Section 2759, General Code, directing that the county recorder shall record in the proper record in a fair and legible handwriting, typewriting or printing, all deeds, mortgages or other instruments of writing required by law to be recorded; and that maps and plats, entitled to record, may be recorded by photostatic process.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2206.

POLICE AND FIRE DEPARTMENTS—VILLAGES—CITIES—PENSION FUNDS—WORKMEN'S COMPENSATION—RIGHTS TO PARTICIPATE DISCUSSED.

SYLLABUS:

1. *Regular members of lawfully constituted police and fire departments of* villages, *under any appointment or contract of hire, are employes within the Workmen's Compensation Act, regardless of whether or not the village maintains a policemen's or firemen's pension fund; and such members, who are injured in the course of their employment, are entitled to participate in the state insurance fund, as are the dependents of such members, where death results from injuries received in the course of the member's employment.*

2. *The Workmen's Compensation Act was intended to provide a speedy and inexpensive remedy as a substitute for previous unsatisfactory methods and such act should be liberally construed in favor of employes.*

3. *Where an enacting clause is general in its language and objects and a proviso is afterwards intruduced, such proviso is to be strictly construed and no case is to be taken out of the enacting clause, which does not fall fully within the terms of the proviso.*

4. *Regular members of lawfully constituted police and fire departments of* cities, *under any appointment or contract of hire, may receive compensation from the state insurance fund for injuries received in the course of their employment, except in cases where the injured policemen or firemen are legally qualified and actually entitled to participate in any local policemen's or firemen's pension fund, established and maintained by municipal authority under existing laws.*

5. *In case of the death of regular members of lawfully constituted police and fire departments of* cities, *under any appointment or contract of hire, resulting from injuries received in the course of their employment, the dependents of such members may participate in the state insurance fund, unless such dependents are legally qualified and actually entitled to receive death benefits from a local pension fund, established and maintained by municipal authority under existing laws.*

6. *Where regular members of lawfully constituted police and fire departments of municipalities are injured in the course of their employment, resulting in temporary total disability, if such municipalities continue to pay the injured policemen of firemen their regular wages, during the period they are off duty because of their injuries, no loss in the way of compensation is sustained on account of such injuries and there can be no compensation out of the state insurance fund therefor, although such injured policemen or firemen are entitled to receive compensation from the state insurance fund, for medical, nurse and hospital services and medicine, unless thay are legally qualified and actually entitled to participate in a local pension fund, established and maintained by municipal authority under existing laws.*

7. *Where the lawfully constituted police department of a municipality consists of a chief of police and a given number of patrolmen, and one of said patrolmen, who was*

legally appointed from the eligible civil service list, was killed in the course of his employment, since the municipality had the power to hire and discharge such employe and to direct and control him, said patrolman was an employe of said municipality, within the Workmen's Compensation Law of Ohio, even though he received his compensation from a fund subscribed by citizens of such municipality; and in such case his dependents are entitled to receive compensation from the state insurance fund, unless they are actually entitled to receive benefits from a local pension fund, established and maintained by municipal authority under existing laws.

COLUMBUS, OHIO, June 5, 1928.

HON. HERMAN R. WITTER, *Secretary, Industrial Commission of Ohio, Department of Industrial Relations, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your request for my opinion, as follows:

> "The Industrial Commission of Ohio has before it for consideration a number of claims for compensation of firemen and policemen who have been injured in the course of their employment. Some of these injured policemen and firemen are in the service of municipalities wherein policemen's and firemen's pension funds are maintained. The rules and regulations promulgated by the proper authority in each municipality vary somewhat in their provisions as to the disbursement of the pension funds and especially as to the conditions that must obtain before any benefits may be paid.
>
> By reason of the various rules governing the different pension funds different situations have been presented in claims before the Industrial Commission which for the purpose of reference may be classified as follows:
>
> 1. Where the fireman or policeman in order to be placed upon the pension rolls and receive payments from the pension fund must be retired from the police or fire department either because of length of service or because of disability resulting from sickness or injury caused by the actual performance of his official duty, no payments being made from the pension fund to the injured policemen or firemen except where the injury has caused retirement from the department.
>
> 2. Where the policemen or firemen when injured even though the disability resulting is not such as to cause their retirement are placed upon the pension rolls and are paid a stated amount monthly during their period of disability but no payments are made from the pension fund expressly for medical or hospital services.
>
> 3. Where the policemen or firemen in order to be entitled to benefits from the pension fund in the event of injury must have been a member of the Department for a certain period of time as for example, one year.
>
> 4. Where firemen or policemen, when injured so that the disability resulting does not cause retirement from the police or fire department, receive no payments from the pension fund, the municipality continues to pay the policeman or fireman his regular wage during the period he is off duty because of injury.
>
> 5. Where any member of the fire or police department, including those who have been retired and whose name remains on the pension rolls, dies, payments from the pension fund are made to the widow or the children.
>
> While all of the situations mentioned cannot exist under any one pension fund obviously more than one of the conditions may exist in one municipality.

In view of the provisions of paragraph one of Section 1465-61, Ohio General Code, the Industrial Commission desires your advice:

First, as to whether in the event any one or more of the situations mentioned above exist in a municipality any of the policemen or firemen in that municipality are employes as defined in Section 1465-61 Ohio General Code and entitled to compensation from the State Insurance Fund in the event of disability resulting from injury received in the course of employment;

Second, as to whether in the event the facts are as described in situtation No. 2 the Industrial Commission of Ohio may pay from the State Insurance Fund for the medical and hospital services of injured police and firemen;

Third, as to whether in the event the situation described in No. 5 exists the Industrial Commission of Ohio may pay compensation to a dependent of a policeman or fireman killed in the course of his employment when such deendent received payments from the pension fund.

The Industrial Commission also has before it a claim for compensation because of the death of a policeman who was killed while in the course of his employment in the city of Kent, Ohio; the city police department consisting of a chief of police and five patrolmen. The deceased was regularly appointed from the eligible civil service list to one of the positions of patrolman in the police department of that city. He was assigned a regular beat in the business section of the city and functioned in all respects as other members of the police department.

The city, however, paid no salary to the deceased patrolman. The city for some time had been short of funds. Various merchants of the city desiring police protection prevailed upon the council or proper city authorities to hire or retain the fifth policeman, and various merchants in the down town section of the city subscribed to a fund to pay the deceased patrolman, the payments being made direct from the merchants to the patrolman. This city maintains no policemen's or firemen's pension fund.

The Commission desires your advice as to whether the deceased patrolman was an employe of the city of Kent within the meaning of the Workmen's Compensation Act and in the event this deceased patrolman was an employe of the city of Kent within the meaning of the Workmen's Compensation Act whether they may award compensation to his dependents and whether the city of Kent under the law would be required to reimburse the State Insurance Fund for such expenditure."

Section 1465-61 of the General Code, defining an employe within the meaning of the Workmen's Compensation Law, reads in part as follows:

"The terms 'employe', 'workman' and 'operative' as used in this act, shall be construed to mean:

1. Every person in the service of the state, or of any county, city, township, incorporated village or school district therein, including regular members of lawfully constituted police and fire departments of cities and villages, under any appointment or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, township, incorporated village or school district therein. Provided that nothing in this act shall apply to police or firemen in cities where the injured policemen or firemen are eligible to participate in any policemen's or firemen's pension funds

which are now or hereafter may be established and maintained by municipal authority under existing laws.

* * *"

This section was originally enacted on February 26, 1913 (103 v. 72, 77). As first enacted the proviso contained in paragraph 1, above quoted, read as follows:

"Provided that nothing in this act shall apply to policemen or firemen in cities where policemen's and firemen's pension funds are now or hereafter may be established and maintained by municipal authority under existing laws."

The section was amended on March 20, 1917 (107 v. 157, 159), but the language of the proviso as quoted above was left unchanged.

Section 1465-61 was again amended on April 17, 1919 (108 v. Pt. 1, 313, 316), when the proviso was enacted in its present form; and the provisions of paragraph 1 of the section under consideration were left unchanged, when the section was further amended on April 6, 1923 (110 v. 224).

At the outset, it should be noted that, while your communication refers generally to *municipalities*, the proviso here involved is, by its terms, applicable only to policemen and firemen in *cities*. Regular members of lawfully constituted police and fire departments of *villages*, under any appointment or contract of hire, are employes, within the meaning of the Workmen's Compensation Law, regardless of whether or not the village maintains a policemen's or firemen's pension fund; and the regular members of village police and fire departments, therefore, have the right to participate in the state insurance fund, as do the dependents of such members, where their death results from injuries received in the course of their employment. It was so held in Opinion No. 2930 of this department rendered to the Department of Industrial Relations, Industrial Commission of Ohio, under date of March 15, 1922 and reported in Opinions, Attorney General, 1922, Vol. 1, page 198, the syllabus of said opinion reading as follows:

"Under the provisions of General Code Section 1465-61, G. C., firemen in cities are exempted from the benefits of state industrial insurance where such firemen are entitled to participate in a firemen's pension fund established under General Code Sections 4600 et seq. or 4647-1 et seq. of the General Code.

Firemen in villages are entitled to the benefits of state industrial insurance and also to the benefits of any fund established for their protection under General Code Sections 4600 et seq. or 4647-1 et seq. G. C."

In so far as policemen and firemen in cities are concerned, the answer to the first, second and third questions asked by you depends upon a proper construction of the following italicized words in the proviso to the effect "that nothing in this act shall apply to policemen or firemen in cities *where the injured policemen or firemen are eligible to participate in any policemen's or firemen's pension funds.*"

In determining the question here presented it must at all times be remembered that the Workmen's Compensation Law was enacted to remedy the former unsatisfactory condition of the law and to substitute a means of providing compensation to employes, who were injured, and to the dependents of employes, who were killed, in the course of the employes' employment commensurate with the needs of modern society and the demands of an industrial people. Since the original enactment of the law all of the amendments passed by the Legislature have been to liberalize and extend its provisions; and in the construction of the Compensation Act and the amend-

ments thereto it has been repeatedly said by the courts that provisions for the benefit of injured employes should be liberally construed to effect the purpose sought to be attained.

In the case of *Roma* vs. *The Industrial Commission of Ohio*, 97 O. S. 247, Chief Justice Nichols, speaking for the court, said as follows:

> "A strict application of this rule would undoubtedly defeat the right of the plaintiff in error to recover, but in view of the peculiar circumstances which the record discloses, *and the feeling which abides within this court that the remedies provided in the Workmen's Compensation Act for the benefit of injured parties should be construed and interpreted with the utmost liberality*, we are constrained to hold that the appeal was filed in time."

The fourth branch of the syllabus in the case of *Industrial Commission of Ohio* vs. *Weigandt*, 102 O. S. 1, reads:

> "The statute was intended to provide a speedy and inexpensive remedy as a substitute for previous unsatisfactory methods, and should be liberally construed in favor of employes."

In the opinion, after referring to the Compensation Law originally passed in 1911 (102 v. 524) and the act then in force (103 v. 72), and to Section 35, Article II of the Constitution of Ohio, the court said:

> "The successive advanced steps expressed the growth of public sentiment. It came to be believed that employes should receive compensation for injuries received in the course of their employment, unless the injury was caused by the wilful neglect of the employe; that upon just and scientific consideration such injuries should be regarded as a charge upon the business upon which the employes are engaged. This principle and the position in the line of causation which employers and their enterprises sustain in industrial pursuits are the foundations upon which laws that compel employers to contribute to state compensation funds are based.
>
> * * *
>
> *We are likewise impressed that this law is intended to provide an inexpensive, humane remedy as a substitute for outworn and unsatisfactory methods, and it sould be liberally construed in favor of employes.*" (Italics the writer's.)

The amendment of the proviso on April 17, 1919 (108 v. 313, 316), above noted, was in keeping with the legislative tendency to broaden the scope and extend the application of the Compensation Law. By the terms of this proviso as originally enacted, if a policemen's or firemen's pension fund were maintained by a city the members of the police or fire department of such city were precluded from participation in the state insurance fund, even though certain members, by reason of the rules and regulations under which the local pension fund was administered, might not be eligible to participate in the local fund. For example, in some cities before a policeman or fireman becomes eligible to receive benefits from the local pension fund, it is required that he shall have been a member of the department for a certain period of time, as for example, for one year. In such a case, a policeman or fireman, who had not served for the required period, even though injured in the course of his employment, would, under the section as it formerly read, have received nothing from the local pension fund. Neither could he have participated in the state insurance fund because, by the express terms of the proviso as it formerly read, nothing in the Workmen's Compensation Act applied to any policeman or fireman in any city "where

policemen's and firemen's pension funds * * * (were) maintained." Such was the ruling of this department in Opinion No. 1543, rendered under date of November 8, 1918, to the Industrial Commission of Ohio and reported in Opinions, Attorney General, 1918, Vol. II, page 1378, in which it was held:

> "Inasmuch as the City of Dayton maintains policemen's and firemen's pension funds, this fact alone would disqualify any of its policemen and firemen from receiving the benefits of the State Workmen's Compensation Law, whether particular policemen and firemen are entitled to the benefits of the local pension funds or not."

To remedy this situation the proviso was amended as above set forth, and I am of the opinion that in accordance with the legislative tendency and the rule of liberal construction hereinbefore quoted, the language of the proviso as amended should be construed with the "utmost liberality" and so as to extend and make applicable the beneficent provisions of the Compensation Law to all cases where policemen or firemen, injured in the course of their employment are not eligible, i. e. entitled to receive compensation from the local pension fund.

Moreover, even if this rule of liberal construction were not to be applied for the reasons above suggested, since paragraph 1 of Section 1465-61, supra, expressly provides that the term "employe" shall be construed to mean "every person in the service of * * * any * * * city * * *, including regular members of the lawfully constituted police and fire department of cities * * * under any appointment or contract of hire * * *," the Compensation Law applies to all policemen and firemen employed by cities, unless such policemen and firemen are excepted by the terms of the proviso, which must be *strictly* construed. That is to say, since the proviso withdraws certain persons from the operation and benefit of the Workmen's Compensation Law, although the *class* to which such persons belong are employes within the meaning of such law, the proviso should be literally construed and applied strictly to the persons coming within its terms.

An early case often cited in support of this proposition is the case of *United States* vs. *Dickson*, 15 Peters, 141, 165. In the opinion in that case Justice Story said as follows:

> "Where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, *that proviso is strictly construed, and takes no case out of the enacting clause which does not fall fully within its terms.* In short, a proviso carves special exceptions only out of the enecting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof." (Italics the writer's.)

The Supreme Court of Ohio applied the same rule in the case of *Brunner* vs. *Briggs*, 39 O. S. 478, 484, when it said:

> "This proviso is a limitation or exception to a right conferred by the general provision of the section. Its effect is to be limited to cases clearly falling within its terms."

Approaching the question presented with these principles in mind, it will be observed that regular members of lawfully constituted police or fire departments of cities, under any appointment or contract of hire, are employes within the provisions of the Compensation Law, except *"where the injured policemen or firemen are eligible* to participate in any policemen's or firemen's pension funds." And it is necessary, therefore, to determine what policemen or firemen are excepted from the general definition of employes.

The word "where" is here used in the sense of "if" or "when". The first definition of the word "where" given by Webster's New International Dictionary is "at or in what place; hence, in what situation, position or circumstances." Such meaning has been often given by the courts. See, for example, *Swink* vs. *Anthony*, 107 Mo. App. 601; 81 S. W. 916, in which it was held:

> "The word 'where', as used in the statute providing that notice of the time and place of taking depositions shall be served on the adverse party or his attorney, where such party or his attorney resides in the state, is synonymous with 'if', and assumes the condition of one or the other—either adverse party or litigant—residing in the state."

See also *Campbell* vs. *Milliken*, 119 Fed. 982, 986, in which it was said:

> "The word 'where', in a statute relating to the removal of causes 'where a suit is now pending or may hereafter be brought in any state court', etc., is the equivalent of 'when'."

The word "eligible" is generally used in connection with the eligibility or ineligibility of a person to hold public office, and it is in this respect that Webster's New International Dictionary defines the word as meaning: "1. Fitted or qualified to be chosen or elected; legally or morally suitable; * * *" 2. Worthy to be chosen or selected; desirable; * * *" It is used in this proviso, however, in the sense of the definition given by Worcester, namely "*Legally qualified;* capable of being chosen."

Giving these meanings to the words above defined, the phrase under consideration may be paraphrased as follows: "*If* the injured policemen or firemen are *legally qualified* or *legally entitled* to participate in any policemen's or firemen's pension funds," nothing in the Workmen's Compensation Act applies. When the proviso is thus read it seems clear that the Legislature only intended to exclude from the benefits of the Compensation Law, such policemen and firemen, receiving injuries in the course of their employment, as were actually entitled to participate in the local pension fund.

This construction is further supported by the use of the language "where *the injured policemen or firemen* are eligible", etc., thus indicating an intention to deal with individual cases of *injured* policemen and firemen, as distinguished from dealing with the eligibility of the entire police or fire department as the case may be. And in the use of this word "injured", I feel quite certain that it was not the intent of the Legislature to limit participation in the state insurance fund to policemen and firemen, who are injured merely, to the exclusion of those, whose injuries result in their death. Such a construction would lead to an obvious absurdity.

Certainly, the construction herein adopted is in keeping with the object intended to be accomplished by the enactment of the Workmen's Compensation Act and the amendments thereto; and at the same time it may be said that the object sought to be attained by the proviso is not defeated. Undoubtedly the purpose of the proviso was to prevent a duplication in the payment of compensation, it not being intended however, that it would operate so as to prevent regular members of a city police or fire department, who, as above pointed out, are employes under the Compensation Law, from receiving compensation from one fund or the other.

For these reasons I conclude that regular members of lawfully constituted police and fire departments of cities, under any appointment or contract of hire, may receive compensation from the state insurance fund, for injuries received in the course of their employment, except in cases where the injured policemen or firemen are legally qualified and actually entitled to participate in any local policemen's or firemen's pension fund. It is also my opinion that, in case of the death of such a member, resulting from injuries received in the course of his employment, the dependents of such

member may likewise participate in the state insurance fund, unless such dependents are legally qualified and actually entitled to receive death benefits from a local pension fund.

It has been suggested that if the above conclusions be correct the statutes under consideration will not have uniform application in the various municipalities of the state; and as an example, it was said that if, in the case of a municipality having a local pension fund paying benefits in case of injuries received in the course of employment, but paying no death benefits, two members of the police department were injured at the same time, the one dying instantly and the other several weeks or months later, the dependents of the first would be entitled to compensation from the state insurance fund, while in the other case, since the injured policeman was entitled to receive benefits for the *injuries* received by him, his dependents would not be entitled to be compensated from the state insurance fund upon his death. With this suggestion I cannot agree. The cause of action accruing under the statutes to an employe injured in the course of his employment is one thing, while the cause of action accruing to the dependents of an employe receiving injuries in the course of his employment, from which he dies, is another thing. This was held by the Supreme Court of Ohio in the case of *Industrial Commission* vs. *Hamrath*, 118 O. S. 1, Ohio State Bar Association Report, April 3, 1928, the syllabus in such case reading as follows:

> "1. The rights of injured employes and the dependents of killed employes to participate in the state insurance fund are such, and such only, as are conferred by statutory law.
>
> * * *
>
> 3. The cause of action of an injured employe accrues at the time he receives an injury in the course of his employment.
>
> 4. The cause of action of a dependent of a killed employe accrues at the time the employe dies from an injury received in the course of his employment."

In the opinion, Judge Robinson, speaking for the court, said:

> "We quite agree with the trial court in the view that the defendant in error's cause of action, had she had a cause of action by reason of her decedent coming within the classification of Subsection 4 of Section 1465-82, would have been in her own right, and not a continuance by substitution of her decedent's cause of action. His right was a right to participate in the fund because of his injury, and accrued when the injury was sustained. Any right which his dependent might have to participate in the fund because of his death necessarily could not accrue during his life; and since the right to participate in the fund is not in any way dependent upon the fault of the employer, and is not a right against him, but is wholly dependent upon statutory creation, and where created is a right against the fund, the Legislature had the power prior to his death to create a future right which would accrue to his dependent in the event of his death—notwithstanding the fact that the injury was the cause of the death, the death giving rise to the right."

Inasmuch as the right of an injured employe to participate in the state insurance fund is a different right from the right of the dependents of an employe, killed in the course of his employment, to participate in such fund, it is my opinion that, in the example above given, since the local fund pays no death benefits whatever, the dependents of the officer who was killed outright in the course of his employment would be entitled to receive compensation from the state insurance fund; likewise, since the cause of action of the dependents of the officer, who received injuries from which he

later died, did not accrue until his death, it is my opinion that, since no death benefits were paid by the local fund, such dependents would be entitled to receive compensation from the state insurance fund, notwithstanding the fact that such officer had received compensation while alive for his injuries from the local fund.

This brings me to a consideration of the specific questions asked in your letter, which will be answered in the order asked.

You ask first as to whether, in the event any one or more of the situations stated by you exist in a municipality, any of the policemen or firemen in such municipality are employes within the meaning of the Workmen's Compensation Law and entitled to compensation from the state insurance fund in the event of disability resulting from injury received in the course of employment. The first situation stated by you is as follows:

> "Where the fireman or policeman in order to be placed upon the pension rolls and receive payments from the pension fund must be retired from the police or fire department either because of length of service or because of disability resulting from sickness or injury caused by the actual performance of his official duty, no payments being made from the pension fund to the injured policemen or firemen except where the injury has caused retirement from the department."

In view of the discussion above set forth, since in the case stated by you, the injured fireman or policeman would not be entitled to receive compensation from the local pension fund except where the injury caused retirement from the department, it is my opinion that, unless such injury did cause retirement so as to enable the particular fireman or policeman to participate in the local fund, such fireman or policeman would be entitled to receive compensation from the state insurance fund.

The second situation you state to be as follows:

> "Where the policeman or fireman when injured even though the disability resulting is not such as to cause their retirement are placed upon the pension rolls and are paid a stated amount monthly during their period of disability but no payments are made from the pension fund expressly for medical or hospital services."

In this case it is my opinion that, since the injured policemen or firemen are eligible to participate in the local policemen's or firemen's pension funds, they would not be entitled to participate in the state insurance fund even though no payments are made from the local fund expressly for medical or hospital service. That is to say, since in such case the policeman and firemen in question "are eligible to participate in any local policemen's or firemen's pension funds * * * established and maintained by municipalities under existing laws", they are not employes within the definition contained in Section 1465-61 of the General Code.

The third case stated by you is:

> "Where the policemen or firemen in order to be entitled to benefits from the pension fund in the event of injury must have been a member of the Department for a certain period of time as for example, one year."

Manifestly, this case comes squarely within the conclusions above set forth, and if the policemen or firemen have not served a sufficient length of time to entitle them to benefits from the local pension fund, then clearly, if such policemen or firemen be in-

jured in the course of their employment, they are entitled to receive compensation under the Workmen's Compensation Act.

As to the fourth situation stated in your letter, namely:

> "Where firemen or policemen, when injured so that the disability resulting does not cause retirement from the police or fire department, receive no payments from the pension fund, the municipality continues to pay the policeman or fireman his regular wage during the period he is off duty because of injury."

I assume from the context of your statement, that your inquiry is limited to cases of total temporary disability. It is my opinion that under the provisions of Section 1465–68, General Code, if the policemen or firemen be employes within the meaning of the Workmen's Compensation Law, such employes would only be entitled to receive compensation for medical, nurse and hospital services and medicines.

You will observe that Section 1465–68, General Code, provides in part as follows:

> "Every employe mentioned in Section 1465–61, who is injured, and the dependents of such as are killed in the course of employment, wheresoever such injury has occurred, provided the same was not purposely self-inflicted, on or after January 1, 1914, shall be paid such compensation out of the state insurance fund *for loss sustained on account of such injury* or death as is provided in the case of other injured or killed employes, and shall be entitled to receive such medical, nurse and hospital services and medicines and such amount of funeral expenses as are payable in the case of other injured or killed employes.
>
> * * *"

Obviously, if the municipality continues to pay the policemen or firemen their regular wages during the period they are off duty because of their injuries, no loss in the way of compensation is sustained on account of such injury and there can be no compensation out of the state insurance fund therefor. In this connection your attention is directed to the opinion of this office reported in Opinions, Attorney General, 1915, Vol. 1, page 483.

It is true that Section 1465–69, General Code, provides for compensation in a certain sum during a period of temporary total disability, yet, as above stated, if the injured employe receives his regular wages during the period of temporary total disability, there is, in so far as his wages are concerned, no loss sustained, and under the terms of Section 1465–68, supra, there can be no compensation where there is no loss.

The fifth situation stated by you is as follows:

> "Where any member of the fire or police department, including those who have been retired and whose name remains on the pension rolls, dies, payments from the pension fund are made to the widow or the children."

It is my opinion that while Section 1465–61 does not expressly mention the dependents of an injured policeman or firemen, yet the definition therein contained, as to who are employes under the Workmen's Compensation Law, applies not only to the employes themselves but to their dependents as well. This being true, in view of the above discussion, since in the situation stated by you the dependents of the policemen or firemen are eligible to and do actually receive payments from the local pension fund, such dependents are ineligible to participate in the state insurance fund.

You ask as to whether in the event the facts are as described in the second situation, the Industrial Commission may pay from the state insurance fund for the medical and hospital services of the injured firemen and policemen.

It is my opinion that since in situation No. 2, the injured policemen or firemen are placed upon the local pension roll and paid a stated amount monthly during the period of disability, they are not employes within the definition contained in Section 1465-61, General Code, and are not eligible to receive compensation from the state insurance fund. In other words, the mere fact that they do not receive as much from the local fund as they would from the state insurance fund does not serve to make them employes within the Workmen's Compensation Law. By the express terms of Section 1465-61, supra, if such policemen and firemen "are eligible to participate in any policemen's or firemen's pension funds", they are not employes within the Workmen's Compensation Act.

In your third question you ask as to whether in the event the situation described in No. 5 exists, the Industrial Commission may pay compensation to the dependents of policemen or firemen killed in the course of their employment when such dependents receive payments from the pension fund. This question has already been answered, but for the sake of clarity I will repeat that, where the dependents of policemen or firemen killed in the course of their employment receive payments from a local pension fund, such policemen or firemen are not employes within the Workmen's Compensation Law, and their dependents are not entitled to participate in the state insurance fund.

In your last question you state that a member of the police department of the City of Kent, consisting of a chief of police and five patrolmen, was killed while in the course of his employment. You further state that the deceased was regularly appointed from the eligible civil service list to one of the positions of patrolman and was assigned a regular beat in one of the business sections of the city and functioned in all respects as other members of the police department. The city, however, because of shortage of funds, paid no salary to the deceased patrolman, his salary being paid from a fund subscribed by the various merchants in the downtown section. This city maintains no policemen's or firemen's pension fund, and you ask if the deceased patrolman was an employe of the City of Kent within the meaning of the Workmen's Compensation Law.

Without passing upon the legality of the employment of a public officer to be paid from private funds, it is my opinion that the policeman in question was performing services for the city under an appointment. Although it is true that Section 1465-61, supra, provides that regular members of lawfully constituted police departments "under any appointment or contract of hire" are employes, it is my opinion that the circumstances under which the officer in question was serving, were sufficient to constitute him a regular member of the lawfully constituted police department of Kent under an appointment. I am of the opinion, therefore, that he was an employe within the meaning of the act, and that the Commission is authorized to pay compensation from the state insurance fund to his dependents on account of his death, which resulted from injuries received in the course of his employment.

While no question could be raised as to the amount to be paid for funeral and medical expenses for the reason that these amounts are fixed by law, a question does arise as to what was the average weekly wage of said employe, since such wage must be taken as the basis for computing the benefits to be paid to the dependents. It is true he received nothing from the city, but an employe does not have to receive compensation direct from his employer. Evidence as to who pays an employe is sometimes considered in determining who the employer was, but that is not the controlling factor. The real test to be applied, in determining who the employer was, is who had the right to hire and discharge said employe and the power to direct and control him. In the instant case unquestionably it was the City of Kent. It follows

that while, as above stated, there might be some doubt as to the legality of the arrangement in question, yet the pay he received from the fund subscribed was by virtue of the officer's appointment by the city and should be taken as the basis in determining his average weekly wage for the purpose of fixing the amount of compensation to be paid to his dependents.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2207.

COUNTY TREASURER—MUST FILE CIVIL ACTION IN COMMON PLEAS COURT TO ENFORCE LIEN OF DELINQUENT TAXES WITHOUT REGARD TO AMOUNT OBTAINABLE.

SYLLABUS:

It is the duty of the county treasurer, when requested by the auditor of state, to enforce the lien of delinquent taxes and assessments, or either, and any penalty thereon, by civil action, for the sale of the premises in the court of common pleas of the county, without regard to the amount claimed, and without regard to the probable amount to be obtained, in the same way mortgage liens are enforced.

COLUMBUS, OHIO, June 6, 1928.

HON. LEROY W. HUNT, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of June 2nd, 1928, reading as follows:

> "The Auditor of State has certified the West 25-100 feet of the East Twenty-seven and twenty-five hundredths (27.25) feet of the North One Hundred and Three (103) feet to Lot Number One (1) in Boody's Addition, to the City of Toledo, Lucas County, Ohio, to this office and instructed us to institute foreclosure proceedings; you will note that property only three inches in width is involved and no doubt grows out of an error in making out the deeds. However, the adjoining property owners do not want to assume the delinquent taxes and it would entail considerable expense to institute foreclosure suit. No doubt this question has come up in other districts and we would like to be advised what to do in this matter."

You do not state any specific questions in your communication and I assume that you desire to know whether or not under the circumstances outlined in your letter it is the duty of the county treasurer to enforce the lien for delinquent taxes as prescribed by statute.

If this be your question it was answered in Opinion No. 2100, rendered under date of May 15, 1928, to the Honorable J. R. Pollock, Prosecuting Attorney, Defiance, Ohio, the syllabus of said opinion reading as follows:

> "It is the duty of the county treasurer, when requested by the auditor of state, to enforce the lien of delinquent taxes and assessments, or either, and any penalty thereon, by civil action, for the sale of the premises in the court of common pleas of the county, without regard to the amount claimed,