in which a course of study equivalent to the work in the first year of a high school is offered, be required to pay the tuition of a pupil residing in said district who attends a high school maintained by the board of education of the adjoining village school district of Garrettsville, in said county, and who, having completed the course prescribed for the first year in said high school, has been certified as eligible for the second year's work?

I do not deem it necessary to quote the various provisions of the statutes respectively defining an elementary school and a high school and the different grades of high schools having statutory recognition.

It is sufficient to observe that under provision of section 7655, G. C., high schools of a less grade than the third grade high schools defined by provisions of section 7654, G. C., "shall be denominated as elementary schools."

Section 7654, G. C., provides that a high school of the third grade shall cover a period of not less than two years of not less than twenty-eight weeks each, in which not less than eight courses of study are required for graduation.

It is evident that the school in Nelson township rural school district, referred to in your inquiry, being a school of less grade than a third grade high school, as defined by section 7654, G. C., is an elementary school within the meaning of section 7655, G. C.

It follows, therefore, that in so far as the payment of the tuition of the pupil in question is concerned, the board of education of said rural school district is governed by that part of section 7747, G. C., as amended in 104 Ohio Laws, 125, which provides:

> "The tuition of pupils who are eligible for admission to high school and who reside in rural districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. No more shall be charged per capita than the amount ascertained by dividing the total expenses of conducting the high school of the district attended, exclusive of permanent improvements and repair, by the average monthly enrollment in the high school of the district."

The above provision of the statute makes it the duty of the board of education of said rural school district to pay the tuition of the pupil referred to in your inquiry residing in said district and attending the Garrettsville village high school.

I am of the opinion, therefore, that your question must be answered in the affirmative.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1038.

MECHANICS' LIENS—CANNOT BE PERFECTED AGAINST STATE FUNDS DUE CONTRACTORS ENGAGED IN CONSTRUCTION WORK OF STATE.

Inasmuch as the state cannot be sued, mechanics' liens cannot be perfected against funds in the hands of the state, and due or to become due to contractors engaged in the construction of state work.

COLUMBUS, OHIO, November 19, 1915.

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

DEAR SIR:—I have your communication of November 5, 1915, enclosing a copy of a letter received by your department from Messrs. Hayes & Hayes, attorneys-at-law, of Wilmington, Ohio. In their letter they state that they enclose eleven notices of mechanics' liens asserted against The Ironton Transfer & Storage Company. They further state that these several liens are asserted against all payments due or unpaid and owing to The Ironton Transfer & Storage Company, by reason of or growing out of the contract for the building of a state road in Warren county. You state in your communication that these liens which it is sought to assert grow out of the furnishing of teams, wagons and drivers for hauling material on an improvement being constructed by The Ironton Transfer & Storage

Company under contract with the state highway department, and request my opinion as to what action, if any, may properly be taken by you in the premises.

Replying to your inquiry, I beg leave to direct your attention to opinion No. 16 of this department, rendered by me to the Ohio Board of Administration on January 19, 1915, a copy of which opinion is herewith enclosed. In the opinion in question it was held that inasmuch as the state cannot be sued, mechanics' liens cannot be perfected against funds in the hands of the state and due or to become due to contractors engaged in the construction of state work. The following is quoted from the opinion to the Ohio Board of Administration:

> "Inasmuch as a suit may not be brought against the state for the enforcement of a mechanics' lien, there is no method by which a court can decree its enforcement, and in the absence of a law to enforce the same, the auditor of state cannot recognize this lien."

In view of the above, I advise you that there is nothing which you can do towards affording relief to the creditors of The Ironton Transfer & Storage Company, and that you cannot recognize the liens asserted in favor of these creditors.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1039.

AMENDED SENATE BILL NO. 49, 106 O. L., 499—SALE OF REAL ESTATE UNDER THIS ACT BY SUPERINTENDENT OF PUBLIC WORKS TO CITY OF TOLEDO—APPROVAL OF SALE BY GOVERNOR AND ATTORNEY GENERAL—AUDITOR OF STATE REQUIRED TO DRAFT CONVEYANCE.

A sale of land to the city of Toledo under amended senate bill No. 49, 106 O. L., 499, is to be made by the superintendent of public works. While the sale is subject to the approval of the governor and attorney general, they are not to join in making the same.

The auditor of state is required to draft conveyance of real estate sold on behalf of the state.

COLUMBUS, OHIO, November 22, 1915.

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

DEAR SIR:—I have your communication of November 6, 1915, which reads as follows:

> "Herewith I transmit resolutions preliminary to carrying out the exchange of land between the state of Ohio and the city of Toledo, as provided for in the act of the general assembly of Ohio, passed May 27, 1915, (105 and 106 O. L., page 499).
>
> "You have before you a deed and abstract conveying certain lands to the state of Ohio. The resolution herewith enclosed together with the deed which I herewith submit to you, for approval as to form, is intended to carry out the state's part of the contract entered into between the state board of public works and the city of Toledo, dated December 14, 1912."

It should be noted that the deed from the city of Toledo to the state of Ohio, together with abstract of title covering the property conveyed by said deed, have been submitted to this department and that the same were approved by me in opinion No. 1016, rendered to you on November 12, 1915.

Under the terms of amended senate bill No. 49, found in 106 O. L., 499, the consideration for the deed from the city of Toledo to the state of Ohio is to be the transfer by the state to the city of Toledo of certain real estate described in the act in question, and the proceeding which you now seek to carry out is the consummation of the sale by the state to the city and the execution of the proper deed. For that purpose you have used a form of proceeding previously approved by this department where lands were sold by you, together with the governor and attorney general, this proceeding being authorized by section 13971 of the Appendix to the General Code of Ohio. That section required the governor and attorney general, in certain instances, to join in making the sale, whereas amended senate bill No. 49, 106 O. L., 499, now under consideration, provides that the superintendent of public works shall make the sale and that the sale shall be approved by the governor and attorney general. I therefore suggest that the expression "join with me in selling" be stricken out of the third paragraph of the document which you have submitted in duplicate, and which you style a record of proceeding, and that in place of said expression "join with me in selling" there be substituted the expression "approve of the sale by me of." In view of the above, there will be no necessity for the adoption of a resolution by the governor, superintendent of public works and attorney general, and I suggest that the form of resolution which you have attached to your record of proceedings be detached therefrom, and that the following be endorsed at the end of your record of proceedings:

> I hereby approve of the sale by the superintendent of public works to the city of Toledo of the real estate described in the foregoing record of proceedings of the department of public works.
>
> Dated---------- ----------,
> Governor of Ohio.
>
> Dated---------- ----------,
> Attorney General of Ohio.

Upon the return to you of your record of proceedings, with the written approval of the governor and attorney general, you should add thereto the following entry:

> OFFICE OF THE SUPERINTENDENT OF PUBLIC WORKS.
>
> COLUMBUS, OHIO, ----------1915.
>
> The sale to the city of Toledo of the real estate described in the foregoing record of proceedings having been approved by the governor and attorney general, I have this day sold said real estate to the city of Toledo.
>
> ----------
> Superintendent of Public Works.

I note that you attach to your communication a form of deed. The first paragraph of this deed is open to the same objection as the record of proceedings, and instead of reciting a sale by the governor, attorney general and superintendent of public works, should recite a sale by the superintendent of public works with the approval of the governor and attorney general.

I deem it proper, however, in this connection, to call your attention to the provision of section 8523 of the General Code of Ohio, to the effect that a conveyance of real estate or any interest therein sold on behalf of the state in pursuance of law, shall be drafted by the auditor of state. I therefore suggest the advisability of requesting the auditor of state to prepare the conveyance for execution by the governor.

For the reasons above stated, I am returning the record of proceedings without my approval, but will be glad to approve the same when you have complied with the suggestions herein made.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1040.

APPROVAL OF TRANSCRIPT OF BONDS FOR CITY OF CONNEAUT, OHIO.

COLUMBUS, OHIO, November 24, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—IN RE:—Bonds of the city of Conneaut, Ohio, in the sum of $31,320.00, dated November 1, 1915, being thirty bonds of $1,000 each, three falling due each year from November 1, 1916, to and including November 1, 1925, and one bond of $1,320, falling due on November 1, 1925.

I have examined the transcript of the above mentioned bonds submitted by the city auditor relative to the proceedings of council and other officers of said city, and find that the purpose for which said bonds are issued is authorized by law; that the proceedings of said city council and other officers relative thereto have been regular and in conformity to statutory requirements; that the amount of said bonds and the tax levy which will be necessary to pay the interest thereon and create a sinking fund for their redemption when due exceeds no statutory limitation.

I have examined the first twenty-nine bonds of $1,000 each of the issue above described, which have been delivered to the treasurer of state, and find that the same are properly drawn and executed. The absence of the two remaining bonds, viz.: No. 30 for the sum of $1,000, and No. 31 for the sum of $1,320, is due to the fact that a portion of the assessment levy for the improvement of said streets has been paid to the treasurer of the city of Conneaut, and the necessity for the issuance of said bonds no longer exists, and it is the intention of the city officers to deliver only the first twenty-nine bonds.

I therefore certify that the twenty-nine bonds in the hands of the treasurer of state constitute valid obligations of the city of Conneaut, and I approve the purchase of the same.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1041.

APPROVAL OF LEASES OF CANAL LANDS NEAR BASIL AND RESERVOIR LANDS AT INDIAN LAKE, OHIO.

COLUMBUS, OHIO, November 26, 1915.

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

DEAR SIR:—I have your communication of November 12, 1915, transmitting to me for examination the following leases of canal and reservoir lands:

E. E. Kumler, Ohio canal lands near Basil, valuation---------- $100.00
E. E. Rex, lands at Indian Lake, valuation---------- 200.00

I find these leases to be in regular form, and am therefore returning the same with my approval endorsed on the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1042.

ABSTRACT OF TITLE AND DEED OF REAL ESTATE TO BE PURCHASED FOR MANSFIELD REFORMATORY—APPROPRIATION TO PURCHASE H. L. PEEKE LAND.

COLUMBUS, OHIO, November 26, 1915.

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

DEAR SIR:—In house bill No. 721, making sundry appropriations (106 O. L., 834), there appears the following appropriation: (Page 840.)

> "To purchase H. L. Peeke 9-13/100 acres of land for the uses and purposes of the Mansfield reformatory, $2,000.00."

In section 2 of said appropriation bill it is provided that the moneys so appropriated shall be paid upon the approval of a special auditing committee consisting of the budget commissioner, the attorney general, the auditor of state, the chairman of the finance committee of the senate and the chairman of the finance committee of the house of representatives.

Upon examination of the records of the committee constituted as above, I find the following entry:

> "It was moved by Mr. Ballard, seconded by Mr. Wise, that for the sum of $2,000.00 to be paid to H. L. Peeke for 9-13/100 acres of land, the auditor of state be authorized to issue his warrant when the title to said property has been approved by the attorney general and deed delivered to the auditor of state; all members voting aye."

Mr. H. L. Peeke has submitted to this department an abstract of title to the premises in question, as well as a deed covering the same, said premises being described as follows:

> "Situated in the township of Madison, county of Richland, and in the state of Ohio, and more particularly described as being situated in sections nine (9) and sixteen (16), range eighteen (18), township twenty-one (21), Richland county and state of Ohio. Being a strip of land one hundred

(100) feet wide, being fifty (50) feet on either side of the center line of The Chicago Short Line Railway Company, as now staked across the land heretofore owned by Roberta E. J. Buckley. Said center line is described as follows: Beginning at a stake or point two hundred (200) feet south of the center line of section nine (9) measured on half section line; thence with a curve line to the right with a radius four thousand, five hundred and eighty-three and seven-tenths (4,583.7) feet for a distance of five hundred and seventy-six and five-tenths (576.5) feet; thence with a tangent in a southeasterly direction a distance of three thousand, four hundred and eighty-nine (3,489) feet to the center of Nelson street, in New Trenton addition, in Madison township. The center of said street being the southerly line of said strip of land, containing in all nine and thirteen one-hundredths acres of land more or less, according to a tracing which is recorded on page 16, volume 8, of the plat records of Richland county, Ohio.

I have carefully examined the abstract and find that the title now in Mr. Peeke, after the said title had been quieted in him in the case of H. L. Peeke v. The Columbus Savings & Trust Company et al., No. 12864, Richland county court of common pleas, is a good, merchantable title, and that there are now no incumbrances against the same, Mr. Peeke having submitted to me receipted tax bills for the taxes for the year 1915 covering said property, which I herewith hand to you for your files.

I have likewise examined the deed and find the same to be properly executed and stamped in accordance with the federal income tax law.

I herewith enclose you the deed in question and the abstract pertaining thereto. I also enclose you a map outlining the premises conveyed, as well as an abstract of title to 189.20 acres of land purchased by the state from Roberta E. J. Buckley for the use of the Mansfield Reformatory, which abstract was handed to me by the Board of Administration.

The title to the premises sought to be conveyed by the deed heretofore referred to having been approved by me and the deed delivered to you, a voucher may be issued by you to the order of H. L. Peeke, Sandusky, Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1043.

LEASES OF CANAL LAND AT DAYTON AND BALTIMORE, OHIO, DISAPPROVED—RESOLUTION OF BOARD OF DIRECTORS OF THE DAVIS AND SHERRER COMPANY AUTHORIZING LEASE SHOULD ACCOMPANY CONTRACT—LEASE EXECUTED BY VILLAGE OF BALTIMORE SHOULD BE SIGNED BY MAYOR AND CLERK.

COLUMBUS, OHIO, November 26, 1915.

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

DEAR SIR:—I have your communication of November 12, 1915, transmitting to me for examination the following leases of canal lands:

The Davis & Sherrer Co., M. & E. canal lands at Dayton, valuation	$3,333.33
The village of Baltimore, Ohio, canal lands, valuation	200.00

Attached to the lease to The Davis & Sherrer Company is a certified copy of section 3 of the code of regulations of that company, which section is to the effect that all written contracts entered into on behalf of the company shall be signed by both the president and secretary and sealed with the corporate seal. This provision has reference to the mode of execution of contracts rather than to the authority to make the same, and there should be attached to the triplicate copies of the lease in question certified copies of a resolution of the board of directors of The Davis & Sherrer Co., authorizing the leasing of the lands in question.

The lease to the village of Baltimore is signed by B. B. Holland, as mayor. Section 4221, G. C., provides that all contracts made by the council of a village shall be executed in the name of the village and signed on behalf of the village by the mayor and clerk. The council of the village of Baltimore should pass a resolution or ordinance providing for the leasing of the land in question, which resolution or ordinance should contain a description of the land. The lease should then be signed in the name of the village by its mayor and clerk.

For the reasons above stated I am returning these leases without my approval.

Respectfully,
EDWARD C. TURNER,
Attorney General

1044.

MAPLE PRODUCTS—WHEN COMPOUND OF MAPLE AND CANE SYRUPS IS PERMITTED BY SECTION 5785, G. C.—HOW LABELED.

Compound of syrup composed of unadulterated "cane" syrup and unadulterated "maple" syrup may be sold if the package containing same bears label "cane and maple syrup," and said label contains the percentage of the ingredients making up the compound in terms as prescribed by section 5785, G. C.

COLUMBUS, OHIO, November 26, 1915.

The Board of Agriculture, Dairy and Food Department, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge the receipt of your request for an opinion which is as follows:

> "There has been some controversy in regard to the labeling maple products when mixed with some other syrup, and I would ask you to kindly give a ruling on the following:
>
> "Would it be permissible to label syrup composed of cane or sugar syrup and maple, as 'cane' and 'maple syrup' without giving the percentage of each contained therein?"

Section 12763, 12764 and 12765 of the General Code, are as follows:

> "Sec. 12763. Maple sugar or pure maple sugar and maple syrup or pure maple syrup are the unadulterated product by the evaporation of pure sap from the maple tree. The standard of weight of a gallon of maple syrup of two hundred and thirty-one cubic inches shall be eleven pounds. A substance purporting to be maple syrup or maple sugar not

made in compliance with this section shall be an adulteration of maple syrup or maple sugar, and maple syrup of less weight than herein required shall be an adulteration of maple syrup.

"Sec. 12764. Whoever manufactures for sale, offers for sale, has in in his possession with intent to sell, or sells or delivers, as and for maple syrup or maple sugar, an adulteration thereof shall be fined not less than fifty dollars nor more than two hundred dollars.

"Sec. 12765. Whoever offers for sale, has in his possession with intent to sell, sells or delivers an adulteration of maple syrup or maple sugar in a box, can, bottle, or other package having the word 'maple,' or a compound thereof, as the name or part of the name of the contents thereof or a device or illustration suggestive of maple syrup or sugar or the manufacture thereof, shall be fined not less than fifty dollars nor more than two hundred dollars."

Section 5785 of the General Code, is, in part, as follows:

"Food, drink flavoring extracts, confectionery or condiment shall be misbranded within the meaning of this chapter * * *

"(2) if it is labeled or branded so as to deceive or mislead the purchaser. * * *

"(5) if the package containing it or a label thereon bears a statement, design or device regarding it or the ingredients or substances contained therein, which is false, or misleading in any particular; provided, that this section shall not apply to mixtures or compounds recognized as ordinary articles of food or drink if each package sold or offered for sale is distinctly labeled in words of the English language as mixtures or compounds, with the name and percentage, in terms of one hundred per cent. of each ingredient therein. The word 'compound' or 'mixture' shall be printed in letters and figures not smaller in height or width than one-half the largest letter upon any label on the package, and the formula shall be printed in letters and figures not smaller in height or width than one-fourth the largest upon any label on the package, and such compound or mixture must not contain an ingredient that is poisonous or injurious to health."

Section 12763 of the General Code, *supra,* is specific and precise in its declaration as to just what shall be considered as pure maple syrup and brands every other product purporting to be maple syrup as an adulteration thereof.

Section 12764 of the General Code, *supra,* provides a penalty for the manufacturing for sale, offering for sale, having in possession with intent to sell, selling or delivering any adulteration of maple syrup as maple syrup. This section clearly prohibits the sale of any product as maple syrup which does not meet the requirements of section 12763 of the General Code, *supra.*

Section 12765 of the General Code, *supra,* goes still farther in protecting the public from being imposed upon by manufacturers or vendors of maple products by providing that the use of the word "maple" or a compound thereof as the name or part of the name indicating or suggesting the contents of the package to be a maple product, shall be subject to the penalty therein provided *if the contents of the package be an adulteration of maple syrup or maple sugar.*

I am inclined to agree with you that the mixing of pure maple syrup with pure cane sugar syrup would not constitute an adulteration of maple syrup such as is contemplated in the provisions of section 12765 of the General Code, supra,

but under the provisions of section 5785, General Code, supra, the result of the mixture would be a compound which could be offered to the public for sale provided that the package containing it bears a label, statement, design or device regarding it, which is not misleading and there is distinctly stated in words of the English language the name of the compound and the percentage in terms of one hundred per cent. of each ingredient therein. The word "compound" or "mixture" shall be printed in letters and figures not smaller in height or width than one-half the largest letter of any label upon the package, and the formula shall be printed in letters and figures not smaller in height or width than one-fourth the largest letter of any label upon the package, it being assumed, of course, that the mixture of pure maple syrup with pure cane or sugar syrup would not result in a compound or mixture containing any ingredient that is poisonous or injurious to health.

It is my opinion therefore that it is permissible to label syrup composed of cane or sugar syrup or maple syrup as "cane and maple syrup," provided the requirements of section 5785, General Code, are complied with strictly, it being understood, of course, that such a compound could not, under section 5785 of the General Code, supra, be labeled "cane" or "maple syrup" even though the percentage of ingredients was stated as referred to above,—such label would be misleading and constitute a misbranding of the article.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1045.

ROADS AND HIGHWAYS—COUNTY COMMISSIONERS—ROAD PETITIONS—WHEN FILED AND FAVORABLY ACTED UPON PRIOR TO SEPTEMBER 6, 1915, WHEN CASS HIGHWAY LAW BECAME EFFECTIVE, ROADS SHOULD BE IMPROVED UNDER LAW THEN IN EFFECT.

Where road petitions were filed under section 6956-1, *G. C., and the county commissioners under section* 6956-2, *G. C., acted favorably thereon prior to September* 6, 1915, *the roads covered by such petitions should be improved under the law in force at the time such petitions were filed and acted upon.*

COLUMBUS, OHIO, November 29, 1915.

HON. F. J. BISHOP, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—I have your communication of November 9, 1915, in which you request my opinion upon the following facts:

Prior to the taking effect of the Cass highway law, petitions had been filed with the commissioners of Ashtabula county, asking for the building of roads in different parts of the county. These petitions were filed under section 6956-1, G. C., and in response to such petitions the commissioners, acting under section 6956-2, G. C., then in force, went upon the line of the proposed roads and duly determined the routes and termini of the same, the kind and extent of the improvements, etc., and appointed the county surveyor to go upon the lines of such roads and make surveys, plats, profiles, etc., which duty was performed by the county surveyor, all of the above occurring prior to September 6, 1915, upon which date

the Cass highway law went into effect. The question now is as to the right of the county commissioners to proceed under the old law to complete the roads in question.

As bearing upon this question, you cite the curative provisions of section 300 of the Cass highway law, which section reads as follows:

> "All proceedings for the construction, improvement or repair of stone, gravel or other roads in this state under the provisions of sections 6956-1 to 6956-16 inclusive, of the General Code, has since May 10th, 1910, and all petitions granted, bonds issued, taxes and assessments levied or to be levied on account of such roads, and all contracts made or entered into, under the provisions of said sections, and any and all steps taken thereunder, are hereby declared and held to be valid, and boards of county commissioners or other officials shall have full power and authority to complete all roads in process of construction under said sections, and shall have full power and authority to levy taxes and assessments for such roads, and to sell bonds, to pay for the construction and improvement of all such roads, and to do any and all things contemplated by the provisions of said sections.
>
> "All petitions granted, bonds issued, contracts let, taxes and assessments levied or to be levied, on account of such roads, shall be deemed and held to have been done under the provisions of said section 6956-1 to 6956-16 inclusive, notwithstanding any irregularity in said petitions, contracts, bonds, levies or assessments, and the proceedings had in connection therewith, and notwithstanding said proceedings may not have been had in strict conformity to the provisions of the sections above referred to; and all proceedings for the construction of stone, gravel or other roads which have not been had in conformity to any valid existing law, shall be deemed and held to have had under the provisions of sections above referred to, and such proceedings and all the steps thereunder are hereby declared and held to be valid, notwithstanding any defect or irregularity therein, or any failure to conform strictly to the provisions of the above mentioned sections."

Without discussing fully the scope of section 300 quoted above or the intention of the legislature in enacting the same, it is sufficient for the purposes of this opinion to observe that the same was intended, as is indicated by its chapter heading, to be principally a curative and not a saving provision, and that in so far as it is a saving provision, it was intended to apply only to invalid proceedings, the defects in which were cured by the section in question.

The saving provision applicable to the state of facts presented by you is contained in the following language found in section 303 of the Cass highway law.

> "This act shall not affect or impair any contract or any act done, or right acquired of any penalty, forfeiture or punishment incurred prior to the time when this act or any section thereof takes effect, under or by virtue of any law so repealed, but the same may be asserted, completed, enforced, prosecuted or inflicted as fully and to the same extent as if such laws had not been repealed. *The provisions of this act shall not affect or impair any act done or right acquired under or in pursuance of any resolution adopted by the board of commissioners of any county,* the trustees of any township, or the commissioners of any road district *prior to the time of the taking effect of this act,* * * *"

Under the state of facts presented by you, the county commissioners must, prior to the taking effect of the Cass highway law, have found and determined by resolution that the public utility and convenience required that the roads in question be laid out, constructed, repaired, improved, altered, straightened or widened, as petitioned for, and they must further have determined by resolution the routes and termini of such roads, if the petitions were for the laying out of new roads, and the kind and extent of the improvements or repairs and the alterations in the lines and changes of grades of said roads, if any. Having determined these facts by resolution duly adopted and entered on their journal, it follows that the case presented is one where a right has been acquired under or in pursuance of resolution adopted by a board of commissioners of a county. In other words, the commissioners, having made a favorable finding upon the petitions presented to them, a right now exists in the petitioners to have the improvements completed, and it is therefore my opinion, in answer to your specific question, that under the saving provision of section 303 of the Cass highway law, quoted above, it is the duty of the county commissioners to proceed with the construction of the improvements in question and to prosecute the work to completion under the law in force at the time the petitions were filed, and the resolutions making a favorable finding thereon adopted by the board of county commissioners.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1046.

SUPERINTENDENT OF PUBLIC WORKS—CANAL LANDS SOLD AT PUBLIC SALE—PARTICIPATION IN SALE OF CANAL LANDS BY ATTORNEY GENERAL.

Where canal lands are sold at public sale the participation of the attorney general in the making of the sale is not required or warranted by law, and his only function in such a transaction is as one of the commissioners of the sinking fund in fixing the terms of payment.

COLUMBUS, OHIO, November 29, 1915.

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

DEAR SIR:—I have your communication of November 18, 1915, which reads as follows:

> "Herewith I enclose duplicate copies of resolution providing for the sale of certain state lands therein described to Martin D. Kuhlke, of Akron, Ohio, for your approval. This land has been advertised and bids received, Mr. Kuhlke being the highest and only bidder therefor, his bid being $8,700.00, which is an excellent price for the land."

Section 13971 of the Appendix to the General Code of Ohio, which is the section relating to the sale of canal lands, reads as follows:

> "Any land or lands belonging to the state of Ohio, near or remote from the line of any canal in this state, that cannot be leased so as to

yield six per cent. on the valuation thereof, as determined by said commission, may be sold by said commission at not less than three-fourths of such valuation, upon such terms of payment as may be fixed by the commissioners of the sinking fund, and such land shall be offered for sale at public vendue, at the court house in the county where the same is situated, after at least thirty days' notice given by publication in two papers of opposite politics of general circulation in such county; provided, however, that said commission, together with the governor and attorney general of the state of Ohio, shall have power to sell any such land or lands which are appraised at five hundred dollars or less at private sale, at a price not less than the appraised value thereof; the governor to execute deeds to purchasers of any such lands, whether sold at public or private sale; provided, further, that such land or lands shall not be sold or offered for sale unless the said commission, board of public works, and the chief engineer of the board of public works shall have, by a majority vote in joint session, determined that such land or lands are not necessary or required for the use, maintenance, and operation of any of the canals of this state."

Under the terms of an act passed on March 6, 1913, and found in 103 O. L., 119, the word "commission," as found in the section of of the Appendix to the General Code quoted above, is to be read "superintendent of public works." It will be noted that under the terms of the section above quoted, the participation of the governor and attorney general in a sale of canal lands is limited to those cases in which the lands are appraised at $500.00 or less, and are sold at private sale. In the case now under consideration, the lands were appraised at more than $500.00 and were sold at public sale. It therefore follows that my participation in the making of the sale is not required or warranted by law. Where canal lands are sold at public sale, the only function to be discharged by the attorney general is as one of the commissioners of the sinking fund. It is required by section 13971 of the Appendix to the General Code, quoted above, that where canal lands are sold at public sale, the terms of payment are to be fixed by the commissioners of the sinking fund. Under section 8 of article VIII of the constitution of Ohio, the auditor of state, secretary of state and attorney general are the commissioners of the sinking fund. From the above it will appear that my participation in or approval of the sale made by you is not required or warranted by the statutes, but that before consummating the sale you should submit the terms of payment to the commissioners of the sinking fund, consisting of the auditor of state, secretary of state and myself, for approval.

For the reasons above stated I am returning the duplicate copies of resolution without my approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1047.

JOINT STOCK COMPANY FORMED UNDER THE LAWS OF NEW YORK STATE, NOT REQUIRED TO SECURE FROM SECRETARY OF STATE CERTIFICATE AUTHORIZING IT TO DO BUSINESS IN OHIO, BUT SUCH COMPANY IS REQUIRED TO COMPLY WITH SECTION 8099, G. C.—AMERICAN NEWS COMPANY.

The American News Company, a partnership or joint stock association, formed under the laws of the state of New York, is not a foreign corporation within the meaning of section 178, G. C., and is not required, as a prerequisite of transacting business in Ohio, to procure from the secretary of state a certificate that it has complied with the requirements of the law authorizing it to do business in Ohio; neither is the secretary of state authorized by the laws of Ohio to receive and file a certificate tendered to him by The American News Company.

COLUMBUS, OHIO, November 29, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of November 15th requesting my opinion as follows:

> "We are herewith enclosing a communication from Squire, Sanders and Dempsey, attorneys at law, Cleveland, Ohio, copy of articles of association of THE AMERICAN NEWS COMPANY, and certificate of The American News Company, a partnership or joint stock association, formed and existing under and by virtue of the laws of the state of New York, and beg to ask for your opinion upon the following questions:
>
> "1. Are there any provisions of the law in the state of Ohio authorizing the secretary of state to receive and file said certificate of THE AMERICAN NEWS COMPANY, a partnership or joint stock association of New York State?
>
> "2. If the laws of the state of Ohio authorize the secretary of state to receive and file the aforesaid certificate what fee should be charged by the secretary of state for the filing of same?"

The articles of association of The American News Company and the certificate enclosed with and referred to in your letter reveal that The American News Company is a joint stock association formed under the laws of the State of New York. Paragraph 2 of article I, chapter 29, of the consolidated laws of New York, defining a joint stock association, is as follows:

> "As used in this chapter the term 'joint stock association' includes every unincorporated joint stock association, company or enterprise, having written articles of association and capital stock divided into shares, *but does not include a corporation,* and the term 'stock holder' includes every member of such association."

In Hibbs v. Brison, 112 App. Div., 214, affirmed in 190 N. Y., 167 in discussing the distinction between joint stock associations and corporations says:

> "Joint stock associations are in all essential aspects, except the personal liability of stockholders, like corporations, the difference is that ordinarily

the creditors of a corporation may only have recourse to corporation property while the creditors of a joint stock association may cover all the stockholders, without exhausting his remedy against the association."

See also People ex rel. Winchester v. Coleman, 133 N. Y., 279.

In McFadden et al., v. Leeks et al., 48 O. S., 513, the court, at page 526 of the opinion, makes the following distinction:

"The unincorporated association known as the Union Pork House Company is to be regarded as merely a co-partnership, and subject to the rules governing that branch of the law. It did not lose its real nature as a partnership because certain of its members were constituted directors, and its members were called stockholders, and a constitution and by-laws were adopted, and the number of its members was large. It might be deemed expedient to appoint directors to act as the special agents for managing the affairs of the company instead of leaving each member, as in an ordinary partnership, to act as a general agent for the transaction of business in the ordinary way. The company, too, might be a partnership, although its capital stock be divided into shares, which, by the articles of association, are made transferable on the books of the company."

The above language very aptly describes the characteristics of The American News Company. It has a capital stock divided into shares, and a considerable number of stockholders. Its business is managed and operated by directors elected by stockholders, and it possesses many of the other attributes of a corporation, yet it is not a corporation and its so-called stockholders are individually liable to the creditors of the association.

Section 178 of the General Code, requires a foreign corporation for profit, as a prerequisite of transacting business in Ohio, to procure from the secretary of state:

* * * "a certificate that it has complied with the requirements of law to authorize it to do business in this state, and that the business of such corporation to be transacted in this state is such as may be lawfully carried on by a corporation organized under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kind of business exclusively. * *"

Section 179 of the General Code, requires the corporation, in order to secure such certificate, to first file with the secretary of state a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal setting forth the detailed information required by said section.

The language of the two sections just referred to indicates that they were intended to apply exclusively to corporations, and I know of no provision of the General Code of Ohio which requires a foreign stock association organized under the laws of a sister state to secure from the secretary of state a certificate authorizing it to do business in Ohio, or which authorizes the secretary of state to file and record any statement made by such joint stock association.

In Commonwealth v. Adams Express Company, 123 Ky., 720, (97 S. W. Rep., 386) the court held that:

"An unincorporated express company need not obtain a permit from the state under a statute requiring foreign corporations to do so."

In this case the Adams Express Company, a joint stock association created under the laws of New York, was indicted for doing business in Kentucky without having filed with the secretary of state the statement required by section 571 Ky. St., of 1903. The Kentucky statute upon which the action was based is, in part, as follows:

> "All corporations, except foreign insurance companies formed under the laws of this or any other state, and carrying on any business in this state, shall at all times have one or more known places of business in this state, and an authorized agent or agents thereat upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this state, until it shall have filed in the office of the secretary of state a statement, signed by its president or secretary, giving the location of its office or offices in this state, and the name or names of its agent or agents thereat upon whom process can be served; and when any change is made in location of its office or offices, or in its agent or agents, it shall at once file with the secretary of state a statement of such change * * * and if any corporation fails to comply with the requirements of this section such corporation or any agent or employe of such corporation, who shall transact, carry on or conduct any business in this state for it shall be severally guilty of a misdemeanor * * *."

The court held that the Adams Express Company was not a corporation within the meaning of the language of the statute above quoted, although section 457 of the Kentucky statutes, of 1903, contained a provision that "* * * the words 'corporation' and 'company' may be construed as including any corporation, company, person, persons, partnership, joint stock company or association."

I therefore advise you that you are not authorized by the laws of Ohio to receive and file said certificates of The American News Company referred to in your letter. The answer to your first question is also an answer to your second question.

I think it proper here to suggest, however, that before The American News Company can undertake to carry on its business in Ohio it should comply with the requirements of section 8099 of the General Code, which is as follows:

> "Except as otherwise provided in the next following section, every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners therein, must file with the clerk of the common pleas court of the county in which its principal office or place of business is situated, a certificate to be indexed by him, stating the names in full of all the members of the partnership and their places of residence."

See also the provisions of section 8101 and 8102 of the General Code, particularly applicable to joint stock companies. The provisions of the last two sections of the General Code, relative to joint stock associations, further indicate that it was not the legislative intent to treat them as corporations.

I am returning herewith the letter addressed to you by Messrs. Squire, Sanders and Dempsey, two documents addressed to the secretary of state, and a printed copy of the articles of association which were enclosed with your letter.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1048.

CASS HIGHWAY LAW—COUNTY HIGHWAY SUPERINTENDENT—STATE NOT REQUIRED TO PAY ANY PORTION OF HIS EXPENSES ON STATE OR COUNTY WORK.

The state is not required to pay any portion of the expenses of a county highway superintendent even when that official is employed on state work.

COLUMBUS, OHIO, November 29, 1915.

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

DEAR SIR:—I have your communication of November 26, 1915, which reads as follows:

> "I respectfully request an opinion from your office as to whether or not the state highway department, in addition to paying one-fifth of the total salaries of the county highway superintendents under the Cass highway law, is required to pay any portion of the expenses of said county highway superintendents when placed in charge of state work by the state highway department."

In answering your inquiry I am not unmindful of the provision of section 212 of the Cass highway law, section 1219, G. C., to the effect that the expense of surveys and plans for state work, when made by the county highway superintendent, shall be equally divided between the state and county, and that the expense of supervision and inspection of state work when under the control of the county highway superintendent shall be apportioned between the state and the county on the same basis as the cost of construction. I am of the opinion, however, that the controlling provision is that part of section 138 of the Cass highway law, section 7181, G. C., which reads as follows:

> "In addition thereto, the county highway superintendent and his assistant, when on official business, shall be paid out of the county treasury, their actual, necessary traveling expenses, including livery, board and lodging."

Section 139 of the Cass highway law, section 7182, G. C., provides explicitly that the state shall pay one-fifth of the salary of the county surveyor when that official has charge of state work, but no place in the act is there found any provision for a division between the state and county of the expenses of the county highway superintendent. On the contrary, as pointed out above, the positive declaration of section 138 of the act, is that the expenses of the county highway superintendent shall be paid out of the county treasury.

It must be borne in mind that the assistants referred to in section 138 of the act, and whose expenses are to be paid out of the county treasury, are of an entirely different class from the assistants, superintendents and inspectors referred to in section 212. The assistants referred to in section 138 are such as are needed upon county and township work, while those referred to in section 212 are the assistants required upon state work. This distinction is made clear by the difference in the method of appointment and compensation as to the two classes of assistants. The expense referred to in section 212 of the act and which is to be divided between the state and county is evidently the compensation and expenses of the assistants, superintendents and inspectors appointed under that section.

In view of the above consideration, it is my opinion, in answer to your specific question, that the state is not required to pay any portion of the expenses of a county highway superintendent even when that official is employed on state work. In order that this opinion may not be misunderstood, however, it should be added that if assistants are appointed upon state work under the provisions of section 212 of the Cass highway law, section 1219, G. C., then not only the compensation but also the expenses of such assistants are to be divided between the state and the county. If such assistants are employed in the making of surveys and plans, their compensation and expenses are to be equally divided, and if employed upon construction work their compensation and expenses are to be divided on the same basis as the cost of construction.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1049.

PHYSICIANS' LIABILITY INSURANCE—RIGHT OF FOREIGN INSURANCE COMPANY TO WRITE SAME—MALPRACTICE.

1. *Physicians' liability insurance is authorized under paragraph 2 of section* 9510, *G. C., and may be written in Ohio by a company organized or admitted to make the several kinds of insurance enumerated in said paragraph.*

2. *Section* 665, *G. C., is a limitation upon the business of insurance and no insurance can be made in Ohio, except such as is expressly authorized by Ohio law.*

3. *Physicians' liability insurance is not authorized by the provision of paragraph 2, section* 9510, *G. C., which confers the right "to make insurance on the health of individuals and against personal injury."*

4. *The provision contained in paragraph 2 of the policy form under consideration "to defend in the name and on behalf of the assured any suit brought against the assured" being merely incidental to the main contract of insurance may be embodied in the policy without conflicting with the principle laid down in the case of State v. Laylin,* 73 *O. S.,* 90.

COLUMBUS, OHIO, November 29, 1915.

HON. FRANK TAGGART, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I have your letter of October 22, 1915, requesting my opinion as follows:

> "On July 20, 1914, the attorney general of Ohio gave to the Hon. Robert Small, superintendent of insurance, an opinion as to the right of liability companies to write physicians' liability policies. The copy of the policy which was under consideration at that time contained the following provisions:
>
> "'1. TO INDEMNIFY the person named in statement No. 1 of the schedule of warranties and herein called the assured, AGAINST LOSS FROM THE LIABILITY IMPOSED BY LAW UPON THE ASSURED for damages on account of bodily injuries or death, suffered by any person or persons in consequence of any malpractice, error or mistake—(a) of the

assured in the practice of his profession during the term of this policy; (b) of any assistant of the assured while assisting the assured in the administration of medical or surgical treatment during the said term;

"'2. TO DEFEND in the name and on behalf of the assured, any suit brought against the assured to enforce a claim, whether groundless or not, for damages on account of bodily injury or death suffered, or alleged to have been suffered by any person or persons in consequence of any malpractice, error or mistake—(a) of the assured in the practice of his profession during the term of this policy; (b) by any assistant of the assured while assisting the assured in the administration of medical or surgical treatment during the said term;'

"Its limit of indemnity is set out in paragraph one of that part thereof designated, 'Subject to the following conditions,' and is as follows:

"'1. The company's liability for loss from any malpractice, error or mistake resulting in the bodily injuries to or in the death of one person is limited to FIVE THOUSAND DOLLARS, and, subject to the same limit for each person, the company's total liability under this policy is limited to FIFTEEN THOUSAND DOLLARS. The expenses incurred by the company in defending any suit, including the interest on any verdict or judgment and any costs taxed against the assured, will be paid by the company irrespective of the limit expressed above.'

"The company which proposed to issue said policy was licensed by this department for the years 1911, 1912 and 1913, as follows:

"'Its appropriate business of making insurance on the health of individuals and against personal injury, disablement or death, resulting from traveling or general accidents by land and water; making insurance against loss or damage resulting from accident to property from cause other than fire or lightning, guaranteeing the fidelity of persons holding places of public or private trust, who may be required to or do, in their trust capacity, receive, hold, control, disburse public or private moneys or property; guaranteeing the performance of contracts other than insurance policies, and executing and guaranteeing bonds and undertakings required or permitted in all actions or proceedings, or by law allowed; making insurance to indemnify employers against loss or damage for personal injury or death resulting from accidents to employes or persons other than employes, and to indemnify persons and corporations other than employes against loss or damage for personal injury or death resulting from accidents to other persons or corporations, as prescribed in section 9510, paragraph second, General Code, in accordance with law, during the current year.'

"It also appears from that opinion that the company proposing to write this class of insurance was by its charter and the laws of the state of its origin authorized to write physician's liability insurance.

"The honorable attorney general, in his answer to the superintendent of insurance, held that the laws of Ohio do not authorize this class of insurance, and further answered the question of the superintendent of insurance that section 9510 does not affirmatively provide for such insurance.

"On August 3, 1915, Mr. M. J. Hanley, general agent for the General Accident, Fire and Life Assurance Corporation, Limited, requested of the insurance department a further consideration of the ruling based on the opinion of the attorney general of the date of July 20, 1914. The policy of this last named insurance corporation contains the following provision:

"'Does hereby agree (1) to indemnify the person named in statement

numbered 1 of the schedule of warranties and herein called the assured, AGAINST LOSS FROM THE LIABILITY IMPOSED BY LAW UPON THE ASSURED for damages on account of bodily injuries or death, suffered by any person or persons in consequence of any malpractice, error or mistake—(a) of the assured in the practice of his profession during the term of this policy; (b) of any assistant of the assured while assisting the assured in the administration of medical or surgical treatment during the said term;

"'2. To defend in the name and on behalf of the assured any suit brought against the assured to enforce a claim, whether groundless or not, for damages on account of bodily injuries or death suffered, or alleged to have been suffered, by any person or persons in consequence of any malparctice, error or mistake—(a) of the assured in the practice of his profession during the term of this policy; (b) of any assistant of the assured while assisting the assured in the administration of medical or surgical treatment during the said term;

"'SUBJECT TO THE FOLLOWING CONDITIONS:

"'1. The corporation's liability for loss from any malpractice, error or mistake resulting in bodily injuries to or in the death of one person is limited to FIVE THOUSAND DOLLARS, and, subject to the same limit for each person, the corporation's total liability under this policy is limited to FIFTEEN THOUSAND DOLLARS. The expenses incurred by the corporation in defending any suit, including the interest on any verdict or judgment and any costs taxed against the assured, will be paid by the corporation irrespective of the limit expressed above.'

"This last named corporation is authorized to do physician's liability insurance by its charter and by the laws of the country of its incorporation.

"Upon taking up this question, it was the ruling of this department that this class of physicians' liability insurance could not be written, basing the ruling upon the opinion of the attorney general as formerly given to this department.

"Upon the ruling of this department being made public, the physicians of the state in great numbers, together with the liability companies writing this class of insurance, again requested a reconsideration of the whole matter, and I beg to ask your opinion and direction on the questions involved, in order that I may again announce what is the law respecting this class of insurance.

"I am desirous of knowing whether policies containing the conditions and provisions above quoted may be written by corporations organized in other states and countries, whose charters and the laws of the states and countries where incorporated permit physician's liability insurance—can such policies be written in the state of Ohio under what is known as the rule of comity between states?

"Second, can this class of insurance be written under sections 9510 and 665 of the General Code of Ohio?

"Your opinion in this matter is respectfully requested."

As stated in your letter, my predecessor, Hon. Timothy S. Hogan, on July 20, 1914, rendered an opinion to Hon. Robert M. Small, the then superintendent of insurance of Ohio, in which he held that the laws of Ohio do not authorize insurance companies to issue policies agreeing to indemnify and defend physicians against

loss from liability imposed by law for damages on account of bodily injury or death suffered by any person or persons in consequence of any malpractice, error or mistake, of such physician or his assistants.

By reason of the former opinion referred to, I have given the questions submitted by you more than usual time and consideration, and in arriving at a conclusion I have had before me and carefully read the briefs submitted by Hon. Timothy S. Hogan, representing The General Accident, Fire and Life Assurance Corporation, wherein the author, after a more careful and complete personal investigation of the law, reaches and unequivocally expresses a conclusion contrary to that announced by him while attorney general of Ohio; also two briefs submitted by Hon. A. I. Vorys,—one on behalf of the United States Casualty Company of New York, and the other for The Aetna Life Insurance Company, of Hartford, Conn.; also the brief of Hon. Thomas L. Pogue, representing various organizations of physicians and surgeons interested in securing for themselves the protection afforded by this character of insurance.

I have been very materially helped in my investigation by the careful and exhaustive manner in which the question has been discussed by the authors of the briefs just referred to, and I desire to acknowledge my obligation to them.

I will first consider your second question, which is as follows:

> "Can this class of insurance (meaning physicians' liability insurance) be written under sections 9510 and 665 of the General Code of Ohio?"

These two sections, so far as applicable, are as follows:

> "Section 9510. A company may be organized or admitted under this chapter to * * *
>
> "2. Make insurance on the health of individuals and against personal injury, disablement or death, resulting from traveling or general accidents by land and water; make insurance against loss or damage resulting from accident to property, from cause other than fire or lightning; guarantee the fidelity of persons holding places of public or private trust, who are required to, or, in their trust capacity do receive, hold, control, disburse public or private moneys or property; guarantee the performance of contracts other than insurance policies, and execute and guarantee bonds and undertakings required or permitted in all actions or proceedings, or by law allowed; make insurance to indemnify employers against loss or damage for personal injury or death resulting from accidents to employes or persons other than employes and to indemnify persons and corporations other than employers against loss or damage for personal injury or death resulting from accidents to other persons or corporations. But a company of another state, territory, district or country admitted to transact the business of indemnifying employers and others, in addition to any other deposit required by other laws of this state, shall deposit with the superintendent of insurance for the benefit and security of all its policy holders, fifty thousand dollars, * * *
>
> "Section 665. No company, corporation, or association, whether organized in this state or elsewhere, shall engage either directly or indirectly in this state in the business of insurance, or enter into any contracts substantially amounting to insurance, or in any manner aid therein, or engage in the business of guaranteeing against liability, loss or damage, unless it is expressly authorized by the laws of this state, and the laws regulating it and applicable thereto, have been complied with."

The right to make physicians' liability insurance in Ohio is claimed under the following provisions of section 9510 of the General Code: "to indemnify persons and corporations other than employers against loss or damage for personal injury or death resulting from accidents to other persons or corporations."

The answer to your second question, to my mind, depends entirely upon the proper interpretation of the word "accidents" as used in the above language. My predecessor, in his opinion of July 20, 1914, referred to in your letter, wherein he had under consideration a sample copy of insurance policy identical in language with the sample policy you have submitted to me, without entering into any discussion or citing authority therefor, lays down the bare statement that

> "the contingency insured against in the policy submitted to me cannot be classified as an accident,"

and from this statement or hypothesis the conclusion is drawn that section 9510 does not authorize physicians' liability insurance.

This conclusion doubtless logically follows the stated premise, but I am unable to agree with the learned writer of the opinion upon the premise adopted by him, and I take it from the brief filed that he has now reached a contrary opinion.

I believe that the word "accidents" as used in the statutes should receive a liberal interpretation and be given a much wider meaning than that accredited to it in the opinion of my predecessor. Whether or not an occurrence resulting in injury to another is an accident within the meaning of the statutes depends upon the relationship of the occurrence to the person injured rather than to the person from whose act or neglect the injury resulted. If the narrower meaning of the word is adopted, then the provision of section 9510, above quoted, under which is claimed the right to make physicians' liability insurance is reduced to an absurdity. If the word "accidents" does not include occurrences which result from negligence or failure to comply with lawful requirements, then the legislature has enacted that an insurance company may insure a physician against loss or damage for personal injury or death of his patients, only in the event no liability is imposed upon him by law, for if the physician is not negligent and has not failed to comply with the lawful regulations and requirements he cannot be held to answer in damages for the death or injury of a patient. In other words, his negligence or failure to comply with the lawful requirements is the basis of his liability in damages. Therefore, insurance would be useless to him unless he can be indemnified against liability for injuries resulting from his mistake, negligence or failure to comply with lawful requirements.

The interpretation which I have given to the word "accidents" is sustained by numerous authorities.

> "The equitable definition of the term 'accident' includes not only inevitable casualty and such as are caused by the act of God, but also those which arise from unforeseen occurrences, misfortune, losses, and *acts or omissions of other persons* without fault, negligence or misconduct on the part of the person injured."
>
> (Bostwick v. Steller, 35 Conn., 198.)
>
> "An act done deliberately and wilfully by a third person may be an accident from the point of view of the employer and employe."
>
> Keller v. District School, L. T. J., 605.)
>
> (Anderson v. Balfour, 2 I. R., 497.)
>
> (Nesbitt v. Wayne, 3 B. W. C. C., 507.)

Defining the word "accident":

"A casualty, something out of the usual course of events and which happens suddenly and unexpectedly and without design on the part of the person injured."

(Richards v. Travelers Ins. Co., 89 Cal., 170.)

(Price v. Occidental Life Ins. Co., 147 Pac., 1175.)

"An event happening without any human agency, or if happening through human agency, an event which under the circumstances is unusual and not expected by the person to whom it happened."

(McGlinchy v. Fidelity & Casualty Co., 80 Mo., 251.)

I quote from the opinion of the attorney general of Massachusetts, published in the Investigator of August 10, 1901, which has been cited and followed by the attorney general of the state of New York and of Minnesota:

"* * * In general, an accident may be said to be the operation of chance. As the word is more commonly used, it signifies an undesirable or unfortunate happening designed to harm or injure, but the word as used in the statute is to be construed in accordance with its surroundings. Throughout the insurance statutes a distinction is made between death and injury resulting from disease, and those which are the result of what are ordinarily called casualties or accidents. Mere disease, therefore, is not an accident. An aggravation, however, of the disease caused by no fault of the patient but by a mistake, inadvertence or error of another may properly be termed an accident so far as the patient is concerned. * * *

"Bearing this consideration in mind I see no good reason to doubt that whenever a patient receives an injury, the proximate cause of which is the negligence of the physician, he may not be properly said to have been injured by accident as an employe who is thrown to the ground by a staging defective in consequence of the negligence of his employer. The same is true, in my judgment, of fatal injuries caused under the same circumstances. If a man receives a wound not of itself fatal, but which causes death by what is commonly called blood-poisoning, this would be death by accident. If a patient is treated by a physician who neglects to use antiseptic precaution and death results from such neglect it is still an accident so far as the patient is concerned, and one for which the physician may be liable.

"An employer whose neglect causes injury to his employe may be held to pay damages therefor either at common law or by some statute. He may insure himself against such liability.

"A physician whose negligence causes injury to his patient that would not have happened to him if he had been skillful may be made to pay the damages which resulted. I see no difference between insuring the physician under such circumstances and the employer whose negligence made him liable to his employe.

"It is not necessary to consider whether there may not be casualty or liability of physicians for malpractice which could not be insured against under the statutes quoted. It is sufficient that some cases where physicians are held liable at common law come within the meaning of the statute as I interpret it and therefore the form of policy cannot be pronounced illegal."

The provision of the Massachusetts statute, in construing which the attorney general of Massachusetts used the language above quoted is:

> "To insure any person, firm or corporation against loss or damage on account of bodily injury or death by accident of any person for which loss or damage said person, firm or corporation is responsible."

It will be observed that in the Massachusetts statute, as well as in the Ohio statute, the determination of whether or not physician's liability insurance could be written depended upon the interpretation to be given the word "accidents." This was also true in the New York and Minnesota statutes, which have been construed to authorize physicians' liability insurance.

Employers' liability insurance, as written for many years prior to the passage of the workmen's compensation act, and as since written to a more limited extent, was made under the authority of the following language in paragraph 2 of section 9510 of the General Code, above quoted:

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

The statutory authorization for employers' liability insurance is based upon a liberal construction of the word "accidents" as therein used, and unless the word "accidents" be interpreted to include occurrences causing injury to employes which occurrences are due to the negligence or failure to comply with lawful requirements upon the part of the employer, then employers' liability insurance is not and has never been authorized in Ohio. There is no reason why the word "accidents" as used in one line of the statute should be given a narrower meaning than is given to it in another line of the same sentence of the statute. It seems impossible to distinguish between the character of liability of an employer and that of a physician. Incident to the employers' activities is the possible injury to his employe, likewise to the activities of the physician is the possible injury to his patient.

The form of employers' liability insurance which has been written for many years has never been questioned, and recent legislation in the workmen's compensation law, one of the purposes of which is to relieve the employer from liability, shows beyond question that injury resulting from negligence or carelessness of an employer are recognized as accidental injuries, at least for the purpose of determining whether or not the employe is entitled to compensation from the state insurance fund, which is paid and accepted in lieu of enforcing the liability of the employer.

Under the authorities above cited and the language of paragraph 2 of section 9510 of the General Code, I am of the opinion that physicians' liability insurance may be written by insurance companies organized or admitted to do the class of insurance indicated by paragraph 2 of the said section.

I have not considered and deem it here unnecessary to discuss to what extent a physician may protect himself from financial loss through liability insurance. The courts have uniformly held that such insurance is in general consistent with sound public policy. Considerations of public policy would doubtless deny the right to make or recover upon a policy of insurance purporting to indemnify a physician against liability resulting from his criminal act or misconduct.

In discussing the meaning of paragraph 2 of section 9510 of the General Code, the authors of the several briefs submitted have strongly urged that physicians' liability insurance is authorized by the language of the first line of paragraph 2 of said section to "make insurance on the health of individuals. * * *"

I am unable to agree with the learned counsel in this interpretation of the language just quoted. It seems clear to me that it was the legislative intent in the use of this language to authorize insurance upon the health of certain ascertained individuals; whereas physicians' liability insurance undertakes to indemnify the assured against loss which may result to him by reason of accident to or failure of the health of individuals whose identity is not and cannot be ascertained at the time the contract is made. I think this construction is fortified by the fact that later in the same paragraph of this section liability insurance is expressly authorized.

In view of my conclusion as to the construction of paragraph 2 of section 9510 of the General Code, the provisions of section 665 of the General Code, offer no obstacle to the making of physicians' liability insurance, because section 665 does not purport to prohibit the making of insurance which is authorized by Ohio laws, but only makes it unlawful in Ohio for any company, corporation or association to make any kind of insurance which is not expressly authorized by Ohio laws.

In construing the language of section 665 of the General Code, supra, Mr. Hogan, in the brief submitted by him, asserts and strongly maintains that the provisions of the section apply not to the subject-matter of the insurance but to corporations or associations engaged therein. In other words, that the section does not require an express authorization or the particular kind of insurance, but only that the company, corporation or association engaged therein must be expressly authorized and must comply with all the laws applicable to and regulatory of it. He arrives at this conclusion by construing the pronoun "it" as referring to and having as its antecedent not the "business of insurance" but "the company, corporation or association engaged in such business." Upon this premise he argues that since physicians' liability insurance is not expressly prohibited by law, that it may therefore be written under the rule of comity by any foreign company authorized, under its charter and the laws of the state where it is incorporated, to make such insurance, if said company has been admitted and licensed to do business in Ohio.

I cannot concur in this interpretation of section 665, General Code. To my mind, the pronoun "it" clearly has as its antecedent and refers to "the business of insurance." This meaning, I think, is made clear by referring to the language of section 289, Revised Statutes of 1908, from which section 665, General Code, was taken. The language of section 289, Revised Statutes, as originally enacted in 69 O. L., 32, was as follows:

> * * * "it shall be unlawful for any company, corporation or association, whether organized in this state or elsewhere, either directly or indirectly, to engage in the business of insurance, or to enter into any contract substantially amounting to insurance, or in any manner to aid therein, in this state, without first having complied with all the provisions of this act."

On March 5, 1902, the then superintendent of insurance in his annual report, at page 7, made the following recommendation relative to amending the provisions of section 289:

> "Section 289 declares it 'unlawful for any company, corporation or association * * * to engage in the business of insurance, or to enter into any contracts substantially amounting to insurance, or in any manner to aid therein, in this state, without first having complied with all the provisions of this chapter.

"The chapter referred to is Chapter VIII, Title III, Division II, Part First of the Revised Statutes. This chapter contains general provisions, applying to some insurance companies.

"Chapters X and XI of Title II, Division II, Part Second, contains many important regulations, and authorize insurance not subject to this chapter VIII. It is recommended that from section No. 289 the following be eliminated, 'without first having complied with all the provisions of this chapter,' and that the following be substituted therefor, 'unless the same is expressly authorized by the statutes of this state, and such statutes and all laws regulating and applicable to such insurance or contracts have been complied with.'"

On May 12, 1902, 95 O. L., 553, said section 289 was amended by the legislature in the manner suggested by the superintendent of insurance as follows:

* * * "and it is unlawful for any company, corporation or association whether organized in this state or elsewhere, either directly or indirectly, to engage in the business of insurance, or to enter into any contracts substantially amounting to insurance, or in any manner to aid therein, in this state, or to engage in the business of guaranteeing against liability, loss or damage unless the *same* is expressly authorized by the statutes of this state, and such statutes and all the laws regulating the *same* * * * have been complied with; * * *"

There is nothing to indicate that the legislature in adopting the report of the codifying commission intended to change the meaning of the language contained in section 289 of the Revised Statutes; and if there is any ambiguity in the language of the revision it is a well settled principle of law that reference will be had to the section of the Revised Statutes from which it was taken, in order to ascertain its proper interpretation. It seems clear, therefore, that it was the legislative intent in the adoption of section 665, General Code, to prohibit the making of insurance contracts of any kind in Ohio unless that particular kind of insurance is expressly authorized by law. It follows that insurance cannot be written in Ohio under any rule of comity, because no insurance can be made except such as is expressly authorized by law (by which is meant legislative enactment), and if expressly authorized there is no necessity or occasion to resort to the rule of comity.

Objection has been raised to the making of the form of insurance set forth in the policy form submitted in your letter on account of the agreement or covenant contained in paragraph 2 thereof:

"2. To defend in the name and on behalf of the assured any suit brought against the assured to enforce a claim whether groundless or not * * *"

this objection being based upon the decision of the supreme court of Ohio in the case of State v. Laylin, 73 O. S., 90, the syllabus of which is as follows:

"1. A foreign corporation, the sole business of which is authorized by its charter, is that of defending physicians and surgeons against civil prosecution for malpractice, which, in the prosecution and conduct of said business, issues and sells to members of the medical profession a contract whereby it undertakes and agrees to defend the holder of said contract against any suit for malpractice that may be brought against him during

the term therein specified, but does not assume, or agree to assume or pay, any judgment that shall be rendered against him in such suit, is not engaged in the business of insurance, nor is the contract so issued and sold an insurance contract.

"2. But a foreign corporation created for the purpose of engaging in and carrying on such business, is not entitled to have or receive from the secretary of state of the state of Ohio, a certificate authorizing it to transact such business in this state, for the reason that the business proposed is professional business, and as such is expressly prohibited to corporations by section 3225 of the Revised Statutes of Ohio."

It will be observed that the court found from the evidence in the above case that the sole authorized business of the physicians' defense company was that of defending physicians, that the company neither paid nor agreed to pay any indemnity whatever, and that the contract written by it was not a contract of insurance, but a contract for professional services and prohibited by the statutes.

The policy form submitted in your letter, however, is a contract of indemnity wherein the insurer agreed to indemnify the assured under certain conditions and limitations to a stipulated amount. As incidental to such contract of indemnity, the insurer agrees to defend "in the name and on behalf of the assured any suit brought against the assured." In the insurance world it is a well recognized fact that these provisions to defend are inserted as much for the benefit and protection of the insurance company as for the benefit of the assured. By virtue of such provision the insurance company may protect itself from the payment of indemnity resulting from the failure of the assured to make proper defense in an action brought against him. This provision in the policy form submitted is clearly incidental to the main contract of indemnity, and in no manner impairs its essentials as an insurance contract. Since the policy form under consideration is a contract for indemnity and is therefore insurance, an agreement of the insurer to defend the assured is merely incidental, and the principle laid down in the case of State v. Laylin, supra, is not applicable.

Specifically answering the several questions asked by you, I am of the opinion:

1. That physicians' liability insurance of the class specified by you is authorized by the language of paragraph 2 of section 9510 of the General Code, and may be written in Ohio by any company organized or admitted to make the several kinds of insurance enumerated in said paragraph.

2. Section 665 of the General Code, is a limitation upon the business of insurance, and no insurance can be made in Ohio unless that particular kind of insurance is expressly authorized by Ohio laws. The fact that a foreign insurance company, admitted to do business in Ohio, is by its charter and the laws of its home state authorized to make a particular kind of insurance will not authorize such company to make that kind of insurance in Ohio unless it is expressly authorized by Ohio law.

3. Physicians' liability insurance is not authorized by the provisions of paragraph 2 of section 9510 of the General Code, which confers the right "to make insurance on the health of individuals and against personal injury."

4. The provision contained in paragraph 2 of the policy form quoted in your letter "to defend in the name and on behalf of the assured any suit brought against the assured" being merely incidental to the main contract of indemnity may be embodied in the policy without conflicting with the principle laid down in the case of State v. Laylin, 73 O. S., 90.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1050.

FOREIGN INSURANCE COMPANY AUTHORIZED BY ITS CHARTER AND LAWS OF STATE OF ITS INCORPORATION TO WRITE PHYSICIANS' LIABILITY INSURANCE AND WHICH IS ADMITTED TO DO BUSINESS IN OHIO UNDER SECTION 9385, G. C., MAY MAKE PHYSICIANS' LIABILITY INSURANCE CONTRACTS IN THIS STATE —SUCH COMPANY REQUIRED TO DEPOSIT $50,000 IN BONDS AS PRESCRIBED BY SECTION 9510, G. C.—THE AETNA LIFE INSURANCE COMPANY.

The Aetna Life Insurance Company of Hartford, Connecticut, having authority under its charter and the laws of Connecticut to make physicians' liability insurance, and admitted to do business in Ohio primarily under section 9385, *G. C., may, under the provisions of said section, make physicians' liability insurance contracts in Ohio, but must make the* $50,000 *deposit with the superintendent of insurance as prescribed in the latter part of paragraph* 2 *of section* 9510, *G. C.*

COLUMBUS, OHIO, November 29, 1915.

HON. FRANK TAGGART, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of November 19, 1915, requesting my opinion as follows:

> "The Aetna Insurance Company claims the right to write physicians' liability insurance under and by virtue of section 9385. Its charter and the laws of the state of its origin permit it to do this class of business.
>
> "I am requesting you to consider this question in conjunction with the right of companies to issue physicians' liability insurance, which has heretofore been submitted to you. I do this in order to save the necessity of submitting again to you the question of physicians' liability from a different angle, and in order that the entire question may be concluded by your opinion."

As my opinion holding that physicians' liability insurance is authorized by paragraph 2 of section 9510 of the General Code, and may be written in Ohio by a company organized or admitted to make the several kinds of insurance therein enumerated is already prepared, I am addressing my reply to the question submitted in your letter just quoted as a separate opinion, which may be considered as supplementary to the general opinion on physicians' liability insurance.

From the facts stated in your letter and in the brief submitted by Honorable A. I. Vorys, representing the Aetna Life Insurance Company, it appears that this company is a foreign life insurance company organized under the laws of Connecticut, and that its charter and the laws of Connecticut permit it to make liability insurance.

The Aetna Life Insurance Company is licensed to do business in Ohio, and secures its right to transact its business primarily under section 9385 of the General Code, which is a part of the chapter relating to life insurance, whereas section 9510 of the General Code, under which I have heretofore held that physicians' liability insurance may be written in Ohio, is a part of the chapter relating to insurance upon property and against certain contingencies. The Aetna Life Insurance Company claims the right to make physicians' liability insurance under section 9385 of the General Code, which is as follows:

> "No company, organized under the laws of this state, shall undertake any business or risk, except as herein provided, and no company, partnership, or

association, organized or incorporated by act of congress, or under the laws of this or any other state of the United States, or by any foreign government, transacting the business of life insurance in this state, shall be permitted or allowed to take any kind of risks, except those connected with, or appertaining to making insurance on life or against accidents to persons or sickness, temporary or permanent physicial disability, and granting, purchasing and disposing of annuities; nor shall the business of life insurance, or life and accident insurance in this state, be in any wise conducted or transacted by any company, partnership or association which in this state, or any other state or country, make insurance on marine, fire, inland, or any other risk, or does a banking or any other kind of business in connection with insurance."

While the language of section 9385 of the General Code, above quoted, is that of regulation and restriction rather than of affirmative grant, nevertheless by clear implication it recognizes the right, and would seem to confer upon and invest in companies having charter authority, such as the Aetna Life Insurance Company, with full authority to make insurance and take risks in anywise connected with or appertaining to accidents to or sickness of persons.

By analogy from the principle announced and the reasoning expressed by the supreme court in the case of State ex rel., v. The Aetna Life Insurance Company 69 O. S., 317, I am of the opinion that physicians' liability insurance may be written in Ohio under section 9385 of the General Code by the Aetna Life Insurance Company. In that case the court held that a foreign insurance company (which was the Aetna Life Insurance Company, of Hartford, Conn.), licensed to do business in Ohio, and whose charter conferred upon it authority to make employers' liability insurance, was privileged to write such insurance in Ohio under the language of section 9385 of the General Code:

"to make insurance and take risks connected with and appertaining to accidents to persons."

At page 323, the court, in the opinion, say:

"That this kind of insurance, employers' liability insurance, may from its very nature appropriately be classified with and peculiarly belongs to what is commonly known and designated as accident insurance must, we think, be conceded, inasmuch as such insurance has for its primary purpose indemnification against the effects of *accidents* resulting in bodily injury or death. It is said by Barker, J., in Employers' Assurance Corporation v. Merrill, 155 Mass., 406: 'In one sense, there can be no doubt that an employers' liability policy is accident insurance. Such policies cover accidents to others than the assured, but the assured must stand in such a relation to the person accidentally injured or killed as to be legally liable for the result of the accident, and it is only an accident causing bodily injury or death which creates a right to the insurance.' * * *"

Again, at page 325, as follows:

"However, a consideration of the legislation in Ohio touching the rights of life, and life and accident insurance companies, organized under the laws of another state and doing business in this state, will show that it has not been, and is not the policy of our law to discourage or prohibit such companies from engaging in or doing an accident insurance business in this state; nor can there be found any statutory inhibition whereby the right of such com-

> panies to insure against accidents is limited or restricted to risks by accident to the person assured, but on the contrary the right conferred is to take such risks as are in anywise connected with or appertaining to accident to persons. It follows, therefore, that so long as the defendant company confines itself to insurance against accidents to persons, and its contract is one to indemnify the assured against loss by accidental injury to a person in whom the assured has an insurable interest because legally liable for the results of such accident, that such risk is clearly one 'connected with and appertaining to accidents to persons' and is therefore within the legitimate scope of the powers and authority possessed by such company by virtue of section 3596, Revised Statutes."

If, therefore, as decided in the above case, the Aetna Life Insurance Company may make employers' liability insurance under authority of the language in section 9385 of the General Code "connected with or appertaining to the making of insurance on life or against accidents to persons, or sickness, * * *" I cannot escape the conclusion that the same company may make physicians' liability insurance under authority of the same language, because his liability is precisely the same kind of a liability as that of the employer.

Although, as above stated, I am convinced that the Aetna Life Insurance Company may make physicians' liability insurance under authority of section 9385 of the General Code, I cannot subscribe to the further claim which is made by counsel for the Aetna Life Insurance Company, and which is perhaps the company's real purpose in requesting this opinion, that it may make physicians' liability insurance in Ohio without the necessity of first depositing with the superintendent of insurance bonds to the amount of fifty thousand dollars of the kind enumerated and required in the latter part of paragraph 2 of section 9510 of the General Code. The language pertinent is as follows:

> "* * * But a company of another state, territory, district or country admitted to transact the business of indemnifying employers and others, *in addition to any other deposits* required by other laws of this state, shall deposit with the superintendent of insurance for the benefit and security of all its policy holders, fifty thousand dollars in bonds of the United States or of the state of Ohio, or of a county, township, city or other municipality in the state, which shall not be received by the superintendent at a rate above their par value. * * *"

This language clearly indicates the legislative intent to require foreign insurance companies, which are admitted to make insurance in Ohio indemnifying "employers and others," to deposit for the benefit and security of its policy holders fifty thousand dollars in bonds mentioned, which deposit shall be in addition to any and all other deposits. The language requiring this extra deposit was placed in section 9510 of the General Code (Revised Statutes, section 3596), by amendment approved April 25, 1904 (97 O. L., 408), subsequent to the enactment of sections 9367 and 9373 of the General Code, which provide generally as to the amount and kind of the deposit required by a foreign life insurance company, and also subsequent to the enactment of section 9385 of the General Code.

Specifically answering the question asked by you and the further question raised by counsel for the Aetna Life Insurance Company, I am of the opinion that the Aetna Life Insurance Company, a foreign insurance company endowed with authority under its charter and the laws of the state of its incorporation to make physicians' liability insurance contracts and which is admitted to transact its business in Ohio primarily under section 9385 of the General Code, may, under the language of said section and upon the principle laid down in the case of State v. the Aetna Life Insurance Company,

69 O. S., 317, make physicians' liability insurance contracts in Ohio. Regardless, however, of the source from which it claims its authority to transact the business of indemnifying employers and others, the Aetna Life Insurance Company must, in addition to any other deposits required by the laws of Ohio, make the deposit of $50,000.00 in bonds prescribed by the latter part of paragraph 2 of section 9510, of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1051.

STATE BOARD OF EMBALMING EXAMINERS—CLAIM OF FORMER SECRETARY OF BOARD FOR COMPENSATION AND EXPENSES—HOW ADJUSTED.

COLUMBUS, OHIO, November 29, 1915.

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

DEAR SIR:—Under date of November 19th, you certified to my department, a claim against Mr. George Billow, of Akron, Ohio, formerly secretary of the Ohio state board of embalming examiners, in the sum of $155.00, being the amount received by said Billow as license fees while secretary of said board. Mr. Billow admits that he had in his hands at the time of ceasing to be secretary of said board, the sum of $155.00, the amount of the claim, and in payment thereof has tendered to you the sum of $22.75 by check signed by him and made payable to your order, and a voucher for $132.25, being the amount owing to him by the state for salary in the sum of $100.00 for services as such secretary for the month of January, 1915, and the sum of $32.25 being for expenses incurred by him while acting as such secretary.

We understand that there is no claim made, but that the sum of $132.25 is properly owing to Mr. Billow, but that the reason the same has not been paid is that there is no money available to the embalming board with which to pay the same. In your letter you state:

> "There being no money available to the embalming board with which to pay his expenses, he attempted to deduct them from the receipts in his possession by filing with this office the revenue voucher above mentioned, for the receipts, and in lieu of the cash, the board's voucher to him for his expenses, and his own check to A. V. Donahey for the balance."

The matter is in the following situation:

Mr. Billow, as secretary of the state board of embalming examiners, owes the state of Ohio for license fees collected by him, as such secretary for the state of Ohio, the sum of $155.00; the state of Ohio owes him the sum of $132.25, and he offers the state of Ohio his check for the difference between the two amounts. As we understand it, Mr. Billow refuses to pay over the amount of $155.00, being the amount of the claim which you have certified to me against him. It will, therefore, be necessary that suit be brought on the said claim, and the question then arises as to whether or not, if suit is brought, Mr. Billow will be entitled to a set-off in the sum of $132.25.

In the case of State of Ohio v. Franklin Bank of Columbus, 10 Ohio, 91, the court recognizes the right of a defendant to set off a debt due to him from the state in a civil action by the state. The opinion on the above point is no more than a statement

of the proposition, but it has not been reversed or modified in any subsequent case in Ohio so far as I am able to ascertain. At the end of the opinion the court states the entire proposition as follows:

> "Such being the opinion of the court, we are requested to render judgment against the state for the balance due. This we cannot do. But under the agreed case we are authorized to set off so much of this amount which is due from the state to the bank, as will be sufficient to balance the claim $47.66, which is done accordingly."

This rule is not in accordance with the overwhelming weight of authority, but is in accordance with the rule laid down in Kentucky and Arkansas.

The rule of law in Ohio being, that on suit brought by the state, the defendant can set off any claim legally due to him from the state to the amount claimed by the state, I am of the opinion that an action could not be maintained in the courts of Ohio to recover from Mr. Billow the entire sum of $155.00, but that the court would permit a set off of the amount claimed by him to be due him from the state, which claim is not disputed in the sum of $132.25, leaving a balance of $22.75, for which he has already tendered his check.

I am, therefore, of the opinion that Mr. Billow's check should be converted into cash, and that proper entry should be made on your books showing that the transaction is closed.

The claim was certified to this department under the provisions of sections 259 and 268 of the General Code. Under the provisions of section 268, the attorney general and auditor of state are authorized, if they deem it for the best interests of the state, to adjust the claim by allowing a set-off or abatement thereto. My suggestion for settling this matter is that you and myself abate the claim of $155.00 by the amount of the claim of Mr. Billow, in the sum of $132.25, and accept his check for $22.75, balance due.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1052.

POLICE RELIEF—TRUSTEES OF POLICE RELIEF FUND CANNOT DIVERT ANY PART OF GENERAL POLICE FUND RAISED BY AUTHORITY OF SECTION 4621, G. C., TO A POLICE SUB-FUND AUTHORIZED BY SECTION 4625, G. C.

The police relief fund authorized by section 4621, G. C., is to be made up of receipts of a levy provided therein, the amount, if any, credited on account of a resort to the tax on the business of trafficking in intoxicating liquors, fines imposed upon members of the police department by way of discipline, rewards, fees or proceeds of gifts and emoluments allowed by the authority in charge or control of the department and donations made to and accepted by the trustees under the provisions of section 4624, G. C., unless the conditions under which said donations are made prescribe that they shall become a part of the police relief sub-fund, in which case they may be credited to that fund.

The power given to the trustees to make rules and regulations for the distribution of the fund under section 4628, G. C., does not confer authority to divert moneys from the funds to which, under the law, they are to be credited.

COLUMBUS, OHIO, November 29, 1915.

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

GENTLEMEN:—Permit me to reply to your request for an opinion relative to the police relief sub-fund of the city of Columbus, Ohio, which is as follows:

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

"The trustees of the police relief fund of the city of Columbus, Ohio, have created a 'Police Relief Sub-fund' under authority, as cited in their rules, of section 4628 of the General Code. The purpose of this fund is to furnish sick benefits and funeral expenses to such members of the police department as voluntarily contribute from their salaries certain amounts as provided in section 4625 of the General Code. In addition to such voluntary contributions, the trustees have turned into this sub-fund rewards and fees for extraordinary services by members of the police force, moneys arising from the sale of unclaimed property, and donations to the police relief fund. In fact, all revenues accruing to said fund except those raised by taxation. At the time the police relief sub-fund, so-called, was created in December, 1913, the money in the regular police relief fund, which was received from these sources (other than taxation) was transferred to said sub-fund.

"Since only a part of those who are entitled to receive benefits from the police relief fund, have any share in this sub-fund, and since the law specifically provides that moneys derived from fines, and all rewards, fees, etc., for extraordinary services, as well as donations, shall be credited to the police relief fund (sections 4623 and 4624, G. C.), is such action of said trustees in diverting said moneys to the sub-fund legal?

"We enclose a copy of the rules of the trustees of the police relief fund and the police relief sub-fund. An early reply will be greatly appreciated."

The police relief fund in the first instance is maintained by the levy of a tax authorized by section 4621 of the General Code, which is as follows:

"In each municipality availing itself of these provisions, to maintain the police relief fund, the council thereof each year, in the manner provided by

law for other municipal levies, and in addition to all other levies authorized by law, may levy a tax of not to exceed three-tenths of a mill on each dollar upon all the real and personal property as listed for taxation in the municipality. In the matter of such levy, the board of trustees of the police relief fund shall be subject to the provisions of law controlling the heads of departments in such municipality, and shall discharge all the duties required of such heads of departments."

If the maximum amount authorized to be levied under the preceding section be not provided the deficiency may be made up from the annual tax on the business of trafficking in intoxicating liquors as provided in section 4622 of the General Code, and it is specifically provided that the *police relief fund* may be further augmented under the provisions of section 4623 and section 4624 of the General Code, which are as follows:

"Section 4623. All fines imposed upon members of the police department of the municipality by way of discipline or punishment by the authority having charge or control thereof, and all rewards, fees, or proceeds of gifts and emoluments allowed by the authority in charge or control of the department, paid and given for or on account of any extraordinary service of any member of the force, and moneys arising from the sale of unclaimed property or money, after deducting all expenses incident thereto, shall be credited to the police relief fund.

"Section 4624. The trustees of the fund may make by gift, grant, devise or bequest, moneys on real or personal property, upon such terms as to the investment or expenditure thereof as is fixed by the grantor or determined by the trustees."

It will be observed therefore that there is to be credited to the police relief fund as such the receipts arising from the levy authorized by section 4621, supra, the amount, if any, credited on account of a resort to the tax on the business of trafficking in intoxicating liquors, fines imposed upon members of the police department by way of discipline in the department, rewards, fees, or proceeds of gifts and emoluments allowed by the authority in charge or control of the department given on account of the extraordinary service of any member of the force, the net amount arising from the sale of unclaimed property and donations made to the trustees and accepted under the provisions of section 4624 of the General Code, supra, for such fund.

The *police relief sub-fund* referred to in your letter is authorized and established under the provisions of section 4625 of the General Code, which is as follows:

"The trustees of the fund may also receive such uniform amounts from each person designated by the rules of the police department, a member thereof, as he voluntarily agrees to, to be deducted from his monthly pay, and the amount so received shall be used as a fund to increase the pension which may be granted to such person or his beneficiaries, or in the discretion of such trustees moneys derived from such monthly deductions shall be used to relieve members of the force who contribute thereto when sick or disabled from the performance of duty, for funeral expenses, relief of their families in case of death or for pensions when honorably retired from the force."

Section 4628 of the General Code, as amended, page 557 O. L., vol. 106, is as follows:

"Such trustee shall make all rules and regulations for distribution of the fund, including the qualifications of those to whom any portion of the

fund shall be paid, and the amount thereof, with power also to give credit for prior continuous actual service in the fire department or in any other department of the city rendering service in fire prevention, but, no rules or regulations shall be in force until approved by the director of public safety or the marshal of the municipality, as the case may be."

The provision, *"with power also to give credit for prior continuous actual service in the fire department or in any department of the city rendering service in fire prevention,"* was inserted by way of amendment by the recent general assembly, otherwise the law is as it was at the time of the establishment of the police relief sub-fund referred to in your letter.

Under the provisions of section 4328 of the General Code, supra, it is contended that the trustees asserted the right to, and actually did, transfer to the police relief sub-fund certain moneys derived from fines and all rewards, fees, etc., for extraordinary services, which had been placed to the credit of the police relief fund under the provisions of section 4623 of the General Code, supra.

A reading of section 4625 of the General Code, supra, will at once disclose the fact that the fund therein authorized and created is not a part of the police relief fund but is a separate and distinct fund in the nature of an auxiliary fund to be distributed among a number limited to those who contributed voluntarily to the same, and that the fund is made up exclusively of such contributions from members of the police department and such other moneys or real or personal property as may be added to such fund under the conditions of the grant, devise or bequest fixed by the grantor under the provisions of section 4624 of the General Code, supra. While only contributing members of the police force are entitled to share in the police relief sub-fund created under section 4625 of the General Code, supra, all members of the police department are entitled to share in the police relief fund which is maintained by general taxation.

It is my opinion therefore that the trustees of the police relief fund were without authority to divert any part of the general police relief fund, which was for the benefit of all, to the sub-fund, which is for the benefit of a limited number, and that the general fund must be expended strictly as a police relief fund without reference to the existence of the sub-fund, save and except in the case of donations to the fund made under the provisions of section 4624, supra, which may have been diverted to the police relief sub-fund under conditions fixed by the grantor. The power to make rules, contained in section 4628, General Code, supra, does not confer authority to divert moneys from the funds to which under the law they are to be credited.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1053.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS IN EIGHT DIFFERENT COUNTIES.

COLUMBUS, OHIO, November 29, 1915.

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

DEAR SIR:—I have your communication of November 29, 1915, transmitting to me for examination final resolutions relating to the following road improvements:

"Defiance county—Hicksville-Defiance road, section 'C,' petition No. 574, I. C. H., 420.

"Holmes county—Mansfield-Millersburg road, section 'G,' petition No. 883, I. C. H., 145.

"Meigs county—Pomeroy-Jackson road, section 'M,' petition No. 1098, I. C. H., No. 395.

"Morgan county—McConnelsville-Caldwell road, section 'H,' petition No. 1345, I. C. H., 390.

"Perry county—Newark-New Lexington road, section '—,' petition No. 893, I. C. H., 356.

"Perry county—New Lexington-Athens road, petition No. 889, I. C. H., 158.

"Seneca county—Lima-Sandusky road, section 'N,' petition No. 1044, I. C. H., 22.

"Seneca county—Findlay-Tiffin road, section 'M,' petition No. 1045, I. C. H., 219.

"Union county—Urbana-Marysville road, section 'E,' petition No. 839, I. C. H., 191.

"Williams county—West Unity-Montpelier road, section 'M.' petition No. 1510, I. C. H., 303.

"Williams county—West Unity-Montpelier road, section 'M,' petition No. 1510, I. C. H., 303."

I find these resolutions to be in regular form, and am therefore returning the same with my approval endorsed thereon. I have also endorsed my approval upon the duplicate copies of the last three resolutions referred to above, which duplicates you transmitted to me with the originals.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1054.

BOARD OF EDUCATION OF VILLAGE SCHOOL DISTRICT—WHERE NO HIGH SCHOOL MAINTAINED SAID BOARD CAN BE REQUIRED TO PAY TUITION OF PUPILS ATTENDING HIGH SCHOOLS—WHERE SECOND OR THIRD GRADE HIGH SCHOOL IS MAINTAINED BOARD LIABLE FOR TUITION FOR ONE YEAR AND TWO YEARS RESPECTIVELY.

The board of education of a village school district which is subject to both district and county supervision, and which maintains no high school, and which makes no provision for the schooling of its high school pupils in the manner authorized by the first part of section 7750, G. C., may be required to pay the tuition of said pupils, residing in said district, who are eligible for admission to and are attending a high school in another district.

In case the board of education of said village school district has made the agreement authorized by the first part of said statute, any pupil residing in said district, and eligible for admission to high school, and living at a distance of three or four miles from the high school designated in said agreement, will still have the right, under the provision of said statute, to select a high school other than the one designated by said board of education, and to have his tuition paid by said board.

Under provision of section 7748, G. C., as amended in 104 O. L., 126, the board of education of a village school district which is subject to both district and county supervision, and which maintains a third grade high school, may be compelled to pay the tuition of graduates from such high school, residing in the district, at a first grade high school for two years.

The board of education of a village school district which is subject to both district and county supervision, and which maintains a second grade high school, may be compelled to pay the tuition of graduates from such high school, residing in the district, at a first grade high school for one year.

COLUMBUS, OHIO, November 30, 1915.

HON. FRANK W. MILLER, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—In your letter under date of November 23rd you request my opinion on the following questions:

"1. A certain village school district has no high school. Can the board of education of said village be compelled to pay the high school tuition of its pupils who are eligible for admission to high school?

"2. Can the board of education of a village school district maintaining a third grade high school be compelled to pay for two years the high school tuition of its pupils who have graduated from said third grade high school?

"3. Can the board of education of a village school district maintaining a second grade high school be compelled to pay the high school tuition for one year of one of its pupils who has graduated from said high school and who is now attending a high school of the first grade located in another district?"

The village school districts of the state may be classified as follows:

"1. Village school districts which are exempt from the supervision of the county board of education, under the provision of section 4688, G. C., as amended and supplemented by section 4688-1, G. C., 104 O. L., 133.

"2. Village school districts which, having complied with the requirements of section 4740, G. C., as amended in 106 O. L., 439, are exempt from

district supervision, and are continuing under the direct supervision of the county superintendents of the respective counties in which such districts are located.

"3. Village school districts other than those referred to in the above mentioned classes, and within the county school district as defined by section 4684, G. C., as amended in 104 O. L., 133, and therefore subject to district and county supervision."

Upon investigation I find that every village school district of the first class above mentioned maintains a first grade high school as defined by section 7652 G. C. It is evident, therefore, that inasmuch as every village school district of the second class maintains a high school of the first grade, your questions can have reference only to those village school districts of the third class above mentioned which are subject to both district and county supervision.

With this limitation in mind, your first question may be stated as follows:

"May the board of education of a village school district which is subject to both district and county supervision, and which maintains no high school, be required to pay the tuition of pupils, residing in said district, who are eligible for admission to and are attending a high school in another district?"

Section 7750, G. C., provides as follows:

"A board of education not having a high school, may enter into an agreement with one or more boards of education maintaining such school, for the schooling of all its high school pupils. When such agreement is made, the board making it shall be exempt from the payment of tuition at other high schools of pupils living within three miles of the school designated in the agreement, if the school or schools selected by the board are located in the same civil township, as that of the board making it, or some adjoining township. In case no such agreement is entered into, the school to be attended can be selected by the pupil holding a diploma, if due notice in writing is given to the clerk of the board of education of the name of the school to be attended and the date the attendance is to begin, such notice to be filed not less than five days previous to the beginning of attendance."

It will be observed, under the provisions of the first part of section 7750, G. C., as above quoted, the board of education of the village school district, referred to in your inquiry, is authorized to enter into an agreement with one or more boards of education maintaining high schools, for the schooling of all of its high school pupils. By exercising this authority and entering into such an agreement, said board of education would be exempt from paying the tuition of pupils residing within three miles of the school designated in said agreement, when such school is located in the same or some adjoining township.

If no such agreement is made, it remains to be determined whether said board of education may be required to pay the tuition of the pupils, referred to in your first question.

It will be observed, that under the provisions of the latter part of section 7750, G. C., if said board of education fails to provide for the schooling of its high school pupils in the manner therein set forth, a high school can be selected by those pupils holding diplomas, providing due notice in writing is given to the clerk of said board in the manner prescribed by said statute.

The above provision of said section 7750, G. C., by its terms, limits the right to select a high school, in case of the failure of a board of education having no high school

to provide for the schooling of its high school pupils, to those pupils holding diplomas, issued to them by the board of county school examiners, under authority of section 7744, G. C., as in force prior to May 20, 1914.

This section was repealed by an act of the general assembly, as found in 104 O. L., 125, which act constitutes a part of the new school code so-called, and which became effective on said date of May 20, 1914. The provisions of the aforesaid section were not re-enacted, and the board of county school examiners is no longer authorized to examine pupils to determine their eligibility for admission to high school, and to issue diplomas as evidence of such eligibility.

I call your attention, however, to the latter part of section 7747, G. C., as amended in 104 O. L., 125, which provides that:

> "The district superintendent shall certify to the county superintendent each year, the names of all pupils in his supervision district who have completed the elementary school work, and are eligible for admission to high school. The county superintendent shall thereupon issue to each pupil so certified, a certificate of promotion, which shall entitle the holder to admission to any high school. Such certificates shall be furnished by the superintendent of public instruction."

These provisions of section 7747, G. C., must be read in connection with the latter part of section 7655-7, G. C., as found in 104 O. L., 129, which provides that:

> "Graduates of any elementary school shall be admitted to any high school without examination on the certificate of the district superintendent."

It was evidently the intention of the legislature, in repealing the provisions of section 7744, G. C., as in force prior to May 20, 1914, and in enacting the above provisions of sections 7747 and 7655-7 of the General Code, that the certificates of promotion issued by the district and county superintendent, under authority of said section 7747, G. C., as amended, shall take the place of the diploma formerly issued by the board of county school examiners, under authority of said section 7744, G. C., and be the proper evidence of the eligibility of a pupil for admission to the high school.

I am of the opinion, therefore, in answer to your first question, as stated by me, that pupils holding such certificates of promotion, and residing in a village school district of the third class above mentioned, which maintains no high school, and which makes no provision for the schooling of said pupils in the manner authorized by the first part of said section 7750, G. C., may attend a high school in another school district, and the board of education of said village school district may be required to pay the tuition of said pupils provided the notice required by the latter part of said section is given as therein prescribed.

In case said board of education of the village school district has made the agreement authorized by the first part of said statute, any pupil residing in said district and holding said certificate of promotion, and living at a distance of three or more miles from the high school designated in said agreement, will still have the right, under the provisions of said statute, to select a high school other than the one designated by said board of education, and to have his tuition paid by said board.

Your second question may be stated as follows:

> "May the board of education of a village school district of the third class, above mentioned, which maintains a third grade high school, be compelled to pay the tuition of graduates from such high school, residing in the district, at a first grade high school for two years?"

Your third question may be stated as follows:

"May the board of education of a village school district of the third class above mentioned, which maintains a second grade high school, be compelled to pay the tuition of graduates from such high school, residing in the district, at a first grade high school for one year?"

The answers to your second and third questions, as stated by me, are found in the provisions of the first part of section 7748, G. C., as amended in 104 O. L., 126, which are as follows:

"A board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from such school residing in the district at any first grade high school for two years, or at a second grade high school for one year. Should pupils residing in the district prefer not to attend such third grade high school, the board of education of such district shall be required to pay the tuition of such pupils at any first grade high school for four years, or at any second grade high school for three years and a first grade high school for one year. Such a board providing a second grade high school as defined by law shall pay the tuition of graduates residing in the district at any first grade high school for one year; except that, a board maintaining a second or third grade high school is not required to pay such tuition when the maximum levy permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district."

Respectfully,
EDWARD C. TURNER,
Attorney General.

1055.

OFFICES INCOMPATIBLE—JUSTICE OF PEACE—ASSESSOR.

A justice of the peace elected assessor under the provisions of section 3349, *G. C., as amended,* 106 *O. L.,* 250, *and whose term of office as assessor begins January* 1, 1916, *may not hold both the office of assessor and justice of the peace after the beginning of the term of office of assessor, notwithstanding the fact that the actual work of assessor may not begin until the second Monday in April,* 1916, *as the two offices are incompatible, having been made so under the provisions of section* 5590, *G. C., as amended,* 106 *O. L.,* 270.

COLUMBUS, OHIO, November 30, 1915.

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

GENTLEMEN:—This office is just in receipt of a letter from Mr. Dow Bretz, justice of the peace of Napoleon township, Napoleon, Ohio, which is as follows:

"At the regular election held on the 2nd of November I was elected assessor of the village of Napoleon. As I understand it I cannot hold both office of justice of the peace and assessor, and what I would like to know is: Can I hold the office of justice of the peace until April 1, 1916, as I will not commence work as assessor until the second Monday in April?"

The election of assessor is provided for in section 3349 of the General Code, as amended, 106 O. L., 250, which, in part, is as follows:

> "At the regular election to be held in November, 1915, and biennially thereafter, assessors shall be elected in the manner provided by law. * * * Such assessor shall take and hold his office for the term of two years from and after the first day of January following his election. Upon the election and qualification of such assessor, the right of the deputy assessor theretofore appointed under any provision of law to exercise any powers or perform any duties as such deputy assessor shall cease and determine, and he shall turn over to the person so elected and qualified, all the books, records, papers and furniture of said office. Such elected assessor shall be the successor of said appointed officer, with full power to take up, carry on and complete any and all of the unfinished business thereof, and he shall perform all the duties, exercise all the powers and be subject to all the liabilities and penalties devolved, conferred or imposed by law upon the deputy assessor so appointed."

Section 5590 of the General Code, as amended (106 O. L., 270), is as follows:

> "*An assessor*, member of a county board of revision or an assistant, expert, clerk or other employe of a county board of revision *shall not, during his term of office*, or period of service or employment, as fixed by law or prescribed by the tax commission of Ohio, *hold any other public office of trust or profit*, except offices in the state militia or the office of notary public."

It will be noted from the provisions of section 3349 of the General Code, quoted above, that the term of the office of assessor to which the incumbent of the office of justice of the peace, who makes the enquiry, has been elected, will begin on January 1, 1916, and under the provisions of section 5590 of the General Code, supra, it is clear that from and after that date he will not be allowed to hold the offices of justice of the peace and assessor.

It is my opinion, therefore, in answer to his question that he cannot continue to hold the office of justice of the peace until April 1, 1916, and at the same time the office of assessor to which he has been elected, notwithstanding, as he states, he will not commence work as assessor until the second Monday of April.

A copy of this opinion has been sent to Mr. Bretz.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1056.

CASS HIGHWAY LAW—COUNTY HIGHWAY SUPERINTENDENT MUST FURNISH MAPS OF COUNTY WHEN STATE HIGHWAY COMMISSIONER REQUESTS THE SAME.

Where the county highway superintendent is called upon by the state highway commissioner or chief highway engineer to furnish a map or maps of the county, showing the location of rivers, etc., together with any other information that may be required, it becomes the duty of the county highway superintendent to prepare the map or maps in question, furnish the required information and make any survey necessary in preparing such map or maps and collecting such information.

COLUMBUS, OHIO, November 30, 1915.

HON. LINDSEY K. COOPER, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—I have your communication of November 27, 1915, which reads as follows:

> "I am advised by the county commissioners of this county that the state highway commissioner has called upon the county highway superintendent of this county to make a survey of all the roads in the county, giving detailed information relative to same, and especially with reference to all bridges and culverts, their condition, etc., over one foot in diameter. The county commissioners of this county, believing that this would entail an expenditure of considerable money, which is very badly needed for defraying expenses of labor and material necessary to repair the roads, have called upon me for an opinion as to whether or not this expense would absolutely have to be incurred.
>
> "I have advised them as per copy of letter enclosed herewith. They requested me to ask you for an opinion upon the same, and in accordance with said request I respectfully refer the matter to you."

Your letter of advice to the county commissioners of your county, a copy of which you enclosed with your inquiry, reads as follows:

> "Replying to your question of whether or not the county surveyor is compelled to furnish to the state highway commissioner the detailed information called for with reference to all roads in the county, including all bridges, culverts, etc., and making a general survey of said roads, will say:
>
> "Section 180 of the Cass highway act, being section 1187, General Code, provides in part:
>
> " 'The state highway commissioner or chief highway engineer may call upon the county highway superintendent, at any time, to furnish a map or maps of the county showing distinctly the location of any rivers, railroads, streams, township lines, cities, villages, public highways and deposits of road material, together with any other information that may be required by said commissioner or engineer. Such information shall be furnished in such form as the state highway commissioner may require.'
>
> "It is my opinion that this section is broad enough to cover the information asked for, and that the county highway superintendent may not legally refuse to furnish such information."

I concur fully in the opinion expressed by you, and advise that when the county highway superintendent is called upon by the state highway commissioner or chief

highway engineer to furnish a map or maps of the county, showing the location of rivers, railroads, streams, township lines, cities, villages, public highways and deposits of road material, together with any other information that may be required by said commissioner or engineer, it becomes the duty of the county highway superintendent to prepare the map or maps in question and to furnish the required information, and to make any survey or surveys that may be necessary in the preparation of such map or maps or in the collection of the information required, and that the county highway superintendent cannot legally refuse to act in the premises.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1057.

COUNTY COMMISSIONERS—INTERPRETATION OF SECTIONS 2489, G. C., AND 2490, G. C., IN REGARD TO REWARDS OFFERED FOR APPREHENSION OF CRIMINALS GENERALLY AND ALSO FOR HORSE THIEVES—REWARD LIMITED TO SPECIFIC CRIME WHICH HAS BEEN COMMITTED AND IS NAMED IN RESOLUTION OF COMMISSIONERS—DEPUTY MARSHAL OR NIGHT WATCHMAN OF MUNICIPALITY NOT ENTITLED TO REWARD FOR MAKING SUCH ARREST.

1. *Until the crime or crimes specified in sections* 2489 *and* 2490, *G. C., have been committed, county commissioners may not offer the reward provided for in said sections.*

2. *The reward offered under the provisions of said sections may be limited only to a specific crime or crimes named and described in the resolution offering the reward, which resolution must name the reward and by appropriate reference be made to apply only to such specific crime or crimes.*

3. *A deputy marshal or night watchman of a municipality making an arrest in the discharge of his official duty may not demand or receive a reward therefor and is entitled to no other or further remuneration or reward for making such arrest than that prescribed by law.*

COLUMBUS, OHIO, November 30, 1915.

HON. A. A. SLAYBAUGH, *Prosecuting Attorney, Ottawa, Ohio:*

DEAR SIR:—I have your letter of November 15, 1915, containing the following statement and inquiries:

> "The board of county commissioners of Putnam county, Ohio, under the provisions of section 2490, General Code, passed a resolution some years ago, offering a reward of $50.00 for the arrest and conviction of any person or persons stealing a horse within the limits of said Putnam county, i. e., they offered a standing reward for the arrest and conviction of any person stealing a horse, or aiding, or abetting the same subsequent to the passage of such resolution. This resolution was passed not for the purpose of offering a reward for any particular person or crime that had been committed, prior to the passage of the resolution. Did they have the authority to pass such a resolution, and if so, is the party, not an officer, who was the cause of the arrest and conviction of the horse thief subsequent to the passage of such resolution entitled to the reward?
>
> "2. In order for a person to collect a reward offered by the county

commissioners, must the county commissioners have passed a certain resolution subsequent to the date of the claim and specifying in the resolution the date of the crime, the kind of the crime and the amount of reward offered before any person would be entitled to the reward for the arrest and conviction of such a person?

"3. Is the deputy marshall or a night watchman of a municipality entitled to a reward under any conditions?

"In answer to third question, I wish to say that in my opinion, no night watchman or deputy marshal, whether he has given bond or receives a salary is entitled to any reward, because under section 13492, he is a police officer, within the meaning of the statutes of Ohio, and in case of Bank v. Edmund, 76 O. S., 396, appears to have determined this third question to my entire satisfaction; still I would like to have your opinion on the matter. As to the 1st and 2nd questions, I would say that by construing section 2490, General Code, literally, and in favor of public policy, the county commissioners would have authority to offer a standing reward for any of the crimes specified in sections 2489 and 2490, General Code, but I would greatly appreciate your opinion on this point."

Section 2490, G. C., to which you refer in your letter, provides as follows:

"When they deem it expedient, the county commissioners may offer such reward, or employ such detectives, as in their judgment the nature of the case requires for the detection or apprehension of any person charged with horse stealing or engaged in aiding or abetting horse stealing, and upon the conviction of such person, pay such reward or other compensation from the county treasury. On the collection of a recognizance given and forfeited by such person, if they deem it expedient, the commissioners may pay such reward or other compensation. In no case shall the owner of the stolen horse or horses be entitled to any of such reward."

The preceding section 2489, G. C., I also consider pertinent to the discussion of the questions submitted by you, and it provides as follows:

"When they deem it expedient, the county commissioners may offer such rewards as in their judgment the nature of the case requires, for the detection or apprehension of any person charged with or convicted of felony, and on the conviction of such person, pay it from the county treasury, together with all other necessary expenses, not otherwise provided for by law, incurred in making such detection or apprehension. When they deem it expedient, on the collection of a recognizance given and forfeited by such person, the commissioners may pay the reward so offered, or any part thereof, together with all other necessary expenses so incurred and not otherwise provided for by law."

An analysis of the section first quoted shows that the authority or jurisdiction therein conferred upon the county commissioners to offer a reward or employ detectives is predicated upon the fact that some person or persons, known or unknown are charged with the crime of horse stealing or are engaged in aiding or abetting horse stealing. Manifestly the commission of the crime must precede the charge of stealing and necessarily there can be no aiding and abetting unless a crime is committed.

It is provided further that the jurisdiction so conferred in said section is to be

exercised by the county commissioners as in their judgment the nature of the case requires. In this provision their action is again limited to a condition which must obtain by reason of the happening of some former event and have reference thereto.

In view of these plain provisions of the law and its purposes I am impelled to conclude that the action of the county commissioners in offering a reward, or in the employment of detectives, can only be taken after a specific crime, or crimes, have been committed, and said reward or employment must be limited to such specific crime or crimes.

It follows, therefore, that until a crime or crimes have been committed as contemplated by section 2489 or 2490, the commissioners are without authority to take the action therein provided.

This view of the law is substantially the same as that held by Hon. George K. Nash in an opinion reported at page 861, of vol. 2, of the attorney general's report for the years 1880 and 1883. I quote from said opinion as follows:

> "Sometime ago you asked me this question: 'Have the county commissioners the legal authority, where a crime has been committed in their county, to enter into a contract with a person to pay him so much per day to investigate the case and find out the criminal?'
>
> "I have given the matter considerable thought, but have not been able to find any statute authorizing the commissioners of a county to make such a contract. In the absence of statutory authority, I do not believe that they have any inherent power or authority so to do. Sections 918 and 919 authorize the county commissioners to pay a reward in certain cases after conviction, and section 1310 authorizes them to pay certain expenses incurred by officers in pursuit of persons charged with felony who have fled the county.
>
> "I suppose that these sections were placed in the law because in their absence the commissioners would not have authority to pay such rewards or such expenses."

Sections 918 and 919, as referred to in said opinion, are now sections 2489 and 2490 of the General Code, under consideration here. There has been no substantial change made in either section since the date of said opinion except the added provisions in both sections referring to forfeited recognizances.

I agree with the conclusion in said opinion that the commissioners of a county in the absence of a statutory authority cannot pay rewards for the detection or conviction of crimes. Where statutory authority is conferred it may extend only to conditions named and prescribed in the statute conferring such authority.

Answering your first question, therefore, I am impelled to conclude that until the crime or crimes specified in sections 2489 and 2490, G. C., have been committed county commissioners are without authority to offer, under the provisions of said sections, any reward for the apprehension and conviction of the person or persons known or unknown, charged therewith.

The observations made in answering your first question offer the solution to your second. To comply with the provisions of the sections quoted aforesaid, an offer of a reward by the county commissioners should be made by an appropriate resolution to refer to the specific crime or crimes committed for the conviction of which the reward is offered, and said resolution should also name the reward offered in each particular case or cases.

You state in your letter that the case of Bank v. Edmund, 76 O. S., 396, has determined the third question to your satisfaction. I concur with you in the conclusion you reach in this regard.

I therefore conclude, in answer to your inquiries:

(1) That until the crime or crimes specified in sections 2489 and 2490, G. Co., have been committed, county commissioners may not offer the reward provided for in said sections.

(2) That the reward offered under the provisions of said sections may be limited only to a specific crime or crimes named and described in the resolution offering the reward, which resolution must name the reward and by appropriate reference be made to apply only to such specific crime or crimes.

(3) That a deputy marshal or night watchman of a municipality making an arrest in the discharge of his official duty may not demand or receive a reward therefor and is entitled to no other or further remuneration or reward for making such arrest than that prescribed by law.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1058.

COUNTY COMMISSIONERS—WHEN COUNTY INFIRMARY DESTROYED BY FIRE HOW INSURANCE MONEY CAN BE EXPENDED—MAXIMUM AMOUNT THAT CAN BE EXPENDED WITHOUT VOTE OF ELECTORS—WHEN BUILDING COMMISSION IS REQUIRED TO BE APPOINTED—TEMPORARY BUILDING MAY BE ERECTED WHEN INFIRMARY DESTROYED BY FIRE—BUILDING COMMISSION NOT REQUIRED WHERE MEMORIAL STRUCTURE ERECTED AT COST LESS THAN $10,000—NOTICE REQUIRED BY SECTION 2444, G. C, IS NECESSARY WHEN COUNTY OWNS ITS REAL ESTATE UPON WHICH MEMORIAL STRUCTURE IS TO BE ERECTED.

1. *Insurance money paid to a county for buildings destroyed by fire may be placed in any fund designated by the county commissioners of said county.*

2. *Section* 2436, *G. C., is the controlling section of our statutes as to the amount of money county commissioners may expend for the purpose of rebuilding an infirmary without a vote of the people.*

3. *The amount of money provided in said section* 2436, *G. C., supra, viz.,* $50,000, *is the maximum amount of money which may be borrowed by the commissioners without a vote being taken.*

4. *Said amount of* $50,000 *is the maximum amount that may be expended without a vote under the provisions of said section* 2436, *supra, for the erection of any building named therein.*

5. *A building commission is required to be appointed under the provisions of section* 2333, *G. C., when an infirmary building, which has been wholly destroyed by fire, is to be rebuilt at a cost to exceed* $25,000.

6. *When a county infirmary has been destroyed by fire the commissioners may erect a temporary building to be used in connection with other buildings not destroyed by fire to accommodate the inmates of such infirmary during the construction of the infirmary building so destroyed.*

7. *A building commission is not required to be appointed where a memorial structure is to be erected at a cost of not to exceed* $10,000.

8. *When the county owns real estate upon which it is proposed to erect such memorial structure, the notice required by section* 2444, *G. C., as amended in* 106 *O. L.,* 423 *is necessary, public comfort stations being the only exception under said statute when no purchase of land is required.*

COLUMBUS, OHIO, November 30, 1915.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I have your letter of November 20, 1915, containing the following statement and inquiries:

> "The county infirmary of Warren county, located at Lebanon, Ohio, was destroyed by fire on the second day of November, 1915, and the commissioners of the county contemplate rebuilding the same. They will probably have about $20,000.00 of insurance from the old building and we desire to submit to you the following questions:
>
> "First: Into what fund should the insurance money collected from the company be paid, and may it be expended from that fund in the construction of the new building?
>
> "Second: Sections 2333 et seq. provide the general rules for the construction of county buildings. Section 2436 provides that the commissioners may borrow not to exceed $50,000.00 without a vote of the people,

for the purpose of rebuilding an infirmary which has been destroyed by fire or other casualty. Section 14585 of the General Code provides for the issuance of $90,000.00 of bonds for the construction of an infirmary destroyed by fire.

"I note also that at page 1261 of the annual report of the attorney general for 1913, your office construed sections 2333 and 2436. We desire to inquire:

"First: What amount of money may be borrowed by the commissioners for the erection of the building without a vote being taken?

"Second: What amount may be expended by them without such vote, that is, including the amount received from the insurance?

"Third: Must a building commission be appointed, as provided in section 2333, for the construction of this building?

"Fourth: Can the commissioners erect a temporary building to accommodate the patients until a permanent building can be built?

"The commissioners of this county desire to construct a memorial structure under sections 14849, 14849-1 and 14849-2, as amended in 106 O. L., page 456.

"First: Is it necessary in the building of this structure that a building commission be appointed?

"Second: Is it necessary to give notice of intention to build, under section 2444, as amended in 106 O. L., page 423, the land upon which it is proposed to build this memorial structure being a lot of land dedicated for the use of the public?

"Is the Little Miami River, in its course through Warren county, Ohio, legally deemed a navigable stream?"

In addition to the facts stated in your letter, I have learned from you through other sources, that the infirmary which your county commissioners contemplate building will probably cost $70,000.00. From this fact it appears that if the amount of money which your county commissioners may expend without a vote is limited to $50,000.00, and that amount may be expended independent of the insurance money you may receive, no vote will be necessary to approve said expenditure. Upon the other hand, however, if the insurance money may be considered as a part of the entire amount to be expended, under the statute requiring a vote, it will be necessary to submit the proposition to your voters.

I also learn in connection with your inquiries regarding the construction of a memorial structure that your commissioners propose to erect such structure upon land now dedicated to and owned by the county, and that the cost of such structure will not exceed $10,000.00.

With the foregoing additional facts in mind I will now address myself to your inquiries.

Referring to your first question, which is in reference to the disposition to be made of the insurance money received from the old building, it may be said that while it is probable the purpose of the insurance upon the old infirmary was to provide a fund for rebuilding in the event it was destroyed by fire, yet that fact cannot now fix the legal status of the money received under such contract. In other words, it may be said that the insurance money in question may not now legally belong to any fund. Had it been withdrawn from any fund of the county heretofore, it should now be returned to that particular fund, but never having been withdrawn from any fund of the county, it is money which never was in the county treasury, and therefore may not be used for any particular purpose until that purpose be determined by some competent authority. State v. Allen, 86, O. S., 244. The authority which may determine its use is the board of county commissioners, who should direct into what

fund this money may be placed, and when such direction is made to the county auditor, it thereupon becomes his duty, under section 2567, G. C., to certify into said fund and charge the treasurer accordingly. State v. Allen, supra.

Answering your first question, therefore, specifically, the insurance money to which you refer in your letter may be placed in any fund of the county to be determined by the board of county commissioners, which fund may be the building fund for the construction of your new infirmary.

Your second inquiry involves a consideration of section 2436, G. C., and section 14585, as found in the appendix to the General Code.

Section 2436, G. C., in so far as its provisions may affect the question here under consideration, provides as follows:

> "For the purpose of rebuilding an infirmary, or court house, destroyed by fire or other casualty, the commissioners of a county may appropriate money, levy tax, issue and sell the bonds of such county in anticipation thereof, in an amount not to exceed fifty thousand dollars, without first submitting to the voters of said county, the question of rebuilding such infirmary or court house, appropriating such money, levying such tax and issuing and selling such bonds."

This section was first enacted March 3, 1904, and is found in vol. 97 O. L., page 33. After its enactment it appeared in the Revised Statutes as section 871-1. As first enacted, it limited the amount to be expended without a vote to $50,000.00, and its provisions were limited to the rebuilding only of a county infirmary destroyed by fire or other casualty.

It was first amended March 31, 1906, 98 O. L., page 187. The amendment made at this time added a provision making the provisions of the law applicable to a county infirmary condemned as unsafe and uninhabitable by the chief inspector of workshops and factories.

The next amendment to this section is found in vol. 99 O. L., 138, which amendment was passed April 21, 1908, and which is now incorporated into section 14585 as found in the appendix to the General Code, which is the section referred to in your letter as providing for the issuing of bonds to the amount of $90,000.00 for the construction of an infirmary destroyed by fire.

This section as amended at that time was in the precise form it is now found in said section 14585 of the appendix to the General Code.

From the foregoing facts it clearly appears that at the time of the codification in 1910, the law as amended April 21, 1908, fixing the amount at $90,000.00, was the controlling law of the state on the matter therein specified and contained. It seems, however, that this amendment of April 21, 1908, escaped the attention of the codifying commission with the result that the amendment of March 31, 1906, 98 O. L., 187, supra, was carried into the General Code as section 2436 thereof (see General Code of Ohio, 1910), and being adopted by the general assembly as a section of said Code must be held to repeal by implication at least, the amendment of April 21, 1908. However, the repeal of this last amendment is further emphasized and conclusively determined by the last amendment of April 28, 1910, 101 O. L., 135, which amendment was in the form of the law as it now appears in section 2436.

In view of these facts, I am clearly of the opinion that the provisions of section 2436, supra, fixing the amount at $50,000.00, must control. It may be urged to impeach this conclusion that the amendment of April 21, 1908, which was subsequently found by the commission, employed by the attorney general to prepare an appendix and was carried into said appendix and designated as section 14585 thereto, could give said section any vitality. I therefore hold, as above noted, that the law con-

trolling the amount which now may be appropriated and expended without a vote, for the erection of the building in question, is found in section 2436, G. C., supra, and said amount so fixed by said section is $50,000.00.

The succeeding two inquiries in your letter may be considered together, and refer to the relation the insurance money bears to the limitations imposed by said section. Do the provisions of said section fixing the amount at $50,000.00, apply independent of, and without reference to, the expenditure of said insurance money, or is the insurance money to be considered as a part of the $50,000.00 fixed by said section which may be appropriated and expended? The opinion of my predecessor, Hon. T. S. Hogan, to which you refer, reported in the attorney general's report for the year 1913, at page 1261, answers these questions fully. In that opinion it is held that sections 5638, 5639-1 and 5640 of the General Code, and said section 2436, supra, are sections *in pari materia*, and must be construed and applied together, and when so construed, the limitation provided in said section 2436, supra, is a limitation on the authority to *expend*, and not merely on the authority to appropriate money, levy a tax, issue and sell bonds in the amount named. In this conclusion I concur, and it follows, therefore, that any expenditure in excess of $50,000.00, whether raised wholly by taxation, or of which the insurance money may be a part, must first have the approval of the voters of your county as provided in sections 5638 et seq., above noted.

As before stated, if the probable cost of the building you contemplate erecting will exceed $50,000.00, such expenditure must be first submitted to the electors of your county for approval. It follows from this that the commissioners may not borrow in excess of the sum of $50,000.00 without a vote being taken, nor may they expend more than $50,000.00 without such vote being taken, which said amount of $50,000.00 may include the money received from the insurance. In order that you may thoroughly understand this ruling and applying the facts in my answer to your question I will say further that if you receive $20,000.00 and apply that amount to the construction of the new building, you may not then borrow more than $30,000.00 without a vote being taken. If, however, the $20,000.00 of insurance is certified to some other fund of the county and not expended in the construction of your new building, you may then borrow to the full amount of $50,000.00.

You next inquire whether a building commission must be appointed as provided in section 2333, G. C., in the erection of this new infirmary building.

Keeping in mind the fact that you propose to erect an entirely new building to cost more than $50,000.00, which expenditure must receive the approval of your voters, I conclude that the provisions of section 2333, G. C., apply, and that such commission must be appointed. While this conclusion may appear in conflict with some of the observations made by my predecessor, in his opinion hereinbefore referred to, yet it must be noted in this connection that such observations had no direct reference to any question then under consideration. In another opinion, however, by General Hogan, reported at page 1142 of the attorney general's report for the years 1911, 1912, in which the precise question now under consideration was therein presented, it was held that:

> "Under section 2436, General Code, when an infirmary has been destroyed by fire, the commissioners are empowered to appropriate money, levy tax, and issue and sell bonds in anticipation of said tax in an amount not to exceed $50,000.00 without submission to the vote of the electors.
>
> "While this section presents an exception to that part of sections 2333-2343, General Code, providing for a submission to the electors the question of issuing bonds for county buildings in excess of $25,000.00, it in no way excepts any of the other restrictions of these sections, providing for a building commission, etc."

In the same opinion, in commenting upon this question, General Hogan says:

> "My final conclusion is that in the situation covered in section 2436, G. C., the said section becomes operative and governs, insofar as the exception goes, to wit: The commissioners may appropriate money, levy tax, and issue and sell the bonds of such county in anticipation thereof, etc., without first submitting to the voters thereof the question of rebuilding such infirmary, appropriating such money, etc.: for to hold otherwise would make the exception of no effect upon the original rule which it modifies, and more restricted than it really is, but with respect to the remaining provisions of said sections 2333 and 2342, General Code, I think it necessarily follows, and I am of the opinion that said remaining provisions would apply and govern, and that the county commissioners would be legally required to rebuild in accordance therewith. That is to say, the only exception, as I have stated above, to the provisions contained in said sections is, that in the event the county infirmary is destroyed by fire or other casualty, then the commissioners may expend a sum to the extent of $50,000 without submitting the proposition to a vote of the people of the county; and this being the only exception, of course it follows that all the remaining provisions would govern."

It is sufficient to say, in concluding my observations upon this inquiry, that I fully concur both in the reasoning and the conclusion of the above opinion.

In answer to your inquiry as to the authority of the county commissioners to erect a temporary building to accommodate the inmates of your infirmary until a permanent building may be erected, I have to advise that there are no statutory provisions specially covering such contingency. While it is provided in section 2437, G. C., that in case a county infirmary building or buildings are condemned by the board of health, the commissioners may construct temporary buildings, this section is limited to the contingency therein named. However, it is provided in section 2419 G. C., as amended 106 O. L., 423, that:

> "A court house, jail, public comfort station, offices for county officers, and an infirmary, shall be provided by the commissioners when, in their judgment, they, or any of them, are needed. Such buildings and offices shall be of such style, dimensions, and expense, as the commissioners determine."

It is further provided in section 2434, G. C., that for the purpose of erecting or acquiring certain buildings, including a county infirmary, or additional land for an infirmary or county children's home, or other necessary buildings or bridges, or for the purpose of enlarging, repairing, improving or rebuilding thereof, or for the relief or support of the poor, the commissioners may borrow such sums of money as they deem necessary, etc. Under the provisions of the first section cited, the county commissioners are authorized to erect certain buildings, including county infirmaries. Under the last section noted, they are empowered to borrow money for the purpose of erecting certain buildings, which include county infirmaries. In view of the provisions of the two foregoing sections I incline to the opinion that the county commissioners have authority to erect for temporary purposes a building designed for the care of the poor of your county during the rebuilding of the infirmary destroyed by fire.

I learn from you in this connection that the proposed building is to be used in conjunction with other buildings on your infirmary premises, which buildings escaped destruction when your main building burned. As your proposed temporary building

is to be in fact merely an additional building to those now standing, and is to be erected at a cost of about $2,000, I advise that your commissioners may legally make such expenditure under the authority conferred in the foregoing statutes.

Referring now to your inquiries in reference to the construction of a memorial under sections 14848 and 14849, G. C., and 14849-1 and 14849-2, G. C., as amended in 106 O. L., 456, you inquire whether it is necessary in the construction of said building that a building commission may be appointed. As the contemplated cost of this memorial structure is only $10,000 it does not come within the provisions of section 2333, G. C., which fixes the minimum cost of a building requiring the appointment of a commission at $25,000. I am therefore of the opinion that it is not necessary that such commission be appointed in the construction of said memorial building.

You next inquire whether it is necessary to give notice of interition to build said memorial structure under the provisions of section 2444, G. C., as amended in 106 O. L., page 423. This section, insofar as it applies to this question, provides as follows:

> "Before the county commissioners purchase lands to erect a building or bridge, the expense of which exceeds one thousand dollars, they shall publish and circulate hand bills, and publish in one or more newspapers of the county, notice of their intention to make such purchase, erect such building or bridge, and the location thereof, for at least four consecutive weeks prior to the time of that purchase, building, or location is made."

It is obvious, that the purpose of this statute is to give the people of the county wherein such action is to be taken, an opportunity to object to the purchase of land and the consequent location and erection of the building or bridge thereon. In other words, the facts which bring into operation the provisions of this statute are the proposed purchase of lands, and the location and erection thereon of a building or bridge.

While in your case no purchase of land is required, yet as the legislature, by a very recent amendment, has chosen to except under such conditions the erection of public comfort stations only, I conclude that in other cases where the land is owned and no purchase thereof required, it was the purpose of the legislature that notice be given.

At your request, your last inquiry will be reserved for a separate answer.

Recapitulating the conclusions reached herein I hold:

1. That insurance money paid to a county for buildings destroyed by fire may be placed in any fund designated by the county commissioners of said county.

2. Section 2436, G. C., is the controlling section of our statutes as to the amount of money county commissioners may expend for the purpose of rebuilding an infirmary without a vote of the people.

3. That the amount of money provided in said section 2436, supra, viz., $50,000, is the maximum amount of money which may be borrowed by the commissioners without a vote being taken.

4. That said amount of $50,000 is the maximum amount that may be expended without a vote under the provisions of said section 2436, supra, for the erection of any building named therein.

5. A building commission is required to be appointed under the provisions of section 2333, G. C., when an infirmary building, which has been wholly destroyed by fire, is to be rebuilt at a cost to exceed $25,000.

6. When a county infirmary has been destroyed by fire, the commissioners may erect a temporary building to be used in connection with other buildings not destroyed by fire, to accommodate the inmates of such infirmary during the construction of the infirmary building so destroyed.

7. A building commission is not required to be appointed where a memorial structure is to be erected at a cost of not to exceed $10,000.

8. When the county owns real estate upon which it is proposed to erect such memorial structure, the notice required by section 2444, G. C., as amended in 106 O. L., page 423, is necessary, public comfort stations being the only exception under said statute, when no purchase of land is required.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1059.

BOARD OF LIBRARY TRUSTEES—LIBRARY FUND OF SCHOOL DISTRICT FOLLOWS SCHOOL FUNDS OF SUCH DISTRICT INTO DEPOSITARY—WHO HAS CONTROL OF LIBRARY FUND IN CITY SCHOOL DISTRICTS WHERE DEPOSITARY IS AND IS NOT PROVIDED—WHO HAS SUCH CONTROL IN VILLAGE OR RURAL SCHOOL DISTRICTS.

The library fund of a school district follows the school funds of such district into the depositary provided for said funds by the board of education of said district, under authority of sections 7604, *et seq., G. C.*

In a city school district where the board of education has not as yet provided a depositary for the school funds, or where the board of education has provided such depositary but has not yet dispensed with the position of treasurer of said funds, under authority of section 4782, *G. C., as amended* 104 *O. L.,* 138, *the city treasurer, being treasurer of the funds of such school district, under the provisions of section* 4763, *G. C., is treasurer of the library fund of said school district.*

Where the board of education of a city school district has provided a depositary for the funds of such district and has dispensed with the position of treasurer of said funds under authority of said section 4782, *G. C., the clerk of said board, having succeeded to the duties of treasurer of said funds, under provision of the latter part of said section* 4782, *G. C., is treasurer of the library fund of said district.*

In a village or rural school district where the board of education has not provided a depositary for school funds, the county treasurer, being treasurer of the funds of such school district, under provision of the latter part of said section 4763, *G. C., is treasurer of the library fund of said school district.*

Where the board of education of a village or rural school district has provided a depositary for the funds of said district and has dispensed with the position of treasurer of said funds, under authority of said section 4782, *G. C., the clerk of said school district having succeeded to the duties of treasurer of said funds under the provision of the latter part of said section* 4782, *G. C., is treasurer of the library fund of said district.*

COLUMBUS, OHIO, November 30, 1915.

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

GENTLEMEN:—In your letter under date of November 11th you request my opinion as follows:

> "We would respectfully request your written opinion upon the following questions:
>
> "Has the board of library trustees, organized under the provisions of section 7636, General Code, the authority to elect a treasurer, or to provide for a bank depositary for the funds under their control, or is the city treasurer the treasurer of said funds?

"In most cities the city treasurers have been the treasurers of the school funds until the boards of education have provided a depositary for school funds. In such cases the clerk of the board serves as clerk-treasurer, and the position of treasurer of the school funds is dispensed with.

"Does the library fund follow the school funds, or what disposition should now be made of such moneys?"

Section 7631, G. C., as amended in 104 Ohio Laws, page 228, provides:

"The board of education of any city, village or rural school district, by resolution, may provide for the establishment, control and maintenance, in such district, of a public library, free to all the inhabitants thereof. For that purpose, by purchase, it may acquire the necessary real property, and erect thereon a library building; acquire, by purchase or otherwise, from any other library association, its library property; receive donations and bequests of money or property for such library purposes, and maintain and support libraries now in existence and controlled by the board."

Section 7632, G. C., provides:

"Such board of education annually may make a levy upon the taxable property of such school district, in addition to all other taxes allowed by law, of not to exceed one mill for a library fund, to be expended by the board for the establishment, support and maintenance of such public library."

Section 7633, G. C., contains provisions similar to those above set forth, applicable to a building and library owned jointly by two or more school districts.

Section 7634, G. C., provides that such library building and library, and the expenditure of all moneys for the purchase of books and other purposes, and the administration of the library, shall be vested in a board of six trustees, three to be appointed by each of the boards of education for the term of five years.

Section 7635, G. C., must be read in connection with the provisions of sections 7631 and 7632, G. C., above quoted, and provides that the board of education referred to in section 7631, G. C., *may* provide for the management and control of such library by a board of trustees, to be elected in the manner provided by section 7636, G. C.

Section 7636, G. C., provides:

"Such board of library trustees shall consist of seven members, who must be residents of the school district. No one shall be eligible to membership on such library board who is or has been for a year previous to his election, a member or officer of the board of education. The term of office shall be seven years, except that at the first election the terms must be such that one member retires each year. Should a vacancy occur in the board, it shall be filled by the board of education for the unexpired term. The members of the library board must serve without compensation and until their successors are elected and qualified."

Under provision of section 7637, G. C., the library board referred to in section 7636, G. C., is authorized to hold, in its own name, the title to, and to have the custody and control of all libraries, branches, stations and reading rooms, of all library property, real and personal, of such school district, referred to in section 7631, G. C., and of the expenditure of all moneys collected or received from any source for library purposes for said school district.

Section 7638, G. C., confers on said board the power to purchase or lease prop-

erty for library purposes, and the power to appropriate such property when the purchase of the same cannot be effected by an agreement with the owner, and to dispose of land when in its opinion the same is no longer needed for library purposes.

Section 7639, G. C., provides that such board of library trustees annually, during the month of May, shall certify to the board of education the amount of money needed for increasing, maintaining and operating the library during the ensuing year in addition to the funds available therefor from other sources. Said section further provides that the board of education annually shall levy on each dollar of taxable property within such school district, in addition to all other levies authorized by law, such assessment not exceeding one and one-half mills as shall be necessary to realize, without reduction, the sum so certified, which must be placed on the tax duplicate and collected as other taxes.

Section 7640, G. C., provides that the proceeds of such tax will constitute a fund to be known as the library fund, and that payments therefrom shall be made only upon the warrant of the said board of trustees, signed by the president and secretary thereof.

Under the above provisions of the statutes it will be observed that the board of education of any city, village or rural school district may, itself, establish a library in the manner provided in section 7631, G. C., and, under authority of section 7632, G. C., levy a tax annually upon the taxable property of such school district, in addition to all other taxes authorized by law, of not to exceed one mill for a library fund, to be expended by said board in the manner provided in said section 7632, G. C., or the said board may, under authority of section 7635, G. C., provide for the management and control of such library by a board of trustees, elected in the manner provided by section 7636, G. C., and having the powers and duties prescribed by sections 7637, 7638 and 7639 of the General Code.

In case the board of education of a school district determines to place the management and control of the library of said district in the hands of a board of trustees, section 7639, G. C., makes it the duty of said board of education to make the annual tax levy therein provided for library purposes.

It will be further observed that in the case of a library established by the boards of education of two or more school districts, under authority of section 7633, G. C., the management and control of such library is vested in a board of trustees by provision of section 7634, G. C., to be chosen in the manner therein prescribed.

It will be noted, however, that under any of the plans above set forth, the authority to levy the tax and establish the library fund is vested in the board of education of the school district.

No statutory authority is given the library board, in its organization, to elect a treasurer to take charge of the library fund or to provide a depositary for said fund.

It seems clear to my mind that while, under provision of section 7634, G. C., the board of library trustees of a library, established and owned jointly by two or more school districts, is charged with the control of all library property and with the expenditure of all moneys for library purposes, and while the board of trustees of the library, established by the board of education of a school district under authority of section 7631, G. C., is charged with similar powers and duties, the library fund established by the board of education of a school district and maintained by an annual tax levy by said board of education must be considered as the fund belonging to said school district and under the general control of said board of education.

In case of a library owned jointly by the boards of education of two or more school districts, the board of education of each district is authorized, by provision of section 7633, G. C., to levy an annual tax for the establishment, support and maintenance of such library. The fund so established and maintained by each of said school districts would, therefore, be under the general control of the respective boards of education.

In the exercise of its powers and in the performance of its duties, the board of library trustees acts, in a certain sense, as the agent of the board of education, and in

this respect the relation of said board of trustees to said board of education is somewhat similar to that of the trustees of the county children's home to the board of county commissioners of such county.

While the management and control of a county children's home is vested in a board of trustees appointed by the county commissioners, under authority of section 3081, G. C., the children's home fund is under the control of the county commissioners and is considered a part of the county funds, insofar as the duty of the county commissioners to place the same in a legally designated depositary is concerned.

Section 4763, G. C., as amended in 104 Ohio Laws, page 138, provides that in each school district the treasurer of the city funds shall be the treasurer of the school funds, and further provides that in all village and rural school districts which do not provide legal depositaries, as provided by sections 7604 to 7608, inclusive, the county treasurer shall be the treasurer of the school funds of such districts.

Section 4782, G. C., provides that when a depositary has been provided for the school moneys of the district, as authorized by law, the board of education of the district, by resolution adopted by a vote of a majority of its members, shall dispense with the treasurer of the school moneys belonging to such district. Said section further provides that in such case the clerk of the board of education of the district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school district.

Inasmuch as the board of library trustees, organized under provision of section 7634, G. C., or under provision of section 7636, G. C., is without authority to elect a treasurer or to provide a depositary for the library fund, and inasmuch as I have already held that said library fund is a part of the school funds of the school district in which such library is established and maintained, and under the control of the board of education of such school district, insofar as it being placed in a legally designated depositary is concerned, I am of the opinion, in answer to the questions submitted by you, that the library fund of a school district follows the school funds of such district into the depositary provided for said funds by the board of education of said district, under authority of and in compliance with the requirements of sections 7604, et seq., of the General Code, and that in a city school district, where the board of education has not as yet provided a depositary for the school funds, or where the board of education has provided such depositary but has not dispensed with the position of treasurer of said funds, under authority of section 4782, G. C., as amended in 104 Ohio Laws, page 138, the city treasurer, being treasurer of the funds of such school district, under the above provisions of section 4763, G. C., is treasurer of the library fund of said school district. It follows that where the board of education of a city school district, having provided a depositary for the funds of such district in compliance with the requirements of said sections 7604, et. seq., of the General Code, and dispensed with the position of treasurer of said funds under authority of said section 4782, G. C., the clerk of said board, being required to perform all the services and discharge all the duties. and being subject to all the obligations required by law of the treasurer of such school districts, under provision of the latter part of said section 4782, G. C., is the treasurer of the library fund of said district. In a village or rural school district where the board of education had not provided a depositary for the school funds, the county treasurer, being treasurer of the funds of such school district, under provision of the latter part of said section 4763, G. C., is treasurer of the library fund of said school district. Where the board of education of a village or rural school district, having provided a depositary for the funds of such district in compliance with the requirements of said sections 7604, et seq., of the General Code, has dispensed with the position of treasurer of said funds under authority of said section 4782, G. C., the clerk of said school district, having succeeded to the duties of treasurer of said funds, under provision of the latter part of section 4782 G. C., is treasurer of the library fund of said district.

In connection with the duty of the board of education of a school district to pro-

vide a depositary for school funds, it should be noted that section 7604, G. C., as amended in 106 Ohio Laws, page 328, provides a definite time limit beyond which no school district in the state shall be without a lawfully designated depositary for its funds, and section 7609, G. C., as amended in 106 Ohio Laws, page 328, provides that upon the failure of the board of education of any school district to provide a depositary according to law the members of the board of education shall be liable for any loss occasioned by their failure to provide such depositary, and in addition shall pay the treasurer of the school funds two per cent. on the average daily balance on the school funds during the time said school district shall be without a depositary.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1060.

STATE FIRE MARSHAL—DATE WHEN ANNUAL OR PRINTED REPORT OF SUCH DEPARTMENT SHOULD BE FILED—WHAT SAID REPORT SHOULD NOT CONTAIN—HOW AN ADDITIONAL REPORT MAY BE PRINTED AND DISTRIBUTED.

The state fire marshal, not having filed any report for the period from date of last annual report to and including June 30, 1915, should now file a partial report in accordance with section 2264-1, G. C.

Such report need not contain statement of receipts and disbursements of the department.

An additional report of said department for the calendar year may, with the approval of the commissioners of public printing, be printed and distributed, in such form and in such numbers as said commission may prescribe.

COLUMBUS, OHIO, November 30, 1915.

HON. BERT B. BUCKLEY, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—Your letter of November 22, 1915, asking for my opinion, received. For the sake of brevity, your questions may be stated as follows:

"(1) This department not having filed a report for the period from January 1, 1915, to June 30, 1915, should such report now be filed in accordance with section 2264-1 of the General Code?

"(2) If such report should be filed, should it contain a statement of receipts and disbursements of the department during said period?

"(3) Would it be proper for this department to submit to the commissioners of public printing a report of the department for the calendar year for printing and distribution, in addition to the report for the fiscal year as provided in said section 2264-1, G. C.?

In answer to your first question:
Section 260 of the General Code provided in part as follows:

"In all the departments, institutions, public works and buildings of the state, the fiscal year shall close on the fifteenth day of November of each year, and all annual reports from such departments and institutions shall be made with reference to that date."

This section was amended by section 1 of senate bill No. 226, passed April 11, 1913 (103 O. L., 661), being section 260-1, G. C., to read as follows:

> "For all state offices, departments, commissions, boards and institutions of the state the fiscal year shall be and is hereby fixed to begin on the first day of July in each year and to end on the last day of June of the succeeding year, and all annual reports from such departments, commissions, boards and institutions of the state shall be made as of those dates."

This amendment, however, did not go into effect until June 30, 1915.

Section 4 of senate bill No. 226 above mentioned, being section 260-4 of the General Code, 103 O. L., 661, provided as follows:

> "Such state officers, departments, commissions, boards and institutions of the state as are required by law to submit annual reports to the governor of state or to other persons, bodies, boards or commissions shall prepare and submit to the governor or such other persons, bodies, boards or commissions, on the first day of July, 1915, or as soon thereafter as is practicable, partial reports for the period covered between the date of the closing of the fiscal year formerly in force for such state officers, departments, boards and other institutions and June 30, 1915. The governor, or other persons, bodies, boards or commissions, to whom such partial report shall be made shall use their proper discretions as to the publication of such partial reports."

In your letter you state that your department made a report to the governor for the year ending December 31, 1914. It was therefore your duty on July 1, 1915, or as soon as practicable thereafter, to make and file with the governor a report for the period from December 31, 1914, to June 30, 1915, in accordance with the provisions of section 260-4, supra, and this you state in your letter has not been done. You cannot now file the report provided for in said section for the reason that the same was repealed by amended senate bill No. 158, which became effective September 3, 1915. However, section 2 of senate bill No. 158 (106 O. L., 517), provides as follows:

> "All officers, boards, commissions, institutions, associations, or corporations that were heretofore by law required to make an annual or semi-annual report to the governor of the state, shall on the first day of July, 1915, or as soon thereafter as practicable, make partial reports for the period covered between the date of the making of the last preceding annual or semi-annual report to the governor and June 30, 1915, in triplicate, to be filed in the manner prescribed by section 2264-1 of the General Code. This section shall cease to have any effect or operation on and after January 1, 1916."

This section being now in effect, it is your duty to comply with the same and file a report for the period covered between the date of the making of your last preceding annual report and June 30, 1915. Said report should be prepared and filed in accordance with the provisions of section 2264-1, G. C., 106 O. L., 508, which is as follows:

> "Each elective state officer, * * * the state fire marshal, * * * shall make annually, at the end of each fiscal year, in triplicate, a report of the transactions and proceedings of his office or department for such fiscal year excepting however receipts and disbursements, unless otherwise specifically required by law. Such report shall contain a summary of the official acts of such officer, board or commission, institution, association or corpora-

tion, and such suggestions and recommendations as may be proper. On the first day of August of each year, one of said reports shall be filed with the governor of the state, one with the secretary of state, and one shall be kept on file in the office of such officer, board, commission, institution, association or corporation."

In answer to your second question, your attention is called to the fact that under section 2264-1, G. C., supra, receipts and disbursements should not be included in said partial report nor in subsequent annual reports "unless otherwise specifically required by law." The only other section of the General Code referring to annual reports from your department is section 843, G. C., and this section was repealed by senate bill No. 158 above mentioned. You are therefore advised that it is not necessary for you to include in your partial report, nor in subsequent annual report, a statement of such receipts and disbursements.

In answer to your third question, your attention is called to the fact that the primary purpose of the partial annual reports provided for by senate bill No. 158 above mentioned, is to enable the secretary of state to publish "the Ohio general statistics" and full provision as to the distribution of said publication is made in the law. There is no provision for any other publication or distribution of such partial or annual report. However, your attention is called to section173-2, G. C., (106 O. L., 514), which provides as follows:

"No officer, board or commission, shall print or cause to be printed at the public expense, any report, bulletin, or pamphlet, unless such report, bulletin or pamphlet be first submitted to and the publication thereof approved by the commissioners of public printing. If such commission shall approve the publication thereof, it shall determine the form of such publication and the number of copies thereof, provided that in all cases the commissioners of public printing shall cause their action thereon to be entered upon the minutes of their proceedings.

"If such approval is given, the commissioners shall cause the same to be printed, and may authorize such printing to be done at any penal, correctional or benevolent institution of the state having a printing department of sufficient equipment therefor; and when printed, such publications, other than the Ohio general statistics, shall be delivered to such officer, board or commission for distribution by him or it."

Under this section it would be proper for you, if you so desire, to prepare a report for the calendar year from January 1 to December 1, and submit the same to the commissioners of public printing, and with their approval the same could be printed in such form and in such numbers as they prescribe.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1061.

STATE BOARD OF HEALTH—APPROVAL OF SEWERAGE AND SEWAGE TREATMENT PLANT FOR VILLAGE OF LEBANON, OHIO.

COLUMBUS, OHIO, December 2, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Enclosed you will find an amended order of the state board of health, relating to sewerage and sewage treatment plant for the village of Lebanon, Ohio, said order to become effective when you have approved the same.

I have communicated with Hon. W. Z. Roll, mayor of said village relative to this matter, and upon being satisfied as to conditions it is my opinion that the order should be approved and I have approved the same under the provisions of section 1251 of the General Code, and the same is now transmitted to you for your approval.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1062.

CLERK OF SUPREME COURT—FEES TO BE CHARGED WHEN MOTION TO DISMISS PETITION IN ERROR IS SUSTAINED AND CASE IS AGAIN BROUGHT UP ON MOTION TO CERTIFY RECORD AND MOTION ALLOWED—TWO DISTINCT PROCEEDINGS.

If a case which originated in the court of common pleas is taken to the supreme court on petition in error as of right, and motion to dismiss is sustained by such court, but said case was also sought to be brought before said court on motion to certify record and said motion is allowed, the case is in court on two proceedings, and the fee of five dollars prescribed by section 1512, *G. C., should be charged in each such proceeding.*

COLUMBUS, OHIO, December 3, 1915.

HON. FRANK E. MCKEAN, *Clerk of Supreme Court, Columbus, Ohio.*

DEAR SIR:—Under date of November 22nd, you submitted for my opinion the following inquiry:

> "Will you please refer to section 1512, of the General Code, and advise me as to my duty in a case as follows:
>
> "(1) A petition in error is filed in an error proceeding brought into the supreme court. The petition in error so filed alleges that a constitutional question is involved.
>
> "(2) At the same time, and in the same action, a motion is filed in the supreme court asking that the court of appeals certify up its record.
>
> "(3) Counsel for defendant in error filed a motion to dismiss the petition in error on the ground that no constitutional question is involved.
>
> "(4) The supreme court allows the motion to dismiss the petition in error.
>
> "(5) The supreme court allows the motion to certify up the record.
>
> "The docket fee of $5.00 having been paid, under the provisions of section 1512, for the docketing of the case, and the petition in error therein

having been dismissed, and a new petition in error allowed to be filed, the question arises whether or not it is my duty as clerk of the supreme court to charge $5.00 for the second petition in error.

"In other words, under section 1512, and under the circumstances outlined above, is it incumbent upon me to consider each of the two petitions in error as a separate case, and am I expected to collect a fee of $5.00 for the filing of each petition in error?"

Section 12251 of the General Code (103 O. L., 431) provides as follows:

"Except as to the judgment or final order of the court of appeals or a judge thereof, in cases involving questions under the constitution of the United States, or of this state, and in cases which originated in the court of appeals, no petition in error shall be filed in the supreme court in cases over which it has jurisdiction without its leave, or that of a judge thereof."

Section 1512 of the General Code provides, in part, as follows:

"The clerk of the supreme court shall charge and collect the following fees:

"For each case placed on the trial docket, five dollars, which shall be in full for docketing case, etc.

"For each case placed on the motion docket, two dollars, which shall be in full for docketing such case from term to term, etc.

* * * * * * * *

"Such fees must be paid to the clerk by the party invoking the action of the court, before the case or motion is docketed; * * *."

I assume that the case to which you refer originated in the common pleas court. Under the provisions of section 12251, G. C., in cases involving questions under the constitution of the United States, or of this state, a petition in error may be filed in the supreme court as of right; in cases in which no such question is involved leave must first be obtained to file a petition in error, and a motion must be filed to obtain such leave.

If a case is brought up to the supreme court as of right, it is docketed on the records of said court, and the fee of five dollars should be charged; and if such case is dismissed, that ends the case on that branch of it.

If a motion is filed to certify up the record, that brings the case before the court in an entirely different aspect, and it is my opinion that the fee of five dollars should again be charged for docketing said cause, after the court has granted leave to file a petition in error under that method, upon the filing of the same.

It is my opinion that you should consider each of the two petitions in error as a separate case.

The case appears to me as somewhat analogous to taking a case from the common pleas court to the court of appeals, both on error and on appeal.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1063.

TOWNSHIP TRUSTEES—LEVY FOR BRIDGE PURPOSES UNDER SECTION 7562, G. C., BEFORE ITS REPEAL BY CASS HIGHWAY LAW MAY BE TRANSFERRED TO TOWNSHIP ROAD FUND OR MAY BE TRANSFERRED UNDER PROVISIONS OF SECTION 2296, G. C.

Moneys raised under section 7562, G. C., repealed by the Cass highway law, which moneys are not now needed by the township trustees for the construction or repair of bridges, owing to a transfer of authority to the county commissioners, may be transferred to the township road fund or other fund of the township in the manner pointed out in sections 2296, G. C., et seq.

COLUMBUS, OHIO, December 3, 1915.

HON. HUGH. F. NEUHART, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—I have your communication of November 16, 1915, which reads as follows:

> "Since the repeal of section 7562, G. C., with reference to the repair of bridges and culverts by the Cass highway law, vol. 106, page 615, which provides that the county highway superintendent 'shall generally supervise the construction, improvement, maintenance, and repair of the *bridges and culverts* on the highways of the county, the cost of which shall be *borne by the county*, unless otherwise provided by law,' I have had numerous inquiries from the various township trustees as to what use they may now make of the bridge fund they now have on hand in the various townships levied under the old law, for repairs as provided in section 7562 repealed.
>
> "I am unable to discover any other provision in the law as it stands now for the payment of repairs for bridges and culverts except the above provision for payment from the county funds.
>
> "Section 3370, vol. 106, page 594, in defining the duties of the township highway superintendent, provides that 'Under the direction of the township trustees he shall have control of the *roads* of his district and keep them in good repair.' No mention being made of bridges or culverts. Section 3374 goes further as to his duties, but not so far as to conflict with 7192 that I can see.
>
> "Section 6956-1, vol. 106, page 647, provides: 'The board of county commissioners shall provide annually a fund for the repair and maintenance of *bridges* and county highways.'
>
> "Our township have, under the old law, been in the habit of levying separately for bridge and road purposes, but I am not sure that it was necessary for them to do so, and if such is the fact can they not now use the amounts in their bridge fund for road purposes? See section 3274, G. C., before its repeal."

Section 3274, G. C., to which you refer and which was repealed by the Cass highway law, was not broad enough to warrant the expenditure for road purposes of a bridge levy made under section 7562, G. C. Section 3274, G. C., only went so far as to warrant the expenditure of a road levy for either bridge or road purposes, and inasmuch as the section has been repealed, it is now without force and effect even if its terms were broad enough to meet the situation presented by you.

I am of the opinion that the proper course of procedure for a board of township trustees, which made a levy for bridge purposes under section 7562, G. C., and which is now unable to use the proceeds of such levy on account of the transfer of authority from the township trustees to the county commissioners, is that which may be had under sections 2296, et seq., of the General Code.

Section 2296, G. C., as amended in 103 O. L., 522, provides in part that township trustees may transfer public funds, except the proceeds or balances of special levies, loans or bond issues under their supervision, from one fund to another, or to a new fund created under their supervision. The subsequent sections provide for the passage of a resolution by the board of trustees, the filing of a petition in the common pleas court of the county, the giving of notice and the hearing, and if the provisions of these sections be followed in the matter covered by your inquiry, the court will be authorized, upon a hearing, to transfer from the bridge fund the moneys for which no use now exists and the transfer may be made to the road fund of the township, if the proper facts showing the necessity for such transfer are made to appear to the court.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1064.

BOARD OF ADMINISTRATION—TRUST FUNDS HELD BY SAID BOARD UNDER AUTHORITY OF SECTION 1840, G. C., CANNOT BE DEPOSITED IN BUILDING AND LOAN ASSOCIATIONS.

Trust funds held by the Ohio board of administration under section 1840, G. C., cannot be deposited in a building and loan association.

COLUMBUS, OHIO, December 3, 1915.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Permit me to reply to your request for an opinion with reference to the investment of certain trust funds under your charge, which request is as follows:

> "Section 1840, General Code, reads in part as follows:
>
> " 'The board shall accept and hold on behalf of the state, if deemed for the public interest, any grant, gift, devise or bequest of money or property made to or for the use or benefit of said institution or any of them, whether directly or in trust, or for any pupil or inmate thereof. The board shall cause such gift, grant, devise or bequest to be kept as a distinct property or fund, and shall invest the same, if in money, in the manner provided by law; but the board may, in its discretion, deposit in a proper trust company or savings bank any fund so left in trust during a specified life or lives, and shall adopt rules and regulations governing the deposit, transfer or withdrawal of such funds and the income thereof. The board shall, upon the expiration of any trust according to its terms dispose of the funds or property held thereunder in the manner provided in the instrument creating the trust.'
>
> "The board of administration has in its possession a trust fund, amounting at the present time to $2,141.46, invested in certificates of deposit in the State Savings Bank and Trust Company, bearing interest at 3 per cent.
>
> "It is the desire of the board to deposit this money in a building and loan association, which would net 4½ per cent. interest per annum, and a surety bond given by the building and loan indemnifying the board against any loss. The law refers only to trust companies and savings banks. Would the board be within the law provided this money were deposited with a building and loan company?"

In view of the provisions of section 1840, General Code, quoted in part in your letter, and the fact there is no provision of law for the diversion of the trust funds in your hands to any purpose excepting those stated in section 1840, General Code, it is my opinion that the deposit of funds cannot be made in a building and loan association.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1065.

JUSTICE OF PEACE—TERM OF OFFICE—WHEN SUCCESSOR SHOULD BE ELECTED.

A justice of the peace under the provisions of section 1714, *G. C., may be appointed to serve until the next regular election for justice of the peace, which would be on the first Tuesday after the first Monday in November in the odd numbered year next following said appointment.*

COLUMBUS, OHIO, December 3, 1915.

HON. FORREST G. LONG, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—I have your letter of November 26, 1915, as follows:

> "A question has arisen in Logan county, Ohio, concerning the term of justice of the peace, in which several attorneys have taken a position adversely to the position I hold with reference to this question, and the seriousness with which they have brought the matter to bear upon me causes me to seek an opinion from you on the subject.
>
> "At the general election in 1913, John W. Bergschicker was elected and qualified as a justice of the peace in and for Lake township, Logan county, Ohio, and died on or about the first day of May, 1915, when one Henry C. Hayes was duly appointed to fill the vacancy. Said Hayes filed his petition according to law and was a candidate for election to said office at the general election just passed, but was defeated. His attorneys now contend that 1915 was not the time for the election of a justice of the peace, and that no man could be elected to succed him earlier than 1917. Holding that the only years for the election of justice of the peace was 1913-17-21, etc.
>
> "The law which seems to take care of the question is found in article 4, section 9, and section 1 of article 4 of the constitution (said section 9 of article 4 being without effect since section 1 of article 4 was adopted), section 1711-1 of the General Code or 103 Ohio Laws, page 214, and chapter 2 of the General Code.
>
> "I feel certain that your opinion will settle this question without any court proceedings, and therefore I should be very much pleased to hear from you."

In answering your foregoing inquiry it is necessary first to call your attention to the constitutional provision found in section 1 of article XVII. Said section provides:

> "Elections for state and county officers shall be held on the first Tuesday

after the first Monday in November in the even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years."

The general assembly has provided in section 1713 of the General Code, that:

"All justices of the peace shall be elected for a term of four years."

Coming now to consider the law under which the party in question was appointed, it is found in sections 1714 and 1715 of the General Code, which provides as follows:

"*Section* 1714. If a vacancy occurs in the office of justice of the peace, by death, removal, absence for six months, resignation, refusal to serve, or otherwise, the trustees, within ten days from receiving notice thereof, by a majority vote, shall appoint a qualified resident of the township to fill such vacancy, who shall serve until the next regular election for justice of the peace, and until his successor is elected and qualified. The trustees shall notify the clerk of the courts of such vacancy and the date when it occurred.

"*Section* 1715. At the next regular election for such office, a justice of the peace shall be elected in the manner provided by law, for the term of four years, commencing on the first day of January next following his election."

While the provisions of the foregoing sections may be susceptible of different constructions, yet when those provisions are considered in connection with the constitutional provision hereinbefore noted, it is apparent that an appointment to fill a vacancy in the office of justice of the peace may only be made to continue until the next regular election for justice of the peace, which would be on the first Tuesday after the first Monday in November in the odd numbered year next following such appointment. If this were not the purpose and intent of the provisions of section 1714, that such appointee shall serve until the next regular election for justice of the peace, it would be wholly unnecessary to provide, as is done in the succeeding section, 1715, that the successor of said appointee shall be elected for the full term of four years. In other words, if there were no part of an unexpired term for which it might be claimed such successor was elected, this provision would be unnecessary, as such successor, being elected at the end of a completed full term of four years, would necessarily serve a full succeeding term of four years without such special provision in section 1715.

I am of the opinion, therefore, that a successor to said appointee named in your letter was properly elected at the November election of this year, and that upon the qualification of such person so elected, the term of said appointee will end. This conclusion is in harmony with an opinion of my predecessor, reported in the attorney general's reports for the years 1911-1912, at page 1689.

The contention that an election for justice of the peace may only be held in the year 1913, and every four years thereafter, doubtless arises from the claim that by the repeal of section 9 of article IV of the constitution, said office was abolished, and, when thereafter it was re-created and re-established by the enactment of section 1711-1 G. C. (103 O. L., 214), the first elections thereunder were held in 1913. The answer to this contention is found in the case of State ex rel. v. Redding, 87 O. S., 388, wherein it is held:

"A justice of the peace holding office January 1, 1913, is entitled to serve as such official until the expiration of the term of office to which he has been elected, and the adoption of the amendment to the constitution September 3, 1912, does not deprive him of that right."

This case has the effect of continuing in office all justices of the peace elected in 1911 until January 1, 1916, and also made necessary the election on November 2, 1915, of their successors.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1066.

WORKMEN'S COMPENSATION ACT—COMPENSATION ASCERTAINED AND DETERMINED TO BE DUE AN INJURED EMPLOYE UNDER SECTION 27 OF SAID LAW—SPLITTING A CAUSE OF ACTION—SETTLEMENT OF PARTIAL OR TOTAL AMOUNT DUE.

Where an injured employe of an employer who has not complied with the provisions of section 22 of the Ohio workmen's compensation act makes application to the state liability board of awards to ascertain and determine the amount of the compensation due the injured employe from his employer, the state liability board of awards should ascertain and determine the total amount due the injured employe by reason of his injuries.

A single cause of action cannot be split or divided so as to sustain two or more actions.

COLUMBUS, OHIO, December 3, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—We are in receipt of your favor of October 22, 1915, which is as follows:

"The commission has had before it for consideration the claim of one Antonio Balbia, filed under the provisions of section 27 of the workmen's compensation act.

"Mr. Balbia, on September 4, 1914, was injured while in the employ of Peter Praechter of Cincinnati, Ohio. His injuries were so serious that they may ultimately result in a case of permanent total disability. It is certain that the case, if it does not develop into one of permanent total disability, will involve a very serious permanent partial disability. However, it is not possible at this time to accurately determine the exact extent of this permanent disability, and for this reason the commission is unable to make a complete and final award.

"On September 23, 1915, the case was before the commission for hearing, at which time the claimant was allowed compensation to cover his temporary total disability from September 4, 1914, to March 21, 1916, amounting to the sum of $716.14. In addition, medical bills in the sum of $149.00 were allowed. Notice of this finding and order was sent to the employer, Peter Praechter, but we are advised by the claimant that to date he has received no compensation.

"Inasmuch as the claimant has been unable to work for more than one year, and is absolutely destitute and in desperate need of financial assistance, and according to the medical division it will not be possible to give a definite estimate as to the permanent disability in this case until about April 1, 1916, in view of all of these circumstances we desire to enquire as to whether it would be possible to institute civil proceedings at once against the employer

for the collection of the partial award heretofore made by the commission. If so, will you kindly advise, in order that we may certify to you copy of our findings in this case?"

It is to be noted from the contents of your communication that Mr. Balbia was an employe of Peter Praechter, of Cincinnati, Ohio, that the employer had not complied with the provisions of section 22 of the workmen's compensation law, section 1465-69 of the General Code, in that he had not paid a premium to the state insurance fund or elected to compensate his injured employes direct, therefore this claim comes within the provisions of section 27 of the workmen's compensation act, section 1465-74 of the General Code. It is stated in your communication that:

"On September 23, 1915, the case was before the commission for hearing, at which time the claimant was allowed compensation to cover his temporary total disability from September 4, 1914, to March 21, 1916, amounting to the sum of $716.14. In addition, medical bills in the sum of $149.00 were allowed. Notice of this finding and order was sent to the employer, Peter Praechter, but we are advised by the claimant that to date he has received no compensation."

It is also stated in your letter that:

"According to the medical division, it will not be possible to give a definite estimate as to the permanent disability in this case until about April 1, 1916."

Your enquiry is as to whether or not it would be possible to institute civil proceedings at once against the employer for the collection of the partial award heretofore made by the commission.

Section 27 of the workmen's compensation act, section 1465-74 of the General Code, provides a means whereby an employe, whose employer has failed to comply with the provisions of section 22, and which employe has been injured in the course of his employment, may obtain compensation for said injuries. It is provided in this section that he may make application to the state liability board of awards for compensation in accordance with the terms of the act. However, when he makes application to the state liability board of awards for compensation he does so in lieu of proceedings against his employer by civil action in court. That is to say that the employe by making application to the industrial commission prefers to have the commission determine and fix the amount due him for injuries rather than to bring proceedings in court for damages as provided in section 26 of the act, or section 1465-73 of the General Code, 103 O. L., 72.

It is further provided in section 27 that:

"* * * the board shall hear and determine such application for compensation in like manner as in other claims before the board; *and the amount of the compensation which said board may ascertain and determine to be due to such injured employe,* or to his dependents in case death has ensued, shall be paid by such employer to the person entitled thereto within ten days after receiving notice of the amount thereof as fixed and determined by the board; and in the event of the failure, neglect or refusal of the employer to pay such compensation to the person entitled thereto within said period of ten days, the same shall constitute a liquidated claim for damages against such employer

in the amount so ascertained and fixed by the board, which, with an added penalty of fifty percentum, may be recovered in an action in the name of the state for the benefit of the person or persons entitled to the same. * * *"

It will be noted that the section provides that the hearing before the board on application for compensation shall be in like manner as other claims before the board. I construe this section to mean that the hearing on application shall be the same as the hearing on any other claim. It will also be noted that this section provides that the *amount of compensation* which said board may ascertain and determine to be due to the injured employe shall be paid to such employe or to the person entitled thereto within ten days, etc. It also appears from a reading of this section that the full amount due the injured employe from his employer by reason of his injury must be determined and fixed by the commission at the time of the hearing of the claim.

It is quite evident that this section does not contemplate that the amount of compensation fixed and determined by the board shall be paid in periodical payments for the reason that the section provides that it shall be paid within ten days after the employer receives notice of the finding of the board.

Nowhere do we find in this section of the statute that the commission has authority to determine and fix a partial amount due the employe for his injuries, but the language throughout this section leads us to the belief that the total amount due him by reason of his injuries must be fixed and determined by the commission at the time of the hearing. It is further provided in this section that upon the failure, neglect or refusal of the employer to pay such compensation within a period of ten days after receiving notice of the amount, the same shall constitute a liquidated claim for damages. The fact that the amount determined and fixed by the commission as due the employe becomes, according to the statute, a liquidated claim for damages leads us to the further conclusion that the amount so determined and fixed must be the *total amount* due the injured employe by reason of his injuries.

Section 26 of the act abolishes the common law defenses of contributory negligence, assumed risk and fellow servant rule to such employers as fail to comply with the provisions of section 22, and provides that such employer shall also be subject to the provisions of the next two succeeding sections of the act, to wit: sections 27 and 28. Section 28 provides for the collection by civil suit from an employer who defaults in any payment required to be made by him to the state insurance fund. It would seem from a reading of section 27 and section 28 that these are in the nature of a penalty provided against a defaulting employer.

I am, therefore, of the opinion that the amount when fixed by the commission as compensation for an injury to an employe arising under section 27 must be the *whole amount* of the compensation due him.

It is further provided in this section that the amount plus fifty percentum may be recovered in an action in the name of the state for the benefit of the person or persons entitled to the same. The cause of action against the employer arises upon the breach of the duty of the employer to pay the amount of compensation fixed and determined by the commission. If the commission proposes to collect by a civil action a *portion* of this award, we are likely to be confronted with another proposition, to wit: the principle applying to the "splitting of a cause of action." The supreme court of Ohio has held repeatedly that causes of action can not be split. Referring to the case of James v. Allen County, 44 O. S., 230, in which case the plaintiff sought to recover in several actions which all arose out of the same transaction, the court, in speaking upon the question, uses the following language:

"There is but one dismissal, but one breach, pleaded. The dismissal was one act. And, as to recovery of damages for that, plaintiff could not split

up his cause of action, recovering a part of his damages in one suit, and the remainder afterward. He must include all that belonged to that cause of action in his first petition, so that one suit and one recovery should settle the rights of the parties. It would be at his own risk and peril if he negligently or ignorantly omitted a part of what might properly have been embraced in the cause of action in his first suit. His mistake, if he made one might be a matter of regret, but that could not change the rule of law."

In the case of Cockley v. Brucker, 54 O. S., 227, the court say:

"A single cause of action cannot be split up into two or more causes of action; neither can two or more actions be sustained against the same party on a single cause of action."

The claim of Antonio Balbia against his employer for compensation arises out of a single transaction, and is for an amount of compensation due him by reason of an injury which he sustained in the course of his employment.

The question might arise as to the continuing jurisdiction of the board over claims arising under section 27. Section 39 of the act, section 465-83 of the General Code, provides as follows:

"The powers and jurisdiction of the board over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings or orders with respect thereto, as in its opinion, may be justified."

The board, no doubt, has continuing jurisdiction over claims for compensation by employes of employers who have complied with section 22, and may make such modification or change with respect to the same just as is provided in section 39, but the provisions of this section could not apply to claims arising under section 27 for the reason that when suit is entered for the recovery of the amount found due, the board necessarily divests itself of any further continuing jurisdiction over the claim, because it has a suit in a court of competent jurisdiction where the question submitted must be adjudicated according to the rules of civil procedure, and a finding or judgment obtained in a civil court would be beyond the power of modification or change by the state liability board of awards.

In view of the above cited decisions, and the construction we place upon the sections of the statutes herein discussed, together with the facts submitted in your letter, I am of the opinion that the commission in determining the amount of compensation due the injured employe must, under the provisions of section 27, determine the full amount due said employe by reason of his said injury. If an action is instituted in court for the recovery of a partial amount of the award, we might meet the objection that a recovery had been made in a former suit and that the question between the industrial commission and the employer had been adjudicated in a former action. This theory seems to be substantiated by the decision of the supreme court and might, if taken advantage of by the employer, work great harm to the injured employe in the collection of the amount of the award.

Therefore, answering your question directly, I am of the opinion that a civil action should not be commenced for the collection of a partial amount of the award already found due, but that the action should be for the *full amount* due the employe by reason of his said injuries.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1067.

WORKMEN'S COMPENSATION ACT—PAYMENT OF COMPENSATION OUT OF STATE INSURANCE FUND OR BY A DIRECT COMPENSATING EMPLOYER TO AN INJURED EMPLOYE NOT A BAR FOR ACTIONABLE NEGLIGENCE OF THIRD PERSON—RIGHT OF ACTION AGAINST A THIRD PERSON WHO IS A TORT-FEASOR.

Where an employe of an employer has sustained an injury in the course of his employment and his employer has paid a premium to the state insurance fund, or has elected to pay compensation direct to his injured employe, and which injury to the employe was caused by a tort-feasor (a third person) the payment of compensation to the injured employe out of the state insurance fund or the payment of compensation to the injured employe by a direct-compensating employer is not a bar to a right of action against such third person for negligently injuring such employe.

COLUMBUS, OHIO, December 3, 1915.

HONORABLE JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I am in receipt of your letter of November 24, 1915, in which you request an opinion as follows:

> "We have been requested to submit for your opinion the following question:
>
> " 'If an employe is hurt by reason of the negligence of a third party while working for an employer who is regularly contributing to the state insurance fund, and such employe participates in the fund, is he barred in the subsequent action brought against the said third party on the theory that a settlement with one joint tort-feasor is a settlement with all?'
>
> "We trust that you may render this opinion at your very earliest convenience and beg to remain."

The question submitted in your letter is as to whether or not an employe of an employer who has contributed to the state insurance fund and the employe having accepted compensation for an injury out of the state insurance fund would be barred in a subsequent action brought against a third person where the employe has been injured by the third person while in the course of his employment with his employer.

This question has been before the Industrial Commission of Ohio in two cases—one case being that of Ridorfo v. The Cleveland Telephone Company, found in 7 N. C. C. A., 1187, the syllabus of which is as follows:

> "SETTLEMENT WITH TORT-FEASOR. EFFECT ON RIGHT TO COMPENSATION. Where an employe is injured while in the course of his employment and a tort-feasor, other than his employer, is responsible therefor, his right to receive compensation in accordance with the provisions of the workmen's compensation act of Ohio is not lost by settlement with the tort-feasor."

The other case is that of Ferraro v. LaBelle Iron Works, 8 N. C. C. A., 1180, the second branch of the syllabus being as follows:

> "2. DEATH CAUSED BY ACTIONABLE NEGLIGENCE OF THIRD PERSON. EFFECT ON RIGHTS OF DEPENDENTS TO RECOVER COMPENSATION. The right of the dependents of a killed employe to receive compensation in accordance with the provisions of the workmen's

compensation act of 1913 is not affected by the fact that the death of the employe was caused by the actionable negligence of a third person not connected with the employment."

The opinions in these two cases before the industrial commission discuss the question quite fully.

The enactment of the workmen's compensation law of Ohio has made an innovation in the law of torts. Under the Ohio workmen's compensation law an injured employe's right to participate in the state insurance fund or to receive compensation direct from his employer is not based upon any wrong the basis of which, for a recovery as in an action for tort, would be upon the fault or negligence of his employer. A review of the workmen's compensation law reveals the fact that compensation is not awarded on the ground that the employer has been at fault or negligent, but on the simple fact that the injury to the employe was received in the course of his employment and not purposely self-inflicted. Therefore the compensation the employe receives is not paid to him because of any fault or negligence on the part of the employer, which fault or negligence must be the basis of an action in tort, and the employer could not be considered under the workmen's compensation law as a tort-feasor, and there is no liability on the part of the employer for an injury on the ground that he is a tort-feasor.

This question was before the court of common pleas of Cuyahoga county, and on July 9, 1915, Judge Feran rendered an opinion in a series of cases in which he discussed the various provisions of the Ohio workmen's compensation law, and on page 13 of the opinion of the court the same question submitted by you was discussed as follows:

"That while the act and the related acts are far from being perfect * * * they certainly do not deprive the employe of a right of action against a third person who injures him while he may be or is in the course of his employment."

And by way of illustration, Judge Feran says that:

"If the driver of a lumber wagon, in the course of his master's business, is negligently injured by a railroad company while crossing its tracks upon a public highway, he may recover from the wrong-doer, notwithstanding, he has recovered compensation or has been awarded compensation by the state industrial commission from the state insurance fund, for the injury.

"There is no possible justification in law or ethics or morals for the principle or proposition that a railroad company, or any other corporation or person, may wantonly or negligently injure a man and claim immunity on the ground that the injured man received compensation from the state insurance fund. The act or law does not provide for full compensation and even if it did, to hold that a third person might negligently injure a man while that man was in the course of his master's business, and escape liability merely because the man's employer was a contributor to the state insurance fund, would inevitably lead to wanton destruction of limb and life. To so hold would be tantamount to holding that because a man has ample insurance upon his life, another may negligently kill him; or if he has an accident policy, another may wantonly injure him, and plead the payment of the insurance as a defense to an action for the injury or death. It has been so uniformly held that this cannot be done that it would be useless and unnecessary to cite authorities in support of the proposition. The English act of 1906 provides in express

terms that an employe injured in the course of his employment, by a third person, 'shall not be entitled to recover both damage and compensation.' The Ohio statute places no such limitation upon the rights of an employe."

Again, quoting from Judge Feran's opinion, on page 15:

"From a consideration of these provisions it becomes apparent at a glance that the doctrine forbidding double compensation or double recovery for the same wrong can have no application and may not be invoked by a third person who has negligently caused an injury to an employe while engaged in his master's business, even though such employe has made application for and has been awarded compensation by the industrial commission."

Again, on page 16, the court says:

"Again, it must not be forgotten that an employe is entitled to the compensation provided for in the act, even though the injury is the result of his own gross negligence, and that the employer was in no sense responsible for it and was in no sense a wrong-doer. Under such circumstances, how can it be said that the employer is a tort-feasor?"

The same question as submitted in your letter was before the supreme court of New Jersey, and arose out of or under the workmen's compensation law of that state in the case of Painting Company v. Klotz, 85 N. J. L., 432, the syllabus of which is as follows:

"Where a workman is injured by an accident arising out of and in the course of his employment, and a tort-feasor other than his master is responsible therefor, the right to compensation under the act of 1911 is not lost by settlement with and release of a tort-feasor."

On page 434 of the opinion the court say, after stating the general policy and reason of the act, that:

"These considerations suffice to show that the right to compensation under the statute, and the right to recover damages of a tort-feasor are of so different a character that the rule of law appealed to by the prosecutor is inapplicable."

A very interesting discussion of your question is found in the Ohio law reporter of April 5, 1915, the article being written by Mr. Ernst Angell, of the Cleveland bar. Without entering into a discussion of this article, suffice it to say that his conclusions are that the acceptance of compensation by an injured employe out of the state insurance fund or direct from his employer does not affect his right of action against a third person who is a tort-feasor.

Therefore, answering your question direct, I am of the opinion that the acceptance of compensation from the state insurance fund or from his employer who has elected to pay compensation direct, does not bar the employe of his subsequent action against a third person who is a tort-feasor.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1068.

APPROVAL OF RESOLUTIONS FOR IMPROVEMENT OF CERTAIN ROADS IN GUERNSEY, LORAIN, MORGAN, SENECA AND WAYNE COUNTIES, OHIO.

COLUMBUS, OHIO, December 3, 1915.

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

DEAR SIR:—I have your communication of November 30, 1915, transmitting to me for examination final resolutions relating to the following road improvements:

"Guernsey County—Cambridge-Barnesville road, petition No. 1550, I. C. H. No. 107;

"Lorain County—Oberlin-Elyria road, Section 'M', I. C. H. No. 313, petition No. 1589;

"Morgan County—McConnelsville-New Lexington road, petition No. 1344, section 'G', I. C. H. No. 354;

"Seneca County—Tiffin-Bellevue road, section 'K', petition No. 1052, I. C. H. No. 271;

"Wayne County—Wooster-Massillon road, I. C. H. No. 69, petition No. 725."

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

1069.

APPROVAL OF SALE OF CERTAIN CANAL LANDS TO MARTIN D. KUHLKE.

COLUMBUS, OHIO, December 3, 1915.

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

DEAR SIR:—I have your communication of November 30, 1915, requesting my approval of the sale of certain canal lands to Martin D. Kuhlke.

I find that your proceedings have been regular and that the record of the same has been prepared in accordance with my opinion of November 29, 1915, relating to the same matter. I therefore return the duplicate copies of your record with my approval of the sale endorsed thereon. In the opinion referred to above it was only intended to hold that the participation of the attorney general was not required in making a public sale of canal lands, and the reference therein to the matter of approval as distinguished from participation was through inadvertence. I find upon an examination of the statutes that the requirement, that the commissioners of the sinking fund fix the terms of payment, was evidently intended to apply only where credit was extended as to some part of the purchase price.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1070.

APPROVAL OF LEASE OF PART OF ABANDONED HOCKING CANAL TO T. R. COWELL, FOR OIL AND GAS PURPOSES.

COLUMBUS, OHIO, December 3, 1915.

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

DEAR SIR:—I have your communication of November 23, 1915, transmitting to me for examination triplicate copies of a lease of two miles of the abandoned Hocking canal to T. R. Cowell, for oil and gas purposes.

I find that this lease has been executed in accordance with the provisions of the statutes and am therefore returning the same to you with my approval endorsed upon the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1071.

COUNTY COMMISSIONERS—NOT AUTHORIZED UNDER CASS HIGHWAY LAW TO LET CONTRACTS ON UNIT PRICE BASIS.

County commissioners are not authorized, under the Cass highway law, to let contracts on a unit price basis.

COLUMBUS, OHIO, December 3, 1915.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Under date of November 20, 1915, I have a communication from Mr. Charles A. Groom, of your office, which communication reads as follows:

> "Enclosed please find form of contract combining surveyor's estimate, proposal, bid, bond and specifications for road improvements prepared with special reference to the Cass highway law upon the unit price basis, but so arranged that, with the insertion of a page or one or two words in blanks left, same may be used for contract on a total price basis.
>
> "In contracts for road construction by the county commissioners, section 91 requires the surveyor to transmit estimate of cost with survey, plats, profiles, cross-sections, estimates and specifications; section 124 provides that the commissioners may let the work as a whole or in convenient sections and shall award the contract to the lowest and best bidder; section 126 provides for a bond equal to the contract price and section 127, relating to extras, is apparently upon the theory of a definite total contract price since same refers to original contract price less than ten thousand dollars and original contract price of ten thousand dollars or more.
>
> "In view of the fact that there should be uniform procedure throughout the state under the Cass law, I request your opinion as to whether it is possible to award contracts on the unit price basis, or whether it is requisite to award contracts for a definite price, requiring the bidder to state merely unit prices for the purpose of complying with section 127 in case extras become necessary.

"It appears to me that a total price, definitely ascertained, is requisite under the law for the reason that definite plans, specifications, cross-sections and profiles are required and a total contract price for all work is indicated by sections 126 and 127; this, however, will undoubtedly make the work more expensive for the county and in resurfacing contracts will be almost impossible of execution because of the variation in wear requiring larger or smaller quantities at various points along the road to be repaired. On the other hand the unit price basis presents numerous difficulties in the application of the law; the unit price bid and payment thereunder for quantities and work on the actual basis furnished would not disclose the total price until the completion of the work and therefore the amount of the bond could only be upon the basis of an estimated figure and the same would apply to operations under the section regarding extras, and since a bidder, having surveys, profiles, etc., could make an unbalanced bid and thereby load his items at the points where the greatest amount of work and materials were necessary, he could thereby mulct the county and receive a high price on the loaded item necessary in the work and only have a small deduction for the items running substantially under the estimate of quantities. On unit bids, contractors customarily cover their method of calculation by unbalanced bidding, and since the calculation is based upon the total units, there is no method of preventing this practice.

"With your opinion on the question as to whether the unit price basis may be used or whether a definite total price is requisite, will you kindly indicate desired changes in wording of estimate, proposal and contract form, as it seems to me that a uniform or standard type of contract and specifications will tend to definite understanding both upon the part of the contractors and commissioners for the benefit of the public.

"If there is anything I can do to be of assistance either in the matter of arriving at a conclusion or upon the subject of standardizing a form of contract and specifications under the Cass law, I shall be glad to confer with you."

The question raised by Mr. Groom's inquiry is not free from doubt. In view of the reference in section 127 of the Cass highway law, section 6948, G. C., to an original contract unit price, it would seem that the legislature in framing that section acted upon the assumption that contracts might be let upon a unit price basis. On the other hand, section 126 of the act, section 6947, G. C., provides that before entering into a contract the county commissioners shall require a bond in a sum equal to the contract price.

As pointed out by Mr. Groom, there would be no way of fixing the amount of the contractor's bond if the contract were let upon a unit price basis, inasmuch as the contract price could not be determined until the work had been completed and the quantities measured. Even the section of the act which refers to an original contract unit price contains references to the amount of the original contract price of such a character as to warrant the inference that such price must be a fixed sum, determined at the time the contract is made. The section refers to cases in which the original contract price is less than ten thousand dollars and to cases in which the original contract price is ten thousand dollars or more, and establishes a different rule for the letting of contracts for extra work in the two cases. If contracts were let on a unit price basis it would often be impossible to determine in advance of the completion of the contracts whether the amounts involved were less than ten thousand dollars or whether they equalled or exceeded that sum, thus involving in doubt the manner of letting contracts for extra work. At no place in the act is any express authority conferred on county commissioners to let contracts on a unit price basis and any argu-

ment in favor of the existence of such authority must be based on the reference in section 127 of the act to "the original contract unit price." In view of the other provisions of this section, and the provisions of the preceding section relating to the amount of the contractor's bond, all of which contemplate a fixed and definite total contract price, I am of the opinion that any argument in favor of the existence of the authority to let contracts on a unit price basis would not be well taken, and therefore concur in the view expressed by Mr. Groom, that county commissioners do not have authority, under the Cass highway law, to let contracts on a unit price basis, that a total price, definitely ascertained, is necessary under the law, and that the language of section 127 of the act relating to the original contract unit price can only be given such effect as to authorize the commissioners to require bidders to state the unit prices used by them in arriving at the total sum bid, such unit prices to be of no effect unless extra work becomes necessary, the contractor to receive the total sum bid without additions or deductions and without reference to quantities handled or furnished unless extra work rendered necessary by unforeseen contingencies is contracted for by the commissioners.

I also note Mr. Groom's request that I indicate any changes that should be made in the wording of the estimate, proposal and contract form submitted by him. The form submitted was evidently drawn upon the theory that the work was to be let upon a unit price basis and I am sure the changes necessary to conform to the requirement of a total price, definitely ascertained, will readily suggest themselves. The statement under the heading of surveyor's estimate and immediately preceding the table of quantities and prices might properly be amended to provide that the contractor should not be entitled to any additional compensation rather than to any claim for loss of profits or for other damages, should the quantity of work done prove greater than estimated. No reference would be required to a situation where the work done might prove less than estimated. The table of items and prices embodied in the proposal should have added to it two additional columns,in one of which should be printed under an appropriate heading the total estimated quantities while the other should provide a space for the total bid for each kind or class of labor or material. The heading of the column already provided for prices should be so altered as to call for the unit prices for each kind or class of labor or material, and at the foot of the column provided for the total bid for each kind or class of labor or material a space should be provided for the total bid for the complete work. The contract should be reframed to provide for a definite lump sum as compensation and should contain a provision to the effect that the contractor shall not be entitled to any extra compensation in case the quantities actually exceed the estimates, and certain references to the measurement of the work should be stricken from the specifications. There may be some other slight changes necessary in order to conform fully to the theory of a definite lump sum bid.

I have not attempted to rewrite the estimate, proposal, contract and specifications in their entirety, and have only suggested the line to be followed in reframing the same, but am sure that no difficulty will be encountered on this score.

Respectfully,

EDWARD C. TURNER,
Attorney General.

1072.

CASS HIGHWAY LAW—PROVISION IN REGARD TO SIGN POSTS ON HIGHWAYS—STATE HIGHWAY COMMISSIONER AND COUNTY HIGHWAY SUPERINTENDENT'S DUTY IN PRESCRIBING AND PROVIDING DESIGN.

Under section 7196, G. C., the state highway commissioner is not required to provide sign posts, his duties under that section being limited to prescribing and providing the design. The county highway superintendent is not required to erect sign posts until the county commissioners have authorized the necessary expenditure.

COLUMBUS, OHIO, December 4, 1915.

HON. F. C. GOODRICH, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—I have your communication of November 23, 1915, which reads as follows:

> "Under section 7196 of the General Code, the county highway superintendent is required to erect and maintain at cross roads on inter-county and main market roads suitable sign posts, etc. I would like an opinion from your office as to who pays for these sign posts, whether they are furnished and paid for by the highway commissioner, or whether they are furnished and paid for by the county commissioners."

So much of section 7196, G. C., being section 153 of the Cass highway law, as is material to your inquiry, reads as follows:

> "The county highway superintendent shall erect and maintain at cross roads, on inter-county and main market roads, suitable sign posts of a design to be prescribed and provided by the state highway commissioner, showing the names of the roads, and the direction and distance to nearby villages and cities."

So far as the above quoted language is concerned, the only duty that it casts upon the state highway commissioner is to prescribe and provide a design for sign posts. The word "provided" relates to the word "design" and not to the word "sign posts," and the language in question does not require the state highway commissioner to provide any sign posts. His only duty is to prescribe a design for general use on the inter-county highways and main market roads of the state and to provide each county highway superintendent with a copy of the design.

While the language in question might seem at first glance to impose upon the county highway superintendent a mandatory duty to erect and maintain sign posts upon certain highways, yet this language must be read in connection with the other provisions of the act in which it is found. Under section 155 of the act, section 7198, G. C., the county highway superintendent may employ laborers and purchase material only with the approval of the county commissioners or township trustees, and other sections of the act further indicate that the county highway superintendent has no authority to bind the county unless authorized by the county commissioners. It therefore follows that under the provision of section 153 of the Cass highway law, section 7196, G. C., no duty attaches to the county highway superintendent to erect sign posts until the county commissioners have authorized the purchase and erection

of the same. When such purchase and erection have been authorized by the county commissioners, then it becomes the duty of the county highway superintendent to act and the cost and expense is, of course, to be paid from the county treasury.

By the above it is not meant to hold, however, that independent of section 153 of the Cass highway law the state highway commissioner, acting either with or without the co-operation of the local authorities, would not have authority to include the erection of sign posts in the plans for the improvement of an inter-county highway or main market road.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1073.

STATE HIGHWAY COMMISSIONER—AN ASSIGNMENT BY CONTRACTOR OF ALL COMPENSATION DUE OR TO BECOME DUE UNDER HIS CONTRACT OR ALL OF AN INSTALLMENT BECOMING DUE IS VALID.

An assignment by a contractor on state highway work of all the compensation due or to become due to him under his contract, or all of any particular installment or installments to become due is valid and must be recognized by the state highway commissioner. An assignment of a part of the compensation due or a part of an installment to thereafter become due, may or may not be recognized by the state highway commissioner at his option.

COLUMBUS, OHIO, December 6, 1915.

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

DEAR SIR:—I have your communication of October 26, 1915, which reads as follows:

> "We are attaching hereto copy of a paper purporting to be an assignment by Henry J. Neipfoot & Company to the Universal Portland Cement Company of all moneys due and payable to Henry J. Neipfoot & Company for the construction of section 'P,' Cleveland-East Liverpool road, Portage county.
>
> "The Universal Portland Cement Company's representative requests the signature of the auditor of Ohio, and myself, as highway commissioner, to the blank form of acceptance at the bottom of this paper, and the honoring of the purported assignment.
>
> "I respectfully request an opinion from your office as to what action may properly be taken by this department pursuant to the Universal Portland Cement Company's request."

I am informed by you, that as a matter of fact your department has no contract with Henry J. Neipfoot & Company for the construction of section "P" of the Cleveland-East Liverpool road in Portage county, the contract in question being with Henry J. Neipfoot and not with Henry J. Neipfoot & Company. In so far as the assignment submitted by you is concerned, it therefore follows that the same is invalid and should not be recognized by you in any way, for the reason that the same is not executed by the contractor for the road in question.

I understand, however, that you desire a general statement of your rights and duties relative to assignments by contractors of compensation due or to become due

to them on account of work performed under contracts entered into by your department. No question has ever been raised as to the right of a contractor to assign compensation already earned. The courts have generally extended this right to unearned compensation under an existing contract. The rule in Ohio, and indeed generally is that a contingent debt founded on an existing contract is property which is assignable.

Andrew v. Krippendorf-Dittman Co., 7 O. L. R., 114;
Rodijkeit v. Andrews, 74 O. S., 104;
Brooks Co. v. Tolman, 6 O. C. C. (n. s.), 137.

The first case above cited related to the assignment of commissions on sales made, and the other two cases to the assignment of wages, but the same principles are applicable and have been generally recognized by the courts as to the compensation due to contractors, and the rule is the same where the contract is one for the erection of a public work.

In the case of Soeder v. Cleveland, 12 O. D. N. P., 222, the court recognized the validity of orders given by a city contractor for the payment to persons named therein of sums of money out of certain funds due or to become due the contractor under a contract with the city. Assignments of moneys due or to become due on public contracts are recognized as valid in the following cases:

Fortunato v. Patten, et al., 147 N. Y., 277;
Gilligan Co. v. Casey, 210 Mass., 26;
Perkins v. Butler County, 44 Neb., 110;
Bank v. School District (Neb.), 110 N. W., 347;
Dickson v. City of St. Paul (Minn.), 106 N. W., 1053;
Bank v. School Committee, 121 N. C., 107;
Stott v. Franey, 20 Ore., 410;
Board of Education v. Brick Company, 13 Utah, 211.

The right of a contractor on public work to receive compensation at such future time as he shall have completed the work, or some part thereof, being property and subject to assignment, the general rule is that the consent of the debtor is not necessary to the validity of an assignment of this character. The existence of this rule in Ohio was recognized by Spiegel, J., in the case of Andrew v. Krippendorf-Dittman Co., supra, in the following language:

> "The personal confidence which precludes the transfer of rights arising out of a contract must be involved in the nature of the rights themselves. It is not ordinarily involved in the right to receive moneys due under a contract and this right is generally assignable without the consent of the other party."

In view of the above it follows that no formal written acceptance of the assignment on your part, or on the part of the state auditor is necessary, and that such an acceptance would not add anything to the rights of the assignee. I therefore suggest the advisability of your declining to execute any such acceptance.

I have so far considered only those cases in which a contractor holding a contract for the construction of a highway executes and delivers an assignment for all of the compensation due or to become due to him under his contract, or all of any particular installment or installments to become due. I advise you that such assignments, if sufficient in form and substance and properly executed by the contractor and filed with you, are to be regarded as valid and binding upon you, and that payment of

moneys due on such contract should be made to the assignee and moneys thereafter becoming due on such contract and covered by the assignment, should be paid to the assignee when they become due.

A somewhat different situation presents itself where a contractor endeavors to assign a part of the compensation which may be due, or a part of an installment which may thereafter become due to him. Such assignments have generally been held to be unenforceable at law unless assented to by the debtor, for the reason that their effect is to split a cause of action and create two debts where one had previously existed.

> Stanbery v. Smythe, 13 O. S., 495;
> Railway Company v. Supply Company, 6 O. C. C. (n. s.), 429.

In other words, if a creditor without his debtor's consent, assigns a part of a claim, or if he assigns parts of the claim to different persons, the debtor is not bound, and may discharge himself by payment to the original creditor, but an assignment of a part of a fund assented to by the debtor is valid.

I therefore advise you that as to the class of assignments now under consideration, you are not bound to recognize the same and may refuse to consent to such assignments and may make payments to the contractor, or you may, at your option, consent to such partial assignments and make payment to the assignees.

I am not advised as to the advantage or disadvantage to your department of being called upon to recognize assignments of compensation by contractors engaged in the construction of highways. If it be a fact that the duty imposed upon you by law, of recognizing such assignments when in due form and properly executed, works to the disadvantage of the public and tends to hamper the work of your department, the remedy is to be found in the insertion in the contracts hereafter made by your department of a clause prohibiting the contractor from assigning without your consent any of the money that may become payable under his contract.

The validity of such a provision was sustained by the court in the case of City of Omaha v. Standard Oil Company, 55 Neb., 337. The facts in that case were that the Metropolitan Street Lighting Company had contracted with the city of Omaha to light its streets for a consideration to be paid monthly. The contract contained the following provision:

> "It is further agreed between the parties hereto that the party of the second part shall not assign this contract without first obtaining the consent of the first party endorsed hereon in writing."

I therefore advise you that as to the class of assignments now under consideration, you are not bound to recognize the same and may refuse to consent to such assignments and may make payments to the contractor, or you may at your option consent to such partial assignments and make payment to the assignees.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1074.

COUNTY COMMISSIONERS—PRELIMINARY VIEW OF PROPOSED DITCH —COUNTY SURVEYOR NEED NOT ACCOMPANY THEM ON SUCH INITIAL VIEW.

County commissioners are without authority to order the county surveyor to accompany them upon their preliminary view of a proposed ditch or to attend upon the preliminary hearing had upon a ditch petition, and the county surveyor cannot be compensated for such services.

COLUMBUS, OHIO, December 6, 1915.

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

GENTLEMEN:—I have your communication of November 24, 1915, which reads as follows:

> "Have the county commissioners, under sections 6451, General Code, et seq., the discretion to legally order the county surveyor to accompany them upon the initial view of a proposed ditch, petitioned for, and if so, how is the surveyor to be paid for the services so rendered by him?"

Your inquiry presents a question involving the construction of certain apparently inconsistent sections of the General Code of Ohio, relating to the construction of single county ditches. The sections in question are found in chapter I of title 3 of part 2 of the General Code.

Under sections 6447, G. C., et seq., jurisdiction as to the construction of single county ditches is obtained by the county commissioners of a county upon the filing of a petition with the county auditor and the giving of notice. Section 6451, G. C., provides that the county commissioners shall meet at the place of beginning of the ditch on the date fixed, hear the proof offered, go over and along the line of the improvement and determine the necessity thereof. This section also provides that the commissioners may adjourn from time to time so that the preliminary view of the site of the proposed improvement and the hearing of proof may occupy one or more days. At no place in the statutes is found any direct authority for the county surveyor to accompany the county commissioners in their preliminary view or to attend upon the hearing of proof, either of his own volition or on the order of the county commissioners.

Section 6454, G. C., provides that if the county commissioners find for the improvement, they shall cause to be entered on their journal an order directing the county surveyor to go upon the line described in the petition, or as changed by them, and perform certain duties, this being the first direct statutory authority for any action on the part of the county surveyor in the premises.

Considering the above provisions together, it would seem clear that no duty attaches to or can be required of the county surveyor prior to the time that the county commissioners have found for the improvement, and if it were not for the existence of a provision found in section 6453, G. C., there could be no doubt of the soundness of the proposition that county commissioners do not have the power to order the county surveyor to accompany them upon the initial view of a proposed ditch.

Said section 6453, G. C., reads as follows:

> "If the county commissioners find against the improvement, they shall dismiss the petition and proceedings at the cost of the petitioners, and cause an itemized bill of the costs to be made up by the auditor for their examination

and approval, *including the per diem of the county surveyor,* together with all costs necessarily made except fees of the auditor and compensation of the commissioners."

It thus appears that while prior to a finding of the county commissioners, either for or against the ditch, there is no statutory authority for the performance of any duties in the matter by the county surveyor, either on his own motion or at the request of the county commissioners, yet the section pointing out the duty of the county commissioners in case they do find against the improvement contemplates the inclusion in the bill of costs of the per diem of the county surveyor. This apparent inconsistency in the statutes is, however, cleared up by an examination into the history of the law of Ohio relating to the construction of single county ditches.

The first act of the legislature relating to this subject, and approximating the present law as to form, is found in 68 O. L., 60. Under section 2 of that act it was the duty of the auditor to furnish a copy of the petition to the commissioners, who were required to thereupon proceed *with or without an engineer, as they deemed best* to view the site of the proposed improvement, and to perform certain other duties.

Section 2 of the act, found in 68 O. L., 60, was amended in 70 O. L., 79, and in its amended form provided that the commissioners, upon receipt of the petition, should *direct the county surveyor or a competent engineer to go upon the line of the proposed ditch, view the same and perform certain other duties.* Under this section the county surveyor, or some other engineer, was required to perform certain duties upon receipt of a direction so to do from the county commissioners and before the county commissioners had taken any other action in the premises. This section was again amended in 73 O. L., 181, but the part of the section now under consideration was not substantially changed.

In the revision of 1880, sections 4452 and 4453 read as follows:

"*Section* 4452. If the bond be approved by the county auditor he shall immediately deliver a copy of the petition to the commissioners, who shall thereupon take to their assistance a competent surveyor or engineer, if, in their opinion, his services are necessary, and at one proceed to view the line of the proposed improvement, and determine by actual view of the premises along and adjacent thereto, whether the improvement is necessary or will be conducive to the public health, convenience or welfare, and whether the line described is the best route; and they shall report their finding in writing and order the auditor to enter the same on their journal.

"*Section* 4453. If the commissioners find against the improvement, they shall dismiss the petition and proceedings at the cost of the petitioners; and they shall cause an itemized bill of all the costs, to be made up by the auditor, for their examination and approval, *which shall include the per diem of the surveyor or engineer,* together with all other costs necessarily made, except fees of the auditor and compensation of the commissioners."

Section 4452, R. S., as subsequently amended, became section 6452, G. C., while section 4453, R. S., became section 6453, G. C. As the two sections stood in the Revised Statutes of 1880, they were not inconsistent, but a subsequent amendment of section 4452, R. S., section 6452 G. C., was so framed as to strike from that section the provision authorizing the commissioners to take to their assistance a surveyor or engineer. The legislature, however, evidently overlooked the provision of section 4453, R. S., section 6453, G. C., to the effect that the bill of costs should include the per diem of the surveyor or engineer and this oversight produced the present apparent conflict between the two sections. Inasmuch, however, as all authority on the part of the commissioners to call to their assistance the county surveyor or any other engineer

in making their preliminary view of the site of the proposed ditch has been destroyed by the action of the legislature, the language in section 6453, G. C., to the effect that the itemized bill of cost shall include the per diem of the county surveyor, must be rejected as surplusage.

It is therefore my opinion, in answer to your specific question, that the county commissioners have no authority to order the county surveyor to accompany them upon their initial or preliminary view of a proposed ditch, or to attend upon the preliminary hearing had upon a ditch petition, and that the county surveyor cannot be compensated for such services. Indeed, such services on the part of the county surveyor, not being official in their nature, cannot, strictly speaking, be rendered even without compensation, for the reason that under section 7181, G. C., as amended in 106 O. L., 612, the county surveyor is required to give his entire time and attention to the duties of his office.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1075.

TAXES AND TAXATION—TOWNSHIP AND VILLAGE ASSESSORS—WHEN ELECTION TO SUCH OFFICES ARE VOID BY REASON OF ELECTOR NOT RESIDING IN REQUIRED DISTRICT—OFFICES COMPATIBLE—VILLAGE TREASURER AND TOWNSHIP CLERK—VILLAGE TREASURER AND TOWNSHIP TREASURER—VILLAGE CLERK AND TOWNSHIP CLERK.

The election of resident of a village within a township as township assessor and the election of a resident of the territory of a township outside of such village as village assessor, are void and of no effect, and a certificate of such election may not be compelled to be delivered to the person found by the canvassing officers to be so elected.

A vacancy will occur in such offices on the first day of January, 1916, to be filled in the manner provided by law.

The offices of village treasurer and township clerk; the offices of village treasurer and township treasurer, and the offices of village clerk and township clerk are not incompatible, and may be held by the same person at the same time, unless the volume of business is such or for other reasons it be physically impracticable for one person to properly perform all of the duties of the offices held by him.

COLUMBUS, OHIO, December 6, 1915.

HON. HUGH F. NEUHART, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—Your request for an opinion under date of November 16, 1915, is as follows:

> "Section 3349, G. C., as amended, 106-250, provides among other things: 'In villages one assessor shall be elected; * * * in townships composed in part of a municipal corporation, one assessor shall be elected in the territory outside such municipal corporation. * * * An assessor shall be a citizen possessing the qualifications of an elector of such ward, district, city, village or township.'
>
> "Batesville village is a municipal corporation in Beaver township, this county.
>
> "B, qualified elector of Batesville village, received 12 votes for the office of assessor of Batesville village. He also received 106 votes in Beaver town-

ship, in the territory outside such municipal corporation, for the office of assessor of such territory. He was also elected a member of council of Batesville village.

"F, qualified elector of Beaver township, outside Batesville village, received 25 votes as assessor of Batesville village. He also received 85 votes in Beaver township, in the territory outside such municipal corporation, for the office of assessor of such territory.

"B, elector of the village, received the majority vote for township assessor in the territory outside the municipality, while F, qualified elector of the township in the territory outside the municipality, received the majority vote as village assessor.

"*Query.* To whom shall the deputy state supervisors of elections give notice of election as provided in section 5119 of the General Code, or does a vacancy exist in either or both of said offices?

"If elected thereto, may an elector of a municipality qualify for and hold the following offices: Village treasurer and township clerk? Village treasurer and township treasurer? Village clerk and township clerk?

"If not, may he elect which one to hold and qualify therefor, or is he disqualified from both?"

Section 3349, G. C., 106 O. L., 250, provides in part as follows:

"At the regular election to be held in November, 1915, and biennially thereafter, assessors shall be elected in the manner provided by law for the election of ward, district, city, village and township officers as follows: In municipal corporations divided into wards, one assessor shall be elected in each ward; in villages one assessor shall be elected; in cities not divided into wards, the board of deputy state supervisors of elections or the board of deputy state supervisors and inspectors of elections, as the case may be, shall, acting in conjunction with the county auditor, within ten days after this act shall become effective, divide such cities or such part or parts thereof as may be located in their county, into such number of assessment districts as in the judgment of the county auditor may be necessary in order to provide for the assessment of all the property therein; * * * One assessor shall, at the time specified in this section, be elected in each assessment district so created; * * * in townships not having a municipal corporation therein, one assessor shall be elected in such township; in townships composed in part of a municipal corporation, one assessor shall be elected in the territory outside such municipal corporation. An assessor shall be a citizen possessing the qualifications of an elector of such ward, district, city, village or township. * * *"

It seems unnecessary to say here that although an elector of a municipality may also be an elector of the township in which the municipality is located, for the purpose of electing certain township officers, the term "elector" as used in the last sentence above quoted has a somewhat narrower application and there clearly comprehends only electors of such wards, districts, cities, villages and townships for the purpose of electing assessors therein. That is to say, an assessor must be entitled to vote for an elector to fill that office in the ward, district, city, village or township in which he is elected.

An elector of a ward, district, city or village is not entitled to vote for an assessor of the township in which such city or village is located, and is, therefore, not an elector of the township for the purpose of electing an assessor, and is, therefore, ineli-

gible to the office of assessor for the township. For like reason an elector of the township residing outside of the limits of a municipal corporation is not, for the purpose of electing assessors, an elector of any city or village, or any ward or district thereof, and is ineligible to the office of assessor herein.

From this it follows that B is ineligible to the office of assessor of Beaver township, outside of Batesville, and likewise is F ineligible to hold the office of assessor in the village of Batesville. The face of the election returns then shows, under your statement, that there was elected in both Beaver township and Batesville a person who is ineligible to fill the office to which he was elected. From this it follows that the election to the office of assessor was a nullity in both the township and village and consequently a vacancy in that office will occur on the first day of January, 1916, in each case to be filled in the manner provided by law.

The rule is well established that where there is elected to an office a person who is ineligible to fill the same, the election is void.

15 Cyc., 391;
23 Am. & Eng. Ency., 338, 2nd Ed.;
Dorian v. Walters, 116 S. W., 313 (Ky. 1909);
Jenners v. Clark, 129 N. W., 357 (N. D. 1910);
Spruill v. Bateman, 77 S. E., 768 (N. C. 1913).

The election being a nullity by reason of the ineligibility of the person receiving the highest number of votes, it would seem that under the authority of State ex rel. v. Egry, 79 O. S., 400, and Brown v. State, 81 O. S., 556, canvassing officers may not be compelled to issue certificates of election.

Inquiry is made as to whether the offices of village treasurer and township clerk may be held by the same person at the same time. In the absence of other disqualification or express statutory inhibition, a person may hold more than one office unless they are incompatible from the nature of the functions and the duties thereof.

There is no such statutory inhibition against these offices being held by the same person at the same time. It is impracticable to here quote or even make specific reference to all the statutory provisions defining the powers and duties of these offices. Suffice it to say that a careful examination of the statutes fails to disclose any incompatibility of the offices mentioned. On the contrary, it appears that the duties and functions of these offices are entirely independent of each other. That is to say, we fail to find any duty of one of these offices which is related to a duty of the other, or any duty of one which is in any way dependent on the other.

The rule of incompatibility of offices is stated in the case of State ex rel. v. Gebhart, 12 C. C. (n. s.), 274, as follows:

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

The duties of the offices of village treasurer and township clerk being entirely independent of each other, one could not be said to be subordinate to or a check upon the other, nor would it ordinarily be physically impossible for one person to perform the duties of both.

I am therefore of the opinion that unless on account of the volume of business of the two offices, or for other reasons, it is impracticable for one person to properly perform the duties of both, a person otherwise qualified may hold the offices of village treasurer and township clerk at the same time.

For similar reasons to those above stated, my predecessor held in an opinion under date of November 21, 1911, to be found at page 1461 of the report of the at-

torney general of this state for the year 1911, that the offices of treasurer of a municipality within a township and treasurer of the township may both be legally held by the same person. In this opinion, and the reasons given therefor, I fully concur.

The offices of village clerk and township clerk, about which you also inquire, are found upon investigation to be in no way a check upon or subordinate to each other. It therefore follows that unless it is impracticable for one person, who is otherwise in all respects qualified to properly perform all the duties of both offices, he may legally hold both at the same time.

The foregoing answers to your preceding inquiries obviates the necessity of an answer to your concluding question. It may be observed, however, that while the holding of one office may disqualify from holding another, the mere election to a second office will not disqualify from holding either in the absence of specific statutory provision to that effect.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1076.

CANVASSING OFFICERS—WITHOUT AUTHORITY TO PASS UPON QUALIFICATIONS OF PERSONS ELECTED TO OFFICE—DISQUALIFICATION TO HOLD OFFICE PERPETUAL, SEE SECTION 3808, G. C.

No authority is conferred upon canvassing officers to pass upon the qualifications or eligibility of persons who are by the election returns shown to have been elected to office.

If it clearly appears that a person so elected is disqualified to hold an office to which he has been elected by reason of the provisions of section 3808, *G. C., he may not compel to be delivered to him a certificate of such election.*

The disqualification to hold office provided in section 3808, *G. C., is perpetual.*

COLUMBUS, OHIO, December 6, 1915.

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

GENTLEMEN:—Your request for an opinion under date of November 11, 1915, is as follows:

> "We would respectfully request your written opinion upon the following questions:
>
> "Section 3808, General Code, provides that a violation of any provision of this or the two preceding sections shall disqualify the party violating same from holding any office of trust or profit in the corporation, etc.
>
> "If a mayor of a village, serving in 1912, drew several vouchers in payment for labor on streets, etc., has been elected as mayor at the November election of 1915, may the clerk and present mayor, in their canvassing of the vote, refuse to issue a certificate of election to the mayor on the grounds that he was disqualified by reason of the violation of the provisions of section 3808, General Code?
>
> "For what length of time is a person disqualified who has violated the provisions of said law, and how shall the disqualification be established?"

Section 3808, G. C., to which you refer, provides as follows:

> "No member of the council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the cor-

poration other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom."

The provisions of this section were originally enacted as a part of section 45 of the Municipal Code passed in 1902, 96 O. L., 37, and except for slight changes in phraseology made in the codification of 1910, has not been changed. Section 45 of the Municipal Code was sub-divided and incorporated in the General Code as sections 3806, 3807, 3808 and 3809, without substantial change and are independent of section 12912, G. C., therefore enacted and which is a penal statute.

The authority and duties of the clerk of a municipality with respect to the issuance of certificates of election to municipal officers, is found in section 5114, G. C., which provides as follows:

"The returns of municipal elections shall be made by the judges and clerks in each precinct to the clerk or auditor of the municipality. Such clerk or auditor, or, in his absence or disability, a person selected by the council, shall call to his assistance the mayor, and, in his presence, make an abstract and ascertain the candidates elected, as herein required with respect to county officers. Such clerk or auditor shall make a certificate as to each candidate so elected, and cause it to be delivered to him. If there is no mayor, or he is absent, disabled or a candidate at such election, the clerk or auditor shall call to his assistance a justice of the peace of the county."

A careful examination of the statutes fails to disclose jurisdiction or authority conferred upon those officers, charged with the duty of canvassing the returns of municipal elections and issuing certificates to those elected, to in any way determine questions as to the qualifications or eligibility of persons elected to office. The power of canvassing officers, as such, conferred by law is limited to determining in the first instance the number of votes cast for each candidate and to issue certificates of election to those candidates thereby found to be elected. Stated in another way, it may be said that it is made the plain duty of such canvassing officers, upon ascertaining what candidates are elected, to issue to them a proper certificate of election. See Ingerson v. Berry, 14 O. S., 315, at page 322 of the opinion of the court, citing 20 Pick., 484.

In Phelps v. Schroder, 26 O. S., 549, it is held:

"1. Under the 34th section of election law (S. & C. 536) where the poll-books upon their face are substantially correct, the justices and clerk, in making the abstract of votes, are not authorized to reject such poll-books on account of fraud in the election."

See also Dalton v. State ex. rel., 43 O. S., 652.

In the case of State ex rel. v. Pattison, 73 O. S., 305, it is held:

"4. In certifying the election of an officer the power of the deputy supervisors of elections is limited to certifying that the successful candidate has been elected and they have no power to decide upon a disputed term of office."

In reaching this conclusion the court at page 330 of the opinion, referring to the duties of canvassing officers, said:

> "It was the duty of those officers to certify the relator's election and their authority conferred by statute ends."

In this connection it will not be overlooked that there is specific statutory provision for the removal of a municipal officer to be found in sections 4670 to 4675, G. C., both inclusive. Section 4670, G. C., provides in part as follows:

> "When complaint under oath is filed with the probate judge of the county in which the municipality, or the larger part thereof is situated, by any elector of the corporation, signed and approved by four other electors thereof, charging any one or more of the following: * * * or that a member of the council or an officer of the corporation is or has been interested, directly or indirectly, in the profits of a contract, job, work or service, or is or has been acting as commissioner, architect, superintendent or engineer in work undertaken or prosecuted by the corporation, contrary to law; or that a member of council or an officer of the corporation has been guilty of misfeasance or malfeasance in office, such probate judge shall forthwith issue a citation to the parties charged in such complaint for his appearance before him within ten days from the filing thereof, * * *"

Detailed provision is made in the following sections above referred to for further proceedings, and upon determination of the sufficiency and truth of the charges the court is authorized, under the provision of section 4674, G. C., to make an order removing such officer from office.

From the absence of specific statutory authority given to the canvassing officers to pass in any way upon the qualifications of those persons who are by the election returns shown to have been elected, and a consideration of the above provisions for removal, it would seem to follow that it was hardly in contemplation of the legislature that canvassing officers would undertake to exercise such authority.

It will be observed that disqualification under the provisions of section 3808, G. C., supra, arising from its violation, is without qualification or limitation as to time and in the absence of such limitation little if any doubt can arise as to the legislative intent that such disqualification to hold an office of trust or profit in a corporation should be perpetual.

In coming to answer your inquiry specifically, I am therefore of opinion that the officers of a municipality charged by law with the duty of canvassing the returns of election of officers of such municipality, are without authority to pass on or consider the qualifications of persons shown by the returns to have been elected to office, and upon the determination of the fact of election it becomes the duty of the clerk or auditor to make and deliver the certificate of election.

I am further of opinion that when any person becomes disqualified to hold any office in a municipality under the provisions of section 3808, G. C., such disqualification is permanent.

It may be further observed, however, that notwithstanding the lack of authority in canvassing officers to pass upon the qualifications and eligibility of persons elected to office, if it clearly appear that a person elected to office is disqualified by operation of section 3808, G. C., supra, under authority of state ex rel. v. Ergy, 79 O. S., 400, and Brown v. State, 81 O. S., 556, such fact would constitute a defense against an action to compel the issuance and delivery of a certificate of election.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1077.

STATE HIGHWAY COMMISSIONER—WHEN ANNUAL AND PARTIAL REPORT OF HIGHWAY DEPARTMENT SHOULD BE MADE—WHAT INFORMATION SHOULD BE CONTAINED IN REPORT.

The state highway commissioner should now file a partial report of the activities of the department covering the period from November 15, 1914 *to June* 30, 1915, *as provided in section* 2 *of senate bill No.* 158 (106 *O. L.*, 508), *which report should be made in the form and containing the information called for in sectoin* 2264-1, *G. C.*, 106 *O. L.*, 508. *Each year the state highway commissioner should file the annual report provided in section* 2265-1, *G. C.*, 106 *O. L.*, 508.

Each year the state highway commissioner should file with the governor the report provided for in section 1229, *G. C.*, 106 *O. L.*, 643.

COLUMBUS, OHIO, December 7, 1915.

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

DEAR SIR:—Your letter of November 30, 1915, asking my opinion, received and is as follows:

"The records of this department indicate that the annual report filed by this department covered the period from November 16, 1913, to and including November 15, 1914, this presumably under authority of section 260, of the General Code. Since then no report has been made by this department.

"We are now confronted with two seemingly inconsistent sections of the General Code, to wit: sections 1229 and 2264-1.

"I therefore respectfully request an opinion from your office as to when this department is to make an annual report to the governor.

"I would also appreciate your advising me the meaning of the following requirement of section 1229:

" 'The report shall contain * * * a detailed itemized statement of the expense of the commissioner and of the department.' "

Section 260-1, G. C., 106 O. L., 508, provides as follows:

"For all state officers, departments, commissions, boards and institutions of the state the fiscal year shall be and is hereby fixed to begin on the first day of July in each year and to end on the last day of June of the succeeding year."

Section 2264-1, G. C., 106 O. L., 508, provides as follows:

"Each elective state officer * * * * the state highway department, * * * shall make annually, at the end of each fiscal year, in triplicate, a report of the transactions and proceedings of his office or department for such fiscal year excepting however receipts and disbursements unless otherwise specifically required by law. Such report shall contain a summary of the official acts of such officer, board or commission, institution, association or corporation, and such suggestions and recommendations as may be proper. On the first day of August of each year, one of said reports shall be filed with the governor of the state, one with the secretary of state, and one shall be kept on file in the office of such officer, board, commission, institution, association or corporation."

Section 2 of senate bill No. 158, 106 O. L., 517, provides as follows:

"All officers, boards, commissions, institutions, associations, or corporations that were heretofore by law required to make an annual or semi-annual report to the governor of the state, shall on the first day of July, 1915, or as soon thereafter as practicable, make partial reports for the period covered between the date of the making of the last preceding annual or semi-annual report to the governor and June 30, 1915, in triplicate, to be filed in the manner prescribed by section 2264-1 of the General Code. This section shall cease to have any effect or operation on and after January 1, 1916."

Section 174, G. C., 106 O. L., 513, provides as follows:

"The secretary of state shall prepare from the reports filed with him or with the governor of the state, accurate statistical tables and practical and analytical information regarding the activities and proceedings of the several offices and departments of the state to be known as 'Ohio General Statistics.' "

Section 173-1, G. C., 106 O. L., 513, provides as follows:

"The secretary of state shall annually publish the 'Ohio General Statistics,' the number of copies thereof to be determined by the commissioners of public printing. The first issue of 'The General Statistics' shall be for the period from November 15, 1914, to and including June 30, 1915."

The foregoing sections are quoted in order to show the underlying purposes of section 2264-1, supra, which is to provide for the furnishing to the proper officers of the information necessary to a compilation of the publication known as "Ohio General Statistics," and thus make available to the citizens of the state information as to the activities of the various state departments.

Senate bill No. 158, of which all the foregoing sections were parts, was passed May 27, 1915, and filed in the office of the secretary of state June 4, 1915, thus becoming effective September 3, 1915.

Section 1229, G. C., 106 O. L., 643, provides as follows:

"Each year not later than January first, the state highway commissioner shall make a report to the governor of the operation of the highway department. The report shall contain a statement of the number of miles, cost and character of roads or highways built under his direction; a detailed itemized statement of the expense of the commissioner and of the department, and such other information relative to the condition of the public roads of the state as the commissioner may deem proper. Not less than one thousand copies of this report shall be published by the state, five hundred of which shall be distributed by the secretary of state and the remainder under the direction of the state highway commissioner. The state auditor shall prescribe methods of accounting for the highway department, and the same when prescribed shall be followed in all respects."

The Cass highway law, of which section 1229 was a part, was also passed May 27, 1915, filed in the office of the secretary of state on June 5, 1915, and by its own terms became effective September 6, 1915.

The foregoing sections apparently contain inconsistent provisions concerning the same subject-matter, and if this be so they present a question of implied repeal. Under the well settled rule that implied repeals are not favored and that apparently incon-

sistent statutes should be reconciled, if possible, we now examine the above sections with this end in view and find that, whereas the group of sections, above quoted, enacted as part of senate bill No. 158, provide for a general report of the proceedings and transactions of the state highway department and a summary of the official actions of the state highway commissioner, one copy of which is to be filed with the governor and one copy in the office of the secretary of state for his information in the preparation of the "Ohio General Statistics," section 1229 provides for a report to the governor by the state highway commissioner covering specific things therein set out, to wit: "the number of miles, cost and character of highways built under his direction, a detailed itemized statement of the expense of the commissioner and of the department, and such other information relative to the condition of the public roads of the state as the commissioner may deem proper," and provides for the printing and distribution of the same. So that it requires no strain of construction to say that section 1229, supra, providing as it does for a detailed report to the governor of specified activities of the state highway department and for the printing and distribution of such report among the citizens of the state, is an entirely separate and distinct provision and calls for a report in addition to the general report provided for in senate bill No. 158, supra. Clearly this is a case for the application of the rule of reconciling apparently inconsistent statutes and the entire intention of the legislature can only be accomplished and the results desired obtained by the making of two reports, one on the first day of January of each year, under section 1229, G. C., supra, and the other on the first day of August of each year, as provided in section 2264-1, supra.

Having determined that your department should comply with the provisions of senate bill No. 158, supra, your attention is called to an opinion rendered by this department to Hon. Bert B. Buckley, state fire marshal, under date of November 30, 1915, being opinion No. 1060, a copy of which is enclosed herewith and from which you will see that your department should now file a partial report from November 15, 1914, to June 30, 1915. Neither said partial report or subsequent annual reports, made under the provisions of section 2264-1, supra, need contain any statement of receipts and disbursements of your department.

On the first day of January of each year your department should prepare and file with the governor the report called for in section 1229, supra, covering the preceding calendar year, and it is in connection with this report that your second inquiry as to expenses becomes pertinent. It is impracticable, of course, in this opinion to attempt to go into detail in this connection. It is sufficient to say that the report made under this section should contain a statement of all the expenditures of your department for the year, including under the appropriate head such of your expenditures as are properly charged to cost of construction and under the appropriate head such of them as constitute expenses.

The fact that section 1229, supra, provides no leeway in the matter of the date of making the report therein provided for, but requires the report to be made on January 1st for the preceding year, ending December 31st, suggests a practical difficulty in the way of complete compliance therewith, to wit: the lack of complete data on January 1st as to activities of the department during the closing days of the preceding year. However, when it is remembered that the report in question deals principally with the activities of the department in the building of roads, an activity in which at that season of the year field work is at a standstill, this difficulty does not appear to be insurmountable. By requiring prompt action on the part of all officials and employes of the department in reporting their activities and expenses for the month of December, which, when added to a report already compiled covering the previous months of the year, would make a complete report, it would seem that the intent and purpose of section 1229 can be fully carried out and the report filed on the day named.

Specifically answering your questions, therefore, you are advised that your department should now file a partial report as called for in section 2 of senate bill No. 158,

supra, and on the first day of August of each year the annual report called for in section 2264-1, G. C., supra, in which reports it is not necessary to include receipts and disbursements; that on the first day of January of each year your department should file with the governor the report called for in section 1229, supra, in which report should be included all expenditures of the department for the year under the appropriate heads of construction and expense.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1078.

STATE BOARD OF HEALTH—INTERPRETATION OF OHIO BUILDING CODE—DUTY OF ENFORCING CODE RESTS WITH STATE BOARD OF HEALTH WHERE MUNICIPAL HEALTH AUTHORITIES REFUSE TO ACT—PROVISIONS OF STATE CODE DO NOT EXTEND TO PRIVATE DWELLINGS.

1. *The duty of enforcing the Ohio building code is cast on the state board of health in cities where the building inspector or health authorities refuse or neglect to act.*

2. *To permit of the substitution of a device at variance with those prescribed in part 4, sanitation, Ohio building code, there must be an agreement between the state and municipal authorities.*

3. *The provisions of the Ohio building code do not extend to private dwellings and the state board of health is without power to extend the operation of the code to private dwellings by orders issued under its general powers.*

COLUMBUS, OHIO, December 8, 1915.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—Permit me to acknowledge receipt of your request for an opinion, which is as follows:

> "I submit the following questions and request your opinion relative thereto:
>
> "1. Has the state board of health jurisdiction to enforce the provisions of the Ohio building code (sections 12600, 12600-282, General Code, both inclusive), in relation and pertaining to sanitary plumbing (sections 12600-137 to 12600-273, General Code, both inclusive), in municipalities having a building inspector or commissioner or health department, when the said building inspector or commissioner or health department fails and refuses to enforce such provisions (section 12600-281, General Code)?
>
> "2. The state board of health acting in conjunction with the proper municipal authorities (the building inspector or commissioner or health department), is authorized to approve and permit the substitution of another device, fixture or construction at variance with what is described in part 4, sanitation, Ohio building code, if the device, fixture or construction proposed answers to all intents and purposes the fixture, device or construction therein described.
>
> "Query: Has the state board of health the authority to require or permit the substitution of a device, fixture or construction in a municipality, where, because of the failure or refusal of the proper municipal authorities to

act, the state board of health is called upon to enforce the provisions of the Ohio Building Code in relation and pertaining to sanitary plumbing, when, in the judgment of said board, the substitution would be of economic and sanitary advantages?

"3. Has the state board of health the authority to adopt and enforce orders and regulations of a general character for the construction, installation and inspection of plumbing and drainage in and for any class or character of buildings not included within the scope of the Ohio building code?"

Answering your first question permit me to call your attention to the provisions of section 12600-281 of the General Code, which is as follows:

"It shall be the duty of the state fire marshal, or fire chief of municipalities having fire departments, to enforce all the provisions herein contained relating to fire prevention.

"It shall be the duty of the chief inspector of workshops and factories, or building inspector, or commissioner of buildings in municipalities having building departments, to enforce all the provisions herein contained for the construction, arrangement and erection of all public buildings, or parts thereof, including the sanitary condition of the same, in relation to the heating and ventilation thereof.

"It shall be the duty of the state board of health, or building inspector, or commissioner, or health departments of municipalities having building or health departments, to enforce all the provisions in this act contained, in relation and pertaining to sanitary plumbing. But nothing herein contained shall be construed to exempt any other officer or department from the obligation of enforcing all existing laws in reference to this act."

It will be noted that the duty of enforcing the provisions of the state building code devolves upon the state board of health, or building inspector, or commissioner, or health department of municipalities having building or health departments, and that there is express provision that nothing contained in the section quoted shall exempt any officer or department from the obligation of enforcing all existing laws with reference to this act. The intention of the legislature in enacting section 12600-281 was to provide for the enforcement of the building code in any and all events, and a penalty was provided for the violation of the code in section 12600-279, which is as follows:

"Whoever being the owner or having the control as an officer, or as a member of a board or committee, or otherwise, of any opera house, hall, theatre, church, schoolhouse, college, academy, seminary, infirmary, sanitorium, children's home, hospital, medical institute, asylum, memorial building, armory, assembly hall or other building for the assemblage or betterment of people in any municipal corporation, township or county in this state, violates any of the provisions of the foregoing act, or fails to conform to any of the provisions thereof, or fails to obey any order of the state fire marshal, chief inspector of workshops and factories, or building inspector, or commissioner in cities having a building inspection department, or the state board of health, in relation to the matters and things in this act contained, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than one thousand dollars and stand committed until said fine and costs be paid, or secured to be paid, or until otherwise discharged by due process of law."

Where a duty is imposed by statute upon two or more persons for the benefit of the public, a disregard of the obligation by both on the ground that the other was

charged with the fulfillment of the duty would be at the peril of both, and it would be no defense for either to say that the duty rested on the other. In the case of Smith v. Builders Exchange, 91 Wis., 360, L. R. A., 504, it was held:

> "An ordinance requiring any owner or contractor constructing any building abutting on a public sidewalk shall, after the completion of the first story, cause a roofed passageway to be built in front of the building is a reasonable one, and any owner or contractor who fails to do so is liable for an injury to one passing on the sidewalk."

The court, in the opinion handed down in this case, says:

> "This ordinance was passed by the common council before the erection of this building was begun, and provides in substance that 'any owner or contractor who shall hereafter build or cause to be built' any building abutting on a public sidewalk shall, after the completion of the first story, cause a roofed passageway to be built in front of the building, upon the sidewalk, under pain of a certain fine or imprisonment * * *. This ordinance, we think, is entirely reasonable, and it was therefore law to all intents and purposes, and it required both the owner and contractor to construct a covered way over the sidewalk where this accident happened * * *."

With respect to your first question, therefore, entertaining a view that a municipality having a building inspector or health department, the duty of enforcing the provisions is conferred concurrently on the state board of health and the building inspector or health department of such municipality, I am of the opinion that when such building inspector or municipal health department refuses or fails to enforce such provision, the power and duty of enforcing the same rests on the state board of health.

Referring to your second question, which relates to the substitution of another device, fixture or construction at variance with what is described in part 4, sanitation, Ohio building code, attention is directed to the provisions of section 12600-277 of the General Code, which is as follows:

> "Nothing herein contained shall be construed to limit the council of municipalities from making further and additional regulations, not in conflict with any of the provisions of this act contained, nor shall the provisions of this act be construed to modify or repeal any portions of any building code adopted by a municipal corporation and now in force which are not in direct conflict with the provisions of this act. *Where the use of any other fixture, device or construction is desired at variance with what is described in this statute, plans, specifications and details shall be furnished to the proper state and municipal authorities mentioned in section* 1 (G. C., 12600-281), *for examination and approval, and if required actual tests shall be made to the complete satisfaction of said state and municipal authorities that the fixture, device or construction proposed answers to all intents and purposes the fixture, device or construction hereafter described in this statute,* instead of actual tests satisfactory evidence of such tests may be presented for approval with full particulars of the results and containing the names of witnesses of said tests."

The general assembly in enacting the provisions of the law above quoted doubtless had in mind the fact that from time to time changes in the mode of building brought about through the experience of persons skilled in that line of endeavor, also the possibilities of improvements in the way of devices, and therefore in order that every ad-

vantage might be taken of improvements and substitutes in the way of devices that would serve better to carry out the purpose for which they were designed than those described in the various statutes, provided for such substitution when in accordance with the views of the state board of health acting through its proper officers and municipalities affected, it was mutually agreed that when the substitution not at variance with the provisions of the statutes would be best for economic reasons, and that such substitution would be allowed when a device is presented as a substitute for one already provided for, it is necessary that the plans, specifications and details shall be furnished to the proper state *and* municipal authorities for examination and approval, and if such state and municipal authorities can be satisfied without an actual test of the device that it is proper to substitute the same and an agreement is entered into between the state and the municipal authorities then the substitution may be made. Upon the failure of either party to agree to the substitution, it naturally follows that the original provision of the law must prevail and the substitution will not be allowed.

Your third enquiry is directed to the authority and power of your board to adopt and enforce orders and regulations of a general character for the construction, installation and inspection of plumbing and drainage in and for buildings not included within the scope of the Ohio building code.

The immediate purpose of this enquiry is to determine your authority in this regard as to private dwellings, residences and homes. While you impliedly admit in your question that buildings of this character are not included within the provision of said building code, yet a brief reference to the same may be had if for no purpose other than to emphasize the fact that the legislature in its general grant of powers to the state board did not contemplate that such grant may be so construed as to include the matter of the plumbing and drainage of private residences and homes.

The state building code is found in sections 12600-1 of the General Code, to section 12600-283 of the General Code, inclusive. It was enacted in 1911 and is found in 102 O. L., 586. In the preamble as it appears on page 588 thereof, it is declared that the classification of the various buildings covered by the code will be found under the following titles:

Title 1—Theatres and assembly halls.
Title 2—Churches.
Title 3—School buildings.
Title 4—Asylums, hospitals and homes.
Title 5—Hotels, lodging houses, apartments and tenement houses.
Title 6—Club and lodging buildings.
Title 7—Workshops, factories and mercantile establishments.

The titles as above designated were not enacted in the law which follows. An inspection of the code discloses that titles 1 and 3 were enacted, but titles 2, 4, 5, 6 and 7 were omitted. However, had the classification as made been incorporated in the law as enacted, it is manifest that such classification did not include, nor was it intended to include, private residences and the homes of individual owners. The term "homes" as used in the classification made under title 4 has no reference to the private home of an individual owner designed only for private habitation. Under the most elementary rules of statutory construction it must be held that the term "homes" as used in said classification refers to homes of the character of children's homes, or the homes owned, operated and maintained by various associations and societies, and are therefore in a certain sense public buildings, and used in that sense in connection with the two terms which precede it under the same title, viz: asylums and hospitals.

This distinction is further emphasized by the penal sections of the building code which are intended to enforce its provisions, and which by their express terms are

confined to the prosecution of such persons who own, or have control of, buildings of a public character. I refer in this connection especially to section 12600-279, which provides as follows:

> "Whoever being the owner or having the control as an officer, or as a member of a board or committee, or otherwise, of any opera house, hall, theatre, church, school house, college, academy, seminary, infirmary, sanitorium, children's home, hospital, medical institute, asylum, memorial building, armory, assembly hall or other building for the assemblage or betterment of people in any municipal corporation, township or county in this state, violates any of the provisions of the foregoing act * * * shall be guilty of a misdemeanor, and upon conviction thereof shall be fined * *."

In this section we have the conclusive evidence that the provisions of the building code which preceded it, and which include in part 4 thereof the matter of sanitary plumbing, were intended to apply only to public buildings. It is hardly probable that had the legislature in the enactment of this code intended to make it apply to private homes it would have left the law incapable of enforcement against the owners of such homes. It may be claimed, however, that some of the provisions of part 4 of this code, which cover the matter of sanitary plumbing, may apply to private homes. Conceding this to be true, it is also manifest that such provisions at the same time apply fully and completely to such public buildings as children's homes, the homes of various associations and secret societies, asylums, hospitals and other public buildings of that character. It follows therefore, that as indicated by your enquiry, the provisions of the state building code do not apply to private homes.

Considering, now, the question whether under the general powers of your board, as delegated to it by the legislature, it has authority to adopt and enforce the orders and regulations in question, we must refer to the provisions of section 1237 of the General Code, which provides as follows:

> "The state board of health shall have supervision of all matters relating to the preservation of the life and health of the people and have supreme authority in matters of quarantine, which it may declare and enforce, when none exists, and modify, relax or abolish, when it has been established. It may make special or standing orders or regulations for preventing the spread of contagious or infectious diseases, for governing the receipt and conveyance of remains of deceased persons, and for such other sanitary matters as it deems best to control by a general rule. It may make and enforce orders in local matters when emergency exists, or when the local board of health has neglected or refused to act with sufficient promptness or efficiency, or when such board has not been established as provided by law. In such cases the necessary expenses incurred shall be paid by the city, village or township for which the services are rendered."

Before discussing the provisions of this section in detail, it must be noted that the matter of plumbing in private dwellings is now under the control and supervision of local boards of health by direct grant of power in that regard under the provisions of sections 4413, 4420 and 4421 of the General Code. Without quoting the provisions of said sections in full, it is sufficient to say that they confer full and ample authority upon local boards of health to regulate plumbing and drains and all matters pertaining thereto. That this authority is now being exercised by local boards of health is observed by you in your correspondence when you call attention to the fact that there are now in force in this state thirty different municipal plumbing ordinances in that many different cities.

Speaking now of the general plan observed by legislatures in their distribution of power to state and local boards, Parker and Worthington on public health, in section 73, observe:

> "The statutory provisions defining the powers and duties of state boards vary in the different states, but there is an apparent uniformity in the method of their organization and the purpose they are designed to subserve. As a rule the state boards of health are not invested with any enlarged executive duties, these being relegated usually to local boards, and their duties are chiefly inquisitorial and advisory, both in relation to the government and the local boards. They have cognizance of all matters touching the interests of the health and lives of the citizens of the state, and directed to make a special study of vital statistics, the cause of disease, and especially of epidemics, the sources of mortality and the effects of localities, employments and their conditions upon the public health. They frequently have general supervision of the state system of registration of births, marriages and deaths, and sometimes have charge of all matters pertaining to quarantine, with authority to make and enforce quarantine regulations."

An analysis of section 1237, *supra*, indicates that the power therein delegated to your board is confined to the matters noted in the foregoing observations and is in harmony therewith. The specific subjects named in said section, over which your board is given direct control, are matters of quarantine, the prevention of the spread of contagious or infectious diseases and the receipt and conveyance of the remains of deceased persons. There is further a grant of authority as to such "other sanitary matters" as the board may deem best to control by a general rule. While the matter of plumbing may under certain circumstances become a sanitary matter, especially in cities, yet in view of the fact that the legislature has directly and expressly delegated this matter to local boards under the provisions of the sections hereinbefore noted, it is evident by reason of this fact that it was not the purpose of the legislature to include plumbing in the term "sanitary matters" as used aforesaid. To so hold would be to say that the legislature had conferred authority upon two separate bodies to do the same thing, when the general purpose and policy of the law, as evidenced by its other provisions relating to such bodies, shows that one is to be considered subordinate to and under the authority of the other. Again, it must be noted that by the provisions of said section 1237, *supra*, the state board is given full authority to supervise the work of local boards, and when the latter fail to act the state board may make and enforce its own orders.

In consideration of these various provisions and their consequent conditions, I am of the opinion that under the general powers delegated by said section 1237, *supra*, the state board has no power to adopt and enforce orders and regulations for the construction, installation and inspection of plumbing and drainage in private homes and residences throughout the state of Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1079.

APPROVAL OF CONTRACT FOR PURCHASE AND INSTALLATION OF FLAG CASES IN ROTUNDA OF STATE HOUSE.

COLUMBUS, OHIO, December 9, 1915.

HON. FRANK B. WILLIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—Under date of December 8th you submitted copies of signed contract for the purchase and installation of flag cases in the rotunda of the state house, and requested me to advise you whether or not the same meets the proper legal requirements.

After a careful examination of the contract, I am of the opinion that the same does meet the proper legal requirements.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1080.

TREASURER OF STATE—NOT AUTHORIZED TO MAKE REDUCTION IN AMOUNT CERTIFIED TO HIM FOR COLLECTION—MAY ACCEPT FROM INSURANCE COMPANIES PAYMENT OF AMOUNT OF TAX UNDER EITHER SECTIONS 5433 OR 841, G. C.—FIRE MARSHAL TAX—REFUSAL OF PAYMENT.

The treasurer of state is not authorized to make any reduction in or to accept other than the exact amount certified to him for collection by the auditor of state under sections 5433 and 841, G. C. He may, however, accept from insurance companies payment of the amount of the tax assessed under either of said sections, even though payment of the tax assessed under the other section be refused.

COLUMBUS, OHIO, December 9, 1915.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of December 4th, 1915, requesting my opinion as follows:

> "The superintendent of insurance of Ohio certified to this department for collection moneys due the state, under section 5433 of the General Code, and section 841. This certification has been in bulk, or in other words, the controlling account as certified shows as follows:
>
> " 'State of Ohio,
> " 'INSURANCE DEPARTMENT,
> " 'Statement of Account.
>
> " 'COLUMBUS, OHIO, November 15, 1915.
>
> " 'Section 5433, G. C., tax for year 1914, 2.5% of $41,043.19__ $1,026.08
> " 'Section 841, G. C., tax for year 1914, .005% of $64,339.51____ 321.70
> " 'EQUITABLE FIRE & MARINE INSURANCE CO.,
> " 'Providence, R. I.'

"The fire insurance companies are contending that the amount of tax certified against them under section 841 is illegal, and are tendering their checks in payment of the 2½%, but in some instances are refusing to pay the fire marshal tax, and in other instances are doing their own computation and tendering their checks in payment therefor.

"As treasurer, I contend that I have no right to receive anything against this account except what is charged against me. The insurance companies are willing to pay the 2½%, but are objecting very seriously to paying the other tax. I would like to have your decision as to whether the treasurer of state could legally receive the 2½% tax, and refuse payment on the fire marshal tax unless the full amount was offered pending an adjustment of the controversy. Your early opinion will enable us to get considerable money in the state treasury."

Section 5433 of the General Code, as worded both prior to and since its amendment, 106 O. L., 500, authorizes a tax against every insurance company incorporated by authority of another state or government of 2½% upon the balance of the gross amount of premiums received during the preceding calendar year, after deducting return premiums and considerations received for reinsurance.

Section 841 of the General Code, referred to in your letter, and known as the "Fire marshal tax," prior to its amendment by the last general assembly, authorized a tax against fire insurance companies doing business in this state of one-half of one per cent. upon the gross premium receipts of all the business transacted in the state during the preceding year as shown by its annual report. This section was twice amended at the last session of the general assembly (106 O. L., pages 241 and 500), so that now, in determining the amount of gross premium receipts upon which such tax is computed, a deduction must be made of returned premiums and considerations paid for reinsurance.

Under section 24-1 of the General Code (106 O. L., 500), it is the duty of the superintendent of insurance to certify the amount of both these taxes, viz.: those charged under sections 5433 and 841 of the General Code, to the auditor of state,

"* * * upon triplicate forms prescribed by such auditor, and at such time or times as he may prescribe, including in such certificate such matters and information as he may direct. Within five days next following the receipt by the auditor of state of such certification, * * * the auditor of state shall transmit to the treasurer of state for collection a duplicate of the charges so certified or determined. The treasurer of state shall immediately proceed to collect the charges upon such duplicate, and shall forthwith notify the person, co-partnership, or corporation * * * so charged upon such duplicate of the amount thereof, by mail, to the address of such person, co-partnership or corporation * * *."

Section 24-2 of the General Code (106 O. L., 500), which provides further as to the duties of the treasurer of state in the collection of such taxes is, in part, as follows:

"Within thirty days after the receipt of such duplicate by the treasurer of state, he shall return the same to the auditor of state. Said auditor shall immediately transmit to the attorney general such duplicate for collection of all delinquent charges therein, and, at the same time, shall certify a copy thereof with all credits and interest thereon to the officer, board or commission originally certifying the same. * * * The attorney general, in ad-

dition to the other powers reposed in him, shall have such further powers to enforce payment as are given by law to officers, boards or commissions originally certifying such charges * * *."

It is apparent from the language above quoted from sections 24-1 and 24-2 of the General Code, that the sole duty of the treasurer of state is to collect the taxes certified to him upon the duplicate furnished him by the auditor of state. No authority is conferred upon the treasurer of state to effect any compromise, make any reduction, or to accept other than the exact amount certified to him for collection under said sections 5433 and 841 of the General Code. His duty in the matter is purely ministerial.

Since the taxes provided for in said sections 5433 and 841 of the General Code are separate and distinct taxes, authorized by different acts of the legislature, and not in any way related, it follows that the treasurer of state may accept payment of the tax levied under either of said sections from a company even though it refuses to pay the tax assessed under the other section. It is made his further duty after the expiration of thirty days from the receipt of such duplicate from the auditor of state, to return the same to the auditor. Thereupon it becomes the immediate duty of the auditor of state to transmit such duplicate for collection of delinquent charges to the attorney general.

Without discussing or considering whether or not the particular amount of tax assessed against any company under authority of section 5433 or section 841 of the General Code has been properly computed and is the correct amount, it is my opinion that you may accept payment from any company of the amount charged against it under either section 5433 or section 841 of the General Code, but that you are not authorized to make a reduction in the amount of tax charged, or to accept less than the amount which has been certified to you for collection under either of said sections. If any company offers to pay the tax certified under section 5433 of the General Code and refuses to pay the amount certified under section 841 of the General Code, or vice versa, it is your duty to accept the certified amount of either of said taxes and after the expiration of thirty days from the receipt of such duplicate from the auditor of state, it will be your duty to return said duplicate to him showing the amount paid and the amount unpaid. The auditor of state will then within the time prescribed by law certify the duplicate to the attorney general for collection of any unpaid tax, at which time the correctness of any disputed charge can be determined.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1081.

CORPORATION ORGANIZED TO ACT AS AN AGENT OF THE GENERAL INSURANCE, SURETY AND FIDELITY BOND BUSINESS IS NOT AN INSURANCE COMPANY—THE DAVIS AND FARLEY COMPANY —ARTICLES OF INCORPORATION NEED NOT BE APPROVED BY ATTORNEY GENERAL.

A corporation organized for the purpose of acting as an agent of the general insurance, surety and fidelity bond business and to do all things necessary and incidental thereto is not an insurance company within the meaning of section 9341, *G. C., and the approval of its proposed articles of incorporation by the attorney general is not necessary.*

COLUMBUS, OHIO, December 9, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of December 6th, with enclosures, in which you refer to me for examination and approval the proposed articles of incorporation of The Davis and Farley Company. The purpose clause stated in the proposed articles of incorporation is as follows:

> "Said company is formed for the purpose of acting as an agent of the general insurance, surety and fidelity bond business and doing all things necessary and incidental thereto."

I assume that these articles were referred to me under the supposition that the proposed corporation is an insurance company, and that the approval of its articles by the attorney general is necessary under the provisions of section 9341 of the General Code. The purpose clause stated, however, does not confer authority to make insurance contracts but only to act in the capacity of an agent. The company proposed, therefore, in my opinion, is not an insurance company, and the approval of the attorney general is not necessary.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1082.

OFFICES INCOMPATIBLE—TOWNSHIP TRUSTEE—MEMBER OF BOARD OF EDUCATION FOR SAME TOWNSHIP.

The office of township trustee and member of the board of education in and for the same township are incompatible in that they may be, and frequently are, adverse in the matter of the levying and adjustment of tax rates as provided by sections 5649-3*a*, 5649-3*b*, *as amended* 106 *O. L.*, 180, *and* 5649-3*c*, *G. C.*

COLUMBUS, OHIO, December 9, 1915.

HON. T. B. JARVIS, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—I have your letter of December 2, 1915, as follows:

> "I would like to have your opinion on this question. At our recent election a party was elected as township trustee and at the same time was

holding office as a member of the board of education, the term of which office will not expire for two years. The township wherein he is to certify as trustee is the same jurisdiction as the township in which he is now serving as a member of the board of education.

Are the two offices incompatible? I note the respective duties of the township trustee and a member of the board of education. From the opinions rendered by former Attorney General Hogan concerning the duties of the respective officers, my opinion is they are not incompatible, but because of the dates and specific times of their meeting they might become incompatible in the manner of conducting the business of the two boards. I would like to have your opinion."

The office of township trustee and member of the board of education in and for the same township are incompatible in that they may be, and frequently are, adverse in the matter of the levying and adjustment of tax rates as provided in sections 5649-3a, 5649-3b, as amended 106 O. L., 180, and 5649-3c of the General Code.

The first named section provides, that on or before the first Monday in June of each year, the trustees of each township, and each board of education, and certain other taxing authorities shall submit, or cause to be submitted to the county auditor, an annual budget setting forth an estimate stating the amount of money needed for their wants for the incoming year, and for each month thereof. It further provides the matters that such budgets shall specifically set forth and the limits of the rate to be fixed by each of the taxing authorities named in said statute.

Section 5649-3b, as amended as aforesaid, provides for a board known as the budget commissioners, to be composed of the county auditor, the county treasurer and the prosecuting attorney, for the purpose of adjusting the rates of taxation and fixing the amount of taxes to be levied in each county. Said section further provides for the meeting of said board and prescribes their duties and compensation, and makes certain other provisions not necessary to enumerate here.

Section 5649-3c requires the county auditor to lay before the budget commissioners aforesaid the annual budgets submitted under the provisions of the section first quoted and provides that said budget commissioners shall examine such budgets. It provides further that if the budget commissioners find the total amount of taxes raised in each taxing district does not exceed the amount authorized by law to be raised therein, that fact shall be certified to the county auditor. It then provides as follows:

"If such total is found to exceed such authorized amount in any township, city, village, school district, or other taxing district in the county, the budget commissioners shall adjust the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets, and may reduce any or all the items in any such budget, or any item therein. The budget commissioners shall reduce the estimates contained in any or all such budgets by such amount or amounts as will bring the total for each township, city, village, school district, or other taxing district within the limits provided by law."

It is apparent without further discussion, that under the provisions of the section last quoted, the budget commissioners may be compelled to make changes in the original estimates made and contained in the budgets submitted by township trustees and boards of education. In the event this becomes necessary, which is very frequently the case, the members of said two taxing authorities, viz., township trus-

tees and board of education, are called before the budget commissioners for conference to determine what changes shall be made in the estimates submitted by them. This necessarily involves the consideration by the budget commissioners of the merits of the respective claims made by the township trustees and board of education. Under such circumstances the same individual may not be permitted to represent such adverse interests.

I am of the opinion, therefore, that one individual cannot hold contemporaneously both the office of township trustee and of member of the board of education in and for the same township, because the same are incompatible, at least in the respect hereinbefore named.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1083.

BOARD OF STATE CHARITIES—SECTION 1841, G. C., AMENDED TWICE AT SAME SESSION OF LEGISLATURE—WHICH SECTION NOW IN EFFECT.

Section 1841, *G. C., was amended by house bill No.* 249, 106 *O. L.*, 114, *which became effective July* 2, 1915.

Said section was again amended by house bill No. 154, 106 *O. L.*, 558, *which became effective September* 4, 1915, *and said section as amended by said house bill No.* 249 *was thereby repealed.*

COLUMBUS, OHIO, December 9, 1915.

HON. H. H. SHIRER, *Secretary Board of State Charities.*

DEAR SIR:—Your letter of December 4, 1915, asking for my opinion, received, and is as follows:

> "A few days ago the state printing commission granted this board authority to print a special bulletin containing the laws relating to benevolent and correctional institutions and kindred subjects.
>
> "In preparation of copy for this bulletin I find that the general assembly at its recent session made two radical amendments to section 1841. By reference to vol. 106, Ohio Laws, you will find on page 114, house bill 249, which was filed in the office of the secretary of state on April 5. On page 558 will be found house bill 154, which was filed on June 5. These amendments were prepared by different persons with a distinct purpose, which is considerably different, as will be found by noting the particular amendments.
>
> "We desire to ascertain what in your opinion is the correct reading of section 1841, so that when our bulletin is published it will contain what may be considered the current law."

House bill 249 (106 O. L., 114) was passed April 1, 1915, and filed in the office of the secretary of state April 5, 1915, and provides as follows:

> "Section 1. That section 1841 of the General Code (102 O. L., 211) be amended to read as follows:
>
> "Section 1841. The board shall have power to regulate the admission and discharge of the pupils and inmates in said several institutions, as pro-

vided by law, and the powers and duties of the board of state charities under sections 1819, 1820, 1948, 1949, 1950, 1952 and 1956 of the General Code shall cease and thereafter devolve on the board of administration alone from and after August 15, 1911.

"Upon the admission of any person who has been committed to any state institution under its control there shall be included with the papers committing such person, and signed by the authority executing such commitment, such information relative to the person so to be committed as may be required by said board. The board shall provide blank forms for such information, and the same when properly filled in and signed and delivered as herein provided shall be filed under the direction of the board for statistical and other proper purposes.

"Section 2. That said original section 1841 of the General Code be, and the same is hereby repealed."

The above amendment of section 1841 therefore became effective July 2, 1915, and from and after that date was the only section 1841 in existence.

House bill 154 (106 O. L., 558) was passed May 27, 1915, and was filed in the office of the secretary of state June 5, 1915, and provides as follows:

"Section 1. That sections 1841 and 2068 of the General Code be amended, and section 1815 be supplemented to read as follows:

"Section 1841. The board shall have power to regulate the admission and discharge of the pupils and inmates in said several institutions, as provided by law. Provided, that subject to the approval of the Ohio board of administration the admission and discharge of patients in the Ohio state sanatorium shall be governed by rules and regulations adopted by the state board of health.

* * * * * * * * * *

"Section 2. That said original sections 1841, 2067 and 2068 of the General Code are hereby repealed."

The repealing clause of this bill therefore became effective September 4, 1915, and operated to repeal section 1841 of the General Code. There being but one section 1841 upon which it could operate, it follows that said section as amended by house bill 249, supra, was thereby repealed, and section 1841 as it appears in house bill 154, supra, is now in full force and effect.

Specifically answering your question, therefore, the correct reading of section 1841 is that found in house bill 154, supra, and the original section as it appeared in the General Code and the amendment thereof by house bill 249 have been repealed.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1084.

STATE BOARD OF EMBALMING EXAMINERS—QUALIFICATIONS OF APPLICANTS FOR LICENSE—NEED NOT BE RESIDENT OF THIS STATE—RESIDENT OF ANOTHER STATE MUST TAKE EXAMINATION.

The state board of embalming examiners may not require an applicant for a license as an embalmer to be a resident of this state, nor may they issue such license to a resident of another state without an examination as required by the laws of this state.

COLUMBUS, OHIO, December 9, 1915.

The Ohio State Board of Embalming Examiners, Columbus, Ohio.

GENTLEMEN:—I have your letter of December 6th, submitting the following inquiries:

> "1. May the state board of embalming examiners provide as a condition to an applicant taking an examination that he shall be a resident of this state at the time of taking such examination?
>
> "2. May this board issue an embalmer's license, without examination, to a resident of another state who has been duly licensed in such other state?"

The authority and duties imposed by law upon the state board of embalming examiners are administrative. They must administer the law as they find it, and may not, therefore, change, modify or add to it any conditions or provisions not contained therein.

The only qualifications required by the statute law of this state of an applicant for a license as an embalmer are that he shall possess a good moral character and shall pass a satisfactory examination in the subjects specified in section 1341, G. C., which subjects it is not necessary here to enumerate. There are no provisions of law requiring an applicant to be a resident of this state, and your board, therefore, may not add such condition to the qualifications provided by law.

I hold that your board is without authority of law to require an applicant for a license as an embalmer to be a resident of this state. For the same reasons heretofore noted, I must also hold that when an applicant has been duly licensed in another state of which he is a resident your board is not authorized to issue a license to such applicant without an examination as provided by the laws of this state. No provisions are made by law authorizing the granting of a license except upon the condition that the applicant pass a satisfactory examination as heretofore specified. Your board may not waive such requirements.

In conclusion I therefore advise that both of your inquiries must be answered in the negative.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1085.

NEW COURT HOUSE—BUILDING COMMISSIONS—HAVE AUTHORITY TO DETERMINE NECESSITY OF AN INSPECTION OF STRUCTURAL WORK FOR SAID NEW BUILDING—HOW INSPECTION MAY BE AUTHORIZED—CIVIL SERVICE.

Building commissions have authority, under section 2338, *G. C., and related sections, to determine the necessity of an inspection of the structural work of a court house which is being constructed under its supervision and may provide for such inspection in any manner authorized by law.*

COLUMBUS, OHIO, December 9, 1915.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I am in receipt of your letter of October 27, 1915, as follows:

"I am in receipt of a letter from the new court house building commission of Hamilton county, Ohio, stating that the commission requests me to ask the attorney general of Ohio for an opinion as to whether the civil service laws apply to inspectors of steel and riveting.

"I enclose herewith copy of correspondence transmitted with the letter, which will disclose the field of the inquiry, and respectfully request your opinion as to whether the civil service law applies, or whether this work may be contracted out to such an institution as The Pittsburgh Testing Laboratory.

"The provisions of the specifications referred to are paragraphs 287 and 288, reading as follows:

" 'STEEL AND IRON WORK.
" 'INSPECTION.

" '287. The mill and shop inspection of all structural work shall be done by an expert inspector or inspecting company, to be selected and named by the architects; the entire cost of such inspection to be paid by the contractor, and for which he shall allow in his proposal the sum of 50 cents per ton.

" '255. Ample facilities, including all necessary labor, shall at all times be furnished the duly authorized inspector at the mill and shops for inspection of materials, and the finished pieces, except surfaces that are in contact after assembling, must not in any case be painted or oiled before being accepted at the shop.'

"The inspection now desired is inspection on the building site of the construction of the steel work and riveting of the parts. You will note that this is not included in the specifications. My own notion of the matter is that inspection of the mechanical work of assembling the structure is a matter for the commission and should not be let as an extra to the contractor, and that it differs from shop inspection, which of necessity must be made in various parts of the country, and the results reported by the contractor as provided in the specifications.

"Being of opinion that such inspection is a matter for the commission, the question arises as to the application of the civil service laws and the commission desire your opinion on this subject."

It appears from your letter that the inspection in question is not covered by the

specifications or contract under which your new court house is being built. It seems, therefore, that it has been determined upon by the building commission, as a matter of precaution, to safeguard a proper construction of certain parts of said building. It is clear that such action by the commission is within its authority and power.

Section 2338, G. C., provides among other things, that:

> "Until the building is completed and accepted by the building commission, it may determine all questions connected therewith, and shall be governed by the provisions of this chapter relating to the erection of public buildings of the county."

This provision of the law vests in the commission full authority, first, to determine the necessity of an inspection and, secondly, to provide for it in any manner authorized by law.

It is equally clear, that such inspection is a matter that comes within the duties that may be imposed upon employes of said commission, as contemplated by section 2339, G. C., which provides as follows:

> "The commission may employ architects, superintendents and other necessary employes during such construction and fix their compensation and bond."

While this method may be adopted, I am not prepared to say that it may be regarded as exclusive; upon the contrary, I incline to the opinion that in view of the wide discretion and power vested in said commission by the provisions of sections 2338 and 2339, aforesaid, it may, in the exercise of its discretion, make a contract for such inspection with a person or company competent to do such work.

However, should the commission determine to make this inspection through its own employes, the persons so employed are within the civil service of the county as defined in paragraph 1 of section 486-1, 106 Ohio Laws, 400. See opinion of this department to your office under date of August 24, 1915.

Answering your question specifically, I am of the opinion that the inspection in question may be made by the building commission through the agency of its own employes, or it may be made by an independent person or company under contract therefor, and, if made by its own employes, they are within the civil service of the county as defined by section 486-1, supra. I agree with you that such inspection may not be let to the contractor.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1086.

COUNTY TREASURER—FUNDS WITHDRAWN FROM INACTIVE AND PLACED IN ACTIVE DEPOSITARY—PURPOSE, PAYMENT OF BONDED INDEBTEDNESS DUE OR TO BECOME DUE—PROVISION OF SECTION 2722, G. C., COMPLIED WITH—SEE OPINION No. 1027, NOVEMBER 16, 1915.

When large amounts of money are withdrawn from an inactive and placed in an active depositary of a county in anticipation of the payment of the interest and principal of its funded indebtedness due and to become due, observance must be had of the provisions of section 2722, G. C., requiring a bond equal to the amount of money that may be deposited in a depositary at any one time.

COLUMBUS, OHIO, December 9, 1915.

HON. CYRUS LOCHER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I have received, through the courtesy of Hon. Frederick W. Green, assistant prosecuting attorney, a copy of an opinion rendered by you upon certain matters relative to the manner of the payment of the principal and interest of the funded indebtedness of your county.

The facts upon which your opinion is predicated are so radically different from the facts on which my opinion No. 1027 was rendered, sometime since, that I am wholly unable to understand the discrepancy.

I have no criticism to make of your conclusions based upon the facts as stated in your opinion. If it is true that no funds were withdrawn from any county depositary and thereafter placed to the individual credit of the county treasurer, in a bank of his own choosing, and subject to his individual check, the main subject of criticism in the conduct of these matters is eliminated. Permit me, however, to suggest that when funds are withdrawn from an inactive and placed in an active depositary due observance must be had of the provisions of section 2722, G. C., requiring a bond equal to the amount of money which may be deposited therein at any one time. It must also be remembered in this connection that no bank or trust company may receive a larger deposit than one million dollars (section 2715, G. C.), nor more than five hundred thousand dollars if said depositary is within the class named in section 744-12, G. C., as amended 106 O. L., 505.

Referring now to your construction of sections 2609, 2614 and 2441, G. C., I wish simply to note that I considered said sections merely in the light of the question submitted, that being whether or not there was any conflict in their various provisions. While it may be held that the last named section applies only to the payment of such bonds as may be issued under the provisions of section 2434, G. C., and therefore may not include other bonds, as for instance road bonds, yet it must be remembered that said section 2441 in its present form received the approval of the legislature again in 1910 when the present general code was adopted. I was also informed by the bureau of inspection and supervision of public offices that for many years it has been and is now followed in the various counties of the state as a statute of general application, which fact it must be assumed was known by the legislature and its last adoption made in the light of this knowledge.

In view of these facts I would now hesitate to give it such limited application as you suggest. However, I regard these matters as not material, they refer only to the manner of payment. If the funds in question are kept in a depositary until required for the payment either of the principal or interest of the funded debt of your county, and are protected by bond as required by section 2722, supra, I know of no just cause for criticism or complaint.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1087.

REGISTRAR OF VITAL STATISTICS—LOCAL REGISTRAR WHEN REMOVED INELIGIBLE TO REAPPOINTMENT—IN COMPETITIVE CLASSIFIED SERVICE OF THE CIVIL SERVICE—CITY BOARD OF HEALTH MAY BE COMPELLED BY MANDAMUS TO FILL SUCH VACANCY.

A local registrar who has been removed in accordance with section 203, G. C., is ineligible to reappointment under the facts stated in this opinion.

Local registrars are in the competitive classified service of the state and may be appointed only in accordance with the civil service law.

A city board of health may be compelled by mandamus to fill a vacancy in the office of local registrar in a city.

COLUMBUS, OHIO, December 9, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your request for an opinion under date of November 13, 1915, is as follows:

> "Under section 203, General Code of Ohio, Charles Griffith, local registrar, Bucyrus, Ohio, district, was removed on the 26th day of July, 1915, by the secretary of state for failing to efficiently discharge the duties of his office in this, to wit:
>
> " 'Failing to make reports of births and deaths to the state registrar of vital statistics.'
>
> "Under section 201, General Code, the board of health of Bucyrus, Ohio, was requested by the secretary of state to appoint a successor to the aforesaid Charles Griffith. Said board of health failed and refused to appoint a successor to the aforesaid Charles Griffith until the 20th day of October, 1915, according to a report from W. S. Hite, president of the aforesaid board, which communication reads as follows:
>
> " 'BUCYRUS, OHIO, October 22, 1915.
>
> " 'HON. M. W. BLAND,
>
> " 'State Registrar, Columbus, Ohio.
>
> " 'DEAR SIR:—Upon my arrival home from Columbus, Wednesday evening, I called a special meeting of the board of health for the purpose of appointing a local registrar of vital statistics for the city of Bucyrus. The board met Thursday evening, with all members present. Mr. Charles Griffith, upon his request, was given a hearing. Mr. Griffith stated that he was first appointed to the position of local registrar in 1908. Was again appointed to the same office on January 1, 1910, by Carmi A. Thompson, then secretary of state. He claims that he had no knowledge of the change of law until you and Mr. Pemberton visited him last July, and presumed that the appointment held good under the secretary of state. Now that appointment is in the hands of the board of health. Mr. Griffith made application to appointment for the position and the board unanimously elected him.'
>
> "Please advise as to the proper procedure for the removal of Charles Griffith as local registrar in the Bucyrus, Ohio, district, and the selection of some one who will efficiently discharge the duties of the said office."

Section 201, G. C., to which you refer, provides with reference to local registrars in cities as follows:

"* * * in cities the city board of health shall appoint a local registrar of vital statistics * * *."

Section 203, G. C., provides in part as follows:

"A local or sub-registrar who fails to efficiently discharge the duties of his office shall be forthwith removed from office by the secretary of state * * *."

While there is no specific statutory authority for the filling of vacancies in the office of local registrar in cities, as stated in opinion No. 889, rendered to you under date of October 5, 1915, it seems clearly to have been the legislative intent that there should be at all times proper persons qualified and authorized to perform the duties of such office in cities and specific provision is made for their appointment by the city board of health. Of course, any removal of a local registrar of a city creates a vacanacy in that office and as a result thereof it becomes the plain duty of the board of health to appoint a proper, qualified elector to fill such vacancy.

In view of this conclusion, two questions then arise under the statement of facts set forth by you.

(1) Has such appointment been made?

(2) If not, what is the remedy?

It will be noted that a local registrar may be removed for inefficient discharge of the duties under authority of section 203, G. C., and it was for that cause the registrar in question was so removed.

In providing for the removal of such registrars, the legislature most certainly never contemplated the authorization of the idle performance of the removal of a registrar for the cause specified by the secretary of state, and his immediate reappointment to the same position. It cannot be conceived that such a course of procedure would tend to effect efficiency of service, the manifest purpose sought in the removal. From these considerations I am inclined to the view that a local registrar who has been removed in accordance with the provisions of section 203, G. C., is disqualified thereby, and therefore ineligible to reappointment, under the facts stated by you.

It appears, however, that the appointment made on October 20, 1915, was not made from an eligible list certified by the civil service commission under the civil service law. While a local registrar of a city is removable by the secretary of state, and is paid from the county treasury, and may be appointed only by the city board of health, and his jurisdiction and authority is confined to the city in which he is appointed, I am inclined to the view that such officer performs only state functions and, for the purpose of the present consideration, such local registrar is an officer in the employ of the state.

The position of local registrar is not specifically included in the unclassified service as defined by division (a) of section 486-1, G. C., 106 O. L., 404, and is therefore in the competitive classified service as defined by division (b) of said section.

Section 486-13, G. C., 106 O. L., 408, provides in part as follows:

"Appointments to all positions in the classified service, as herein defined, that are not filled by promotion, transfer or reduction, as provided for in this act and the rules of the commission prescribed thereunder, shall be made only from those persons whose names are certified to the appointing officer in accordance with the provisions of this act, and no employment, except as provided in this act, shall be otherwise given in the classified service of this state or any political subdivision thereof."

Provision is made in section 486-14, G. C., 106 O. L., 409, for temporary and exceptional appointments. These, however, may not be made except within conditions precedent therein prescribed, which are not shown in your inquiry to have been met. On the contrary, it appears that the action of the board referred to was intended as a permanent employment and without regard to the civil service law.

For the reasons above suggested, the action of the city board of health was wholly unauthorized and of no effect. I am therefore of opinion that there exists a vacancy in the office or position of local registrar in the city of Bucyrus and it is the duty of the city board of health to appoint an eligible elector to fill the same in the manner provided by law, which is enforceable by mandamus.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1088.

OHIO GENERAL STATISTICS—VOLUME I SHOULD COVER PERIOD FROM NOVEMBER 15, 1914, TO JUNE 30, 1915—SECRETARY OF STATE.

The first issue of "Ohio General Statistics" should cover the period from November 15, 1914, to June 30, 1915, and should be published as soon as the required information is available, and it would not be proper to hold same and consolidate it with the issue for the fiscal year ending June 30, 1916.

COLUMBUS, OHIO, December 13, 1915.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of December 7, 1915, asking my opinion, received and is as follows:

> "Under amended senate bill No. 158, passed May 27, 1915, approved June 3, 1915, filed in the office of the secretary of state June 4, 1915, shall the secretary of state, under section 173-1 of said act, publish the general statistics for the period from November 15, 1914, to and including June 30, 1915 or may said general statistics be compiled from the 15th day of November, 1914, to the 30th day of June, 1916, in one volume?"

Section 173-1 of the General Code, 106 Ohio Laws, 513, provides as follows:

> "The secretary of state shall annually publish the "Ohio General Statistics," the number of copies thereof to be determined by the commissioners of public printing. The first issue of 'The General Statistics' shall be for the period from November 15, 1914, to and including June 30, 1915."

While it would be more economical to consolidate the general statistics for the period from November 15, 1914, to June 30, 1915, with the volume for the year ending June 30, 1916, it was clearly the intention of the general assembly, when they provided that the publication should be made annually and defined what the first issue should contain, that a volume of the "Ohio General Statistics" should be published in the year 1915 and annually thereafter.

I am therefore of the opinion that it would not be proper for the first issue of the

"Ohio General Statistics" to be held until June 30, 1916, and consolidated with the publication for the year ending on that date, but that the first issue should be published as soon as the information is available and the volume can be prepared.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1089.

MOTHERS' PENSION LAW—WHEN APPLICANT RETURNS FROM A TWO YEARS' RESIDENCE IN SISTER STATE, HAVING RESIDED IN THIS STATE THE GREATER PART OF HER LIFE, SHE IS ELIGIBLE FOR PENSION.

A mother of dependent children, returning to Seneca county, Ohio, where she formerly resided for the greater part of her life, after an absence of several years, in a sister state, is eligible to file application for mothers' pension under the provisions of section 1683-2, *G. C., and under the facts presented an award of such pension by the juvenile court judge would not be regarded as an abuse of discretion.*

COLUMBUS, OHIO, December 13, 1915.

HON. GEORGE M. HOKE, *Probate Judge, Seneca County, Tiffin, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your letter asking for an opinion on the mothers' pension law, which letter is as follows:

> "The following are the facts in reference to the residence of a mother who is poor, the mother of several children of school age not entitled to an age and schooling certificate, and whose husband is dead.
>
> "She always resided in this county until about two and a half years ago. She and her husband and family then moved to another county in this state where they resided for about one year. They then moved to Michigan where they resided for a little more than a year when her husband died. She and the children then moved back to this county where they could get some help from her relatives. They have been back here about five months. Is this woman entitled to receive partial support under the so-called mothers' pension law? If not now, when will she be entitled to the same?
>
> "Of course she lost her residence in Ohio when they removed from the state in good faith and became a resident of Michigan. The statute, however, does not seem to require a continuous residence in this state or in any county of this state for the TWO YEARS previous to the time of maki ng and receiving the allowance. It seems to satisfy the statute if the mother has resided continuously for two years in any county of this state at some time before the allowance is made. So it has been held by a former attorney general. It has also been held that the statute should be liberally construed. It is true that a person coming to Ohio from another state who has never resided in Ohio would be compelled to reside in Ohio for two years in some one county before being entitled to the benefits of the law. But this case is different, as the two years residence in a county in Ohio has been complied with.
>
> "I have my own notion about this case, but I would like to have an official opinion from you, and if possible, please let me have it before January 11, when the association of probate judges holds its next meeting."

In your letter you make reference to an opinion of my predecessor to be found on page 921 of the first volume of the report of the attorney general for the year 1914. In the opinion referred to the question considered was similar to the one presented, although in that case the residence of the applicant for two years preceding the award of the mothers' pension was entirely within the state, but in a separate county; whereas, in the case under consideration the mother and the dependents have been residing in a sister state for a portion of the two years immediately preceding the application.

Section 1683-2 of the General Code (103 O. L., 877) is as follows:

> "For the partial support of women whose husbands are dead, or become permanently disabled for work by reasons of mental or physical infirmity, or whose husbands are prisoners or whose husbands have deserted, and such desertion has continued for a period of three years, when such women are poor, and are mothers of children not entitled to receive an age and achooling certificate, and such mothers and children have been legal residents in any county of the state for two years, the juvenile court may make an allowance to each of such women, as follows: Not to exceed fifteen dollars a month, when she has but one child not entitled to an age and schooling certificate, and if she has more than one child not entitled to an age and schooling certificate, it shall not exceed fifteen dollars a month for the first child and seven dollars a month for each of the other children not entitled to an age and schooling certificate. The order making such allowance shall not be effective for a longer period than six months, but upon the expiration of such period, said court may from time to time extend such allowance for a period of six months or less. Such homes shall be visited from time to time by a probation officer, agent of an associated charities organization, a humane society, or such other agents as the court may direct, provided that the person who actually makes such visits shall be thoroughly trained in charitable relief work, and the report or reports of such visiting agent shall be considered by the court in making such order."

The mothers' pension act has been made a part of the juvenile court act; section 1683 of the General Code is also a part of the juvenile court act and provides for a liberal construction of the mothers' pension law to the end that proper guardianship may be provided for the child in order that it may be educated and cared for as far as practicable.

There is no express provision of law to the effect that two years' residence in a county of the state must be continuous or immediately preceding the application for an award under the mothers' pension act. In the case presented, the widow and children of the deceased husband had lived in Seneca county for the greater portion of their lives until several years ago, of course covering a period much longer than the two years' residence provided for in the statute. For some reason or other they moved to Michigan and after the death of the father they returned to Seneca county, Ohio, where they are now residing, and to all intents and purposes are residents of the county.

In view of the provisions of section 1683-2 of the General Code, supra, coupled with the provisions of section 1683 of the General Code, referred to above, it is my opinion that under the facts presented in this particular case, the mother referred to is eligible to file an application for an award of a mother's pension, subject to the determination of questions of law and fact to be passed upon by the juvenile court judge, and if an award should be made such action would not be an abuse of the discretion conferred upon the court.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1090.

TAX COMMISSION—ALL EMPLOYMENTS, PROVISIONAL OR PERMANENT, UNDER PROVISIONS OF SECTION 1465-8, G. C., 102 O. L., 225 MUST BE APPROVED BY GOVERNOR—SERVICE FOR ONE YEAR UNDER SAID PERMANENT APPOINTMENT WITHOUT APPROVAL OF GOVERNOR DOES NOT GIVE APPOINTEE THEREOF VESTED LEGAL RIGHT THERETO.

1. All employments, both provisional and permanent, made under the provisions of section 1465-8, *G. C.*, 102 *O. L.*, 225, *and compensation therefor, to be effective, must first be approved by the governor.*

2. Service for one year under a permanent appointment made under said section, but without the approval of the governor, does not give the appointee thereof a vested legal right thereto.

COLUMBUS, OHIO, December 13, 1915.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of October 11, 1915, in which you present certain facts in reference to the appointment of one Mr. M. to the position of examiner public utilities under the state tax commission. In connection with your letter is also submitted certain correspondence and data from your records and the records of the state tax commission, from all of which the following facts appear:

On January 29, 1914, the state tax commission with the approval of the governor provisionally appointed Mr. M. as special excise tax examiner for the period of three months, which appointment was duly authorized by the state civil service commission after a non-competitive examination. On June 2, 1914, a competitive examination was held in which twenty-three persons competed including Mr. M., who as a result of such examination was ranked third in the order of eligibility. On or about August 18, 1914, his name and the names of two persons ranking above him were duly certified by your commission to the tax commission, and on said date said tax commission made the following order:

> "The commission being in receipt of a list of the names of three men eligible for the position of examiner of public utilities which was certified by the state civil service commission after a competitive examination conducted by said body, and after careful consideration of the same, the commission has this day, appointed as examiner of public utilities M. A. M—, of ----------, ---------- County, Ohio, who was on January 29, 1914, provisionally appointed by the commission with the approval of the governor as special excise tax examiner, effective February 1, 1914."

Thereupon said tax commission duly reported to your commission its appointment of the said Mr. M. as follows:

"COLUMBUS, OHIO, August 18, 1914.

"To the State Civil Service Commission of Ohio.

"GENTLEMEN:—You are hereby notified that M. A. M— was appointed this day (from certificate No. 322) rank No. ------ on the eligible list as examiner public utilities in this department at a monthly salary of one hundred and fifty dollars."

Mr. M. continued to serve under said appointment in the position of examiner of public utilities until on or about October 1, 1915. The records do not show that the

regular appointment, made as aforesaid on August 18th, was approved by the governor. In fact, it may be considered in view of the contentions in this case that the failure to so approve this appointment is admitted. It is claimed, however, that the governor's approval of the provisional appointment was all the law required in that behalf and that said approval continued in effect as to said regular appointment. It is further claimed that Mr. M. having served without objection from any official or department and having since the date of said appointment received his salary, his right now to said position cannot be questioned.

Upon the foregoing facts you submit the following inquiries:

> "1. Does the approval of the provisional appointment automatically insure the approval of the permanent appointment?
>
> "2. Does he have any vested right in his position, inasmuch as he was allowed to serve so long with the approval of the tax commission, and without objection from the governor?"

In answering your foregoing inquiries it is necessary, first, to briefly refer to the provisions of the law whereby the approval of the governor was required in this appointment. This law is found in section 10 of the "act to further define the duties of the tax commission" 102 O. L., 225, being section 1465-8, G. C., and which provides, after authorizing the commission to make certain appointments including examiners, as follows:

> "Such employments and compensation therefor shall be first approved by the governor."

It was held by this department in an opinion under date of September 8, 1915, to the Hon. A. V. Donahey, auditor of state, in which the same question was under consideration in connection with the provisions of another statute similar to the one above quoted, that the approval of the governor to an appointment under this requirement was necessary to give said appointment legal effect and that without such approval it would not be valid, that this requirement, in other words, was jurisdictional in order to give the person appointed a legal status and a right to his salary. That the approval of the governor was necessary at some stage of the proceedings in the case under consideration seems to be conceded, but it is claimed that the approval of the provisional appointment continued in effect and applied to and covered the subsequent regular appointment.

The law under which said provisional appointment was made is in itself a complete answer to this contention. This law is found in section 486-14, G. C., 103 O. L., 705, and is as follows:

> "Whenever there are urgent reasons for filling a vacancy in any position in the competitive class and the commission is unable to certify to the appointing officer upon requisition by the latter a list of persons eligible for appointment after a competitive examination, the appointing officer may nominate a person to the commission for non-competitive examination, and if such nominee shall be certified by the said commission as qualified after such non-competitive examination, he may be appointed provisionally to fill such vacancy until a selection and appointment can be made after competitive examination; but such provisional appointment shall continue in force only until regular appointment can be made from eligible lists prepared by the commission, and such eligible lists shall be prepared within ninety days thereafter."

Under the foregoing provisions regulating a provisional appointment it is provided that said provisional appointment shall continue in force only until a regular appointment can be made from eligible lists prepared by the civil service commission. This makes the provisional appointment and the regular appointment from an eligible list as distinct and separate from each other as they would be if they referred to and involved two wholly different positions. The eligible list from which the regular appointment must be made may or may not contain the name of the provisional appointee. In other words a provisional appointment does not make the appointee eligible to the regular appointment. If the provisional appointee passes a competitive examination and ranks among the three highest certified as eligible from said examination, he may be considered in connection with the regular appointment, otherwise not. If on this eligible list of three, he may or may not be appointed, that being a matter to be determined by the appointing authority.

In view of the foregoing considerations, to hold that the governor's approval of the provisional appointment followed and obtained in the regular appointment would be no more consistent than to maintain that the commission of an elective officer given to cover his first term of office would follow and be in force during a second term in the same office. I am clearly of the opinion that the contention that the regular appointment did not require the approval of the governor cannot be entertained and that such approval was required and was necessary to give said regular appointment valid force and effect.

There remains then the contention that because Mr. M. was permitted to serve and receive his salary under said invalid appointment, from August 18, 1914, to the present time, it cannot now be questioned. I know of no principle of equitable estoppel that can be applied under the facts in this case to the extent of justifying such contention. As between Mr. M. and the tax commission, the former might successfully contend that the latter cannot now be heard to complain because it knew the facts, or should have known them in the exercise of that degree of care which the law requires of it in making such appointments. This situation, however, does not extend to other authorities connected with his appointment or his subsequent official relations and service. In the case of the civil service commission there is nothing to show that it knew or should have known of this irregularity in his appointment. On the contrary, that the certificate of his appointment was made to said commission by the tax commission would imply that such appointment had been made under all the provisions of law and with due regard therefor. It necessarily follows from this that it is now the duty of said commission, since all of the facts are known to it, to disregard said appointment and refuse to longer certify Mr. M. on the payroll, unless his appointment and compensation are approved by the governor.

I would suggest, however, in this connection that hereafter your commission require that all certificates of appointment from the appointing authority show the approval of the governor when said appointment to be effective requires said approval.

I therefore conclude in this case that the approval of the governor was necessary to make said permanent appointment effective and to entitle said appointee to his salary thereunder and that service for one year under said permanent appointment, without such approval, does not give said appointee a vested legal right thereto.

Respectfully,

EDWARD C. TURNER,
Attorney General.

1091.

COLLATERAL INHERITANCE TAX—BEQUEST TO THEOLOGICAL INSTITUTION TO EDUCATE STUDENTS OF PARTICULAR CLASS AND RELIGIOUS FAITH, SUBJECT TO SUCH TAX—MT. SAINT MARY'S SEMINARY.

A bequest to an institution of learning, which limits its students to a particular class and religious faith, is subject to the collateral inheritance tax.

COLUMBUS, OHIO, December 13, 1915.

HON. JOHN V. CAMPBELL, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—I have received through Hon. Henry G. Hauck, assistant prosecuting attorney, the following inquiry of the date of November 13, 1915:

> "By direction of Hon. William H. Lueders, judge of our probate court, I am writing for your opinion as to the taxability under the collateral inheritance tax law of this state of a bequest of four thousand dollars to the Mt. St. Mary's seminary, a theological institution incorporated under the laws of the state of Ohio, the object and purpose of which is the education of young men for the priesthood in the Roman Catholic Church."

I learn from you in a subsequent communication that the seminary in question is maintained by endowments and contributions and that its students are required to profess the Catholic faith, and if needy are educated therein without pay, but those having means are required to pay their board and lodging and an annual tuition fee. Under the limitations thus imposed upon those whom it elects to serve, I am of the opinion that such institution is neither a "public institution of learning" nor an "institution for the purpose only of public charity," within the meaning of said terms as employed in section 5332, G. C., and that it is therefore not exempt from the collateral inheritance tax. This conclusion is based upon the authority of:

> Morningstar Lodge, I. O. O. F. v. Hayslip, 23 O. S., 144;
> Gerke v. Purcell, 25 O. S., 229;
> Little v. Seminary, 72 O. S., 417.

Those authorities and others were discussed in opinion No. 261 of the date of April 19, 1915, which involved, among others, an inquiry very similar to the one now submitted. I therefore, without further discussion, attach hereto a copy of said opinion and request that you consider it in connection with the conclusion herein stated.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1092.

STATE HIGHWAY COMMISSIONER—TRAFFIC RULES AND REGULATIONS PUBLISHED BY SAID COMMISSIONER NOT APPLICABLE TO STREETS WITHIN LIMITS OF ANY MUNICIPAL CORPORATION.

The traffic rules and regulations prepared and published by the state highway commissioner under section 249 of the Cass highway law, section 7246, G. C., apply only to those parts of inter-county highways and main market roads which have been or may hereafter be constructed or taken over by the state, and do not under any circumstances apply to any road or street within the limits of any municipal corporation.

COLUMBUS, OHIO, December 13, 1915.

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

GENTLEMEN:—I am in receipt of a number of inquiries relative to the application of section 249 of the Cass highway law, being section 7246, G. C., and am therefore addressing to you an opinion upon the question involved. An idea of the character of the question involved in these inquiries may be gathered from the following letter from Hon. M. R. Talbott, mayor of the city of Urbana, Ohio, under date of December 8, 1915:

> "Will you please inform us whether section 7246 of the 'Road Law' is applicable to incorporated municipalities or not?
>
> "We have a city ordinance which provides for the manner of turning all vehicles, and one of its provisions is that all vehicles shall make turns only at street intersections. Does this ordinance conflict with the above section?"

Section 249 of the Cass highway law, section 7246, G. C., which is the section referred to by Mr. Talbott, is as follows:

> "The state highway commissioner, within sixty days after the taking effect of this act, shall prepare and publish a set of traffic rules and regulations governing the use of, and traffic on, all state roads. All rules and regulations that are to apply generally throughout the state, including those applicable to roads constructed of the various kinds of road material, shall become effective thirty days after publication. Special rules and regulations or orders, applying only to specified sections of state roads, shall become effective as soon as posted at each end, and at all road crossings on such specified section. For the purpose of carrying into effect the provisions of this section, it shall be the duty of the state highway commissioner, the county commissioners, the county highway superintendent, the township highway superintendent, township trustees and all patrolmen or deputies employed on any highways within the state, to prosecute any violation of this section. It shall be unlawful for any person or persons, firm or corporation to enter upon, or travel over said state roads, except in accordance with the traffic rules and regulations promulgated by the state highway commissioner."

Section 251 of the Cass highway law, section 7478, G. C., reads as follows:

> "The state highway commissioner shall furnish the county highway superintendent with a copy of the rules and regulations promulgated by said state highway commissioner, and applicable to his county. The county

highway superintendent shall cause the rules and regulations so furnished to him by said highway commissioner to be published, at least one each week, for two successive weeks, in a newspaper published and of general circulation in said county, if there be any such paper published in said county, but if there be no newspaper published in said county then in a newspaper having general circulation in said county. When such regulations are published in the manner aforesaid, it shall be deemed a sufficient publication under the provision of this act."

I am informed that the state highway commissioner, acting under authority of section 7246, G. C., has prepared and published a set of traffic rules and regulations, and has furnished the county highway superintendents of the several counties of the state with copies of the same, and that publication of these rules and regulations has been made generally in the several counties. I am not advised as to whether sufficient time has elapsed in any particular county in which publication of the rules and regulations has been made so that they are now effective.

The rules and regulations prepared by the state highway commissioner, and copies of which have been furnished to the county highway superintendents, bear the following heading:

"TRAFFIC RULES AND REGULATIONS.
"Governing Traffic on the Public Highways of Ohio.
"These rules and regulations are effective on and after December 5, 1915."

The penal section applicable in case of a violation of the rules and regulations prescribed by the state highway commissioner is section 294 of the Cass highway law, section 13421-17, G. C., which section reads as follows:

"Whoever enters upon, travels over any portion of the highways, within the state, in violation of the traffic rules and regulations duly prescribed by law, or the state highway commissioner, or the county highway superintendent of any county, shall be fined not more than one hundred dollars, nor less than five dollars, and in addition thereto such person shall be liable for all damage done to such highway."

While the title or heading of the traffic rules and regulations prescribed by the state highway commissioner states that the same govern traffic on the public highways of Ohio, yet such title could not enlarge the scope of the rules and regulations which the state highway commissioner is authorized to prepare and publish.

An examination of section 249 of the act discloses the fact that the traffic rules and regulations prepared and published by the state highway commissioner are to govern the use of and traffic on all *state* roads. It therefore follows that, notwithstanding any title which may have been given to these rules, they are of no force and effect except as to state roads. It therefore becomes important to determine what roads are state roads. This question is answered by the provisions of paragraph (a) of section 241 of the act, which reads as follows:

"State roads shall include such part or parts of the inter-county highways and main market roads as have been or may hereafter be constructed by the state, or which have been or may hereafter be taken over by the state, as provided in this act, and such roads shall be maintained by the state highway department."

It therefore follows that the traffic rules and regulations prescribed and published by the state highway commissioner have no application except to inter-county high-

ways and main market roads, and apply only to those parts of inter-county highways and main market roads which have been or may hereafter be constructed by the state, or which have been or may hereafter be taken over by the state, as provided in the Cass highway law. Such rules and regulations do not, under any circumstances, apply to any road or street within the limits of any municipal corporation.

Municipal corporations have power to regulate the use of the streets, but, independent of whether any particular municipal corporation has or has not exercised its power to regulate the use of its streets, the traffic rules and regulations prescribed by the state highway commissioner have no force and effect within such municipal corporation.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1093.

TOWNSHIP TRUSTEES—COUNTY SURVEYOR MAY NOT BE EMPLOYED TO SURVEY TOWNSHIP DITCH FOR LAND DRAINAGE—SERVICES OF ASSISTANTS TO COUNTY SURVEYOR FOR TOWNSHIP DITCH WORK—FEES FOR LAND SURVEYS BY DEPUTY COUNTY SURVEYOR—COUNTY COMMISSIONERS SHOULD FIRST AUTHORIZE ROAD AND BRIDGE REPAIR WORK—FORCE ACCOUNT NOT LIMITED TO EXPENDITURE OF $200.00—LABORERS EMPLOYED BY COUNTY HIGHWAY SUPERINTENDENT.

Township trustees may not employ the county surveyor to survey a township ditch for land drainage.

Assistants to the county surveyor, while in the service of the county and drawing compensation from the county treasury, may not accept employment from township trustees on township ditch work.

A deputy of the county surveyor making land surveys under sections 2807 *to* 2814, *G. C., may charge and collect for such services the fees fixed by law. There is no authority for covering such fees into the county treasury and the same may be disposed of in any manner agreed upon between the surveyor and his deputy.*

All road and bridge repair work should be first authorized by the county commissioners and this is true even where roads and bridges are in a dangerous condition.

County commissioners, when proceeding to improve roads by force account, are not limited to an expenditure of $200 *or less. Laborers engaged on such force account work are to be employed by the county highway superintendent.*

COLUMBUS, OHIO, December 13, 1915.

HON. ROGER D. HAY, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—I have your communication of November 9, 1915, in which you submit a number of inquiries as to the operation of the Cass highway law. Your first inquiry reads as follows:

> "May the township trustees request the county surveyor to survey a township ditch for land drainage? Said ditch to be governed by the special assessment law."

The pertinent provision of the General Code is found in section 6612 and reads as follows:

"The trustees may employ an engineer to locate, level and measure the course of such ditch, and such other assistance as they need."

Under the provision above quoted, it is no part of the official duty of the county surveyor to do the engineering work on a township ditch. Under the statutes in force prior to the going into effect of the Cass highway law, the township trustees might employ the county surveyor or they might employ some other engineer to perform the engineering work on a township ditch. The county surveyor was compensated on a per diem basis, and if any of his time was not required for his official duties there was nothing to prevent his accepting other employment during the time when he was not employed about the duties of his office. As to his employment by the trustees to survey a township ditch, he occupied the same position as any other engineer. This situation has been entirely changed by the Cass highway law. Section 138 of that law, being section 7181, G. C., provides that the county surveyor shall give his entire time and attention to the duties of his office. As pointed out in opinion No. 844, of this department, rendered to the bureau of inspection and supervision of public offices, on September 20, 1915, the county surveyor is prohibited by the Cass highway law from accepting any employment, either public or private, not provided for by statute. Inasmuch as the county surveyor is required to devote his entire time to his official duties and inasmuch as the engineering work on a township ditch is no part of the official duties of the county surveyor, it follows, in answer to your first question, that township trustees may not employ the county surveyor to survey a township ditch for land drainage.

Your second question reads as follows:

"May the township trustees employ the county surveyor or one of his assistants and the surveyor draw the fees? Section 5551 of the General Code gives the township trustees the right to employ an engineer. Now does this give them the right to employ a county engineer and the county surveyor draw the fees?"

Your reference to section 5551, G. C., is not in point, as that section refers to the appointment of the county surveyor as tax map draughtsman by the county commissioners. Assuming that your second inquiry relates to the same subject as your first, it has already been answered in part by the observation that the township trustees may not employ the county surveyor on township ditch work. It is equally apparent that the county surveyor cannot receive any compensation for such work, whether performed by himself or an assistant. It is also clear that no right exists in the township trustees to employ one of the assistants of the county surveyor on township ditch work. The compensation of assistants to the county surveyor is paid from the county treasury and is a full compensation for all of their time, and such assistants would have no right while in the service of the county, and drawing compensation from the county treasury, to also accept employment from township trustees on township ditch work, and this is true without regard to whether the compensation for the township ditch work is retained by the assistants or paid by them to the county surveyor.

Your third inquiry is as follows:

"Land surveys. Whether the fees from work done on land surveys by the assistants in the county surveyor's office are to be paid to the county surveyor? If not, how can this work be done? Under your opinion the fees cannot be collected and paid back into the county treasury."

The answer to this question depends upon the character of the land surveys referred to by you. Inasmuch as the county surveyor is required to give his entire

time and attention to the duties of his office, he cannot devote any time to land surveys unless the surveys in question be of such a character that private individuals have a right to call upon the county surveyor in his official capacity to make the same.

The land surveys which the county surveyor may be called upon to make in his official capacity, and therefore the only land surveys which it is permissible for him to make, are those referred to in sections 2807 to 2814, inclusive, of the General Code of Ohio. If called upon to make surveys of this class, the county surveyor may either do the work himself or may detail a deputy to do the work, for, under the provisions of section 9. G. C., a deputy, when duly qualified, may perform all and singular, the duties of his principal. It would not be proper, however, for the county surveyor to detail any assistant other than a duly qualified deputy to perform the surveyor's duties under sections 2807 to 2814, inclusive.

The opinion of this department to which you refer, being opinion No. 844, was rendered on September 20, 1915, to the bureau of inspection and supervision of public offices, and that opinion only went so far as to hold that the salary of the county surveyor provided for by section 138 of the Cass highway law, section 7181, G. C., does not cover services rendered by the county surveyor to private individuals under sections 2807 to 2814, inclusive, of the General Code.

The following is quoted from the opinion in question:

> "Sections 2807 to 2814, inclusive, of the General Code, provide that land owners may call upon the county surveyor to make surveys of their lands, plant corner stones or posts, conduct proceedings to establish corners and take depositions therein, and record plats and certificates of the surveys made by him. These are clearly duties of the office of county surveyor. It is further provided that the fees of county surveyors for such services shall be paid by the person or persons applying therefor, and there is no provision of law requiring these fees to be covered into the treasury. If, therefore, a county surveyor is called upon to render services under sections 2807 to 2814, G. C., such surveyor will be entitled to charge and collect therefor the fees provided by law, and such fees will be in addition to the annual salary provided by section 138 of the act now under consideration."

It will be noted that the opinion from which the above is quoted refers in terms only to those cases where the land surveys are made by the county surveyor himself. Its principles, are, however, applicable where the surveys in question are made by a deputy or the county surveyor. In such cases the deputy is authorized to charge and collect the fees fixed by law for such services. The disposition of such fees after collection is a matter in which only the county surveyor and his deputy are interested, and the fees may be disposed of in any manner that may be agreed upon between them. There is, however, no authority for covering the fees into the county treasury even where the surveys are made by a deputy.

Your fourth question and the first branch of your fifth question may be answered together. They are as follows:

> "Should all road and bridge repair work be first ordered by the county commissioners upon their journal, providing same comes under $200.00?
>
> "Can the county highway superintendent repair roads and bridges in dangerous condition without the approval of the county commissioners?"

These inquiries involve a statement of the rights and duties of county commissioners and county highway superintendents as to the repair of roads and bridges. Several sections of the Cass highway law seem to confer an independent authority in this particular upon the county highway superintendent.

Section 141 of the act, section 7184, G. C., provides that the county highway

superintendent shall have general charge, subject to the rules and regulations of the state highway department, of the construction, improvement, maintenance and repair of all bridges and highways within his county, whether known as township, county or state highways, and that the county highway superintendent shall see that the same are constructed, improved, maintained, dragged and repaired as provided by law and shall have general supervision of the work of constructing, improving, maintaining and repairing the highways, bridges and culverts in his county, subject to an exception which it is not necessary to note in this connection.

Section 149 of the act, section 7192, G. C., provides that the county highway superintendent shall keep the highways of the county at all times in good and suitable condition for public travel and shall generally supervise the construction, improvement, maintenance and repair of the bridges and culverts on the highways of the county, the cost of which shall be borne by the county unless otherwise provided by law.

Section 154 of the act, section 7197, G. C., provides that the county highway superintendent, under the direction of the state highway commissioner, shall provide for the maintenance and repair of the roads of the county, under such system as may be deemed expedient, so that each section of the highways of the county shall be under proper supervision and be effectively and economically improved, maintained and repaired.

Similar general provisions are found in several other sections of the act, but the provisions specifically referred to above, and others of a similar character, must be read in the light of the other provisions of the law.

A consideration of the entire act leads to the conclusion that its general spirit is that the county highway superintendent shall be the executive officer of the county commissioners in so far as bridges and highways are concerned. While duties in reference to repairing roads and bridges are enjoined upon him in general terms, he is given no authority to perform these duties with reference to county roads except in so far as the county commissioners may furnish him the means. Under section 155 of the act, section 7198, G. C., the county highway superintendent may employ laborers, teams, implements and tools and purchase materials only with the approval of the county commissioners, and the same is true under section 160 of the act, section 7203, G. C. I do not find any authority in the act for a county highway superintendent to make a contract binding upon the county except as he may be authorized by the county commissioners.

It seems clear from the above that it was the intention of the legislature to confer upon the county commissioners the power and authority of determining in the first instance what repairs should be made upon county roads and to place the work of making such repairs under the supervision of the county highway superintendent. The limitation of $200.00 referred to by you in your fourth question has reference only to the necessity for advertising and securing competitive bids, and I conclude, in answer to your fourth question, that all road and and bridge repair work should be first ordered by the county commissioners without reference to the cost of the work and, of course, their orders and instructions to the county highway superintendent in this particular should appear upon their journal.

In answer to the first branch of your fifth question, it is my opinion that the rule above stated is the same, even where roads and bridges are in a dangerous condition, and that the repair of such roads and bridges should be first authorized by the county commissioners.

The latter part of your fifth question reads as follows:

> "May the county commissioners build new roads by force account when the same will cost over $200.00, and also is the county highway superintendent, when work is done under force account, to have charge of the employ-

ment of men upon the work or whether it is meant that the work shall be done under his direction in so far as quality of workmanship and material is concerned?"

Section 156 of the act, being section 7199, G. C., contains the following language:

"If, in the opinion of the county commissioners, it is advisable to provide for the improvement, maintenance and repair of any portion of the highways of the county by contract * * *,"

thus indicating that it was the intention of the legislature to authorize not only the maintenance and repair, but also the improvement of highways by force account. The several provisions of the act authorizing the employment of laborers, teams, implements and tools and the purchase of tools and materials, also indicate that it was the intention to authorize force account work. The county could have no use for labor or tools or material unless the county commissioners were authorized to proceed by force account. It is therefore manifest that under proper conditions and circumstances, the county commissioners have authority to improve, maintain or repair highways by force account, and without going into an extended discussion of any possible limitation that may exist on this right, it is my opinion that the same is not confined to work costing $200.00 or less, and that if the other facts exist which would authorize the commissioners to proceed by force account, they are not prohibited from so doing merely by the fact that the improvement in question will cost more than $200.00.

In view of the provision of section 155 of the act, section 7198, G. C., to the effect that the county highway superintendent may, with the approval of the county commissioners, employ laborers, teams, implements and tools, and purchase material it is my opinion that where the county commissioners determine to proceed by force account, the laborers engaged on the work are to be employed by the county highway superintendent, such employment having been first authorized by the county commissioners.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1094.

TOWNSHIP TRUSTEES—NO AUTHORITY AT PRESENT TIME FOR MAKING ROAD IMPROVEMENT BY BOND ISSUE UNDER CASS HIGHWAY LAW.

Township trustees are without authority at the present time to raise funds by a bond issue under the Cass highway law for the improvement of roads under chapter III of that law.

COLUMBUS, OHIO, December 13, 1915.

HON. B. A. MYERS, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—I have your communication of December 3, 1915, which reads in part as follows:

"Calling your attention to chapter III of Cass road law, 105-106 Ohio Laws, page 589.

"A petition has been filed with the board of trustees of Dublin township in our county asking for the improvement of a certain road as set out and described in the petition.

"Section 60 of said law provides that the board of trustees of any township may levy and assess upon the taxable property of such township a tax not exceeding three mills in any one year upon each dollar of taxable property therein for the purpose of improving, dragging, repairing or maintaining any public road or roads or part thereof. Such levy shall be in addition to the levy of two mills authorized by law for general township purposes, but subject to the limitation upon the combined maximum rate for all taxes now in force.

"The question arises, how will the township trustees raise funds for the immediate improvement of this road? Are they authorized to issue bonds in anticipation of the collection of this levy? * * * The trustees desire to proceed under the Cass road law, if possible, and construct roads which they may see fit to grant under the petitions filed. How can they proceed and secure funds under this law?"

As I understand your question, you desire to know whether the township trustees may, under the provisions of the Cass highway law, raise funds at the present time for the improvement of a road under chapter III of that law, either by a bond issue or otherwise. Your question is specifically answered by opinion No. 849 of this department rendered to the bureau of inspection and supervision of public offices on September 21, 1915, a copy of which opinion will be found on page 32 of a pamphlet which I am sending you under separate cover. In this opinion it was held that bonds might be issued by township trustees for the construction or reconstruction of roads under sections 60 and 74, inclusive, of the Cass highway law, provided such bonds were authorized by a vote of the qualified electors of the township and provided further that the money raised by a levy under section 60 of the act did not furnish sufficient funds for such work. It was further held that as the Cass highway law did not go into effect until September 6, 1915, and therefore no levy could be made this year under section 60 of that act, no election to determine the question of issuing bonds could be held until after the time in the year 1916 when the township made its levy under section 60 of the act, and it was determined that said levy did not furnish sufficient funds for the construction and repair of the designated roads. It therefore follows that township trustees are without authority at the present time to raise funds by a bond issue under the Cass highway law for the improvement of roads under chapter III of that law, and I know of no other method by which they may at the present time raise such funds.

Inasmuch as township trustees are without authority to raise such funds at the present time, it becomes unnecessary to discuss the further question suggested by you in your letter relating to a conflict of authority between the county commissioners and the township trustees.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1095.

COUNTY COMMISSIONERS—MAY ISSUE BONDS FOR PIKE REPAIR PURPOSES—CONSTRUCTION OF SECTION 6929, G. C.

Bonds for pike repair purposes may be issued by county commissioners under section 108 of the Cass highway law, section 6929, G. C.

COLUMBUS, OHIO, December 13, 1915.

HON. DONALD F. MELHORN, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—I have your communication of November 11, 1915, in which you request my opinion as to the legality of a certain method suggested by you for raising money for pike repair purposes. You state that many of the main traveled highways of the county are badly in need of repair and that same are a positive menace to the safety of those who traverse them, and that the pike repair fund of the county is already overdrawn and the amount that will be available from the February, 1916, settlement will be altogether inadequate. Some of the roads in question are main market roads, others are inter-county highways and the remainder are county roads.

Referring to the possibility of relief through a road repair levy under section 238 of the Cass highway law, you make the point, among others, that the proceeds from such a levy would not be available until after the February, 1917, settlement. This point is well taken, and it is apparent that relief must be sought under some other section of the law.

As to obtaining state aid for the repair of the inter-county highways within your county, either under section 184 or under the latter part of section 196, of the Cass highway law, you state you are informed by the state highway commissioner that state aid is not obtainable at the present time, for the reason that the apportionment to Hardin county has been exhausted. You also point out that it would be useless to attempt to proceed at the present time under section 196 of the Cass highway law, even if state funds were available, for the reason that there are no funds in the county treasury subject to appropriation for the "equal sum" which must be appropriated and expended by the county in order to obtain state funds under this section.

Referring to the procedure for repairing roads under section 85 and the succeeding sections of the Cass highway law, using one of the methods of paying the costs and expenses set forth in section 98 of the law, you raise the objection, based upon the policy pursued by your county in the past, that such a procedure would involve assessing a part of the cost of the repairs upon the owners of abutting real estate. You observe that this has never been done in the history of your county in repairing pikes, and indicate that you are anxious to adopt a course of procedure which would enable the county to bear the entire cost of the contemplated repairs.

You state that the method called for by your present situation is not only one that will enable the county to bear the entire expense, but also one that will furnisih pike repair money that may be legally used on main market, inter-county and county roads alike. The method which you state you have in mind, and as to the legality of which you desire my opinion, is set forth in your communication as follows:

> "(A) The first thing that the county commissioners would do, would be to comply with section 196 (G. C. 1203), and get the approval of the chief highway engineer as to the plans and specifications of the repair of the inter-county highways and main market roads. Section 226 (G. C. 1231), would seem to give the commissioners the same right to repair a main market road, as is given by section 196, that is, after receiving the chief highway engineer's O. K. on the plans and specifications.

"(B) The county commissioners would take jurisdiction, without a petition, under section 89 (G. C. 6910), pass resolutions to repair certain specified roads, and order, by virtue of section 100 (G. C. 6921), all costs and expenses to be 'paid out of the proceeds of any levy or levies for road purposes on the grand duplicate of the county.' Said resolution would, of course, further provide, under section 105 (G. C. 6926), for a fund to be created by taxation for the payment of the county's proportion of the costs and expenses of the improvement (in this case the county's proportion being all of said costs and expenses).

"(C) Then the county commissioners, under section 108 (G. C. 6929), would issue bonds in anticipation of the taxes to be raised under the levy provided for by section 105 (G. C. 6926), to pay the costs and expenses of the improvement."

I am of the opinion that the method suggested by you will meet the situation which you present and that the same may be lawfully followed with sole slight changes in the order in which the several steps should be taken.

The county commissioners should first, by a unanimous vote, adopt a resolution, under section 89 of the Cass highway law, declaring the necessity for repairing the roads in question, which resolution should contain a description of each road. Acting under section 90 of the law, they should, by a unanimous vote, adopt a resolution determining the kind and extent of the repairs, and at the same time should order the county surveyor to make surveys, plats, profiles, cross sections, estimates and specifications, such as may be required for the repairs in question, and when the same have been made the profile and grade should be approved by the county commissioners. While it is true that in the latter part of section 90 of the law the word "improvement" is twice used instead of the phrase "construction, improvement or repair," yet the use of the expression "constructed, improved or repaired" in the first part of the section indicates that the word "improvement," as used thereafter in the section, was intended to include construction and repair.

Upon the completion of the surveys, plats, profiles, cross sections, estimates and specifications, and the approval of the profile and grade by the county commissioners, the plans and specifications for the proposed repairs should, in the case of inter-county highways and main market roads, be submitted to the chief highway engineer for examination and approval. This action should be taken in view of the following provision found in section 196 of the law:

"Nothing in this chapter shall be construed as prohibiting the county commissioners or township trustees from constructing, improving, maintaining or repairing any part of the inter-county highways within such county or township; provided, however, that the plans and specifications for the proposed improvement shall first be submitted to the chief highway engineer and shall receive his approval. * * *"

While the authority for county commissioners to construct, improve, maintain or repair main market roads, provided the plans and specifications be first approved by the chief highway engineer, is not expressly conferred by the portion of section 196 of the law quoted above, yet I am of the opinion, from a consideration of the entire act, that it was the intention of the legislature to confer such authority and that the same exists and may be exercised.

Upon the approval of the plans and specifications by the chief highway engineer, the county commissioners should, under section 100 of the act, adopt, by a unanimous vote, a resolution ordering that all the costs and expenses of making the repairs be paid

out of a road repair fund to be thereafter created by a bond issue under section 108 of the act, or, as hereinafter pointed out, such resolution might properly be omitted from the procedure at this point and adopted at a later date. They should then, under section 108 of the act, and in anticipation of the collection of taxes levied under section 105 of the act, adopt a resolution declaring the necessity, in their judgment, for a bond issue, and providing for the issuing of the bonds of the county in an aggregate amount necessary to pay the estimated cost and expense of the repairs.

In order to comply with the constitutional requirement of section 11 of article XII of the constitution of Ohio, to the effect that no bonded indebtedness of the state, or any political subdivision thereof, shall be incurred, unless in the legislation under which such indebtedness is incurred provision is made for levying and collecting annually, by taxation, an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity, the county commissioners should, in their bond resolution, provide for the levying and collecting annually thereafter by taxation, upon the grand duplicate of the county, under section 105 of the act, an amount sufficient to pay the interest on the bonds in question and to provide a sinking fund for their redemption at maturity. If the resolution called for by section 100 of the act, and hereinbefore referred to, has not been adopted prior to the adoption of the legislation providing for a bond issue, the county commissioners should, after the sale of the bonds, adopt such resolution and order therein that all the costs and expenses of making the repairs be paid out of the road repair fund created by the bond issue in question. The commissioners will then be in a position to proceed with the work of repair, either by contracts duly entered into by them or by force account, as may be determined.

I deem it proper in this connection, however, to call your attention to certain considerations which bear upon the amount of bonds which may be issued by the county under favor of section 108 of the Cass highway law, section 6929, G. C. The bonds which it is proposed to issue in your county are to be issued in anticipation of a levy made under section 105 of the Cass highway law, section 6926, G. C., said levy to be provided for in the legislation authorizing the issuance of the bonds in question. The levy under that section is one made for the purpose of providing a fund for the payment of the county's proportion of the costs and expenses of constructing, improving, maintaining, dragging and repairing roads under chapter VI of the Cass highway law.

The third branch of the syllabus in the case of Rabe v. Board of Education, 88 O. S., 403, reads as follows:

> "Bonds cannot be issued in anticipation of income from taxes levied or to be levied in an amount greater than the income to be anticipated thereby."

The above rule must be observed by your county in carrying through the scheme of bond legislation herein discussed, but it does not follow that the limitation expressed in the third branch of the syllabus in the Rabe case, quoted above, is the only limitation which, under the facts presented by you, should be observed in the issuing of bonds. The Rabe case was one involving the right to issue bonds for the purpose of obtaining and improving school property, and the court at page 422 used the following language:

> "It would seem to be not only proper but necessary to take into account the future demands upon the school funds for school purposes in connection with the probable increase of the tax duplicate in determining just what income may be anticipated by the issue of bonds for the purchase of school property without detriment to the future imperative needs of the schools of that school district. This, of course, is a question for the determination of the

board of education in the first instance, and a court of equity would not for this reason interfere to restrain the issue of these bonds, except for an abuse of discretion."

In view of the foregoing, it may be stated that in issuing bonds under section 6929, G. C., in anticipation of taxes levied under section 6926, G. C., the county commissioners cannot issue bonds in an amount greater than the income to be anticipated. In determining the amount of income derived from taxes levied under section 6926, G. C., in anticipation of which bonds may be issued, the commissioners should first determine the total amount that can probably be realized by a levy under the section in question, having due regard to the needs and requirements of other taxing subdivisions and to the needs and requirements of the county for other purposes. From such total amount there must be deducted by the county commissioners an amount to be determined by them in the exercise of a sound discretion, which amount must be sufficient to meet the future imperative needs of the county for the purposes of constructing, improving, maintaining, dragging and repairing roads under chapter VI of the Cass highway law during the life of the bonds to be issued. The balance of such total amount left after making such deduction is the amount that may be anticipated by a bond issue. In other words, the amount of bonds that may be issued under section 6929, G. C., in anticipation of levies made under section 6926, G. C., plus the interest that will have to be paid on such bonds, cannot exceed the total amount that can probably be realized by the levy under section 6926, G. C., having due regard to the needs and requirements of other taxing subdivisions and to the needs and requirements of the county for other purposes, less an amount to be determined by the county commissioners in the exercise of a sound discretion and which amount must be sufficient to meet the future imperative needs of the county for the purposes of constructing, improving, maintaining, dragging and repairing roads under chapter VI of the Cass highway law during the life of the bonds to be issued.

An opinion covering the limitations set forth in the several tax levying sections of the Cass highway law is in process of preparation by this department and inasmuch as some of the matters therein to be treated have a bearing upon the matters set forth in your inquiry, a copy of that opinion will be forwarded to you as soon as the same is prepared.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1096.

APPROVAL OF TRANSCRIPT OF BOND ISSUE OF BOARD OF EDUCATION OF DISTRICT OF UNION TOWNSHIP, BUTLER COUNTY, OHIO.

COLUMBUS, OHIO, December 14, 1915.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

"*In Re:* Bonds of Union township rural school district, Butler county, Ohio, in the aggregate amount of $30,000.00, being sixty bonds of $500.00 each, bearing interest at five per centum per annum, and payable $1,500 each year, beginning May 1, 1916, and ending May 1, 1935."

I have examined the transcript of the proceedings of the board of education of the district of Union township, Butler county, Ohio, relative to the issuance of the

above bonds; also the certified copies of the opinions of the court of common pleas, and of the court of appeals of Butler county, in the case of Harry W. Howard et al., plaintiffs, v. Aufranc et al., defendants, and I am of the opinion that said bonds are valid and legal obligations of the said Union township school district, and approve the same.

I wish to state further that the objections which have heretofore prevented my approval of these bonds have been removed by the decisions of the court of common pleas and the court of appeals of Butler county, above referred to, and this opinion is based upon the judgment of the courts expressed in the above action.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1097.

SECTION 2314, G. C., REQUIRED TO BE FOLLOWED WHEN INSTALLING HEATING SYSTEM IN STATE INSTITUTION COSTING MORE THAN $3,000—KENT STATE NORMAL SCHOOL.

There is no authority to install heating system in state institution costing more than three thousand dollars without following provisions of section 2314 et seq., G. C.

COLUMBUS, OHIO, December 14, 1915.

HON. J. E. MCGILVREY, *President Kent State Normal School, Kent, Ohio.*

DEAR SIR:—Under date of December 7th, you submitted for my written opinion the following:

> "During the Christmas holidays, while school is not in session, I wish to take the hot air furnaces out of the administration building, which was built three years ago, and put in the necessary vento radiation for connecting this building with the power plant. It is necessary to make this connection, not only for the proper heating of this building, but I do not have money enough appropriated under personal service to operate two power plants for the remainder of the year. For the purpose above stated I wish to buy, to be paid for out of the appropriation for heating plant and equipment, five thousand (5,000) feet of vento radiation directly on bids from the manufacturer, which will cost not more than $1,573.00. From another firm I wish to buy the automatic temperature regulation which will cost $1,500.00, and I wish to install this radiation and equipment by direct labor with our plumbers who are at work here on the plant in the same way that we paid for the labor on the grading of the grounds this summer, and on the tunnel basement of the corridors. I feel sure that the proposed plan comes within the provision of the law. By doing work this way I find I can save enough money from the appropriation for the heating plant and equipment to connect the dormitory with the heating plant. This saving amounts to about $1,466.00.
>
> "I am enclosing copy of the report to the board of trustees which will give you the facts connected with this case which show that, because of the delay and unwarranted neglect of the architect, it would be impossible to advertise these items for the heating of this building in time to install during the Christmas vacation.

"The work in question might readily be considered under the head of 'Repairs to an old building.' This building was completed two years ago and heated with hot air furnaces. I wish now to buy and install a certain amount of radiation, as specified above.

"This matter is urgent, and I shall be glad to have an opinion at your earliest convenience."

The answer to your inquiry is contained in section 2314 of the General Code, which reads as follows:

"Before entering into contract for the erection, alteration or improvement of a state institution or building or addition thereto, excepting the penitentiary, or for the supply of materials therefor, the aggregate cost of which exceeds three thousand dollars, each officer, board, or other authority by law charged with the supervision thereof, shall make or cause to be made the following: full and accurate plans, showing all necessary details of the work, with working plans suitable for the use of mechanics and other builders in such construction, so drawn and represented as to be plain and easily understood; accurate bills showing the exact amount of different kinds of material necessary to the construction to accompany such plans; full and complete specifications of the work to be performed, showing the manner and style required, with such directions as will enable a competent mechanic or other builder to carry them out and afford bidders all needful information; a full and accurate estimate of each item of expense and of the aggregate cost thereof."

Since, from your letter, it appears that the five thousand feet of vento radiation will cost $1,573.00, and the automatic temperature regulation will cost $1,500.00, the cost of the two will be in excess of three thousand dollars, without considering the labor on the same. To attempt to do the work in the way described in your letter would be in direct violation of the provisions of section 2314, supra.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1098.

ROADS AND HIGHWAYS—WHAT COUNTY COMMISSIONERS MUST DO TO COME UNDER PROVISION OF SAVING CLAUSE OF CASS HIGHWAY LAW WHEN PROCEEDING UNDER SECTION 6956-1, G. C.

In order that proceeding under sections 6956-1, et seq., G. C., may be preserved by the saving provisions of the Cass highway law, the county commissioners must, prior to September 6, 1915, have gone upon the line of the proposed road improvement, determined that the public utility and convenience require such road to be laid out, constructed, repaired, improved, altered, straightened or widened as petitioned for, and taken the other action provided by section 6956-2, G. C.

COLUMBUS, OHIO, December 14, 1915.

HON. S. W. ENNIS, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—I have your communication of December 11, 1915, which communication reads as follows:

"I would like to have your opinion upon the law relating to the following facts:

"In Paulding county there have been a number of petitions and bonds filed with the auditor to construct and improve pike roads, in accordance with the provisions of sections 6956-1 to 6956-16 of the General Code of Ohio, all being filed since May 10, 1910. On some of these petitions for said road improvements the county commissioners have counted the names of the petitioners, and found that a majority of the land owners owning land lying and being within one mile in any direction from either side, end or terminus thereof have petitioned for said road improvements. The proceedings or journal of said county commissioners show no further action taken, nor have the county commissioners gone upon the line of any said roads or parts thereof, and all of said petitions were filed in 1913 and 1914, and such actions as were taken thereon by said county commissioners were prior to the passage of the Cass highway act.

"Section 300 of said Cass highway act, chapter 13, of the curative provisions of said act, provides in part as follows:

" 'Section 300. (Former proceedings, contracts, tax levies, bonds, etc., shall be valid.) All proceedings for the construction, improvement or repair of stone, gravel, or other roads in this state under the provisions of sections 6956-1 to 6956-16, inclusive, of the General Code, had since May 10, 1910, and all petitions granted, bonds issued, taxes and assessments levied or to be levied on account of such roads, and all contracts made and entered into, under the provisions of said sections, and any and all steps taken thereunder, are hereby declared and held to be valid, and boards of county commissioners or other officials shall have full power and authority to complete all roads in process of construction under said sections, and shall have full power and authority to levy taxes and assessments for such roads, and to sell bonds to pay for the construction and improvement of all such roads, and to do any and all things contemplated by the provisions of said sections.'

"Do such actions and proceedings as have been taken, above referred to, by the county commissioners on said road improvements, in accordance with the provisions of said sections 6956-1 to 6956-16, before being repealed by said Cass highway act, enable them to complete said road improvements under the old law, or will said pike road improvements have to be repetitioned for under the new law?"

Your question is substantially answered by opinion No. 1045 of this department rendered to Hon. F. J. Bishop, prosecuting attorney of Ashtabula county, on November 29, 1915, a copy of which opinion you will find enclosed.

For the reasons set forth in the opinion to Mr. Bishop it is my opinion that, under the state of facts disclosed by your letter, the county commissioners are without authority to proceed under the old law, inasmuch as they did not, prior to the going into effect of the Cass highway law on September 6, 1915, go upon the lines of the roads covered by the petitions and determine that the public utility and convenience required that the roads in question be laid out, constructed, repaired, improved, altered, straightened or widened as petitioned for, and did not determine the routes and termini of such roads as were to be laid out, and did not determine the kind and extent of the improvement or repair, and the alterations in the lines and changes of grades of said roads, if any. This being true, it will be necessary, in the construction or improvement of the roads in question, to institute new proceedings under the Cass highway law.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1099.

OHIO STATE UNIVERSITY—APPROVAL OF CONTRACT FOR CONSTRUCTION OF HOMEOPATHIC HOSPITAL BUILDING.

COLUMBUS, OHIO, December 14, 1915.

HON. CARL E. STEEB, *Secretary Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval the following contracts:

"For the construction of the homeopathic hospital building, awarded to the Dawson Construction Company, in the sum of $39,890.00, to cover the entire work bid upon except items 15 and 16;

"One to the Huffman-Conklin Company, in the sum of $13,298.00, to cover said items 15 and 16;

"Also for the construction of the shops building, the entire contract except items 13 and 14 having been awarded to the Dawson Construction Company, in the sum of $84,625.00; and

"To the Huffman-Conklin Company to cover said items 13 and 14, in the sum of $17,731.00."

I have carefully examined the advertisements calling for the bids, and find the same to be in all respects correct.

I have examined the contracts referred to and the bonds attached thereto and find them to be correct, and have, therefore, approved the same.

I have filed in the office of the auditor of state the original of the contract of the Dawson Construction Company for the construction of the homeopathic hospital building, the contract of the Huffman-Conklin Company for the heating and ventilating plumbing, gas fitting and sewer, covered by items 15 and 16, the contract of the Dawson Construction Company for the construction of the shops building, and the contract of the Huffman-Conklin Company for the heating and ventilating, plumbing, gas fitting and sewer, together with the bonds covering the respective contracts, and I am herewith returning to you the advertisements upon which bids were received.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1100.

PRESCRIBED FORM OF LEASE FOR USE BY THE INDUSTRIAL COMMISSION OF PREMISES OWNED BY W. G. STONEMAN.

COLUMBUS, OHIO, December 14, 1915.

HON. BENSON W. HOUGH, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—You have requested me to prepare for you a form of lease for the premises owned by Mr. W. G. Stoneman, of Columbus, Ohio, and described as follows:

"All of the third and fourth floors and four thousand (4,000) square feet of the basement of the building known as the 'South-Stoneman building,'

situated at Nos. 335-339 South High street, in the city of Columbus, Ohio, together with four hundred (400) square feet of storage room in the attic of said building,"

to be used by the industrial commission of Ohio.

In accordance with your request, I herewith submit to you a form of such lease:

LEASE.

THIS AGREEMENT OF LEASE WITNESSETH:

That W. G. STONEMAN, of Columbus, Ohio, lessor, in consideration of the rents and covenants hereinafter stipulated to be paid and performed by the STATE OF OHIO, lessee, through THE INDUSTRIAL COMMISSION OF OHIO, does hereby GRANT, REMISE AND RELEASE to the said lessee, the following described premises, to wit:

"All of the third and fourth floors and four thousand (4,000) square feet of the basement of the building known as the 'South-Stoneman building,' situated at Nos. 335-339 South High street, in the city of Columbus, Ohio, together with four hundred (400) square feet of storage room in the attic of said building."

TO HAVE AND TO HOLD the same, with the appurtenances, unto the said lessee for the use of the industrial commission of Ohio, from the first day of March, 1916, for and during the term covered by the life of the existing appropriations made to said he industrial commission of Ohio, applicable to the payment of rent for such premises herein leased.

And it is expressly stipulated and agreed by lessor herein that the said premises shall, at the commencement of this lease, be in all respects in the condition required by the plans and specifications now on file in the office of the adjutant general of Ohio. Lessor further agrees that if said premises are not in the condition prescribed by said plans and specifications on the day of the commencement of this lease no rent shall be charged for the use and occupancy of the same until said premises are put in the condition prescribed by the said plans and specifications.

Said lessor agrees during the life of this lease, or any renewal thereof, to furnish adequate light, heat, water and janitor service at all times, and also to furnish elevator service from eight o'clock a. m. to eleven o'clock p. m. on each and every day during the continuance of this lease except Sundays.

Continued occupation by lessee, after the expiration of this lease, shall not operate as a renewal hereof for any period, but a new lease must be made. And said lessor, for himself and for his heirs, executors, administrators and assigns, covenants with the said lessee that he will, on or before the expiration of this present lease, at the request of said lessee, acting through the adjutant general of Ohio, grant and execute to it a new lease of the premises hereby demised, with their appurtenances, for a lawful term to be designated by lessee, acting through the adjutant general of Ohio, to commence upon the expiration of the term hereby granted, at the same rent, payable in like manner, and subject to like covenants, provisos and conditions, except for renewal, as are contained in this lease.

The rent to be paid hereunder shall be nine hundred dollars ($900.00) per month, payable from the appropriations now made to the industrial commission of Ohio, upon voucher of said commission, and said lessee hereby covenants and agrees with said lessor, his heirs and assigns, that it will pay said rents, in the manner aforesaid, unless said premises shall be destroyed

or rendered untenantable by fire or other casualty; that it will not do or suffer any waste therein nor assign this lease, or any part thereof, without the written consent of said lessor, and that at the end of said term, unless a renewal be requested, will deliver up said premises in as good order and condition as they now are or may be put by said lessor, reasonable use and ordinary wear and tear thereof and damage by fire and other unavoidable casualty excepted.

PROVIDED, HOWEVER, That if said rent, or any part thereof, shall remain unpaid for sixty (60) days after it shall become due, and after demand therefor has been made upon the industrial commission of Ohio, it shall be lawful for said lessor, his heirs or assigns, to re-enter said premises and the same to have again, repossess and enjoy, as in his first and former estate; thereupon this lease and everything therein contained on said lessor's behalf to be done and performed shall cease, determine and be utterly void.

PROVIDED, HOWEVER, That nothing herein shall bind lessee for any amount of money in excess of that portion of the amount now appropriated by law to the industrial commission of Ohio applicable to rent of premises.

And said lessor, for himself and for his heirs, executors, administrators and assigns, covenants and agrees with said lessee that said lessee paying the rents, and observing and keeping the covenants of this lease on its part to be kept, shall lawfully, peacefully and quietly hold, occupy and enjoy said premises, during said term, without any let, hindrance, ejection or molestation by said lessor, or his heirs, or any person or persons lawfully claiming under them.

The said lessee, acting through the adjutant general of Ohio, may terminate this lease at any time upon the giving to the lessor, or his duly authorized agent, sixty (60) days' notice of its intention so to do.

This lease shall not be binding upon lessee until approved by the governor of Ohio.

IN WITNESS WHEREOF, the said lessor and the said lessee, acting by and through the adjutant general of Ohio, said adjutant general being thereunto duly authorized by statute, have hereunto set their hands, in triplicate, on the_____day of December, in the year of our Lord one thousand nine hundred and fifteen.

_____(Lessor.)

Signed and acknowledged in
the presence of

THE STATE OF OHIO, (Lessee.)

_____

By_____
as Adjutant General of Ohio.

_____

Approved_____, 1915.

_____
Governor of Ohio.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1101.

TAX COMMISSION—LEASE FOR NEW QUARTERS FOR SAID COMMISSION—LESSOR—THE COMMERCIAL IMPROVEMENT COMPANY.

COLUMBUS, OHIO, December 16, 1915.

HON. BENSON W. HOUGH, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—You have requested me to prepare for you a form of lease for the premises owned by the Commercial Improvement Company, of Columbus, Ohio, and described as follows:

"Rooms Nos. 401, 403, 405, 407 and 409, located on the fourth floor of the 'Commercial building,' No. 104 North Third street, in the city of Columbus, Ohio,"

to be used by the tax commission of Ohio.

In accordance with your request, I herewith submit to you a form of such lease:

"LEASE.

"This Agreement of Lease Witnesseth:

"That the Commercial Improvement Company, a corporation organized under the laws of the state of Ohio, with its office in the city of Columbus, Ohio, lessor, in consideration of the rents and covenants hereinafter stipulated to be paid and performed by the state of Ohio, lessee, through the tax commission of Ohio, does hereby grant, remise and release to the said lessee, the following described premises, to-wit:

"Rooms Nos. 401, 403, 405, 407 and 409, located on the fourth floor of the 'Commercial building,' No. 104 North Third street, in the city of Columbus, Ohio.

"To have and to hold the same, with the appurtenances, unto the said lessee for the use of the tax commission of Ohio from the first day of January, 1916, for and during the term covered by the life of the existing appropriations made to said the tax commission of Ohio applicable to the payment of rent for such premises herein leased.

"And it is expressly stipulated and agreed by the lessor herein that the said premises shall, at the commencement of this lease, be in all respects in the condition required by the plans and specifications now on file in the office of the adjutant general of Ohio, to which reference is hereby made. Lessor further agrees that if said premises are not in the condition prescribed by said plans and specifications on the day of the commencement of this lease, no rent shall be charged for the use and occupancy of the same until said premises are put in the condition prescribed by the said plans and specifications.

"Said lessor further agrees to furnish during the life of this lease adequate light, heat, water and janitor service and elevator service at all times during the continuance of this lease.

"Continued occupation by lessee, after the expiration of this lease, shall not operate as a renewal hereof for any period, but a new lease must

be made. And said lessor, for itself and for its successors and assigns, covenants with said lessee that it will, on or before the expiration of this present lease, at the request of said lessee, acting through the adjutant general of Ohio, grant and execute to said lessee a new lease of the premises hereby demised, with their appurtenances, for a lawful term, not exceeding two years, to be designated by lessee, acting through the adjutant general of Ohio, to commence upon the expiration of the term hereby granted, at the same rent, payable in like manner, and subject to like covenants, provisos and conditions, except for renewal, as are contained in this lease.

"The rent to be paid hereunder shall be two hundred dollars ($200.00) per month, plus an amount equal to the amount paid by lessor to the Columbus Railway Power & Light Company for electricity furnished to the premises herein leased, as the same shall be determined monthly by a reading of the meter to be provided by the lessor for the sole use of the premises herein leased. Said amount to be payable from the appropriations now made to the tax commission of Ohio, upon voucher of said commission, and said lessee hereby covenants and agrees with said lessor, its successors and assigns, that it will pay said rents in manner aforesaid, unless said premises shall be destroyed or rendered untenantable by fire or other casualty; that it will not do or suffer any waste therein nor assign this lease, or any part thereof, without the written consent of said lessor, and that at the end of said term, unless a renewal be requested, will deliver up said premises in as good order and condition as they now are or may be put by said lessor, reasonable use and ordinary wear and tear thereof and damage by fire or other casualty excepted.

"Provided, however, that if said rent, or any part thereof, shall remain unpaid for thirty (30) days after it shall become due, and after demand therefor has been made upon the tax commission of Ohio, it shall be lawful for said lessor, its successors or assigns, to re-enter said premises and the same to have again, repossess and enjoy, as in its first and former estate; thereupon this lease and everything therein contained on said lessor's behalf to be done and performed shall cease, determine and be utterly void.

"Provided, however, that nothing herein shall bind lessee for any amount of money in excess of that portion of the amount now appropriated by law to the tax commission of Ohio applicable to rent of premises.

"And said lessor, for itself and for its successors and assigns, covenants and agrees with said lessee that said lessee paying the rents, and observing and keeping the covenants of this lease on its part to be kept, shall lawfully, peacefully and quietly hold, occupy and enjoy said premises, during said term, without any let, hindrance, ejection or molestation by said lessor, or its successors or assigns, or any person or persons lawfully claiming under them.

"The said lessee, acting through the adjustant general of Ohio, may terminate this lease at any time upon the giving to the lessor, or its duly authorized agent, ninety (90) days' notice of its intention so to do.

"This lease shall not be binding upon lessee until approved by the governor of Ohio.

"In witness whereof, the lessor herein, the Commercial improvement Company, has hereunto set its hand and affixed its corporate seal by its ----------, he being thereunto duly authorized by resolution of its board of directors, and the said lessee, the state of Ohio, acting by and through the adjutant general of Ohio, said adjutant general being thereunto

duly authorized by statute, has hereunto set its hand, in triplicate, this ---------- day of December, in the year of our Lord one thousand nine hundred and fifteen.

"THE COMMERCIAL IMPROVEMENT COMPANY,
"By ---------- (Lessor)
"Its

"THE STATE OF OHIO,
"By ---------- (Lessee)
"As Adjutant General of Ohio.

"Approved ----------, 1915.

"Governor of Ohio."

Respectfully,
EDWARD C. TURNER,
Attorney General.

1102.

ASSESSORS—FAILURE TO FILE BONDS AT TIME PRESCRIBED BY STATUTE—DISCRETION WITH COUNTY AUDITOR TO ACCEPT BOND OR FILL VACANCY BY MAKING AN APPOINTMENT.

When assessors elected under the provisions of section 3349, *G. C.* (106 *O. L.*, 250), *file their bonds after the expiration of the time prescribed therefor by section* 3353-1 (106 *O. L.*, 252) *the county auditor, if he has not filled the vacancies thus created by appointment, may accept said bonds and permit said assessors to take the oath of office.*

COLUMBUS, OHIO, December 16, 1915.

HON. P. A. SAYLOR, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I have your letter of December 6, 1915, submitting the following inquiry:

> "Quite a few of our assessors-elect have given their bonds since the second day of December, 1915. Shall the auditor refuse these bonds and declare the offices vacant and appoint others, or has he the discretion to accept these bonds and treat them as having been filed before the second day of December? The auditor has stated that he will appoint the parties elected, if he has to appoint them under section 3353, General Code (105-106 Year Book at 252)."

Section 3353-1, G. C., being section 22 of an act to provide for the listing of property, etc., 106 Ohio Laws, 252, provides as follows:

> "If there shall be a failure to elect an assessor in any ward, district, city, village or township, or if a person elected assessor fails to give bond and take the oath of office within thirty days after his election, or if after his appointment or election, an assessor shall remove from the ward, district, city, village or township for which he was appointed or elected, the office

shall be deemed vacant. Should there be at any time a vacancy in such office for any of the causes aforesaid, or from any other cause, the county auditor shall fill such vacancy by appointing any competent and suitable elector of such ward, district, city, village or township, who will accept and perform the duties of such office."

It appears from your inquiry that the provisions of the foregoing section have not been complied with by quite a number of assessors in your county, who have filed their bonds since the expiration of thirty days from the date of their election. You inquire if the auditor may refuse to accept these bonds and declare their offices vacant, or if he may treat the bonds as having been filed prior to December 2, 1915, which date was the expiration of the thirty-day limit. The provisions of the section quoted must be considered in connection with section 7 of the General Code, which section also has a direct application to the question here submitted. Said section 7, aforesaid, provides as follows:

"A person elected or appointed to an office, who is required by law to give a bond or security previous to the performance of the duties imposed on him by his offce, or who refuses or neglects to give such bond or furnish such security within the time and in the manner prescribed by law, and in all respects to qualify himself for the performance of such duties, shall be deemed to have refused to accept the office to which he was elected or appointed and such office shall be considered vacant and be filled as provided by law."

When the two sections are considered together, it would seem clear that their provisions must be held to be mandatory and that upon the failure of the officers named in your inquiry to qualify within the time prescribed by section 3353-1, aforesaid, their offices shall be deemed vacant and by the further provisions of section 7, aforesaid, they shall be deemed to have refused to accept said offices.

This conclusion is fully supported by the case of Davies, Auditor, v. State, 11 C. C. (n. s.), 209. In this case one Scherer was duly elected assessor of a taxing district in a municipality on the 5th day of November, 1907, and did not file his bond until the 19th day of said month. At that time section 1518, Revised Statutes, was in force and provided that if a person so elected failed to give bond and take the oath of office for one week after his election, said office should be considered vacant. Under this section of the Revised Statutes and section 7 of the General Code, aforesaid, being then section 19 of the Revised Statutes, the court in said case said:

"Taking the two sections together there seems to be no escape from the conclusion that the failure to file his bond and take the oath of office within the time and in the manner provided by law raises the presumption that he has declined the office and also that it has become vacant."

However, in this case while the fact does not appear in the opinion, the plaintiff Davies as auditor had filled the vacancy thus occasioned by Scherer's failure to qualify prior to the time the latter attempted to file his bond. This being so the provisions of the law were fully complied with by the auditor and when said appointment was made to fill the vacancy the matter was closed and no one had any further authority or power in reference thereto.

In the cases submitted by you a different situation is presented. It seems that the auditor has not as yet exercised his authority to fill the vacancies created by the

failure of said assessors to qualify within the prescribed time. It follows that while as to them the law may be said to be fully executed and they are barred of all legal rights to the office, yet I am not prepared to say that its provisions conferring the authority upon the auditor to fill said vacancies go to the extent of automatically precluding or prohibiting said auditor from accepting the bonds in question. That is to say, until said vacancies are filled by appointment, as in the case quoted, the auditor may accept said bonds and permit the officers in question to qualify if he elects so to do.

I, therefore, conclude, under the facts stated in your inquiry, that said auditor may accept the bonds of the assessors in question and permit them to qualify.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1103.

COUNTY COMMISSIONERS — PROSECUTING ATTORNEY — WITHOUT AUTHORITY TO REMIT TAXES ON REAL ESTATE BECAUSE IT IS ASSESSED AT AN EXCESSIVE VALUE.

The board of county commissioners and the prosecuting attorney of any county are without authority to remit or release any taxes charged upon the tax duplicate of said county against real estate therein upon the ground and for the reason that said real estate is assessed for taxation at an excessive value.

COLUMBUS, OHIO, December 16, 1915.

HON. HENRY W. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I have your letter of December 10, 1915, as follows:

> "For the past three or four years, the Indian Guyan Coal Company, which owns some little surface, and about three thousand acres of minerals in Gallia county, has failed to pay its taxes. The minerals were assessed at $10 an acre, three or four times their real value.
>
> "The company has now gone into the hands of a receiver, and owes this county in taxes and penalties, about a thousand dollars.
>
> "The attorney for the company has requested me to O. K. an order of the court of common pleas of Lucas county, ordering the payment to Gallia county of taxes at the rate of $4.00 an acre on this land, including penalties.
>
> "I believe that this would be a fairly equitable settlement of the controversy. The county commissioners were prepared last year to make a compromise, but I concluded that they had no authority to do so, and so advised them.
>
> "As this matter is being held up pending a settlement, I will take it as a favor if you will advise me promptly as to my duties in the matter."

Your board of county commissioners are without any authority to release or remit under any compromise or adjustment any of the taxes in question. In the case of Peter v. Parkinson, Treasurer, 83 O. S., 36, the authority of the commissioners in this regard is discussed by the court and disposed of in the following language:

"Some reliance seems to be placed by counsel for plaintiff in error upon section 1038, Revised Statutes, which authorizes the correction of errors on tax list and duplicate by the county auditor, and empowers the board of county commissioners, under certain circumstances, to order refunded taxes that have been erroneously charged and collected. But neither by this statute nor by any other, is the board of county commissioners empowered to settle, remit, or release, either in whole, or in part, taxes that stand charged upon the duplicate and are unpaid. While in a sense the board of commissioners is the representative and financial agent of the county, its authority is limited to the exercise of such powers only as are conferred upon it by law. * * *

"Another, and perhaps sufficient reason why the county commissioners could not rightfully settle or remit the taxes sued for in this case is that such taxes were not wholly due to, nor were they wholly levied for, the use of Holmes county, but there was included therein as well, state, township, municipal and other taxes."

While the foregoing decision was rendered on the 25th day of October, 1910, there has been no legislation since that date which can in any way change the authority of the commissioners in this regard. It follows, therefore, that what they cannot do themselves you, as their attorney, may not do for them nor have you, as prosecuting attorney, any independent statutory authority to adjust this matter.

You state, however, that you are requested to approve an order of the court of common pleas of Lucas county directing payment to Gallia county of the taxes in question at the rate of four dollars per acre on said land, including penalties, and you now inquire as to your duties in reference thereto. I am wholly unable to understand in what way or by what means the common pleas court of Lucas county obtained jurisdiction in this matter. I conclude, therefore, that the order in question is to be made by consent and that you are requested merely to consent or agree to said order. This being so I must advise you that you are without any authority so to do.

I, therefore, hold that your board of county commissioners and you, as their representative, may not in any manner or by any method compromise, remit or release any of said taxes.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1104.

BOARD OF EDUCATION OF RURAL SCHOOL DISTRICT—WHEN IT IS DUTY TO PROVIDE TRANSPORTATION FOR PUPILS WHO LIVE MORE THAN TWO MILES FROM SCHOOL—SECTIONS 7731 AND 7646, G. C., CONSTRUED.

The provision of the first part of section 7731, G. C., as amended in 104 O. L., 140, taken in connection with the provisions of section 7646, G. C., as amended in 104 O. L., 228, makes it the duty of the board of education of a rural school district to provide transportation for those pupils residing in that part of said rural district formerly known as a subdistrict of said rural school district, and living more than two miles from the school maintained by said board of education in said part of said rural school district.

COLUMBUS, OHIO, December 16, 1915.

HON. E. A. SCOTT, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—In your letter of November 20th, you state that in one of the rural school districts of your county the nearest school to the residence of certain children is more than two miles from said residence and that said children have been attending said school. You further state that the part of said rural school district in which said school is located and in which said children reside was formerly known as subdistrict No. _____.

You inquire whether section 7731, G. C., as amended in 104 O. L., 133, requires the board of education of said rural school district to provide transportation for said children.

While section 4716, G. C., which provided that:

> "The division of township school districts into subdistricts as they exist shall continue and be recognized for the purpose of school attendance, but the board of education may increase or diminish the number or change the boundaries of the subdistricts at any regular meeting,"

was repealed by the act of the general assembly as found in 104 O. L., 133, and the provisions of said section were not re-enacted, section 7646, G. C., as amended in 104 O. L., 228, is still in force and provides that:

> "The board of education of each rural school district shall establish and maintain at least one elementary school in each subdistrict under its control, unless transportation is furnished to the pupils thereof as provided by law."

Section 7731, G. C., as amended in 104 O. L., 140, provides in part as follows:

> "In all rural and village school districts where pupils live more than two miles from the nearest school the board of education shall provide transportation for such pupils to and from such school. The transportation for pupils living less than two miles from the school house by the most direct public highway shall be optional with the board of education."

I have already held in opinion No. 875 of this department rendered to Hon. Joseph W. Horner, prosecuting attorney of Licking county, under date of September 30, 1915, that as to those pupils in a rural or village school district living more than two miles from the nearest school in said rural or village district, the above pro-

vision of section 7731, G. C., makes it the duty of the board of education of such school district to provide transportation for such pupils and if said board of education neglects or refuses to provide such transportation it becomes the duty of the board of education of the county school district, under provision of the latter part of said statute, to provide transportation for said pupils and charge the cost thereof to said local school district.

In keeping with my former holding I am, therefore, of the opinion in answer to your question that the above provision of section 7731, G. C., as amended, taken in connection with the provision of section 7646, G. C., as above quoted, makes it the duty of the board of education of the rural school district referred to in your inquiry to provide transportation for those pupils residing in that part of said rural school district formerly known as subdistrict No. ---------- and living more than two miles from the school maintained by said board of education in said part of said rural school district.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1105.

CASS HIGHWAY LAW—COUNTY HIGHWAY SUPERINTENDENT MUST PUBLISH TRAFFIC RULES AND REGULATIONS PRESCRIBED BY STATE COMMISSIONER.

Section 7478, G. C., makes it mandatory upon the county highway superintendent to cause to be published the traffic rules and regulations prescribed by the state highway commissioner.

COLUMBUS, OHIO, December 16, 1915.

HON. HENRY W. CHERRINGTON, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—I have your communication of December 13, 1915, which communication reads as follows:

> "Does section 7478 of the General Code, as amended 106 Ohio Laws, 651, make it mandatory upon the county highway superintendent to publish the rules and regulations promulgated by the state highway commissioner, as provided for in said section?"

Section 7478, G. C., being section 251 of the Cass highway law, 106 O. L., 574, 651, reads as follows:

> "The state highway commissioner shall furnish the county highway superintendent with a copy of the rules and regulations promulgated by said state highway commissioner, and applicable to his county. The county highway superintendent shall cause the rules and regulations so furnished to him by said highway commissioner to be published, at least once each week, for two successive weeks, in a newspaper published and of general circulation in said county, if there be any such paper published in said county, but if there be no newspaper published in said county then in a

newspaper having general circulation in said county. When such regulations are published in the manner aforesaid, it shall be deemed a sufficient publication under the provisions of this act."

The language of the above quoted section would seem to leave no doubt as to its mandatory character. It is true that under familiar rules of construction the word "shall" may sometimes be read "may," but no reason can be suggested why such meaning should be given the word in the sentence now under consideration. On the other hand, certain other provisions of the Cass highway law make it manifest that in adopting section 251 of the Cass highway law the legislature intended to cast upon the county highway superintendent a mandatory duty in reference to causing the traffic rules and regulations prepared by the state highway commissioner to be published.

Section 294 of the act in question, being section 13421-17, G. C., makes it a misdemeanor to enter upon or travel over any portion of the state highways in violation of the traffic rules and regulations duly prescribed by the state highway commissioner and under the provisions of section 249 of the act such rules and regulations do not become effective until thirty days after publication. Publication in each county of the state of such traffic rules and regulations, at least once each week for two consecutive weeks in a newspaper published and of general circulation therein, if such there be, is, therefore, a part of the promulgation of such rules and regulations.

I, therefore, conclude, in answer to your specific inquiry, that section 7478, G. C., makes it mandatory upon the county highway superintendent to cause to be published the rules and regulations prepared by the state highway commissioner, under authority of section 7246, G. C., and furnished to the county highway superintendent in compliance with the provisions of the first part of said section 7478, G. C.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1106.

CONSTRUCTION OF SECTION 3019, G. C., AS TO FEES AND COSTS MADE BY JUSTICE OF PEACE OR CONSTABLE IN EXECUTION OF SEARCH WARRANT IN FELONY CASE.

Fees and costs made by a justice of the peace or constable or both in the execution of a search warrant in a felony case can only be paid in case of conviction or under the provisions of section 3019, *G. C., when the state fails.*

COLUMBUS, OHIO, December 16, 1915.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—Permit me to reply to your request for an opinion on the question of the payment of certain fees and costs, which request is as follows:

"I would like an opinion on the following facts: An affidavit is filed before a justice of the peace charging the offense of burglary, and an affidavit is also filed before the same justice at the same time for a search warrant to search the premises of the party accused of burglary. The party

charged with the offense was not and has not been apprehended, but the property which had been stolen was found upon the premises of the accused by the officer in executing the search warrant.

"Can the county commissioners allow the regular fees to the justice and constable for issuing the search warrant and for the search and seizure of the goods stolen, when the offender has not been apprehended and probably never will be?"

Sections 3015, 3016, 3017 and 3019 of the General Code, are as follows:

"Sec. 3015. The county commissioners may allow and pay the necessary expense incurred by an officer in the pursuit of a person charged with felony, who has fled the country.

"Sec. 3016. In felonies, when the defendant is convicted the costs of the justice of the peace, police judge, or justice, mayor, marshal, chief of police, constable and witnesses, shall be paid from the county treasury and inserted in the judgment of conviction, so that such costs may be paid to the county from the state treasury. In all cases, when recognizances are taken, forfeited and collected and no conviction is had, such costs shall be paid from the county treasury.

"Sec. 3017. In no other case whatever shall any cost be paid from the state or county treasury to a justice of the peace, police judge or justice, mayor, marshal, chief of police, or constable.

"Sec. 3019. In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at any regular session, may make an allowance to any such officer in place of fees, but in any year the aggregate allowance to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

It will be noted from the sections quoted that the only provisions of law for the payment of fees and costs referred to in your letter are in the case of felonies where the defendant has been convicted, or in the case of a misdemeanor wherein the defendant proves insolvent, in addition to the provision for the payment of fees and costs in cases of felony where the state fails—such payment being authorized by the provisions of section 3019 of the General Code, supra.

In the case presented by you, while there is ample provision for the paying of fees and costs for the services incidental to the execution of the search warrant, the conditions precedent to the payment of fees and costs have not been made inasmuch as there has not been a conviction in a felony case, nor has the state failed. Hence, it is my opinion that there is no authority for the payment of the fees and costs in the case presented by you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1107.

HUMANE SOCIETY—COUNTY HAS NO AUTHORITY TO PAY AN ATTORNEY WHO CONDUCTS A PROSECUTION FOR DELINQUENCY IN JUVENILE COURT ON BEHALF OF SUCH SOCIETY.

There is no authority in law for the payment by the county of a bill rendered by the attorney for the humane society for conducting a prosecution for delinquency in a juvenile court.

COLUMBUS, OHIO, December 16, 1915.

HON. J. H. MUSSER, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your request for an opinion under date of December 11, 1915, which is as follows:

"Auglaize county has a humane society, with its principal officers located in St. Marys, Ohio. The humane society has an attorney who represents it if prosecution is brought.

"A short time ago a number of young girls were brought before our juvenile court, and charged with delinquency, and at the same time a number of men were brought before the court on a charge of contributing to the deliquency of the girls.

"The attorney, who represents the humane society in St. Marys, came into the juvenile court, and made the complaints, and looked after their prosecution.

"This attorney has now presented a bill to the probate court, who is our juvenile judge, for his approval, and the probate judge told the attorney to secure my approval before presenting the bill for payment.

"I refused to approve the bill, for the reason that I could not see that such prosecutions were among those described in section 13440 of the General Code.

"This attorney informed me that he had in the past prosecuted such cases as attorney for the humane society, and that his bill had been approved, allowed, and paid out of the county treasury, and that the county examiners had never as yet held the bill to be improper, and I then suggested to him that I would write you for your opinion in the matter. I wish that you would please advise me as to whether or not this is a proper bill to be paid by the county."

Section 13440 of the General Code is as follows:

"A humane society or its agent may employ an attorney to prosecute the following cases, under this section, who shall be paid for his services out of the county treasury in such sum as the judge of such county or the county commissioners thereof may approve as just and reasonable:

"1. Violations of law relating to the prevention of cruelty to animals or children;

"2. Violations of law relating to the abandonment, non-support or ill-treatment of a child by its parent;

"3. Violations of law relating to the employment of a child under fourteen years of age in public exhibitions or vocations injurious to health, life or morals or which cause or permit such child to suffer unnecessary physical or mental pain;

"4. Violations of law relating to neglect or refusal of adult to support destitute parent."

From a reading of the section referred to it will be noted that the prosecutions mentioned in your letter were not such as are contemplated under the provisions of section 13440 of the General Code, supra.

Section 1664 of the General Code, which is a part of the juvenile court law, is as follows:

"On the request of the judge exercising such jurisdiction, the prosecuting attorney of the county shall prosecute all persons charged with violating any of the provisions of this chapter."

There is no authority for the employment of a prosecutor in juvenile court cases save and except under the provisions of section 1664 of the General Code, supra, which makes it the duty of the prosecuting attorney, when called upon by the juvenile court judge, to prosecute cases pending in the juvenile court.

In the case of State ex rel. v. Commissioners, 8 O. N. P. n. s., 281, it was held:

"In the absence of statutory provision for the employment of persons to perform the duties of public officers, no person other than a public officer can legally be employed and paid from the public treasury, or perform the duties of a legal officer unless such officer refuses to act or has become adversely interested. The county commissioners have no power to employ special counsel to represent that board in specific litigation even though such appointment might be in accordance with the interests of the county."

There is nothing in the request submitted by you to indicate that the prosecuting attorney of Auglaize county refused to act or was adversely interested in the prosecution referred to; and there being no statutory authority for the employment of an officer of the humane society to conduct prosecutions in the juvenile court, such as referred to in your letter, it is my opinion that the bill for the services for such prosecution presented by him should not be allowed nor paid.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1108.

STATE AND COUNTY LIQUOR LICENSING BOARDS— CANNOT PAY SERVICES OF LEGAL COUNSEL—ATTORNEY GENERAL.

Neither the state nor the county liquor licensing board is authorized to pay for the services of legal counsel rendered for complainants or either of such boards in hearings in matters of rejection of applications for saloon licenses before the county board or upon appeal thereof before the state board.

COLUMBUS, OHIO, December 16, 1915.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I acknowledge receipt of yours under date of December 14, 1915, with which you enclose a letter addressed to you by the Franklin county liquor

licensing board and duplicate statement of claim made against the Franklin county board for legal services, stated in the letter to you to have been rendered to the complainants at a hearing before the Franklin county board in the matter of the rejection of the application of George J. Wahlemaier, for renewal of a saloon license. The statement, however, purports to make claim also for services in the same matter before the state liquor licensing board. This statement and letter of the Franklin county board, you state, are referred to me in the hope that I may be able to find some way to pay for the services mentioned.

Our authority is limited to that which we find to have been conferred by the legislative branch of the state government. In this view I call your attention to section 1261-55, G. C., 103 O. L., 233, which provides that in cases of appeal before the state board, such as that to which reference is made, the prosecuting attorney shall, upon request of the county board, represent the state at the hearing thereof.

In reference to the services rendered for complainants in this matter before the county board, it is sufficient to say that payment therefor is nowhere authorized by the statutes of this state.

Your attention is further called to the provisions of section 333 of the General Code, which are in part as follows:

> "The attorney general shall be the chief law officer for the state and all its departments. No state officer, board or the head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys-at-law. * * *"

The statutory provisions above referred to not only provide ample counsel in the matters referred to, but clearly preclude the employment of other counsel than that which is therein provided in any event, by either the county or state boards, and the payment for services rendered complainants in hearings before county boards by either the state or county board is, in my opinion, unauthorized by law.

No request was made of this department for counsel in this case, although we are constantly looking after the work of your department.

I am, therefore, unable to approve the payment of the enclosed bill.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1109.

OHIO UNIVERSITY—CONTRACT FOR CONSTRUCTION AND COMPLETION OF A WOMEN'S DORMITORY FOR SAID UNIVERSITY, APPROVED.

COLUMBUS, OHIO, December 17, 1915.

HON. ALSTON ELLIS, *President Ohio University, Athens, Ohio.*

DEAR SIR:—A few days ago Hon. Frank L. Packard, architect for the board of trustees of Ohio unversity, submitted for my approval a contract entered into on the thirtieth day of October, 1915, between the Cullen & Vaughn Company, of Hamilton, Ohio, and the board of trustees of Ohio university, for the construction and completion of a women's dormitory for said university.

I have carefully examined the advertisement for bids and find that the same was made for the requisite time. It appears, however, that the same was inserted

five times in the various newspapers, whereas four times would have been sufficient. However, if inserted four times a period of at least eight days must elapse after the fourth and last publication before the day fixed for opening the bids.

It appears from the transcript of the minutes of the meeting held by the board of trustees of Ohio university on October 30, 1915, that the Cullen & Vaughn Company, of Hamilton, Ohio, is the lowest bidder, the general bid being in the sum of $95,177, and the five alternates, to wit, alternates B, C, E, G and H, exercised by the board amounted to $2,619, or a total of $97,796. The amount of the architect's estimate for the building is $113,333.30. Therefore, the bid as accepted is below the architect's estimate by about $15,000.

In an examination of the specifications submitted at the time the plans were submitted it appears that there was no architect's estimate on the alternates. The same should have been estimated, either as an addition or deduction, at that time; but as the bid after the exercise of the alternates mentioned—all of which increased the cost of the building—was below the estimate, I make no objection to the fact that the alternates were not estimated in this instance.

The amount specified in the contract to be paid is $97,796, and is to be paid from the appropriation made in house bill No. 701, passed May 27, 1915, $15,000 of which was appropriated in section 2 thereof and $105,000 appropriated in section 3 thereof. The contract is, therefore, well within the amount appropriated. The bond is in proper form, and both are hereby approved.

On an examination of the appropriations made to the Ohio university for the purpose of the women's dormitory, I find that in section 2 of house hill No. 701 the following appropriation is made:

"G 2. Women's dormitory to cost complete with equipment $120,000.00 ---------- $15,000 00"
(106 O. L., 745.)

and in section 3 thereof the following appropriation:

"To complete and equip women's dormitory---------- $105,000 00"
(106 O. L., 820.)

On an examination of the estimate made by the architect I note that but $910.00 was provided for the furnishing of said dormitory. Had the contract price been the amount of the architect's estimate of $113,333.30 and the architect's commission and advertising cost been as estimated, there would have been but $910.00 for furnishing or, in other words, equipping said women's dormitory. I am at a loss to understand how the sum of but $910.00 would be sufficient to complete the equipment of the women's dormitory in accordance with the intention of the legislature clearly expressed in the appropriation bill. The mere fact that the contract is for $15,000 less than the estimate does not, in my mind, justify the fact that the architect in his estimate estimated but $910.00 for the furnishing and equipment.

I have this day filed the contract and bond in the office of the auditor of state and have handed the rest of the papers to your architect, Mr. Packard.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1110.

STATE HIGHWAY COMMISSIONER—CONTRACT OF THE SWINT BROTHERS STONE COMPANY FOR ROAD IMPROVEMENT IN SANDUSKY COUNTY—AMOUNT OF PAYMENTS ON CONTRACT.

Under the facts as submitted by the state highway commissioner, the Swint Bros. Stone Company is entitled to receive $2,250.00 *for the work covered by the original plans and specifications for contract No. 742, relating to the Fremont-Perrysburg Road, I. C. H. No. 275, in Sandusky county. The company is entitled to receive* $2,816.69 *for the work covered by the original plans and specifications for contract No. 741, relating to the same road. Under both contracts the company is entitled to receive its unit bid prices of three and four-fifths cents per square yard for extra scarifying, etc., and one dollar and fifty cents per ton for extra limestone screenings, in so far as such extras were rendered necessary by changes in the plans and specifications.*

COLUMBUS, OHIO, December 17, 1915.

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

DEAR SIR:—I acknowledge the receipt of your communication of December 4, 1915, which communication reads as follows:

"I quote for your information letter under date of November 30th, from Swint Bros., contractors, of Fremont, relative to two contracts with this department:

" 'Hon. Clinton Cowen, State Highway Commissioner, Columbus, Ohio.

" 'My Dear Sir:—On August 7, 1915, we attended a letting at the Sandusky county court house, securing contract No. 742, known as I. C. H. No. 275 in Washington township, called the Fremont-Perrysburg road.

" 'Relative to the above contract, we wish to call your attention to our bid on this job, and which was made out as follows:

" 'Approx. Quantities.	Unit Bid Price.	Total Amt. Column
27,290 sq. yds.	3 4-5c	$1,100.00
1,000 tons stone.	$1.50	1,150.00

" 'You will notice that our unit bid price of 3 4-5c for the 27,290 square yards of reshaping and scarifying should make a total of $933.32, and instead of inserting that amount under the total amount bid, we inserted $1,100, which is an error on our part and in our favor. You will also find that our unit bid price for the 1,000 tons of stone was $1.50, which should make a total of $1,500 under the total amount bid column, and instead we inserted $1,150 in the column of total amount bid, therefore, you can plainly see that these errors are in our favor and also in your favor. The reason this occurred is that when we attended this letting we only had our figures in the unit bid price column, and only having a minute or two we inserted the total amount figures in the total amount column roughly and quickly so as to be able to hand our bid in for letting. We also wish to say that our time was so short that the district engineer and commissioner clerk granted us permission to have the bonds signed after the letting if we were awarded this contract, and which we secured, therefore, you will see that these figures in the total amount column were entered roughly by making errors in favor of us both.

" 'We have not as yet received full settlement from the state and county for the above contract, but up to date we have received one estimate, and

in looking same over carefully together with our contract unit price, we note that you have allowed us 4c per square yard for reshaping and scarifying, and for stone you allowed us $1.15 per ton. You should have allowed us only according to our bid, 3 4-5c for reshaping and scarifying, and $1.50 per ton for stone, and according to your estimate you are paying us too much for reshaping and scarifying, and not enough for the stone, as it should be $1.50 per ton, and we wish you would please advise us if we are to receive settlement according to our unit price bid or not; however, we should. This price is what we intended receiving and not the total amount bid in the total amount column on account of the true facts explained to you in this letter.

" 'According to the quantities in this contract, as per your estimate, we are to receive in full $2,433.32, without figuring any of our extras, and if you should settle for our bid in the amount column we would only receive $2,250, and which would make a difference due us of $183.32, and which we believe we are entitled to, and which should be corrected on the contract and also adjusted on the final estimate which no doubt is in your hands at this time for payment. We also note on the contract (printed) that the yardage, etc., is governed according to unit bid prices only, and we sincerely hope and trust that you will give this matter your careful attention and allow us for this job according to our figures in the unit bid price column only, as we are frank to say that this is what we bid the work for, and as we have already had a considerable loss on this work we trust that you will fix this up all satisfactory when settling the final estimate, and which no doubt is in your hands by this time from the Sandusky county engineer.

" 'Thanking you very kindly for giving this your prompt and careful attention, and hoping to have an early and favorable reply, we are,

" 'Yours very truly,

" '(Signed) SWINT BROS.,

" 'SW-E. By S. A. Swint.

" 'P. S.—On August 6th we also secured contract No. 741, known as I. C. H. No. 275 in Washington township, Sandusky county, called the Fremont-Perrysburg road, for which we have settlement in full to date. However, according to our unit bid price, which was 3 4-5c for reshaping and scarifying, we should have received $1,289.15, and only received from your department as final settlement $1,166.69, at a price of 3 6-10c per square yard, which leaves a balance due us of $122.46 on this contract. We also wish you would please give this your careful attention and include same in final settlement when settling for the other contract above mentioned.'

"We are attaching hereto copies of proposals signed by the Swint Bros. Stone Co. in connection with each contract.

"The letter quoted above does not state all their troubles in connection with these contracts. A considerable amount of extra work has been performed by these contractors for which estimates have been allowed them at a unit price arrived at by ignoring the unit price as set out in the proposal and dividing the total amount bid by the quantities.

"I respectfully request an opinion from your office as to the proper method of making payments both on the original contracts and for the extra work."

The form of proposal used by the contractor in both instances referred to by it is identical. The proposal which resulted in the award to the Swint Bros. Stone Co. of the contract known as contract No. 741, was headed as follows:

"PROPOSAL

For improving the section of intercounty highway No. 275 (the Fremont-Perrysburg road) in Washington township, Sandusky county, beginning at the west line of Washington township, and extending in a southeasterly direction to the Gibsonburg road, near the east line of section 9 a distance of 3.40 miles; by scarifying, reshaping the crown, thoroughly harrowing, filling depressions with No. 2 crushed limestone where ordered, rolling, applying screenings and water required to build a waterbound surface according to item A-3, including the cutting off of the shoulders where necessary."

The first part of the proposal was worded as follows:

"To the State Highway Commissioner.

"The undersigned, having full knowledge of the site, plans and attached specifications for the above improvement, hereby agrees to furnish all services, labor, materials and equipment required to complete the same by September 15, 1915, according to the plans and specifications and to accept in full compensation therefor the sum of twenty-two and fifty 00/100 ($2,-250.00).

"The undersigned further agrees to accept the following 'unit bid prices' in compensation for any small additions or deductions caused by any changes or alterations in the plans or specifications of the work.

"(The bidder is required to fill in under 'unit bid price,' a unit price for additions and deductions opposite each item for which there is a quantity given in the 'approximate estimate.' The gross sum of the totals in the 'total' columns shall equal the sum (given above) bid for the work.)"

Following the portion of the proposal quoted above was a table, in which table appeared a number of printed columns showing the approximate quantities, units of measurements, items and approxicate estimates, the latter being subdivided under the heads of "estimated unit cost" and "totals."

From the printed table referred to above it appears that in the matter now under consideration the work to be done was estimated at 27,290 square yards of scarifying, etc., at a unit cost of four cents per square yard, or a total of $1,116.80, and 1,000 tons of limestone screenings at a unit cost of one dollar and fifty cents per ton, or a total of $1,500.00. The table referred to above also contains a column for the itemized proposal, subdivided under the heads of "unit bid price" and "total amount bid." The contractor in the case now under consideration inserted in the column for "unit bid price" a bid of three and four-fifths cents per square yard for scarifying, etc., and a bid of one dollar and fifty cents per ton for limestone screenings. In the column provided for "total amount bid" the contractor inserted the sum of $1,100.00 for scarifying, etc., and the sum of $1,150.00 for limestone screenings, and the amount of $2,250.00 for gross sum bid.

The proposal was then concluded with the following language:

"On acceptance of this proposal for said work we do hereby bind ourselves to enter into written contract with the state highway commissioner within ten days from date of notice of award, and to give the required bond and surety to perform said work for the consideration above named."

As previously indicated, the same form of proposal was used as to contract No. 741. As to the proposal which resulted in an award of that contract to the Swint

Bros. Stone Co., it should be observed that the table embodied in said proposal contained an estimate of 32,229 square yards of scarifying, etc., at a unit cost of four cents per square yard, or a total of $1,289.16, and 1,100 tons of limestone screenings at a unit cost of one dollar and fifty cents per ton, or a total of $1,650.00. In filling out the itemized proposal contained in said table the contractor inserted in the column provided for "unit bid price" a bid of three and four-fifths cents per square yard for scarifying, etc., and a bid of one dollar and fifty cents per ton for limestone screenings. In the column provided for "total amount bid" the contractor inserted the amount of $1,166.69 for scarifying, etc., and $1,650.00 for limestone screenings, or a gross bid of $2,816.69.

The bids of the Swint Bros. Stone Co. being the low bids as to these two improvements, this company was awarded the contracts and agreements were duly signed. So much of contract No. 742 as is material to the present inquiry reads as follows:

> "For and in consideration of payments hereinafter mentioned, to be made by the party of the first part, party of the second part agrees to furnish all materials, appliances, tools and labor, and perform all the work required for the improvement of a certain portion of the public highway known as section (——) of Fremont-Perrysburg road, I. C. H. No. 275, Washington township, Sandusky county, petition No. ——, state of Ohio, according to the plans and specifications and to the satisfaction and acceptance of the party of the first part.
>
> "The party of the second part further covenants and agrees that the following papers shall be bound with, and be an essential part of this contract: Notice to contractors, instructions to bidders, specifications, proposal for the work and bond for the performance of the contract.
>
> "In consideration of the foregoing premises the party of the first part agrees to pay to the party of the second part the sum of twenty-two hundred and fifty dollars ($2,250.00)."

In drawing contract No. 741 the same blank form was used as in the preparation of contract No. 742.

Referring now to contract No. 742 and the proposal for the same, it should first be observed that in the proposal form with which bidders were supplied there appeared an error in the computations made thereon. The quantity of scarifying, etc., was estimated at 27,290 square yards and the estimated unit cost thereof at four cents per square yard. By multiplying the estimated quantity by the estimated cost per unit, it is determined that the total estimated cost of the scarifying, etc., was $1,091.60. This amount should have been printed in the sub-column of the approximate estimate devoted to "totals," but instead of inserting this sum the sum actually inserted was $1,116.80.

When the contractor came to bid upon the scarifying, etc., it inserted in the "unit price" column the sum of three and four-fifths cents. By multiplying the approximate quantity of scarifying, etc., to wit, 27,290 square yards, by the unit price bid by the contractor the result is found to be $1,037.02, instead of $933.32, as stated by the contractor in its letter to you. Despite the fact that the approximate quantity of scarifying, etc., multiplied by the unit bid price amounts to only $1,037.02, the contractor inserted in the column provided for "total amount bid" the sum of $1,100.00. As to the item of limestone screenings, the approximate quantity was 1,000 tons, and the contractor inserted in the column provided for "unit bid price" the sum of one dollar and fifty cents, but despite this fact it inserted in the column devoted to "total amount bid" the sum of $1,150.00. As to the proposal which re-

sulted in the award of contract No. 741 to this contractor the approximate quantity of scarifying, etc., was 32,229 square yards, and the unit bid price was three and four-fifths cents per square yard. By multiplying the quantity by the unit bid price the result obtained is $1,224.70, instead of $1,289.15, as stated by the contractor in its letter. The contractor in filling out the proposal inserted in the column provided for "total amount bid" a bid of $1,166.69 for scarifying, etc.

Both of these contracts have been completed and in both cases the plans and specifications for the work were changed after the contracts were entered into and these changes have resulted in the performance of a certain amount of extra work on the part of the contractor.

As indicated by your communication, two questions present themselves for consideration:

> "1. To what compensation is the contractor entitled for work covered by the original contract?
>
> "2. To what compensation is the contractor entitled for extra work rendered necessary by changes in the plans and specifications?"

It should first be observed that, while under ordinary conditions and circumstances a contractor would insert in the column devoted to "unit bid price" the same unit price used by him in computing the total amount bid by him, yet there is no positive requirement on the face of the proposal to the effect that the unit price bid by the contractor for additions or deductions must be the same unit price used by him in computing the total amount bid by him for any class of work.

Considering the proposals and the contracts together there is but one conclusion that can be reached as to their legal effect in case no changes should be made in the plans and specifications and the quantity of work thereby changed. The contracts were for the performance of certain work according to the plans and specifications and upon the completion of that work, in case no changes were ordered, the contractor was entitled to receive the lump sum set forth in the contracts, and that without regard to whether the actual quantities should prove greater or less than the estimates. In other words, the contracts, in so far as they contemplate the completion of the proposed work without changes or alterations in the plans, were contracts upon a lump sum basis and the unit bid price therein could have no possible effect or operation unless changes were made in the plans and specifications, which changes might increase or diminish the quantity of work required of the contractor. This being true, it is my opinion and I advise you that in settling with the contractor he is entitled to receive for the work covered by the original plans and specifications for contract No. 742 the sum of $2,250.00, and for contract No. 741 the sum of $2,816.69.

In so far as extra scarifying, etc., rendered necessary by any changes or alterations in the plans or specifications is concerned, the contractor is entitled to receive for such extra work its unit bid price of three and four-fifths cents per square yard, and in so far as extra limestone screenings rendered necessary by any change or alterations in the plans or specifications are concerned, the contractor is entitled to receive for such extra screenings its unit bid price of one dollar and fifty cents per ton. This last observation as to the prices to be allowed for extra work rendered necessary by changes in the plans and specifications applies alike to both contracts, since the unit bid prices in both cases are the same.

It may well be that the contractor in these particular instances made an error in that its intention was to bid $1,037.02 for the scarifying, etc., and $1,500.00 for the limestone screenings required under contract No. 742, and that it intended to bid $1,224.70 for the scarifying, etc., as to contract No. 741, but it cannot be heard

to say at this date that it did not mean to bid the sum set forth in its proposals and in the written contracts duly executed by it. The contractor's remedy would seem to be to give more time to its mathematical calculations, for even in the communication which it has addressed to you it has made two errors in computing the amounts which it claims were intended to be inserted in its original proposals.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1111.

TAXES AND TAXATION—FOREIGN MANUFACTURING CORPORATION —RULE FOR DETERMINING RELATIVE VOLUME OF BUSINESS OF SUCH CORPORATION WHEN IT OPERATES FACTORIES IN OHIO AND ALSO SELLS PRODUCTS OF OUTSIDE FACTORIES IN OHIO.

Rule for determining relative volume of business of foreign manufacturing corporation when it operates factories in Ohio and also sells product of outside factories in Ohio.

COLUMBUS, OHIO, December 18, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have referred to me the facts respecting the business of the Carnegie Steel Company, the American Sheet & Tin Plate Company, the American Steel & Wire Company, the American Bridge Company, International Harvester Company of New Jersey and the International Harvester Corporation, foreign corporations doing business in Ohio, with the request that I advise you, in as much detail as the nature of the case warrants, as to the proper method of computing the proportion of the total authorized capital stock of these several companies represented by their property and business in Ohio, for the purpose of assessing the annual franchise tax.

A general statement of facts will suffice to cover all of the specific cases submitted. In each case the company has one or more manufacturing plants in Ohio, and, consequenly, exercises the function of production within the borders of this state. Each company also has one or more manufacturing plants which are located outside of the state of Ohio. Each company sells the products both of Ohio factories and other factories to Ohio buyers. In some cases these sales are made by the negotiations of a business agency located outside of the state of Ohio, in such way as to call for delivery directly from the factory to the buyer. For the purposes of this opinion, such sales will be characterized as "factory sales." Some of the companies at least also maintain in the state of Ohio branch houses or warehouses, from which deliveries are made; and stocks in such warehouses are made up indiscriminately of the products of Ohio factories and other factories. Such sales will, for the purposes of this opinion, be called "branch house sales."

The production activities of the several companies, of course, vary according to the nature of their respective businesses. All of them, however, are as a matter of course engaged in transforming what is, for their purposes, raw material into what is, for their purposes, a finished product, though the raw material worked upon by them may be the finished product of another kind of manufacturing business, and though their finished products may constitute the raw material of still another kind of manufacturing business.

The discussion of the principles involved in and the rules to be evolved from facts of this character starts with the general conclusions expressed in my opinion to the commission respecting the franchise tax of Swift & Company, being opinion No. 246, rendered on April 13, 1915.

In that opinion I advised the commission that manufacturing is not commerce; and that when a corporation organized under the laws of another state carries on manufacturing operations within this state, it is, to the full extent of its character as a producer, "transacting business" within this state; and that as such it is, on that account alone, obliged to comply with the laws of this state and subject to an annual franchise tax therefor, it being necessarily assumed, of course, that it will have and employ a part or all of its capital or plant in this state. The conclusion was therefore reached that such manufacturing activities so carried on in this state constituted "business in this state" for the purpose of the section of the General Code which prescribes the rule for the apportionment of the franchise tax.

It was further pointed out that the thing aimed at by the statute, so far as business is concerned, is the relative volume thereof in this state as compared with the total volume of the business of the company.

The conclusion was reached that sales, though themselves partaking of the nature of commerce rather than of the nature of production, might be used to indicate the volume of manufacturing business; so that the sales of the product of an Ohio factory, for example, might be regarded as indicative of the volume of manufacturing business carried on at that factory; and the total sales of the company—that is, the sales of the products of all its factories—might be regarded as indicative of the volume of its manufacturing business everywhere. It was, however, conceded in the opinion that, scientifically, sales do not constitute an accurate criterion of the volume or extent of manufacturing; so that there could be no objection at least to the adoption of some other criterion which might more accurately represent or indicate the exact relative volume of manufacturing activities.

The opinion referred to went on to point out that while the production activities of a corporation of themselves constituted "business," yet every manufacturing corporation is under the necessity of disposing of its products, and in disposing of them must necessarily engage in commerce—that is, in sales and deliveries. So that, in perfect accuracy, the production activities of a manufacturing corporation constitute but one side of its whole business, its selling or commercial activities constituting another and equally important side. Therefore, when a foreign corporaion which has no factory in Ohio maintains a branch house in this state, where it keeps a stock of goods from which sales and deliveries are made, it is likewise "doing business" in Ohio, though it does not carry on within this state any of its production activities. Though the previous opinion is silent on this point, it follows that when a corporation which has a factory in Ohio sells some of the products of that factory directly to an Ohio consumer, it is likewise on that account alone "doing business" in Ohio.

All these things being true, for the reasons stated in the former opinion, the present problem is to work out a scientific, accurate rule of apportionment under the statute as applied to facts like those above set forth.

In the first place, it is to be remembered that under the recent decision of Judge Kinkead of the common pleas court of Franklin county, in State v. Cabin Creek Consolidated Coal Company, the assessment must in all cases be made by adding together the figures representing property and business in Ohio and dividing them by the figures representing property and business everywhere, which are to be added together in like manner; then multiplying the resultant fraction or percentage by the total authorized capital stock of the company, the result being a figure which constitutes the "proportion of the total authorized capital stock of the company rep-

resenting its property and business in Ohio," upon which the tax or fee at the rate of three-twentieths of one per cent. is to be computed.

On the basis of this decision we may, for convenience, consider the initial calculation as a fraction, in the numerator of which must appear all elements constituting Ohio business or property, and in the denominator of which must appear all elements indicating the total business or property of the same kind or character. For the purposes of this opinion, therefore, this calculation will be herein referred to as the basic fraction.

Now in the cases submitted the companies may be considered, I think, as engaged in at least two distinct kinds of business in Ohio, viz.: production and sales; and the business of sales may, for the purpose of perfect accuracy, be subdivided into that represented by direct factory sales and that represented by branch house sales.

In my opinion, there should be an element both in the numerator and in the denominator of the fraction representing each kind of business so above distinguished, in order to work out a scientifically satisfactory rule. Each of the companies should report to the commission its direct factory sales in Ohio—meaning thereby the sales of its Ohio factories directly to Ohio buyers, and this amount should be placed in the numerator of the basic fraction; the company should also report all of its direct factory sales, whether of the products of other factories to Ohio customers or of the products of such factories to buyers outside of Ohio, and including likewise the sales of the products of Ohio factories directly to buyers outside of Ohio, in addition to the Ohio direct factory sales as above described; that is to say, this figure should represent all the direct factory sales of the company, and it should be placed in the denominator of the basic fraction.

Each company should also report its total Ohio branch house sales, and this figure should be placed in the numerator of the fraction; in the denominator and corresponding therewith should be placed a figure to be reported by the company representing its total sales from branch houses; the sum of the two figures in the denominator should equal the total sales of the company for the year covered by the report.

So far the fraction contains figures on both sides thereof representing the commercial activities of the company in Ohio and everywhere, and disclosing with substantial accuracy, it seems to me, the extent to which the franchise to sell is exercised in Ohio as compared with the total exercise of that particular corporate franchise everywhere.

The function of production, not being thus far accounted for, is to be represented by a figure in the numerator of the fraction measuring the total volume of production of the Ohio factories, and a corresponding figure in the denominator representing the total volume of production of the company for the year.

In the previous opinion it was said that total sales might represent the thing to be measured, and might be used to define the proportion or relation in this respect; but in the other opinion the inference was plainly left that any other criterion of volume of production satisfactory to the commission and to the company might be selected instead of sales.

In the particular cases now under consideration I am informed, through correspondence and conference with Messrs. Squire, Sanders & Dempsey, counsel for the several companies, that another criterion of volume is preferred. It may be described in general as follows:

From the total selling price of the product the followning deductions are made:

1. The cost of the raw material;
2. The profits, including cost of delivering finished product.

It is obvious that the result of making these deductions is to leave a figure which represents the actual enhancement in the value of commodities produced by the manufacturing operations conducted at the particular factory, less profits. The profits and delivery costs are deducted because, in a most accurate sense, they are produced by the commercial activities of the company—by its sales, and not by its production. The cost of the raw material is eliminated because it is in no sense the product of the exercise of the corporate franchise. It is true that where the manufacturing company actually produces its own raw material in Ohio, the cost of producing the same should not be deducted. I am informed that this is not the case with respect to any of the companies under consideration. The most accurate way in which to put the point now under discussion is to say that there should be deducted from the value of the product manufactured in Ohio the cost of materials *purchased* anywhere and the value of materials produced by the company outside of Ohio.

If the figures arrived at by making the aforesaid deductions for each Ohio factory are added together and placed in the numerator, and if corresponding figures, the same deductions being made, are used to measure the volume of all manufacturing business wherever conducted and placed in the denominator, the basic fraction will be complete so far as business is concerned; then there should be, of course, added to the numerator the value of the capital or plant of the company in Ohio, and its total capital investment everywhere should be placed in the denominator; then all the figures in the numerator should be added together and likewise those in the denominator, the fraction ascertained and the process as outlined by Judge Kinkead carried out.

I am informed that the above mentioned companies are willing to file corrected reports under oath, setting forth their respective figures ascertained according to the above rule. I advise the commission that when such reports are filed they may lawfully and should, in the interest of approximate accuracy, be received by the commission and used in the manner above indicated to make the respective assessments which are involved.

For the sake of clearness I may express the process approved in this opinion as follows:

Numerator:

> Value of capital and plant in Ohio plus Ohio factory sales, plus Ohio branch house sales, plus factory value of goods manufactured in Ohio (meaning the selling price less delivery costs and profits, and including all goods produced within the year, whether sold or not), minus the cost of raw material entering into same (none being produced by the company in Ohio).

Denominator:

> The total value of the capital and plant of the company in the aggregate, plus all sales of the company, whether through branch houses or by direct factory delivery, plus the total production everywhere (meaning the factory value of all the annual product of the company, whether sold or unsold, during the year, minus the cost of raw material purchased).

I do not mean to be understood as holding that the above formula is strictly logical and closed to technical objections. On the contrary, there is a duplication of factors, in that the company's sales, both in Ohio and everywhere, and whether through branch houses or by direct factory deliveries, are measured by the total

selling price, which includes, of course, not only the production elements elsewhere entering into the numerator and the denominator of the fraction, but also the cost of raw materials.

To make the formula perfect this duplication should be avoided, and the elements in the numerator and in the denominator, respectively, so based as to measure with logical perfection the exact amount of "business done" represented by the discharge of the several functions. That is to say, each element might, and perhaps technically should, be based upon figures which will represent the exact enhancement of the values brought about by the exercise of the particular function which is being accounted for thereby; for "business" as used in the law may, and in entire accuracy should be, regarded as the creation of values.

Such a strictly scientific formula would be stated as follows:

Numerator:

Value of capital and plant in Ohio plus (the sales in Ohio of the product of Ohio factories, whether through branch houses or by direct delivery, minus cost of material purchased anywhere or value of material produced outside of Ohio), plus (sales from Ohio branch houses of the products of foreign factories, minus value of the product on arrival at branch houses), plus (factory value of annual product of Ohio factories, eliminating therefrom such product as has been sold in Ohio during the year and leaving therefore (the unsold Ohio product plus the Ohio product sold outside of Ohio) minus material entering into Ohio product so diminished, purchased anywhere or produced outside of Ohio).

Denominator:

Aggregate value of the capital and plant of the company everywhere, plus total sales everywhere, plus factory value of goods manufactured everywhere during the year but not sold, minus the cost of all material purchased.

While the formula last above set forth is strictly and technically correct, practical reasons have deterred me from advising the commission to adopt it in the present cases. It must be conceded that under section 5502, G. C., the commission has some discretion in adopting methods of arriving at and measuring the relative volume of business in Ohio. Therefore, if practical considerations should dictate the employment of a formula against which purely technical objections might be raised, I believe the commission would be justified in following the practical method.

I can see one practical objection to the formula last above stated: As it is stated, it is of universal application and should fit any manufacturing company. Should it be applied, however, to a manufacturing company having no factory in Ohio, but engaged in business extensively in Ohio through branch houses, the formula would require that the company's business in Ohio be measured solely by what might be roughly called the profits of the company from such Ohio business, and what is, with perfect accuracy, described as the difference between the value of the goods as delivered in Ohio at the branch houses and the price for which the same goods are sold in Ohio. If it should appear that through market conditions, or otherwise, goods produced outside of Ohio were sold through Ohio branch houses at less than the cost to manufacture them and deliver them to the Ohio branch houses, great difficulty would be presented in the practical application of the strict formula last above set forth. I do not think that the occurrence of such a condition—the occurrence of which is, of course, entirely possible and at times actually probable—would prove the mathematically exact formula wrong. In such case, how-

ever, it would be necessary to revalue the product, as such, from day to day during a year of fluctuating markets and to enter into a rather complicated calculation to determine just how much enhancement of value to the company had been produced by its selling agencies, as such, during that period.

It is not for me to say that the more accurate formula above expressed is entirely impracticable. The commission is the judge of that. But I have rejected it as impracticable in the instant cases and at the present time, for the reason that I know the commission has always measured the business done in Ohio by a company having no producing plant in this state by the gross sales thereof in Ohio as compared with gross sales everywhere. There are many such companies which have been assessed for franchise taxes for the current year and for past years on this basis. Uniformity of apportionment is to be sought, within the limits of the law, above all things else. Hence, it would be most improper, I think, to adopt the strictly logical and scientific formula last above set forth, if it is to be adopted at all, as to a few companies in a given year without applying it to all. To apply this formula to all companies would necessitate a reorganization of the commission's methods and a revision of the blank forms used by it. I am satisfied that in the particular cases under consideration the choice between the two methods above outlined does not make any very material difference in the amount of taxes paid by the companies. Therefore, it seems to me that even though the commission should find it practicable to adopt the more elaborate and technically correct formula which I have stated, the commission should not attempt to put it into effect except at the beginning of an annual assessment of the tax, so that all foreign corporations in the same category can be treated alike. Hence, I repeat my advice that the first of the two formulas above set forth be used in the cases of the above named companies for the current year.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1112.

COUNTY AUDITOR—ADDITIONAL ALLOWANCE FOR CLERK HIRE—COMMON PLEAS JUDGE, AUTHORITY DISCRETIONARY—MANDAMUS WILL NOT LIE TO COMPEL HIM TO MAKE ADDITIONAL ALLOWANCE.

The judge of the court of common pleas to whom an application is made by one of the county officials mentioned in section 2978, *G. C., for an additional allowance under authority of section* 2980-1, *G. C., as amended in* 106 *O. L.,* 14, *and for the purpose mentioned in said latter section, is vested with the discretion to determine in view of all the facts and circumstances of each particular case whether said additional amount applied for, or any part of said amount, shall be allowed.*

COLUMBUS, OHIO, December 20, 1915.

HON. A. C. MCDOUGAL, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—I have your letter under date of December 10th, which is in part as follows:

"The tax commission of Ohio, as I am informed, has communicated with our county auditor with reference to the employment of extra help

in his office made necessary by the repeal of the Warnes law which repeal as I understand it requires the work now being performed by the district assessor in each county to be performed by the county auditor on and after January 1, 1916, and without making any provision for the payment of any extra compensation to the auditor, deputy or clerk for the performance of such extra labor.

"I am informed that the tax commission of Ohio has cited the auditor of our county to section 2980-1, G. C., as amended, approved March 1, 1915, Vol. 105-6 O. L., pages 14, 15, as authority for obtaining such extra compensation.

"The county auditor and several of the county officials have been allowed by the county commissioners the limit or maximum prescribed by the above section of the General Code measured by the percentum limitations as provided therein. Said auditor and other county officials have filed their applications with the judge of the court of common pleas of this county asking for an additional allowance to carry on the business of their respective offices as provided in said section of the Code.

"The applications for extra allowances in this county have been approved by the county commissioners as provided by said section of the Code.

"The above cited section of the Code provides for a hearing upon said applications, and if upon hearing the same said judge shall find that such necessity exists, he may allow such sum of money as he deems necessary to pay the salary of such deputy, etc.

"The common pleas judge of this county frankly informs me that unless compelled to do so he will refuse to make extra allowances to said officials.

"Is the above provision of the Code prescribing the duties of said judge mandatory or discretionary? In other words, would mandamus lie to compel him to make such allowances? Or could he refuse to make the same in the exercise of his discretion?"

Section 2980, G. C., provides that:

"On the twentieth of each November such officer (the probate judge, auditor, treasurer, clerk of courts, sheriff or recorder of the county) shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, bookkeepers, clerks and other employes, except court constables, of their respective offices, showing in detail the requirements of their offices for the year beginning January 1st, next thereafter with the sworn statement of the amount expended by them for such assistants for the preceding year. Not later than five days after the filing of such statement, the county commissioners shall fix an aggregate sum to be expended for such period for the compensation of such deputies, assistants, bookkeepers, clerks or other employes of such officer, except court constables, which sum shall be reasonable and proper, and shall enter such finding upon their journal."

Section 2980-1, G. C., as amended in 106 O. L., 14, provides that:

"The aggregate sum so fixed by the county commissioners to be expended in any year for the compensation of such deputies, assistants, bookkeepers, clerks or other employes, except court constables, shall not exceed for any county auditor's office, county treasurer's office, probate judge's office, county recorder's office, sheriff's office, or office of the clerk of the

courts, an aggregate amount to be ascertained by computing thirty per cent. on the first two thousand dollars or fractional part thereof, forty per cent. on the next eight thousand dollars or fractional part thereof and eighty-five per cent. on all over ten thousand dollars, of the fees, costs, percentages, penalties, allowances and other perquisites collected for the use of the county in any such office for official services during the year ending September thirtieth next preceding the time of fixing such aggregate sum."

Said section further provides that:

"If at any time any one of such officers require additional allowance in order to carry on the business of his office, said officer may make application to a judge of the court of common pleas, of the county wherein such officer was elected; and thereupon such judge shall hear said application and if, upon hearing the same *said judge shall find that such necessity exists,* he may allow such a sum of money as he deems necessary to pay the salary of such deputy, deputies, assistants, bookkeepers, clerks or other employes as may be required, and thereupon the board of county commissioners shall transfer from the general county fund, to such officers' fee fund, such sum of money as may be necessary to pay said salary or salaries.

"Notice in writing of such application and the time fixed by such judge for the hearing thereof shall be served by the applicant, five days before said hearing upon the board of county commissioners of such county. And said board shall file in said proceeding their approval or disapproval of the allowance asked for and shall have the right to appear at such hearing and be heard thereon; and evidence may be offered."

It seems clear to my mind, that, in view of the provision of said statute that if upon hearing the application the judge shall find "that such necessity exists," he may allow such a sum of money "as he deems necessary" to pay the salary of such deputies, assistants, bookkeepers or other employes as may be required, the judge of the court of common pleas, to whom said application is made, is vested with the discretion to determine in view of all the facts and circumstances of each particular case whether the additional amount applied for, or any part of said amount, shall be allowed.

I am of the opinion, therefore, in answer to your question that an action in mandamus will not lie to compel the court of common pleas of your county to make the additional allowances for which applications have been made by the county officials referred to in your inquiry.

Prior to the enactment of the Warnes law all of this clerical work was done in the office of the county auditor. After the enactment of said law few, if any, auditors in the state reduced their force in the slightest, claiming that all of their force was required at certain times of the year and that as to the work taken away from them and given over to the Warnes law assessors, that had always been done between rush seasons by their regular force. Perhaps this is what was in the mind of your common pleas judge when he stated to you that no increase would be granted.

Ordinarily and without peculiar circumstances in a particular case I see no reason for increasing the clerical force in the auditor's office, especially when such force was not reduced at the time the said Warnes law became effective.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1113.

SUPERINTENDENT OF PUBLIC WORKS, NOT AUTHORIZED TO SELL ANY PART OF CANAL EMBANKMENT BY SECTION 13971 OF APPENDIX TO GENERAL CODE—MAY SELL UNDER AUTHORITY OF SECTION 412, G. C.—LIMITATIONS APPLICABLE TO SUCH SALE—THE B. F. GOODRICH COMPANY, AKRON, OHIO.

The superintendent of public works is not authorized by section 13971 *of the Appendix of the General Code to sell any part of a canal embankment. Should the superintendent of public works, acting under authority of section* 412, *G. C., narrow a canal embankment or eliminate an unnecessary basin, he may, under certain conditions, be authorized to sell a part of the land not occupied by the canal and its reconstructed embankments, but no sale should be made which would reduce the width of the state's property below its narrowest width at any adjacent point. The state's property should not be narrowed at any point so as to prevent an improvement of such width as might be made at other points along the same canal.*

COLUMBUS, OHIO, December 20, 1915.

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

DEAR SIR:—I have your communication of November 5, 1915, which reads as follows:

> "The B. F. Goodrich Co. has made application to the superintendent of public works for the purchase of the parcels of state land along the Ohio canal in the city of Akron, shown in yellow on the plat hereto attached marked 'Exhibit A' and made a part hereof.
>
> "This department favors selling these parcels of land if it can legally be done.
>
> "The company will construct a much needed perpendicular, concrete retaining wall about 1,650 feet long on the water line of the canal to maintain a tow path.
>
> "The sale of these parcels, according to the application of the company, would leave *ten feet of level surface for tow path,* forty feet, top and bottom of water, and nothing for *berme* bank.
>
> "The department is satisfied to retain only forty feet, top and bottom, of water, but is in doubt whether it can legally sell without retaining 15.68 feet, instead of ten feet, for tow path and twelve feet, instead of nothing, for berme bank.
>
> "The superintendent asks that the attorney general give his opinion as to whether a sale of Ohio canal lands reserving only ten feet for tow path and nothing for berme bank can legally be made.
>
> "The B. F. Goodrich Company will furnish a brief to the attorney general."

You transmitted to me, along with the above quoted communication, a plat showing the lands involved in your inquiry, a series of drawings showing cross sections of the Ohio canal under varying conditions and a copy of the rules and specifications relating to the construction of the Ohio canal and the estimating of work performed thereon. On the 10th of November I was in receipt of a brief from the B. F. Goodrich Company, which brief was accompanied by a number of

blue prints and photographs, and on the 19th day of November I received from you a pamphlet containing additional information bearing upon the question submitted by you.

I desire to first call your attention to the sections of the Appendix to the General Code of Ohio, relating to the leasing and selling of canal lands. So much of section 13965 of the Appendix to the General Code of Ohio as is pertinent to the present inquiry reads as follows:

> "That each and every tract of land, and any part of the berme bank of any canal, canal basin, reservoir and outer slope of the towing path embankment, * * * may be leased. * * *"

The pertinent provision of section 13971 of the Appendix to the General Code is as follows:

> "Any land or lands belonging to the state of Ohio, near or remote from the line of any canal in this state, that cannot be leased so as to yield six per cent. on the valuation thereof * * * may be sold. * * *"

A comparison of the provisions of the two sections referred to above shows that under the section relating to leasing, there are three classes of canal property that may be leased, to wit: (1) Canal land, (2) any part of the berme bank of any canal, canal basin or reservoir, and (3) the outer slope of the towing path embankment of a canal; while the section relating to sales contains no reference to berme banks or towing path embankments and only goes so far as to authorize the sale of any land or lands belonging to the state of Ohio and near or remote from the line of any canal.

From the language used in the two sections and from the fact that in the section relating to leases, berme banks and the outer slopes of towing path embankments are specifically referred to, while in the section relating to sales, no reference whatever is made to berme banks or towing path embankments, it clearly appears that the legislature intended to permit the leasing of the berme bank of any canal and the outer slope of the towing path embankment thereof and did not intend to authorize the sale of any part of either embankment. It may, therefore, be safely asserted that the superintendent of public works, while authorized to lease all or any part of the berme bank of a canal and the outer slope of the towing path embankment, is not authorized to sell any part of either embankment and in making sales of canal lands is limited to those lands lying outside the lines marking the outer edges of the two embankments of a canal.

It is provided, however, by section 412, G. C., 103 O. L., 120, that the superintendent of public works shall have the care and control of the public works of the state and shall make such alterations and changes thereof as he may deem proper in the discharge of his duties. I am of the opinion that this confers a certain degree of authority upon the superintendent of public works to narrow the embankments of the canals of the state and to eliminate basins not necessary for the storage of water or other purposes incident to the operation and use of the canals, by constructing a new embankment inside the line of the old.

At the time the Ohio canal was constructed, the use of concrete retaining walls was unknown and all the canal embankments were constructed of earth. In order that these embankments might have sufficient strength to resist the force of the water, it was necessary to build them with wide slopes. Land was not expensive at that time and often where the canal skirted the base of a hill, no berme bank was constructed and the water was allowed to form a basin, bounded on one side by

the towing path embankment and on the other by the hill. It was in this manner that the basin to the west of the B. F. Goodrich Company's plant was formed. While authority exists to eliminate unnecessary basins and to narrow embankments by the use of modern concrete construction, yet this authority should never be so exercised as to narrow the channel of the canal or the towing path below their minimum dimensions, as disclosed by the original plans and specifications for the construction of the canal in question.

The determination of this question does not, however, dispose of the question as to the right of the superintendent of public works to sell any lands not occupied by the canal and its embankments after such narrowing process has been carried to completion. Before discussing that question it becomes necessary, in the view that I take of the law, to note the character and extent of the state's canal property in the vicinity of the land which the B. F. Goodrich Company desires to purchase.

A careful examination of Silliman's Survey of that part of the Ohio canal in the city of Akron discloses that the canal property owned by the state in that city varies in width from about 65 feet to about 267 feet. The approximate width of the state's property, as shown by Silliman's Survey, beginning at Ravine street in the northern part of the city and extending to Nathan street in the southern part of the city, is as follows:

"At Ravine street---------- 90 feet
At Maple street---------- 125 feet
At North street---------- 115 feet
At B. & O. R. R. crossing---------- 100 feet
At Station 1794---------- 76 feet
At Lock No. 11---------- 84 feet
At Station 1803---------- 124 feet
At Lock No. 8---------- 68 feet
At Cherry street---------- 80 feet
At Ash street (south side)---------- 65 feet
At Quarry street---------- 73 feet
At Lock No. 3---------- 67 feet
At State street---------- 92 feet
At Buchtel avenue---------- 107 feet
At Exchange street---------- 82 feet
At Cedar street---------- 100 feet
At Chestnut street---------- 90 feet
At the basin (widest point)---------- 267 feet
At Falor street---------- 203 feet
At Station 1875---------- 85 feet
At Bartges street---------- 75 feet
At Campbell street---------- 80 feet
At Vassar street---------- 75 feet
At LaSalle and Princeton---------- 76 feet
At Thornton street---------- 79 feet
At Wolfe street---------- 76 feet
At Nathan street---------- 85 feet"

The part of the canal referred to in your inquiry and along which the B. F. Goodrich Company desires to purchase certain land, extends south from Cedar street, where the state's property has a width of about 100 feet, to Bartges street, where the state's property has a width of about 75 feet. The B. F. Goodrich Com-

pany desires to purchase land on both sides of the canal between these two streets and to reduce the state's property between these two points to a width of only 50 feet. It should be observed at this point that the future policy of the state, with reference to its canal system, remains to be determined. It is not known at the present time whether the state will sell its canals, repair and maintain them at their present width, or enlarge, improve and practically reconstruct them. This lack of a definitely established policy for the future should be taken into account in dealing with the canal property of the state under the existing statutes, and the authorities charged with the control and management of the canal property should not, by sales of canal lands, so narrow the state's property at any point as to prevent an improvement of such width as might be made at other points along the same canal. This conclusion is dictated not only by the existing statutes, but also by the principles of sound public policy.

It appears that at only three points in the city of Akron is the state's property of less width than about 73 feet. At Lock No. 8 the state's property narrows to a width of about 68 feet for a distance of about 70 feet. At the south side of Ash street the state's property is about 65 feet wide for a distance of about 120 feet. At Lock No. 3 the width is about 67 feet for a distance of about 80 feet. The narrowest part of the state's property in the vicinity of the land which the B. F. Goodrich Company desires to purchase is at Bartges street, where the width is about 75 feet.

Applying the above principles to the facts presented by your inquiry, it is my opinion that you are authorized by the provisions of section 412, G. C., to narrow the towing path embankment between Cedar street and Bartges street by the use of concrete retaining walls and to eliminate, by the construction of a new berme bank, so much of the basin to the west of the plant of the B. F. Goodrich Company as is not needed for canal purposes, and that when this narrowing process is completed a part of the land not occupied by the canal and its embankments may, under certain conditions, be sold, but that in making such sale of land you should, under no circumstances, reduce the width of the state's property below its narrowest width at any adjacent point. In other words, in making a sale of any lands not occupied by the canal or its embankments, after such embankments have been reconstructed and narrowed you should reserve for the state a strip of land between Cedar street and Bartges street not less than 75 feet in width, that being the approximate width of the state's property at Bartges street at the present time.

Answering your specific question, I advise that you should not make a sale of so much of the state's property as is described in the application of the B. F. Goodrich Company referred to by you in your communication. Even should the narrowing process referred to above be carried out under authority of section 412, G. C., the land outside of the lines marking a 75 feet strip of land to be reserved by the state could only be sold by you under the conditions set forth by law for the sale of other canal lands. In other words, the land outside the 75 feet strip to be reserved for the state could not be sold if it could be leased so as to yield six per cent. on the valuation thereof. Neither could it be sold if necessary or required in any way for the use, maintenance and operation of the canal. If valued at more than $500.00, it could only be sold at public sale, after due notice as provided by law.

I am returning herewith the copies of the rules and specifications relating to the construction of the Ohio canal, and the sixty-ninth annual report of the board of public works submitted by you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1114.

CASS HIGHWAY LAW—CONFERS NO AUTHORITY UPON COUNTY HIGHWAY SUPERINTENDENT TO ENTER INTO CONTRACTS—EXCEPTION, WHEN HE IS AUTHORIZED BY COUNTY COMMISSIONERS—PROSECUTING ATTORNEY LEGAL ADVISER OF COUNTY HIGHWAY SUPERINTENDENT.

The Cass highway law does not confer any authority upon the county highway superintendent to enter into any contracts, employ any labor or purchase any tools or material for road repairs except as he may be authorized by the county commissioners.

The prosecuting attorneys of the several counties are the legal advisers of the county highway superintendents of their respective counties.

COLUMBUS, OHIO, December 20, 1915.

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

DEAR SIR:—I have your communication of November 17, 1915, in which you quote for my information a letter from Mr. R. E. Hempel, county highway superintendent of Trumbull county.

Mr. Hempel in his letter to you refers to section 141 of the Cass highway law which provides, among other things, that the county highway superintendent shall see that all bridges and highways within his county are constructed, improved, maintained, dragged and repaired as provided by law. He also refers to section 149 of the Cass highway law, which provides that the county highway superintendent shall keep the highways of the county at all times in good and suitable conditions for public travel, and section 154 of that act, which provides that the county highway superintendent, under the direction of the state highway commissioner, shall provide for the maintenance and repair of the roads of the county under such system as may be deemed expedient. Mr. Hempel also refers to section 303 of the Cass highway law which, by its terms, enjoins upon the county highway superintendent the duty of improving and repairing certain classes of roads at the cost of the county. Mr. Hempel says that the sections referred to by him seem to make it plain that the county highway superintendent shall maintain and keep in repair bridges and highways of the county, that the county has money in the treasury for both road and bridge work, but that the prosecuting attorney rules that the county highway superintendent has no authority to hire labor or to buy material.

Further statements contained in Mr. Hempel's letter indicate that the matter in which he is interested is the repair of county and possibly of township roads, and that the matters about which he inquires are not connected, at least directly, with the activities of the state highway department.

In your communication of November 17th you stated that you desired my opinion as to the duties of your department in the premises. Upon receipt of your letter I addressed a communication to Hon. Archer L. Phelps, prosecuting attorney of Trumbull county, quoting Mr. Hempel's letter for his information and stating to Mr. Phelps that before answering your inquiry I would be grateful to him if he would advise me as to the exact nature of the question raised by Mr. Hempel. I am in receipt of a letter from Mr. Phelps from which it appears that the matters in which Mr. Hempel is interested relate solely to the activities of the county

commissioners and the county highway superintendent in the repair of county and township roads and that the matters in question are not directly connected with the activities of the state highway department.

Mr. Phelps' letter indicates that he has advised the county highway superintendent in substance that while the Cass highway law in several sections would seem to confer some authority upon him relative to the construction, maintenance and repair of highways and bridges and seems to charge him with the duty of seeing that certain work is done, yet nowhere in the act is there any authority conferred upon the county highway superintendent to expend money or enter into contracts for road repair unless the same be authorized by the county commissioners.

I concur in the view expressed by Mr. Phelps, as set forth above, and it is my opinion that while a number of the sections of the Cass highway law in terms enjoin certain duties upon the county highway superintendent with reference to the construction, improvement, maintenance and repair of bridges and highways, yet the act does not confer any authority upon the county highway superintendent to enter into any contracts, employ any labor or purchase any tools or material for road repairs except as he may be authorized by the county commissioners. In other words, the county highway superintendent is merely the executive officer of the county commissioners in matters relating to the construction, improvement, maintenance and repair of roads and bridges under the jurisdiction of the commissioners.

Since the matter referred to by Mr. Hempel is purely a county matter and since he has already been advised in the premises by the prosecuting attorney of his county, I am unable to advise you that your department has any duty to perform in the premises other than to inform Mr. Hempel that the prosecuting attorney is his legal adviser, and that in all matters where he is in doubt as to the law he should apply to the prosecuting attorney for advice.

It is true that section 148 of the Cass highway law provides that the county highway superintendent may request advice and assistance from the state highway commissioner in all matters relating to his duties, but I do not think that the effect of this provision is to substitute your department for the prosecuting attorneys of the several counties or to make you the legal adviser of county highway superintendents. It was rather the intention of the legislature in enacting this provision to give the county highway superintendents of the several counties of the state the right to call upon you for advice and assistance in matters of an engineering nature, and as to legal matters they should apply to the prosecuting attorneys of their respective counties for advice and assistance.

If the prosecuting attorney of any county is in doubt upon any proposition submitted to him by the county highway superintendent and desires the advice or opinion of this department the same will be promptly given if requested. In the case under consideration, however, the prosecuting attorney does not seem to have entertained any doubts as to the law and has not requested my advice or opinion and, so far as I can judge from the correspondence, has advised the county highway superintendent substantially in accordance with my understanding of the law. I, therefore, conclude that there is no further duty to be performed in the premises either by this department or by yours.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1115.

JUSTICE OF PEACE—CANNOT QUALIFY AND BECOME MEMBER OF VILLAGE COUNCIL—OFFICES INCOMPATIBLE.

A justice of the peace cannot qualify and become a member of a village council.

COLUMBUS, OHIO, December 22, 1915.

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

GENTLEMEN:—I am in receipt of a communication from Mr. C. H. Warner, justice of the peace in Harrison township, Paulding county, Ohio, and as the question asked by Mr. Warner is one of general interest I am taking the liberty of addressing an opinion to you. Mr. Warner's inquiry is as follows:

> "I am taking the liberty of addressing you for the purpose of acquiring information concerning the following, to wit:
>
> "The village of Payne is situated in Harrison township, Paulding county, Ohio, and I am serving as a justice of the peace, having been elected to that position in the year 1913, and on the 2nd of November, last, was elected a member of the village council of Payne.
>
> "Now what I wish to know is, whether I can qualify, and serve as such councilman, and also continue as justice of the peace."

The inquiry requires no further investigation than a reference to section 4218, G. C., which provides as follows:

> "No member of the council shall hold any other public office or employment except that of notary public or member of the state militia, or be interested in any contract with the village. * * *"

From this plain and unambiguous statutory provision it follows that so long as he continues to hold the office of justice of the peace he cannot qualify and become a member of the village council. A similar holding to that above stated was made by my predecessor, Hon. Timothy S. Hogan, in an opinion to be found at page 1666 of the annual report of the attorney general for the year 1913, a copy of which is herewith enclosed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1116.

COUNTY COMMISSIONERS—REBUILDING OF COUNTY INFIRMARY—APPROVAL OF SUCH EXPENDITURE AT AN ELECTION MAY BE HELD UNDER PROVISIONS OF SECTION 5640-1, G. C., AND BONDS ISSUED UNDER FAVOR OF SECTION 5642-1, G. C.

When an election is held under section 5640-1, *G. C., to approve an expenditure for the erection of a county building and said expenditure is approved by a majority of the votes cast at said election, the county commissioners may thereafter, under favor of section* 5642-1, *G. C., issue bonds in any amount not exceeding the amount stated upon said ballots, to be used exclusively for the purpose stated upon said ballots, and no other or further vote is required to approve said bonds.*

COLUMBUS, OHIO, December 22, 1915.

HON. DEAN E. STANLEY, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I have yours of December 19, 1915, as follows:

> "The commissioners of Warren county have called an election submitting to vote the questions of expending $84,000 for an infirmary building and issuing $65,000 of bonds for that purpose. Should the form of ballot in 5640-1, G. C., which says nothing about bonds, be used? If not, what form?"

In an opinion to you under date of November 20, 1915, I held, following an opinion of my predecessor, Hon. Timothy S. Hogan, that sections 2436, 5638, 5639-1 and 5640-1, G. C., are sections in *pari materia,* and must be construed and applied together, and that before your county commissioners could expend any sum in excess of $50,000 for the rebuilding of your county infirmary said expenditure must first have the approval of the voters of your county, as provided in said section 5638, et seq., as above noted.

I beg now to refer you to that opinion and to add that said section 5640-1 provides the only method of so submitting said questions to your voters.

From your inquiry it would seem that you propose to submit both the question of an expenditure of $84,000 and the matter of issuing bonds thereunder to the amount of $65,000, and that some doubt exists as to the application of said section 5640-1, G. C., because it does not expressly provide for the issuing of bonds. I must advise you that the matter of the amount of bonds to be issued may be determined by the commissioners after a vote upon the amount of the expenditure named, to wit: $84,000, and that the issuing of the bonds is fully covered by the provisions of a succeeding section 5642-1, G. C., which provides as follows:

> "If a majority of the votes so cast are against the proposed expenditure the board of county commissioners shall not assess a tax or issue bonds therefor. If a majority of the votes cast are in favor of the proposed expenditure, the board of county commissioners shall proceed to issue bonds in any sum not exceeding the amount stated upon said ballots, the proceeds of which shall be used exclusively for the purpose stated upon said ballot, and said board shall levy such amount of tax as may be necessary to pay the interest accruing on said bonds and to redeem them at maturity."

It will be observed that under the provisions of the foregoing section the county commissioners are delegated full authority to determine the amount of bonds which

shall be issued if the expenditure is approved by a majority of the votes cast at said election. In other words, it is not necessary that the amount of bonds be submitted to the voters, but only the amount to be expended, and if that amount is approved then the commissioners may issue bonds under said vote in any sum not exceeding the amount of expenditure so approved.

In conclusion, therefore, I advise you that an election for the approval of an expenditure of $84,000 by your board of county commissioners for the rebuilding of your county infirmary may be held under the provisions of section 5640-1, supra, and if said expenditure is approved by a majority of the votes cast at said election bonds may be issued in any amount not exceeding said sum of $84,000, under favor of section 5642-1, supra.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1117.

INTOXICATING LIQUORS—SECTION 1261-73, G. C., BARS PROSECUTION FOR ALL VIOLATIONS OF ANY STATE LAWS OR ORDINANCE REGULATING THE LIQUOR TRAFFIC COMMITTED PRIOR TO SERVICE OF WARRANT OF ARREST IN PROSECUTION FOR VIOLATION OF SUCH LAWS WHICH RESULTS IN CONVICTION.

When a licensee is convicted for an offense under any law or ordinance regulating the traffic in intoxicating liquors the provisions of section 1261-73, *G. C.* (103 *O. L.*, 241), *bar a prosecution of any and all offenses under said laws or ordinances committed prior to the time of the service of the warrant of arrest in the case in which said licensee is convicted.*

COLUMBUS, OHIO, December 23, 1915.

HON. CHARLES T. STAHL, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—I have your letter of December 18, 1915, submitting the following statement and inquiry:

> "During the October term of the Fulton county court of common pleas the grand jury returned two indictments for selling and furnishing intoxicating liquors to a minor, each indictment being for a different minor, but indicting the same person for selling and furnishing.
>
> "We went to trial and found the person guilty as charged, and now the other indictment will be up for trial in the near future.
>
> "Under section 58 of the Ohio liquor license code, we find:
>
> "'If at the time of conviction for any offense under the laws or ordinances regulating the traffic in intoxicating liquors, the fact shall be that an offense has been committed under said laws or ordinances by the licensee prior to the time of the service of the warrant of arrest, prosecution upon said other offenses shall be barred.'
>
> **"It is my opinion that under the above section we have no right to** try the defendant on this indictment, as each charge against him was committed at the same time.
>
> "I ask that you give me your opinion on the said section."

It is apparent from a consideration of the section quoted that its purpose is to prevent a prosecution of any offense against the liquor laws committed prior to the time of the service of the warrant of arrest in a case wherein the accused is convicted. This conclusion is inevitable when the phrase "service of the warrant of arrest" is interpreted as applying and referring to the case in which the accused is convicted. It may be said that this seems to be the only possible construction that may be given to this language and make it harmonize with the remainder of the section and make the whole section intelligible.

It is suggested that this law was enacted with a view of mitigating, to some extent, the application of the constitutional provision found in section 9 of article XV of the constitution, which requires the revocation of a license after two convictions for violation of liquor laws and thereafter disqualifies the licensee from receiving a license. Regardless, however, of the considerations which moved the legislature to enact this law, I agree with your conclusion that, under the facts of the case presented in your inquiry, a further prosecution upon the remaining indictment, which is for an offense committed prior to the service of the warrant in the case in which you secured a conviction, is barred by the statute in question.

I, therefore, advise, in conclusion, that said section 58, being section 1261-73, G. C., bars prosecution for all violations of any state law or ordinance regulating the traffic in intoxicating liquors which are committed prior to the service of a warrant of arrest in a prosecution for a violation of said laws which results in a conviction.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1118.

STATE LANDS—VOUNTARY ASSOCIATION—MEMBERS OF SUCH ASSOCIATION DESIRING TO LEASE CANAL OR RESERVOIR LANDS SHOULD HAVE LEASE EXECUTED BY MEMBERS AS INDIVIDUALS —UNINCORPORATED CLUB.

Where the members of an unincorporated club desire to lease canal or reservoir lands, the lease should be drawn to and executed by the members as individuals.

COLUMBUS, OHIO, December 23, 1915.

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

DEAR SIR:—I have your communication of December 7, 1915, which communication reads as follows:

> "The Wyandotte club of Upper Sandusky, Ohio, a sort of a voluntary association for the purpose of conducting a club house on an island in Indian Lake, as a pleasure resort for the members thereof, comprising Messrs. Chas. S. Matthews, Z. S. Virtner, Arthur Stultz, Ray Cuneo, Bert Hill, Eliott Hedges, Ira Pontius, Len O. Smith, A. F. Schoenberger and Will Fleck, has applied for a lease of a small island in Indian Lake for club house and boat landing purposes. We are somewhat in doubt as to the standing of this club. It does not appear to be either a partnership or corporation, but rather a voluntary association for club purposes. They keep

a record of their proceedings and have spread upon their minutes a resolution directing the president and secretary of the association, or club, to execute a lease on behalf of the club in pursuance of the resolution referred to above.

"The club does not attempt to derive any income from the building, but from time to time an assessment is levied to meet the current expenses and improvements and repairs.

"Any information you can give us on this subject will be appreciated and followed in connection with this lease."

From your letter it is apparent that the Wyandotte club to which you refer is neither a corporation nor a partnership and is to be classed as a voluntary association not for profit. It has been held that a voluntary association, as such, cannot hold real estate.

Mannix v. Purcell, 46 O. S., 102.
Church v. Society, 44 Conn., 259.
Association v. Scholler, 10 Minn., 331.

I suggest that the members of the Wyandotte club should be requested to make application, as individuals, for a lease of the land in question and that the lease be drawn to and executed by the ten persons composing the club, all reference to the club being omitted both from the application and from the lease. All question of the liability of all the members for the payment of rent and the observance of the other covenants of the lease will thereby be avoided.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1119.

APPROVAL OF RESOLUTION FOR IMPROVEMENT OF CERTAIN ROAD IN CLERMONT COUNTY, OHIO.

COLUMBUS, OHIO, December 24, 1915.

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

DEAR SIR:—I have your communication of December 23, 1915, transmitting to me for examination final resolution relating to the improvement of the Ohio river (Cincinnati-Pomeroy) road, I. C. H. No. 7, petition No. 1241, in Clermont county.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

1120.

APPROVAL OF RESOLUTION FOR IMPROVEMENT OF CERTAIN ROADS IN HURON COUNTY, OHIO.

COLUMBUS, OHIO, December 30, 1915.

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

DEAR SIR:—I have your communication of December 28, 1915, transmitting to me three final resolutions relating to the Bellevue-Norwalk road, petition No. 1092, I. C. H. No. 289, and two final resolutions relating to the Oberlin-Norwalk road, petition No. 1086, I. C. H. No. 290, all in Huron county.

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

Respectfully,
EDWARD C. TURNER,
Attorney General.

1121.

TAX COMMISSION—APPOINTMENT OF EXECUTORS AND ADMINISTRATORS OF ESTATES.

The tax commission of Ohio is in no way concerned with the appointment of executors and administrators of estates.

COLUMBUS, OHIO, December 30, 1915.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter under date of December 14th in which you enclose a letter received by you from the probate judge of Hamilton county, together with certain memoranda including a copy of the opinion of the court of appeals of said county in the matter of Clifford Seasongood, plaintiff in error, v. Philip L. Seasongood, et al., defendants in error, No. 738 in said court of appeals, to which opinion said probate judge makes special reference in his letter.

As stated by Judge Lueders in said letter the probate court of Hamilton county, in the appointment of executors and trustees under the will, and administrators of estates, has for many years followed a rule adopted by said court, not to appoint non-residents of the state as executors or administrators.

Upon an examination of the opinion of the court of appeals in the case above referred to, I find that said case went to said court of appeals on error from the judgment of the court of common pleas of Hamilton county, affirming the judgment of the probate court of said county, in refusing to appoint Clifford Seasongood, plaintiff in error, as a co-executor and co-trustee under the will of Lewis Seasongood, deceased, on the ground that the said Clifford Seasongood is a non-resident of the state of Ohio.

From the statement of facts as set forth in said opinion it appears that on November 29, 1914, the said Lewis Seasongood, a resident of Cincinnati, Hamilton county, Ohio, died testate leaving a large estate, part of which was located in Ohio and part in New York, and in his will nominated as executors his three sons, Philip L., Albert and Clifford, and his nephew Murray Seasongood, and also nominated all of his executors except Albert as testamentary trustees.

It further appears that all of the above named persons were appointed as nominated in said will by the surrogate court of New York on February 8, 1915, and that the said Clifford Seasongood was a resident of New York City at the time of his father's death, as well as at the time when his application for appointment as co-executor and co-trustee under said will was made to the probate court of Hamilton county.

After a careful consideration of the law applicable to the issues involved in said case the court of appeals held that the appointment of the said Clifford Seasongood as co-executor and co-trustee under his father's will is mandatory and should be recognized by the probate court by accepting a proper and sufficient bond and issuing to him in conjunction with his co-executors and co-trustees letters testamentary on said will.

The judgment of the court of common pleas of said county affirming the judgment of the probate court, in refusing to appoint the said Clifford Seasongood as a co-executor and co-trustee under his father's will on the ground that the said Clifford Seasongood is not a resident of the state of Ohio, having been reversed by the court of appeals of said county, it is the desire of Judge Lueders of said probate court to have this case taken to the supreme court, and it is his idea, as stated by you, that inasmuch as the filing of inventories and accounts in the probate court has to do with the assessment of taxes, the case above referred to may be of sufficient importance to justify your commission in requesting me as attorney general of the state to represent the defendants in error in prosecuting error in the supreme court to the judgment of said court of appeals. You ask to be advised as to my authority in this matter.

Section 1465-9, G. C., provides:

> "Upon the request of the commission the attorney general, or under his direction, the prosecuting attorney of any county, shall aid in any investigation, hearing or trial had under the laws which the commission is required to administer, and to institute and prosecute all necessary actions or proceedings for the enforcement of such laws, and for the punishment of all violations thereof, arising within the county in which he was elected."

The laws referred to in the above provision of the statute are the laws governing the assessment and collection of taxes on real and personal property. While executors and administrators have certain duties to perform under said laws and your commission is concerned with the proper administration of the trust by said executors and administrators in the performance of said duty, you are in no way concerned with their appointment or with the law applicable to such appointment. It follows, therefore, that inasmuch as your commission is in no sense either a necessary or proper party to the case above referred to and is in no way concerned with the law applicable to the issues involved in said case, I am without authority under the above provision of the statute to represent the defendants in error in the prosecution of error to the judgment of the court of appeals.

I call your attention to the provisions of section 11 of the so-called Parrett-Whittemore law as found in 106 O. L., 249. This section will become effective January 1, 1916, and provides as follows:

> "Sec. 5371-3, G. C. Personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise belonging to the estate of a deceased person whose residence at the time of his decease was in this state, shall be listed by his executors, administrators, trustees or personal representatives, *whether residents of this state or not,* in the township, city

or village in which the deceased would have been required to list the same if he had been or was living on the day preceding the second Monday of April."

The provisions of this statute clearly prescribe the duty of executors, administrators, trustees or personal representatives in the listing of personal property for taxation and, I think, meet the objections of Judge Lueders to the appointment of a non-resident as an executor or an administrator of an estate.

I am of the opinion therefore in answer to your question that I am without authority in law to represent the defendants in error, in the case above referred to, in the prosecution of error in the supreme court to the judgment of the court of appeals.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1122.

STATE LIQUOR LICENSING BOARD—INSPECTOR OF SAID BOARD INDICTED FOR CRIMINAL OFFENSE—NO AUTHORITY TO EMPLOY COUNSEL OR INCUR EXPENSE IN DEFENSE OF SUCH PERSON.

The state liquor licensing board is without authority to employ counsel or incur other expense in defense of a person against an indictment for a criminal offense, by reason of the fact that the person so indicted is an inspector appointed by the state liquor licensing board.

COLUMBUS, OHIO, December 30, 1915.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—In yours under date of December 18, 1915, you make inquiry whether you may employ attorneys for the defense of an inspector appointed by your board, who is under indictment for shooting in Champagin county in this state. I learn from members of your board, personally, that it is claimed by the inspector that the shooting was done by him in self-defense while engaged in the discharge of his duties as such inspector.

It is unnecessary to reiterate what has already been stated in opinion No. 1108, addressed to you under date of December 16, 1915, in reference to the employment of attorneys or counsel to represent the state liquor licensing board in any matter. It is sufficient to observe that your board is not under indictment and therefore cannot have occasion to be represented in the trial on the indictment referred to, or otherwise, in respect to the same, neither is any inspector, as such, so indicted.

The indictment referred to is against an individual in his individual capacity and your inquiry resolves itself into this: Is your board authorized, under the law of this state, to employ counsel for a person under indictment for a criminal offense, by reason of the facts that it is claimed that the transaction upon which such indictment is founded occurred while the person under indictment was in the proper pursuit and discharge of his duties as liquor licensing inspector, and that it is claimed by the person so indicted that the shooting with which he is charged was necessary to his proper self-defense?

Your inquiry involves a consideration of section 5 of the license law (section 1261-20, G. C., 103 O. L., 218), as follows:

> "The state liquor licensing board shall provide itself with an office at the seat of government. Said board shall employ the necessary clerks, examiners, inspectors, stenographers and other assistants as it may deem necessary and fix their compensation, subject to the approval of the governor; and shall also provide itself with the necessary furniture, books, stationery and other things that may be necessary for the proper conducting of the office, and may incur such other expenses as it deems expedient, subject to the approval of the governor.
>
> "The commissioners, the secretary, clerks, examiners, inspectors, stenographers and other assistants that may be employed shall be entitled to receive their actual and necessary expenses while traveling on the business of the board. Such expenses shall be itemized and sworn to by the person who incurred the same, allowed by the commission and paid as other expenses are paid.
>
> "The board may remove any of its employes for any violation of law or the rules of the board, or for any neglect of duty or for other good and sufficient cause."

The expenses incurred by the employment of attorneys, as above stated, could not, in any sense, come within the terms of the provision for the payment of traveling expenses of inspectors while on the business of the board.

It will be observed, however, that the state board is here authorized to "incur such other expenses as it deems expedient, subject to the approval of the governor." This provision is rather elastic and certainly leaves much to the discretion of the board and the governor. Its manifest purpose is to make provision for extraordinary matters of expense which are not susceptible of anticipation in the regular course of business and leaves that board and the governor the authority and responsibility of determining the necessity and expedience thereof. It is, however, subject to the well established rule of construction that where general terms are used in direct and immediate connection with specific terms, the general are limited in their meaning and application to the class to which the specific terms belong.

An examination of the preceding special provisions discloses an authorization of expenditures which are essential to a proper performance of the duties of the state board and its employes imposed by law. That is to say, an office, clerks, examiners, inspectors, stenographers, assistants, furniture, books, stationery and expenses of traveling are, to a certain extent, not only necessary but indispensable to a proper performance of the duties and functions of the state liquor licensing board. But the legislature clearly anticipated the necessity of further expenditures so essential in their nature, which, in the very nature of things, could not be so specifically enumerated, hence the use of the general provision.

It cannot be argued, however, that under this general provision there may be found authority for any expenditure which even expenditures, in its broadest sense, might suggest. As stated above, expenditures authorized by this general provision must be confined to that class of objects which the legislature clearly had in mind in making the specific enumerations immediately preceding.

It does not seem, from anything which may be found in the license law or in the statutes defining the powers and duties of inspectors appointed by the state liquor licensing board, that it was anticipated that it might be at all necessary to the proper performance of their duties that inspectors become involved in personal encounters or become the subject of criminal charge in any way, and it

therefore follows that the expense of their defense against criminal charges of any character by inspectors, had no place in the legislative mind in the enactment of the provisions of section 1261-20, G. C., supra.

It will be further borne in mind that notwithstanding any claim made by or on behalf of the inspector referred to, an indictment is a complaint of the state made in due course of legal procedure and founded on evidence sufficient in the judgment of a grand jury to establish a prima facie case of the commission of a criminal offense. It has never been the policy of the state to institute criminal prosecution, the defense of which would in any way devolve upon the state itself, except in those extraordinary cases in which the accused is shown to the court to be indigent and without means to secure counsel for his defense, wherein the means of furnishing such counsel is provided in section 13617, G. C., et seq.

I am therefore of opinion that your board is unauthorized to employ counsel for or to incur any expense in the defense of an inspector appointed by your board against an indictment for shooting under the facts stated by you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1123.

MUNICIPAL COPORATION—SECTION 4276, G. C., 106 O. L., 483, PROVIDES THE EXCLUSIVE MANNER IN WHICH DUTIES OF OFFICES AS WELL AS POSITIONS NAMED THEREIN MAY BE MERGED WITH THOSE OF CITY AUDITOR IN CERTAIN CITIES.

The provisions of section 4276, G. C., as amended in 106 O. L., 483, are exclusive both as to the mode by which the duties of the offices named therein may be merged with those of city auditor in the cities named and also as to such offices or positions the duties of which may be merged with those of city auditor.

COLUMBUS, OHIO, December 30, 1915.

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

GENTLEMEN:—I have your letter of December 14, 1915, submitting the following inquiries:

> "1. If council refuses or neglects to pass an ordinance merging the duties of the city auditor with those of clerk of council, could the city auditor be elected by council as their clerk and receive the compensation attached to said position, in addition to his salary as city auditor?
>
> "2. Since the amendment to section 4276, General Code (106 O. L., 483), enumerates the positions in the city service which may be merged with that of city auditor, does such legislation prevent the city auditor from holding any other clerical positions in the city service, if the duties be not incompatible?"

Section 4276, G. C., as amended in 106 O. L., 483, to which you refer in your foregoing inquiries, provides as follows:

> "The auditor shall keep the books of the city, exhibit accurate statements of all moneys received and expended, and of all property owned by

the city and the income derived therefrom, and of all taxes and assessments. In cities having a population of less than twenty thousand the city council may, by a majority vote, merge the duties of the clerk of the waterworks, if any, clerk of the board of control and clerk of the city council with the duties of the city auditor, allowing him such additional assistants in performing such additional duties as council may determine."

It seems that the doubt which prompts the submission of your foregoing inquiries arises from the contention that the legislature having provided in the foregoing section in what manner and by what method the duties of the various offices therein specified may be merged with the duties of the office of city auditor, such provisions must be held to be exclusive both as to the method of such combination and as to the offices the duties of which may be so combined.

The section in question provides a mode or method in certain cities specified therein whereby four offices or positions theretofore existing may be merged or combined into one office and the duties thereof imposed upon the city auditor. It is therefore an affirmative statute introductory of a new law which creates new rights and imposes new and additional duties and responsibilities upon the city auditor.

It is a well settled maxim of statutory construction that if an affirmative statute, which is introductory of a new law, directs a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner.

Harlan v. Roberts, et al., 2d Dec. Reprint, 460.

Applying this rule to the statute in question it would seem to establish conclusively that the legislature having provided a method whereby the duties of clerk of council may be merged with those of city auditor in certain cities, such method must be regarded as exclusive and such combination may be made only in the manner so provided. I am of the opinion, therefore, that your first question must be answered in the negative.

If this statute is exclusive as to the method which may be pursued in combining the duties of the office of city auditor with those of the duties of the other offices or positions therein named, it must also be held to be exclusive as to the positions which may be so combined with that of city auditor. This construction follows as the logical result of the application of the rule of construction above noted, and the application of another maxim of statutory construction, viz., expressio unius est exclusio alterius. That is to say, the legislature having by special enactment provided what offices or positions may be combined with that of city auditor in cities of the class specified in this law, it must be assumed that it intended those provisions to cover all combinations that may be made with said office. I therefore conclude, in answer to your second question, that a city auditor in cities of the class named in section 4276, G. C., supra, may not hold any clerical position in the city service other than those provided for in said section.

In view of these considerations I am of the opinion that the provisions of section 4276, supra, are exclusive both as to the manner in which the duties of the offices named therein may be merged with those of city auditor in the cities named, and also as to the offices or positions the duties of which may be merged with those of city auditor in said cities.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1124.

SUPERINTENDENT OF PUBLIC WORKS—APPROVAL OF CERTAIN CANAL LANDS.

COLUMBUS, OHIO, December 31, 1915.

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

DEAR SIR:—I have your communication of December 14, 1915, transmitting to me for examination the following leases of canal lands:

"Sarah Shawaker, portion of abandoned Columbus feeder, Franklin county, valuation	$2,000 00
"Lillie B. Weltner, canal lands at Logan, portion of abandoned Hocking canal, valuation	166 66
"George Burke, Logan, portion of abandoned Hocking canal, valuation	166 66
"Eleanor Young, Dayton, lot at Indian Lake, valuation	300 00"

I find these leases to be in regular form and am therefore returning the same with my approval endorsed on the triplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1125.

ARTICLES OF INCORPORATION—SHOULD FIRST BE APPROVED BY BOARD OF STATE CHARITIES WHEN FOR BENEVOLENT AND CHARITABLE INSTITUTIONS.

A corporation, the purpose of which is the rendering of benevolent and charitable protection and assistance to unfortunate girls and to train them religiously and industriously is one such as is referred to in section 1352-2, *G. C.*, 103 *O. L.*, 866, *and before the secretary of state can issue a certificate of such incorporation in such a case it is necessary that a certificate be filed in his office showing that the articles of incorporation have been examined and approved by the board of state charities under the provisions of section* 1352-2, *G. C. The act of the secretary of state in issuing such corporation papers, without having the certificate of the state board of charities on file, is a nullity; anyone attempting to act as a corporation under such articles may be proceeded against under the provisions of section* 12303, *G. C.*

COLUMBUS, OHIO, December 31, 1915.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—Permit me to reply to your request for an opinion, which is as follows:

"On October 9, 1915, the secretary of state issued articles of incorporation to the Tatum missionary home, of Dayton, Ohio, as will be found in volume 180, page 692 of the Records of Incorporation in his office.

"Section 3 of said articles provides in part: 'Said corporation is formed for the purpose of rendering benevolent and charitable protection and assistance to unfortunate girls.'

"We are of the opinion that this part of the said articles comes within the provisions of section 1352-2 of the General Code (O. L., 103, p. 864), which requires such articles to be referred to this board for approval. If these articles had been referred to this board for approval it is doubtful if the board would have approved them.

"1. We desire to ascertain from you whether in your opinion these articles of incorporation should have been referred to the board of state charities.

"2. If such reference should have been made has the secretary of state authority to withdraw the issuance of said articles?

"3. If the secretary of state cannot on his own part withdraw the issuance of said articles, what method would you suggest to have them cancelled?"

From a copy of the articles of incorporation of the Tatum missionary home, of Dayton, secured from the office of the secretary of state, I quote the purpose clause, which is as follows:

"3. Said corporation is formed for the purpose of rendering benevolent and charitable protection and assistance to unfortunate girls and to train them religiously and industriously."

Sections 1352-1 and 1352-2 of the General Code (103 O. L., 865-866), are as follows:

"Sec. 1352-1. Such board shall annually pass upon the fitness of every benevolent or correctional institution, corporation and association, public, semi-public or private, as receives, or desires to receive and care for children, or places children in private homes. Annually at such times as the board shall direct, each such institution, corporation or association, shall make a report, showing its condition, management and competency, adequately to care for such children as are, or may be committed to it or admitted therein, the system of visitation employed for children placed in private homes, and such other facts as the board requires. When the board is satisfied as to the care given such children, and that the requirements of the statutes covering the management of such institutions are being complied with, it shall issue to the association a certificate to that effect, which shall continue in force for one year, unless sooner revoked by the board. No child shall be committed by the juvenile court to an association or institution which has not such certificate unrevoked and received within fifteen months next preceding the commitment. A list of such certified institutions shall be sent by the board of state charities, at least annually, to all courts acting as juvenile courts and to all associations and institutions so approved. Any person who receives children or receives or solicits money on behalf of such an institution, corporation or association, not so certified, or whose certificate has been revoked, shall be guilty of a misdemeanor, and fined not less than $5.00 nor more than $500.00.

"Sec. 1352-2. No association whose object may embrace the care of dependent, neglected or delinquent children or the placing of such children in private homes shall hereafter be incorporated unless the proposed articles

of incorporation shall have been submitted first to the board of state charities. The secretary of state shall not issue a certificate of incorporation unless there shall first be filed in his office the certificate of the board of state charities that it has examined the articles of incorporation, and that in its judgment the incorporators are reputable and respectable persons, and that the proposed work is needed, and the incorporation of such association is desirable and for the public good. Amendments proposed to the articles of incorporation of any such association shall be submitted in like manner to the board of state charities, and the secretary of state shall not record such amendment or issue his certificate therefor unless there shall first be filed in his office the certificate of the board of state charities that it has examined such amendment, that the association in question is, in its judgment, performing in good faith, the work undertaken by it, and that such amendment is, in its judgment, a proper one, and for the public good."

From a reading of section 1352-2 of the General Code, supra, it is clear that the articles of incorporation should have been submitted to your board for examination before a certificate of incorporation was issued by the secretary of state, the section providing that the secretary of state shall not issue a certificate of incorporation unless there shall first be filed in his office the certificate of the board of state charities that it has examined the articles of incorporation and that in its judgment the incorporators are reputable and respectable persons, and that the proposed work is needed and that the incorporation of such association is desirable and for the public good.

It is therefore clear that it was the duty of the incorporators to file in the office of the secretary of state such certificate before asking that articles of incorporation issue. This course, however, was not followed, and in view of the statements of your board to the effect that it is doubtful that the board would have approved the articles if they had been submitted, coupled with the information conveyed by your Mr. Shirer personally, the reason for the failure to file the certificate with the secretary of state is obvious. For some reason, either through a misinterpretation of the law, or facts surrounding the formation of the Tatum missionary home, of Dayton, Ohio, the certificate of incorporation was issued by the secretary of state without there having been filed in his office the certificate of approval referred to in section 1352-2 of the General Code, supra.

In view of this situation you now present the three questions contained in your letter, and in answer to the first question it is my opinion that the facts presented in the articles of incorporation referred to constitute a case such as should have been submitted to your board for approval or disapproval before such articles were filed in the office of the secretary of state, as the filing of the certificate of approval of your board is a jurisdictional matter without which the secretary of state has no authority in law to issue articles of incorporation such as are contemplated in section 1352-2 of the General Code, supra.

In answer to your second question I have to advise that as the secretary of state was without authority in law to issue the articles of incorporation in the case under consideration his act was a nullity and there is, therefore, nothing to cancel notwithstanding the fact that the persons who signed the incorporation papers have in their possession what purports to be articles of incorporation of the Tatum missionary home of Dayton, Ohio.

Coming to your third question in which you ask what course should be pursued to have the articles of incorporation canceled, I might say that the answer to your second question practically disposes of the necessity of replying to this

question; however, for your information I call your attention to the provisions of section 1352-1 of the General Code, supra, from which it will be observed that notwithstanding the fact of the issuance of the articles of incorporation by the secretary of state for a corporation such as the Tatum missionary home of Dayton, Ohio, your board is vested with final authority in passing upon the fitness of the institution, corporation or association to engage in business such as is contemplated by the Tatum missionary home, and unless after such investigation and examination you issue a certificate to the effect that you are satisfied that the institution, corporation or association is qualified to engage in the business contemplated by the statute, any effort to carry on the business, to receive children, or even to receive or solicit money for the benefit of the corporation would make the offending party or parties subject to the infliction of a fine of not less than five dollars nor more than five hundred dollars.

It is therefore clear that the articles of incorporation do not of themselves authorize the incorporation to engage in a business such as is contemplated by the Tatum missionary home unless section 1352-1 of the General Code has been complied with. If, however, in pursuance of the course which has been taken by the persons who filed the articles of incorporation of the Tatum misisonary home of Dayton, they should attempt to exercise corporate powers resort might then be made to section 12303 of the General Code, which, in part, is as follows:

> "A civil action may be brought in the name of the state * * *
>
> "3. Against an association of persons who act as a corporation within this state without being legally incorporated."

Specifically answering your third question it is my opinion that if the purpose you desire to accomplish cannot be secured through the restraining influences of section 1352-1 of the General Code, supra, which is a criminal statute, a civil action may be instituted under the provisions of section 12303 of the General Code, referred to and partly quoted above, on the ground that the parties are attempting to act as a corporation within this state without being legally incorporated.

A question covering this same matter has been presented to this department by Mr. D. F. Garland, director of public welfare of the city of Dayton, and a copy of this opinion is being sent to him for his information, as well as one to the secretary of state.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1126.

INDUSTRIAL COMMISSION—FEES AND FINES COLLECTED BY ENFORCEMENT OF LAW RELATING TO PRIVATE EMPLOYMENT AGENCIES—PAID TO COMMISSION, WHICH IN TURN PAYS SAME INTO STATE TREASURY—DEFENDANT IN A PENDING ACTION NOT PREJUDICED BY SUCH DISPOSAL.

Fees and fines collected through the enforcement of the law relating to private employment agencies may be paid over to the industrial commission by a justice of the peace in order that the commission may turn same into the state treasury as provided by law.

The manner of disposition of such fees and fines, either or both, in the hands of the justice of the peace does not concern the defendant in the pending action and he cannot be prejudiced thereby.

COLUMBUS, OHIO, December 31, 1915.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Permit me to reply to your request for an opinion, which is as follows:

"We have a case in court in Toledo before Judge W. O. Morse, in which we are prosecuting Joseph Nowakowski for violation of the law governing private employment agencies.

"Nowakowski was arrested on the following affidavit of Mr. Charles H. Mayhugh, special agent of the department of investigation and statistics of the industrial commission:

"'State of Ohio, County of Lucas, ss.

"'Before me, W. O. Morse, one of the justices of Adams township, Lucas county, Ohio, personally came Charles H. Mayhugh, who being duly sworn according to law deposeth and saith that Joseph Nowakowski, late of the county aforesaid, on or about the 25th day of July, A. D. 1915, at the county of Lucas, aforesaid unlawfully and knowingly did operate and maintain a private employment agency for hire in which the said Joseph Nowakowski did charge a fee of $10.00 (ten dollars) to secure a position for one Adam Rutowski at the Willys-Overland Automobile Company. The said Adam Rutowski being then and there an applicant for employment at said employment agency. The said Joseph Nowakowski at the time aforesaid did operate and maintain said employment agency for hire without having paid the legal fee for maintaining and operating a private employment agency for hire, to the proper authorities.'

"The case is being prosecuted by Mr. Robert Phillips, police prosecutor and the defendant's attorneys are Fell and Shaw, Toledo. This trial was set for December 3, at which time the defendant's attorneys attacked the affidavit, claiming the court had no jurisdiction upon the following grounds: They claim that the law requires the industrial commission of Ohio to enforce the laws governing private employment agencies and pay the fines collected into the state treasury, and does not provide for the justice turning the fines over to the industrial commission.

"They cited section 13429, which requires the justice to turn such fines into the county, unless otherwise instructed by law, and claimed that there is no law which empowers the justice to turn the money to the industrial

commission. In their arguments they used the 'Dope' law which provides that all fines assessed shall be turned over to the secretary of the health board, and he in turn shall pay them into the state treasury.

"After their arguments, the court continued the case until we could get a decision from your department. We would like very much to have an early decision of this matter in order that we may have the case brought to trial promptly, as delay would probably result in our not being able to locate the principal witnesses."

Section 13429 of the General Code is as follows:

"Fines collected by a justice of the peace shall be paid into the general fund of the county where the offense was committed within thirty days after collection unless otherwise provided by law."

Sections 894, 895 and 896 of the General Code, which is a part of the law relating to private employment agencies, are as follows:

"Sec. 894. The term 'applicant for employment,' as used in the laws governing private employment agencies, shall mean any person seeking work of a lawful character, and 'applicant for help' shall mean any person seeking help in any legitimate enterprise. Nothing in such laws shall limit the meaning of the term 'work' to manual labor, but it shall include professional service and all other legitimate service. All moneys received from fees and fines as provided by the laws governing private employment agencies, shall be paid into the state treasury by the commissioner of labor statistics in the manner provided by law.

"Sec. 895. Whoever violates any provision of law relating to private employment agencies shall be fined not less than fifty dollars nor more than one hundred dollars for each offense.

"Sec. 896. The commissioner of labor statistics shall enforce the laws relating to private employment agencies, and when informed of a violation of such laws, institute proceedings in a court of competent jurisdiction to enforce their penalties."

Under the provisions of section 871-24 of the General Code (103 O. L., 103) which is section 24 of the act creating the industrial commission, the duties, liabilities, powers and privileges of certain departments, including the commissioner of labor statistics, are conferred upon the industrial commission of Ohio, and under that section it becomes the duty of the commission to pay money received from fees and fines collected under the law relating to private employment agencies into the state treasury, as provided for in section 894 of the General Code, supra.

It is clear that the provisions of section 13429 of the General Code, supra, do not apply in the case presented by you owing to the provision contained in section 894 of the General Code, supra, for the payment of fees and fines collected under the law relating to private employment agencies into the state treasury.

The contention is made that the court had no jurisdiction to hear and dispose of the pending action referred to in your letter on account of the fact that there is no express law providing for the transfer of the money received by the court to the industrial commission for payment into the state treasury. In view of the express provision of section 894 of the General Code, supra, coupled with the provisions of section 871-24 of the General Code, referred to above, and the exception contained in section 13429 of the General Code, supra, it is my opinion that there

is ample authority for the justice of Adams township, in case conviction is had, to take the receipt of the industrial commission for any money which may be collected in order that the commission may be in position to turn such money into the state treasury provided by law and that there is no merit in the contention made by the attorneys representing the defendant in the matter under consideration as the question is entirely immaterial, does not concern him, nor can he be prejudiced in any manner by reason of the situation of which he complains.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1127.

MUNICIPAL CORPORATION—VILLAGE MAYOR—VACANCY BY REASON OF DEATH AFTER RE-ELECTION—PRESIDENT PRO TEM. OF COUNCIL BECOMES MAYOR FOR UNEXPIRED TERM AND FOR TWO-YEAR TERM FOR WHICH DECEASED MAYOR WAS ELECTED.

Upon the death of a village mayor, the president pro tem. of council becomes the mayor for the unexpired term and until a successor is elected and qualified. Section 4256, G. C.

Where the mayor of the village, who has been re-elected to office, dies after his re-election but before his new term commences the president pro tem. who becomes the mayor by virtue of section 4265, G. C., for the unexpired term and until a successor is elected and qualified will continue as mayor for the unexpired term of the deceased mayor and for the two-year term for which such deceased mayor was elected.

COLUMBUS, OHIO, December 31, 1915.

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

GENTLEMEN:—I have your letter of December 22, 1915, requesting my opinion as follows:

> "The present mayor of a village, who has been re-elected to the position at the last November election, died on or about November 20th, the president of council succeeding to the position of mayor and is now serving in said position.
>
> "*Question*: Whose duty will it be to call the incoming council to order on January 1st, next, and how shall the vacancy in the office of mayor be filled?"

Sections 4255 and 4256 of the General Code contain the answers to your question, and are as follows:

> "The mayor shall be elected for a term of two years, commencing on the first day of January, next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. He shall be the chief conservator of the peace within the corporation, and shall have the powers hereinafter conferred, perform the duties hereinafter

imposed, and such other powers and duties as are provided by law. He shall be the president of the council, and shall preside at all regular and special meetings thereof, but shall have no vote except in case of a tie.

"Sec. 4256. When the mayor is absent from the village, or is unable for any cause to perform his duties, the president pro tem. of council shall be acting mayor. In case of the death, resignation, or removal of the mayor, the president pro tem. of council shall become the mayor and serve for the unexpired term and until the successor is elected and qualified."

By virtue of the last sentence in section 4255, above quoted, the mayor of a village is the presiding officer of the council, and as such should preside at its regular and special meetings.

By the language in the last sentence of section 4256 of the General Code, above quoted, upon the death, resignation or removal of the mayor, the president pro tem. of council becomes the mayor and serves as such for the unexpired term and until a successor is elected and qualified.

Under the facts stated in your letter, the president pro tem. of council by virtue of his office became the mayor of the village upon the death of the elected mayor and succeeded to all the powers and authority of the office to as full an extent as though he had been regularly elected. By virtue of this same language in section 4256 of the General Code, the president pro tem., having succeeded to the office of mayor, is entitled to hold this office until his successor is duly elected and qualified. Since the former mayor was re-elected to the office in November, 1915, and has since died, it follows that no new mayor can be elected until November, 1917. Therefore, the incumbent of the office, viz: the former president pro tem. of council, will, under the statutes, hold the office of mayor until January 1, 1918.

The language of the sections of the General Code above quoted is, to my mind, clear and susceptible only of the interpretation above given to it.

For a further citation of authority and a discussion of what is meant by the term "until his successor is elected and qualified," I respectfully refer you to an opinion of my predecessor, Hon. Timothy S. Hogan, rendered March 14, 1912, found at page 1202 of volume II, of the annual report of the attorney general for 1912.

Directly answering your question, therefore, I am of the opinion that it will be the duty of the present mayor, viz: the former president pro tem. of council, to call the incoming council to order on January 1, 1916, and that there will at that time be no vacancy in the office of mayor, but that the present mayor will hold office until January 1, 1918.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1128.

ROADS AND HIGHWAYS—TOWNSHIP TRUSTEES—BONDS ISSUED PRIOR TO GOING INTO EFFECT OF CASS HIGHWAY LAW—PROCEEDS CAN BE EXPENDED FOR IMPROVING ROADS OF TOWNSHIP ROAD DISTRICT.

Township trustees are authorized to expend on the roads of a township road district the proceeds of bonds issued under sections 7033 to 7052, inclusive, G. C., as those sections stood prior to the going into effect of the Cass highway law.

COLUMBUS, OHIO, December 31, 1915.

HON. GEORGE THORNBURG, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—I have your communication of December 17, 1915, in which you call my attention to opinion No. 978 of this department, rendered to you on October 27, 1915, and relating to the sale of certain bonds of Washington township, Belmont county, the bonds being issued for the improvement of the roads of that township under section 7033 to 7052, inclusive, of the General Code of Ohio, as those sections stood prior to the going into effect of the Cass highway law.

You further call my attention to the fact that in your request for the opinion referred to above you asked me to advise you as to whether or not the township trustees could use the proceeds of the $10,000 worth of bonds and the proceeds of the remaining bonds, when sold, for the purpose of improving the roads of Washington township, and observe that opinion No. 978 does not specifically answer that part of your inquiry.

You state that the township trustees have sold the $10,000 worth of bonds, and are now about to let a contract for road improvement, which contract will involve the expenditure of the proceeds of the bonds, and that the question has now arisen as to whether the trustees have the right to let such a contract in view of the following provision found in section 303 of the Cass highway law:

> "* * * but no such organization or organizations shall contract any new obligation or obligations after the taking effect of this act, for the construction or repair of additional road or roads or the maintenance or repair of roads already improved."

You further state that from the language of opinion No. 978 you assumed that it was intended to hold therein that the trustees had authority to use the proceeds of the bond sale for the purpose of improving the roads and authority to enter into a contract for that purpose, but that since having your attention called to the fact that my former opinion does not seem to expressly cover that point, you desire a definite and specific reply covering the matter in question before further advising the trustees in the premises.

You were entirely correct in the interpretation which you placed upon my former opinion, although the matter was not therein covered by language as specific as might have been chosen.

I desire to call your attention to opinion No. 976 of this department, rendered on October 27, 1915, to Hon. Archer L. Phelps, prosecuting attorney of Trumbull county, a copy of which opinion is herewith enclosed. It was held in that opinion that sections 7033 to 7052, inclusive, of the General Code, as those sections stood prior to the going into effect of the Cass highway law, did not provide for an "organization" within the meaning of that term as used in that part of section 303 of the Cass highway law above quoted.

Applying the reasoning of that opinion to the facts in the case presented by you, it is my opinion that the township trustees of Washington township are now authorized to expend, according to law, the proceeds of the $10,000 bond issue and to enter into contracts involving the expenditure of the same for the purpose of improving the roads of the township road district, and that if, as pointed out in opinion No. 978 rendered to you, they proceed within a reasonable time to sell the remaining $40,000 of bonds authorized by a vote of the electors, they will also be authorized to so expend the proceeds arising from the sale of such bonds.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1129.

STATE HIGHWAY DEPARTMENT—FORM OF BOND FOR DIVISION ENGINEER WHEN SAME IS REQUIRED AFTER SERVICE HAS BEGUN.

Form of bond prescribed for a division engineer of the state highway department when such division engineer is not required by the state highway commissioner to give bond until after his service has begun.

COLUMBUS, OHIO, December 31, 1915.

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

DEAR SIR:—I have your communication of December 20, 1915, submitting for my approval the bonds of John R. Chamberlin, deputy highway commissioner, and Nicholas Koehler, division engineer in your department.

In so far as the bond of Mr. Chamberlin is concerned, permit me to call your attention to the fact, as pointed out in opinion No. 988 of this department, rendered to you on October 29, 1915, that the statute does not require me to approve the form of the bonds of deputy highway commissioners.

In so far as the bond of Mr. Koehler is concerned, permit me to call your attention to opinion No. 940 of this department, rendered to you on October 16, 1915, in which opinion there was suggested a proper form of bond to be furnished by division engineers. In that opinion it was pointed out that a division engineer is not an officer and that when he is required to give a bond by the state highway commissioner, the bond should be so drawn as to indicate that he is the holder of a position rather than an office. The form of bond suggested in opinion No. 940 was drawn to meet the condition existing where a division engineer was required to give bond at the time of his appointment. That is not the condition existing with reference to Mr. Koehler, as he already holds the position of division engineer and you are now requiring him to give a bond.

This brings me to the observation that the bond of Mr. Koehler, submitted for approval, is dated December 11, 1915, but the bond seeks to bind the principal and surety for any failure on the part of the principal to faithfully discharge the duties of his position from and after September 24, 1915. It has been held that a statute which requires an officer or employe to give bond with condition for the true and faithful discharge of the duties of his office or position does not authorize a bond with condition that such officer or employe has truly and faithfully discharged such duties. Fed. Cas. No. 14663 (Gilp. 155).

While in the form of bond submitted the word "shall" is used, yet it is the manifest intention to cover a period of time beginning prior to the date of execu-

tion of the bond. In view of the fact that the statute does not authorize the taking of a bond with the condition that duties already performed have been faithfully discharged, I suggest the following as a proper form for the bond to be furnished by Mr. Kohler:

"BOND.

"STATE OF OHIO.

"Know All Men by These Presents:

"That we, Nicholas Koehler, of Grandview Heights, Ohio, as principal, and American Surety Company of New York, of 100 Broadway, New York City, New York, as surety, are held and firmly bound unto the state of Ohio in the penal sum of four thousand ($4,000) dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, assigns and successors, jointly and severally, firmly by these presents.

"The condition of the above obligation is such, That, Whereas, the said Nicholas Koehler has heretofore been duly and in accordance with law appointed division engineer of the state highway department of the state of Ohio, to serve until his incumbency in said office shall have been terminated according to law;

"Now, if the said Nicholas Koehler shall hereafter during his incumbency in said position of division engineer, faithfully discharge the duties of said position, then this obligation shall be void, otherwise it shall remain in full force and effect.

"Witness, our hands and seals, this _____ day of _____ 191__.

_____

_____

_____

_____

_____

_____"

I am returning herewith the bond of Mr. Koehler submitted by you, without my approval, but will be glad to approve the same when the bond has been redrafted in accordance with the suggestions herein made. I also return the bond of Mr. Chamberlin submitted by you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1130.

COLLATERAL INHERITANCE TAX—HOW APPORTIONED WHEN HEIRS CONTEST WILL AND COMPROMISE IS EFFECTED—TAX DETERMINED BY TERMS OF WILL.

Where heirs contest the probate of a will and a compromise is reached whereby the whole estate is divided between devisees and legatees, on the one hand, and contestants, on the other, and the will is admitted to probate as a valid will, administration to follow the terms of the compromise, the amount and apportionment of the collateral inheritance tax is determined by the terms of the will itself and the value of the inheritances created thereby, without reference to the compromise.

COLUMBUS, OHIO, December 31, 1915.

HON. CHARLES KRICHBAUM, *Probate Judge, Canton, Ohio.*

DEAR SIR:—I am in receipt of your letter of December 10, 1915, requesting my opinion upon the following facts:

> "B died testate, unmarried and leaving brothers and sisters. By the terms of his will numerous bequests were made to neighbors. The brothers and sisters contested the will; but in the course of the trial of the action an agreement was arrived at by the terms of which the devisees and the relatives divided the estate regardless of the terms of the will. The court thereupon charged the jury, in accordance with the statute, that the will was valid and must stand as admitted to probate.
>
> "On what basis is the collateral inheritance tax to be computed under these circumstances?"

Upon a somewhat similar but not identical statement of facts my predecessor in an opinion to the prosecuting attorney of Hamilton county, under date of December 19, 1913, held that the title of the contestors being one of inheritance, the tax was to be assessed against their respective shares if not otherwise exempt, although the amount thereof was determined by the agreement and not by the will. In short, where the contestors as well as the contestants are all collateral relatives, the tax is to assessed against all their shares notwithstanding the agreement, but in accordance with the distribution fixed thereby; so that assuming a simple case, if the sole legatee were a brother and the contestant were another brother, and the agreement were to divide the estate equally, the tax would be computed upon the shares of each as fixed by the agreement, over and above the sum of five hundred dollars.

I agree with my predecessor in the main and perhaps the only point passed upon by him in his opinion; that is to say, I agree that the making of the compromise does not deprive the portion of the estate passing to the contestors thereunder of the character of inheritance and thus exempt it from the tax. It is clear in my mind, upon the authorities referred to by my predecessor in his opinion, which will be found at page 1444 of the annual report of this department for the year 1913, Vol. 2, that no part of the estate can become exempt from taxation solely by reason of the making of an agreement of this character. Such a conclusion affords a partial answer to the question submitted by you. It is certain that the tax must be collected in the case you submit—all parties to the agreement being collateral rela-

tives—upon the entire estate except as affected by exemptions, and not merely upon that portion thereof which is to be paid or has been paid to the devisees and legatees under the will in pursuance of the agreement.

But there is another question which is material and must be answered in connection with your general query, upon which the opinion of my predecessor is not so satisfactory to me. Though the point was apparently not passed upon in the opinion, the implication from the authorities cited and the reasoning adopted by my predecessor in the opinion referred to is that the tax shall be computed upon the respective shares of the takers, under the agreement, as inheritances. This is the holding of the supreme court of Pennsylvania in the case of In re Peppers Estate, 159 Pa. St., 508, which has been followed in other states. The contrary doctrine is maintained by the supreme court of Massachusetts in the case of Baxter v. Treasurer and Receiver General, 209 Mass., 459, wherein it is held that under circumstances of this character, where the will is sustained, the property is to be regarded as having passed first to the devisees and legatees under the will, so that what ultimately becomes of it under the agreement is subsequent to the vesting of the inheritance and in fact is not an inheritance at all. Upon this theory the tax is to be based upon the respective shares as they would have passed under the will and the exemptions deducted in accordance therewith without making any allowance or deduction for or on account of the amounts paid to contestors. The difference between the two rules is therefore material as affecting the amount of the tax, as determined by the exemptions to be deducted. In a case in which the contestors were direct heirs the difference would be even greater, for in that event, under the Pennsylvania theory, their shares would be exempted entirely and there would be a corresponding reduction in the tax charged against the entire estate, while under the Massachusetts law, the fact that under the agreement and not under the will a part of the estate might go to a direct relative would be immaterial.

Upon very careful consideration I am inclined to prefer the reasoning of the Massachusetts court. As stated in Blakemore and Bancroft on Inheritance Tax Law, section 106, "It would seem that the Massachusetts doctrine is preferable, both on principle and as a practical matter of policy. The other view is an open inducement to unscrupulous persons to make such collusive arrangement as may save their pocketbooks at the expense of their conscience."

The statute of Massachusetts is not materially different in phraseology from the statute of Ohio in respect to the question under consideration.

It is my conclusion, therefore, that under the circumstances described by you the tax should be computed upon the values of the several inheritances as determined by the will, deducting only the exemptions thereon and the costs, if any, paid out of the estate in connection with the litigation, as well as other costs of administration.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1131.

COLLATERAL INHERITANCE TAX—UNITED STATES BONDS INCLUDED IN AN INVENTORY OF AN ESTATE ARE TO BE CONSIDERED IN DETERMINING THE AMOUNT OF SAID TAX.

The fact that United States bonds constitute a part of an inheritance passing to collateral heirs does not affect the amount of the collateral inheritance tax.

COLUMBUS, OHIO, December 31, 1915.

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

DEAR SIR:—I am in receipt of your letter of December 21, 1915, submitting for my opinion the following question:

> "Are United States government bonds which were included in an inventory filed in the probate court of a county taxable under the collateral inheritance tax law of this state?"

No property as such is taxable under the collateral inheritance tax law. The subject of the tax is the privilege of inheriting; that is, taking property by will or under the intestate laws of the state, or by deed or other instrument of conveyance intended to take effect at the death of the owner thereof. There are exemptions from the collateral inheritance tax, and it would be sufficient to state that none of them would include any part of an inheritance on the ground that the same is composed of United States bonds. It may, however, be stated also that none of the exemptions from the tax are based upon the character of the property transmitted, but upon the character of the taker or the purpose of the bequest.

The one serious question involved in your inquiry arises under the language of the first section of the inheritance tax law, G. C., section 5331 as amended, 103 O. L., 463. The section provides that:

> "All property within the jurisdiction of this state, * * * which pass by will or by the intestate laws of this state * * * to a person * * * shall be liable to a tax of five per cent. of its value above the sum of five hundred dollars."

The query is thereby raised as to whether United States bonds are "within the jurisdiction of this state," within the meaning of this section. If the meaning of this phrase is to be determined by the analogy of the general property tax laws the answer must be in the negative, because it must be conceded that the state is without power to tax bonds of the United States as property unless with the consent of the United States evidenced by an act of congress. In my opinion, however, the meaning of the phrase in question may not be thus narrowed. I think the word "jurisdiction" implies rather the idea of territoriality than the notion of power, especially in view of the fact that it is not the property as such which is taxed but the privilege of inheritance; so that though specific property be sold to pay debts, or otherwise, and a residue merely passed to the inheritor, he is under this law taxed on his inheritance and not upon the property itself.

There can be no doubt that the state may tax the privilege of inheriting United States bonds as well as the privilege of inheriting any other property, though it might not tax the bonds themselves.

For all these reasons, as well as for the primary reason above suggested, and

the language of the act, including as well that of the sections containing the machinery of the assessment of the tax as the exemption provision thereof which are consistent with such a conclusion, I advise that United States bonds included in the inventory of an estate are to be considered in determining the value of a taxable inheritance therein, under the collateral inheritance tax laws of this state.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1132.

COUNTY BOARD OF EDUCATION—REQUIREMENTS OF SECTION 4736, G. C., IN CREATING A NEW SCHOOL DISTRICT—WRITTEN NOTICE TO DISTRICT BOARDS AFFECTED—MAPS MUST BE FILED WITH COUNTY AUDITOR—NOTICE POSTED OR PRINTED—REMONSTRANCE MAY BE FILED AGAINST TRANSFER.

In creating a new school district under authority of the latter part of section 4736, *G. C., as amended in* 106 *O. L.,* 397, *the county board of education is required, as a condition precedent to the exercise of such authority, to give written notice to the boards of education of the districts to be affected by the transfer of territory, as required by provision of the first part of said section.*

Under provision of the first part of said section 4736, *G. C., as amended, taken in connection with the provisions of section* 4692, *G. C., as amended in* 106 *O. L.,* 397, *said transfer of territory will not take effect until a map is filed with the auditor of the county in which the territory to be transferred is situated, showing the boundaries of the territory to be transferred, and until a notice of such proposed transfer has been posted in three conspicuous places in the district or districts proposed to be transferred, or printed in a paper of general circulation in said county for ten days, and such transfer shall not take effect if a majority of the qualified electors residing in the territory to be transferred, shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer.*

COLUMBUS, OHIO, December 31, 1915.

HON. A. B. UNDERWOOD, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—In your letter under date of December 13th you request my opinion as follows:

> "In the *creation* of a new school district, under the last half of section 4736, G. C., three questions have arisen upon which your opinion is desired, to wit:
>
> "1. What notice, if any, is required to be given to the school boards affected?
>
> "2. What notice, if any, is required to be given to the people of the territory affected?
>
> "3. Is the clause permitting a remonstrance, as provided for in the first half of section 4736, G. C., intended to apply in case of the *creation* of a new school district under the second half of said section?"

Section 4736, G. C., as amended in 106 O. L., 397, provides:

"The county board of education shall arrange the school districts according to topography and population in order that the schools may be most easily accessible to the pupils, and shall file with the board or boards of education in the territory affected, a written notice of such proposed arrangement; which said arrangement shall be carried into effect as proposed unless, within thirty days after the filing of such notice with the board or boards of education, a majority of the qualified electors of the territory affected by such order of the county board, file a written remonstrance with the county board against the arrangement of school districts so proposed. The county board of education is hereby authorized to create a school district from one or more school districts or parts thereof. The county board of education is authorized to appoint a board of education for such newly created school district and direct an equitable division of the funds or indebtedness belonging to the newly created district. Members of the boards of education of the newly created district shall thereafter be elected at the same time and in the same manner as the boards of education of the village and rural districts."

Under provision of said section 4736, G. C., as amended in 104 O. L., 138, and as in force prior to the date when said section as amended in 106 Ohio Laws became effective, the county board of education had power to change district lines and to transfer territory from one rural or village school district to another.

The general assembly in 1915, by the same act in which it amended section 4736, G. C., carried the above provision as well as the subsequent provisions of said statute, as found in 104 O. L., prescribing the conditions under which the aforesaid power might be exercised, into section 4692, G. C. This section as amended in 106 O. L., 397, and as now in force provides:

"The county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district. Such transfer shall not take effect until a map is filed with the auditor of the county in which the transferred territory is situated, showing the boundaries of the territory transferred, and a notice of such proposed transfer has been posted in three conspicuous places in the district or districts proposed to be transferred, or printed in a paper of general circulation in said county, for ten days; nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer. If an entire district be transferred the board of education of such district is thereby abolished or if a member of the board of education lives in a part of a school district transferred the member becomes a nonresident of the school district from which he was transferred and ceases to be a member of such board of education. The legal title of the property of the board of education shall become vested in the board of education of the school district to which such territory is transferred. The county board of education is authorized to make an equitable division of the school funds of the transferred territory either in the treasury or in the course of collection. And also an equitable division of the indebtedness of the transferred territory."

It will be observed, however, that under provision of section 4736, G. C., as amended in 106 O. L., and as now in force, the county board of education has power to arrange the school districts of the county school district according to topography and population in order that the schools may be most easily accessible to the pupils and as a condition precedent to the making of such an arrangement said county board is required to file with the boards of education in the territory affected a written notice of such proposed arrangement and said arrangement shall be carried into effect as proposed unless, within thirty days after the filing of such notice with said boards of education, a majority of the qualified electors of the territory to be affected by the order of the county board file a written remonstrance with said county board against said proposed arrangement.

It is evident that in arranging school districts under authority of section 4736, G. C., as amended, the county board must necessarily exercise the powers conferred upon it by the above provisions of section 4692, G. C. The provisions of the two sections must therefore be read together. The legislature in amending section 4736, G. C., as found in 106 Ohio Laws, extended the authority heretofore exercised by the county board under provisions of said section as amended in 104 Ohio Laws, by providing in the latter part of said section that "the county board of education is hereby authorized to create a school district from one or more school districts or parts thereof."

While it may be argued that inasmuch as the latter provision of said statute follows the provision requiring the county board of education as a condition precedent to the arrangement of the school districts of the county school district, to file with the boards of education of the districts to be affected by changes in district lines and transfers of territory, written notice of such proposed arrangement, it is not intended that such notice and opportunity to the electors of such districts to file objections to such proposed arrangement shall be given by the county board of education in the exercise of the authority conferred by said latter provision, I think that inasmuch as the authority conferred by said latter provision is merely an extension of the authority conferred by the former provisions of said section, and in view of the provisions of both section 4736 and section 4692 of the General Code as amended in 106 Ohio Laws, requiring the giving of notice and the affording of an opportunity to the electors of the districts to be affected by changes proposed to be made under authority of said sections, as conditions precedent to the exercise of such authority, it cannot be said that the county board of education may create a new district from one or more school districts or parts thereof, and thus exercise the extreme power conferred by said latter provision of said section 4736, G. C., without being required to give the notice to the boards of education of the districts to be affected by said proposed transfer of territory and without affording the opportunity to the electors of such districts to file a remonstrance against said proposed arrangement as provided for in the first part of said section.

I am of the opinion therefore in answer to your first question that, in the creating of a new school district under authority of the latter provision of said section 4736, G. C., as amended in 106 O. L., 397, the county board of education is required, as a condition precedent to the exercise of such authority, to give written notice to the boards of education of the districts to be affected by such transfer of territory as required by provision of the first part of said section.

Replying to your second and third questions I am of the opinion that under provision of the first part of said section 4736, G. C., as amended, taken in connection with the above provisions of section 4692, G. C., said transfer of territory will not take effect until a map is filed with the auditor of the county in which the territory to be transferred is situated, showing the boundaries of the territory to be transferred, and until a notice of such proposed transfer has been posted in three

conspicuous places in the district or districts proposed to be transferred, or printed in a paper of general circulation in said county for ten days, and that such transfer shall not take effect if a majority of the qualified electors residing in the territory to be transferred, shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1133.

CLERK OF BOARD OF EDUCATION—A NON-RESIDENT OF A SCHOOL DISTRICT MAY NOT HOLD SUCH AN OFFICE.

A non-resident of a school district may not hold the office of clerk of the board of education of said district.

COLUMBUS, OHIO, December 31, 1915.

HON. D. F. MILLS, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—I have your letter under date of December 3d, which is as follows:

> "In Jackson township, Shelby county, Ohio, there are two school districts, namely, the Jackson Center village school district, and the Jackson township rural district. The Jackson township rural school district comprises all the territory in said township outside of the Jackson Center village school district. The township clerk resides in the territory included in the Jackson Center village school district; the board of education of the Jackson township rural school district desires to appoint the township clerk as clerk of their board of education.
>
> "I would like to have your opinion as to whether or not the fact that the township clerk does not reside in the district will disqualify him from serving as clerk of the township board of education."

Under provision of section 4747, G. C., as amended in 104 O. L., 133, a person who may or may not be a member of the board of education may be elected as clerk of said board by the members thereof. Section 4774, G. C., provides that:

> "Before entering upon the duties of his office, the clerk of each board of education shall execute a bond in an amount and with surety to be approved by the board, payable to the state, conditioned for the faithful performance of all the official duties required of him."

In so far as the compatibility of the two offices is concerned, the duties of township clerk in no way conflict with the duties of the office of clerk of the board of education of the township rural school district and it is interesting to note in this connection that under provision of section 4747, G. C., as in force prior to its amendment in 104 Ohio Laws, the clerk of the township was ex-officio clerk of the board of education of the township school district.

Your inquiry, however, is confined to the question as to whether or not the

fact that the person, who holds the office of township clerk, is a non-resident of the Jackson township rural school district disqualifies such person from holding the office of clerk of the board of education of said school district.

Section 4 of article XV of the constitution as adopted November 4, 1913 (103 O. L., 992), provides in part:

> "No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector."

Under provision of section 1 of article V of the constitution of Ohio, as modified by the fourteenth and fifteenth articles of amendments to the federal constitution, every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township or ward in which he resides, such time as may be provided by law, *shall have the qualifications of an elector, and be entitled to vote at all elections.*

Sections 4861, 4862 and 4863 of the General Code, as found in the chapter relating to the qualifications of electors, provide as follows:

> "Sec. 4861. Every male citizen of the United States, who is of the age of twenty-one years or over, and possesses the qualifications in regard to residence hereinafter provided, shall be entitled to vote at all elections.
>
> "Sec. 4862. Every woman, born in the United States or who is the wife or daughter of a citizen of the United States, who is over twenty-one years of age and possesses the necessary qualifications in regard to residence hereinafter provided for men shall be entitled to vote and to be voted for for member of the board of education and upon no other question.
>
> "Sec. 4863. No person shall be permitted to vote at any election unless he shall have been a resident of the state for one year, resident of the county for thirty days, and, except as provided in the next section, resident of the township, village or ward of a city or village for twenty days next preceding the election at which he offers to vote."

Section 4864, G. C., provides that a person who is the head of a family and has resided in the state and in the county in which such township, village or ward of a city or village is situated the length of time required by the preceding section, and who bona fide removes with his family from a ward to another ward in such city or village, or from a ward of such city or village to a township or village in the same county, or from a township or village to a ward of a city or village in the same county, or from one township to another in the same county, shall have the right to vote in such township, village or ward of a city or village without having resided therein the length of time so prescribed by such section.

Section 4865, G. C., provides that:

> "Such voter so removing with his family from a township to a village or ward of a city or village in the same county shall not have the right to vote at any municipal election held in such city or village, unless he shall have resided therein twenty days prior to such municipal election."

Upon an examination of the above provisions of the constitution and statutes it will be observed that the right to vote at all elections in this state is limited to male citizens of the United States of the age of twenty-one years, who have been residents of this state for one year next preceding the election at which they desire

to vote, and residents of their respective counties for thirty days and, except as provided in section 4864, G. C., residents of their respective townships, villages or wards of a city or village for twenty days next preceding such election.

It will be noted, however, that while residence of the state and county and of a township or village, or ward of a city or village, for the respective lengths of time prescribed by the above provision of the statute, is a necessary qualification of an elector for the purpose of voting at any election, the above provisions of the constitution and statutes do not by their terms make residence of a school district a necessary qualification of an elector of such district.

Assuming, therefore, that the township clerk referred to in your inquiry has resided in the state and in the county and township mentioned in said inquiry the respective lengths of time required by the above provisions of the constitution and the statutes, it still remains to be determined whether the fact that he is a nonresident of Jackson township rural school district disqualifies him from serving as clerk of the board of education of such district.

Upon a careful consideration of the above provisions of the constitution taken in connection with the provisions of the statutes relating to the qualification of electors, the casting and counting of votes and the challenging of voters, I have reached the conclusion that the township clerk referred to in your inquiry is not eligible to the office of clerk of the board of education of said township rural school district for the reason that, not being a resident of said district, he is not a qualified elector thereof and is therefore disqualified from holding the office of clerk of said board of education under the above provision of section 4 of article XV of the constitution.

Section 4866, G. C., provides in part as follows:

> "All judges of election, in determining the residence of a person offering to vote, shall be governed by the following rules, so far as they may be applicable:
>
> "1. That place shall be considered the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning." * * *

Section 5055, G. C., provides:

> "Each qualified elector shall vote at the polls of the precinct in which he has a legal residence, unless otherwise directed by special provision of law."

Section 5061, G. C., provides in part:

> "If the person offering to vote is challenged as unqualified, one of the judges shall tender him the following oath: 'Do you swear that you will fully and truly answer all questions put to you, *touching your place of residence* and qualifications as an elector at this election?'
>
> * * * * * * * * * * * *
>
> "Third—If the person is challenged as unqualified on the ground that he is not a resident of the county or precinct where he offers to vote, the judges or one of them shall put the following questions:
>
> "1. How long have you resided in this precinct?
>
> * * * * * * * * * * *
>
> "6. Are you an actual resident of this precinct?"

In support of the proposition that a qualified elector of a school district must be a resident of such district I call your attention to the opinion of the court in

the case of Lehman v. McBride, 15 O. S., 573, and particularly to that part of said opinion as found at pages 597 and 598, in determining the intent and meaning to be given to the words "all elections" as found in the above provision of section 1 of article V of the constitution. The court said:

> "We are, doubtless, to give such construction to the words 'all elections,' as will be in harmony with the other clear and unmistakable provisions of the constitution on the same subject. Now, other portions of the same instrument clearly point out in what elections the several electors of the state may respectively participate, by their votes. And this is uniformly done, not by reference to the places where elections may be held, but to the character of the office to be filled by election, *and the residence of the electors.* Thus, as we have seen, senators and representatives are to be elected 'by the electors in' (that is, residing in), 'the respective counties or districts' which they directly represent in the legislative branch to which they are chosen. The governor and other executive officers of the state, 'by the electors of the state;' judges of the supreme court, 'by the electors of the state at large;' judges of the courts of common pleas, 'by the electors of their respective subdivisions;' judges of probate courts, clerks of the court of common pleas, and county officers generally, 'by the electors of each county' for which they are severally to be elected; justices of the peace, and township officers generally, 'by the electors of their respective townships;' judges, other than those provided for in the constitution, 'by the electors of the judicial district for which they may be created;' and officers in the militia, 'by the persons subject to military duty in their respective districts.' On a well-recognized rule of construction, these various provisions, which specify the portion of electors by whom the different officers shall be chosen, exclude all others from a right to vote at such elections; and are, therefore, limitations or qualifications to be carefully respected in giving a construction to the words under consideration. The general priciple which pervades the constitution on this subject, is, *that no one shall be allowed to participate in the election of officers whose jurisdiction will not extend over him, or territorially include the place of his residence;* but that the electors of each district or civil subdivision of the state, shall have the right to select their own official representatives, or public functionaries. And, keeping in view the limitations to which we have referred, there can be but little danger of misunderstanding what is meant by an elector's right *'to vote at all elections.'"*

This same rule was recognized by the supreme court of the state of New Jersey in the case of State ex rel. Allison v. Blake, 25 L. R. A., 480-486, in interpreting a similar provision of the constitution of that state.

Replying to your question I am of the opinion that inasmuch as the person referred to in your inquiry is not a resident of the rural school district mentioned in said inquiry, and is not therefore a qualified elector of said district, said person is not eligible to the office of clerk of the board of education of such district.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1134.

COUNTY SUPERINTENDENT OF SCHOOLS—AS MEMBER OF COUNTY BOARD OF SCHOOL EXAMINERS, MAY NOT TEACH IN, BE CONNECTED WITH OR BE FINANCIALLY INTERESTED IN A SUMMER SCHOOL, OR ANY SCHOOL, NOT SUPPORTED WHOLLY OR IN PART BY STATE.

The superintendent of a county school district as a member of the county board of school examiners may not teach in, be connected with or become financially interested in a summer school or any school which is not supported wholly or in part by the state.

COLUMBUS, OHIO, December 31, 1915.

HON. JOSEPH W. HORNER, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—I have your letter under date of December 4th, which is as follows:

> "Section 7811 of the school laws, provides:
>
> "'There shall be a county board of school examiners for each county, consisting of the county superintendent, one district superintendent and one other competent teacher, the latter two to be appointed by the county board of education.'
>
> "Section 7812 also provides:
>
> "'No examiners shall teach in, be connected with, or financially interested in any school which is *not* supported wholly or in part by the state, etc.'
>
> "The question is whether or not the county superintendent comes strictly under the term 'examiner' or whether or not he would be permitted to teach in a summer school which is *not* supported wholly or in part by the state, or in other words, whether it would be illegal for a county superintendent to teach in any summer school that is *not* supported wholly or in part by the state?"

Under provision of section 7811, G. C., as amended in 104 O. L., 102, and as quoted by you, the superintendent of the county school district is ex-officio a member of the county board of school examiners, and the authority to appoint the other two members of said board is vested in the county board of education.

By the same act of the legislature amending section 7811, G. C., section 7812, G. C., was amended and the only change in said latter section affected by said amendment was to vest in the county board of education instead of the probate judge of the county the authority to remove an examiner and appoint his successor in case it is ascertained by said county board of education that such examiner is connected with or interested in any school not under state control, or is employed in any such institution in his own county, or becomes an agent of or interested in any book company or journal, or fails to hold the necessary teacher's certificate, or has removed from the county.

Inasmuch as the legislature, in amending said section 7812, did not except the county superintendent as a member of the county board of school examiners from the inhibitions therein provided, it seems clear that said officer is subject to the provisions of said section the same as the other two members of said board of school examiners.

I am of the opinion, therefore, in answer to your question, that under the plain provisions of said section 7812, G. C., as amended, the county superintendent as a

member of the county board of school examiners may not teach in, be connected with or become financially interested in a summer school or any school which is not supported wholly or in part by the state, and in case the county board of education ascertains that said county superintendent as a member of said board of examiners sustains any of said relations to such an institution, it will be the duty of said county board of education to remove said county superintendent from his office and appoint a successor to said office.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1135.

COUNTY BOARD OF EDUCATION—MAY TRANSFER A PART OR ALL OF A SCHOOL DISTRICT OF COUNTY DISTRICT TO AN ADJOINING DISTRICT OR DISTRICTS OF SAID COUNTY SCHOOL DISTRICT—REGARDLESS OF ELECTION HELD PRIOR TO TIME OF SUCH TRANSFER AT WHICH ELECTION CENTRALIZATION IS FAVORED —WHEN TRANSFERRED TERRITORY WILL BE LIABLE FOR BONDED INDEBTEDNESS CREATED BY ELECTORS OF A SCHOOL DISTRICT BY SECTION 7625, G. C.

A county board of education acting under authority of section 4692, G. C., as amended in 106 O. L., 397, and in compliance with its requirements, may transfer a part or all of a school district of the county school district to an adjoining district or districts of said county school district, and this may be done regardless of the fact that at an election held prior to the time of such transfer the electors of the district to which such territory is transferred, voted in favor of centralization.

If the electors of a school district vote in favor of a bond issue under authority of section 7625, G. C., and for the purposes therein mentioned, and thereafter the county board of education transfers a part or all of another school district to such district, upon said transfer being effected, said territory thus transferred will become a part of said district for all school purposes and will, therefore, be liable for its share of the bonded indebtedness so created.

COLUMBUS, OHIO, December 31, 1915.

HON. ADDISON P. MINSHALL, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—In your letter under date of December 13th, you request my opinion as follows:

> "I am desirous of having your opinion on the following proposition:
>
> "At the general election in November last the electors of the Green township rural school district of Ross county, Ohio, voted in favor of the centralization of the schools of said district. The board is now contemplating the submission of a bond issue, for the purpose of procuring a site and erecting a suitable building thereon, to the electors of said district.
>
> "Can the county board of education transfer a part of another township rural school district to the Green township rural school district after centralization has been carried?
>
> "If the bond issue, about to be voted upon, carries, and a part of an-

other district is transferred to the said centralized district, will the bond issue be a liability upon the territory to be transferred to the centralized district as well as upon the territory of the centralized district?"

Section 4692, G. C., as amended in 106 O. L., 397, provides:

"The county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district. Such transfer shall not take effect until a map is filed with the auditor of the county in which the transferred territory is situated, showing the boundaries of the territory transferred, and a notice of such proposed transfer has been posted in three conspicuous places in the district or districts proposed to be transferred, or printed in a paper of general circulation in said county, for ten days; nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer. If an entire district be transferred the board of education of such district is thereby abolished or if a member of the board of education lives in a part of a school district transferred the member becomes a non-resident of the school district from which he was transferred and ceases to be a member of such board of education. The legal title of the property of the board of education shall become vested in the board of education of the school district to which such territory is transferred. The county board of education is authorized to make an equitable division of the school funds of the transferred territory either in the treasury or in the course of collection. And also an equitable division of the indebtedness of the transferred territory."

It will be observed that the county board of education, acting under the above provisions of the statute and in compliance with the requirements of said provisions, may transfer a part or all of a school district of the county school district to an adjoining district or districts of said county school district.

The provisions of this statute are in no way related to or dependent upon the provisions of section 4726, G. C., as amended in 104 O. L., 139, and as supplemented by section 4726-1, G. C., as found in 106 O. L., 442, which sections provide for the submitting of the question of centralization by one or more rural boards of education of a township to the qualified electors of the rural school district or rural school districts of such township.

I am of the opinion, therefore, in answer to your first question that your county board of education, acting under authority of section 4692, G. C., as amended, and in compliance with its requirements, may transfer a part of the township rural school district referred to in said inquiry to the Green township rural school district, and that this may be done regardless of the fact that at the last general election, the electors of said Green township rural school district voted in favor of centralization.

Your second question has been answered in opinion No. 919 of this department rendered to Hon. Earl K. Solether, prosecuting attorney of Wood county, under date of October 13, 1915. In said opinion it was held that where a village school district within a county school district votes in favor of a bond issue under authority of section 7625, G. C., for the purposes therein mentioned, and thereafter the county board of education transfers a part of a rural school district within said county school district to said village school district, upon said transfer being effected, said

part of said rural district will become a part of said village school district for all school purposes and will, therefore, be liable for its share of the bonded indebtedness so created.

In keeping with said former holding I am of the opinion in answer to your second question that if the bond issue referred to in your inquiry as about to be voted upon, carries, and a part of another district is transferred to said centralized district, said part of said district so transferred will be liable for its share of said bonded indebtedness so created.

A copy of the opinion above referred to is enclosed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1136.

MUNICIPAL CORPORATION—WHERE LOCATED IN MORE THAN ONE COUNTY—TAXES AND TAXATION—ELECTION OF ASSESSOR—ONE SHOULD BE ELECTED IN EACH OF SEVERAL PARTS OF SAID MUNICIPAL CORPORATION AS LOCATED IN SEVERAL COUNTIES.

Under provision of section 17 of the so-called Parrett-Whittemore law, being section 3349, G. C., 106 O. L., 250, where a municipal corporation is located in more than one county, each of the several parts of said municipal corporation as located in the several counties respectively, constitutes an assessment district in which an assessor should be elected as provided in said section.

COLUMBUS, OHIO, December 31, 1915.

HON. C. H. CURTISS, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—In your letter under date of December 24th you request my opinion as follows:

> "I desire to call your attention to section 17 of the act: 'To provide for the listing and valuation of property for purposes of taxation' and ask for your construction of such section which is found on page 250, 105 Ohio Laws, as relating to a situation we have in this county and that of Summit county in relation to an assessor or assessors for the village of Mogadore; which is located partly in Summit county and partly in Portage county, the greater portion being in Summit county.
>
> "By a construction placed on this section by the authorities in Summit county (as I understand) only one assessor was elected for the village of Mogadore; he being elected there by the electors of said village residents of both Portage and Summit counties.
>
> "The person elected to this office resides on the Summit county side. The question being whether he is legally elected assessor for the whole village including the parts in each county or whether under the situation a vacancy exists on the Portage county side, or perhaps on both sides.
>
> "A further question arises, if under this section, as would seem to be indicated by the latter part of line 6 and the first part of line 7 of such section this person is legally elected assessor for the whole village whether then he must give one bond or two bonds as such assessor; if one bond, with which auditor the same shall be filed and approved."

Section 17 of the so-called Parrett-Whittemore law, being section 3349 of the General Code, as found in 106 O. L., 250, provides in part as follows:

> "At the regular election to be held in November, 1915, and biennially thereafter, assessors shall be elected in the manner provided by law for the election of ward, district, city, village and township officers as follows: In municipal corporations divided into wards, one assessor shall be elected in each ward; in villages one assessor shall be elected; in cities not divided into wards, the board of deputy state supervisors of elections or the board of deputy state supervisors and inspectors of elections, as the case may be, shall, acting in conjunction with the county auditor, within ten days after this act shall become effective, divide such cities or such part or parts thereof as may be located in their county, into such number of assessment districts as in the judgment of the county auditor may be necessary in order to provide for the assessment of all the property therein; a division so fixed shall remain in effect for a period of four years, at the expiration of which and quadrennially thereafter a like division shall be made in the same manner and by the same authority. One assessor shall, at the time specified in this section, be elected in each assessment district so created; provided, however, that nothing therein shall be so construed as to require a division of any municipal corporation or part thereof into assessment districts when, in the judgment of the county auditor, such division is not necessary, in which event one assessor shall be elected in the entire municipal corporation or in that part thereof which may be located in one county as the case may be;"

Under the above provision of the statute it will be observed that where a municipal corporation is located in more than one county, each of the several parts of said municipal corporation as located in the several counties respectively, constitutes an assessment district in which an assessor should have been elected as provided in that part of section 17 above quoted.

Inasmuch as a part of the village of Mogadore is located in Portage county and the remaining part of said village is located in Summit county, each of said parts of said village constitutes a separate assessment district in which an assessor should have been elected as above provided.

It follows therefore that said village as a whole could not be considered as an assessment district and the action of the electors in attempting to elect an assessor for the entire village is without legal effect.

The vacancy in the assessment district comprising that part of said village located in Portage county should be filled by the auditor of said county under authority of section 22 of the act and in the manner therein provided. In like manner the vacancy in the assessment district comprising that part of said village located in Summit county should be filled by the auditor of said county.

The conclusion reached in answer to your first question disposes of the other question submitted by you.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1137.

COUNTY TREASURER MAY NOT ACT AS MEMBER OF BOARD OF EDUCATION OF VILLAGE SCHOOL DISTRICT LOCATED IN SUCH COUNTY—OFFICES INCOMPATIBLE.

The treasurer of a county may not act as a member of the board of education of a village school district located in such county.

COLUMBUS, OHIO, December 31, 1915.

HON. WILLIAM C. HUDSON, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR:—In your letter under date of December 22d you request my opinion as follows:

> "Please give your opinion on the following: Is a county treasurer disqualified from acting as a member of a village board of education in the county of which he is treasurer?"

Section 5649-3b of the General Code, as amended in 106 O. L., 180, provides in part as follows:

> "There is hereby created in each county a board for the annual adjustment of the rates of taxation and fixing the amount of taxes to be levied therein, to be known as the budget commissioners. The county auditor, the county treasurer and the prosecuting attorney shall constitute such board."

Section 5649-3c of the General Code, makes it the duty of the county auditor to lay before the budget commissioners the annual budgets submitted to him by the boards and officers named in section 5649-3a, G. C., together with an estimate to be prepared by the auditor of the amount of money to be raised for state purposes in each taxing district in the county, and such other information as the budget commissioners may request, or the tax commission of Ohio may prescribe. Said section further provides that:

> "The budget commissioners shall examine such budgets and estimates prepared by the county auditor, and ascertain the total amount proposed to be raised in each taxing district for state, county, township, city, village, school district, or other taxing district purposes. If the budget commissioners find that the total amount of taxes to be raised therein does not exceed the amount authorized to be raised in any township, city, village, school district, or other taxing district in the county, the fact shall be certified to the county auditor. If such total is found to exceed such authorized amount in any township, city, village, school district, or other taxing district in the county, the budget commissioners shall adjust the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets, and may reduce any or all the items in any such budget, but shall not increase the total of any such budget, or any item therein. The budget commissioners shall reduce the

estimates contained in any or all such budgets by such amount or amounts as will bring the total for each township, city, village, school district, or other taxing district within the limits provided by law."

You will readily observe that the duties of the county treasurer as a member of the board of budget commissioners of the county would conflict with the duties of a member of the board of education of a school district in such county, for the reason that the budget commissioners, in considering the annual budget of the various taxing authorities of the county and in limiting the amount of taxes to be raised in each of the several taxing districts of such county to the amount authorized by law to be raised in such taxing district, acts as a check on said taxing authorities.

It follows, therefore, that inasmuch as the board of education of a school district is one of the taxing authorities of the county in which such district is located, the office of county treasurer is incompatible with the office of member of the board of education of such school district, under the rule laid down by the court in the case of State ex rel. v. Gebert, 12 C. C. (n. s.), 294.

I am of the opinion therefore in answer to your question that the treasurer of a county may not act as a member of the board of education of a village school district located in such county.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1138.

CASS HIGHWAY LAW—COUNTY HIGHWAY SUPERINTENDENTS—AUTHORIZED TO PUBLISH ALL CONTENTS OF PAMPHLET IN REGARD TO TRAFFIC RULES AND REGULATIONS SENT OUT BY HIGHWAY COMMISSIONER, INCLUDING FOREWORD AND APPENDIX.

Where the state highway commissioner, in publishing a set of traffic rules and regulations as authorized by section 7246, G. C., included in the pamphlet containing the same a foreword and an appendix containing several sections of the General Code and the pamphlet and accompanying communication to county highway superintendents contained nothing indicating that the entire contents of the pamphlet were not regarded as a part of the traffic rules and regulations, the county highway superintendents were authorized to cause to be published all the contents of the pamphlet.

COLUMBUS, OHIO, December 31, 1915.

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

GENTLEMEN:—I have your communication of December 7, 1915, which communication reads as follows:

"Section 7246, G. C. (Sec. 249 of the Cass highway act), requires the state highway commissioner to prepare and publish a set of traffic rules and regulations, and section 7478, G. C. (Sec. 251 of the Cass highway act), provides that the state highway commissioner shall furnish the county high-

way superintendent with a copy of the rules and regulations promulgated by said state highway commissioner, and directs that official to publish the same in a newspaper in his county.

"A week or so ago this department received a copy of a newspaper containing the rules and regulations, with the request that we measure same. Since that time this department has received two other newspapers with the request for measurement, but in these instances the advertisement contains the entire contents of the pamphlet sent out by the state highway commissioner entitled, 'Traffic rules and regulations.' We enclose herewith copy of the pamphlet, together with the letter of the state highway commissioner submitting the same to the county highway superintendent, and we would ask you for a ruling as to whether or not the law contemplates the publication of all the matter as given in the pamphlet including the highway commissioner's 'Foreword,' page 3, and the quotation of the laws under the head of 'Appendix' as same appears on pages 16, 17, 18, 19, 20, 21 and 22.

"*Question*: Should the advertisement, as required to be published by section 7478, G. C., embrace only the rules and regulations as set forth in the pamphlet commencing at page 5 and ending at page 15, or should the entire text of the pamphlet be published?

"*Question*: If you should hold that only the rules and regulations are necessary, should findings for recovery be made if the entire pamphlet was published and paid for, and if so, against whom should the excess finding for recovery be made, the publisher of the newspaper or the officer who authorized the publication?"

Section 7246, G. C., referred to by you, requires the state highway commissioner to prepare and publish a set of traffic rules and regulations governing the use of and traffic on all state roads.

Section 7478, G. C., provides that the state highway commissioner shall furnish the county highway superintendent with a copy of the rules and regulations promulgated by said state highway commissioner and applicable to his county, and the county highway superintendent is required to cause the rules and regulations so furnished by said highway commisssioner, to be published at least once each week for two successive weeks in a newspaper published and of general circulation in said county, if there be any such paper published in said county, but if there be no newspaper published in said county then in a newspaper having general circulation in said county.

In pursuance of the duty enjoined upon him by section 7246, G. C., it appears that the state highway commissioner did prepare a set of traffic rules and regulations. These traffic rules and regulations consist of nine articles, containing a total of seventy-two sections. It is manifest that the publication of these traffic rules and regulations to be made by the state highway commissioner, under authority of section 7246, G. C., is not the newspaper publication referred to in section 7478, G. C., and the state highway commissioner, in performing the duty of publishing the traffic rules and regulations prepared by him exercised this authority and performed this duty by printing such traffic rules and regulations in a small pamphlet suitable for general distribution.

The first page of the cover of this pamphlet bears the following title:

"Ohio state highway department, Columbus, Ohio. Traffic rules and regulations covering traffic on the public highways of Ohio. These rules

and regulations are effective on and after December 5, 1915. Prepared in accordance with sections 7246 and 7478 of the General Code. Clinton Cowen, state highway commissioner. November, 1915."

This title is repeated on page 1 of the pamphlet and pages 3 and 4 are taken up by a foreword, which foreword contains a reference to section 7246, G. C., and a brief statement of the sources from which the rules and regulations are derived and an acknowledgment of the assistance rendered by certain persons in their preparation. Pages 5 to 15, inclusive, of the pamphlet contain the rules and regulations, and pages 16 to 22, inclusive, contain an appendix. This appendix consists of 18 sections of the General Code of Ohio, the sections in question being those relating to the use of the highways of the state. So far as the title is concerned, it might be well to observe that the traffic rules and regulations, as pointed out in a former opinion of this department, are effective only on state roads and not on all of the public highways of the state. This is not material, however, as the title does not serve to enlarge the scope of the rules and regulations, neither does the use of the expression "public highways" serve to invalidate the rules and regulations in so far as the use of and traffic on state roads are concerned. The statement in the title that the rules and regulations are effective on and after December 5, 1915, must, of course, be read in the light of the provision of section 7246, G. C., to the effect that the rules and regulations shall become effective thirty days after publication. The only effect, therefore, of the statement that the rules and regulations are effective on and after December 5, 1915, is to prevent their going into effect before that date, even in those cases where publication might have been made more than thirty days before December 5th.

A careful study of the rules and regulations and of the appendix, discloses the fact that practically every provision found in the eighteen sections of the General Code included in such appendix, has been carried into and made a part of the traffic rules and regulations. It is manifest that the legislature did not intend that the state highway commissioner should select all or any part of the sections of the General Code applicable to highways and promulgate the same as a code of rules and regulationss for state roads. All the sections of the General Code applicable to state roads, and it may be observed that most of the sections of the General Code relating to the use of highways are of general application to all roads, were and are in full force and effect without the necessity of any adoption, promulgation or publication on the part of the state highway commissioner. It was evidently in the mind of the legislature that these sections of the General Code did not cover all the ground that should be covered and the intention was that rules and regulations covering additional ground should be adopted, promulgated and published. The state highway commissioner in the performance of his duty has seen fit to restate in simple form, certain of the statutory requirements already in force.

From the above it must be concluded that neither the foreword nor the appendix, containing quotations from the General Code of Ohio, strictly speaking, constitute any part of the traffic rules and regulations. While it was entirely proper to include the appendix and also the foreword in any pamphlet that might be published by the state highway commissioner for general distribution, yet the reason for making a newspaper publication of the rules and regulations does not exist as to the foreword or the sections of the General Code found in the appendix. The object of the newspaper publication required by section 7478, G. C., was manifestly to bring to the knowledge of the public the traffic rules and regulations prescribed by the state highway commissioner. No publication in a newspaper, however, was necessary to bring to the knowledge of the public the sections of the General Code contained in the appendix.

In a prosecution under section 13421-17, G. C., for violating the traffic rules and regulations prescribed by the state highway commissioner, it might be a good defense to show that the traffic rules and regulations in question had not been published in the county in which the prosecution was had, but in a prosecution for violating any one of the sections of the General Code found in the appendix, the defendant could not be heard to complain that such section of the General Code had not been published in a newspaper in that county.

Your communication, however, does not present so much a question of what should have been included in the rules and regulations or what, as a matter of law, constitutes the rules and regulations, as it does a question of what construction county highway superintendents and newspaper publishers were entitled to place upon the communication of the state highway commissioner and the pamphlet enclosed therewith.

The communication addressed by the state highway commissioner to each county highway superintendent in the state and accompanying the pamphlet referred to above, read as follows:

> "We are sending you herewith a copy of the traffic rules and regulations prepared, published and furnished by this department in accordance with sections 7246 and 7478 of the General Code of Ohio. Additional copies are being sent you under separate cover for distribution by you.
>
> "You will note that section 7478 of the Code requires that you have these rules and regulations published at least once each week for two consecutive weeks in a newspaper published and of general circulation in your county.
>
> "I suggest that you familiarize yourself with sections 7246, 7478 and 13421-17 of the General Code, in addition to the rules themselves, in order that these rules may be of the greatest value to the public."

It will be noted that this communication refers to a copy of the traffic rules and regulations, but the enclosure was the pamphlet in question. As previously noted, the title of this pamphlet appeared on the first page of the cover and also on page one, and there was nothing to indicate that all that followed was not regarded by the state highway commissioner as a part of the traffic rules and regulations. In other words, there was nothing, either in the pamphlet or the accompanying communication, to indicate, either to the county highway superintendent or to the publisher, that the state highway commissioner did not intend to incorporate into and make a part of the rules and regulations both the foreword and the appendix.

There is no statutory limitation upon the length of the traffic rules and regulations or as to what may or may not be included therein and while it is unfortunate that there has been created a situation resulting in the incorporation in the legal advertisement of unnecessary matter, yet I am of the opinion, in view of the form in which this matter was sent out by the state highway department, that county highway superintendents were authorized to cause to be published all of the contents of the pamphlet. It therefore becomes unnecessary to answer your inquiry in regard to findings.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1139.

SUPERINTENDENT OF PUBLIC WORKS—APPROVAL, SALES OF CANAL LANDS IN VILLAGE OF WAVERLY, OHIO.

COLUMBUS, OHIO, January 3, 1916.

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

DEAR SIR:—I have your communication of December 14, 1915, transmitting to me resolutions providing for the sale of two tracts of canal lands to the following parties:

"To Charles L. Greenbaum, a portion of the abandoned Ohio canal lands in the village of Waverly, valuation..... $500 00
"To Wells S. Jones, a portion of the abandoned Ohio canal lands in the village of Waverly, valuation..... 500 00"

I find that your proceedings in these matters have been in accordance with the statutes and I am, therefore, returning the two resolutions in question with my signature attached to the duplicate copies thereof.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1140.

VILLAGE COUNCIL—BOARD OF TRUSTEES OF PUBLIC AFFAIRS—LATTER HAS AUTHORITY TO LET CONTRACT FOR CONSTRUCTION OF WATERWORKS—HOW ACTION OF COUNCIL MAY BE RATIFIED.

It is the duty of the council of a village, when it orders waterworks to be constructed, to establish a board of trustees of public affairs, and it is the duty of the mayor, subject to confirmation by council, to appoint the members of such board to hold office until the next regular election.

It is the duty of the board of trustees of public affairs to secure plans, specifications and estimates of proposed waterworks and after the expenditure therefor has been approved by council to let a contract for the work with the lowest and best bidder after advertisement as directed in section 4328, G. C.

The mayor and the clerk of the council have no authority to let a contract for the construction of waterworks.

Where council has secured plans and specifications for the waterworks and bids have been received after advertisement therefor by the village clerk, the board of trustees of public affairs may approve and ratify the action of council and the village clerk and let a contract to the lowest and best bidder.

COLUMBUS, OHIO, January 3, 1916.

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

GENTLEMEN:—I have your letter of December 13th, with enclosures, in which you request my opinion as follows:

"Section 4357, G. C., et seq., provides that when council orders waterworks * * * to be constructed, or leased, or purchased, council shall es-

tablish at such time a board of trustees of public affairs for the village, which board shall consist of three members to be, in the first instance, appointed by the mayor, subject to the confirmation of council.

"A village has issued bonds for the construction of a municipal waterworks plant and desires to enter upon the construction thereof.

"*Question* 1. Just where do the powers of council cease and those delegated to the board of public affairs begin, in the execution of the contracts for the purchase of the site and the erection of the plant?

"*Question* 2. If the council of a village has issued and sold the bonds of the village for the construction of a waterworks plant, purchased the site therefor, and awarded the contract for the construction of the plant upon receipt of bids after due advertisement as provided by law, would said contract, if signed by the mayor and clerk on behalf of the village, and by the contractor, be a valid contract as against the special fund created by the sale of bonds for such purpose?

"We enclose herewith a statement and brief prepared by the mayor of the village of Belleville, O., for your information, *which kindly return with your reply*. An early consideration and reply to the above will greatly accommodate the officials of said village."

Your inquiry arises from a situation existing in the village of Belleville, Ohio, and I quote the following statement of facts furnished by the mayor of the village, which contains a synopsis of the proceedings of council in the matter of the construction of a waterworks system:

"PROCEDURE.

"Resolution No. 8, declaring it necessary to issue bonds in the sum of $25,000.00, passed September 23, 1914, and duly published.

"Notice of election, November 3, 1914, duly published.

"Election resulted as follows:

For waterworks bond issue	194
Against	92
Total vote cast at election	308

(Some did not vote on the proposition.)

"Ordinance No. 15, to issue bonds, passed December 16, 1914. Duly published. Form —, page 383, Ellis' Municipal Code.

"Ordinance establishing board of public affairs, passed January 4, 1915. Duly published. No. 17.

"Ordinance No. 23, 'amending section 1 of ordinance No. 15', passed April 19, 1915. Changed rate of interest on bonds. Duly published. Bonds sold June 10, 1915, to Seasongood and Mayer, Cincinnati, $915.00 premium.

"Ordinance No. 31, 'To levy a tax to create a sinking fund' passed July 1, 1915. Duly published.

"Resolution 'Approving the plans and specifications' passed September 8, 1915. Same approved by the state board of health, September 23, 1915.

"Notice to contractors for bids to be received by the clerk, November 9, 1915.

"Bids received by clerk and opened and read. The engineer tabulated the bids and met with council on the evening of November 9th, but there being twenty-eight bids, and such variance, no action was taken by council on that date. Owing to the sickness and death of the wife of the engineer, A. H. Smith, the further consideration was delayed until on or about the

twenty-second day of November, at which time the mayor appointed the three men who had received the highest number of votes for members of the board of public affairs, at the November election, as members of said board for the time intervening between then and January 1, 1916. The appointment was confirmed by council, and the members took the oath of office. After some consideration they refused to further qualify by the giving of bond as required, and claimed that the whole proceeding of the clerk in advertising for bids was without authority of law, and should have been by the board, and that the board had full and complete authority to supervise the construction of the system of waterworks from the commencement.

"No resolution ordering waterworks was ever passed. * * *"

Section 4357 of the General Code, which provides for the establishment of a board of trustees of public affairs in villages, is as follows:

"In each village in which waterworks, an electric light plant, artificial or natural gas plant, or other similar public utility is situated, *or when council orders waterworks, an electric light plant, natural or artificial gas plant or other similar public utility, to be constructed,* or to be leased or purchased from any individual, company or corporation, council shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall be each elected for a term of two years."

Section 4361 of the General Code (103 O. L., 561), relating to the powers and duties of the board of trustees of public affairs, is, in part, as follows:

"The board of trustees of public affairs shall manage, conduct and control the waterworks, electric light plants, artificial or natural gas plants, or other similar public utilities, furnish supplies of water, electricity or gas, collect all water, electrical and gas rents, and appoint necessary officers, employes and agents. * * The board of trustees of public affairs shall have the same powers and perform the same duties as are possessed by, and are incumbent upon, the director of public service as provided in sections 3955, 3959, 3960, 3961, 3964, 3965, 3974, 3981, 4328, 4329, 4330, 4331, 4332, 4333, 4334 of the General Code, and all powers and duties relating to waterworks in any of these sections shall extend to and include electric light, power and gas plants and such other similar public utilities, and such boards shall have such other duties as may be prescribed by law or ordinance not inconsistent herewith. * * *"

In order, therefore, to determine the extent of the powers and duties of the board of trustees of public affairs, the sections of the General Code to which reference is made in section 4361 must be consulted.

Section 3961 of the General Code, relative to the powers of the director of public service to make certain contracts, is as follows:

"Subject to the provisions of this title, the director of public service may make contracts for the building of machinery, waterworks buildings, reservoirs and the enlargement and repair thereof, the manufacturing and laying down of pipe, the furnishing and supplying with connections all nec-

essary fire hydrants for fire department purposes, keeping them in repair, and for all other purposes necessary to the full and efficient management and construction of waterworks."

Section 4328 of the General Code, which directs the manner in which contracts shall be made by the director of public service, is as follows:

"The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

Section 4329 of the General Code provides that bids for such contracts

"shall be opened at twelve o'clock, noon, on the last day for filing them by the director of public service and publicly read by him."

also that:

"the director may reject any and all bids."

Section 4334 of the General Code provides that:

"All contracts made by the director of public service shall be executed by him in the name of the city. * * *"

It will be observed that under the language of section 4361 of the General Code, above quoted, the board of trustees of public affairs are given the same powers and duties relative to the making of contracts as are conferred upon the director of public service in cities by virtue of sections 3961, 4328, 4329 and 4334. Under these last sections it is clear that it is not only the right but also the duty of the director of public service in cities to contract for the erection of a waterworks plant and to manage and control such plant after its construction. Since the board of trustees of public affairs are by direct reference given the same power relative to making contracts as the director of public service in cities, it follows that the board of trustees should contract for and supervise the erection of a waterworks plant whenever the village council orders such waterworks to be constructed, and by ordinance directs such expenditure of money.

Although the facts submitted in the statement of the mayor of Bellville do not show that the village council ever formally ordered waterworks to be constructed, yet, since by ordinance they authorized an election to determine whether or not bonds should be issued to construct waterworks, and subsequently passed an ordinance authorizing the issuance of bonds for the construction of waterworks, and also enacted an ordinance establishing a board of public affairs, it is fair to assume that the requirement of the statute that council must first order the construction of waterworks was complied with.

Specifically answering your first question, therefore, I am of the opinion that

it is the duty of council, when it orders the construction of a waterworks plant, to immediately establish a board of trustees of public affairs for the village. It thereupon becomes the duty of such board to prepare plans and specifications looking toward the construction of the plant and submit the same to council for approval. If these plans and specifications meet the approval of council, the expenditure therefor should first be authorized and directed by ordinance of council under the provisions of section 4328, and it then becomes the duty of the board of trustees of public affairs to advertise for bids as required by law and to enter into a contract in the name of the village with the lowest and best bidder.

Replying to your second question, I am of the opinion that the provisions of section 4357 of the General Code are mandatory and that council must establish a board of trustees of public affairs whenever it orders waterworks or other like utilities to be constructed. It therefore follows that council has no authority to proceed to let the contract for the construction of such utility, and that a contract signed by the mayor and the clerk on behalf of the village and by the contractor would not be a valid contract against the special fund created by the sale of the bonds for such purpose.

It appears from the facts stated that the village did, by ordinance, make provision for a board of trustees of public affairs, but that the mayor failed to appoint the members thereof as provided in section 4358 of the General Code, and that council itself proceeded to secure the plans and specifications and to advertise for bids through the village clerk and that a number of bids were received in response to such advertisement, but that no contract has yet been let. Upon these facts the mayor of the village of Bellville raises the further question as to whether or not the board of trustees of public affairs can approve and adopt the proceedings of council in securing of plans and specifications and advertising for bids through the clerk of the village, and now enter into a valid contract with the lowest and best bidder who has submitted a bid in response to the advertisement by the village clerk.

It was clearly the legislative intent that when a village authorizes the erection of a waterworks plant or other like utility, a board of trustees of public affairs should be established, and the members thereof appointed, to take charge of the construction of said utility and to manage and control it after construction. Under the provisions of section 4328 of the General Code, it was the duty of such board to make a written contract with the lowest and best bidder *"after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the village."* If the board is satisfied with and wishes to approve the plans and specifications adopted by council, I know of no reason why they cannot acquiesce in and ratify the action of council and enter into a valid contract with the lowest and best bidder who submitted a proposal in response to the advertisement of the village clerk, provided that such notice to bidders was published for not less than two nor more than four consecutive weeks in a newspaper of general circulation in the village. The statute does not provide in so many words that the notice to bidders shall be given in the name of the board, and as the purpose of advertising for bids is to insure full publicity and give notice to prospective bidders, it seems that the purpose of the statutes in this respect has been accomplished. In view of the statement that twenty-eight bids were received there certainly can be no doubt as to the effectiveness of said advertisement.

I therefore advise you that the board of trustees of public affairs may, upon the facts presented, approve and adopt the proceedings and action of the village council and, after the passage of an ordinance by council authorizing such expenditure, the board of trustees of public affairs may enter into a lawful contract for the construction of such waterworks plant with the lowest and best bidder, whose bid

was received in response to publication of notice by the village clerk, and that such contract will be valid as against the special fund created by the sale of the bonds referred to.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1141.

APPROVAL OF TRANSCRIPT FOR BOND ISSUE OF CITY OF WAPAKONETA, OHIO.

COLUMBUS, OHIO, January 3, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

In re:—Bonds of the city of Wapakoneta in the sum of $21,000.00, consisting of two issues as follows:

Bonds to the amount of $4,500.00 issued for the purpose of paying the city's portion of Perry and Main streets improvement, consisting of ten bonds of $450.00 each, dated January 1, 1916, payable one bond each year, beginning January 1, 1918.

Bonds to the amount of $17,000.00 issued for the purpose of refunding three notes or certificates of indebtedness heretofore issued by said city in anticipation of special assessments to pay the cost and expense of improving part of Main and Perry streets, consisting of twenty bonds of $600.00 each, and ten bonds of $500.00 each, payable $1,700.00 each year commencing January 1, 1917.

I have examined the transcript of the proceedings of council and the other officers of the city of Wapakoneta relative to the issuance of the above described bonds, also the bond and coupon form and certificate attached to said transcript, and I am of the opinion that said proceedings have been regular and in conformity with law, and that said bonds, when properly executed and delivered, will constitute valid and binding obligations of said city, and I hereby certify my approval thereof. As part of the proper execution of said bonds, it is essential to their validity that they be recorded in the office of the sinking fund trustees of the city of Wapakoneta, and bear the stamp of the board of sinking fund trustees containing the words: "Recorded in the office of the sinking fund trustees," and signed by the secretary of said board. (Section 4521, G. C.)

Respectfully,
EDWARD C. TURNER,
Attorney General.

1142.

WORKMEN'S COMPENSATION ACT—PUBLIC EMPLOYES—HOW ONE PERCENTUM ASSESSMENT IS LEVIED IN TAXING DISTRICTS—WHEN STATE AND COUNTY ARE TO BE REGARDED AS UNITS—CLAIMS ARE TO BE PAID OUT OF GENERAL STATE INSURANCE FUND.

All claims arising from injury or death of public employes in the course of employment when found by the industrial commission to be justified are to be paid out of the general state insurance fund.

The statutory assessment of one percentum is to be made up from a charge of one per cent. of the amount expended for services of persons employed by the state, counties, cities, townships, incorporated villages, school districts or other taxing subdivisions, except policemen and firemen in municipalities maintaining police or firemen's pension funds.

For the purpose of the collection of the statutory assessment, the state in the first instance and the county in the second instance are to be regarded as the units.

All just claims will be paid from general state insurance fund in case of injury or death to public employes as contemplated by law, notwithstanding credit of particular subdivision when general state insurance fund is depleted, there being provision of law for subsequent assessments to replenish such credit standing.

COLUMBUS, OHIO, January 3, 1916.

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

DEAR SIR:—Permit me to reply to your letter in which you submit certain questions relative to public employes under the workmen's compensation act, which is as follows:

> "We hereby request your opinion upon the following questions pertaining to public employes under the workmen's compensation law, as enacted 103 O. L., 72, and the subsequent amendments thereto:
>
> "1. Is the general fund which was created for the protection of public employes by the statutory assessment of one percentum of the money expended by the state and each taxing district therein to be considered the unit from which claims arising under said act are to be paid?
>
> "2. How is the statutory assessment of one percentum to be made?
>
> "3. Is the state, county, city, township, school district, each a separate unit so that when assessments are made and paid they are credited to each subdivision and when a subdivision exhausts its credits under this act is a further assessment required only against the subdivision exhausting its credit?"

With your letter you submit a communication addressed to you by the industrial commission of Ohio, which, omitting the names of the counties and the taxing districts referred to therein, is as follows:

> "In accordance with section 18 of the workmen's compensation act, as amended in 105 O. L., page 4, requiring that the industrial commission certify to the auditor of state certain information with reference to the counties contributing to the state insurance fund for public employes, please be advised as follows:

"I.

"The following counties have not made any contribution to the state insurance fund, as required by law, viz.: * * *

"II.

"The following counties have omitted to include in their payments to the treasurer of state assessments from certain of their taxing districts, which are as follows: * * *

"III.

"If the state insurance fund for the protection of public employes is to be considered as the unit, there is, in the judgment of the commission, sufficient money in said fund to pay all lawful claims likely to come against the same to and including December 31, 1916.

"IV.

"If the county is to be considered as the unit, we hereby certify that there is, in the judgment of the commission, sufficient money to the credit of each county within this fund to pay all lawful claims likely to come against each such county, to and including December 31, 1916, with the following exceptions: * * *

"V.

"If the separate taxing district of the county is to be considered as the unit, we hereby certify that there is, in the judgment of the commission, sufficient money to the credit of each taxing district within such county to pay all lawful claims likely to come against each such taxing district, to and including December 31, 1916, with the following exceptions: * * *"

To your first question, which is as to whether the general fund which was created for the protection of public employes is a unit from which all claims for injuries or death of public employes arising under said act are to be paid, my answer is in the affirmative.

Coming to your second question, your attention is directed to the provisions of section 1465-63 of the General Code (103 O. L., 77), which is as follows:

"The amount of money to be contributed by the state itself, and by each county, city, incorporated village, school district or other taxing district of the state shall be, unless otherwise provided by law, a sum equal to one percentum of the amount of money expended by the state and for each county, city, incorporated village, school district or other taxing district respectively during the next preceding fiscal year for the service of persons described in subdivision one of section fourteen hereof."

From a reading of the section quoted above it will be noted that the statutory assessment of one percentum which is made for the purpose of payment into the general state insurance fund for the purpose of compensating public employes injured in the course of their employment or to the dependents of public employes

killed while in the course of their employment embraces a collection of one per-centum of the amount expended by the state, counties and the taxing subdivisions of the county for the employes, as defined in paragraph 1 of section 1465-61 of the General Code (103 O. L., 77).

Replying to your third question, I prefer to deal with the fourth branch of the letter of the industrial commission of Ohio which you have just handed to me, and which is as follows:

> "If the county is to be considered as the unit, we hereby certify that there is, in the judgment of the commission, sufficient money to the credit of each county within this fund to pay all lawful claims likely to come against each such county, to and including December 31, 1916. * * *"

Your attention is invited to the provisions of section 1465-65 of the General Code, as amended, page 4 of 105 O. L., which is as follows:

> "In the month of December of each year, the auditor of state shall prepare a list for each county of the state, showing the amount of money expended by each township, city, village, school district or other taxing district therein for the service of persons described in subdivision one of section fourteen hereof, during the fiscal year last preceding the time of preparing such lists; and shall file a copy of each such list with the auditor of the county for which such list was made, and copies of all such lists with the treasurer of state. Such lists shall also show the amount of money due from the county itself, and from each city, township, village, school district, and other taxing district thereof, as its proper contribution to the state insurance fund, and the aggregate sum due from the county and such taxing districts located therein.
>
> "Provided, however, that should the industrial commission of Ohio on or before the first day of December in any year certify to the auditor of state that sufficient money is in the state insurance fund to the credit of any county or counties to provide for the payment of compensation to the injured and to the dependents of killed employes of such county or counties and the several taxing districts therein for the ensuing year, the auditor of state shall not prepare and file with the county auditors and the treasurer of state said list or lists for such county or counties specified in such certificate; and it shall be the duty of the industrial commission of Ohio to make and file such certificate with the auditor of state whenever in its judgment there is sufficient money in the state insurance fund to the credit of any county or counties to provide for the probable disbursements required to be made to the injured and to the dependents of killed employes of such county or counties and the several taxing districts therein for the ensuing year."

From a reading of this section it will be observed that for the purpose of the collection of the statutory assessment the county is to be regarded as the unit. All the dealings of the industrial commission acting through the auditor of state are with the county auditor representing the county, and under the provisions of the section just quoted it becomes the duty of the auditor of state, in the month of December each year, to prepare a list for each county of the state showing the amount of money expended by each township, city, village, school district or other taxing district therein for the service of persons described in subdivision one of section fourteen of the act during the fiscal year last preceding, unless, pursuant

to the second paragraph of section 1465-65 of the General Code, supra, the auditor is relieved from preparing the list referred to above for such counties as may be certified by the industrial commission of Ohio as having to their credit in the state insurance fund a sufficient sum to provide for the probable disbursements required to be made to injured and to the dependents of killed employes of such counties and the several taxing districts thereof in the ensuing year. In other words, the auditor of state is charged only with the making and sending of the list referred to in section 1465-65 of the General Code, supra, to such county or counties as are not certified by the industrial commission as having a status of credit in the state insurance fund to relieve them from further payment.

It is generally understood that the purpose of the state insurance fund is to compensate injured employes or to care for the dependents of killed employes, and in the case of public employes such as are covered by the state insurance fund claims arising on account of such injuries or death presented to the industrial commission of Ohio would be considered and allowances made when justified, notwithstanding the fact that the particular counties or subdivisions do not have the required credit in the state insurance fund—the law providing that when such credit is depleted it shall be replenished by further assessment as provided for in section 1465-65 of the General Code, supra.

Summing up, it is my opinion:

1. That all claims arising for injuries or death of public employes as comprehended by the act referred to are to be paid out of the general state insurance fund for public employes without regard to the credit standing of any taxing subdivision.

2. The statutory assessment which makes up the fund is to be arrived at by making a charge of one per cent. of the amount expended for services of persons employed by the state, counties, cities, townships, incorporated villages, school districts or other taxing districts therein—this latter statement being subject to the exception of municipalities maintaining police or firemen's pension funds.

3. For the purpose of the collection of the statutory assessment the state in the first instance and the counties in the second instance are to be regarded as units without reference to the various taxing subdivisions of the county enumerated, except in so far as the information concerning such taxing subdivisions is submitted to the county auditor by the auditor of state for the purpose of enabling the county auditor to make the necessary and proper settlements with the taxing subdivision after drawing his warrant for the payment of the county's assessment to the state insurance fund.

4. At all events any just claims arising from the death or injuries to public employes in the course of their employment are to be cared for out of the general state insurance fund for public employes regardless of the fact that the credit of the particular subdivision may at the time be depleted, it being especially provided that such credit shall be replenished by subsequent assessments.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1143.

ASSISTANT FIRE MARSHALS—SERVICES AS WITNESSES—NO FEES OR MILEAGE SHOULD BE DEMANDED WHEN ON REGULAR SALARY AND EXPENSES.

When the services of assistant fire marshals are required as witnesses in the trial of criminal cases with which they have theretofore had an official connection, such services are within the scope of their official duties and while so in attendance as witnesses they should be paid their regular salary and expenses, but no further fees or mileage as witnesses should be demanded or paid to them or taxed as costs in said cases.

COLUMBUS, OHIO, January 4, 1916.

HON. BERT B. BUCKLEY, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—I have your letter of December 23d containing the following statement and inquiries:

> "In this department our assistant fire marshals are called to the various county seats in the state to participate, as witnesses, in arson trials which have been brought about by their activity in investigation. They receive from this department, out of a fund made for that special purpose, their actual railroad fare and their necessary maintenance while away from their residences.
>
> "As a direct legal proposition, are these assistant fire marshals, who are also citizens, entitled to the 10 cents per mile from the county clerk of the county where the trial might be held?
>
> "Again, if this is sent to them, should they refuse it or should they turn it in to this department for turning over to the general revenue fund of the state of Ohio—from which this department draws its maintenance under the present budget system?
>
> "Further, if it were found that these assistant fire marshals had been receiving this 10 cents mileage and had made no return of it to this department, are they liable for the return of it and to what extent, or are they entitled to it under the general provision of law which gives 10 cents per mile to each citizen called as a witness, to some distant point?"

It appears from your statement that your assistant fire marshals are frequently called as witnesses in the trial of arson cases in which they were instrumental in developing and securing evidence resulting in the presentment of indictments and subsequent prosecution thereon. It may be added in this connection, because it is a well known fact, that in a great number of cases their testimony is the main reliance of the state for conviction.

It further appears from your statement that said assistants, when in attendance upon such trials, are paid their actual railroad fare and necessary expenses while so attending as witnesses. While you do not so state in your letter, I assume that their official salary is also paid for the time they are in attendance upon such trials as witnesses.

I will say in the outset of my observations that I regard such payments as proper and that the services rendered by said assistant fire marshals as witnesses may justly be said to be in the line of the duties of their office and as necessary and essential to the proper administration and enforcement of the laws as their services in procuring evidence in the first instance.

To state the matter differently, when your assistants are attending as witnesses they are merely performing a service required of them by the duties of their office and it is proper that they should be paid for said services in the same manner as they are paid for official services rendered in any other way. This being so, you then inquire if under such state of facts it is their right to demand and receive mileage as witnesses in addition to the salary and expenses which should be paid to them as above noted.

It may be said in this connection that in some states and under the federal law payment of witness fees to state or government officials is prohibited when they are called upon as witnesses in cases which are in the line of their official duties.

In this state no such qualifications are attached to the payment of witness fees and mileage, and, under our statutory provisions covering the payment of the same, it must be admitted that such assistant fire marshals have the legal right to demand and receive their fees and mileage as witnesses. It is evident, however, that they cannot serve the state in an official capacity and be permitted at the same time to receive compensation from other sources for the same official service. This proposition has received the approval of the courts in many instances and the general rule which seems to prevail in such cases is that when the officer's services as a witness are fairly within the scope of his duties as an official and for which he receives his salary and other necessary expenses, he may not receive fees as a witness. Upon the other hand, when as a witness he performs services for the public not required of him by the duties of the office which he holds, he stands upon a plane with any other citizen and may exact the same compensation for his services that the law allows to anyone for services as a witness.

Healy v. Hillsboro County, 49 Atlantic Reporter, 69.
Starmount v. Cummins, 120 Mich., 627.

I am of the opinion, therefore, that when the services of your assistant fire marshals are required as witnesses in the prosecution of criminal cases with which they have theretofore had an official connection, and such services are reasonably within the scope of their official duties, their salary and expenses should be paid by the state as indicated in your letter and no further fees or mileage as witnesses should be demanded or paid to them or taxed as costs in such cases. When, however, such assistant fire marshals are subpoenaed as witnesses and thereafter attend such trials as private citizens, they may be paid their statutory witness fees and mileage, but may not, during the time they are in attendance as such witnesses, receive any official salary or expenses from the state.

This conclusion, I think, is consistent with the proper expenditure of the state funds under your control and also obviates a situation in which such officials appearing as witnesses would be subject to the attack that they have a pecuniary interest in the case not common to all other witnesses in attendance.

Answering your questions specifically I must advise that when your assistant fire marshals are paid their regular salary and expenses when in attendance as witnesses in the trial of criminal cases such services must be deemed to be in the line of their duty and they are not entitled to any further witness fees and mileage, and if such fees and mileage are sent to them they should be returned to the county treasury from which they are drawn. When, however, it appears that any assistant fire marshal has accepted fees and mileage as a private citizen for attendance as a witness and has also for the same time received his salary and expenses from the state, he should be required to refund to the state the salary and expenses so paid.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1144.

TREASURER OF STATE—AUTHORIZED TO ACCEPT DEPOSIT OF $100,000, OFFERED IN CASH BY THE PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES, A TRUST COMPANY—NOT AUTHORIZED TO DEPOSIT SAME IN BANK UNDER DEPOSITORY ACT.

***Under section** 9778, G. C., the treasurer of state is authorized to accept the* $100,000 *cash offered by the Pennsylvania Company for Insurance on Lives and Granting Annuities, a Trust Company, of Philadelphia, Pennsylvania, but is not authorized to deposit the same in any bank or trust company under the depositary act.*

COLUMBUS, OHIO, January 5, 1916.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—On January 3, 1916, you submitted to me a draft for $100,000.00 drawn in your favor by the Girard national bank of Philadelphia on the cashier of the Ohio national bank of Columbus, and submitted at the same time a letter to you from Hon. George H. Warrington, of Cincinnati, Ohio, under date of December 31, 1915, wherein Mr. Warrington states that the draft as presented "is for deposit with you under the provisions of section 9778 of the General Code of Ohio, for the purpose of qualifying the Pennsylvania Company for Insurances on Lives and Granting Annuities, a Trust Company of Philadelphia, Pennsylvania, to accept trusts in the state of Ohio." Mr. Warrington further asks you to telegraph to Mr. Gates, of Philadelphia, upon receipt of his letter "that you have received the money and deposited it, and that the company is authorized thereby to accept trusts in this state."

Section 9778 of the General Code provides as follows:

> "No such corporation either foreign or domestic shall accept trusts which may be vested in, transferred or committed to it by an individual, or court, until its paid in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash fifty thousand dollars if its capital is two hundred thousand dollars or less, and one hundred thousand dollars if its capital is more than two hundred thousand dollars, except that, the full amount of such deposit by such corporation may be in bonds of the United States, or of this state, or any municipality or county therein, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past paid dividends of at least three per cent. on its common stock."

There has been no showing made to you that the said company has a paid in capital of at least one hundred thousand dollars, but upon inquiry of Hon. Harry T. Hall, superintendent of banks of Ohio, I learned that the Banker's Register shows that said company has a paid up capital of two million dollars.

Such being the fact, it appears that said company is authorized to deposit with you the said sum of one hundred thousand dollars, being the amount required by section 9778, G. C.

There does not seem to be any authorization at all for the treasurer of state to call for a certified copy of the charter of the company in order to ascertain whether or not the said company has a paid in capital stock, but, as I view it, the legislature did not require of you that you ascertain what the paid in capital stock of the company is.

Section 736, paragraph "c," of the General Code (106 O. L., 361), provides as follows:

> "Sec. 736. That for the purpose of maintaining the department of the superintendent of banks and the payment of expenses incident thereto, and especially the expenses of inspection and examination, the following fees shall be paid to the superintendent of banks of Ohio:
> * * * * * * * * * * * *
> "(c) Each foreign trust company desiring and intending to do business in this state shall pay to the superintendent of banks a fee of fifty dollars for issuance to it of a certificate authorizing it to transact business in this state. Such fee to be paid before such certificate is issued."

Before a foreign trust company can proceed to transact business in this state it would, of course, be compelled to obtain the authority required by the above section and before it could obtain such authority it would be required to deposit the amount specified in section 9778, G. C.

There is a question as to whether or not a trust company comes within the exceptions found in section 178 of the General Code or within the exceptions found in section 188 of the General Code, in regard to procuring from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this state; but I do not think that it is necessary to determine that question in this instance, since your question is asked solely as to your authority to accept the $100,000.00. It is my opinion that you may accept the same.

You have asked a further question, and that is as to whether or not, if you are to accept the $100,000.00 in cash, there is any authority for you to place the same in the state depositary or in any bank.

Section 9779 of the General Code provides as follows:

> "The treasurer of state shall hold such fund or securities deposited with him as security for the faithful performance of the trusts assumed by such corporation, but so long as it continues solvent he shall permit it to collect the interest on its securities so deposited. From time to time said treasurer shall permit withdrawals of such securities or cash, or part thereof, on the deposit with him of cash, or other securities of the kind heretofore named, so as to maintain the value of such deposit as herein provided."

It appears from section 9779 that the treasurer of state, so long as the corporation depositing securities is solvent, shall permit said corporation to collect the interest on its securities so deposited. There is, however, no provision of law that undertakes to allow a corporation to receive any interest on cash deposited under said section. The money is deposited with you under the provisions of section 9778, G. C., and I have not been able to find any statute which authorizes you to redeposit the same in any bank, either with or without interest, and accept security for the repayment thereof. It is apparent that the legislature intended that the said money should remain in the state treasury.

I therefore advise you that you are without authority to do other than to place the said sum of $100,000.00 in the state treasury, and you are not authorized to lend the same out to any bank or trust company under the depositary act.

I have answered the two questions upon which I understand you desire me to render an opinion, but in concluding I desire to call your attention to the request of Mr. Warrington that you telegraph Mr. Gates, at Philadelphia, upon receipt of Mr. Warrington's letter "that you have received the money and deposited it, *and that the company is authorized thereby to accept trusts in this state.*"

While you have authority to accept the money, you have no authority whatever to notify the company that it is authorized by reason of the deposit of said money to accept trusts in this state. If after the deposit of said money the said company, being a foreign trust company, desires or intends to do business in this state, it will have to comply with section 736, paragraph "c" of the General Code, and likewise, possibly, with sections 179 and 183 et seq.

I therefore advise you that you are not authorized to comply with Mr. Warrington's request.

I am herewith returning to you the letter of Hon. George H. Warrington, together with the draft for $100,000.00. hereinbefore mentioned.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1145.

MUNICIPAL CORPORATION—HEADS OF ALL SUBDEPARTMENTS SERVING UNDER HEADS OF DEPARTMENTS OF PUBLIC SERVICE AND PUBLIC SAFETY IN CITIES ARE WITHIN CLASSIFIED SERVICE OF *CIVIL SERVICE LAW.*

The heads of subdepartments of the department of public service and the department of public safety are within the classified service as defined in subdivision (b) of section 486-8, *G. C., as amended in* 106 *O. L.*, 404.

COLUMBUS, OHIO, January 5, 1916.

The State Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have your letter of December 31, 1915, as follows:

> "Attached hereto, you will find letters from R. D. Turner, district tax assessor, and George H. Lingrel, mayor-elect of the city of Kenton.
>
> "The question is raised as to whether or not the heads of subdepartments under the city public service department are in the classified or the unclassified service. In a similar case, we have given the following as our opinion:
>
> "'It is our opinion that the director of public service and the director of public safety are exempt from the classified service in accordance with paragraph 3 of section 486-8 of the civil service law, and the heads of all subdepartments serving under them are in the classified service, except such as might be claimed exempt under the provisions of paragraph 8 of this section. By this interpretation, the director of public service and the director of public safety would each be entitled to two secretaries, assistants or clerks, and one personal stenographer exempt from the classified service. All other employes serving under them would be subject to the jurisdiction of the municipal civil service commission.'
>
> "Inasmuch as we are receiving a number of such requests, we desire to submit the question raised by Mr. Lingrel to you for an opinion. We are not certain as to whether the heads of subdepartments should be claimed exempt from the classified service as 'assistants.'"

I concur in your construction of paragraph 3 of section 486-8, G. C., as amended 106 O. L., 404, and conclude with you that the heads of all subdepartments serving under the heads of the departments of public service and public safety are within the classified service.

While the heads of such subdepartments are appointed by the mayor under favor of section 4250, G. C., as amended 106 O. L., 483, it may not be said for that reason they should be considered the "heads of departments" within the purview of said paragraph 3 aforesaid. Upon the contrary the fact that they are expressly designated in said section 4250 as the "heads of subdepartments" clearly indicates that such designation was purposely applied to distinguish them from the "heads of departments," and it must be assumed that such distinction was in the legislative mind in the enactment of said paragraph 3.

But it is further provided in section 4323, G. C., that the department of public service shall be administered by the director of public service and in the succeeding section it is provided that he shall manage and supervise all public works and undertakings of the city.

In view of these various provisions it may not be said that the department of public service has any head other than the director of public service and therefore he is the only person in the service of said department who may qualify as its head under the provisions of said paragraph 3.

The question presented here has also been considered by me in a recent opinion to the bureau of inspection and supervision of public offices. A copy of this opinion is attached hereto to which I respectfully call your attention.

I am of the opinion, therefore, that the heads of subdepartments of the department of public service and the department of public safety are within the classified service as defined in subdivision (b) of section 486-8, G. C., aforesaid.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1146.

MUNICIPAL CORPORATION—MAYOR—MAY REMOVE DIRECTORS OF PUBLIC SAFETY AND PUBLIC SERVICE—HEADS OF SUBDEPARTMENTS IN SERVICE OR SAFETY DEPARTMENT IN CLASSIFIED SERVICE, INCLUDING CITY ENGINEER, SUPERINTENDENT OF WATERWORKS.

Mayors may summarily remove the director of public service and the director of public safety under the provisions of section 4250, *G. C., as amended* 106 *O. L.*, 483, *but the heads of subdepartments of the department of public service and the department of public safety are within the classified service as defined by subdivision (b) of section* 486-8, *G. C., as amended* 106 *O. L.*, 404, *and may be removed from office only as provided by the civil service law as found in* 106 *O. L.*, 400 *et seq.*

COLUMBUS, OHIO, January 5, 1916.

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

GENTLEMEN:—I have your letter of November 24, 1915, submitting the following inquiries:

> "Section 4250 provides that the mayor may remove a director of public service, director of public safety and the heads of the subdepartments of the departments of public service and public safety, and section 4263 states that the mayor shall have general supervision over each department and the officers provided for in this title (the Municipal Code), and if the mayor has reason to believe that the head of a department, or such officer, has been guilty in the performance of his official duty of bribery, misfeasance, malfeasance, misconduct in office, gross neglect of duty, gross

immorality or habitual drunkenness, he shall immediately file with the council, except when the removal of such head of department, or officer, is otherwise provided for, written charges against such person, and the following section provides that the officer, upon trial by council, may be removed by a vote of two-thirds of all the members elected to the council.

"*Question* 1. Has a mayor the authority to remove a director of service under the authority of section 4250 without filing the charges, or must he proceed as outlined in sections 4263 and 4264?

"*Question* 2. May the mayor remove a city engineer, or superintendent of waterworks, heads of subdepartments in the department of public service, under authority of section 4250, without filing charges, or must he proceed, if he desires their removal, in the manner prescribed by sections 4263 and 4264?"

Section 4250, G. C., to which you refer above, as amended in 106 O. L., 483, provides as follows:

"The mayor shall be the chief conservator of peace within the corporation. He shall appoint, and have the power to remove, the director of public service, the director of public safety, and the heads of the subdepartments of the departments of public service and public safety, and shall have such other powers and perform such other duties as are conferred and required by law. In cities having a population of less than twenty thousand, the council may by a majority vote merge the office of director of public safety with that of public service, one director to be appointed for the merged department."

The provision in section 4250 aforesaid, empowering the mayor to appoint and remove the directors of public service and public safety and the heads of the subdepartments of the departments of public service and public safety was first placed in said statute by an amendment passed April 29, 1908, found at page 562 of Vol. 99, O. L., and is a part of what is known as the Paine law. The changes in the municipal code made by this law are summarized by the supreme court in the case of State v. Roney, 82 O. S. 376, as follows:

"It amended more than twenty sections of the municipal code, but the changes effected may be summarized as follows: The boards of public service and of public safety were abolished and in their stead was substituted a director of public service and a director of public safety, appointed by the mayor. * * *"

Prior to said amendment of section 4250, the department of public service was administered by a board of directors which consisted of three or five members, as provided by ordinance or resolution of council in each city. They were elected for a term of two years.

Referring now to sections 4263 and 4264, G. C., they were originally section 225 of the municipal code and were not affected by the changes made in said code by the enactment of the Paine law aforesaid. Said sections provide as follows:

"Section 4263. The mayor shall have general supervision over each department and the officers provided for in this title. When the mayor has reason to believe that the head of a department or such officer has been guilty in the performance of his official duty of bribery, misfeasance, malfeasance, nonfeasance, misconduct in office, gross neglect of duty, gross immorality or habitual drunkenness, he shall immediately file with the coun-

> cil, *except when the removal of such head of department or officer is otherwise provided for,* written charges against such person, * * *"

The succeeding section, 4264, makes provision for the hearing of said charges at the next regular meeting of council and for the manner of hearing and trial thereon.

As before noted these two sections were section 225 of the municipal code, and no change was made therein by the enactment of the Paine law. However, when the code was adopted in 1910 the clause italicized in said section 4263 providing as follows:

> "Except when the removal of such head of department or officer is otherwise provided for,"

was added by the codifying commission to section 4263 and thereafter adopted by the legislature. The purpose in writing into this statute an exception of this character which theretofore did not exist therein was evidently to give effect to the provisions of section 4250, supra, to which said clause undoubtedly refers, and excepts from the provisions of section 4263 the officers specified in said section 4250. In other words, prior to the amendment of section 4250 the provisions of section 4263 furnished the only method for the removal of the heads of departments and other officers provided for in the municipal code, but with the amendment of section 4250 in 1908 there was an apparent conflict between the provisions of said section 4250 and said section 4263, which was taken care of by the codifying commission in 1910 in adding to said section 4263 the clause hereinbefore quoted and which as before suggested unquestionably refers to the heads of departments or officers whose removal is provided for in section 4250.

In the case of State v. Roney, supra, Summers, J., in commenting upon said section 4250, says:

> "The power in the mayor to appoint and to remove is a continuing power, and, no term of appointment of the chief of police being fixed, the chief of police holds his office at the pleasure of the mayor and in the absence of statutory regulation may be summarily removed by the mayor."

Since this decision however the chief of police has been placed under the protection of the civil service law and may not now be so removed but the remarks quoted apply here. The director of public service is appointed for no definite term. (See section 4323, G. C.) There are no statutory provisions protecting him from removal. It follows, therefore, that he may be summarily removed by the mayor under the provisions of section 4250, supra, and that the provisions of sections 4263 et seq. do not apply to such removal. I, therefore, hold that the director of public service may be removed under the provisions of said section 4250 and that the provisions of sections 4263 et seq. of the General Code may not apply to such officer.

Referring now to your second question it might be assumed that the observations made here regarding a director of public service apply with equal force to the heads of subdepartments which are also included within the provisions of said section 4250. Such assumption would be well founded were it not for the provisions of the civil service law as found in paragraph 3 of section 486-8, G. C., as amended in 106 O. L., 404. It is provided in said paragraph 3, among other things, that:

> "The members of all boards and commissions and all heads of departments appointed by the mayor, or if there be no mayor such other similar chief appointing authority of any city or city school district,"

shall be in the unclassified service. It becomes pertinent then to inquire whether the heads of subdepartments as designated in said section 4250 are within the provisions of the civil service law just quoted. I am of the opinion that the heads of subdepartments such as referred to in your second inquiry are not the "heads of departments" as contemplated by said paragraph 3 of the civil service law and are therefore within the classified service and protected by the civil service law of the state.

Section 4323, G. C., provides:

> "In each city there shall be a department of public service which shall be administered by a director of public service. The director of public service shall be an elector of the city, shall be appointed by the mayor and shall serve until his successor is appointed and qualified. He shall make rules and regulations for the administration of the affairs under his supervision."

Section 4324, G. C., provides:

> "The director of public service shall manage and supervise all public works and undertakings of the city, except as otherwise provided by law, and shall have all powers and perform all duties conferred upon him by law. He shall keep a record of his proceedings, a copy of which, certified by him, shall be competent evidence in all courts."

In view of the provisions of the statutes just quoted it may not be said that the department of public service has any head other than the director of public service. Therefore, the director of public service is the head of the department which includes the subordinate officers named in your second inquiry and the provisions of said paragraph 3 of the civil service law may not apply to such officers for this reason.

It must also be assumed that the legislature in the use of the term "head of department" did so with knowledge of the fact that in section 4250, supra, reference was made to the heads of subdepartments.

It may be claimed that the last clause of said paragraph 3, relating to chiefs of police and chiefs of fire departments, would indicate that the legislature had intended to exempt all similar subdepartments and therefore deemed it necessary to make special reference to them to include them in the classified service. While the police and fire departments are under the direction of the director of public safety in a city, the statute defining his duty (section 4368) denominates him as the executive head of the police and fire departments only and by separate provisions, viz., sections 4372 and 4376, G. C., provides for the heads of police and fire departments which are not therefore subdepartments in the sense that term may be applied to the waterworks and engineering department. For this reason the legislature rightly considered some question could be raised and therefore settled all controversy by this special provision.

I am, therefore, of the opinion that the officers named in your second inquiry, viz., a city engineer and superintendent of waterworks, are within the classified service of the city under the provisions of the act amending sections 486-1 to 486-31 and repealing section 4505 of the General Code, found in 106 O. L., page 400, and may therefore only be removed from office as provided for in sections 486-17 and 486-17a of said act.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1147.

STATE HIGHWAY COMMISSIONER—WHEN AND TO WHAT EXTENT THE STATE HIGHWAY DEPARTMENT MAY CONTRACT AGAINST FUNDS APPROPRIATED TO SAID DEPARTMENT BY HOUSE BILL NO. 701.

Balances of appropriations for the state highway department carried by H. B. No. 314 *under the classification "F-9, General Plant Service," reappropriated by section* 7 *of H. B. No.* 701, *are available for expenditure at any time prior to July* 1, 1917, *for the purposes for which they were originally appropriated.*

Appropriations for the state highway department carried by sections 2 *and* 3 *of H. B. No.* 701 *are effective for the full amounts therein expressed only in case such amounts come into the treasury by reason of the state levy in so far as the state highway improvement fund is concerned and by reason of surplus automobile registration fees in so far as the maintenance and repair fund is concerned.*

If there is a surplus of receipts over appropriations such surplus cannot be expended. The act limits the expenditure of appropriations carried by section 2 *thereof to a two-year period beginning July* 1, 1915, *and the expenditure of appropriations carried by section* 3 *thereof to a one-year period beginning July* 1, 1916. *The inter-county highway and main market road appropriations carried by section* 2 *represent the proceeds of the February and August,* 1916, *settlements and the appropriations for the same purposes carried by section* 3 *represent the proceeds of the February,* 1917, *settlement.*

In contracting against these appropriations, contracts should be entered into in advance of the coming of the funds into the state treasury only where no payments will be required on such contracts until the funds are actually in the treasury.

The appropriation of surplus automobile registration fees should not be contracted against until the funds contracted against have actually come into the treasury.

COLUMBUS, OHIO, January 5, 1916.

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

DEAR SIR:—I have your communication of December 18th, 1915, in which you request my opinion as to when and to what extent your department may properly contract against the funds appropriated to the state highway department by house bill No. 701.

House bill No. 701, 106 O. L. 666, being an act to make general appropriations, was passed May 27, 1915, and with the exception of certain items therein was approved by the governor on June 5, 1915, and was on that day filed in the office of the secretary of state.

It is provided in section 1 of the act in question that no moneys shall be taken from the general revenue fund to support the highway department, but I am informed by representatives of your department that the amount that will probably be yielded by the state levy of three-tenths of one mill, and the probable surplus of revenues derived from automobile registration fees after the payment of the expenses chargeable against such fees, will be more than sufficient to supply the amounts appropriated for your department by house bill No. 701, and this feature of the matter may therefore be dismissed with the observation that the appropriations for your department carried by house bill No. 701 are effective for the full amounts therein expressed, only in case such amounts come into the treasury by reason of the state levy of three-tenths of one mill in so far as the state highway improvement fund is concerned and by reason of surplus automobile registration fees in so far as the so-called maintenance and

repair fund is concerned. Should the amounts received from these sources exceed the amounts appropriated, you would not thereby be authorized to expend the surplus of receipts over appropriations, and would be limited to the amounts specifically appropriated.

Appropriations for your department are carried by sections 2 and 3 of the act now under consideration. In so far as the sums appropriated in section 2 are concerned, it is provided in that section that such sums shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1915, or incurred subsequent to June 30, 1917. In so far as the moneys appropriated by section 3 are concerned, it is provided in said section that the moneys therein appropriated shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1916, or incurred subsequent to June 30, 1917. Further limitations upon your right to contract against these funds will be hereinafter pointed out.

It should be observed that by the provisions of section 7 of house bill No. 701, any moneys appropriated for the use of your department by house bill No. 314, 106 O. L. 33, under the classification: "F-9. General Plant Service," and against which no liabilities were incurred prior to July 1, 1915, are reappropriated and are available for expenditure by your department. The section in question provides that such reappropriated balances shall be available for expenditure at any time prior to July 1, 1917, for the purposes for which they were originally appropriated.

As previously indicated, your inquiry involves a discussion of certain other limitations upon your power to enter into contracts involving the expenditure of funds appropriated by sections 2 and 3 of house bill No. 701. As pointed out in opinion No. 521 of this department, rendered to you on June 21, 1915, the items of $780,976.50 for the construction, improvement, maintenance and repair of intercounty highways, and $273,000.00 for the construction, improvement, maintenance and repair of main market roads, carried by house bill No. 314, 106 O. L. 33, represented the proceeds of the February, 1915, settlement, and the items $707,100.00 for the construction, improvement, maintenance and repair of intercounty highways, and $97,052.73 for the construction, improvement, maintenance and repair of main market roads, carried by house bill No. 709, 106 O. L. 452, represented the proceeds of the August, 1915, settlement.

It therefore follows that the items of $1,533,400 for the construction, improvement, maintenance and repair of intercounty highways, and $562,500 for the construction, improvement, maintenance and repair of main market roads, carried by section 2 of house bill No. 701, represent the proceeds of the February and August settlements of the year 1916, and the items of $826,300.00 for the construction, improvement, maintenance and repair of intercounty highways, and $305,000.00 for the construction, improvement, maintenance and repair of main market roads, carried by section 3 of house bill No. 701, represent the proceeds of the February, 1917, settlement.

As pointed out in an opinion rendered by my predecessor, Hon. Timothy S. Hogan, to your predecessor, Honorable James R. Marker, on May 23, 1914, and found on page 699 of the Annual Report of the Attorney General for that year, and as also pointed out in opinion No. 521 of this department rendered to you on June 21, 1915, and referred to above, it is both proper and legal for the state highway department to contract for the aggregate amount of money that has been levied and appropriated for an entire tax year, even though the second installment of the tax has not come into the state treasury and would not come into the state treasury for sometime after the letting of contracts for the reason that such second installment of tax had been levied, placed upon the duplicate, and was in

process of collection, and would be in the state treasury before it was actually needed and before the fund arising from the first installment of the year's tax would have been exhausted in payments to contractors on estimates.

It was observed in opinion No. 521, referred to above, that it is a matter of common knowledge that it requires a considerable time, even after a contract is let before the work can be so far prosecuted by the contractor as to require or even warrant the payment of estimates, and that to hold that contracts might not be entered into where compensation to the contractor was to be paid, either in whole or in part, from taxes actually levied, placed on the duplicate and in process of collection but not yet in the treasury, would serve no useful purpose, and the only result of such a holding would be to delay the letting of contracts and the performance of the same.

Applying the principles discussed in the opinions referred to above to the present state of facts, it should first be observed that the items of $1,533,400.00 and $562,500.00, carried by section 2 of house bill No. 701 and appropriated for the construction, improvement, maintenance and repair of intercounty highways and main market roads, respectively, represent a tax which has been levied, placed on the duplicate and is now in process of collection. Approximately one-half of the tax necessary to meet these two items will come into the state treasury at the February, 1916, settlement, and the remainder will come into the state treasury at the August, 1916, settlement.

Since the date of July 1, 1915, has long since past, and since the tax required to meet these two items has been levied, placed on the duplicate and is in process of collection, I advise you, in conformity with my previous opinion and with that of my predecessor, that you may now enter into contracts involving the expenditures of these two items, provided the circumstances are such that no payments from the state treasury will be required to be made on such contracts prior to such time as the proceeds of the February, 1916, settlement may come into the state treasury, and provided payments on such contracts, which will be required to be made from the state treasury between such time as the February, 1916, settlement may come into the state treasury and the time when the August, 1916, settlement will come into the state treasury, will not exceed one-half of such items. In other words, you should take into consideration the fact that these two items represent moneys not yet in the state treasury and that approximately one-half of each item will come into the state treasury at the February, 1916, settlement and the remainder of the items will come into the state treasury at the August, 1916, settlement, and in making contracts, either at the present time or in the future, you should not enter into any contracts which will actually involve any payments from the state treasury in advance of the time when the funds will be actually received from the several counties of the state.

Referring now to the items of $826,300.00 for the construction, improvement, maintenance and repair of intercounty highways and $305,000.00 for the construction, improvement, maintenance and repair of main market roads, carried by section 3 of house bill No. 701, it is manifest that these items represent the proceeds of the February, 1917, settlement. In so far as the limitation of section 3 of house bill No. 701 is concerned, these items may be said to be available for expenditure at any time during the year beginning on July 1, 1916, and inasmuch as the auditor of state is by section 5626, G. C., required to give notice to each county auditor on or before the first Monday of June, annually, of the rate of taxes for state purposes, I conclude that you may contract against the items referred to above and carried by section 3 of house bill No. 701 at any time during the year beginning July 1, 1916, but such contracts should be entered into between July 1st, 1916, and the time of the February, 1917, settlement only where the con-

ditions are such that no actual expenditures will be required to be made on such contracts prior to the time that the proceeds of the February, 1917, settlement come into the state treasury.

Referring to the item of $750,000.00 carried by section 2 of the act and appropriated for the purpose of repairing, maintaining, protecting, policing and patrolling public highways, as provided in section 6309, G. C., and all sections supplementary or amendatory thereof, and to the item of $650,000.00 carried by section 3 of the act and appropriated for the same purpose, it should be observed that in so far as the act itself is concerned, the only limitation as to the first item is that it shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1915, or incurred subsequent to June 30, 1917, while as to the item of $650,000.00 it cannot be expended for the payment of liabilities incurred prior to July 1, 1916, or subsequent to June 30, 1917. These items do not represent the proceeds of any property tax and are appropriations of surplus automobile registration fees, and I am therefore unable to advise you that you have any right to contract against these items until they have actually come into the state treasury, in view of the provisions of section 1 of the act that no moneys shall be taken from the general revenue fund to support the highway department.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1148.

ROADS AND HIGHWAYS—NO AUTHORITY TO ASSESS MAINTENANCE OR REPAIR OPERATION AGAINST OWNERS OF ABUTTING PROPERTY—WHEN WORK IS CONSTRUCTION, RECONSTRUCTION OR IMPROVEMENT—TEN PER CENT. OF COST MUST BE ASSESSED AGAINST OWNERS OF ABUTTING PROPERTY.

So long as any work carried on by the state highway department may be properly classified as a maintenance or repair operation, there is no authority to assess any part of the cost thereof against the owners of the abutting property. If the work is in the nature of construction, reconstruction or improvement, ten per cent. of the cost thereof must be assessed against the owners of the abutting property.

COLUMBUS, OHIO, January 5, 1916.

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

DEAR SIR:—I have your communication of November 19, 1915, which reads as follows:

> "This department contemplates the repair of an approximately three-mile section of an intercounty highway using for this purpose a part of the proceeds of the funds derived from the registration of automobiles.
>
> "This repair is of such a character as to approach a reconstruction, consisting of a substantial resurfacing of a macadam road with new macadam, bound with tar.
>
> "I respectfully request an opinion from your office as to whether or not the abutting property is to be assessed for any portion of the cost of this repair, and if so, by whom, and upon what basis?
>
> "If you find that an assessment should be made in this case, I would appreciate a comprehensive opinion from you covering conditions when

a repair is less extensive, but general in character, filling holes, evening up the surface of a roadway and applying a surface treatment of oil or asphalt, and covering the entire surface with stone chips or pea gravel.

"When it is necessary to apply a portion of the levy for the state highway improvement fund upon the repair of an intercounty highway, or main market road, what assessment, if any, is then required?"

Any doubt that may exist as to the proper answer to be made to your inquiry, results from the loose use of the words "construction," "improvement," "maintenance" and "repair" in the Cass highway law.

It is provided by section 184 of that act, section 1191, G. C., that the commissioners of any county may make application to the state highway commissioner for aid from any appropriation by the state, from any fund available for the construction, improvement, maintenance or repair of intercounty highways. If the commissioners or township trustees do not apply by May first of any year, then the state highway commissioner shall construct, improve, maintain or repair any of the intercounty highways or parts thereof in said county, paying the full cost and expense thereof, except that portion to be assessed against abutting property owners, from the apportionment due said county and unused or unapplied for. The provision last referred to throws little light upon the question, however, as the portion to be assessed against abutting property owners might be ten per cent. in the case of construction or improvement and nothing in the case of maintenance or repair operations. Very important, however, is the following provision to the effect that when an intercounty highway or main market road is *improved* by the state without co-operation ten per cent. of the cost of said *construction* or *improvement* shall be assessed against the land abutting thereon, etc. The failure to use the words "maintained," "repaired," "maintenance" and "repair" in this provision constitutes an argument of considerable weight in support of the proposition that the legislature did not intend that ten per cent. of the cost of maintenance and repair work should be assessed against the abutting land.

Section 187 of the act, section 1194, G. C., provides that the county commissioners or township trustees may expend any amount available by law for the construction, improvement, maintenance or repair of intercounty highways or main market roads within the county, providing the county commissioners or township trustees by resolution agree to pay the cost and expense of said improvement over and above the amount received from the state and the amount received from abutting property owners. This provision furnishes practically no light, however, on the question of whether the abutting property owners are to be assessed for a part of the cost of all construction, improvement, maintenance or repair or whether they are to be assessed only in case the work is of a certain particular character.

Section 204 of the act, section 1211, G. C., reads in part as follows:

"Upon completion of the improvement the chief highway engineer shall immediately ascertain the cost and expense thereof, and apportion the same to the state, county, township or townships and abutting property."

It will be noted that in the above provision only the word "improvement" is used.

Section 205 of the act, section 1212, G. C., reads in part as follows:

"* * * * The proportion of the cost and expense of construction, improvement, maintenance or repair to be made by the county, township

and property owners shall be paid by the treasurer of the county in which the highway is located upon the warrant of the county auditor, issued upon the requisition of the state highway commissioner. * * * * * Where the improvement has been made upon the application of the township trustees the proportion of the cost and expense of such construction, improvement, maintenance and repair to be made by the township and property owners shall be paid by the treasurer of the township in which the highway is located upon the order of the township clerk issued upon the requisition of the state highway commissioner. * * *''

The above language is not inconsistent with the view that there may be certain operations for which no assessment can be made if that view finds sufficient support in other provisions of the act.

The following language is found in section 207 of the act, section 1214, G. C.:

''Ten per cent. of the cost and expense of improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property abutting on the improvement, provided the total amount assessed against any owner of abutting property shall not exceed thirty-three per cent. of the valuation of such abutting property for the purposes of taxation.''

Section 210 of the act, section 1217, G. C., contains the following language:

''In no case shall the property owners abutting upon said improvement be relieved by the state, county or township from the payment of ten per cent. of the cost and expense of such improvement, excepting therefrom the cost and expense of bridges and culverts, provided the total amount assessed against any abutting property does not exceed thirty-three per cent. of the valuation of such abutting property for the purposes of taxation.''

It is significant that in both the above quoted provisions relating to assessments, the words ''maintenance'' and ''repair'' are omitted. In opinion No. 950 of this department, rendered to you on October 19,1915, a definition was attempted of the word ''improvement'' as found in the last paragraph of section 210 of the act. The paragraph contains two sentences, and in framing a definition of the word as used in the second sentence, sufficient consideration was not given to other provisions of the act, and in view of the opinion that will be hereinafter expressed, the definition as framed was made somewhat too broad.

Section 213 of the act, section 1220, G. C., reads in part as follows:

''The board of county commissioners of two or more counties interested, may make application to the state highway commissioner for the construction, improvement, maintenance or repair of intercounty or main market roads upon a county line. The cost and expense of the construction of such improvement, over and above the amount to be paid by the state shall be equitably apportioned by the state highway commissioner between the counties interested therein. The part of the cost and expense adjudged to each county shall be apportioned between the county and the township or townships interested, and the abutting property owners in the same proportion as if the improvement was wholly within one county. * * * *''

The following provision is found in section 216 of the act, section 1223, G. C.:

> "The county commissioners, in anticipation of the collection of such taxes or assessments, and whenever in their judgment it is advisable, are hereby authorized to sell the bonds of any such county in which such construction, improvement or repair is to be made to an amount necessary to pay the respective shares of the county, township or townships, and the lands assessed for such improvement. * * *"

In those phrases of the above quoted provisions relating especially to assessments, the words "maintenance" and "repair" are omitted.

The provisions so far referred to leave the situation involved in doubt, but by a reference to some of the subsequent provisions of the act it is possible to determine the intention of the legislature with a reasonable degree of certainty.

Section 217 of the act, section 1224, G. C., contains the following provision:

> "The state highway commissioner shall maintain and repair to the required standard all intercounty highways, main market roads and bridges and culverts constructed by the state by the aid of state money, or taken over by the state after being constructed."

Section 241 of the act, section 7464, G. C., provides that state roads shall be maintained by the state highway department, and section 244 of the act, section 7467 G. C., provides that the state, county and township shall each maintain their respective roads. All of the above provisions are silent upon the question of whether any part of the cost of maintaining and repairing state roads by the state highway department is to be assessed against the owners of the abutting real estate.

It is also worthy of consideration that the law in force prior to the going into effect of the Cass highway law, did not provide for assessing a part of the cost of maintenance and repair work carried forward by the state highway department. Where doubt exists as to the meaning of a statute, repealed acts in *pari materia* with the statute to be construed may be considered in the interpretation thereof.

> "26 Am. and Eng. Encyc. of Law, 2d Ed., p. 624;
> "Heck v. State, 44 O. S., 536."

In the case of Cincinnati v. Connor, 55 O. S., 82, which was a case involving the validity of certain assessments, the court held that in the absence of any legislative requirement on the subject, statutes imposing taxes and public burdens of that nature are to be strictly construed; and where there is ambiguity which raises a doubt as to the legislative intent, that doubt must be resolved in favor of the subject or citizen on whom the burden is sought to be imposed.

In view of all the foregoing, I am of the opinion that so long as any work carried on by your department may be properly classified as a maintenance or repair operation, there is no authority to assess any part of the cost thereof against the owners of the abutting property. If the work is in the nature of construction, reconstruction or improvement, ten per cent. of the cost thereof must be assessed against the owners of the abutting property.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1149.

STATE HIGHWAY DEPARTMENT—NO APPROPRIATION AVAILABLE FOR PAYMENT OF SALARY OF SECRET SERVICE OFFICER TO MAKE INVESTIGATIONS FOR SAID DEPARTMENT.

There is no appropriation available for the payment of the salary of a person who might be employed by the state highway department to investigate accounts, pay rolls, bills, quantities of materials furnished and financial status of contractors.

COLUMBUS, OHIO, January 5, 1916.

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

DEAR SIR:—I have your communication of December 21, 1915, which reads as follows:

> "I have found at various times during my incumbency in this office, and have reached the conclusion, that the state of Ohio would be more properly protected and an appreciable sum saved each year were this department able to employ continually the services of a capable man to investigate accounts, pay rolls, bills, quantities of material furnished, financial status of contractors—in short, to make investigations generally into matters wherein the state highway department might possibly be defrauded or where greater economy could be exercised in its various operations by its various agents.
>
> "I respectfully request an opinion from your office as to whether or not this department may legally devote any portion of any moneys appropriated for expenditures of this department in the hiring of such a man with such duties as I have described above.
>
> "If you find that this department has such authority, I respectfully request you to advise me if such an employe should be secured through the classified lists of the state civil service commission."

Section 175 of the Cass highway law, section 1182, G. C., contains the following provision:

> "The state highway commissioner may appoint as many additional clerks or stenographers and such superintendents, inspectors and other employes, and may purchase such equipment within the limits of appropriations as he may consider necessary to carry out the provisions of this chapter. Each of said employes shall be paid a salary to be fixed by the state highway commissioner, within the limits of the appropriations made by the general assembly. All appointees and employes for whom provision is made in this and the preceding sections of this act shall receive their actual and necessary expenses when on official business, but such expenses shall have been first authorized by the state highway commissioner and shall be approved by him before a warrant is issued for the payment of the same."

The above quoted provision is found in the chapter of the Cass highway law relating to the construction, improvement, maintenance and repair of roads and bridges by the state highway department. From a consideration of the same it is

manifest that you are authorized to employ a person to perform the duties enumerated by you if there is any appropriation available for the payment of the salary and expenses of such an employe. The answer to your inquiry, therefore, depends upon the terms of the current appropriation measure, house bill No. 701, 106 O. L., 666, and more particularly upon the terms of section 2 of that act.

Section 2 of house bill No. 701, being the section making appropriations for the year begnning July 1, 1915, in addition to providing for the salary of the state highway commissioner, carries salary appropriations under the head of personal service for the following assistants and employes of your department: Three deputy commissioners, eight division engineers, nine engineers, one map maker, two draughtsmen, three superintendents, one testing engineer, two assistants, one chemist, a chief clerk, one file clerk, one bookkeeper, one assistant bookkeeper, one clerk, one assistant, six stenographers, one voucher clerk, a secretary and a messenger. The employe whose duties you have described is not covered by any of the salary appropriations referred to above. There is also an appropriation of $3,500.00 for wages, but it is apparent that the compensation of an employe such as you have referred to must be regarded as salary rather than wages.

It remains to consider whether any or all of the items of $1,533,400.00 for constructing, improving, maintaining and repairing intercounty highways; $562,500.00 for constructing, improving, maintaining and repairing main market roads and $750,000.00 for repairing, maintaining, protecting, policing and patroling public highways are available for the payment of the compensation of an employe of the character referred to by you. It is manifest from a consideration of house bill No. 701, in connection with the Cass highway law, that the three items referred to above are available for the payment of the compensation of certain employes. As has been pointed out in previous opinions of this department, rendered to you, the item of $1,533,400.00, after being divided into eighty-eight equal parts, is available for the payment of the state's portion of the salaries of county highway superintendents. When a county co-operates with the state and assistants, superintendents and inspectors are employed on the work under section 212 of the Cass highway law, section 1219, G. C., the state's proportion of the compensation of such assistants, superintendents and inspectors is payable from some one of the three items referred to above. In other words, if the state and a county co-operate in constructing a section of main market road, and assistants, superintendents and inspectors are employed thereon under authority of section 1219, G. C., the state's proportion of the compensation of such assistants, superintendents and inspectors is payable from the item of $562,500.00. This is true, however, because the compensation of such assistants, superintendents and inspectors is a part of the cost of constructing the main market road in question. In other words, compensation is payable from the three items referred to above only when such compensation is a part of the cost of constructing, improving, maintaining, repairing, protecting, policing or patroling some specific section of highway or the highways of some particular county under state control. It is my opinion that in so far as employes of your department whose services cannot be regarded as a charge against any particular county or any particular road improvement are concerned, you are limited as to the number, character and compensation of such employes by the appropriations for your department under the head of personal service. In other words, those salaries which are to be regarded strictly as overhead expenses and which are not paid out on account of any particular road improvement, or on account of the state's road activities in any particular county are provided for under the head of personal service, and appropriations under that head constitute a limitation which you are not authorized to disregard. In view of the foregoing, I am of the opinion that there is no appropriation avail-

able for the payment of the salary of an investigator or employe having the duties which you enumerate, and it therefore becomes unnecessary to consider your further inquiry involving the application of the civil service law of the state.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1150.

BOARD OF EDUCATION—CLERK OF SAID BOARD REQUIRED TO GIVE ONE BOND WHEN ACTING AS CLERK-TREASURER OF SCHOOL DISTRICT—BOARD SHOULD TAKE INTO CONSIDERATION ADDED DUTIES IN FIXING AMOUNT OF BOND WHEN CLERK REQUIRED TO ACT AS TREASURER.

The clerk of a board of education elected by said board at its meeting on the first Monday in January, under authority of section 4747, *G. C., as amended in* 104 *O. L.,* 133, *is required, before entering upon the duties of his office, to give one bond in an amount and with surety to be approved by said board, payable to the state, conditioned for the faithful performance of all the official duties required of him. The board of education in fixing the amount of said bond should take into consideration the added duties which the clerk is required to perform under provision of the latter part of section* 4782, *G. C., as amended* 104 *O. L.,* 158.

COLUMBUS, OHIO, January 6, 1916.

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

GENTLEMEN:—In your letter under date of December 10th you request my opinion upon the following question:

> "If the board of education by an order on its journal fixed the bond of the incoming clerk-treasurer of a school district at an amount equal to or greater than the bonds of the former clerk and treasurer combined, would it be legal for the clerk-treasurer to give said bond in one obligation or does the law require that two separate bonds be given, one for clerk and one for treasurer which may be signed by different sureties?"

Your question relates to the board of education of a school district which, having provided a depository for the school moneys of such district as authorized by law, has dispensed with the treasurer of the school funds under authority of section 4782, G. C., as amended in 104 O. L., 158.

The treasurer of the school funds of said school district having been dispensed with, the duties formerly performed by such treasurer are now a part of the duties of the clerk of the board of education of said district under provision of the latter part of said section 4782, G. C., which provides that:

> "In such case, the clerk of the board of education of a district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school district."

Section 4783, G. C., provides in part:

> "When the treasurer is so dispensed with, all the duties and obligations required by law of the county auditor, county treasurer or other officer or person relating to the school moneys of the district shall be complied with by dealing with the clerk of the board of education thereof."

Said section further provides that:

> "Before entering upon such duties, the clerk shall give an additional bond equal in amount and in the same manner prescribed by law for the treasurer of the school district."

While under provision of the latter part of section 4783, G. C., the clerk of the board of education above referred to was required, before entering upon the duties cast upon him by provision of the latter part of section 4782, G. C., as amended, to give an additional bond equal in amount to the bond formerly required by law of the treasurer of the school district, it does not necessarily follow that the clerk elected by said board of education at its meeting on the first Monday in January, under authority of section 4747, G. C., as amended in 104 O. L., 133, is required to give separate bonds as clerk of the board of education and as treasurer of the school funds, respectively, of said school district.

I think, however, that the bond of said clerk must meet the requirements of section 4764 as well as section 4774, of the General Code.

Section 4764, G. C., provides:

> "Before entering upon the duties of his office, each school district treasurer shall execute a bond, with sufficient sureties, in a sum not less than the amount of school funds that may come into his hands, payable to the state, approved by the board of education, and conditioned for the faithful disbursement according to law of all funds which come into his hands, provided that when school moneys have been deposited under the provisions of sections 7604-7608, inclusive, the bond shall be in such amount as the board of education may require."

Section 4774, G. C., provides:

> "Before entering upon the duties of his office, the clerk of each board of education shall execute a bond, in an amount and with surety to be approved by the board, payable to the state, conditioned for the faithful performance of all the official duties required of him. Such bond must be deposited with the president of the board, and a copy thereof, certified by him, shall be filed with the county auditor."

Under provision of the latter part of section 4764, G. C., it will be observed that where the board of education of a school district has lawfully provided a depository for the school funds but has not as yet dispensed with the treasurer of such funds under authority of section 4782, G. C., as amended, the bond of said treasurer is in such amount as said board of education may require.

Under provision of section 4774, G. C., the amount of the bond of the clerk of a board of education is fixed by such board.

Replying to your question, I am of the opinion that, under the provisions of sections 4764 and 4774, G. C., the clerk of the board of education referred to in

your inquiry is required, before entering upon the duties of his office, to give one bond in an amount and with surety to be approved by the board, payable to the state, conditioned for the faithful performance of all the official duties required of him.

The board of education in fixing the amount of said bond should take into consideration the added duties which the clerk is required to perform under provision of the latter part of section 4782, G. C., as amended.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1151.

STATE LIQUOR LICENSING BOARD—COUNTY LIQUOR LICENSING BOARD—STATE BOARD WITHOUT AUTHORITY TO CONTROL, REVERSE OR REVOKE ACTION OF COUNTY BOARD—EXCEPTION UPON APPEAL—COUNTY BOARD HAS CONTROL OF APPLICATION FOR REMOVAL OF PLACE OF BUSINESS—TWO EXCEPTIONS.

The state liquor licensing board is without authority to control, reverse or revoke the action of the county liquor licensing board in granting or rejecting an application for a saloon license, except upon appeal, or in the granting or rejection of an application for a removal of the place of business conducted under such license, except upon an appeal taken from the action of such county board in the manner provided by law, or in case of an inability of the county board to agree thereon for a period of more than three days when such disagreement is certified to the state board under section 1261-24, *G. C.*

COLUMBUS, OHIO, January 6, 1916.

The State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—Yours under date of December 22, 1915, is as follows:

> "We desire to submit statement of facts that have arisen in two instances involving the same principle, and to request your opinion as to the power exercised by the state board.
>
> "The first instance is a case arising in Hocking county, where the firm of Hogan & Murphy, licensees, was granted a renewal for which application was made in September. Protests were made by a church congregation, whose building was near that of the saloon, and it was claimed by them that the proximity of the saloon was detrimental. The local board ignored the protests and granted the license. The matter was then brought to the attention of the state board by the protestants, and, although schools and not churches are specifically mentioned in the law, the state board felt that the proximity of this saloon was undesirable to the church and directed the county board that no license should be granted to Hogan & Murphy, except upon condition that the saloon should be removed to another location in the business district of Murray City. This condition was agreed to, and the following contract was entered into between Hogan & Murphy and the Hocking county board:
>
> " 'This agreement made and entered into this 22d day of November,

1915, by and between Hogan & Murphy, a partnership, party of the first part, and the Hocking County Liquor Licensing Board, a party of the second part, WITNESSETH:

" 'THAT WHEREAS, said party of the first part has heretofore made an application for a saloon license to carry on a liquor business on part of lots 56 and 57 in the village of Murray City, Hocking county, Ohio; and

" 'WHEREAS, by a ruling of the State Liquor Licensing Board, it is made necessary to remove said business because of its proximity to the First M. E. Church of Murray City, Ohio; and

" 'WHEREAS, said party of the second part has granted a license to carry on said business on said parts of lots 56 and 57, as described in the original application therefor;

" 'NOW, THEREFORE, it is agreed by and between said parties that in consideration of the granting of said license according to the application therefor, said party of the first part hereby agrees that within ten days from date hereof it will remove its said business from said lots 56 and 57, as described in said license, to some other suitable place in said village of Murray City, Hocking county, Ohio, approvable to said party of the second part.

"IN WITNESS WHEREOF, the parties have hereunto set their hands at Logan this 22d day of November, 1915.

" '(Signed) HOGAN & MURPHY,

" 'Per Hogan.

" 'THE HOCKING COUNTY LIQUOR LICENSING BOARD,

" 'Per W. H. WHITE, President.'

"At the time the license certificate was granted, permission was given to the licensees, Hogan & Murphy, to have until December 12th to effect their removal. On the 12th of December the licensees neglected and refused to take any steps towards moving and repudiated their agreement, whereupon the state board sent an inspector to Murray City and removed the license from the walls of the saloon, notifying the proprietors to close their doors, which was done.

"The second case arises from the city of Cincinnati. A license was applied for in September by one Jacob Pittner, which license was granted thereafter by the Hamilton county board, the location being at 33-35 West Court street. Thereafter the licensee made application to remove to a building at the southwest corner of Ninth and Vine. Protest was made against this removal by the congregation of the Ninth Street Baptist Church, and it developed that this congregation had for two years, on file with the Hamilton county board, what purported to be a permanent protest against the placing of a saloon at this location, which was very near the entrance of the church on Ninth street, the saloon on the corner facing on Vine. The protest against the removal was overruled by the local board, which granted the removal license. The licensee proceeded to improve the property and has possibly involved himself in some expense. The protestants, the Ninth Street Baptist Church congregation, represented by Rev. John Herget, its pastor, brought the matter to the attention of the state board, which, after investigation of the matter, passed the following resolution:

" 'RESOLVED, That it be the sense of this board, that in view of the protest of the Ninth Street Baptist Church, that the removal of Jacob

Pittner to the southwest corner of Vine and Ninth streets should not have been granted, and that the Hamilton county board be directed to rescind the action granting the removal,'

''which was forwarded to the Hamilton county board. In both cases the action of the local boards, that of Hocking county and Hamilton county, was unanimous, there being no disagreement which under the law would bring the matter to this board for disposition.

''We, therefore, request your opinion in writing, based upon the facts stated in the two cases given above, as to the power of the state board in controlling the actions of the local county boards; the direct question being whether or not under the Greenlund licensing law the state board can review the action of local boards upon the appeal or application of protestants who had appeared ineffectually before the local boards.

''Owing to a very general interest over the state, not in these cases individually, but in the underlying principle, we would like to request your early attention to this matter.''

The question involved in each of the foregoing statements of fact goes to the authority of the state liquor licensing board to control, reverse, or revoke the action of local or county licensing boards in granting licenses or renewal thereof, and in the granting or rejection of application for removal by such county board.

It may be observed at the outset that the authority of the state board in these matters is confined to that which may be found to have been conferred by the liquor licensing law, under which both the state and county boards are established. The authority of public officials is, generally speaking, in every case confined to that which is specifically conferred by law and such implied power only as is essential to the performance of the duties imposed by law upon such officers.

It is impracticable to here set out all the provisions of the license law defining the powers and authority of the state liquor licensing board, or to attempt even an exhaustive synopsis of the same.

Section 1 of the liquor law, section 1261-16, G. C., 103 O. L., 217, provides in part that:

> ''The state liquor licensing board shall make rules and regulations for its own government, as well as for government of the county licensing boards hereinafter provided for, not inconsistent with law.''

This provision, however, cannot be regarded as restrictive of the general powers and authority conferred upon county boards, or as giving to the state board power to control the exercise of the same in any general way. In other words, this provision gives to the state board authority only to prescribe the general method of procedure by county boards in the exercise of the powers and functions conferred upon such boards by law, and such rules and regulations may not in any way impinge upon the authority of county boards. Otherwise, such rules and regulations would be inconsistent with law.

Attention is called to that part of section 9 of article XV of the constitution, which reads as follows:

> ''License to traffic in intoxicating liquors shall not be granted unless the place of traffic under such license shall be located in the county in which the person or persons reside whose duty it is to grant such license, or in a county adjoining thereto.''

Thus it is made clear that in no case is it within the authority of the state

board to grant a license, and I am of opinion that the granting of an application for a renewal of a license comes clearly within the terms of the constitutional phrase "to grant a license."

Section 16 of the license law, section 1261-31, G. C., 103 O. L., 221, provides in part as follows:

> "It shall be the duty of the county liquor licensing boards of the respective counties of the state, and they are hereby authorized to grant, issue, renew and transfer, as provided by law, all licenses to traffic in intoxicating liquors in the county wherein the board is situated; also to suspend or revoke, subject to the conditions and in the manner provided by law, all licenses granted or renewed in said county; and to perform such other duties as may be required by law."

Section 36 of the license law, section 1261-51, G. C., 103 O. L., 231, provides in reference to removals as follows:

> "No licensee under a saloon license shall, during the then current year, remove his place of business to a place other than that set forth in the application upon which the license was granted, without the consent of the county board. If any such licensee so removes his place of business without said consent endorsed upon his license certificate, the license may be revoked by the board.
>
> "Upon the application of any licensee who desires to remove during the license year then current, to a location other than that named in the original application, the said board shall, if satisfied with the change of location, endorse upon the license certificate of the applicant the fact of said change of location, and said license shall thereupon be good in said location but shall cease to have force in the old location."

There is thus conferred upon the county boards general authority and control over the granting, issuance, renewal, transfer, suspension and revocation of all licenses to traffic in intoxicating liquors and the removal of the place of business conducted under such license within the county of such board.

No limitation, qualification or restriction may be placed by the state board upon the authority of county boards so conferred, except the state board be specifically authorized by law so to do.

A careful examination of the statutes fails to disclose any provision giving to the state board authority to reverse, revoke, modify or control the action of the county boards in respect to these matters, except upon an appeal from such action by an applicant or licensee under section 38 of the license law, section 1261-53, G. C., 103 O. L., 233, which provides as follows:

> "There shall be an appeal by an applicant or licensee to the state board from all final decisions of any county board, except in cases of suspension under section 34 of this act, and also except in cases of rejection of any application for a saloon license. There shall also be an appeal in cases of such rejection where:
>
> "1. The number of saloon licenses is limited, and where in any subdivision of the state a county licensing board has not granted saloon licenses to the full number allowed by said limitation.
>
> "2. In all cases of rejection by the board of an application for transfer of licenses to others, and for removal of location.

"3. In all cases where the county board has rejected an application to renew a license, or an application for a transfer of a license by one who has purchased a license at court sale, or under the terms of a will or contract of a licensee since deceased."

Section 9 of the license law, section 1261-24, G. C., 103 O. L., 219, infra, and that part of section 40 of the license law, section 1261-55, G. C., 103 O. L., 234, which provides in reference to appeals under section 38, as follows:

"If upon the said hearing and the examination of said record the state board shall decide that the finding of the county board was erroneous, the said state board shall reverse the action of the said county board, and shall order the county board to make the finding in accordance with the conclusions of the state board. Whereupon the said county board shall grant to the said appellant the said license, or shall reinstate the said licensee, or shall make the transfer, or shall do the thing required by the state board upon said record. And in the case of a decision of the county board rejecting an application for renewal, or where through any action of the county board a license is revoked, and where an appeal is taken within the time allowed by law, no license shall be issued to take the place of the license failed to be renewed or of the license revoked unless the action of the county board is affirmed."

It appears, however, that no appeal, as authorized, was taken and that the state board, in each of the matters referred to, acted solely upon its own motion, ostensibly pursuant to a protest or petition presented by or on behalf of certain individuals. While there is provision for the registration of protests against the granting of licenses or in favor of the revocation of any license with county boards, no authority for the filing of such protests with the state board will be found and such petition or protest will not, therefore, give to the state board jurisdiction to take any action in reference to the granting or revocation of any license.

In reference to the second statement of facts, however, which deals with an application for removal, attention is called to that part of section 9 of the license law (section 1261-24, G. C., 103 O. L., 219), which provides as follows:

"In the event of the inability of the board to agree upon any question before it for the period of more than three days, except as to a granting, renewing or transferring of a license, then the subject of difference shall be certified by the secretary of the board to the state liquor licensing board for decision, and its decision shall be final."

From this it will be observed that as to all those matters before the county board, in reference to the determination of which there is an inability of the board to agree for more than three days, except as to granting, renewing and transferring of licenses, upon proper certification thereof, the state board is authorized to make final decision. This provision would, of course, be applicable to and include applications for removal, but in the case under consideration there was no inability of the county board to agree and hence no certification to the state board. It is unnecessary, therefore, to say that in the absence of the inability of the county board to agree in respect to an application for removal and a certification of the same as prescribed, the state board is without authority to direct the action of the county board as to the granting or rejection of such application.

It should be here observed that the matter of the proper location of saloons is

to be determinted in the first instance in their sound judgment and discretion by the county liquor licensing board, subject, however, to such appeal as is authorized by section 1261-53, G. C., supra, and to section 1261-24, G. C., supra.

Under section 10 of the license law, section 1261-25, G. C., 103 O. L., 219, county licensing commissioners may be removed by the state board "in case of misconduct in office, bribery, incompetency, any gross neglect of duty or gross immorality." This provision cannot be given such construction as to authorize the state board to assume to take such action in regard to the granting or revocation of licenses or the granting or rejection of applications for removal, as it may conceive ought to have been taken by the county board in any case. If the action of any member of a county board, with reference to the granting or revocation of a license or the granting or rejection of an application for removal has been such as to constitute any or all of the causes for which removal is authorized, it is then within the power of the state board to make such removal in accordance with the provisions of law prescribing the procedure in such cases. But, as stated above, in no case is the state board authorized to assume to act for and instead of the county board in such matters, except in pursuance of the provisions of section 1261-24, G. C., supra.

I am therefore of opinion that the action of the state board, in respect to both the matters set forth in your communication, was wholly without authority of law.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1152.

APPROVAL OF TRANSCRIPT OF BOND ISSUE FOR VILLAGE OF MARBLE CLIFF, OHIO.

COLUMBUS, OHIO, January 6, 1916.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE:—Bonds of Marble Cliff, Ohio, in the sum of $5,500.00, being 11 bonds of $500.00 each, dated November 1, 1915, bearing interest at five percentum per annum, payable semi-annually, and maturing one year beginning November 1, 1916.

I have examined the transcript of the proceedings of council and other officers of the village of Marble Cliff in connection with the issuance of the above bonds, and I find that said proceedings have been regular and in conformity with the laws of Ohio.

I am therefore of the opinion that said bonds, when properly prepared, executed and delivered, will constitute valid and binding obligations of the said village of Marble Cliff.

Since no bond form has been submitted for my examination, I suggest that when the same are presented to the treasurer for delivery that I be given an opportunity to examine them.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1153.

APPROVAL OF BOND—NICHOLAS KOEHLER, DIVISION ENGINEER, HIGHWAY DEPARTMENT.

COLUMBUS, OHIO, January 6, 1916.

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

DEAR SIR:—I have your communication of January 5, 1916, transmitting to me for examination the bond of Nicholas Koehler, division engineer in your department.

I find this bond to be in proper form and am therefore returning the same with my approval as to form endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1154.

ROADS AND HIGHWAYS—CONTRIBUTION FOR ROAD IMPROVEMENTS BY INDIVIDUALS, FIRMS AND CORPORATIONS—HOW FUND SHOULD BE HANDLED—STIPULATION IN CONTRACT.

Contributions made to the state highway department for road work should be placed by the state highway commissioner in a bank to his account as such commissioner and a surety bond should be taken for the safe keeping of such funds.

In contracting against such funds there should be inserted in the contract a recital of the fact that all or a certain part of the contract price, as the case may be, is payable from contributions. Contributions for work on intercounty highways or main market roads may also be made to the county in which the work is to be done if the co-operation of the officials of such county may be had.

COLUMBUS, OHIO, January 7, 1916.

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

DEAR SIR:—I have your communication of December 17, 1915, which communication reads as follows:

> "This department has confronting it several cases where a certain proportion of the estimated cost of improving an intercounty highway or main market road consists of a fund created by contributions of various individuals, firms and corporations.
>
> "It has been suggested that the proper official to act as custodian of such a fund is the county treasurer of the county in which the improvement is being made, and that such funds in his hands should be drawn upon by the state in the same manner as funds of the county used in co-operation with this department.
>
> "I respectfully request an opinion from your office as to whether or not such county treasurer would be the proper custodian of such funds, and if you find that he is not, I respectfully ask an opinion from your office as to the proper and legal procedure to be followed by this department in the handling of such contributions."

Section 217, of the Cass highway law, being section 1224, G. C., and being

found in the chapter of the Cass highway law relating to the construction, improvement, maintenance and repair of roads and bridges by the state highway department, provides among other things that nothing in that chapter shall be construed so as to prohibit any individual or corporation from contributing a portion of the cost of the construction, maintenance and repair of state highways.

Your communication presents the question of the proper method of handling contributions of the class referred to in the above mentioned provision. It is unnecessary to advance any argument in support of the proposition that you would not be authorized to enter into contracts involving the expenditure of promised contributions from individuals, firms and corporations. That is to say, if an individual specially interested in the improvement of a particular road should merely agree to contribute all or some portion of the funds required for the improvement of such road, you would not be authorized to enter into a contract involving the expenditure of the funds which the person in question had agreed to contribute, but which funds had not been placed in your hands.

The statute does not point out any particular method of handling these funds, and I have been unable to find any provision of law authorizing the handling of such contributions by the county treasurer in those cases in which the contributions are made to your department. In the absence of any statutory direction in the matter, I am of the opinion that you should act as custodian of the funds, and to insure their safe keeping should deposit them in a bank to your account as state highway commissioner, and take from such bank a surety bond conditioned that the bank shall safely keep the funds and pay out the same on your check. The working out of such an arrangement will hardly involve any particular difficulties for the reason that the bank selected by you as depositary of such funds, not being required to pay any interest thereon, will probably be willing to meet the cost of the surety bond required by you. In contracting against such funds, you should insert in the contract a recital of the fact that all or a certain part of the contract price, as the case may be, is payable from contributions received by you.

I am not unmindful of the following provision found in section 24, G. C., 104 O. L., 178:

> "On or before Monday of each week every state officer, state institution, department, board, commission, college, normal school or university receiving state aid shall pay to the treasurer of state all moneys, checks and drafts received for the state, or for the use of any such state officer, state institution, department, board, commission, college, normal school or university receiving state aid, during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals or otherwise, and file with the auditor of state a detailed, verified statement of such receipts."

The above quoted provision uses the words "taxes," "assessments," "licenses," "premiums," "fees," "penalties," "fines," "costs," "sales" and "rentals." None of these terms are broad enough to include contributions. They all refer to funds which the state has a right to demand, and the payment of which it has a right to enforce, and in this particular they do not differ from one another. A contribution is of an entirely different nature, being voluntary, and a thing which the state may receive but has no right to demand. In view of the familiar rule of statutory construction that while in the abstract general terms are to be given their natural and full signification, yet where they follow specific words of a like nature they take their meaning from the latter, and are presumed

to embrace only things or persons of the kind designated by them, I conclude that the use of the word "otherwise" in the provision above quoted does not so enlarge the meaning of that provision as to require you to pay contributions to the state treasurer.

I deem it proper in this connection to call your attention to the fact that individuals, firms and corporations may make their contributions toward the construction, improvement, maintenance and repair of state highways to the county in which the improvement is to be constructed instead of making the same to the state highway department provided the co-operation of county officials may be had in the matter. Under authority of the case of State ex rel. v. County Auditor, 86 O. S., 244, the contributors may secure the placing of their contributions in a specific road fund in the county treasury by indicating their desire in the premises at the time payment is made. Their contributions being placed in the county treasury to the credit of a road fund available for a specific improvement, it would be within the power of the county commissioners to make an application for state aid upon the road in question and to use the contributed funds for the purpose of meeting the county's proportion of the cost and expense of the improvement.

If this suggestion should be followed in any particular case, the procedure of your department and of the county commissioners from the time of the making of the application until the completion of the work and the payment for the same, would be identical with the procedure in those cases in which funds designed to meet the county's share of the cost and expense of the improvement were raised by taxation or by a bond issue.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1155.

ARTICLES OF INCORPORATION—CORPORATION ORGANIZED FOR APPREHENSION AND CONVICTION OF CRIMINALS DISAPPROVED FOR REASON, PURPOSE CLAUSE FAULTY—SECTIONS 10200 TO 10206, G. C., CONSTRUED.

Sections 10200 *to* 10206, *G. C., both inclusive, do not authorize the organization of a corporation for the purpose of enabling its members to exercise police powers in order to collect rewards offered for the apprehension and conviction of criminals. The powers conferred by said sections are only intended to enable the members of such a corporation to provide protection against loss caused by the depredations of criminals, and not for the purposes of profit.*

COLUMBUS, OHIO, January 8, 1916.

HON. CHARLES Q. HILDEBRANT, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of December 6, 1915, together with enclosures, in which you request my opinion as to the legality of the purpose clause contained in the articles of incorporation of the "OHIO SECRET SERVICE BUREAU."

The purpose clause contained in the articles of incorporation enclosed in your letter is as follows:

> "Said corporation is formed for the purpose of apprehending and convicting any person or persons accused of either a felony or misdemeanor.

"The plan of operation of said corporation is as follows: Each member of said corporation shall be entitled to all his fees or reward the same as if he were operating as a private person.

"The only benefit to be derived by any member, exclusive of his said fees or reward, from said corporation, will be the power vested in him by reason of the incorporation; and this corporation will operate under sections 10200, 10201, 10202, 10203, 10204, 10205 and 10206 of the General Code of Ohio."

The proposed articles of incorporation are filed for the express purpose of organizing a corporation under the provisions of sections 10200-10206, inclusive, G. C. Said sections contain special provisions for the organization of a certain class of corporations. Not only are the provisions thereof essentially different from those authorizing the organization of the ordinary corporation, but the organization contemplated thereby is essentially different from the ordinary corporation. An examination of said sections will show that the particular characteristics of a corporation which may be organized thereunder are that it shall be a corporation not for profit, either of itself or its individual members, but a corporation whose sole purpose is the protection of its members from the depredations of criminals.

While section 10200 provides that:

"Any number of persons, not less than fifteen, a majority of whom must be residents of this state, may become incorporated for the purpose of apprehending and convicting any person or persons accused of either a felony or misdemeanor,"

yet this is modified by the provisions of the succeeding sections. Special attention is called to section 10205, G. C., which provides:

"Such an association may make and collect from its members, assessments authorized by its constitution or by-laws, and if so provided in its constitution, also may indemnify its members for losses caused by horse thieves or other felons, and expend such moneys as are deemed necessary in the pursuit, arrest, and to procure the conviction of felons,"

and to section 10206, G. C., which provides as follows:

"Upon the apprehension and conviction of a person charged with felony by such an association, the commissioners of the county in which the crime was committed, may reimburse it in any sum not above one hundred dollars, for necessary expenses, not otherwise provided for by law, incurred in the apprehension and conviction of such criminal. Upon the apprehension and conviction by the association of a person accused of misdemeanor, the commissioners of the county in which the crime was committed may reimburse it in any sum not above seventy-five dollars for necessary expenses incurred, not otherwise provided for by law, in the apprehension and conviction of such criminal."

The foregoing sections, providing for the assessment of members to provide funds for carrying on the activities of the corporation and for reimbursement from the county commissioners for the "necessary expenses" of the corporation in the apprehension and conviction of felons and misdemeanants, show clearly that the corporation contemplated therein is not one which in any sense of the word was designed or intended to be for the profit of itself or any of its individual members

but is, as stated above, one whose sole purpose is to provide the means by which its members may protect themselves from laws by conferring upon them the right to make arrests and to create a fund to indemnify themselves for property stolen or destroyed.

An examination of the purpose clause of the proposed articles of incorporation above set out shows that it is not a corporation not for the profit of its members nor for the purpose of enabling its members to protect themselves from loss in the manner above suggested. On the other hand, it is clearly the intent of the incorporators to organize for the purpose of securing to themselves the power to make arrests, not for their own protection, but solely in order to secure the rewards which may be offered for the apprehension and conviction of criminals.

I am therefore of the opinion that the sections of the General Code above mentioned do not authorize the organization of a corporation such as is contemplated in the application in question for the purposes set out therein.

Respectfully,

EDWARD C. TURNER,

Attorney General.

1156.

COUNTY CHILDREN'S HOME—IF BUILDING IS ERECTED AT COST TO EXCEED $25,000 A BUILDING COMMISSION IS REQUIRED TO BE APPOINTED.

When a county children's home is to be erected in any county at a cost to exceed twenty-five thousand dollars, a building commission is required to be appointed under the provisions of section 2333, *G. C.*

COLUMBUS, OHIO, January 8, 1916.

HON. OTHO W. KENNEDY, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—I have your letter of November 24, 1915, as follows:

> "At the regular election held in this county on November 2d, 1915, a vote was taken under section 3077 of the General Code, as amended in the 103 Ohio laws, on the proposition of establishing a children's home in this county, and the issuing of bonds to provide funds out of which to pay for the same. The proposition carried. This vote was for the purpose of establishing a children's home in Crawford county. In other words, the whole of Crawford county is the district, and the only district or territory for which said home is to be established.
>
> "Now comes the question as to whether or not the provisions of section 2333 of the General Code apply. That is to say, must we have a building commission appointed or not? Personally, it is my judgment that no building commission is contemplated in respect to a children's home. Under section 2333, G. C., the language is very inclusive and probably standing alone would be sufficient to require the appointment of such building commission. But under sections 3077 et seq. in respect to children's homes, it occurs to me that we have a decidedly different situation from that contemplated under section 2333. It is difficult to state, in fact, at this time it is impossible to state how much money will be expended

in the construction of the building, and if it should be within the twenty-five thousand dollars mentioned in section 2333, no building commission would be required. It may cost to exceed the twenty-five thousand dollars, and it may not reach that sum, or at least so far as the statutes are concerned, this may be true. Under section 2333, G. C., if a vote is taken on the proposition of issuing twenty-five thousand dollars or more in bonds for the purpose of constructing a building, a building commission is necessary, but under section 3077, there is no vote taken upon the amount of money to be expended in the building. First, there is a vote taken upon the proposition as to whether or not a children's home will be established or not. And, second, upon the maximum sum of money that may be expended for that purpose.

"As I view it, this clearly means that any sum of money may be expended so long as it does not exceed the sum voted on. But out of this sum voted on, a large portion of it may be used in the purchase of real estate and other things in connection with the children's home that would be proper and necessary, but no part of the building itself. This would indicate that the provisions of section 2333 are upon one question which seems to be this, that the vote must be taken on the bond issue of twenty-five thousand dollars or more for the building alone. Then, under section 3077, there may be more than one county included in the district, and if we had included, say three counties and section 2333 would apply to same, it would follow that there would have to be a building commission appointed in each county to act in conjunction with the commissioners of these counties, and it seems to me that no such thing was intended by the legislature. Then again, under 3077 et seq. this children's home could be established in one of the three counties, while section 2333 seems to contemplate the construction of the building in that particular county. And the wording of sections 3077 et seq. are such that it seems to me that the legislature did not contemplate that the commissioners should act in conjunction with the building commission. While it is true that our district includes Crawford county only, yet this could make no difference upon the meaning to be attached to this law as enacted by the legislature. Then section 3077 and some of the other sections pertaining to children's homes were enacted after the enactment of 2333, and therefore if the same are in conflict with the provisions of section 2333, the later would necessarily have to control. Other reasons might be given as to why a building commission was not contemplated in respect to children's homes, and I might add this to the reasons given before: That the commissioners would have a right to buy a property with a building on it so that no building would be constructed on it, or it might be a case where an old building would simply be repaired or the like.

"I should be pleased to have you give me your opinion at once, as to whether or not the law requires that we have a building commission. An early reply will be much appreciated in view of the fact that the application for the appointment of this commission is to be made within thirty days after the election, and this time will soon be up."

In answering your foregoing inquiry it must be understood that my observations are predicated upon the condition that your board of commissioners propose to erect a children's home at a cost to exceed twenty-five thousand dollars independent of the cost of any land or site upon which said home is to be erected. That is to say, the building furnished, heated, lighted and ready for occupancy

must cost to exceed that amount. In the event, then, that your commissioners propose to erect such a home, I am of the opinion that the provisions of section 2333, G. C., to which you refer, apply, and a building commission is required. While it is true that under sections 3077 and 3078, G. C., the vote required is upon the establishment of a children's home and the maximum amount of money to be expended therefor, yet the only effect of such vote is to eliminate the same requirement from the provisions of said section 2333, supra., and leave its remaining provisions in full force and effect. In other words, the commissioners having submitted the question of issuing bonds under sections 3077 and 3078, supra., such submission is a sufficient compliance with the requirements of said section 2333 in that behalf.

Your reference to the law providing for a district children's home can have no application here as said section 2333, G. C., applies only to court houses and other county buildings.

While the question is not wholly free from doubt, I am of the opinion that when the county commissioners have submitted the matter of establishing a children's home and the issuing of bonds therefor to the qualified electors of their county, as required by sections 3077 and 3078, G. C., and the same is approved by said electors, and that thereafter said commissioners, under the authority so conferred by said election, propose to erect a home at a cost to exceed twenty-five thousand dollars, a building commission is required to be appointed under section 2333, G. C., which appointment may be made without the vote provided for in said section.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1157.

TAXES AND TAXATION—GROSS EARNINGS FROM RAILROADS DOING BUSINESS IN OHIO—TRANSPORTATION OF IRON ORE BY WATER TO THIS STATE AND THEN TRANSPORTED BY RAIL—WHEN SUCH SHIPMENT CONSTITUTES INTERSTATE AND INTRASTATE COMMERCE.

The rail transportation of iron ore from lake ports in the state of Ohio to other points in the state of Ohio constitutes interstate business, and the earnings therefrom are not to be computed in ascertaining the basis of the railroad excise tax, if such transportation is a part of a continuous transit begun outside of the state, as by water transportation on the Great Lakes. The continuity of such transit is not affected by the time at which the title to the ore as between the consignor and the consignee passes, by the fact that the ore may have been brought down to the ports and delivered to the railroad by its owner in vessels belonging to such owner or chartered by him or it, or by the fact that the railroad transportation may be for any other reason upon new and separate bills of lading; but if the ore when landed at the ports is undisposed of, so that it is there held for sale by its owner, and the subsequent Ohio transportation is in pursuance of such sale, it is intrastate in character; and even though ore be contracted for by ultimate consignees, by specification of quality and quantity or otherwise, and quantities of ore are brought down to Ohio lake ports with a general view to discharging such contracts; yet if the ore which is sold lands in Ohio and is there held or detained beyond the strict necessities of transshipment for the convenience of the owner, as distinguished from or in addition to purposes which serve the convenience of transportation, the journey or transit of the commodity must be regarded as having been interrupted at the port, although the detention is in the custody of the railroad company, and in such event the subsequent rail transportation of the ore in Ohio is purely intrastate. Whenever the rail transportation in Ohio is intrastate in character the earnings therefrom must enter into the computation of the basis of the excise tax.

COLUMBUS, OHIO, January 8, 1916.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of your letter of November 30, 1915, requesting my opinion as follows:

> "Under General Code section 5477, it is the duty of this commission to determine the gross earnings from intrastate business of each railroad doing business within this state. Examination of the books of certain of the companies has developed the following facts:
>
> "Iron ore is shipped by water from points outside of this state to points within this state under the following conditions:
>
> "1. The owner of the ore transports same in *his own vessels* to the terminals of certain railroads on lake points within this state. It is then delivered to the railroad company for transportation to some point within this state.
>
> "2. The owner of the ore *charters* a vessel and transports the ore in the same manner as above set out in paragraph 1.
>
> "3. Ore is carried by independent vessels to said lake points and then *reshipped* to points within this state under new and separate billing.
>
> "4. Ore is transported to the said lake points and stored on the docks and *thereafter* sold and delivered to points within this state.

"The railroad companies claim that the above is interstate business and refuse to return same as intrastate business. This commission respectfully requests your opinion in the matter."

My investigation of the law bearing upon these questions has convinced me that no positive answer can be given to some of them in the absence of further facts at least; and even on such supplementary facts as might be imagined for the purpose of a hypothesis, the answers to these questions must be qualified by stating that the law in respect thereto must be regarded as not perfectly settled.

In the first place, the only decisions worth considering are those of the supreme court of the United States. This is true because the questions submitted are purely federal ones, and also because the decisions of the state courts in such matters have been reversed or overruled with such frequency by the supreme court of the United States as to deprive them of determining weight.

The general principle is, of course, that a state may not tax the privilege of carrying on interstate commerce nor measure a tax nominally upon any privilege subject to its jurisdiction by the receipts or earnings from such commerce. Of course, there is nothing in the statutes of Ohio which conflicts with this principle because on their face they show an intention to exclude from the earnings of railroad companies and other commercial carriers, for the purpose of the computation of the public utility excise tax, all receipts which are derived from the commerce which the state may not tax.

The Ohio Tax Cases, 232 U. S. 576.

In short, the only receipts or earnings which may be considered in determining the basis of the apportionment of the tax are those from purely intrastate commerce.

The question presented by each of your specific inquiries then is as to whether or not the transportation of iron ore from the lower lake ports to points within the state of Ohio is intrastate commerce for the purpose of the rule as to privilege taxation.

One of the difficulties which I have encountered lies in the fact, that although the United States supreme court reports are prolific of decisions respecting the power of the state to tax property which has been in interstate commerce after its arrival in the state, no case so far as I am able to discover has been decided upon the exact point or points raised by your letter. To put it broadly, the rule adopted by the supreme court of the United States is, that property which has been carried in interstate commerce becomes subject to local or state taxation when it comes to rest in the taxing state and is there commingled with the general mass of property therein. But it has not been decided, at least directly, that when the property transported has come to rest and is so commingled, the interstate transit thereof is under all circumstances at an end, so that a subsequent movement of the property wholly within the borders of the state is a separate and distinct transit and constitutes purely intrastate commerce. I have, however, come to the conclusion that the reasons upon which the rule as to property taxation is based, apply with equal force to the solution of the question as to when the interstate journey is ended, in order to discriminate between interstate and intrastate business for privilege tax purposes.

I may add that decisions relative to the power to regulate commerce by fixing rates, ordering accommodations and prohibiting practices are not lacking, and that these decisions have been of some service to me. In their consideration, however, I have been mindful of a distinction which the supreme court of the United

States has observed between the state's power to regulate commerce directly and its power to regulate commerce indirectly by taxation thereof. The power of congress in the former respect as opposed to that of the states, is much more zealously guarded by the supreme court of the United States than is the latter. Thus that court does not permit a state to regulate rates of transportation between points within that state over a route, a part of which passes through another state or states, but does permit such a state to tax the privilege of carrying on that commerce; so that such a movement may be said to be interstate for the purpose of police regulation and intrastate for the purpose of taxation.

This rule was discussed and the decisions sustaining it were cited in my predecessor's opinion to the commission relative to the steamer Greyhound (annual report of the attorney general for the year 1913, page 597), Lehigh Valley Railroad Company v. Pennsylvania, 145 U. S. 192.

It will thus be seen that the decisions relative to the police power of the state over commercial transportation within its borders afford an analogy to the rule to be applied to your questions which may be safely employed, so far at least as the rule is favorable to the state.

The following principles and the authorities sustaining them apply to the solution of your questions:

The character of commerce as interstate or intrastate is not determined by the actual route of a particular carrier, which may be wholly within one state without depriving a given act of transportation of the character of interstate commerce. The Daniel Ball, 10th Wallace, 557 and a great multitude of subsequently decided cases.

The character of a given act of transportation is not determined by the bill of lading upon which the goods are being carried upon a given stage of their journey.

Railroad Commission of Ohio v. Worthington, 225 U. S. 101;
Illinois Central Railroad Company v. Louisiana Railroad Commission, 236 U. S. 157-163;
Pennsylvania Railroad Co. v. Clark Coal Company, 238 U. S. 456;
Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498;
Texas, etc., Railroad Company v. Sabine Tram Co., 227 U. S. 111.

In one of the most recent of the above cited cases, Illinois Central Railroad Company v. Louisiana Railroad Commission, supra., the following language was used:

> "The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved. And generally when this interstate character has been acquired it continues at least until the load reaches the point where the parties originally intended that the movement should finally end."

The ownership of the carrying agency by the owner of the goods transported does not affect the character of the commerce.

United States v. Ohio Oil Company, 234 U. S. 548;
Kirmeyer v. Kansas, 236 U. S. 568.

In the first of these cases the jurisdiction of the interstate commerce commission over companies owning interstate pipe lines and transporting therein only

their own petroleum was sustained, and in the latter case the delivery of intoxicating liquors in one state from a warehouse in another state by means of wagons upon orders received by telphone at the warehouse was held to be interstate commerce.

The time when with respect to the transit the title to the goods passes from the consignor to the consignee is immaterial; so that though the title may not pass until acceptance by the consignee at the point of delivery, the goods remaining the property of the consignor even after delivery, so as to afford an opportunity for inspection, testing, etc., the whole transaction if it involves interstate transportation constitutes interstate commerce.

Rearick v. Pennsylvania, 203 U. S. 507;
Dozier v. Alabama, 218 U. S. 124-127;
In re Selma Company, Bankrupt, 204 Fed. 839;
Gulf,etc. Railroad Co. v. Texas, 204 U. S. 403.

On the other hand, when goods are shipped from a point in one state to a point is another, the consignor and the carrier at the time contemplating no further shipment, whether on new or separate bill of lading, and during transit the consignee or one to whom he has sold the goods in the meantime, decides to have them transported to another point in the state of destination, and this is done, the second journey is independent of the first and constitutes intrastate commerce.

Gulf, etc., Railroad Company v. Texas, supra.
C. M. & St. P. Railroad Co. v. Iowa, 233 U. S. 334.

The property tax cases, involving the right of the state to impose a tax upon property as such as against the contention that the property is in transit in interstate commerce and therefore not subject to local taxation and resulting in the rule hereinbefore described, are as follows:

Woodruff v. Parham, 8 Wallace, 123;
Brown v. Houston, 114 U. S. 622;
Coe v. Errol, 116 U. S. 517;
Pittsburgh, etc., Coal Co. v. Bates, 156 U. S. 577;
Kelley v. Rhoads, 188 U. S. 1;
Diamond Match Co. v. Ontonagon, 188 U. S. 82;
American Steel & Wire Co. v. Speed, 192 U. S. 500;
General Oil Company v. Crain, 209 U. S. 211;
Bacon v. Illinois, 227 U. S. 516.

The results of some of these leading cases may be given:

In Coe v. Errol, supra—the most frequently cited of them—it was held that the property or products of a state, though collected from various points and transported to a common place of shipment for further transportation in interstate commerce, were subject to local state taxation because their interstate journey had not yet commenced. The facts of the case were that logs cut in the state of New Hampshire had been drawn by sleds and teams to a point on a tributary of the Androscoggin river, where they were detained until the water should become high enough to float them to a point in Maine. There were also other logs which had been cut in Maine and were ultimately destined to the same point in Maine. but which were held at the New Hampshire point until the propitious time for

their further transportation. As to the latter, however, the state court had ordered the tax abated so that the only question before the court was with respect to the former. Mr. Justice Bradley used the following language at page 527:

> "Such goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state or have been started upon such transportation in a continuous route or journey * * *. This movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state * * *, it may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. * * * * *"

This case fixes the time at which the interstate journey *begins*.

In Brown v. Houston, supra, the facts were as follows:

A partnership of the state of Pennsylvania doing business in Pittsburgh had shipped coal in barges on the Ohio and Mississippi rivers to their agents in New Orleans. While the coal was still in the barges in which it had been transported and afloat on the Mississippi river, and while it was held by the agents to be sold for the account of their principal, it was assessed for taxation by the parish of New Orleans. The supreme court of the United States sustained the tax, which was not levied upon the coal as an import nor as a foreign product but merely as property within the state. Mr. Justice Bradley used the following language at page 632:

> "The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. * *"

This case then in effect holds that when property which has been carried in interstate commerce reaches a destination, its further movement from which, if any, depends upon a new and separate disposition of the goods, it is at rest and becomes a part of the property of the state in which it is situated.

In Kelley v. Rhoads, supra, the assessor of the county of Laramie, Wyoming, had assessed and collected taxes upon a herd of sheep which at the time of the assessment were being driven from a point in Utah across the state of Wyoming to a point in Nebraska for the purpose of shipment by rail from the latter point. The sheep were grazed as they were driven, and were assessed as "live stock brought into this state for the purpose of being grazed." The supreme court of the United States enforced repayment of the taxes on the ground that the sheep were, at the time of assessment, in transit. It will be observed that neither in this case nor in Coe v. Errol, supra, was the movement, the character of which was considered by the court, a service performed by a common carrier.

In Diamond Match Company v. Ontonagon, supra, the facts were quite similar to those in Coe v. Errol. That is, the property which was subjected to the local tax consisted of logs afloat in a river which remained there until the breaking up of the ice therein and the opening of navigation thereon, when the logs, or part of them, were to be released and floated down the river to a point in another state.

It was claimed by the owner of the logs that the sole reason for their accumulation at the given point was its inability to float them further until the opening of navigation. It was, however, agreed and stipulated that it was not the intention or purpose of the complainant, after the opening of navigation, to remove all the logs which had accumulated thereat, "but only such amount as could be manufactured at its said mills during the season," such amount being less than the amount which had been and would be accumulated at the point of detention. The state of Michigan, under the laws by which the tax was levied, had provided by legislation for the assessment of property in transit. The supreme court, which decided this case contemporaneously with its decision in Kelley v. Rhoads, supra, held that it was governed by Coe v. Errol, supra. Although the opinion of Mr. Justice McKenna does not expressly state that controlling effect was given to the facts respecting the accumulation at the point of detention of more logs than would be moved after the opening of navigation, yet at page 96 he dwells on these facts, and I think it may be assumed that they were not without weight in determining the court's decision; so that if it had appeared that the only reason for the detention of the logs at that point had been the closing of navigation, and that the number of logs so detained was not in excess of the number of logs that were to be moved, a different result might have been reached.

I have discussed the Diamond Match Company case because of its bearing upon facts, which I think may be involved in the situation which gives rise to your question, although they are not stated in your letter. The case itself, as it will be observed, does not deal with the termination of the interstate journey, but with the beginning thereof.

In American Steel & Wire Company v. Speed, supra, the facts were as follows:

The company manufactured its products in states other than the state of Tennessee but had selected Memphis in that state as a distributing point, and had made an arrangement with a transfer company in that city by which the latter company was to take charge of the products when shipped to Memphis, consigned to the steel company, store them in a warehouse there, assort them and make delivery to the persons to whom the goods were sold by the steel company. It was alleged that goods so held by the transfer company for the steel company were merely in transit from the point of manufacture outside of the state of Tennessee to the persons to whom they had been previously sold. The lower courts, however, had found, as facts from the evidence, that the contracts of sale, which were in writing, uniformly stipulated for the delivery of goods described as "so many kegs of nails, so many kegs of staples, so many reels of barbed wire, or so many coils of smooth wire," the agreement being with respect to the quantity and kind of goods, but not with respect to the grade and quality. The grade and quality were left open to be subsequently specified when the customer desired delivery. This specification was made in writing to the main office of the steel company in Chicago, which office would send the order to the transfer company at Memphis, and in accordance therewith the latter company would select goods of the desired quantity and quality from the mass in the warehouses and ship them to the customers. The court found that the allegation respecting the taking of orders in advance of shipments to the distributing point was true, but that the steel company, "taking advantage of the seasons when there is a good stage of water in the rivers, which must be used in floating its products from its mills to Memphis, * * * masses its goods at the latter point in anticipation of future sales." Moreover it was found that the products of the different factories of the steel company were indiscriminately massed in the warehouses, so that a given order might be filled from the products of one factory or from another, as the

result of pure accident. In making the assortments and deliveries, however, the original packages of transportation were never broken by the transfer company.

The goods were assessed for property taxation under the general property taxation laws of Tennessee. The supreme court of the United States sustained the tax upon the authority *inter alia* of Brown v. Houston, supra. I quote the following from the language of Mr. Justice White at page 519 et seq.:

> "We are of opinion that the court below was right in deciding that the goods were not in transit, but * * had reached their destination at Memphis, and were there held in store * * to be sold and delivered as contracts for that purpose were completely consummated * * * * *. The other propositions pressed upon our attention require consideration. They relate two subjects: First, the asserted want of power of the state of Tennessee to tax because the goods were imported from another state, and were yet, it is contended, in the original packages;"

(It will not be necessary to state the second point discussed by Mr. Justice White in his opinion.)

On the first point considered by the court it was held that cases like Brown v. Houston, supra, were not overruled by cases like Leisy v. Hardin, 135 U. S. 100, in which the "original package" doctrine had been applied to the exercise of the police power of the state. The distinction was pointed out and it was held that while the state may not prohibit, regulate or otherwise interfere with the sale of goods imported from another state while they remain in the original package of transportation and are offered for sale by the importer, yet the state may tax goods while in the original package as property in the state. In other words, while the courts do not express it in this fashion, commerce possesses at least two aspects, viz., transportation and sale. The question as to the right to tax goods as property depends upon whether or not transportation has begun or ceased; but the question as to the right to prohibit sale or possibly the right to tax sales as such or the business of selling depends upon whether or not the sale, which is the incident of the interstate commerce involved, has been consummated.

The court did not in the case last discussed comment upon a fact as found by the lower court, that in most cases at least the contracts for sale of the goods therein involved were not completed until the goods had arrived at the distributing point in Tennessee. We are, therefore, left in doubt by this decision as to whether the result on the main question in which we are interested, respecting the end of the interstate transit, would have been different if some of the goods held in the warehouses had been sold prior to their delivery at the warehouse under complete contracts specifying quality as well as kind and quantity of goods to be delivered.

In General Oil Company v. Crain, supra, the facts were as follows:

The plaintiff, a Pennsylvania corporation with its principal place of business at Memphis, Tenn., was engaged in the manufacture and sale of illuminating oils. Its wells and refining and manufacturing plants were located in Pennsylvania and Ohio. Memphis was a distributing point from which sales were made and at which large receptacles for oil of various kinds were kept. It was customary for the plaintiff to ship oils from its refineries to Memphis by rail in tank cars, and there to unload the contents of the cars into the other receptacles mentioned. It was shown that for each kind of oil dealt in by the plaintiff it maintained at Memphis two tanks, one plainly and conspicuously marked "oil already sold in Arkansas, Louisiana and Mississippi," and the other marked "oil to be sold in Arkansas, Louisiana and Mississippi." The contents of the first remained in

Tennessee only long enough (a few days) to be properly distributed, placed in smaller tanks, barrels and other receptacles and shipped according to the orders therefor. The oil in the other tank remained in Tennessee until required to supply orders from customers and was never sold except upon receipt of such orders. In short then, oil already sold and oil yet to be sold would come down to the point of distribution indiscriminately, and, of course, of necessity commingled in a single fluid mass in the tank cars and would be distributed and otherwise subsequently dealt with upon its receipt in Memphis. Plaintiff sold no oil at all in Tennessee from either of the two kinds of tanks mentioned.

The defendant was an inspector of oils, and the object of the suit was to restrain him from inspecting the oil in either of the two kinds of tanks above described. The court cited Coe v. Errol, Brown v. Houston, Coal Company v. Bates, Diamond Match Company v. Ontonagon and Kelley v. Rhoads, supra, as well as certain state cases which were followed and approved, among them State v. Engle, 34 N. J. L. 425, in affirming the lower court's decision denying the injunction. The New Jersey case cited having held that coal mined in Pennsylvania and sent by rail to a point in New Jersey where it was deposited on a wharf for separation and assortment, for the purpose of further transportation and not for sale, was not subject to taxation in New Jersey, was relied on for the purpose of establishing a principle approved by the supreme court of the United States and quoted from the decision of the state court as follows:

> "Delay within the state, which is no longer than is necessary for the convenience of transshipment for its transportation to its destination, will not make it property within the state for the purpose of taxation."

This principle, while recognized, was held not applicable to the facts in the case then at bar for the following reasons (per Mr. Justice McKenna at page 229 et seq.):

> "Its oil was not in movement through the state. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in State v. Engle, supra, but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation. It required storage there—the maintenance of the means of storage; of putting it in and taking it from storage. The bill takes pains to allege this. (Here was quoted an excerpt from the bill of complaint showing that for its own purposes the oil company found it convenient to store and reload the oil at Memphis.)
>
> "This certainly describes a business—describes a purpose for which the oil is taken from transportation, brought to rest in the state, and for which the protection of the state is necessary—a purpose outside of the mere transportation of the oil. The case, therefore, comes under the principle announced in American Steel Company v. Speed (supra)."

Mr. Justice Moody, with whom concurred Mr. Justice Holmes, dissented on the ground that the doctrine of the American Steel and Wire Company v. Speed should not be carried forward, as it had been by the majority of the court, and applied to a case where the goods had been completely sold prior to their receipt at the distributing point. It is clear, therefore, that the question left unsettled

by the decision in American Steel & Wire Company v. Speed was necessarily involved in General Oil Company v. Crain, and that it was decided in favor of the state.

In Bacon v. Illinois, supra, the facts were as follows:

The original defendant, Bacon, was sued for the recovery of a tax on grain owned by him and stored in an elevator belonging to him in the city of Chicago. An agreed statement of facts disclosed that all of the grain had been shipped by its original owners, who were residents of western and southern states, under contracts for its transportation, to New York, Pennsylvania and other eastern states, which reserved the right to the owners of the grain to remove said grain from the cars of the railroad companies "for the mere temporary purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading and mixing, or changing the ownership, consignee or destination" thereof. While the grain was in transit it was purchased by Bacon who was represented at the points of destination by agents through whom he disposed of grain and other commodities in eastern markets. He had purchased the grain in question solely for the purpose of selling it in the eastern markets and with the intention of forwarding it according to the shipping contracts. In removing the grain to his private elevator he was merely exercising the reserved right of the owner of the grain under the shipping contract, and it was agreed that the grain remained in the elevator only for such time as was reasonably necessary for the purposes above mentioned, and that immediately after these had been accomplished it was turned over to the railroad companies and was forwarded by them to the eastern cities in accordance with the original contracts of transportation which had been made with the railroad companies themselves. In other words, while the grain was stored in the elevator it was, so to speak, subject to contract for further interstate transportation. The supreme court of the United States, per Mr. Justice Hughes, sustained the imposition of the local tax. The following language appears in the opinion:

> "Neither the fact that the grain had come from outside the state nor the intention of the owner to send it to another state, and there to dispose of it can be deemed controlling when the taxing power of the state of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported, and was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not as he chose. He might sell the grain in Illinois or forward it as he saw fit. It was his possession with the control of absolute ownership. * * He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation which was made in the usual way without discrimination."

It will be observed that thus far Bacon v. Illinois is the culmination of the line of cases involving (with the exception of General Oil Company v. Grain, supra), the right of the state to impose a property tax upon goods which are in some manner or other impressed with the character of subjects of interstate commerce. The rule to be gathered from all of these decisions then may be stated as follows:

Property is subject to local or state taxation though it has been in interstate

commerce and is in the state by reason of interstate commercial dealings when its interstate transit is ended and it has come to rest in the state. Property has come to rest in the state when it has reached its final destination and is here held for purposes of sale, or when though it has not yet reached its final destination, it is detained in the possession of its owner at a place of distribution or transshipment and there commingled with other property of like kind or otherwise held for a purpose beneficial to the owner and beyond the mere necessities of transportation itself. But unless the interstate journey as originally contemplated is ended, the mere accumulation or delay at the place of transshipment, when such transshipment and such accumulation and such delay all result from the mere necessities of transportation, and it appears that nothing is detained or allowed to accumulate but what is to go forward as rapidly as the facilities of transportation permit, and when the accumulation or detention serves no purpose useful to the owner of the goods but merely accommodates the convenience and necessities of the transporting agencies, the goods are not at rest but are regarded as in transit until the end of their originally contemplated journey.

If these cases furnish the rule for the determination of the question as to what constitutes the business of transporting interstate commerce for the purpose of privilege taxes, an answer to your first three questions may, upon certain assumptions which must be made, be approximated. As I have stated, I believe that these cases do furnish such a rule. I base my conclusion upon this point on the fact that these property tax cases have been cited in the rate and regulation cases, where sole question involved was the character of the act of the transporting agency. Thus, in Gulf, etc., Railroad Company v. Texas, supra, Coe v. Errol, supra, was cited as embodying a rule applicable to the determination of the question then before the court. The same is true of Southern Pacific Terminal Railway Co. v. Interstate Commerce Commission, supra; Railroad Company v. Worthington, supra; Texas, etc., Railroad Company v. Sabine Tram Company. Indeed, while the question is as to the nature of the act of transportation, it seems to me that if the interstate transportation has ceased for one purpose, it must necessarily be held to have ceased for all other purposes. To hold the test applicable throughout the whole field, does not conflict with decisions like Leisy v. Hardin, or any other application of the so-called "original package" doctrine; for those cases deal with the right of the state to burden the *selling* aspect of interstate commerce, while your questions require consideration only of the transportation side, so to speak, of that commerce. The rule then may be applied in the solution of your questions, as follows:

You first inquire whether the transportation by the railroad company is intrastate or interstate under the following conditions:

> "1. The owner of the ore transports same in his own vessels to the terminals of certain railroads on lake points within this state. It is then delivered to the railroad company for transportation to some point within this state."

If the delivery to the railroad company from the vessels of the owner of the ore is direct, and there is no accumulation of the ore in the possession of the owner thereof, this transaction constitutes interstate commerce transportation on the part of the railroad company. The owner's ownership of the vessels and the transshipment of the ore at the lower lake port and the journey itself for the first time on a commercial bill of lading are alike immaterial. The journey would appear to be a continuous interstate journey upon the facts as you state them. However, it is a matter of common knowledge and one, too, which has been the subject of investigation by this department, that the case as I have put it is one

which very seldom, if ever, occurs. I understand that ore from the Minnesota and Michigan mines is transported during the period of open navigation to lower lake ports and there laid on docks in piles. These docks, in many instances, belong to the railroad companies, but it is possible that some of them may belong to dealers in ore. The piles are graded with respect to the kind and quality of ore. The railroad company theoretically takes away from the pile in twelve months what is brought to it in six months, but in fact it is often true that the amount brought down by the boats during the period of navigation is greater than the amount required to supply the mills during the year of their operation, as in Diamond Match Company v. Ontonagon, supra. It may be that all ore of a certain quality received on a certain dock is put into a given pile whether a given boat load of ore, which is there placed, has been sold or not, and whether the ore is supposed to be destined for Ohio points or for points outside of Ohio. In other words, the ore docks are like the oil tanks in General Oil Company v. Crain, supra, and like the elevator in Bacon v. Illinois, supra, excepting possibly that the railroad companies are the owners of the ore docks. This fact would not, however, in my opinion, be material. If it should appear that there was no separation of ore for various destinations on the docks, and that the amount of ore received by the railroad company during the period of navigation and held for further shipment, does not correspond to the needs of the mills during the year of ordinary railroad transportation, I should think that under those circumstances the railroad companies, though the owners of the docks, would occupy a position corresponding to that of the transfer company in American Steel & Wire Company v. Speed, supra.

If the commission then should find the fact to be that all are belonging to a given owner is piled indiscriminately on docks at the lower lake ports in Ohio with other ore of like quality, and that the amount thereof, so piled in a given year, is in excess of the amount destined *ab initio* for specific points below the lower lake ports, then it would appear that such storage or accumulation of ore on the dock, though accounted for in a large part, indeed perhaps almost entirely by the necessities of transportation, is also due in some part to the requirements of the owner's convenience. If it should appear that the owner of the ore actually exercises dominion and control over the same while it is on docks, so that he is at liberty to take from the common mass any quantity of ore which he may desire and sell it after it reaches the docks, then I would be of the opinion that the ore is at rest in Ohio, and that any subsequent movement of it is an independent transit as related to the water transportation; so that if such subsequent movement is wholly within the state of Ohio, it would constitute intrastate commerce.

The conditions as described in your second question are as follows:

> "2. The owner of the ore charters a vessel and transports the ore in the same manner as above set out in paragraph 1."

This question must be answered in the same manner as your first question has been answered, namely, upon the facts stated without any other circumstances in the case and assuming an immediate transshipment of the ore at the lower lake ports and its delivery to the railroads, or rather the transshipment and delivery as immediate as the necessities of the transportation, *and such necessities alone*, dictate, the carriage by rail is interstate in character; otherwise, and especially if the ore is placed upon a dock in a pile with other ore of like quality, sold and unsold, the journey has been interrupted and the railroad transportation is intrastate.

Your third set of conditions is as follows:

"3. Ore is carried by independent vessels to said lake points and then reshipped to points within this state under new and separate billing."

This question must be answered in the same way as your first and second questions have been answered. The reshipment under new and separate bills of lading is a fact which of itself is entitled to no weight, upon the authorities above cited.

Your fourth question may be answered positively. If the ore is not sold until it reaches the docks, the transportation thereof subsequent to the sale is undoubtedly intrastate commerce. This is true because the first journey of the ore, noticed for the purposes of this opinion, namely, the water transportation thereof, must necessarily have been terminated at the lower lake port and the ore held there for the purpose of sale. This case comes squarely within Brown v. Houston, supra, as well as the principles of Gulf, etc., Railroad Company v. Texas, supra, and there is no question in my mind as to the character of such transportation.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1158.

STATE HIGHWAY DEPARTMENT—NO APPROPRIATION TO PAY CLAIM OF W. C. MORSE—LOCATION AND AVAILABILITY OF ROAD MATERIAL IN OHIO—REPORT.

The state highway department has no appropriation available for the payment of a claim presented by Professor W. C. Morse.

COLUMBUS, OHIO, January 8, 1916.

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

DEAR SIR:—I acknowledge the receipt of your communication of December 27, 1915, which communication reads as follows:

"Under a former administration, Professor W. C. Morse was employed to make an examination and compile a report in writing on the location and availability of road material in Ohio. The report was completed under my administration. It represents a great amount of labor and has not been paid for.

"Mr. Morse has rendered a bill to the department to the amount of $50.00, in full and final payment for his work. He reports that the amount claimed represents only a fraction of the time necessary to complete the report, and which I have no doubt is correct on examining the amount of work entailed in compiling this report.

"I would respectfully request an opinion from you as to whether I have a right to pay Mr. Morse for his services; and, if so, from what funds should it be taken?"

From an examination of the files of your office, it appears that Professor Morse's claim is that he was asked by the state highway department to investi-

gate the road materials of Ohio, and was engaged during the summers of 1912 and 1913 in field work. Since that time he has been engaged in the preparation of a report covering the road materials of the state, this report being based on his field work and tests of samples collected by him. There seems to be no written evidence of his appointment or employment and the arrangement with him seems to have been an oral one made by Deputy Highway Commissioner Shoemaker. His claim is that he was paid $150.00 per month and expenses for his field work, and that he was to receive $100.00 per month for a period of not more than nine months for the preparation of his report. He states that when he saw the work would extend beyond the nine-month period, he asked the chief clerk of the highway department to withhold the last half of his last month's salary, amounting to $50.00, until such time as the report might be finished. It is this last half month's salary that he now claims.

A reference to the acts of the general assembly of Ohio, making appropriations for your department during the four years prior to February 15, 1915, shows that an expenditure of this character was at that time authorized and an appropriation made to meet the expense of work of the character performed by Professor Morse. The various appropriation measures found in volumes 102 and 103 of the Ohio laws, carry items for contingent expenses of the state highway department and also appropriations for equipping and operating a laboratory for testing road building materials and for services and expenses in collecting samples of such materials.

It is unnecessary to refer specifically to the various items of this character at the present time, for the reason that all of these appropriations have now lapsed. It is also unnecessary to determine whether Professor Morse's position comes under any of the appropriations for the use of your department for personal service carried by house bill No. 701, 106 O. L., 666, for the reason, as I understand the situation, that all of the positions provided for by that act have been continuously filled by other persons during the time that Professor Morse has been completing his work and disbursement has been made accordingly. I have no reason to doubt the correctness of Professor Morse's statements, and indeed they are borne out by correspondence on file in your office, but for the reasons pointed out in opinion No. 1149 of this department, rendered to you on January 5, 1916, I advise you that none of the current appropriations for your department are available for the payment of the claim submitted by Professor Morse.

Respectfully,

EDWARD C. TURNER,

Attorney General.