

Note from the Attorney General's Office:

1932 Op. Att'y Gen. No. 32-4885 was overruled in part by 1965 Op. Att'y Gen. No. 65-110 and clarified by 2003 Op. Att'y Gen. No. 2003-006.

It follows under authority of the foregoing case that the commissioners have no authority to authorize bonds to mature over a period of twenty years when the proceedings leading up to the authorization of the bonds apparently contemplated the issuance of bonds to mature over a period of twenty-four years. This discrepancy in the matter of maturities is perhaps even more serious than in the Curren case, because the average annual levy for these county tuberculosis hospital bonds would be in excess of that computed by the county auditor and authorized by the electors instead of the same as that authorized in the Curren case.

Respectfully,

GILBERT BETTMAN,

Attorney General.

4885.

PEDDLER—NECESSITY FOR SECURING A MUNICIPAL LICENSE—
COMPATIBILITY AND INCOMPATIBILITY OF NUMEROUS PUBLIC OFFICES DISCUSSED.

SYLLABUS:

1. *Discussion of licenses required of a merchant who peddles goods, wares and merchandise throughout one or more counties by means of an automobile truck.*
2. *The offices of county commissioner and member of the board of a rural school district are incompatible.*
3. *The office of county commissioner and position of clerk of the board of education of a rural school district are compatible.*
4. *The offices of county commissioner and township clerk are compatible.*
5. *A member of a board of education of a rural school district may also act as clerk of such board.*
6. *The offices of member of the board of education of a rural school and township clerk are compatible.*
7. *A township central committeeman of a political party may occupy the offices of county commissioner, township clerk, and the position of clerk of the board of education of a rural school district at the same time.*
8. *A township central committeeman of a political party may occupy the offices of member of the board of education of a rural school district, township clerk and the position of clerk of a board of education of a rural school district at the same time.*
9. *The offices of village treasurer and county treasurer are incompatible.*
10. *The office of county treasurer and the position of clerk of the board of education of a rural school district are incompatible.*
11. *The office of village treasurer and the position of clerk of the board of education of a rural school district are compatible.*
12. *A village central committeeman of a political party may occupy the office of village treasurer, and the position of clerk of the board of education of a rural school district at the same time.*
13. *A village central committeeman of a political party may occupy the office of county treasurer at the same time.*

COLUMBUS, OHIO, January 9, 1933.

HON. JACOB E. DAVIS, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date, which reads as follows:

"We are herewith submitting three separate questions upon which we respectfully request your opinion:

First: What, if any, license or licenses are required for the operation by a Jackson County resident, who has the principal place of his business in Jackson County, Ohio, of an automobile truck peddling groceries, smoked meats, dry goods, oils and other notions to the general consuming public? What, if any, difference does it make if the peddler is a resident of Pike County, Ohio?

During the past weeks several private country merchants of this county have complained to this office concerning the great number of peddling trucks going through their territory daily, and want to know what are the legal requirements for such activities. Our investigation of Section 6347 et seq. of the General Code, has not been satisfactory. For that reason, we ask your official opinion.

Second: Are the following offices compatible, that is to say, can all of said offices be held at the same time by one person: Commissioner of Pike County, Member of the township rural board of education, Clerk of said township rural board of education, Clerk of the Board of Trustees in said township, and Member of the Central Committee of his political party for said township? If not all compatible, which ones are?

Third: Are the following offices compatible, that is to say, can all of said offices be held at the same time by one person: Treasurer of Pike County, Ohio, Treasurer of Beaver Village, Pike County, Ohio, Clerk of the Board of Education of the Beaver Rural School District, and Member of the Central Committee of his political party in Beaver Village? If not all compatible, which ones are?"

Sections 6347, 6348, 6349 and 6353, General Code, provide as follows:

"Sec. 6347. When a person files with the auditor of a county, under oath, which may be administered by such auditor, a statement of his stock in trade in conformity with the law requiring the listing of such stock for taxation by merchants or others, and pays to the treasurer of such county the proportionate amount of taxes on such stock in trade in conformity with law, and complies with the terms set forth in section sixty-three hundred and forty-nine, such auditor shall issue to him a license to peddle such stock anywhere in this state."

"Sec. 6348. A merchant or his agent desiring such license shall not be required to make the statement provided for in the next preceding section if such stock has been otherwise listed for taxation."

"6349. Before receiving such license the applicant, if intending to travel on foot, shall file with the county auditor the county treasurer's receipt for twelve dollars; if intending to travel on horseback or in a one-horse vehicle, he shall file such receipt for twenty dollars; if intending to travel in a two-horse vehicle, he shall file the receipt for twenty-eight dollars; or, if intending to travel in a boat, watercraft or on a railroad

car, he shall file it for sixty dollars. He shall also pay to the auditor the sum of fifty cents as the auditor's fee for granting the license."

"Sec. 6353. A license granted in conformity with this chapter shall authorize the person named therein to sell goods, wares and merchandise for one year from the date of the receipt of the treasurer, as a peddler or traveling merchant. Such person may take out a license to peddle for three months or six months, and pay for it proportionately in accordance with the provisions of section sixty-three hundred and forty-nine."

From the provisions of Section 6347, *supra*, it would appear that a license obtained by a person under the terms of such section would entitle such person to peddle his stock in trade "anywhere in this state." However, this section must be read with other sections of the General Code which empower municipalities to license peddlers. Sections 3616, 3670 and 3672, General Code, provide, so far as pertinent, as follows:

"Sec. 3616. All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

"Sec. 3670. To regulate and license * * * peddlers, * * *. In the granting of any license a municipal corporation may exact and receive such sums of money as the council shall deem proper and expedient."

"Sec. 3672. To license * * * peddlers * * * and, in granting such license, may exact and receive such sum of money as it may think reasonable, * * *. Such council may confer upon, vest in and delegate to the mayor of the corporation authority to grant, issue and revoke licenses."

Hence, the peddler must obtain licenses from all the municipalities in which he operates that have such ordinances, as well as the license provided for by Section 6347, General Code, above quoted.

Neither Section 6349, General Code, nor any other sections seem to make provision for a peddler to obtain a license under Section 6347, General Code, to travel by automobile truck; however, it was held in the syllabus of an opinion appearing in the Annual Report of the Attorney General for 1913, Vol. I, page 137, as follows:

"Section 6347, General Code, requires compliance with section 6349, General Code, for the obtaining of a peddler's license, and said section 6349, General Code, provides only for peddlers on foot or with a one-horse vehicle or a two-horse vehicle, or a boat, watercraft or railroad car, and prescribes a specific fee for each mode of peddling. Section 6355, General Code, provides a penalty for peddling without a license.

Since an automobile truck resembles more closely a two-horse vehicle than it does any of the other modes of locomotion, unless (under) the principle that a law becomes applicable to new inventions as new inventions come into use, without special application thereto, a peddler intending to travel on an automobile truck, shall be required to pay the license provided for a two-horse vehicle."

It is to be noted from the terms of Section 6353, General Code, *supra*, that

the license granted under Section 6347, General Code, authorizes a person to sell "goods, wares and merchandise."

The term "goods" is very broad, and would seem to cover all chattels personal, including groceries, smoked meats, dry goods, oils and other notions mentioned in your communication. The term "goods" is defined by Webster's New International Dictionary as: "Wares; chattels; merchandise." Also a section of the Sales Act (Section 8456, General Code) provides in part:

"In this chapter, unless the context or subject matter otherwise requires—

* * * * *

'Goods' include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

* * * * *

In the case of *Davis Laundry & Cleaning Company vs. Whitmore*, 92 O. S. 44, it was held that corporate stock was included within the term "goods, wares and merchandise."

I am unable to see where it would make any difference, so far as the necessity for licenses is concerned, whether or not the peddler lived in Jackson or Pike County.

Hence, I am of the opinion, in answer to your first question that the person involved in your communication is required to obtain a peddler's license under Section 6347 et seq., General Code, and a peddler's license from any municipalities in which he sells his goods, wares and merchandise, if such municipalities have ordinances requiring the licensing of peddlers.

Coming now to your second question, I direct your attention to an opinion of my predecessor, reported in Opinions of the Attorney General for 1928, volume IV, page 2777. The syllabus of said opinion reads:

"The offices of county commissioner and member of a rural board of education within the county are incompatible and may not be held contemporaneously by one and the same person."

I concur in the holding of said opinion, that the offices of county commissioner and member of the board of a rural school district are incompatible.

A search of the Constitution and statutes shows that there is no express inhibition against a county commissioner acting as township clerk at the same time. Moreover, said offices do not appear to be incompatible by reason of the common law. The common law test is stated in the case of *State ex rel., vs. Gebert*, 12 C. C. (N. S.) 274, at page 275, as follows:

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

Applying this test to the offices of township clerk and county commissioner, it would appear that said offices are in no way incompatible.

As to the right of a county commissioner to act as clerk of a board of education of a rural school district, I can find no incompatibility from the Constitution,

statutes or common law rule. Hence, I believe that a county commissioner may act as clerk of a rural board of education at the same time.

It is expressly stated in Section 4747, General Code, that a clerk of a board of education may or may not be a member of the board. Hence, a member of a board of education of a rural school district may be a clerk of said board at the same time.

In the Annual Report of the Attorney General for 1911 and 1912, volume II, page 1204, it is held in the syllabus:

“As there are no conflicting duties, the clerk of a township may serve as a member of the township board of education.”

It is true that section 4747, General Code, one of the sections mentioned in said opinion, has since been amended, and township boards of education no longer exist; however, the amendment of said section is immaterial, and township boards of education are superseded to a certain extent by boards of education of rural school districts. Hence, I feel that there being no conflicting duties, the clerk of a township may serve as a member of a rural board of education.

There appears to be no incompatibility in the office of township clerk and position of clerk of a rural board of education, for the duties are ministerial, performed for two different political subdivisions. Hence, I am of the opinion that a township clerk may act as clerk of a rural board of education at the same time.

Section 4785-63, General Code, provides for the election of central committeemen of a political party. In my Opinion No. 4077, rendered February 20, 1932, I held that a central committeeman was an officer. After an examination of the statutes, I can see no reason to prevent a township central committeeman of a political party from holding either the offices of county commissioner, township clerk and position of clerk of a rural board of education, or the offices of member of a rural board of education, township clerk and position of clerk of a rural board of education at the same time.

Coming now to your third question, your attention is directed to an opinion reported in Annual Report of the Attorney General for 1911-1912, page 332. The syllabus of said opinion reads:

“As it is the duty of the city treasurer to require the county treasurer to account to him for all taxes and assessments collected for city purposes, the offices act as a check upon one another and therefore cannot be held by the same individual at the same time.”

While the above opinion applied to a city treasurer and in the instant situation a village treasurer is involved, yet the statutes on which the conclusion of such opinion is mostly based (Sections 3892, 4298 and 4301, General Code) apply to a village treasurer as well as a city treasurer.

I am therefore of the opinion that the offices of village treasurer and county treasurer are incompatible.

In Opinions of the Attorney General for 1921, volume I, page 308, is to be found an opinion holding in the second paragraph of the syllabus, as follows:

“That the offices of county treasurer and clerk-treasurer of a

board of education in the county are incompatible and cannot be held by one and the same person at the same time."

While section 2689, General Code, mentioned in the above opinion, has since been amended, and while sections 5649-3a, 5649-3b and 5649-3c, General Code, appearing in quotations in said opinion have since been repealed, nevertheless, the amendments of said section 2689 are immaterial, and sections 5625-19, 5625-24 and 5625-25 now contain similar provisions to those formerly appearing in sections 5649-3a, 5649-3b and 5649-3c. Hence, I feel that one person cannot hold the office of county treasurer and the position of clerk of a rural board of education simultaneously.

I see no incompatibility in the office of village treasurer and clerk of a rural school district, nor do I see any incompatibility in central committeemen holding the offices of either county treasurer or village treasurer and the position of clerk of a rural school district.

Hence, all the offices and positions which you mention in your third question are compatible, with the exception of the offices of village treasurer and county treasurer, and county treasurer and position of clerk of the board of education of a rural school district.

Respectfully,

GILBERT BETTMAN,

Attorney General.

4886.

TORRENS LAW—CANCELLATION OF REGISTERED TITLE BY HEIRS OF LAND—EFFECTED BY SURRENDER OF CERTIFICATE OF REGISTRATION ISSUED IN NAME OF SUCH HEIRS.

SYLLABUS:

Where title to a tract of land has been registered under the provisions of section 8572-1, et seq., General Code, commonly known as the Torrens Law, and a certificate of registration is issued to the owner of the land as provided for in this law, the registered title to the land, upon the death of the owner thereof, can be canceled upon the application of the heirs of such deceased owner only by the surrender of a certificate of registration issued in the name of such heirs.

COLUMBUS, OHIO, January 9, 1933.

HON. F. H. BUCKINGHAM, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—This is to acknowledge the receipt from you of a communication which reads as follows:

"The following question has been presented to me by the Recorder of Sandusky County, Ohio, relative to registering land titles under what is known as the 'Torrens Act.'—

'Mary F. died leaving a Will in which she devised certain real estate to her heirs. This real estate in question was registered land under the provisions of Section 8572-1 of the General Code, and sections fol-