OFFICIAL OPINIONS.

DUTIES OF GOVERNOR IN REFERENCE TO LETTERS ROGATORY FROM THE DISTRICT CIVIL JUDGE OF LEON, NICARAGUA.

COLUMBUS, OHIO, January 24th, 1902.

Hon. George K. Nash, Governor of Ohio.

DEAR SIR:—I have the honor to acknowledge the receipt of your letter of this date enclosing commmunication from Hon. John Hay, Secretary of State of the United States, with letters rogatory from the district civil judge of the city of Leon, Nicaragua, addressed to any judicial authority in Cincinnati, requesting that such authority take the testimony of Richard Bahmann to be used in certain proceedings described in the letters rogatory. You also inquire what, in my opinion, the duties of the Governor are under such circumstances.

There are no statutes of the State of Ohio making any provision for taking testimony in proceedings pending in a foreign country. But, there is a rule of international comity by which one country will aid another's judicial proceedings by consenting that their judges may accept rogatory commissions, or, in other words, act as commissioners of foreign courts for the purpose of examining witnesses or otherwise procuring evidence for use in cases pending in such foreign courts.

While the letters rogatory, in my opinion, might have been forwarded direct from the Secretary of State of the United States to any United States judge residing at the city of Cincinnati, since, however, the letters have been referred to you, I know of no duties you as Governor have to perform except to forward the letters rogatory to some judge of a court of record residing at the city of Cincinnati, and to request him to accept the commission and perform the duties therein required.

Very truly yours,
J. M. SHEETS,
Attorney General.

RIGHT OF GOVERNOR TO APPOINT POLICEMEN FOR INTERURBAN STREET RAILWAYS.

COLUMBUS, OHIO, January 24th, 1902.

Hon. George K. Nash, Governor of Ohio.

DEAR SIR:—I have the honor to acknowledge the receipt of your inquiry as to whether in my opinion, under the provisions of Section 3427, R. S., the Governor may appoint policemen for inter-urban street railways.

The act of which Section 3427 now forms a part was originally passed in 1867, 64 O. L., 60, at a time when inter-urban street railways were unknown. Upon reading the provisions of this act it will be observed that the legislature had in view steam lines only, and the law was not made applicable to street railways. Hence, it is my opinion that Section 3427, R. S., does not authorize the Governor to appoint

policemen for inter-urban street railways. This view is much strengthened by the opinion of the Supreme Court in the case of Massillon Bridge Company against The Cambria Iron Company, 59 O. S., 179, where it was held that the railway lien laws of the State did not apply to inter-urban street railways.

Very truly yours,
J. M. SHEETS,
Attorney General.

AMOUNT COLLECTED FROM SALOON KEEPER FOR PORTION OF YEAR ENGAGED IN BUSINESS.

COLUMBUS, OHIO, January 24th, 1902.

Hon. P. H. Kaiser, County Solicitor, Cleveland, Ohio.

DEAR SIR:—Yours of January 23rd seeking an opinion from me as to what sum should be charged and collected from a saloon keeper who had paid the tax for the year ending on the fourth Monday of May, 1901, but continued the business until the 6th of June following without paying any additional tax, is at hand.

I think the sum should be $25, with a penalty of twenty per cent. Had the saloon keeper on June 20th offered to pay the tax he would have been required to pay $175 less a rebate for the portion of the six months he was not engaged in business. Section 3 of this Act provides that no assessment shall be made for less than $25, however brief the time engaged in business. The farther provision of this section, that when a person engaged in the business having paid the assessment discontinues it, the auditor on being satisfied of that fact shall issue "a refunding order for the proportionate amount of said assessment except that it shall be in no case less than $50," in my opinion applies to the amount of the refunding order; not to the amount of the assessment. While the language of this section is not very clear, yet I feel satisfied that the court would hold as I have indicated in my opinion.

Very truly yours,
J. M. SHEETS,
Attorney General.

ADDITIONAL ALLOWANCE TO COUNTY AUDITORS FOR CLERK HIRE.

COLUMBUS, OHIO, January 25th, 1902.

Hon. James W. Tarbell, Prosecuting Attorney, Georgetown, Ohio.

DEAR SIR:—In answer to the query proposed by you, as to whether or not the auditor of Brown County is entitled to an additional allowance, provided by Section 1076 of the Revised Statutes, for clerk hire in the year of the decennial appraisement, I would say, that on the 22nd day of February, 1901, in answer to a query made by Hon. Walter D. Guilbert, Auditor of State, I construed Section 1076 which opinion is still adhered to, and which has no reference to such counties as yours, as have a special salary bill. Section 1076 of the Revised Statutes makes special reference to the preceding sections of that chapter, for the purpose of computing the additional 25 per cent of the annual allowance in the years when the real property is required by law to be reappraised.

The "preceding sections" so referred to, are not sections containing special salary laws, and hence the computation provided for in that section is not applicable to Brown county.

House bill No. 643 (93 O. L. pages 574-577 inclusive) relates to the duties and

compensations of county officers of Brown County. The first section thereof says that, "The compensation of officers hereafter elected shall be by annual salary *exclusively.*"

The auditor's salary therein fixed is $2,200.00. Section 12 of that act provided a rule of construction showing that the entire act is to be held to supercede all other provisions of law inconsistent with said act.

This would have resulted if Section 12 had not so provided. But it reinforces the fact, that the provision theretofore made for the compensation of county officers in other statutes, should have no relation whatever to Brown county.

I am further fortified in this position by the supplemental act in 94 O. L., passed April 6th, 1900 (94 O. L. 701-702) which specially provides an additional compensation to the County Auditor in the years of the decennial appraisement in a sum not to exceed $400.00. Section 2 of that act expressly says, "Which sum when so fixed and allowed, shall be paid to said Auditor in addition to his salary now fixed by law"; the salary therein referred to is the salary fixed by the act of April 12th, 1898, (93 O. L. 574) and by no other act. The authorities are uniform upon the proposition that a public officer is required to perform all of the duties pertaining to his office for the compensation fixed by law, and no other or additional compensation is to be paid to him unless it is so expressly mentioned in the statutes. This proposition is applicable here, and such construction should be adopted as would give to the County Auditor such salary as is provided by the act of April 12th, 1898 and supplemented by the act of April 16th, 1900; but not so as to include in such compensation the provision made by Section 1076 for that would give him the compensation provided by the special act, namely, a salary, and a compensation provided by the general law, which is computed by entirely different methods.

I therefore hold that Section 1076 and the compensation therein provided, has no reference whatever to the salaries of county officers of Brown county.

Yours very truly,
J. M. SHEETS,
Attorney General.

MONEY RECEIVED ON DEPOSIT CANNOT BECOME THE PROPERTY OF THE CORPORATION.

COLUMBUS, OHIO, January 31st, 1902.

Hon. L. C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—I have before me the proposed articles of incorporation of The People's Banking and Trust Company, and also the letter of A. D. Follett addressed to you under date of January 24th, 1902, in reference to the said proposed articles of incorporation. The precise question to be determined in connection with said proposed articles, is, whether or not, a corporation organized under the provisions of the statute relating to safe deposit and trust companies is authorized to receive money on deposit, which money, when so received, shall become the property of the corporation, leaving to the depositor only the rights and remedies of an ordinary creditor?

Mr. Follett in the letter above referred to, contends that such power is given by the statute authorizing the creation of such corporations, and therefore has included in the proposed articles of incorporation as one of the purposes for which said corporation is to be formed, the following:

> "Said corporation is formed for the purpose of receiving moneys on deposit either without interest or at such rate of interest as

may be agreed upon, not exceeding a lawful rate of interest.''

In his letter, Mr. Follett states the proposition under discussion as follows:

> ''That safe deposit and trust companies can only accept money deposited in trust and not in the usual way as debtor and creditor, I deny.''

In support of his proposition, he quotes from Section 3821a, Bates' Revised Statutes, as follows:

> ''Such company shall also have power to receive and hold moneys or property in trust or on deposit from executors, administrators, assignees, guardians, trustees, corporations or individuals, upon such terms and conditions as may be obtained or agreed upon between the parties.''

He further quotes the provisions relating to the manner of investment of funds received in trust, and argues that because the statute contains no restriction as to the manner of investment of moneys received on deposit, said corporation has the right to receive such moneys and invest it in any manner it deems advisable. He further quotes from Section 3821b, the provisions which require that all money or property held in trust, shall constitute a deposit in the trust department, and that the business of such trust department shall be kept separate and distinct from the general business of such company. From all these provisions, he argues the right of such corporation to receive money on deposit in the usual method of banking corporations.

I am not able to agree with Mr. Follett in his construction of this statute. It is elementary that a corporation can have no powers except such as are expressly conferred by the law, authorizing its creation, or such implied powers as are necessary to carry into effect those which are expressly granted. The portions of the Act of April 17, 1882, authorizing the creation of safe deposit and trust companies quoted by Mr. Follett, must be construed with the remainder of the Act in which they are found.

A single sentence taken from the body of an act and considered alone, may convey a very different idea than it does when considered in its place in connection with the other provisions of the Act. Considering this statute as a whole, it is to be observed that such corporations are authorized to do at least two distinct kinds of business. The principal business of such corporation is stated in the opening lines of the Act as follows:

> ''Safe deposit and trust companies shall have power to provide by lease or purchase a proper and secure fireproof building or buildings and fire and burglar proof vaults or safes, and to receive on deposit for safe keeping therein, government securities, stocks, bonds, coins, jewelry, plate, valuable books, papers and documents, and other property of every kind, etc.''

I repeat, this business of receiving on deposit for safe keeping, is the most important of the two functions which such corporation is authorized to perform. With this purpose of the corporation in mind, the sentence quoted by Mr. Follett, to-wit:

> ''Such companies shall also have power to receive and hold moneys or property in trust or on deposit, etc,''

takes a different meaning from that ascribed to it by Mr. Follett. This power to receive and hold moneys or property in trust or on deposit, is to be exercised in conformity with the general purposes of the corporation, viz: That of a safe deposit company, and the moneys which it receives on deposit, is to be held as a deposit, and as the property of the depositor. There is no distinction between receiving and holding moneys in trust, and receiving and holding moneys on deposit as authorized by this statute. This view is strengthened by a consideration of the context. The

language quoted by Mr. Follett is only the latter member of a compound sentence. The entire sentence reads as follows:

> "Any court in this state, including probate courts, may by order, decree or otherwise, direct any moneys or properties under its control, or that may be paid into court by parties to any action or legal proceedings, or which may be brought into court by reason of any order, judgment or decree, in equity or otherwise, to be deposited with such safe-deposit and trust company, as may be by such court designated, upon such terms, and subject to such instructions as may be deemed expedient; provided, however, that such company shall not be required to assume or execute any trust without its own consent; such companies shall also have power to receive and hold moneys, or property in trust, or on deposit from executors, administrators, assignees, guardians, trustees, corporations or individuals upon such terms and conditions as may be obtained or agreed upon between the parties."

It would not be seriously contended, I think, that this would authorize a court to order money under its control to be deposited with such corporation except as a trust deposit. The court in ordering the deposit of moneys under its control, does not lose control of such moneys, but it is still subject to the orders of the court. The deposit authorized by the latter portion of the sentence above quoted is similar in nature. The title to the money so deposited does not pass to the corporation, but remains in the depositor, and the money is held by the corporation in trust or for safekeeping. The fact that the statute makes provisions for the investment of funds thus held in trust, while it makes no provisions for the investment of moneys received on deposit and owned by the corporation, to my mind, instead of evincing the legislative intent that such corporations should have the right to receive such money on deposit, shows conclusively that it was not within the legislative mind that such corporation would have any other or different fund to invest.

It is important to observe in this connection, that by the provisions of Section 3821d, the entire capital of such corporation, with all its property and effects is liable for any default in any of the trust capacities in which such corporation may act. If the corporation were authorized to receive on deposit as contended by Mr. Follett, then the depositor would be without any security for his money, for the reason, as above stated, that all of the property of the corporation is primarily liable for its trust obligations. This furnishes an additional reason for supposing that the legislature did not intend such corporations to exercise the ordinary banking powers of receiving money on deposit.

Such corporations are further authorized to act as trustee, such as assignee, receiver, administrator, executor, etc. This adds another very large and important department to the business for such corporations. It involves the handling of a great deal of property and money in its capacity as trustee. This is entirely separate and distinct from its powers and duties as a safety deposit bank. Such corporation is also required, before commencing business, to have a paid-up capital stock of $200,000, $100,000 of which, must be deposited with the Treasurer of State. It thus appears that such corporation has other funds and other business from which the business of the trust department must be kept separate, without the exercise of the powers of receiving money on deposit as an ordinary bank. In short, all of the provisions of the statute relating to safe deposit and trust companies referred to by Mr. Follett in his letter, when examined in connection with the other provisions of the act, will be found to harmonize with the general purposes which such corporations are authorized to perform, and it is only by taking single sentences out of the body of the act and giving to them strained and forced constructions, that the conclusion can be reached that such act authorizes such corporations to receive money on deposit

in the manner contended for by Mr. Follett. Having this view of the powers of such corporations, I am unable to approve the proposed articles of incorporation, and the same are herewith returned.

Very truly,
J. E. TODD,
Assistant Attorney General.

COLUMBUS, OHIO, February 5th, 1902.

Hon. Mark Slater, Supervisor of Public Printing.

DEAR SIR:—Yours of February 4th, making inquiry as to whether under the laws of Ohio you are authorized to publish what is denominated the "Ohio Bulletin of Charities and Corrections", containing the proceedings of the state annual conference of the different organizations of the State for charity and correction is at hand.

You are required under the provisions of Section 63 of the Revised Statutes, to publish the annual report of the Board of State Charities, but I can find nowhere any provision for you to publish the proceedings of such conventions. Such proceedings are not known and recognized by the laws of the State of Ohio. These conventions are evidently held by the superintendents of the different institutions with a view to exchange ideas and suggest methods by which their charitable work may become more effective. While it is commendable and proper for them to meet in such conventions with a view to making those participating more efficient in their calling, yet the legislature has never made any provision for such conventions, or the publication of their proceedings, and it is clear to my mind that there is no law authorizing the Supervisor of Public Printing to publish, at the expense of the State, any such proceedings.

Yours very truly,
J. M. SHEETS,
Attorney General.

COLUMBUS, OHIO, February 6th, 1902.

J. F. Greene, Prosecuting Attorney, New Philadelphia, Ohio.

DEAR SIR:—Yours of February 4th enclosing copy of contract between the commissioners of your county and the tax inquisitor, purporting to have been entered into under the provisions of Section 1343-1, R. S., duly received. You ask an opinion of me:

First: As to who constitute the board authorized to hire a tax inquisitor?

Second: As to whether the enclosed contract and bond are valid?

Third: Whether the tax inquisitor is bound, by the terms of the contract to pay attorney fees?

Fourth: Must the commissioners approve the bills of the tax inquisitor for services rendered before he can receive payment out of the county treasury?

Fifth: Can the tax inquisitor compromise a case?

In answer to the first question I will say that by direct statutory enactment the commissioners, the treasurer and the county auditor constitute the board to hire a tax inquisitor; but the votes of any three of the board are sufficient to warrant his employment. They must act, however, as a board.

Second: The contract on its face appears to be valid, as it recites that all the officers constituting the board participated in its execution.

Throop, in his work on Public Officers, Section 106, says:

> "The general rule that where a statute confers upon three or more persons a power to act in a matter of public concern, requiring the exercise of discretion and judgment, and contains no directions respecting the number of those who may exercise the power, such exercise will not be valid, unless all act, or unless all meet for consultation and a majority act, has been established by many adjudications of the American courts."

In Section 108, the author also says:

> "However, the presumption is always in favor of the validity of the act, so that if the instrument executed or other official act is executed by a majority only, it will be presumed that all met for consultation, unless the contrary expressly appears upon the face thereof: and where nothing to impeach it appears upon the face thereof, the fact that the minority did not participate in the proceedings must be affirmatively shown by a party seeking to impeach it."

I apprehend, however, this question is of no great importance for the reason that it is very doubtful if a contract for any definite time is binding on the county, as the statute does not authorize making a contract for any definite time, and, of course, one set of officers cannot make a contract that will be binding upon their successors.

> "Where an office is filled by appointment, and a definite term of office is not fixed by constitutional or statutory provision, the office is held at the pleasure of the appointing power, and the incumbent may be removed at any time."
>
> Throop on Public Officers, Section 304.
> State vs. Alt, 26 Mo. Appeal, 673.
> Field vs. Girard College, 54 Pa. State, 233.

The reason for this rule is plain. If one set of officers could, without statutory authority appoint a tax inquisitor for a time beyond their own term, and thus bind their immediate successors, they could bind any number of successors and practically tie the hands of those who succeeded them, forever. Or, in other words, in the place of performing their own duties and leaving the duties of their successors to be performed by them, they would be performing the successors' duties as well as their own. Hence, I am of the opinion however valid a contract may be it is subject to be abrogated at the pleasure of the commissioners, the auditor, and the treasurer.

The bond is worthless, as it fails to state that the tax inquisitor has been employed to do anything. It makes no statement as to what, if any duties, he is to perform. It merely recites that the commissioners, treasurer, and auditor and W. F. Charters have entered into a contract under the provisions of the act of April 10, 1888. There is no statement anywhere that W. F. Charters is employed to do anything, much less as tax inquisitor. Nor is there any statement that he is employed "to make inquiry and furnish the county auditor the facts as to any omissions of property for taxation, and the evidence necessary to authorize him to subject to taxation any property improperly omitted from the tax duplicate."

The condition of the bond is that if W. F. Charters shall faithfully perform all and singular the duties devolving upon him under the terms of the contract it shall be void, yet, there are no duties enjoined upon him under the contract. Hence, the bond is void.

Third: This question is a little indefinite. It does not state whether the attorney fees referred to apply to all necessary proceedings prior to placing the taxes upon the duplicate, or whether they apply to suits instituted for the collection of taxes thus placed upon the duplicate. If to the former there is no question but

what the tax inquisitor must pay the bill, because that would be part of the expenses incident to placing the taxes upon the duplicate. I apprehend, however, that after the taxes are placed on the duplicate, if the county sees fit to sue to recover them, under his contract he would not be required to pay counsel for such services. But for services which counsel may be required to render in proceedings before the auditor, or any other manner, necessary to get the taxes upon the duplicate, under his contract the tax inquisitor must pay.

Fourth: There can be no question that the tax inquisitor is not entitled to receive any compensation until his bill therefor is approved by the county commissioners. Section 894 of the Revised Statutes, provides that "no claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal." While the tax inquisitor is entitled to receive 20 per cent., yet the amount which he is to receive is not fixed by law, for it depends wholly upon the amount of money that is collected and paid into the county treasury by virtue of the taxes placed on the duplicate through his efforts. Hence, it is a subject of calculation, and his claim must be presented to the commissioners and they determine whether or not he has earned that sum before the same is allowed and paid.

Fifth: It would seem that no two persons ought to disagree upon the proposition that the tax inquisitor has no power to compromise with any person who has been delinquent in the return of his property for taxation, but the only power he has is to furnish the auditor the necessary evidence upon which the auditor acts to place the property upon the duplicate. There the tax inquisitor's duties end; he has absolutely no power beyond that.

Yours very truly,

J. M. SHEETS,
Attorney General.

COLUMBUS, OHIO, February 19th, 1902.

F. W. Woods, Prosecuting Attorney, Medina, Ohio.

MY DEAR SIR:—Yours of February 18th at hand and contents noted. You inquire whether in my opinion, where a school house in a township sub-district has burned down, the board of education may build a new school house at a cost of $4,000, and borrow the money simply upon giving a note signed by the members of the board.

My answer is, there is no question but the members of the Board of Education, if they want to be generous enough, may build a new school house and execute their own notes for the amount of the cost, but they become personally liable, and not the Township Board of Education.

Section 3987 provides that the Board of Education of the township districts shall provide the necessary school houses for the pupils of the township.

Section 3988 provides how they shall let the contract for the building of a school house where they have ordered one erected.

Section 3991 provides for the submission to a vote of the electors of the district the question of whether an extra levy shall be made where the ordinary levy is not sufficient to pay the amount the proposed school house would cost.

Section 3993 provides how the levy may be anticipated by issuing bonds, the bonds, of course, must be sold in the regular way by advertising for competitive bids.

I am inclined to the view, however, that the people of the district need not

object to the manner in which the Board of Education has apparently proceeded in the case to which you refer. The members of the Board of Education who signed the notes will probably be the losers when the time comes for payment, especially if some person should conclude to enjoin the payment of the notes out of the school funds.

Very truly yours,

J. M. SHEETS,
Attorney General.

CONSTITUTIONALITY OF SENATE BILL NO. 7.

COLUMBUS, OHIO, February 21st, 1902.

P. H. Kaiser, County Solicitor, Cleveland, Ohio.

DEAR SIR:—In your letter of this date, you inquire whether Senate Bill No. 7, enacted by the 75th General Assembly, authorizes decennial city boards of equalization and revision in cities of the first class, to fix the compensation of their members, and if so, whether such law would be valid and constitutional. Senate Bill, No. 7, is entitled, "An Act x x x to supplement Section 2813a of the Revised Statutes of Ohio."

If, as intimated in your letter, this bill authorizes boards of equalization and revision to fix the compensation of the members of such boards, it undoubtedly would be a violation of Section 20, Article 2 of the Constitution of Ohio, which provides:

> "The General Assembly in cases not provided for in this Constitution shall fix the term of office and compensation of all officers."

It has been held by the Supreme Court of the State, that it is a sufficient compliance with this constitutional provision, if the legislature fixes or establishes a rule by which the compensation of an officer may be determined. That it is not necessary that the legislature in all instances, fix the actual amount of compensation to be received by an officer, providing a rule is established by which such compensation can be ascertained. This, I think, is as far as the meaning of this constitutional provision can be extended. The question to be determined in connection with Senate Bill No. 7, then, is, whether the legislature has fixed the compensation of the members of such boards of equalization and revision, or has fixed a rule by which such compensation can be determined?

The provisions of Senate Bill No. 7, so far as pertinent to this inquiry, are as follows:

> "Each member of a decennial city board for the equalization of real property in any city of the first or second grade of the first class, who served as such member in the year 1900, or thereafter; or who served as a member of such board while sitting as a board of revision in the year 1901, * * * * shall be entitled to receive compensation for any such services as a member of either board, for his period of service, and payment of such compensation shall be ordered by the commissioners of the county in the manner hereinafter provided. Where any such board has heretofore employed a stenographer to aid it or its members in their work of equalization or revision, or shall hereafter employ a stenographer for its work of revision, he shall be entitled to receive, upon the warrant of the county auditor, such rate of reasonable compen-

> sation per day for services heretofore or hereafter rendered, as may be allowed by said board, sitting as a board of revision, and all other compensation above provided for shall be paid out of the county treasury upon the allowance of said board of a reasonable amount made in the manner designated in said Section 2813a for the allowance of salaries, compensation and expenses therein provided for, upon the order of the county commissioners and the warrant of the county auditor.''

There seems to be nothing in the language above quoted, either to fix the compensation of the members of such boards, or to establish a rule by which such compensation can be ascertained. The provisions above quoted, simply mean that the members of such boards shall be entitled to receive compensation which shall be paid out of the county treasury ''upon the allowance of said board of a reasonable amount, made in the manner designated in Section 2813a for the allowance of salaries, etc.'' The reference to Section 2813a was to determine the manner in which the allowance shall be made, and not the amount of such compensation. By reference to Section 2813a as enacted by the 74th General Assembly, 94, O. L., 247, we find the following provision in reference to the payment of salaries, etc.

> ''And all salaries and compensation herein provided for any county or city board together with all expenses necessarily incurred in the performance of their respective duties, shall be paid out of the county treasury upon the allowance of said boards respectively, and the provisions of Sections 1341, 1345 and 1346 of the Revised Statutes, shall not apply to the compensation provided for by this act.''

In this act, Section 2813a, the compensation of the members of the different boards is provided for as follows:

> ''Each member of the decennial county board including the county auditor and the county surveyor, and each member of the annual county board of equalization, shall be entitled to receive for each day necessarily employed in the performance of his duties, including his duties as member of the board of revision, the sum of $3.00, except that in counties having a city of the first or second grade of the first class, the compensation of each member of the decennial county boards including the county auditor in his own proper person, and the county surveyor, for each day so necessarily employed, shall be $5.00; and the members of the decennial city board, including the auditor of the county, except the members of a decennial city board of a city of the first or second grade of the first class, shall receive for each day so necessarily employed, the sum of $5.00.''

It will be observed that the compensation of the members of these various boards, ''except the members of a decennial city board of a city of the first or second grade of the first class,'' is fixed by the legislature at so much per diem, and all that is left for the respective boards to do, is to determine the number of days that said members are entitled to compensation, and make the allowance accordingly.

Recurring now, to Senate Bill No. 7, the allowance is to be made in the same way, but is to be ''of a reasonable amount,'' and not the fixed per diem compensation provided for by Section 2813a. I am of the opinion therefore, that said Senate Bill No. 7 seeks to authorize city decennial boards in cities of the first and second grade of the first class, to fix their own compensation, and for that reason such bill is in conflict with the constitutional provision above quoted.

Nor do I think that Section 3 of Senate Bill No. 7 relieves it from its unconstitutional feature. Section 3 provides as follows:

"That the provisions of Sections 1365-1, 1365-2, 1365-3, 1341, 1345, and 1346 of the Revised Statutes shall not apply to the compensation provided for by this act, or provided for by Section 2813a of the Revised Statutes, for the year 1900 and thereafter, and that the provisions of said Section 2813a, which excepts the members of a decennial city board of equalization of cities of the first grade and second grade of the first class from receiving any compensation for the performance of their duties as such members or as members of the board of revision, be and the same is hereby repealed, and in any county having a city of any such grade and class the employment, heretofore, of any person by its commissioners to prepare any legislative bill or bills relating to taxation or county finances shall be valid and binding upon such county for the amount agreed to be paid, not exceeding in the aggregate five hundred dollars for all such services in any such county."

The author of this bill seems to have been more concerned in securing his fees for drawing the bill than in providing compensation for the members of these boards. The part of this section requiring special notice is that which repeals, "the provisions of Section 2813a, which excepts the members of a decennial city board of equalization of cities of the first grade and second grade of the first class from receiving any compensation for the performance of their duties as such members or as members of the board of revision." There is no such provision in Section 2813a. The exception in that section merely excepts the decennial boards in cities of the first class from the operation of the remaining provisions of the section, which fixes the compensation of other boards, but it does not in terms provide that the members of a decennial board in cities of the first class shall receive no compensation. The repeal of this exception in Section 2813a, if such repeal is accomplished by Senate Bill No. 7, does not bring the boards in cities of the first class within the provisions of Section 2813a, fixing the compensation of other boards. It manifestly was not the intention of the General Assembly which enacted Section 2813a, to include the boards in cities of the first class within such provisions for compensation as are contained in that section, nor is there anything in Senate Bill No. 7 to indicate that the 75th General Assembly intended that such boards should be subject to the provisions for compensation found in Section 2813a. Indeed, the understanding on the part of the boards interested, appears to be that they are not subject to the compensation provided by Section 2813a, but that they are a liberty to fix their own compensation, and I understand, from matters I have seen in the public press that one of such boards has already passed a resolution fixing the compensation of its members at $15.00 per day. I think this board has correctly interpreted the provisions of this bill, unless it should happen that they have misunderstood the provision which restricts their allowance to "a reasonable amount."

Having this opinion of the constitutionality of this bill, I have not examined the journals of the House and Senate to see whether or not the bill received the number of votes required by Article 2, Section 21 of the Constitution of Ohio for bills providing compensation for an officer after the service shall have been rendered.

Very truly,
J. E. TODD,
Assistant Attorney General.

ELECTION OF JUSTICE OF THE PEACE; FILLING VACANCY.

COLUMBUS, OHIO, March 15th, 1902.

Hon. L. C. Laylin, Secretary of State.

DEAR SIR:—Yours seeking an opinion from me as to whether under the Constitution of Ohio a justice of the peace may be elected to the office for an unexpired

term, or for any period less than three years is at hand.

Section 567 of the Revised Statutes provides:

> "When a vacancy occurs in the office of justice of the peace in any township in the State, either by death, removal, absence at any one time for the space of six months, resignation, refusal to serve or otherwise, the trustees, having notice thereof, shall, within ten days from and after such notice, fill such vacancy by appointing a suitable and qualified resident of the township, who shall serve as justice until the next regular election for justice of the peace and until his successor is elected and qualified; and a majority vote of the trustees shall be sufficient to appoint. At the next regular election some suitable person shall be elected justice in the regular way to fill the unexpired term, if any, of the justice originally elected to such office."

Hence, a justice of the peace may be elected to fill an unexpired term unless this provision conflicts with Article 4, section 9 of the Constitution, which provides:

> "A competent number of justices of the peace shall be elected, by the electors, in each of the townships of the several counties. Their term of office shall be three years, and their powers and duties shall be regulated by law."

Prior to the amendment of Section 567 (93 O. L., 167) whenever a vacancy occurred in the office of justice of the peace a successor was elected for the full term of three years.

I am informed that it is claimed by some that if this provision of Section 567 with reference to the election of a justice of the peace to fill an unexpired term is unconstitutional, that all other provisions of the statute providing for the election of any other officer for an unexpired term is also unconstitutional. I think it is clear, from the reading of the provisions of the constitution that that position is untenable. It will be observed that no provision is made by statute for the election of any constitutional officer for an unexpired term whose term is fixed by the constitution except judges and members of the General Assembly. But Article 2, Section 11, and Article 4, Section 13 of the constitution make the election for such unexpired terms necessary.

Article 2, Section 11 of the constitution provides:

> "All vacancies which may happen in either House shall, for the unexpired term, be filled by election, as shall be directed by law."

Article 4, Section 13 of the constitution provides:

> "In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by an appointment by the Governor, until a successor is elected and qualified; and such a successor shall be elected for the unexpired term, at the first annual election that occurs more than thirty days after the vacancy shall have happened."

There is no constitutional provision requiring the election of any other constitutional officer whose term is fixed by the constitution, for an unexpired term except as is provided by Section 2, Article 11 and Section 4, Article 13, above referred to.

If the office of Governor becomes vacant the Lieutenant Governor becomes the Governor. Article 3, Section 3.

If the office of Secretary of State, Auditor of State, Treasurer of State, or Attorney General becomes vacant, the Governor appoints until the next regular election, at which time a successor is elected for the full term. Article 3, Section 18.

Also, if the office of Clerk of Courts becomes vacant, an appointment is made

until the next regular election, at which time a person is elected for the full term.

As the constitution requires a justice of the peace to be elected for three years it is clear to me that it means what it says, and does not contemplate that an election shall be had to fill an unexpired term for that office. If the framers of the constitution so intended they could have made the provision as they did with reference to the office of judge and member of the General Assembly. If the Legislature can provide for the election of a justice of the peace to fill an unexpired term, which, of necessity, must be less than three years, why not provide for the election of justices of the peace in general for a shorter term than three years? It seems to me the power to do the one thing necessarily carries with it the power to do the other.

Hence, I am of the opinion that Section 567, to the extent that it authorizes the election of a justice of the peace for an unexpired term is unconstitutional. This holding, I am informed, is in conformity with the uniform holding of your predecessor.

Yours very truly,
J. M. SHEETS,
Attorney General.

COSTS—SURVEYOR AND CLERK OF COURTS.

COLUMBUS, OHIO, March 17th, 1902.

G. Ray Craig, Norwalk, Ohio.

MY DEAR SIR:—Yours of March 14th at hand and contents noted. Your letter requires an answer to the following questions:

First—Where the county surveyor is employed at such services as the law provides that he shall receive pay by the day, whether in addition to his per diem he may charge up mileage also.

Second—Whether or not the statute which provides that the county commissioners shall allow the clerk of the court his costs in cases wherein the State fails to convict, or to collect costs after due and diligent effort made therefor, includes services of the clerk in cases where no trial has been had, but the indictment has been nollied.

In answer to the first question it is clear to my mind that when a surveyor is paid by the day, his per diem is in full compensation and he cannot charge mileage in addition.

Section 1183 of the Revised Statutes expressly states that when employed by the day the amount of his compensation shall be four dollars per day, but when not so employed it proceeds to state what compensation he shall receive, and mileage is a part of that compensation. As well might he insist that in addition to his four dollars a day when employed by the day he should receive all the other compensation provided for in Section 1183, of the Revised Statutes. If he is entitled to mileage he is entitled to all the other fees mentioned in this section. It would be doing violence to the plain provisions of the law to allow mileage, in my judgment, where he is employed by the day.

As to the second question I am of the opinion that the services of the clerk should be paid even where the indictment has been nollied. The purpose of the statute was to compensate the clerk for his services in criminal cases where there was no conviction, and I would see no reason why the legislature should desire to single out those cases in which there have been indictments but no trials and say he should receive no compensation for services in such cases. In my opinion the provision "wherein the State fails to convict" necessarily includes those cases in which

there has been indictments but they have been nollied without trial, for the State, in such cases, surely has failed to convict; it has failed to convict without effort, it is true, yet failure is no less certain.

Very truly yours,
J. M. SHEETS,
Attorney General.

ELECTION OF TRUSTEES AT MARBLE CLIFF.

COLUMBUS, OHIO, March 18th, 1902.

Hon. L. C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—From your communication of this date it appears that the hamlet of Marble Cliff was organized, and a special election for the selection of officers for said hamlet was held, in November, 1901. That at such special election three trustees were elected, who, at their first meeting, in accordance with Section 1649, R. S., determined by lot the term of office of each, thereby fixing the term of one of such trustees for one year, one for two years, and one for three years. And you inquire how long each of such officers are entitled to hold the office of trustee, and whether or not any trustee, and if so, how many, should be elected at the coming municipal election, and when the officers so elected should take office?

A hamlet is a municipal corporation. Section 1546, R. S. The proceedings for the organization of a hamlet are contained in Chapter 2, Title 12, Division 2 of the Revised Statutes, and are the same as the proceedings for the organization of villages. Section 1564 R. S. provides that the first election of officers shall be held at the first annual municipal election after its creation, but "that such first election may be a special election held at any time not exceeding six months after the incorporation." It thus appears that the "first election of officers" in a hamlet may be either at the regular annual municipal election, or at a special election. If a special election be held, as was done in the organization of the hamlet of Marble Cliff, it takes the place of the annual municipal election, and the officers elected at such special election must be subject to the same provisions of statute as they would be if they had been elected at an annual municipal election. Section 1649 provides that at the first meeting of the trustees of a hamlet, they shall determine by lot the term of service of each, so that one shall serve for one year, one for two years and one for three years, and at every succeeding annual election one trustee shall be elected to serve for three years.. It appears that this was done by the trustees elected in the hamlet of Marble Cliff at the special election held in November, and it would follow therefore, that at the comming annual municipal election, one trustee should be elected in said hamlet to succeed the trustee whose term of office was fixed by lot at one year.

It is provided in Section 1648, R. S., that the trustees of a hamlet shall hold their office until their successors are elected and qualified. No time is fixed for the qualification of a trustee, and no time is fixed for the beginning of the term of a trustee of a hamlet. If the first election be held on the regular annual municipal election, the term for which such trustees are elected would expire at or about the time when their successors would be elected. But when, as in the case under consideration, the trustees are elected at a special election, the term for which they are elected will not expire until some time after the time fixed by statute for the election of their successors. Thus the trustee of Marble Cliff, who, by lot, received the one year term, will not have served his full year until November, 1902, while his successor must be elected on the first Monday of April, 1902. However inconvenient this may be, I know of no authority to reduce the term of the present trustee. He certainly is entitled to serve his full year, and his successor is not entitled to be inducted into

the office until the expiration of his term. The time for the election of trustee is clearly fixed by statute, but the time when he shall assume the duties of his office is not definitely fixed. It must depend upon the expiration of the term of the present incumbent. Manifestly, there cannot be two persons occupying the same office at the same time, and since the present trustee is entitled to serve the full term of one year, his successor must wait until the expiration of that time before he can be clothed with the responsibilities and powers of trustee.

Very truly yours,

J. E. TODD,
Assistant Attorney General.

CHANGE OF OFFICERS IN THE ADVANCEMENT OF CORPORATIONS.

COLUMBUS, OHIO, March 19th, 1902.

Hon. L. C. Laylin, Secretary of State.

DEAR SIR:—In your communication of March 18th, you state that the village of Coshocton has been advanced to a city of the fourth grade, second class, and you inquire whether the term of the members of the council of such village will expire before the term of two years for which they were elected. In the advancement of a village to a city of the second class, a new corporation is created. Necessarily the old corporation must at the same time be abandoned. The same territory cannot exist both as a village and as a city of the second class. By the abandonment of the village charter, the organization of the village is also necessarily abandoned. What I mean is, that the officers elected for the village cannot claim the right to hold office under the city organization. The statutes relating to the election of officers of a new corporation created by the advancement of a village or city to a higher grade, fully sustain this proposition. In Section 1672 it is provided that the legislative authority of cities shall be vested in a council consisting of two members from each ward. While Section 1673 provides that

> "Where corporations are advanced in grade or new corporations or wards created, at the first election for council the mayor in his proclamation shall give notice to the electors to vote in each ward for one member for one year, and one member for two years, * * * * designating the term on their ballots."

This section clearly provides for the election of an entire new council in cases where corporations are advanced in grade.

Section 1585, R. S. makes provision for the election of the other officers of the new corporation as follows:

> "The first election of officers of the new corporation shall be at the first annual municipal election after such proceedings, and the officers of the old corporation shall remain in office until the officers of the new corporation are elected and qualified. And the ordinances, by-laws and resolutions adopted by the old corporation, shall, as far as consistent with this title, continue in force until repealed by the council of the new corporation. And the council and officers of the old corporation, shall, upon demand after the expiration of their term of office, deliver to the proper officers of the new corporation, all the books, records, documents and papers in their possession belonging to the old corporation."

These statutes seem to contemplate an entire change in officers of the corporation. And, indeed, it would appear from Section 1587 that the new corporation is

not fully organized, and cannot be recognized judicially, until it has elected new officers, and such officers have qualified. Similar provisions are found in Sections 1580 and 1581, relating to the advancement of hamlets to villages, from all of which I think it clearly appears, that when a corporation is advanced in grade, the old organization must give way, and be replaced by an entirely new organization, consisting of a new council as well as new municipal officials.

I am of the opinion therefore, that the City of Coshocton should, at the coming municipal election, elect an entirely new council, and that when the members of such council have been elected and qualified, that the official term of the members of the old council will terminate.

Very truly,

J. E. TODD,
Assistant Attorney General.

COMPENSATION OF RECORDERS FOR FILING INSURANCE PAPERS.

COLUMBUS, OHIO, March 19th, 1902.

Hon. A. I. Vorys, Superintendent of Insurance.

DEAR SIR:—Yours of March 17th at hand and contents noted. The question submitted is whether recorders have a right to charge non-resident insurance companies for filing licenses of agents authorized to solicit business for such companies within the State, as required by the provisions of Sections 3604, 3656 R. S.

Section 284, R. S., provides for filing with the county recorder in each county where a foreign insurance company has an agent, the certificate of the Superintendent of Insurance, stating that such company has complied with all the laws of Ohio relating to insurance.

Sections 3604 and 3656 provide for issuing by the Superintendent of Insurance certificates of authority to foreign insurance companies to do business in Ohio, and also certificates of authority or license to agents of such companies to solicit business for their respective principals; also provide for filing with the county recorder of each county where such agent operates, a copy of such license or certificate of authority.

It will thus be seen that Sections 284, 3604 and 3656 are statutes in pari materia, and should be construed together.

State ex. rel. v. Guilbert, 58 O. S., 637.

Section 284 provides that for filing any "such paper the recorder shall receive the sum of ten cents." It is evident that the Legislature contemplated, when it used the term "such paper" to include any certificate, authority, or license required to be filed with the recorder by the provisions of the statute herein referred to.

The rule of law which prohibits a public officer from receiving compensation out of the public treasury for services rendered, unless express provision is made for such payment by statute, has no application to the case under consideration. These are services rendered by a public officer for a private individual, and as these services are required to be performed for the benefit of the company or its agents, I think it is quite clear that the legislature intended the recorder should not be required to render them for nothing, and made provision for payment in Section 284, R. S.

Yours very truly,

J. M. SHEETS,
Attorney General.

TAXATION EXEMPTIONS.

COLUMBUS, OHIO, March 19th, 1902.

Hon. W. D. Guilbert, Auditor of State.

DEAR SIR:—Your letter seeking an opinion from me upon the following questions duly received:

1st. Is the real and personal property, including moneys and credits, belonging to secret societies exempt from taxation?

2nd. Should the real estate of every corporation, needed in the daily operation of the business, be listed and returned each year to the county auditor as a part of its personal property, or should the same be appraised by the decennial land appraiser, as real estate?

3rd. Can the annual board of equalization, having jurisdiction over the property, raise or reduce the value of real estate used by a corporation in the daily operation of its business?

4th. Is the stock of the United States Steel Corporation, owned by residents of Ohio, exempt from taxation?

5th. Under what circumstances is the stock of any foreign corporation, owned by residents of Ohio, exempt from taxation?

Of these in their order:

1st. Is the real and personal property, including moneys and credits, belonging to secret societies, exempt from taxation?

Article 12, Section 2, of the constitution, provides:

> "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money, but burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value two hundred dollars, for each individual, may, by general laws, be exempted from taxation."

It is thus seen that the legislature has no constitutional power to exempt any property from taxation, except the following classes:

1st. Burying grounds.
2nd. Public school houses.
3rd. Houses used exclusively for public worship.
4th. Institutions of purely public charity.
5th. Public property used exclusively for any public purpose.
6th. Personal property to an amount not exceeding two hundred dollars for each individual.

It will thus appear that unless the property of secret societies can be brought within one of these classes, it cannot be exempted from taxation, it matters not what the Legislature may seek to do by direct statutory provision. That the property of secret societies cannot come under either the first, second, third, fifth or sixth classes is entirely clear and needs no discussion. If secret societies can be classed as "institutions of purely public charity," their property may, by general laws, be exempted from taxation; otherwise, not.

The Supreme Court of Ohio has frequently had occasion to determine what are "institutions of purely public charity," but it will subserve our purpose as a means by which a rule can be deduced, by citing but three authorities.

In Gerke v. Purcell, 25 O. S., 229, 249, it was held:

> "For the purpose of determining the public nature of a charity,

it is not material through what particular forms the charity may be administered. If it is established for the use and benefit of the public, and so conducted that the public can make it available, it is all that is required."

In Humphries v. The Little Sisters of the Poor, 29 O. S., 201, it was held:

"A corporation created for the sole purpose of affording an asylum for destitute men and women, and incurable sick and blind, irrespective of their nationality or creed, is an institution of purely public charity within the meaning of Section 2, Article 12 of the constitution."

In Morning Star Lodge v. Hayslip, 23 O. S., 144, it was held that:

"A charitable or benevolent association which extends relief only to its own sick or needy members, and the widows and orphans of its deceased members, is not an institution of purely public charity; and its moneys held and invested for the aforesaid purpose, are not exempt from taxation."

It is thus seen that in order to come within this classification the charity administered must be administered to all alike, and upon the same terms. The charity of secret societies is not so administered. It is administered to a select class, and is usually confined to the dependent members and their families. Hence, under the definition of "purely public charity" as above given, no secret society could come within this category.

While Section 2732-3, R. S., as amended April 16, 1900, does not assume to exempt the property of subordinate lodges of secret societies from taxation, yet, in so far as it seeks to exempt any property of a secret society, either a grand or subordinate body, it is an infraction of the constitution and such property is taxable, notwithstanding the provisions of this section.

2nd. Should the real estate of every corporation, needed in the daily operation of the business, be listed and returned each year to the county auditor as a part of its personal property, or should the same be appraised by the decennial land appraiser, as real estate?

There can be no question but under the provisions of Section 2744, the real estate of a corporation used in the daily operation of its business must be returned, annually by the company for taxation, the same as personal property. The statute expressly so provides, and the decennial land appraiser has no more to do with such real estate than if it were money and credits, or manufactured stock on hand.

3rd. Can the annual board of equalization, having jurisdiction over the property, raise or reduce the value of real estate used by a corporation in the daily operation of its business?

It follows from the answer given to the second question that the annual board of equalization may consider the real estate of a corporation used in the daily operation of its business, the same as though it were personalty, and raise or lower the value in the same manner as any other personal property. Not only may the proper annual board of equalization increase or decrease the valuation placed on personal property returned for taxation, but it may also increase or decrease the value of real estate located within its jurisdiction. See Sections 2804, 2804a, 2804b and 2805, R. S. These sections make ample provision for re-examining each year into the valuation of real estate, as appraised for taxation, with a view to equalizing inequalities. Hence, it matters not whether the real estate of a corporation used in the daily operation of its business, be regarded as real estate or personalty, the annual board of equalization may increase or decrease its value, under the rules laid down in Sections 2804 et. seq.

4th. Is the stock of the United States Steel Corporation, owned by residents of Ohio, exempt from taxation?

The United States Steel Corporation owns no property in Ohio; it does no business in the State; it has not complied with the foreign corporation laws of the State on the ground that it has no property here, and does no business here. It is organized for the sole purpose of owning stocks in other corporations. It owns no tangible property, hence, all the stock of this corporation, owned by residents of Ohio, is taxable in Ohio, and should be returned by them for the purposes of taxation.

5th. Under what circumstances is the stock of any foreign corporation, owned by residents of Ohio, exempt from taxation?

(a) Where all the property of a foreign corporation is located in Ohio, has no property outside of the State, and its property is taxed in the name of the corporation, the owners of the stock need not list the same for taxation. Hubbard v. Brush, 61 O. S., 252.

(b) Where a foreign corporation, annually before the 25th of April, makes a return to the Secretary of State of the names and postoffice addresses of all persons, resident of Ohio, owning stock in the company, the number of shares of stock owned by each on the day preceding the second Monday of April, and the aggregate amount of stock thus owned, and also returnes at the same time, the aggregate amount of property returned by the corporation for taxation in Ohio, then if the aggregate amount of property returned for taxation, by the company is equal to or exceeds the amount of capital stock owned by persons resident of Ohio, the owners of such stock, resident of Ohio, need not list it for taxation. If, however, the aggregate amount of property returned for taxation by the corporation is less than the aggregate amount of capital stock owned by residents of Ohio, then each stockholder must list such proportionate part of his stock as the property of the company located out of Ohio bears to the whole property of the company. These exemptions, however, from taxation cannot be had unless the stockholder specifically sets forth in his tax return the shares owned by him. R. S., Section 148c, (94 O. L., page 225.)

It will thus be seen that before the stock owned by any stockholder, resident of Ohio, is exempt from taxation, the company itself must first have filed with the Secretary of State the statement above referred to, and this statement must be filed annually before the 25th of April. Hence, before anybody can claim any exemption under this section he must make proof that such statement has been filed with the Secretary of State by the company in which he owns stock.

Very truly,

J. M. SHEETS,

Attorney General.

DUTY OF CITY SOLICITOR AND PROSECUTING ATTORNEY TO ACT TRUANCY CASES.

COLUMBUS, OHIO, March 21st, 1902.

Hon. Lewis D. Bonebrake, State Commissioner of Common Schools.

DEAR SIR:—Yours of this date received and contents noted. You inquire as to whether it is the duty of the city solicitor, in city districts, and the prosecuting attorney, in other districts, to act as attorney for the prosecution in proceedings under the truancy statutes of the State; also, if it is not the duty of such city solicitor or prosecuting attorney so to act, whether the board of education may employ and pay counsel to perform such services.

In the outset it may be well to observe that proceedings under the truancy statutes of the State are essentially criminal in their nature; neither the board of education, nor any of its officers, is a party to such proceedings. Indeed, all proceedings against parents, guardians, or other persons, for failure to comply with

the laws with reference to sending a child over which they have control, between the ages named, to school, are strictly criminal, and when the case is prosecuted in the probate or common pleas court it is the duty of the prosecuting attorney to act for the prosecution. Section 1273, R. S.; Section 4022-11, R. S.

Where a parent or other person having control of a child who is truant proves his inability to enforce attendance, then a proceeding is commenced against the child, and such proceeding must be heard and determined in the probate court of the county. Revised Statutes, Section 4022-8. And, as this proceeding is criminal in its nature, I apprehend it is the duty of the prosecuting attorney to act for the prosecution.

Section 1273, R. S., already referred to, provides that "the prosecuting attorney shall prosecute, on behalf of the State, all complaints, suits and controversies, in which the State is a party, and other suits, matters and controversies, as he is directed by law to prosecute within the county, in the probate court, common pleas court, and circuit court." In my opinion this provision is broad enough to require the prosecuting attorney to act when cases of this character are prosecuted in the probate court of the county.

The city solicitor, in my opinion, is under no obligation to prosecute such proceedings. Section 3977 of the Revised Statutes is the only provision with reference to the duties of a city solicitor for and on behalf of a board of education or its officers. This section requires him to act in city districts for and on behalf of the board of education or its officers, as their legal adviser; and is required to act as counsel for such boards and its officers, in all civil cases brought by or against such board or any of its officers in their official capacity. To that extent, and to that extent only, his duties go. Proceedings under the truancy act are not civil proceedings, nor are they brought by or against the board of education or any of its officers in their official capacity. Hence, it will appear that Section 3977 has no application to the question involved.

As to whether the board of education may employ counsel to prosecute such proceedings, I have my grave doubts. The board of education is a quasi public corporation; it has such powers as are given to it by statute, and no more. It is empowered to employ and pay a truant officer, but the statute nowhere authorizes it to expend any public funds toward the employment of counsel in such cases. I think it was contemplated by the Legislature that as these were criminal proceedings, and as the probate court was given jurisdiction, that the prosecuting attorney, in his official capacity, should take charge of them.

Very truly yours,

J. M. SHEETS,
Attorney General.

EMPLOYMENT OF CHILD LABOR.

COLUMBUS, OHIO, March 25th, 1902.

Hon. J. H. Morgan, Columbus, Ohio.

DEAR SIR:—I have the honor to acknowledge the receipt of your letter of this date in which you inquire whether, in my opinion, the provisions of Section 6986-7 of the Revised Statutes, prohibit the employment of boys under fifteen and girls under sixteen years of age in any factory or mercantile establishment located in any district in which the public schools at the time are in session.

This Section, in so far as it bears upon the question at issue, provides that, "No boy under fifteen years of age, and no girl under sixteen years of age, shall be employed at any work performed for wages or other compensation, or assist any person employed as a wage earner when the public schools in which district such

child resides are in session.'' It is thus seen that the limitation of employment is that a child within the ages named shall not be employed as a wage earner at a time when the schools of the district in which the child resides are in session. That is the only limitation. The purpose of this law is to assist in enforcing the attendance of pupils at school when the schools at which, under the law, they are entitled to attend, are in session. It was not the intention of the law to enforce idleness upon boys or girls when the schools of their district are not in session. Useful and honorable employment is desirable for boys and girls as well as for grown people; and there is no provision of the law which prohibits a boy or a girl from accepting employment as a wage earner in an establishment located in a district outside of his own, even though the schools of that district may be in session at the time. The child is not entitled to attend the schools of any district but his own, and to hold otherwise would be to place the child in enforced idleness even though the school of his own district were not in session. The statute does not so read, and no court will read into the statute what it does not contain.

You suggest that the statute, if interpreted as above, would result in discrimination in favor of pupils living in rural districts and against the pupils of city districts. That was a matter for the legislature. We accept the law as it is. There is another provision, however, of the law which makes it questionable whether or not Section 6986-7 compels a girl under sixteen years of age, and a boy under fifteen years of age to attend school longer than twenty weeks in any one school year in a city district. See Section 4022-1.

Section 4022-2 permits the employment of pupils even though the public schools were in session, if they have previously complied with the provisions of Section 4022–1. Hence, there is no substantial discrimination.

Yours very truly,

J. M. SHEETS,

Attorney General.

COMPENSATION TO COUNTY AUDITOR FOR EXTRA SERVICES.

COLUMBUS, OHIO, April 3rd, 1902.

Hon. J. T. Tracy, Portsmouth, Ohio.

MY DEAR SIR:—I am in receipt of your communication in which you seek an opinion from me as to whether a county auditor is entitled to receive extra compensation for extraordinary services made necessary because of the erection of a court house or other county building.

The answer to this question must be found in the Statutes of Ohio, for it is a rule of universal application that ''to warrant the payment of fees or compensation to an officer out of the county treasury it must appear that such payment is authorized by statute.''

Clark v. Commissioners, 58 O. S., 107.

This principle was announced as early as the case of Deibolt v. Trustees, 7 O. S., 237, and has been universally adhered to ever since.

See Anderson v. Commissioners, 25 O. S., 13.

Strawn v. Commissioners, 47 O. S., 404.

The statute makes no provision for the payment of compensation to the auditor for services of the character mentioned in your inquiry. Indeed, there are many duties required of the county auditor for which the statute does not specifically provide compensation. But, by the provisions of Sections 1069 and 1070, R. S., he is allowed an annual salary, the amount depending upon the adult male population of the county. And, this salary is deemed sufficient compensation for all services

required to be rendered by him for which no specific provision is made for payment. The services required of the county auditor for which he is compensated by his annual salary vary from year to year, and it does not lie in the power of the commissioners to say when those services are in excess of the salary allowed, and then proceed to make provision for payment any more than it lies within their power to determine that the services rendered are worth less than the annual salary, and then proceed to reduce the amount allowed him as annual salary. In other words, the law fixes the annual salary which is deemed full and complete compensation for all services except those for which payment is specifically provided by statute.

Hence, it is apparent that the commissioners cannot allow the auditor any extra compensation for the extraordinary services made necessary because of the erection of a court house or other county building.

Very truly yours,
J. M. SHEETS,
Attorney General.

INCOMPATIBLE OFFICES.

COLUMBUS, OHIO, April 4th, 1902.

Hon. L. C. Laylin, Secretary of State.

DEAR SIR:—Your communication enclosing letter from P. F. Fee of Felicity, Ohio, received. Mr. Fee inquires:

1st. Can the same person hold the office of township clerk and the office of member of board of education?

2nd. Can the same person hold the office of councilman and the office of member of board of education in the same village?

In answer to the first question I assume the board of education referred to is the township board, and the question is simply whether the offices of township clerk and member of the township board of education are incompatible. Such offices would not be incompatible at common law. Are they made so by statute? Section 3915 provides:

> "The board of education of each township district divided into sub-districts shall consist of the township clerk, and one director elector (elected) for a term of three years for each sub-district; such board shall organize on the third Monday in April of each year by electing one of its members president. The clerk of the township shall be ex-officio the clerk of the board, but shall have no vote except in cases of a tie."

This language plainly intends that there shall be one member of the board of education from each district in addition to or exclusive of the township clerk. Note the language. "The board * * * * shall consist of the township clerk, and one director * * * * for each sub-district." Again, the clerk is a member of the board ex-officio. He could not be a member ex-officio and also a member as a director representing one of the sub-districts. He must act on the board either in one capacity or the other. Thus, as township clerk he has a vote in case of a tie, and as a member of the board representing a sub-district he would have a vote on all questions. Surely he could not vote as a director, and then in case of a tie vote again as township clerk. Hence, I am of the opinion that the two offices are incompatible.

In answer to the second question I shall only refer to the decision of the circuit court of Clark county in the case of the State of Ohio, ex. rel. vs. James C. McMillan, reported in the 15 Circuit Court Reports, page 163, where it is held, "A councilman during his term of office is ineligible to the office of member of the board of

education." While the reasoning of the court in this case is not entirely satisfactory, still I presume it should be followed until the question is otherwise decided by a court of equal or greater authority.

Yours very truly,

J. E. TODD,
Assistant Attorney General.

INCOMPATIBLE OFFICES.

COLUMBUS, OHIO, April 14th, 1902.

Henry M. Hagelbarger, Akron, Ohio.

MY DEAR SIR:—Yours of April 12th at hand and contents noted. The question you submit is whether a township clerk is eligible to act also as a member of the board of education of a special school district. There is no statute making the same person ineligible to serve in both capacities, hence we must look to the duties required to be performed in order to determine whether these two offices are incompatible.

The township clerk is ex-officio a member of the township board of education and is entitled to vote in case of a tie. The board must organize on the third Monday of April (R. S., Section 3915); so also must the board of education of a special school district organize at the same time. (R. S., Section 3980). It will thus be seen that the township clerk if a member of both boards would be required to be at two different places at the same time in order to perform the duties of his office.

In the event a petition should be filed under the provisions of Section 3946, R. S., to change the boundary lines of a special school district the boards of education of the township district and the special school district must sit in joint session to pass upon the proposed change. The interests of the special school district and the township district might be, and frequently are, under such circumstances, adverse to each other. If the township clerk may act in both capacities we would have a case of the same person acting in two capacities at the same time, and adverse to each other—a rather difficult feat to perform, I should judge.

In Throop on Public Officers the author says: "Two offices are incompatible when the holder cannot, in every instance, discharge the duties of each."

Throop on Public Officers, Section 33.

In Dillon on Municipal Corporations the author lays down the following rule: "Incompatibility in offices exists, where the nature and duty of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both."

Dillon on Municipal Corporations, Section 166, Note.

From these considerations it is quite clear to me that a township clerk cannot act in that capacity and at the same time act as a member of board of education of a special school district.

Very truly yours,

J. M. SHEETS,
Attorney General.

RIGHT OF CERTAIN INSURANCE COMPANIES TO WITHDRAW DEPOSIT REQUIRED UNDER SEC. 3641.

COLUMBUS, OHIO, April 14th, 1902.

Hon. A. I. Vorys, Superintendent of Insurance.

DEAR SIR:—I have the honor to acknowledge the receipt of your communication in which you seek an opinion from me as to your duties with reference to surrender-

ing to certain insurance companies the deposit of $30,000 required of them under the provisions of Section 3641, R. S., prior to its amendment by the present General Assembly. This section, prior to its amendment, required that companies organized under the laws of any other state "to transact the business of guaranteeing the fidelity of persons holding places of public or private trust or of executing or guaranteeing bonds or undertakings" should not be licensed to do such business in this state until it had deposited with the Superintendent of Insurance of Ohio or with the proper officer of the State in which such company was organized, securities amounting to at least $200,000, to be held for the benefit and security of the policy holders of the companies making such deposits. This section also provided that in the event the deposit of $200,000 was made with the proper officer of the state in which such companies were organized that they must also deposit with the Superintendent of Insurance of this state additional securities amounting to $30,000 "for the purpose of paying any judgment obtained against them in this state." This section was so amended by the present General Assembly (H. B. No. 69) as not to require the deposit of this $30,000 before being authorized to do business in Ohio. The amended section also provides that the Superintendent of Insurance shall deliver back to the companies making the $30,000 deposit, the securities so deposited.

What, then, are your duties under the circumstances? The $30,000 deposited by any company became, by the terms of the law requiring the deposit, a fund to secure the performance of all contracts of insurance made after such deposit. Hence, every contract of insurance made after the deposit, became a contingent lien upon the fund; and upon the policy maturing it would become a vested lien. Can the legislature, under such circumstances, order the withdrawal of these securities without impairing the obligation of contracts? I think not. In contemplation of law every contract of insurance made after these deposits, was made upon the faith of the security thus pledged; the law requiring this deposit became a part of the contract of insurance and the security cannot be withdrawn without impairing the obligation thus created.

Hence, I am of the opinion that as long as any contracts of insurance made with residents of Ohio, during the time this deposit was required to be kept up remain in force, you are not at liberty to permit the withdrawal of these deposits notwithstanding the action of the Legislature.

Yours very truly,

J. M. SHEETS,
Attorney General.

EMPLOYMENT OF A SUPERINTENDENT OF INSTRUCTION FOR THE CITY OF TOLEDO.

COLUMBUS, OHIO, April 15th, 1902.

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

DEAR SIR:—Yours of this date requesting an opinion from me as to whether the board of education of the City of Toledo can employ a superintendent of instruction for a period of two years, came duly to hand.

The power of the board of education of the City of Toledo with reference to the employment of a superintendent of instruction, is governed by the provisions of the Act of March 23rd, 1898, (93 O. L., 485 et seq.) Section 5 of this Act provides that

> "The board shall organize on the third Monday of April, 1898, and annually thereafter. The member of the board whose term shall expire at the end of the current year shall be president of the board for such current year, and shall have sole power to

appoint all standing and other committees of said board. The board shall at its first meeting, or as soon thereafter as may be, employ a superintendent of instruction, and also a business manager for a period not to exceed two years.''

''The first meeting'' referred to in this section at which the board must employ a superintendent, means of course, the first annual meeting, for were it not so, the statute would not authorize the employment of a superintendent of instruction in any year after the year 1898. And were it not for the phrase, ''for a term not to exceed two years,'' incorporated into this section, I should be inclined to the view that a superintendent of instruction must be employed annually. For the first part of the section standing alone would indicate an intention on the part of the Legislature to require an annual employment, as it requires that the board of education shall at its first meeting or as soon thereafter as may be, employ a superintendent of instruction, etc. But as the phrase, ''for a term not to exceed two years'' modifies the verb ''employ,'' I am of the opinion that the provision authorizing the employment of a superintendent of instruction, and business manager, should be construed the same as though it read the board ''shall, at its first meeting, or as soon thereafter as may be, employ for a period not to exceed two years, a superintendent of instruction, and also a business manager.''

The comma inserted after the words, ''superintendent of instruction'' and before the phrase, ''and also a business manager, etc.'', should have no influence on the construction. As was stated in Burgess v. Everett, 9, O. S., 428,

> ''The presence or the absence of punctuation is of no weight in the interpretation of statutes—it being often, if not generally, the work of engrossing clerks of the legislative body.''

In view of the fact that Section 5 of the Act under review makes complete provision for the term of employment of a superintendent of instruction, Section 4017, R. S., has no bearing upon the subject.

From the foregoing, it is hardly necessary to add that in my opinion, a superintendent of instruction cannot be employed in the City of Toledo for a period to exceed two years.

Very truly yours,
J. M. SHEETS,
Attorney General.

COMPENSATION TO COUNTY SURVEYOR AND DEPUTY, AND EXPENSES OF PROSECUTING ATTORNEY.

COLUMBUS, OHIO, April 22nd, 1902.

H. W. Robinson, Prosecuting Attorney, Sidney, Ohio.

DEAR SIR:—Yours of April 19th at hand and contents noted. Your letter requires an answer to the following questions:

1st. What, if any, compensation shall be allowed the county surveyor, or his deputy for services rendered the county?

2nd. Is the prosecuting attorney of the county entitled to his living and traveling expenses necessarily paid out in the discharge of his official duties?

Of these in their order:

1st. Section 1166 of the Revised Statutes provides that the county surveyor ''may appoint deputies not exceeding three, and take from them such bond as he requires, and he shall be responsible for their official acts; that surveys made by any deputy shall be signed by such deputy and countersigned by the county surveyor, and when so signed and countersigned shall have the same validity and effect as the surveys of the county surveyor.''

The various sections of the Statutes of the State providing for fees for the county surveyor make no mention whatever with reference to any separate or different fees for his deputy; nor do the statutes make any provision whatever for the payment of the deputy.

From these facts it necessarily follows that the surveyor himself is responsible to his deputy for his hire, and those for whom the services are rendered are responsible to the surveyor himself. Not only is the surveyor responsible to his deputy for his hire, but, under the provisions of Section 1166, he is responsible to the public for the acts of his deputy, and he must countersign and approve all surveys made by such deputy. From these considerations it is apparent to me that the law contemplates that whether the services are rendered by the surveyor or his deputy, the regular fees or per diem provided by law are due the surveyor and not to his deputy.

2nd. The Statute makes no provision for the payment of the expenses of the prosecuting attorney. That being the case he is clearly not entitled to expenses. This principle has been announced by the courts so frequently and so uniformly the same way that it is unnecessary to cite authorities.

Very truly yours,

J. M. SHEETS,
Attorney General.

RIGHT OF AN INSURANCE COMPANY DOING BUSINESS ON THE ASSESSMENT OR STIPULATED PREMIUM PLAN TO DO BUSINESS IN OHIO AS A FULL LEGAL RESERVE COMPANY.

COLUMBUS, OHIO, April 23rd, 1902.

Hon. A. I. Vorys, Commissioner of Insurance, Columbus, Ohio.

DEAR SIR:—I regret that pressure of other business, which would not admit of delay has prevented an earlier consideration of the questions proposed by you to this office for an opinion.

You inquire whether an insurance company, which has formerly transacted the business of life insurance on the assessment plan, or on what is known as the stipulated premium plan, with the provision in its policies for assessments to restore any impairment to the reserve fund, and which has still outstanding a line of assessment or stipulated premium policies, or both, can be admitted to Ohio under Section 3604, Revised Statutes, to transact the business of life insurance on the mutual or stock plan as a full legal reserve company, and to write only full legal reserve business as defined by Section 3596, Revised Statutes? As I understand it, the stipulated premium plan of life insurance is merely a modification of the assessment plan, and such business is clearly distinguishable from legal reserve business.

It is well settled in Ohio that the right to transact the business of insurance is a franchise. State v. Moore, 38, O. S., 7; State, ex rel. v. Ackerman, et al., 51 O. S. 163. It follows that the entire business is regulated and controlled by statute. That a foreign corporation seeking to transact such business within the state must derive its authority, not from the rules of comity between states, but from legislative permission. The question is not, whether the statutes prohibit a foreign insurance corporation to transact its business within the state, but whether such business is specifically authorized.

Aside from fraternal insurance, and insurance on the stipulated premium plan, which it will not be necessary to consider in this connection, the Statutes of Ohio divide insurance corporations into two classes, to-wit: (a) Section 3587, et seq., authorizes the incorporation of companies to transact the business of life insurance on the mutual or stock plan, while section 3604, et seq., provides for the admission of companies organized under the laws of other states to do business in Ohio on such

plan. (b) Section 3630, et seq., authorizes the incorporation of companies to transact the business of life insurance on the assessment plan, while Section 3630e, provides for the admission of companies organized under the laws of other states to do business in Ohio on such plan.

These statutes have from time to time been considered by the Supreme Court of the State, and while the various decisions of the court are not in conflict with each other, as much cannot be said of the opinions as prepared by the several judges of said court.

The powers of corporations organized under Section 3630, was considered by the court in the case of State vs. The W. U. M. Life Insurance Company, 47, O. S. page 167, and the decision announced in the first two paragraphs of the syllabus is as follows:

> 1. "Corporations organized under Section 3630, of the Revised Statutes which do not comply with the laws regulating regular mutual life insurance companies, have no power to issue policies guaranteeing any fixed amount to be paid at the death of the member, 'except such fixed amount shall be conditioned upon the same being realized from the assessments made on members to meet it;' and those corporations so organized, which do comply with such laws, are authorized to issue endowment policies 'promising to pay to members during life any sum of money or other thing of value.' Such Ohio corporations are not permitted to do business in another state upon substantially the same basis and limitations as they are in Ohio, when by the laws of such other state they are not permitted to issue such endowment policies, nor any policy of insurance so conditioned, nor any that does not specify the sum of money to be paid, and unconditionally obligate such corporation to pay the amount so specified, to the beneficiaries of such payment; and corporations organized on the assessment plan under the laws of such other state, are not entitled to do business in this state."
>
> 2. "The business, which corporations of other states organized to insure lives of members on the assessment plan 'shall be permitted to do in this state' under the provisions of Section 3630e, Revised Statutes, is that contemplated by Section 3630, which does not include the business of insuring the lives of members for the benefit of others than their families and heirs. A corporation of another state, organized for insuring lives upon the plan of assessments upon its members, without other limitation than that the policy holder shall have an insurable interest in the life of the member is not embraced within either of said sections."

Here is a judicial recognition of the fact that an assessment company, by complying with the laws regulating mutual life insurance companies, may issue endowment policies guaranteeing to pay a member a sum of money during life, or a fixed sum at death. In view of this decision, the language of Judge Bradbury in the case of State, ex rel. v. Matthews, 58, O. S., page 1, where the learned jurist declares that the Statutes of Ohio divide life insurance companies, other than fraternal, into two classes, the one to transact business on the mutual or stock plan, and the other only on the assessment plan, and that each "must confine its transactions to such methods of insurance as pertain to the class to which it belongs," must be accepted with some qualification.

An assessment company incorporated under the Ohio Statutes, does not have to confine itself to purely an assessment business, but may, by complying with the Statutes relating to mutual companies, do a business which is practically a legal

reserve business. And a corporation organized under the laws of another state, may transact its business in the same way provided such business is authorized by its charter and the laws of the state of its creation. It is to be remembered however, that the only reason an assessment company can thus do an endowment business, is solely because the statutes authorize it.

The power of companies organized to transact life insurance business upon the mutual or stock plan, was considered by the Court in the case of State, ex rel. v. Matthews, 58, O. S., page 1, and the following was announced as part of the syllabus:

> 2. "Although Sections 3587 to 3596, inclusive, Revised Statutes, under which life insurance companies intended to transact business on the mutual or stock plan, are organized, require such companies to have capital stock and stockholders; and although when thus organized they have no authority to transact business on the assessment plan, the want of such authority is not a consequence of their having capital stock and stockholders, nor of want of power in the legislature to confer it, but results solely from an omission of the legislature to clothe them with such power
>
> Notwithstanding the want of such authority in an Ohio corporation, created under those sections, yet, as the powers of a corporation depend on its charter and the laws of the state where it is organized, if the charter of an insurance company created in another state, together with the laws of such state, authorize it to transact business on the assessment plan, it should be admitted under Section 3630e, to transact business on that plan within this state, upon its complying with this section in other respects, although it may have a capital stock, and stockholders, for whose benefit it was created."
>
> 3. "However, what constitutes the transaction of the business of life insurance on the assessment plan within the meaning of that term as used in said Section 3630e, should be determined by the laws of this state; and according to those laws, that phrase should be held to contemplate a scheme of insurance conducted for the sole benefit of the policy holders of a concern, the principal source of revenue of which must arise from post-mortem assessments intended to liquidate specific losses."

Just how a corporation having a capital stock and stockholders, could "conduct a scheme of insurance for the sole benefit of the policy holders," I confess, I am not able to clearly understand. But assuming that it can be done, the decision above quoted, does not go farther than to declare the law to be, that where the laws of the state of its creation authorize a corporation having a capital stock to transact the business of life insurance on the assessment plan, such corporation should be admitted to transact its business on such plan in the State of Ohio. It does hold however, that an Ohio corporation organized to transact the business of life insurance on the mutual or stock plan, *has no authority to transact business on the assessment plan.* If an Ohio corporation so incorporated has no authority to transact business on the assessment plan, neither could a company organized under the laws of another state, and admitted to Ohio as a legal reserve company, claim the right to also do business on the assessment plan. In short, while an assessment company may issue endowment policies, and do a business something similar to that of old line companies, a legal reserve company has no authority to do an assessment business, and the reason it has not, is because the statutes have not conferred such authority.

It might be important to note in this connection, that the business of life

insurance on the assessment plan, is of comparatively modern origin, at least, so far as the Statutes of Ohio are concerned. Such insurance was first authorized in this state by the Act of April 20, 1872, (69 O. L. 82). At that time, the business of life insurance by legal reserve companies was well known, and had frequently been the subject of legislative action. The same General Assembly that authorized assessment insurance, as above stated, had some forty days earlier, passed an act to provide for establishing an insurance department in the State of Ohio, (69 O. L. 32), which act, with very little emendation, now constitutes Chapter 8, Title 3, Part 1, Revised Statutes of Ohio.

In 1867 (64 O. L. 192), an act was passed providing for the incorporation and regulation of life insurance companies, which act, with its various amendments, forms the basis for the present statutes regulating the business of life insurance on the mutual or stock plan. Certainly, none of these acts were intended to provide for insurance on the assessment plan, and indeed, the regulations prescribed in such acts, are such as are entirely incompatible with assessment insurance. Such for example, are the provisions requiring an annual net valuation of all outstanding policies; the provisions requiring a deposit with a state officer for the security of policy holders; the provisions regulating the investment of the assets of such companies, and other provisions, all of which can have no possible application to the business of life insurance on the assessment plan. A careful examination of these acts, with their various amendments, will disclose that they only authorize the creation of corporations to transact the business of life insurance on the mutual or stock plan. That is to make definite contracts of insurance by which the company in consideration of fixed premiums becomes obligated to pay a fixed amount upon the happening of the contingency insured against, and to secure the payment of such amount, not only by the investment of the original capital of the company, but also by the accumulation of a reserve fund. No General Assembly has ever seen proper to clothe such corporations with the power to transact the business of life insurance on the assessment plan. On the contrary, all the statutes of Ohio which authorize the business of life insurance on the assessment plan, only authorize it to be so transacted by a corporation specially organized for that purpose.

A foreign corporation certainly could not claim rights superior to those conferred upon a corporation of our own state. If such claim were made, it would be a sufficient answer to say that the statutes relating to the admission of foreign corporations to transact business within this State, require such companies to comply with all the provisions of the statutes applicable to similar corporations organized in this State. (See Sec. 3604 et seq.) I conclude therefore, that neither a corporation organized under the laws of this State, or a foreign corporation admitted to do business in this State, as a legal reserve life insurance company, is authorized to transact the business of life insurance on the assessment plan.

It only remains to consider whether or not the carrying of a line of assessment policies by a legal reserve company, which company collects the assessments upon such policies and applies the same in the payment thereof, can be said to be transacting the business of life insurance on the assessment plan. Certainly the collection of the assessments and the payment of the policies, is a very important part of such business—important at least, to the policy holder. Whether new business is written or not, the old business must be cared for. 75 Mo. 388; 5 Mo. App., 173. And in caring for such old business, it is my opinion that the company may fairly be said to be transacting business on the assessment plan.

I am of the opinion therefore, that a company which carries a line of assessment or stipulated premium policies on which it collects the premiums or assessments in accordance with the terms of such policies, is doing business on the assess-

ment plan, and is not entitled to admission to Ohio under Section 3604, Revised Statutes, to transact full legal reserve business.

Very truly,

J. E. TODD,
Assistant Attorney General.

COSTS IN CRIMINAL CASES TO MAGISTRATES.

COLUMBUS, OHIO, April 25th, 1902.

F. W. Woods, Prosecuting Attorney, Medina, Ohio.

DEAR SIR:—Yours of April 24th at hand and contents noted. Your inquiry goes to the question as to whether it is proper for the county commissioners to allow costs made before that magistrate as an examining court in criminal cases before the person charged is brought to trial and the case disposed of.

Under the provisions of Sections 1306 and 1308, it will be observed that in felonies the costs made before examining magistrates due the magistrate, constable, or marshal and witnesses are required to be paid out of the county treasury whether there is a conviction or whether there is an acquittal. Section 1309 authorizes the commissioners to make allowances to such officers in lieu of fees wherein the state fails to convict, and in misdemeanors even though there be a conviction when the defendant proves insolvent, but in no year shall the allowances exceed the fees earned, nor shall the allowance exceed $100. Section 1314 provides that all fees of the examining magistrate and constables and marshals collected in misdemeanors be paid into the county treasury, unless it be ascertained that the amount of such fees was not taken into account in estimating the amount to be allowed such officer under the provisions of Section 1309. Section 1311 is in apparent conflict with Section 1309. This provides that when the commissioners are called upon to allow fees to an examining magistrate in misdemeanors they must first determine whether or not security for costs have been taken, and whether or not the officer used due diligence in taking such security for costs before they allow him fees in any such cases. That seems to contemplate that the commissioners may allow fees in misdemeanors even though the state fails to convict, for the question as to whether security for costs was taken is eliminated from the case as soon as there is a conviction.

Construing all of these sections together, I am inclined to the view that the commissioners may allow the fees before the case is disposed of whether it be a felony or a misdemeanor, limited only by the provisions of Section 1309, already referred to.

Yours very truly,

J. M. SHEETS,
Attorney General.

SALARY AND COMPENSATION COUNTY TREASURER CUYAHOGA COUNTY.

COLUMBUS, OHIO, April 29th, 1902.

Hon. P. H. Kaiser, County Solicitor, Cleveland, Ohio.

MY DEAR SIR:—Yours of April 28th, seeking an opinion from me as to whether the salary of the county treasurer of Cuyahoga county is limited to $7,000 per annum, or whether he is entitled to an additional sum of five per cent. on delinquent chattel taxes collected by him, duly received.

Section 1365-1, R. S., provides for the salary of the treasurer of Cuyahoga county in the following terms: "Treasurer, an annual salary of seven thousand

dollars; and the legal penalty of five per centum on all delinquent chattel taxes paid or collected, but the treasurer shall hire at his own expense all collectors employed for that special purpose.'' It is entirely clear to me that this provision means what it says. That is, that the treasurer is to have five per cent on delinquent chattel taxes collected by him, in addition to the $7,000. Certainly the legislature did not intend to make a provision for this additional salary and require the treasurer to pay his own collectors, then mock him by taking away the promised compensation and not even reimburse him for his outlay in employing collectors. This provision for five per cent. additional was evidently intended to stimulate the treasurer into making special efforts to collect delinquent chattel tax that otherwise would be a loss to the county. Certainly there would not be much inducement for the treasurer to be compelled to pay out of his own private funds all expenses incident to collecting delinquent chattel taxes if he were to be denied this five per cent penalty. Sections 1365-1, 1365-2 are part and parcel of the same act, and it can hardly be presumed that the legislature intended that the provisions of one section should conflict with the provisions of the other, nor do I think that giving the provisions of Section 1365-2 a fair construction there is any conflict with the provisions of Section 1365-1. Section 1365-2 requires no more than that all fees and allowances which otherwise would be due to the treasurer for his services as such shall be credited to the fee fund. From this fee fund the treasurer is allowed to draw his salary, to-wit, $7,000 plus five per cent. penalty on the delinquent chattel taxes collected.

Of course, the five per cent. penalty can be computed only on those delinquent chattel taxes collected by his own personal efforts or by the collectors employed by him. He cannot merely stand behind the counter and receive delinquent chattel taxes voluntarily paid and charge five per cent. on the amount thus collected.

In Hunter vs. Borck, 51 O. S., 320, the court held: ''To entitle the county treasurers to the compensation of five per centum allowed under Section 1094 of the Revised Statutes, they must proceed to collect, and, in fact, collect the delinquent taxes by distress, or as provided by Section 1097, 1102 and 1104 of the Revised Statutes; or by special effort in person or through an agent.'' Indeed, the provisions of Section 1365-1 seem to contemplate that the delinquent taxes upon which the treasurer shall be entitled to a penalty of five per cent. shall be collected by extraordinary efforts through himself or collectors.

Yours very truly,

J. M. SHEETS,

Attorney General.

POLICE JUDGE--COMMISSION BY GOVERNOR.

COLUMBUS, OHIO, May 3rd, 1902.

Hon. George K. Nash, Governor of Ohio.

DEAR SIR:—I have the honor to acknowledge the receipt of your communication of recent date in which you seek an opinion as to whether a police judge is required, under the provisions of Section 83, R. S., to receive from the Governor, a commission before he is eligible to perform the duties of the office.

This section provides that:

> ''Each judge of the supreme court, circuit court, court of common pleas and probate court, state officer, county officer, militia officer and justice of the peace, and any officer whose office is created by law, and not otherwise provided for, shall be ineligible to perform any of the duties pertaining to such office until he shall receive from the Governor a commission to fill such office, upon producing to the proper officer or authority a legal cer-

tificate of his being duly elected or appointed.''

It will be observed that this section does not specifically require a police judge to procure from the Governor a commission. If required at all it is included within the provision ''and each officer whose office is created by law, and not otherwise provided for.'' It is only those officers whose offices are ''created by law, and not otherwise provided for'' who must procure a commission from the Governor. The questions, then, to be considered are:

1st. Is the office of police judge ''created by law?''

2nd. Is it an office ''not otherwise provided for?''

Of these in their order.

1. An office created by law does not include an office created by ordinance. In some cities of the state the office of police judge is created by law, while in others it is created by ordinance—each case depending upon the law governing the particular municipality. Hence where the office of police judge is created by ordinance it can hardly be claimed that a commission is required of the Governor, for it is not an office created by law.

2. Even where the office of police judge is created by law is it an office ''not otherwise provided for'' within the meaning of Section 83, R. S.? I think not. This section also provides:

> ''And as soon after any election for any of the offices above named as the result shall have become officially known to them, the city board of elections or the deputy state supervisors of elections of each county in this state shall, upon payment to them by each such officer of the fee above prescribed, immediately forward by mail to the Secretary of State a certificate of election of each such officer * * * and thereupon the Governor, upon the filing of such certificate with the Secretary of State, accompanied with the fee aforesaid, shall issue the proper commission to such officer.''

It thus appears that the board of elections, or deputy state supervisors of elections must certify to the Governor the election of the officers who are entitled to a commission, and this only when the election of the person entitled to a commission bcomes ''officially known'' to the board. While the statute makes complete provision for obtaining this official information of the election of a justice of the peace, county or district officer on the part of the board of elections and deputy state supervisors of elections, it makes no provision for making the result of elections in municipalities ''officially known'' to them.

Section 2966-8 provides:

> ''In April or other elections for township or municipal officers, or boards of education, or the election of a justice of the peace, the judges and clerks of election shall certify the returns to the clerk of the township or the clerk of the municipality in which the election is held, or clerk of the board of education, instead of to the deputy state supervisors, and the said township clerk, or the clerk of the municipality, or clerk of the board of education, shall canvass the vote and declare the result in the manner and as provided in Sections 1453, 1729 and 3910 of the Revised Statutes, and in the case of an election of a justice of the peace, shall certify the result to the board of deputy state supervisors.''

Here is a provision for making the result of the election of justice of the peace ''officially known'' to the board of deputy state supervisors of elections, the purpose being of course to enable the board to certify such election to the Governor, but no provision is made for certifying the result of municipal elections. It appears from these provisions that the election board or the board of deputy state

supervisors of elections must certify to the Governor the election of a person entitled to a commission, but cannot do so until the fact of such election is "officially known" to them, yet makes no provision for obtaining official information of the election of a police judge or other municipal officer—I include municipal offices created by law for the reasoning that would require a police judge to obtain from the Governor a commission would necessarily include every municipal officer whose office is created by law.

Again, all justices of the peace, county and district officers are required to qualify by taking the necessary oath within a certain prescribed time after receiving their respective commissions from the Governor. If they fail to do so the office is declared vacant. Not so with municipal officers. Under the provisions of Section 1729 and 2966-8 R. S. the clerk of the municipality canvasses the vote and notifies the persons elected of their election. Section 1737, R. S., requires each officer of a municipality to qualify by taking the prescribed oath and by executing the required bond before entering upon the discharge of his duties. Section 1740, R. S., provides that the council may declare any office of any person vacant who neglects to qualify within ten days after being notified of his election—not within a certain time after receiving a commission from the Governor, as is provided in cases where a commission is required.

From these considerations I am clearly of the opinion that there is no provision of law whereby a police judge is required to obtain a commission from the Governor.

Very truly,
J. M. SHEETS,
Attorney General.

TRANSPORTATION EXPENSES OF OFFICERS OF NATIONAL GUARD NOT PAYABLE FROM APPROPRIATION FOR NATIONAL GUARD.

COLUMBUS, OHIO, May 14th, 1902.

Hon. George K. Nash, Governor of Ohio.

DEAR SIR:—I have the honor to acknowledge the receipt of your communication, in which you inquire whether the fund appropriated for "transportation of Ohio National Guard," is available to pay the transportation of officers of the National Guard while attending the National Association of Officers of their respective ranks. This item in the appropriation bill does not specifically state what transportation expenses may be paid out of this fund. Hence, in order to know what the Legislature had in mind, the statutes relating to the duties of the National Guard must be consulted. For it is entirely clear that the Legislature intended to limit the purpose for which this appropriation might be used to the transportation of the National Guard when required to be transported in the performance of some duty enjoined upon it by law, e. g., transportation to the scene of a riot to aid the civil authorities in suppressing it, or transportation in attending an annual encampment.

The National Association of the Officers is an association unknown to the law Nowhere in the statutes of the State is reference made to such an association. The officers are under no obligation to join such organization, and if they do so, they must bear their own expenses incident thereto. If the officers can organize such an association and can determine for themselves where they shall meet, and demand and receive out of the state treasury their transportation expenses in attending such meetings, with equal propriety may the privates organize a similar association and determine where their meetings shall be and have their transportation expenses paid. If they can meet in Washington and have their transportation expenses paid by the state, they may meet in San Francisco or in Europe, if they so decide. This is an association over which the state has absolutely no control, and if the law were so

construed as to allow such transportation expenses to be paid, every dollar appropriated by the Legislature could thus be diverted from the legitimate purposes evidently intended by the Legislature when it made the appropriation.

Very truly,

J. M. SHEETS,
Attorney General.

COLUMBUS, OHIO, May 14th, 1902...

To the Board of Public Works. Columbus, Ohio.

GENTLEMEN:—Yours of May 13th at hand and contents noted. You seek an opinion from me in respect to the powers and duties of the Board of Public Works and the commission appointed under the provisions of the act of April 9th, 1902 (95 O. L., 118), with reference to revising water rate contracts already existing, and making new ones for the use of the surplus water of the canals of the state.

Section 4 of this act provides:

> "The said board of commissioners, together with the board of public works, shall within the present year investigate all present water rate contracts on the two lines of canal mentioned in Section 1, and revise and readjust them upon a fair and equitable basis as to the rents to be paid in the future. The board of commissioners and the board of public works shall also investigate the water rent contracts upon the lines of the canal mentioned in Section 3, and make a special report to the next General Assembly as to what extent the rates for water rent may be increased."

These provisions make it incumbent upon the board of public works and the commission during the present year to investigate all water rate contracts and readjust the rents to be received upon an equitable basis to the state. Such being the provisions of this act no old contract for the sale of surplus water of the canals can be revised, nor any new contract entered into without the concurrence of both the board of public works and this commission. The phrase "all present water rate contracts" does not limit the authority of the commission to the consideration of such contracts as existed at the date of the passage of the act, but the context clearly indicates to me the legislative intent to extend the authority of the commission over any contract that might be in existence at any time within the present year. Any other construction would put it within the power of the lessees holding contracts at the date of the passage of the act to rob this commission of all its authority "to revise and readjust" the water rate contracts. For they might after the passage of the act, surrender and cancel all their contracts, then there would be no "present" contracts "to revise and readjust." If the board of public works could then proceed to make new contracts for the surplus water without consulting the commission one of the main purposes of the creation of this commission would be most effectually thwarted. The clear purpose of creating this commission was to enable it to assist the board of public works in revising old contracts and making new ones for the sale of the surplus water of the canals so as to bring to the state a fair and just compensation for the amount of water furnished, and this purpose could not be carried out without the commission were consulted in the execution of all these contracts.

Very truly yours,

J. M. SHEETS,
Attorney General.

COLUMBUS, OHIO, May 17th, 1902.

George E. Young, Prosecuting Attorney, Lebanon, Ohio.

MY DEAR SIR:—Yours of May 16th at hand and contents noted. It requires an opinion as to whether where a constable has been designated to convey to the Boys' Industrial School any youth sentenced to such institution, he is entitled to receive for such services both mileage and expenses incurred; also whether his claim must be allowed by the county commissioners before payment.

Section 756 of the Revised Statutes provides that any youth sentenced to the Boys' Industrial School shall "be conveyed to said industrial school by the sheriff of the county in which the conviction was had, or by some other suitable person designated by the court giving the sentence."

Section 759 provides that "the expenses incurred in the transportation of a youth to the Boys' Industrial School, shall be paid by the county from which he is committed, to the officer or person delivering him, upon the presentation of his sworn statement of account of such expenses."

It will thus be seen that a constable, as such, is not authorized to convey such youth to the school, only the sheriff of the county is so authorized. Hence, if the court designate the constable to convey such youth to the school it is not because he is a contsable, but because he is considered by the court to be a "suitable person" to be designated to perform such service. He does not convey the youth to the school by virtue of his office, but by virtue of an appointment by the court as a "suitable person" to perform that duty. Hence, the question of mileage cannot be considered in determining what compensation must be allowed. It will also be observed that Section 759, which provides for the payment of costs and expenses makes no provision for mileage. It merely provides for payment of the actual expenses incurred. Surely no person who is not an officer would claim that under the law he is entitled to mileage in addition to his expenses. And in contemplation of law the constable as already suggested, conveys the youth, not as an officer, but as a person designated by the court for that purpose. It follows from these considerations, the constable is not entitled to mileage.

The claim for expenses so incurred must be allowed by the county commissioners before payment. Section 894 of the Revised Statutes provides "No claim against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal, in which cases the same shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the same."

The amount due a person for transporting a youth to the Boys' Industrial School is not fixed by law; no person will claim that, nor is there any other tribunal designated by law to pass upon the amount of such claim except the county commissioners.

Very truly yours,
J. M. SHEETS,
Attorney General.

POWER OF GENERAL ASSEMBLY TO DIRECT GOVERNOR OF OHIO TO EXECUTE A DEED CONVEYING AWAY STATE PROPERTY.

COLUMBUS, OHIO, June 9th, 1902.

Hon. George K. Nash, Governor of Ohio.

DEAR SIR:—Yours of recent date in which you seek an opinion from me as to your duties with reference to executing a deed to Aultman, Miller and Company of

Akron, Ohio, for the north half of lot one hundred and eleven in that city, came duly to hand.

It appears that the 75th General Assembly directed the Governor of Ohio to execute to Aultman, Miller and Company a deed for this tract of land, upon the company paying to the Treasurer of State the sum of one dollar—a nominal consideration and in effect a gift.

It appears from the abstract of title furnished that the State of Ohio became the owner of this property April 10, 1821, and conveyed away the south half in 1835. There is no evidence that the State ever parted with title to the remainder of this lot. Nor does there appear to be any equitable reason why Aultman, Miller and Company should now ask that this property be conveyed to it without consideration.

Hence, the question arises: Can the Legislature give to a private individual, e. g., a corporation, the lands of the State. If it has power to make a donation of one tract, it necessarily follows that it may donate all the real property, the title to which is in the State of Ohio. The property of the State is held in trust for all the people, and the Legislature cannot authorize its use or disposition except it be for some constitutional purpose. It was held in State v. Guilbert, 56 O. S., 575, 625, that "the functions of the State are governmental only," and are embraced within the three branches, legislative, judicial and executive. As all powers not delegated in the constitution, are reserved to the people, (Constitution Art. 1, Section 20), hence, regardless of any other constitutional limitation, before an act of the General Assembly can be valid, it must subserve some governmental function.

Owing to press of other matters, I am unable to give the question a more extended consideration, but am of the opinion that the Legislature has not the power to make a gift of the State's property to a private individual, and that you would be fully warranted in refusing to execute the deed in question, especially without proof that the property in equity belongs to Aultman, Miller & Company, and that the bare legal title remained in the State.

Very truly,
J. M. SHEETS,
Attorney General.

COMPENSATION OF COUNTY AUDITORS UNDER SECTION 1069 AS AMENDED MAY, 1902.

COLUMBUS, OHIO, June 9th, 1902.

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

DEAR SIR:—I am in receipt of your inquiry, of recent date, in which you seek an opinion from me as to whether County Auditors who are now in office will receive compensation according to the provisions of Section 1069, R. S., as amended May 12th, 1902, or whether they continue to receive compensation according to the provisions of Section 1069, R. S., before it was amended. This depends upon the question of whether the compensation of the County Auditor, as provided in Section 1069, R. S., before the late amendment, was under the law fees or salary.

If fees, the amount of compensation might be changed during the term; if salary, it could not. See Art. 2, Sec. 20 of the constitution, which provides:

> "The General Assembly, in cases not provided for in this constitution, shall fix the term of office and compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

Section 1069, R. S., before the amendment, provided for compensation of County Auditors to be measured by the quad-rennial enumeration of their respective counties.

This section, as it then stood, provided for an annual compensation regardless of services rendered. It was:

> "An annual or periodical payment for services—the payment dependent on the time and not on the amount of services—hence a salary."
>
> Thompson v. Phillips, 12 O. S. 617.

From this it will be seen that the Legislature did not have the power to pass any law affecting the salary of a County Auditor "during his existing term." Consequently, all County Auditors holding office at the date of the amendment of this section, will continue to receive compensation according to its provisions prior to the late amendment.

Yours very truly,
J. M. SHEETS,
Attorney General.

EXTENSION OF TERM OF CLERKS OF COURT.

COLUMBUS, OHIO, June 14th, 1902.

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

MY DEAR SIR:—I am in receipt of yours of recent date in which you request that I give you an opinion upon the question as to whether or not clerks of court whose terms would otherwise expire in August, 1902, are entitled to hold over until the first Monday of January by virtue of the amendment to Section 1240, R. S., by the 75th General Assembly.

Article 4, Section 16 of the Constitution provides that:

> "There shall be elected in each county, by the electors thereof one clerk of the court of common pleas, who shall hold his office for the term of three years, and until his successor shall be elected and qualified."

You will observe that the successors to the clerks whose terms would expire the coming August, were elected and qualified before the act took effect. Not only that, but the act itself provides, among other things, that:

> "Such successors to clerks of courts of common pleas whose present terms of office expire in nineteen hundred and three, shall be elected at the next general election following the enactment hereof, and thereafter clerks of the courts of common pleas shall be elected at the general election next preceding the beginning of their official terms as fixed by this act."

That is, it is the purpose of the law that the clerks hereafter elected shall take their office on the first Monday of January next after their election. It was evidently the design of the Legislature that a clerk should not be elected at a November election, and then be required to wait more than a year before he should take his office.

Hence, it is entirely clear to me that not only clerks whose terms expire this coming August, but clerks whose terms expire in August, 1903, are not entitled to extension of term.

Very truly,
J. M. SHEETS,
Attorney General.

SALE OF INTOXICATING LIQUOR BY SOCIAL CLUBS.

COLUMBUS, OHIO, July 14th, 1902.

Hon. W. D. Guilbert, Auditor of State.

DEAR SIR:—In your communication of July 9th, you refer to this office the letter of Dr. C. P. Wagar, and request an opinion on the question asked in said letter, to-wit: "Are social clubs allowed to sell liquors to members only, on payment of the Federal tax?" The question doubtless refers to the sale of intoxicating liquors, and will be so considered.

The business of dealing in intoxicating liquors is regulated both by Federal and State law. The Federal statutes are enacted with a view to deriving revenue from such business, while State laws not only seek to obtain revenue from the business, but also "to provide against the evils resulting therefrom." Under each law the business sought to be taxed is defined with some particularity. Thus, Section 3244, Revised Statutes, U. S., defines a retail liquor dealer as follows:

> "Retail dealers in liquor shall pay $25. Every person who sells, or offers for sale, foreign or domestic distilled spirits or wines in less quantities than five wine gallons at the same time shall be regarded as a retail dealer in liquors."

The State statutes, commonly known as the Dow law, contain the following provisions:

Section 4364-9:

> "Upon the business of trafficking in spiritous, vinous, malt or any intoxicating liquors, there shall be assessed, yearly, and shall be paid into the county treasury, as hereinafter provided, by every person, corporation or co-partnership engaged therein, and for each place where such business is carried on by or for such person, corporation, or co-partnership, the sum of three hundred and fifty dollars."

Section 4364-16:

> "The phrase 'trafficking in intoxicating liquors,' as used in this act, means the buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes, but such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof at the manufactory, by the manufacturer of the same in quantities of one gallon or more at any one time."

From a comparison of the Federal and State statutes it will be seen that under both the business sought to be covered by such laws is that of the sale of intoxicating liquors, the Federal statute applying to every one who sells such liquors in quantities less than five gallons, while the State statute applies to every one who sells such liquors except upon a physician's prescription, or for known mechanical, sacramental or pharmaceutical purposes.

Taking the question of Dr. Wagar as stated above, it is apparent that if the club *sells* liquor to its members, that it is within the provisions of both the Federal and State statute, the club not falling within the exception to either law.

But the question is broader than stated by Dr. Wagar. A better statement, perhaps, would be: Can a social club buy liquors and furnish the same to its members at cost, without payment of the Dow tax? It is a matter of common knowledge that such clubs are frequently organized, and liquors are furnished the members of such clubs under some plan or scheme by which it is sought to avoid the appearance of a sale. The number of such schemes is probably as large as the

number of such clubs. It would be impossible to determine, with accuracy, the legal status of all these clubs without some knowledge of the particular schemes or plans under which they operate. It may safely be asserted, however, that whenever any organized club or association, whether a corporation or a co-partnership, buys or procures intoxicating liquors which it furnishes to its members in smaller quantities, to be paid for by such member in proportion to the amount of such liquor so furnished, such club is trafficking in intoxicating liquors, as defined in the Dow law, and is subject to the provisions of said law. Such a transaction, in effect, constitutes a sale by the club to the member, no matter how elaborate the scheme under which it is disguised.

I have pointed out above the similarity between the Federal and State law, and it appears that any one who is a "dealer" as defined by the Federal law, is also "trafficking in intoxicating liquor" as defined by the State law, unless he falls within some of the exceptions to the State law. From this it follows that any one required to pay the Federal tax as a dealer would also be required to pay the Dow tax, unless he is selling upon prescription or for known scientific, sacramental or pharmaceutical purposes. The legislature of Ohio, recognizing this fact, recently enacted: "The fact that a person, firm or corporation against whom suit may be brought to enforce the collection of such assessment, has paid the special tax required by the laws of the United States for engaging in the sale of intoxicating liquors, as shown by the public records in the offices of the internal revenue department, may be offered in evidence as proof that he so engaged for the time for which such special tax has been paid, and shall be prima facie evidence that such person, firm or corporation is actually engaged in the business of trafficking in intoxicating liquors as defined in Sections 4364-9 et seq., of the Revised Statutes of Ohio."

95 O. L., 464.

The provision above quoted is a part of what is commonly known as the Cain law, enacted by the last General Assembly. This act neither enlarges nor restricts the class of persons subject to the provisions of the Dow law, but merely makes additional provision for the collection of the Dow tax from all persons liable to pay the same.

Recurring then to the question of Dr. Wagar, if the social club makes payment of the Federal tax, that fact, so far from exempting it from the payment of the Dow tax, becomes prima facie evidence that it is liable to the payment of the Dow tax.

In so far as the business of these clubs has come before the courts of this State it has been held that the transaction between the club and its members constitutes a sale, and that the club is liable for the Dow tax assessment.

See University Club of Cincinnati v. Ratterman, Treasurer, 3 C. C., 18.
State of Ohio, ex rel. Attorney General v. Broadway Club of Lebanon, and
State of Ohio, ex rel. Attorney General v. The Sanhedrim Club of Lebanon, Supreme Court of Ohio, not reported.

In the two latter cases the Supreme Court overruled a demurrer to the petitions and entered judgment of ouster against the two clubs.

See, also, Walter v. Commonwealth, 88 Pa. St., 137.
Rickert v. People, 79 Ill., 85.
State v. Mercer, 32 Iowa, 406.
Marmont v. State ,48 Ind, 21.
Archer v. State, 45 Md., 33.

Yours very truly,
J. E. Todd,
Assistant Attorney General.

TONNAGE TAX ON FISH CAUGHT IN MICHIGAN AND CANADA WATERS.

COLUMBUS, OHIO, July 15th, 1902.

Hon. J. C. Porterfield, Chief Game Warden, Columbus, Ohio.

DEAR SIR:—I have before me your letter of July 9th, with which you enclose the letter of Frank B. Shirley and request an opinion from this office on questions presented in said letter.

It appears from the letter of Mr. Shirley that certain firms are accustomed to fish for profit with nets in the waters of Lake Erie on the Canada and Michigan sides of said Lake, and bringing their catch to Ohio ports for sale. No import duty is paid on the fish brought from Canada waters and the question is: Can such firms be required to pay the tax imposed by the Ohio Statutes on the business of fishing for profit in the waters of Lake Erie?

Section 6968-2, Revised Statutes of Ohio, as amended May 6th, 1902, requires every person, company or corporation fishing for profit, with nets, in the waters of Lake Erie, to pay a tax of fifty cents per ton of two thousand pounds, upon every ton of food fish caught in the waters named in said Section. While this Section names "the waters of Lake Erie," it is manifest that the statutes extend no farther than the jurisdiction of the State over said waters. The Legislature must be presumed to have intended only to legislate for that portion of Lake Erie over which the State of Ohio has jurisdiction and the tax imposed upon the business of fishing in said waters can only apply to such business as is carried on in the waters of this State. It follows, therefore, that fish caught in Michigan waters or the Canada side of Lake Erie are not subject to the tax. In this connection paragraph 2 of Section 6968-4 should also be considered. This paragraph provides, in substance, that fish brought into any port in the State of Ohio, upon which an import duty has not been paid under the laws of the United States, "shall be deemed to have been caught in the waters mentioned in Section 6968-2 of this act, and the same shall be subject to the tonnage tax provided in said Section." If it was intended by this Section to impose a tax upon fish caught in Michigan waters it would be an interference with inter-state commerce, and for that reason invalid. It should not be assumed that the Legislature intended this result if any other reasonable construction can be given to the language used. Neither can this be regarded as imposing an import duty upon fish brought from Canada, as the only power the Legislature of a State has to impose such a duty is to derive revenue necessary for the execution of its inspection laws, and no such purpose is disclosed in the act in question. The only effect then that can be given to this paragraph of Section 6968-4 is to change the burden of proof from the State to the person or firm bringing such fish into port. That is, such fish shall be deemed to have been caught in Ohio waters and shall be subject to the payment of the tax unless the person or firm so bringing such fish into port prove that the fish were actually caught outside of Ohio waters.

From the letter of Mr. Shirley, I judge that there is no dispute as to the place where the firms in question catch their fish. If this be true, then there should be no dispute as to the tax. If the fish are caught in Ohio waters they are subject to the payment of the tonnage tax, but if caught in Michigan or Canada waters they are not subject to such tax. If the place of the catch is unknown the presumption is that they were caught in Ohio waters and the burden is upon the person bringing such fish into port to prove that they were caught elsewhere.

Yours very truly,

J. E. TODD,

Assistant Attorney General.

EXEMPTION OF PROPERTY FROM TAXATION.

COLUMBUS, OHIO, July 16th, 1902.

Hon. W. D. Guilbert, Auditor of State.

DEAR SIR:—I am in receipt of your communication of this date in which you seek an opinion as to whether certain property in the City of Cleveland is exempt from taxation. The first tract mentioned is, the property of the Young Men's Christian Association, of that city, consisting of the ground and the building erected thereon. Part of the building is used as quarters for the Association, and a part of it is leased as business rooms to persons engaged in mercantile pursuits—the money received from the leases, however, is used in supporting and maintaining the organization.

That part of the building used with a view to profit, i. e., from which rentals are received, is clearly taxable; and, as it appears that the whole property has escaped taxation for a number of years, the part leased should be placed on the tax duplicate not only for the current year, but for previous years back to the last decennial appraisement.

R. S., Section 1040.

I cannot understand how any other conclusion can be arrived at. The principle announced in Library Association v. Pelton, 36 Ohio St., 253, is conclusive of the question at issue. It was there held that where a Library Association, which was an "institution of purely public charity," within the meaning of Article 12, Section 2, of the Constitution, "owns a lot of ground, with a block of buildings thereon, constructed as an entirety, and the buildings having a basement and three stories over the same, each divided into rooms adapted to its use, and for renting, some of which, on each floor, are used by it for its purposes; some are rented out, and the rents received, are applied exclusively to keep the property in good repair, and to the purposes of the association, * * * * that such parts of said building and appurtenances as are rented, or otherwise used with a view to profit, are not exempt from taxation."

2nd paragraph of syllabus.

It was also held in Gerke v. Purcell, 25 Ohio St., 229, that a parsonage located on the same lot with a church, and used as a residence for the pastor of the church, was not exempt from taxation, for it was neither "an institution of purely public charity," nor was it a "house used exclusively for public worship"—it was used as the private residence of the pastor.

No property can be exempt from taxation except such as is enumerated in Article 12, Section 2, of the Constitution—that fact should always be kept in view.

The Young Men's Christian Association can claim no exemption unless its property can be classed as either an "institution of purely public charity," or a "house used exclusively for public worship." Surely it cannot be claimed that that part of the property occupied by merchants is used as an "institution of purely public charity," or as a "house used exclusively for public worship." It matters not that the proceeds of the leases are used for the purpose of maintaining the organization. As well might the Association claim exemption from taxation of any other property it might happen to own, upon proof that the income derived therefrom was used in maintaining and supporting the organization. Indeed, with equal propriety could anybody claim exemption of his property from taxation on the ground that he donated the income derived therefrom to charity. Let me repeat: In order to be exempt, the property itself must be used either as a house of public worship, or as an institution of purely public charity—not property the income of which is used to support either a house of public worship or an institution of public charity. The exemptions mentioned in Article 12, Section 2, of the Constitution, are the only classes of property that can, under any circum-

stances, be relieved of the burden of taxation. And yet, a great deal of property subject to taxation as not coming within any of these exemptions, escapes, under the guise that it is lawfully exempted.

The second tract mentioned is one belonging to the St. Agnes Church, and it appears in the form of an application to obtain a refunder of taxes paid in 1899 and in 1900, on the ground that the property on which the taxes were paid, was exempt from taxation. This application is one that should have been addressed to the Commissioners of Cuyahoga County. R. S., Section 1038. The County Solicitor is the adviser of the County Commissioners, and proper courtesy to him requires that I refrain from assuming to perform duties that come exclusively within his province. Indeed, it appears from the correspondence submitted, that the County Solicitor has already been asked for an opinion upon this subject, and no doubt he has given it. Hence, I beg to be excused from giving the matter consideration at the present time.

Yours very truly,

J. M. SHEETS,
Attorney General,

FULL TRAIN CREW.

COLUMBUS, OHIO, July 23rd, 1902.

Hon. J. C. Morris, Commissioner Railroads and Telegraphs.

DEAR SIR:—I am in receipt of your communication of this date in which you seek an opinion from me as to whether by the provisions of House Bill No. 358, 95 Ohio Laws, 343, two brakemen are required on a passenger train made up of more than five coaches, but where less than five of those coaches carry passengers.

The act referred to makes it unlawful for any railroad company to operate over its line in Ohio "any passenger train with five cars or less carrying passengers with less than a full passenger crew, consisting of one engineer, one fireman, one conductor, and one brakeman; and on trains of more than two cars the said brakeman shall not be required to perform the duties of baggage master or express agent while on the train."

It is quite clear to me that before two brakemen can be required the train must be made up of more than five passenger coaches. The phrase "carrying passengers" modifies the word "cars," not "train." If it were intended that the phrase "carrying passengers" should be descriptive of the train, the statute should have read "any passenger train carrying passengers," etc. According to all rules of construction, unless there is something in the language of the act to indicate a contrary intention, a modifying phrase or clause is placed next to the word intended to be modified. If that rule is to be adhered to in this instance, then the above construction must be followed.

In modern railroading a brakeman's duties are more like that of a porter's—to look after the passengers, to assist them to board the cars and alight therefrom. They are not required to look after express and mail cars. Hence, it seems to me reasonable that the legislature's purpose was not to compel two brakemen to be on a train that might have but one passenger coach, if it happened to have five express and mail cars.

Wherever the word "cars" is used in the act I think it is clear that it is meant to include only passenger cars as that is the class described in the first sentence of the act, no other car having been particularly described, and the act should be so construed.

Yours very truly,

J. M. SHEETS,
Attorney General.

SALARIES OF ASSISTANT PHYSICIANS AND SUPERINTENDENT HOSPITALS.

COLUMBUS, OHIO, July 24th, 1902.

Hon. W. D. Guilbert, Auditor of State.

DEAR SIR:—I am in receipt of your communication in which you ask a construction of House Bill No. 257 (Section 640 R. S.), with reference to the increase of salary of assistant physicians, and also Senate Bill No. 52, (Section 1284, R. S.), with reference to the increase of salary of superintendents of the institutions of the State.

Section 640 provides, in substance, that the salary of an assitant physician shall not exceed the sum of $600 for the first year, but may be increased from year to year, as the services from experience become more valuable, but in no year to exceed $200 above that of the year preceding. As I construe the provisions of this Section, the assistant physicians do not need to commence now as though they were inexperienced, but their services in years gone by may be taken into consideration by the trustees in increasing their salary above that of last year, but there is an express limitation in the statute that the salary cannot be increased in any one year more than $200 above that of the previous year, and never to exceed $1,200. Hence, if the trustees undertake to increase the salary of any assistant physician more than $200 above what it was last year, it is unauthorized.

Section 1284, above referred to, provides, in substance, that the superintendents of asylums for the insane and hospital for epileptics of the State shall be entitled to $2,000 a year for their services, and an additional amount to be ascertained by adding to the sum of $2,000 a sum equal to $100 for each year of continuous previous service in the institution, but not to exceed, however, the sum of $2,500 for any one year. This provision, however cannot apply to any superintendent during the term for which he has been appointed, provided he was appointed prior to the passage of the act, as the act in question provides that the annual salary of superintendents of asylums for the insane and hospital for the epileptics shall continue atthe present salary until the expiration of their present term. Hence, this provision with reference to increase of salaries can apply only to terms where the appointment was made after the enactment of the statute.

I am of the opinion that if the superintendent has been more than five years in continuous service in any of the hospitals named, prior to the passage of the act, he is entitled to receive the sum of $2,500, or if having served in such capacity for a less number than five years, his salary should be graduated accordingly.

Yours very truly,

J. M. SHEETS,
Attorney General.

SALARY OF PATHOLOGIST FOR OHIO HOSPITAL FOR EPILEPTICS.

COLUMBUS, OHIO, July 26th, 1902.

Hon. W. D. Guilbert, Auditor of State.

DEAR SIR:—I am in receipt of your communication in which you inquire as to your duties with respect to honoring a voucher for the salary of Dr. Ohlmacher as pathologist of the Ohio Hospital for Epileptics, between the dates of May 15th and August 5th, 1901.

A proper answer to your inquiry depends upon the answer to two questions. First: Was Dr. Ohlmacher in the employ of the institution during that period? Second: Had the Board of Trustees power to employ and pay a pathologist?

Section 640, R. S., which applies to all boards of benevolent and charitable in-

stitutions of the State, provides that upon the nomination of superintendents, the trustees of these institutions may appoint stewards, matrons, physicians, assistant physicians, "and other needed officers," and shall fix the compensation of each, not exceeding the maximum prescribed by law. These appointees may be removed at the pleasure of the Board of Trustees, and may be suspended by the superintendent.

Assuming to act under the provisions of this Section, on the nomination of the superintendent, the Trustees of the Ohio Hospital for Epileptics appointed Dr. Ohlmacher to the position of pathologist, and fixed his salary at $3,000 per year. On May 1st, 1901, the superintendent of the institution notified Dr. Ohlmacher that on and after May 15th his services as such pathologist would be dispensed with. Whether this action was authorized by the Board of Trustees is questionable; but, waiving that question, the superintendent had the right under the provisions of Section 640 R. S., to suspend any officer authorized to be employed by virtue of the provisions of that Section, and the action on the part of the superintendent operated, at least, as a suspension of this officer. During this suspension the officer could not continue to act, and, of course, could not draw salary.

On August 5th the Board of Trustees passed the following resolution: "Upon motion of Mr. Gould, and seconded by Mr. Sowers, Dr. Ohlmacher was reinstated as pathologist at said institution, to receive full pay from the time of his suspension by Manager Rutter in May, 1901." It will hardly be seriously contended that the trustees could reinstate him and provide for the payment of his salary during the time he was not employed. In my opinion they were without authority when they undertook to do so. The trustees of the benevolent institutions of the State have no powers except those conferred by statute, and surely the Statutes of Ohio do not authorize them to make a donation of the funds set apart for the use of the institution they are called upon to manage.

Second: Had the Board of Trustees the power to create the office of pathologist, and fill the same by appointment? I do not think it had. As already suggested, the board of trustees is a creature of the Statute. It has no powers except those conferred by Statute. If power to create the office of pathologist is conferred at all it is by virtue of the provisions of Section 640, R. S., already referred to. This section specifically authorizes the employment of a steward, matron, physician, assistant physician "and other needed officers," and authorizes the board to "fix their compensation, not exceeding the maximum prescribed by law." There is no express statutory provision creating the office of pathologist, and no law prescribing the maximum compensation which such an officer may receive. Yet, the Legislature was careful to prescribe the maximum compensation of all employees named in the Statutes, even down to the seamstresses—the maximum compensation for each employee ranging from $14 a month for seamstresses to $1,200 per year for superintendents. R. S. Sections 651, 664, 670, 695, 1284.

It would hardly seem reasonable that the Legislature would so carefully guard the maximum compensation allowed to be paid to each employee of these institutions whose employment is provided for by statute, and at the same time give the trustees power to create any number of additional offices and leave them absolutely without limitation as to the compensation to be allowed.

As already suggested, Section 640, R. S., is a general section, and applies to all the benevolent institutions of the State. The law governing the several benevolent institutions of the State does not provide that exactly the same officers shall be employed in all these institutions, hence the necessity of authority to "employ other needed officers." It saved naming in detail the officers of all the institutions, and saved ambiguity. It means that the trustees of each institution shall have authority to employ all the officers which the law provides for that institution. Power to employ an officer does not carry with it power to create an office as was undertaken in

this instance, i. e., that of pathologist. The legislature created the offices; the trustees are authorized to fill them.

Again, what are the duties of a pathologist. The law prescribes none. I take it, however, his duties would be what the title of his office would indicate, i. e., "One who is versed in the nature and diagnosis of disease." (All physicians should have this qualification.) If he is expected to study the nature of the disease of epilepsy, then all the more should each hospital for the insane have one to study the nature of the disease of insanity; also the Institution for Feeble Minded Youth should have a pathologist to study the unfortunate mental infirmities of the inmates of that hospital. If a pathologist may be employed so may a dentist. Indeed, it would seem there would be more practical use for a dentist than for a pathologist. If a dentist might be employed, why couldn't the trustees exercise their ingenuity and create some other office that might be of some value to the institution? It is thus seen that if the door were allowed to be opened, untold mischief might follow, and it is the importance of the question and the danger of the abuse of such power that has caused me to give this matter most careful consideration.

I would prefer to sustain the trustees if I were able to do so consistently with my views of the law.

Yours very truly,
J. M. SHEETS,
Attorney General.

CERTIFICATE OF AUDITOR FOR LEVY BY COMMISSIONERS FOR BUILDING SITE.

COLUMBUS, OHIO, August 6th, 1902.

Columbus Ewalt, Prosecuting Attorney, Mt. Vernon, Ohio.

DEAR SIR:—Yours of August 4th, at hand and contents noted. You state in your letter of inquiry that the building fund of your county is overdrawn to the amount of $29,000 and upward. That with the collections now on the tax duplicate and the collection of the one mill levy made at the June session, it will leave the building fund still overdrawn about $9,000. That at the June session the commissioners made a levy of one-half mill for "purchasing site for county building" which they desire to use in purchasing a jail site. With this state of facts, you present the question, whether the auditor is authorized, under the provisions of Section 2834b. R. S., to certify that the money required for the payment of a building site has been levied and placed on the tax duplicate and in process of collection, and not appropriated for any other purpose.

Section 2823, R. S., authorizes the commissioners to levy a tax for county buildings, for purchasing sites therefor, and also for purchasing lands for infirmary purposes. Hence, the commissioners may levy a tax for any one or for all of these purposes, as the exigencies of the case may require. They have made a levy for building purposes; also one for purchasing a site for county building. The building fund is overdrawn. Hence the money that will be collected upon that levy is already appropriated. But the fund for purchasing a jail site is not overdrawn, or as I understand it, intrenched upon. Hence I see no difficulty in the way of the auditor making the required certificate.

Very truly,
J. M. SHEETS,
Attorney General.

POWER OF STATE BOARD OF HEALTH TO MODIFY ORDERS OF A LOCAL BOARD OF HEALTH.

COLUMBUS, OHIO, August 8th, 1902.

Dr. C. O. Probst, Secretary State Board of Health, Columbus, Ohio.

DEAR SIR:—I am in receipt of your communication of this date in which you inquire, whether in my opinion, an order of a local board of health of the village of Milan, which orders all electric interurban cars to stop running from the city of Norwalk to that place, for the purpose of enforcing quarantine against smallpox, which is claimed to exist at Norwalk, is a proper exercise of the authority of a local board of health; also, what effect a modification of such orders by the state board of health would have upon them.

Sections 2133 and 2134 of the Revised Statutes are the only ones authorizing a local board of health to take any action with reference to the operation of any railroad, steam or interurban, in order to quarantine against a contagious disease. These sections authorize them to make reasonable rules with reference to the operation of railroads in order to prevent the spread of disease, but they do not authorize the stopping of the running of trains or cars, and such orders, are in my opinion, void and of no force.

In any event, should the state board of health modify those orders, the extent to which they were modified, even though legal in the first instance, they would become abrogated, and from that time of course, the local board of health would be compelled to observe the modified orders, and they would be liable either civilly or criminally should they persist in undertaking to enforce the orders of the local board as though unmodified.

Very truly,
J. M. SHEETS,
Attorney General.

POWER OF COUNTY TREASURER TO CONTRACT FOR THE COLLECTION OF DELINQUENT TAXES.

COLUMBUS, OHIO, August 8th, 1902.

P. H. Kaiser, County Solicitor, Cleveland, Ohio.

DEAR SIR:—Yours of August 7th, enclosing contract between the treasurer of Cuyahoga County and Winch and Thompson, under the provisions of Section 1104, R. S., for the collection of delinquent taxes, duly received. I will answer your questions which accompany your communication in their order.

First: Is Section 1104 as amended April 4, 1902, constitutional? I see no reason to question the constitutionality of these provisions. I had occasion to examine the act before its passage, and while it is not just in the form which it was when introduced, yet there is no substantial change in its provisions. I could not see upon what theory any lawyer would argue that the act was unconstitutional.

Second: Under the provisions of the act, are the parties to the contract with the treasurer, entitled to collect taxes immediately upon becoming delinquent, or are they limited to delinquent taxes and assessments for the years prior to 1899?

In my opinion, under the provisions of this contract, the parties contracting to collect the taxes, have a right to proceed to collect any land taxes that stood delinquent upon the duplicate of Cuyahoga County on April 28, 1902, regardless of the time they became delinquent. The contract, it appears, was executed on the 28th of April, and provides that the persons employed are authorized "to collect all delinquent and forfeited taxes and assessments which stand charged against any land or

lots or parcels thereof, upon any general or special duplicate or any special duplicate of delinquent or forfeited taxes or assessments of Cuyahoga County.'' By the terms of this contract, in order to authorize these parties to collect the delinquent taxes, they must be delinquent at the date of the execution of the contract. It is not for the collection of taxes that become delinquent in the future, but is for the collection of taxes then delinquent that these parties were employed.

Third: Does the making of the contract with the treasurer provided for in the act, prevent the treasurer himself from collecting delinquent taxes by any of the methods provided by statute?

The treasurer cannot contract away and delegate to another, the duties which the law enjoins upon him. Should any person offer to pay delinquent taxes, he must receive them, and if he receives them, it follows as a matter of course, that Winch and Thompson are not entitled to twenty-five per cent. for the reason they have not collected the delinquent taxes. It is only such taxes as they collect, that they are authorized to charge and receive the compensation of twenty-five per cent. The contract does not give them the exclusive right to collect, and if it assumed to do so, it would not be enforceable against the county treasurer. Hence, he may if he sees fit, proceed in such manner as the law warrants to collect delinquent taxes himself.

Fourth: Does the above act authorize the county treasurer to enter into a contract, which will entitle the other party to an allowance for taxes collected by means of the treasurer's suit which was pending at the time the act was passed, or the contract entered into?

I apprehend that the treasurer may discharge one set of attorneys and employ another, whenever in his judgment, it is to the interest of the county that the same should be done. Hence, if he desires Winch and Thompson to engage in the prosecution of a case already pending, he is at perfect liberty to do so, and if they collect the taxes, they are entitled to their per cent.

Very truly,

J. M. SHEETS,
Attorney General.

TEMPORARY ORDERS OF A BOARD OF HEALTH NEED NOT BE PUBLISHED.

COLUMBUS, OHIO, August 11th, 1902.

Dr. C. O. Probst, Secretary State Board of Health, Columbus, Ohio.

DEAR SIR:—I am in receipt of yours of August 9th, in which you inquire whether orders of the board of health, which are intended for the general public, must be published in some newspapers of general circulation in a municipality, at least ten days before the orders take effect.

Under the provisions of Sections 2133 and 2134, R. S., rules, regulations and orders, ordained by the board of health of merely a temporary character, with a view to stamp out contagious disease that may be prevalent within the municipality at the time of the orders, need not be published before they go into effect. Such go into effect immediately, and last only until the disease is stamped out. It is only such rules and regulations as are intended to be continuous and permanent, and as the statute expressly provides, intended for the general public, that need be published in a newspaper as ordinances before they go into effect. Such rules and regulations of the board of health, should be adopted and published in the same manner as are ordinances of a general nature. See Section 2118, R. S., to which you call my attention in your letter.

Very truly,

J. M. SHEETS,
Attorney General.

TAXES LEVIED BY TOWNSHIP TRUSTEES SHOULD BE PLACED UPON ALL THE PROPERTY OF THE TOWNSHIP, UNLESS EXEMPTED BY EXPRESS PROVISION OF STATUTE.

COLUMBUS, OHIO, August 11th, 1902.

Frank W. Ketterer, Prosecuting Attorney, Woodsfield, Ohio.

MY DEAR SIR:—I am in receipt of your communication of August 8th, in which you seek an opinion from me as to whether a tax levied by the trustees of a township pursuant to the provisions of Sections 1465, 2827 and 2940, R. S., should be placed by the county auditor upon all the property of the township, including that of a municipality located within the borders of the township.

It is well to observe at the outset, that township trustees are elected by all the voters of the township, including those residing within a municipality that may be located within the township. The jurisdiction of the trustees is co-extensive with the township. All the inhabitants of the township have an interest in the performance of the duties of the trustees. Hence, when a tax is authorized to be levied by the trustees, unless their jurisdiction is limited, it is clear to me that they are authorized to levy a tax upon all the property of the township, just as the commissioners are authorized to levy taxes upon all the property of the county. To say that the voters of the municipality located within the township, should have a voice in the election of the trustees, and share in the benefits resulting from the performance of the official duties of the trustees, should be relieved of the burdens incident to the performance of such duties, would not be in accordance with the general principles of taxation. Indeed, it is apparent to me that the Legislature contemplated that the trustees had power to levy taxes upon the property of a municipality located within the township as well as upon the property of the township located without the municipality, or it would not have provided in certain instances, that the trustees should not levy road taxes upon property within municipalities.

If that is the proper construction to be placed upon the statute, then the levy for township purposes and for the relief of the poor, under Section 2827, R. S., must be placed upon all the property of the township; also, the levy for bridges and culverts, under the provisions of Section 4940, R. S. Where the county commissioners make a levy for bridges and culverts, the levy is spread upon all the property of the county, and this levy under Section 4940, R. S., is made simply to relieve the county commissioners from looking after the repair of bridges and culverts when the amount involved is insignificant. Were it not for this provision, the commissioners would have to make a levy to cover these repairs, and if made by the commissioners, would certainly be made upon all the property of the county, including municipalities. And when made by the trustees of the several townships, there is no reason why the property of municipalities should be exempt.

As to the levy under Section 2829, R. S., here there is an express provision that the levy shall not be placed upon property located within a municipality. That being the case, this levy should be placed upon the property outside of the municipality, and that in the municipality should be exempt.

Very truly,

J. M. SHEETS,

Attorney General.

THE PROBATE JUDGE MAY APPOINT A GUARD OF OHIO SOLDIERS' AND SAILORS' HOME TO CONVEY AN INSANE PERSON TO ONE OF THE HOSPITALS FOR THE INSANE.

COLUMBUS, OHIO, August 21st, 1902.

General Charles M. Anderson, Commandant Ohio Soldiers' and Sailors' Home.

DEAR SIR:—Yours of August 20th at hand and contents noted. You inquire whether, when an inmate of the Ohio Soldiers' and Sailors' Home is adjudged insane, the probate judge of Erie County is authorized to appoint a guard of that institution to convey the insane person to a hospital for the insane. You also inform me that the probate judge has been in the habit of designating one of the guards of the Home, who conveys the insane person without expense to the State, other than his railroad fare.

While Section 705, R. S., provides that the probate judge shall, when a person is adjudged insane and will be received at one of the state hospitals,

> "issue his warrant to the sheriff, commanding him to forthwith take charge of and convey such insane person to the asylum,"

yet, Section 719, R. S., which provides for fees and compensation for the services incident to the inquisition of lunacy, and conveying the insane person to one of the state institutions, evidently contemplates that the probate judge is not compelled to appoint the sheriff. In enumerating the fees allowed, it is provided,

> "to the sheriff, or *other person* other than assistant, for taking an insane person to the state hospital, or removing one therefrom upon the warrant of the probate judge, mileage at the rate of five cents per mile, going to and returning, etc."

It is evident from reading this section, that other persons besides the sheriff may take an insane person to one of the hospitals for the insane.

It is a matter of very little importance as to the person conveying the patient to a hospital for the insane. The important thing is to get the patient there, and if one of the guards of the Home can perform the service, and thus save expense to the state, in my opinion, there is no legal objection in the way.

Very truly,

J. M. SHEETS,
Attorney General.

CITY BOARD OF ELECTIONS NOT AUTHORIZED TO PROVIDE BOOTHS, GUARD RAILS, ETC., THE EXPENSE OF WHICH IS PAYABLE OUT OF THE COUNTY TREASURY.

COLUMBUS, OHIO, August 21st, 1902.

Charles E. Jordan, Prosecuting Attorney, Findlay, Ohio.

DEAR SIR:—I am in receipt of yours of August 20th, in which you inquire whether the city board of elections has authority to order the construction of booths to be placed in polling places, and require the expense of such construction to be paid out of the county treasury.

I have examined the election laws of the State, and am unable to find wherein the city board of elections has been given authority to provide for the construction of booths for polling places, nor am I able to find where the city board of elections is authorized to create a debt payable out of the county treasury, except as is provided in Section 2926t, R. S., for the payment of compensation to judges, registers and clerks of election, where the services have been performed at a general election.

On page 80 of the election laws issued by the Secretary of State, it is provided that the deputy state supervisors of elections

> "shall cause the polling places to be suitably provided with booths, guard rails, etc."

On page 77 of the same laws, it is also provided, that

> "all proper necessary expenses in the performance of the duties of such deputy supervisors, shall be defrayed out of the county treasury as other county expenses, and the county commissioners shall make the necessary levy to meet the same."

Hence, it is my opinion that the booths referred to should have been provided by the deputy state supervisors of elections, and the bill should have been submitted to the county commissioners for their approval, and if approved by them, then the necessary warrants should have been issued on the treasurer for the payment of the amount.

Very truly,

J. M. SHEETS,
Attorney General.

RIGHT OF COUNTY AUDITOR TO CORRECT RETURNS OF INTER-URBAN AND STREET RAILWAYS.

COLUMBUS, OHIO, September 6th, 1902.

Hon. W. D. Guilbert, Auditor of State.

DEAR SIR:—I am in receipt of yours of recent date, requesting an opinion from me upon the following questions:

1st. What is the method by which inter-urban street railways should be listed and valued for taxation?

2nd. After being so listed and appraised, and taxes levied and collected, has the auditor of the county, into or through which any such railroad runs, power, under the provisions of Sections 2781 and 2782, to go back for previous years and place an additional amount upon the tax duplicate against any such company, on the ground that the original appraisement upon which the taxes were levied and collected, was less than the true value in money, of the property of such company?

In answer to the first question I wish to call your attention to the fact that the law prescribing the method by which steam railroads shall be appraised for taxation has no application to street or electric inter-urban railroads. Bridge Company v. Iron Company, 59 O. S., 179. Hence, we must look elsewhere for the statutory provisions governing the listing and appraisement of this class of property for taxation.

Section 2744, R. S., is the only provision I am able to find which applies to the listing of the class of property under consideration, and in my opinion, contains the provisions which must be followed. Indeed, so far as I am able to learn, the provisions of this section have been uniformly observed in listing this class of property for taxation. This section provides that the president, secretary or other accounting officer of every corporation whose taxation is not specifically provided for shall "list for taxation, verified by the oath of the person so listing, all the personal property, which shall be held to include all such real estate as is necessary to the daily operations of the company, moneys and credits of such company or corporation within the State, at the actual value in money in the manner following: In all cases returns shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, village, city, or ward therein. The value of all movable property shall be added to the stationary and fixed property as real estate, and apportioned to such wards, city, villages, or townships pro rata, in

proportion to the value of the real estate and fixed property in said ward, city, village, or township, and all property so listed shall be subject to and pay the same taxes as other property listed in such ward, city, village or township. * * * * If the county auditor to whom returns are made is of the opinion that false or incorrect valuations have been made, or that the property of the corporation or association has not been listed at its full value, or that it has not been listed in the location where it belongs, or in cases where no return has been made to the county auditor, he is hereby required to proceed to have the same valued and assessed."

It will be observed that the return for taxation must be made direct to the county auditor; it must contain a list of all the property of the company, where located, and its value. If the county auditor is of opinion that there is an incorrect return, either as to the amount of the property, location of the property, or the value of the property, it becomes his duty to have the property valued and assessed. It is thus seen that this section contains within itself complete machinery for the listing and valuation of this class of property.

Second: In answer to the second inquiry, it will be observed, as already suggested, that this class of corporations make their returns direct to the county auditor, whose duty it is to proceed at once to correct them, if incorrect, and place the property upon the tax duplicate for taxation at its true value in money—not to wait until the tax is levied and collected on the valuation returned, before he proceeds to perform his duty. In the instance referred to by you the auditor had the amount and character of the property properly returned to him. Its valuation was a matter of easy calculation, and if too low he should have made the correction before placing it on the tax duplicate. Section 2781, R. S., provides for the correction of returns for previous years, only in those cases where there has been a false return or the person required to make the return has evaded making any return. As the company, in this instance, did not evade making a return, the only question left is: Was the return made a false return? In my opinion it was not. There was no concealment. The full amount and character of its property was properly returned; the only complaint being that the value placed upon the property, by the officer making the return, was too low.

It was held in Ratterman v. Ingalls, 48 O. S., 468, that a tax return is not false unless it is not only untrue, but made so with a design to mislead the taxing officers and evade taxation; hence, it was there held that while the defendant in that case had failed for a number of years to list stocks owned by him in a foreign corporation, for taxation, under the mistaken notion that such stocks were not taxable, the county auditor could not, under the provisions of Section 2781, of the Revised Statutes, go back for previous years and place the value of those stocks on the tax duplicate—the reason being that it was neither a false return nor an evasion to make a return under the provisions of Section 2781, R. S.

There is still another reason, in my opinion, why Section 2781 does not apply. It is held in State ex rel. v. Aiken, 63 O. S., 182, that Sections 2781 and 2782 apply only to the returns of those whose duty it is to list their own property for taxation. Hence, it was held that these sections do not apply to the returns of the cashier of a national bank who lists the shares of the stockholders for taxation; and, although in making returns for taxation the law does not allow the deduction of debts owing by stockholders from their stock in national banks, yet where that has been done by the cashier, and the tax levied and collected on the balance left after the deduction of debts from stocks, this was held not to be a false return, and also that no correction can be made of such returns. Applying this principle to the case under consideration, it becomes apparent that Section 2781 does not apply.

The equitable owners of the property of the corporation are the stockholders; the return of its property for taxation was not made by them, but by an agent of the company; he disclosed in the return all the property of the company, and his

estimate of its value. If this value was incorrect it should have been corrected by the auditor at the time. Of the amount and character of the property he had full information; if he was not familiar with its value, the law made it his duty to inform himself. Not only was it the duty of the auditor himself to act, but the law authorized the respective annual boards of equalization having jurisdiction over territory in which any part of the company's property was located, to increase the value of the property in their respective jurisdictions. It would be placing a premium upon a dereliction of duty to permit a county auditor to fail to perform his duty under the provisions of Section 2744 until after the taxes had been levied and collected, and then permit him to go back over previous years and reassess the same property for taxation and charge and collect four per cent. on the amount collected, as compensation for such services.

Section 2782, R. S., provides that "the county auditor, if he shall have reason to believe, or be informed that any person has given to the assessor a false statement of the personal property, moneys or credits, investments in bonds, stocks, joint stock companies, or otherwise, or that the assessor has not returned the full amount required to be listed in his ward or township, or has omitted or made an enormous return of any property, moneys or credits, investments in bonds, stocks, joint stock companies, or otherwise, which are by law subject to taxation, shall proceed at any time before the final settlement with the county treasurer, to correct the return of the assessor and charge such persons on the duplicate with the proper amount of taxes." It will thus be seen that the provisions of this Section apply only to the correction of returns made to the township assessors, and for the current year. Under the provisions of this section he is not at liberty to take into consideration previous years. Hence, neither Section 2781 nor 2782, in my opinion, furnishes any authority to the county auditor to go back for previous years to correct the tax returns of corporations returning under the provisions of Section 2744, R. S., where a truthful return has been made in the first instance, of the amount and character of the property of the company, although the value placed upon the property by the person listing is, in the opinion of the auditor, too low.

Very truly,

J. M. SHEETS,
Attorney General.

"FIRE PATROL" ACT.

COLUMBUS, OHIO, September 6th, 1902.

Hon. A. I. Vorys, Superintendent of Insurance.

DEAR SIR:—I am in receipt of your communication in which you seek an opinion from me as to whether the act of the General Assembly of Ohio, passed April 29, 1902, 95 O. L., 324, et seq., is a valid enactment.

This act provides, in substance, that any number of persons in any municipality or sub-division of the State may organize a corporation for the purpose of preventing fires and saving property from destruction by fires, and to carry out the purposes of such organization they may organize what is termed a "fire patrol." The different fire insurance companies doing business within the municipality or the sub-division of the State in which the corporation is organized shall have a right to determine, by a majority vote, whether they will maintain the fire patrol organized by such corporation, and if the vote is in favor of such maintenance then each fire insurance company doing business within that particular territory is compelled to contribute, annually, toward maintaining such fire patrol, a sum not exceeding two per cent. of the annual gross premium receipts of such company received for business done in such

municipality or sub-division of the State. This statute does not apply to mutual insurance companies, but only to those receiving premiums for insurance written. It also exacts from such companies receiving premiums for insurance written, an enforce contribution for the protection of all property, whether insured in companies paying the contribution, a mutual company, or whether the risk is carried by the owner of the property, although the mutual insurance company and the person who carries his own risk are under no obligations to contribute to the maintenance of such fire patrol.

The corporation, the organization of which is provided for in this statute, is not engaged in performing a state function, but is engaged in a private business enterprise, as much so, indeed as an insurance company is engaged in a private business enterprise. The legislature could no more compel an insurance company to contribute to the maintenance of such an organization than it could compel an owner of property to take out an insurance policy upon it against his will. Hence, this statute, in my opinion, is unconstitutional for the following reasons:

1st. It is a denial of an equal protection of the laws.

2nd. It is an infringement on the right of private contract.

3rd. It results in taking the property of the non-consenting insurance company without due process of law. See

Constitution of Ohio, Article I, Sections 1 and 2.

Constitution of United States, 14th Amendment.

I am unable to elaborate upon these propositions because of other matters requiring my attention.

Yours very truly,

J. M. SHEETS,

Attorney General.

VALIDITY OF H. B. NO. 1081, AUTHORIZING COUNTY COMMISSIONERS TO IMPROVE FAIR GROUNDS AT CHAGRIN FALLS.

COLUMBUS, OHIO, September 8th, 1902.

Hon. P. H. Kaiser, County Solicitor, Cleveland, Ohio.

DEAR SIR:—I am in receipt of yours of September 3rd in which you ask an opinion from me as to the validity of House Bill No. 1081, passed by the General Assembly of the State of Ohio, May 12th, 1902.

This act provides, "That the county commissioners of Cuyahoga County be and they are hereby authorized and empowered to appropriate out of any funds not otherwise appropriated the sum of three thousand dollars for building grandstand and repairing other buildings upon said grounds at Chagrin Falls, Ohio."

This act, in my opinion, is void for two reasons:

1st. It does not say upon what grounds the grandstand shall be erected. It is simply on "said grounds at Chagrin Falls." It might be a race track, it might be in the public square, or any other place at Chagrin Falls. Hence, is void for uncertainty.

2nd. Were this difficulty not in the way it would be an infraction of the following provision of the Constitution:

> "The General Assembly shall never authorize any county, city, town, or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or loan its credit to, or in aid of, any such company, corporation or association.
>
> Article 8, Section 6.

Evidently there is a fair association at Chagrin Falls, and the Legislature has

undertaken to authorize the county commissioners of Cuyahoag County to aid that association. This is clearly an infraction of the constitution above quoted.

Very truly yours,

J. M. SHEETS,
Attorney General.

LIABILITY OF COUNTY FOR FEES OF COUNSEL EMPLOYED BY COUNTY AUDITOR. COUNTY OFFICERS TO BE PROVIDED WITH OFFICES BY COUNTY COMMISSIONERS.

COLUMBUS, OHIO, September 8th, 1902

W. H. Bowers, Prosecuting Attorney, Mansfield, Ohio.

DEAR SIR:—Yours of September 3rd at hand and contents noted. You inquire whether in a case where the county commissioners seek to sell bonds and the county auditor refuses to perform his duties under such proceeding, on the ground that the proceeding of the commissioners is illegal, and in a mandamus proceeding against him he employs counsel and is successful, whether the county is liable for fees of counsel so employed by the auditor.

Second: Whether the county commissioners are required to furnish an office for the prosecuting attorney.

In answer to the first injuiry I wish to suggest that had the auditor of the county acted in concert with the commissioners, the prosecuting attorney, under the provisions of Section 1277 might have enjoined the issue of the bonds, or had he failed, a taxpayer might have done the same thing, and in either event, under the provisions of Section 1278a the prosecuting attorney or the taxpayer would have been entitled to attorney fees, payable out of the county treasury. In this particular instance the auditor obviated the necessity for that kind of a proceeding by refusing to co-operate with the commissioners ,and thus saved an action on the part of the prosecuting attorney, or a taxpayer. Under the circumstances I think it is eminently proper that counsel fees should be allowed him. It is very questionable, however, whether under the law a claim could be successfully maintained against the county. The commissioners are the only officers who are authorized, generally, to contract for and on behalf of the county, and bind it. The commissioners not having done so, in this instance, and there being no special provision of statute authorizing the payment out of the county treasury of counsel fees, I am inclined to the view that the claim for counsel fees, however just, cannot be enforced against the county .

As to the second inquiry it is very clear that under the provisions of Section 859, of the Revised Statutes, the commissioners are under obligations to furnish all county officers with suitable offices. If they are not to be had in the court house, they are required to procure them outside.

Yours very truly,

J. M. SHEETS,
Attorney General.

REPEAL OF HABITUAL CRIMINAL LAW DOES NOT HAVE AN *EX POST FACTO* EFFECT.

COLUMBUS, OHIO, September 9th, 1902.

The Board of Managers of The Ohio Penitentiary, Columbus, Ohio.

GENTLEMEN:—In your letter of recent date, you propound to this office several

questions, upon which you request a written opinion. These questions, I will proceed to discuss in their order.

1. Since the habitual law is repealed, has the board the right to parole habituals?

The act of May 4, 1885, known as the "Habitual Criminal Act," provided that a person convicted of a felony after having been twice convicted, sentenced and imprisoned in some penal institution, shall be deemed an habitual criminal; and further provided that such person, on expiration of his sentence for the felony for which he was convicted, should not be released, but should be detained at the penitentiary during his natural life. But it was further provided, that after the expiration of the term for which he was so sentenced, such habitual criminal may, in the discretion of the Board of Managers, be allowed to go on parole outside of the buildings and enclosures, but to remain, while on parole, in the legal custody and under the control of said Board.

This act was by the last General Assembly unconditionally repealed.

Several persons are now confined in the penitentiary, who were sentenced under this act as habitual criminals, and the question presented, relates to the powers of the Board of Managers to parole such prisoners at the expiration of the term for which they were sentenced.

Section 7388-9 and Section 7388-10, Revised Statutes of Ohio, provide for the parole of prisoners by the Board of Managers of the penitentiary, but only apply to prisoners who have not previously been convicted of a felony and served a term in a penal institution. As all of the inhabitants have been twice convicted and imprisoned in a penal institution for a felony prior to their present conviction and sentence, it is manifest that they can have no relief under the general law. The only law under which the Board of Managers at any time had authority to parole an habitual criminal, was the act of 1885, known as the "Habitual Criminal Act," and which is now repealed.

The repeal of the habitual criminal act could not operate to discharge the persons convicted and sentenced under it. This would mean the exercise of the pardoning power by the Legislature, which is forbidden by the Constitution except in cases of treason. The sentence then, remains in full force, entirely unaffected by the repeal of the law under which it was imposed.

It is equally clear that the General Assembly cannot, either by the repeal or the enactment of a statute, add anything to the punishment of persons convicted of crimes committed prior to the enactment of the law. Any change in the law, which would require a greater punishment than the law annexed to the crime at the time of its commission, would be *ex post facto,* and prohibited by the Federal constitution.

An examination of the habitual criminal act, discloses that the right to go out on parole, is not an unqualified right bestowed upon the prisoner by the statute, but it is conditional, resting entirely in the discretion of the Board of Managers. It is not a right which the prisoner can at any time demand, or which he could in any manner compel the Board to grant. It is a matter of privilege or grace, rather than of right. The punishment fixed by the habitual criminal act, is imprisonment for life, but power is given by that act to the Board of Managers, to mitigate this punishment by permitting the prisoner to go outside of the penitentiary upon parole. The repeal of the habitual criminal act, merely takes from the Board this power to mitigate the punishment of those previously convicted under the act, but does not in any way, add to the punishment of such persons. Their punishment is not greater than it would be if the Board should refuse to admit them to parole.

I am of the opinion therefore, that the repeal of the habitual criminal law, takes from the Board of Managers, all power to parole habitual criminals, and that such

repeal does not have an *ex post facto* effect, and is a valid exercise of legislative power as applied to convictions previously had under the act.

J. E. TODD,
Assistant Attorney General.

WHAT FUND TO BE CREDITED WITH MONEY RECEIVED FROM THE SALE OF LANDS BELONGING TO THE CANAL SYSTEM.

COLUMBUS, OHIO, September 11th, 1902.

Hon. W. D. Guilbert, Auditor of State.

MY DEAR SIR:—I am in receipt of your inquiry as to what fund credit should be given for money received from the sale of lands of the State belonging to the canal system.

I understand a question has arisen as to whether money received from the sale of such lands should be credited to the appropriation for the use of the Board of Public Works, or to the general revenue fund. To determine this question reference must be had to the statutes governing that subject, together with the statutes granting appropriations to the Board of Public Works.

Section 218-7, R. S., provides that "All moneys derived from tolls on the canals, or other improvements of the state, as well as all moneys derived from leases of water power, or the sales of land held by the state for canal purposes, or from any other source appertaining to the interest or management of the public works of the state, shall be paid into the treasury in the manner directed by law."

Section 218-5, R. S., provides that "All receipts from tolls, fines and water rents" shall be paid into the state treasury and credited to the canal fund. The statutes making the appropriations for the years 1902 and 1903 follow the provisions of Section 218-5, above quoted, and appropriate for the use of the Board of Public Works all the earnings of the canals received for the period covered by the appropriations, and also appropriates specific sums of money beside, but do not appropriate moneys received for the sale of lands, and I am unable to find anywhere in the statutes any provision requiring moneys received from the sale of lands belonging to the canal system to be credited to the fund set apart for the use of the Board of Public Works. Indeed, it is doubtful if such a provision were enacted it would have any constitutional validity beyond the period of two years from the date of its enactment. Money received for the sale of lands must all be drafted into the state treasury, and when once there cannot "be drawn from the treasury except in pursuance of a specific appropriation made by law; and no appropriation shall be made for a longer period than two years."

Constitution of Ohio, Article II, Section 22.

It thus appears that the legislature is inhibited from making any provision for the appropriation of money in the state treasury for any period beyond that of two years.

Section 181a, R. S., provides "That all money paid into the state treasury, the disposition of which is not otherwise provided for by law, shall be credited by the Auditor of State to the general revenue fund."

Hence, as the disposition of money received for the sale of lands belonging to the canal system of the state is not otherwise provided for by law, it should be credited to the general revenue fund.

Yours very truly,
J. M. SHEETS,
Attorney General.

BIRDS OR THEIR PLUMAGE, PROTECTED BY THE PROVISIONS OF SECTION 6960, R. S., CANNOT LAWFULLY BE IMPORTED INTO THIS STATE, AND SOLD. OPEN SEASON FOR HUNTING WATER FOWLS, UPON THE LAKES, BAYS AND RESERVOIRS IS FROM SEPTEMBER 1, TO DECEMBER 15, AND UPON THE OTHER WATERS OF THE STATE, FROM MARCH 15th, TO APRIL 20th.

COLUMBUS, OHIO, September 12th, 1902.

Hon. J. C. Porterfield, State Game Warden, Columbus, Ohio.

DEAR SIR:—I am in receipt of your communication of September 8th, in which you seek an opinion from me as to whether, under the Federal statutes known as the "Lacy Law," the plumage of birds protected by the provisions of Section 6960 R. S., can lawfully be imported into this state and sold for ornaments, or other purpose.

The Lacy law makes imported birds or their plumage, subject to the laws of the state into which they must be imported. Hence, it is unlawful for any person to deal in the plumage of any bird protected by the provisions of Section 6960, R. S., whether such plumage was imported into the state or not.

You also inquire as to what, under the provisions of Section 6961, R. S., is the open season for ducks and other water fowl.

This section provides that,

> "No person shall, within this state, catch, kill, injure, or pursue with such intent, * * * * * * * any wild duck, wild goose, wild swan, coot, or mud hen, upon the lakes, bays, and reservoirs of the state, including Lake Erie and its bays, Buckeye and Indian Lakes, except between the first day of September and the fifteenth day of December inclusive, and between the fifteenth day of March and the twentieth day of April, inclusive, upon any of the waters of the state of Ohio."

The first part of the section above quoted, makes the open season between September first and December fifteenth. The last part quoted, makes the open season "upon any of the waters of the state of Ohio," between the fifteenth day of March and the twentieth day of April, inclusive. If literally construed, these provisions are in hopeless conflict, and the statute would be void for uncertainty. "Any of the waters of the state of Ohio," would include the lakes, bays and reservoirs, as well as all the streams running through the state. And as already stated, if literally construed, the last provision above quoted, would make the open season for all the waters of the state between March fifteenth and April twentieth, while the first provision quoted, makes the open season on the lakes, bays and reservoirs from September first to December fifteenth. It was the evident intention of the Legislature however, to make the open season on the lakes, bays and reservoirs between the first day of September and the fifteenth day of December, and on the other waters of the state, i. e., on the rivers and creeks, between the fifteenth day of March and the twentieth day of April.

If the word "other" were interpolated before the word "waters" in the phrase, "upon any of the waters of the state of Ohio," it would then read "upon any of the other waters of the state of Ohio," and would then harmonize with the other provisions of this section.

Words are frequently interpolated in order to give a statute the meaning which the Legislature evidently intended, and where such interpolation is necessary to give all the provisions of the statute effect.

> "Words may be interpolated in a statute, or silently understood as incorporated in it, where the meaning of the legislature is

> plain and unmistakeable, and such supplying words is necessary to carry out the meaning and make the statute sensible and effective.''
>
> Black on Interpretation of Laws, page 84.

Hence in my opinion, this section should be construed as though the word ''other'' were inserted before the word ''waters,'' as above suggested. This construction makes the open season for hunting water fowls upon the lakes, bays and reservoirs of the state, between the first day of September and the fifteenth day of December, and on the other waters of the state, such as creeks and rivers, between the fifteenth day of March and the twentieth day of April.

Very truly,

J. M. SHEETS,
Attorney General.

TO HAVE IN POSSESSION, RABBITS IN CLOSED SEASON, EVEN THOUGH IMPORTED FROM INDIANA OR KENTUCKY, IS UNLAWFUL.

COLUMBUS, OHIO, September 15th, 1902.

Hon. J. C. Porterfield, State Game Warden, Columbus, Ohio.

MY DEAR SIR:—Yours of September 13th, enclosing a letter from W. Longfellow and Company, inquiring whether they can lawfully have in their possession for sale, rabbits, in the closed season of the year, providing such rabbits are imported from Indiana or Kentucky, is duly received.

By the provisions of Section 6961, R. S., the open season for killing rabbits is between November tenth and December first, except they are found destroying fruit trees, etc., they may be killed by the owner or his authorized agent, during the closed season.

Section 6964, R. S., provides that

> ''No person shall buy, sell, expose for sale, offer for sale, or *have in his possession*, any of the birds, game, or animals mentioned in Section 6961 * * Revised Statutes, during the time when the killing thereof is made unlawful.''

Hence, except in the open season, no person can lawfully have rabbits in his possession. It matters not where killed, the provisions of the Federal Statutes, known as the ''Lacy Law,'' make game imported from one state to another, subject to the laws of the state into which it is imported. This being the case, the moment rabbits are imported from Indiana or Kentucky, they become subject to the laws of Ohio, which makes it unlawful to have them in possession during the closed season.

Nor can the law be evaded by any person in whose possession rabbits are found, by claiming that they were destroying fruit trees, hence killed by the owner, for Section 6964 above quoted, makes no exception in favor of rabbits killed under such circumstances. It is just as unlawful to have in possession out of season, rabbits which were killed because they were destroying fruit trees, as to have in possession those killed for consumption and sale. If it were not so, it would be practically impossible to convict a person for killing rabbits during the closed season. He could always claim that they had been killed because they were found destroying fruit trees.

Very truly,

J. M. SHEETS,
Attorney General.

CONSTRUCTION OF H. B. NO. 354 (95, O. L., p. 122) WHERE THE BILL OF EXCEPTIONS DOES NOT RECITE THAT ALL EVIDENCE IS CONTAINED THEREIN, THE APPELLATE COURT WILL ALWAYS PRESUME THAT ALL NECESSARY EVIDENCE IS CONTAINED THEREIN.

COLUMBUS, OHIO, September 15th, 1902.

Lee Stroup, Prosecuting Attorney, Elyria, Ohio.

MY DEAR SIR:—Yours of September 9th, at hand and contents noted. I have examined the act referred to in your inquiry, and am of the opinion that it covers the case described in your letter.

This act provides that

> "Whoever, at any time of the day or night, maliciously and forcibly, by and with the aid and use of any instrument, device, or explosive, whatsoever, blows or attempts to blow, or forces or attempts to force, an entrance into any safe, vault or depository box wherein is contained any money or thing of value, shall upon conviction of said offense, be imprisoned, etc."

It appears from your letter that the alleged thief opened a box containing valuables by the use of a key. This box was located in an iron safe, and when the safe was closed it was protected by an outer door. This, in my opinion, is a depository box within the meaning of the act. It does not take a strained or unnatural construction in order to bring the facts of the case as stated, within the provisions of this law. This much is certain however, you cannot convict of a greater offense than is charged in the indictment. I would charge an offense under the provisions of the act in question, and I believe the court will sustain it.

With reference to your inquiry of May 9th, as to whether, where two acts, which are apparently in conflict, have been passed the same day, and a person has been charged and convicted of an offense under the provisions of one of them, and the bill of exceptions contains no evidence as to which one was actually passed last, must the court presume that the necessary proof was made in order to sustain the judgment of the court. This must be so if the bill of exceptions does not recite that the evidence contained within it, was all the evidence given or offered at the trial of the case. Where the bill of exceptions does not contain that statement, the court must necessarily presume that any evidence which would be necessary to sustain the judgment of the court, was given at the trial. That is a rule of universal application. Hence, if the state were called upon to make proof which act was passed last, the appellate court must conclusively presume that the necessary proof was forthcoming, or had it not been, the judgment of the court would not have been rendered as it was. If the bill of exceptions contains all the evidence, and that fact is so stated in the bill, whether it lies with the state to prove which act was passed last, or with the person accused, has not to my knowledge, been determined in Ohio, or elsewhere.

I have been unable to give the matter any extended consideration, for the reason that so many things are pressing upon me, that I cannot give any the amount of time that I should very much like to give it. But as I understand your case, the bill of exceptions does not contain all the evidence, or at least there is no recital that it does contain all the evidence. Hence, the appellate court, as already stated, will always presume that all evidence was offered that was needed to support the judgment.

Yours very truly,

J. M. SHEETS,

Attorney General.

DIVISION OF FUNDS AUTHORIZED BY H. B. NO. 714 (95, O. L., 218), CREATING A SPECIAL SCHOOL DISTRICT IN UNION COUNTY. CONSTITUTIONALITY OF ACT.

COLUMBUS, OHIO, September 18th, 1902.

James E. Robinson, Prosecuting Attorney, Marysville, Ohio.

MY DEAR SIR:—Yours of September 17th, at hand and contents noted. You make inquiry as to what fund should be divided between the new special school district assumed to be created by the provisons of House Bill No. 714, passed by the last General Assembly (95 O. L., 218), and the balance of the township district. Also, whether in my opinion, the act creating this special school district is constitutional.

The act in question was passed March 26, 1902. Hence the school funds which are required to be divided, could be only those on hand, and those upon the tax duplicate in process of collection. The tax levy for the year 1902 had not been made at the date of the passage of the act. Hence the levy for the special school district for the year 1902, would be made by the district itself, and the only funds for division, would be those raised under the levy of 1901.

Is the act in question constitutional?

It does not stop at merely creating a special school district. It assumes to give the special school district created, specific powers of its own with reference to the borrowing of money, acquiring and disposing of property, the character of school to be carried on, and the conveying of pupils to and from the school.

The case of State ex rel. v. Shearer, 46 O. S., 275, is authority only for the proposition that,

> "The subject of dividing territory into school district, is, in its nature, local."

It goes no further than that. Indeed, the decision itself shows clearly that to that extent only could the Legislature go with reference to the creation of special school district. Judge Spear in speaking for the Court, says, (page 280):—

> "It may be conceded that the subject of common schools is one of a general nature."

Also, page 281:

> "A 'system' might be established by general rules fixing the character and grading of the schools, the scope of the education intended to be given, the character of the officers who shall control, and the powers with which they shall be clothed, together with suitable provision for raising the necessary means to meet the general expenses, and for an equitable division of the funds so procured. These are general features, capable of being reasonably made uniform throughout the state, while the question of division of territory, like that of the erection of school houses, and the procuring of apparatus and other property necessary for the use of the schools, would seem to be so far of local concern merely that special necessities might safely be left to be provided for by special enactments. The kind of school that shall be maintained, and the character of the education which may be received, are of general common concern, to be made uniform in order that the youth of the state may, as far as practicable, be enabled to receive equal benefit from the trust fund and from the 'system' established, while the precise place where these opportunities shall be afforded are, in their nature, local and transitory and as to them it would appear not to be

> necessary to control them absolutely by a rule which would be uniform in its operation throughout the state.''

It thus appears that the Court was of the opinion, that while the Legislature might designate the territory which should compose a special school district, it could not proceed and determine the specific powers which the special school district should have, but should place it under the general school laws of the State. Taking the case of the State ex rel. v. Shearer as guide, I am clearly of the opinion that the act in question is an infraction of the provisions of Art. 2, Section 26 of the Constitution, which provides that,

> ''all laws of a general nature shall have uniform operation throughout the state,''

because it assumes to give this special school district, special powers for its government.

Very truly,
J. M. SHEETS,
Attorney General.

ADVERTISEMENT BY COUNTY TREASURER OF LANDS TO BE SOLD AT DELINQUENT TAX SALE.

COLUMBUS, OHIO, September 22nd, 1902.

C. R. Hornbeck, London, Ohio.

DEAR SIR:—Yours of September 20th is at hand and contents noted. You ask whether, in my opinion, the County Treasurer is compelled to advertise lands at delinquent tax sale before he can proceed under the provisions of Section 1104 R. S. by civil action to foreclose the tax lien and sell the land. This section, so far as is necessary to determine the question is the same as it has been for a good many years. It provides in substance that where the taxes charged against any lands become delinquent, the Treasurer, in addition to all other remedies provided by law, proceeds by civil action, etc. This statute means what it says. He has a choice of remedies. He may proceed by civil action before he has advertised the land for sale at delinquent tax sale if he so desires or he may not.

I have heard nothing from you with reference to the case involving the Auditors' fees. Please let me know the state of the case. It is not my purpose to let it rest.

Yours very truly,
J. M. SHEETS,
Attorney General.

VALIDITY OF ACT FOR SUPPORT OF SCHOOLS FOR DEAF OF CINCINNATI AND CLEVELAND.

COLUMBUS, OHIO, September 22nd, 1902.

Hon. W. D. Guilbert, Auditor of State.

DEAR SIR:—At the time you first requested an opinion from me as to the constitutionality of the act of the 75th General Assembly appropriating out of the common school fund in the State Treasury $63,000 for the support of the public day schools for the deaf at Cleveland, and $42,000 for the support of a similar school at Cincinnati, I was unable, for want of time, to give you a written opinion, but will now endeavor to state, in writing, my reasons for believing the act in question to be unconstitutional.

Article 12, Section 5, of the Constitution, provides:

"No tax shall be levied except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied."

Section 3951, R. S., provides that:

"For the purpose of affording the advantages of a free education to all the youth of the state, there shall be levied annually a tax on the grand list of taxable property of the state, which shall be collected in the same manner as other state taxes, and the proceeds of which shall constitute 'the state common school fund'. * * * * * * The rate of such levy in each case shall be designated by the General Assembly at least once in two years; and if the General Assembly shall fail to designate the rate for any year, the same shall be for the state common school fund, one mill."

Under the provisions of this section the tax which constitutes the state common school fund was levied and collected. It states "distinctly the object of the same", and that is to raise a state common school fund "for the purpose of affording the advantages of a free education to all the youth of the state."

Section 3956 provides that:

"The Auditor of State shall apportion the state common school fund to the several counties of the state semi-annually, upon the basis of the enumeration transmitted to him by the state commissioner of common schools."

The provisions of these two sections above quoted were in full force at the time the tax was levied and collected, the proceeds of which became the state common school fund, which is now sought to be appropriated for the use of the schools for the deaf of Cincinnati and Cleveland.

By the provisions of these sections a tax was levied and collected "to afford the advantages of a free education to all the youth of the state," and was required to be distributed to the several counties of the state in proportion to the number of school youth residing in such counties. Now after this tax has been levied and collected it is proposed to divert a portion of it to the education of the deaf of Cincinnati and Cleveland. If the Legislature has power to divert any part of this fund, it has power to divert all of it.

The people paid the tax in question upon the faith that the money realized would be used for the equal benefit of all the youth of the state in affording them a free education, and the constitution limits the use of the tax to the specific purposes for which it was levied and collected, and the Legislature is powerless to divert it.

This act, in my opinion, is also in conflict with Article 2, Section 26, of the constitution, which provides that "all laws of a general nature shall have uniform operation throughout the state." This law relates to the education of the deaf. The deaf are not confined to the cities of Cincinnati and Cleveland, but are found everywhere within the confines of the state, and wherever found they are entitled to the same protection of the laws. The Legislature cannot single out those composing this unfortunate class living within the two largest cities of the state and provide for their care and education, and leave those residing in other portions of the state without care and education. They should receive the same care and consideration at the hands of the Legislature, and under the constitution they are entitled to it.

It does not appear from the statement of facts submitteed, whether these schools of Cincinnati and Cleveland which the Legislature undertakes to aid, were established under the provisions of the act of April 23, 1898, (93 O. L., 236,) or not. If they are,

provision is made for their support in the act providing for their creation, and that method should be resorted to.

Very truly,
J. M. SHEETS,
Attorney General.

AUTHORITY OF BOARD OF LIVE STOCK COMMISSIONERS TO ORDER DESTRUCTION OF DISEASED ANIMALS.

COLUMBUS, OHIO, September 22nd, 1902.

Dr. Paul Fischer, State Veterinarian, Columbus, Ohio.

DEAR SIR:—Yours of September 16th, making inquiry as to what extent the Board of Live Stock Commissioners may order the destruction of diseased animals under the provisions of Sections 4211-16 and 4211-17, duly received.

The act in question was passed by the last General Assembly and it assumes to confer upon the State Board of Agriculture the duties named in the act. The whole of this act is of doubtful constitutional validity. I am inclined to the view that it was an effort on the part of the Legislature to confer, by special act, corporate powers upon the State Board of Agriculture, which is prohibited by Art. 13, Section 1 of the constitution of the state, which provides that "The General Assembly shall pass no special act conferring corporate powers."

Passing that question, however, the act provides for the destruction of diseased animals without granting a hearing to the owner to determine whether in fact they are diseased. This is taking property without due process of law. It was held in Edson v. Crangle, 62 O. S. 49, that an act providing for the confiscation of nets and other fishing tackle, without trial, where the owner was engaged in illegal fishing, was depriving the owner of his property without due course of law, hence an infraction of the provisions of Art. 1, Section 16 of the constitution.

Again, the act makes no provisions whatever for the payment to the owner of the stock destroyed by the order of this board. It provides that stock shall be appraised, a report made to the Governor and thence in turn transmitted to the General Assembly, but there is no method by which the General Assembly can be required to appropriate any money to pay for any stock that may be destroyed. The statute makes no provisions for payment of stock thus doomed to destruction but merely holds out the hope to the owner that some time in the future the Legislature may be generous enough to pay for it.

From these considerations it is very clear to me that you are without power to enforce the provisions of this act, and I would advise you not to get into litigation.

Yours very truly,
J. M. SHEETS,
Attorney General.

RIGHT OF TRUSTEES DAYTON STATE HOSPITAL TO GRANT RIGHT OF WAY OVER GROUNDS OF INSTITUTION TO RAILWAY.

COLUMBUS, OHIO, September 22nd, 1902.

Dr. A. F. Shepherd, Superintendent Dayton State Hospital, Dayton, Ohio.

DEAR SIR:—Yours of September 20th in which you inquire whether the Board of Trustees of the Dayton State Hospital has authority to grant a right-of-way over lands belonging to the institution to an electric railway company, is duly received.

I observe that part of the trustees of this institution are lawyers and they are fully as able to determine the question presented as I am, and no doubt it is out of courtesy to me that the opinion was asked. It is very clear to my mind that no such authority is conferred upon the Board of Trustees. This board has just such authority as is conferred upon it by statute and no more. The statute nowhere gives it authority to grant away the lands of the state for any purpose. Indeed, Section 625, in my opinion, clearly negatives any claim that might be made for such authority. This section provides, "No streets, alleys or roads shall be laid out or established through or over the lands belonging to any of the public institutions of the state without the special permission of the general assembly." If the Board of Trustees has power to grant right-of-way to one railroad it has power to grant right-of-way to any railroad that has desire to occupy any of the State's lands. In other words, if it could give away the first foot, it could give away the last foot of the State's lands.

I am fully aware that sometimes it is a very great convenience indeed to have a railroad pass through the lands of the State belonging to the institutions, as freight which the institution needs can be brought to it much more cheaply, but the question submitted is one of power and not of expediency.

Yours very truly,

J. M. SHEETS,
Attorney General.

AS TO TRANSFER OF PRISONERS FROM REFORMATORY TO PENITENTIARY.

COLUMBUS, OHIO, September 23rd, 1902.

Hon. George K. Nash, Governor of Ohio, Columbus, Ohio.

DEAR SIR:—I am in receipt of your communication in which inquiry is made as to what power the Board of Managers of the Ohio State Reformatory has to transfer a prisoner, sentenced to that institution, to the Ohio Penitentiary and if such transfer is made, who shall determine the term to be served in the Ohio Penitentiary.

It is only those who are less than thirty years of age and have never been convicted and served a sentence in a penal institution that are eligible to be sentenced to the Ohio State Reformatory. However, as persons who are not eligible are at times sentenced to this Reformatory, and also those who prove to be incorrigible, provision has been made for the transfer of such persons to the Ohio Penitentiary. Section 7388-28 R. S. provides, that the Board of Managers of the Ohio State Reformatory,

> "shall have power to transfer, with the written consent of the governor of the state, to the Ohio Penitentiary, any prisoner, who subsequent to his committal, shall be shown to have been, at the time of his conviction, more than thirty years of age, or to have been previously convicted of crime, and may also transfer any apparently incorrigible prisoner whose presence in the Ohio State Reformatory appears to be seriously detrimental to the well being of the institution."

Upon such transfer being made it becomes important to inquire who shall determine the length of the term to be served in the Ohio Penitentiary. The sentence being indeterminate or general, of course, it can not be changed, and, unless there is authority lodged some where to determine the length of the term in the Penitentiary, the statute providing for the transfer must fail in its operation. Neither can it be less than the minimum nor greater than the maximum prescribed for the crime for which the person sentenced was convicted. Within these limits, when the prisoner is under the control of the Board of Managers of the Ohio State Reformatory, the

duration of the term is left to the discretion of that Board. When transferred to the Ohio Penitentiary, is this power also transferred to the Board of Managers of that institution? I am of the opinion that it is.

I was first inclined to the view that the law made no provisions for such a contingency, but, upon examining the statutes, I am now of the opinion that the sentence of a convict transferred from the Ohio State Reformatory to the Ohio Penitentiary, being indeterminate, that the length of the term (provided, of course, it is neither less than the minimum nor more than the maximum) is left to the discretion of the Board of Managers of the Ohio Penitentiary. Section 7388-6 R. S. provides that when sentencing a convict to the Ohio Penitentiary, the court may, under certain contingencies, give a general or indeterminate sentence, and it is then left to the Board of Managers to determine the length of term—the provisions being similar to those of section 7388-27.

In the case under consideration, the prisoner sentenced to the Ohio State Reformatory, is proposed to be transferred to the Ohio Penitentiary. His sentence, of course, is indeterminate or general, and remains so after being transferred to the Ohio Penitentiary. He was subject to transfer at the time of his sentence, and wherever he may be imprisoned, whether at the Reformatory or at the Penitentiary, the law gives the Board of Managers authority to determine the length of the term, provided, always, it is kept within the maximum and minimum limit prescribed by law.

I come more readily to this conclusion, when I apply the rule which is universal in the construction of statutes, that statutes *in pari materia* should be construed together;; and the additional rule, that statutes should always be construed, if possible, so as to give them effect rather than to so construe them that any part should become inoperative.

It seems to one that the power to transfer is a very salutary provison of the statute and it would be unfortunate if, by any oversight of the Legislature, it should fail of operation.

Yours very truly,

J. M. SHEETS,
Attorney General.

CONSTITUTIONALITY OF HORSESHOERS ACT.

COLUMBUS, OHIO, September 24, 1902.

Hon. George K. Nash, Governor of Ohio.

MY DEAR SIR:—I beg leave to acknowledge receipt of your communication in which you seek an opinion from me as to the constitutionality of the act of May 9, 1902, entitled: "An act to insure the better education of horseshoers and to regulate the practice of horseshoeing," 95 O. L., 450.

This act provides, in substance, for the appointment of a board to examine persons desiring to engage in the avocation of horseshoeing, the board to consist of two journeymen horseshoers, two master horseshoers, and one veterinary surgeon. It provides, also, that all persons engaged in the business of horseshoeing exclusively, at the date of the passage of the act, are eligible to receive a license to engage in the business without examination, provided application is made within six months from the passage of the act. After that date, however, all persons desiring to engage in that avocation must be examined as to their qualifications, and no person is eligible to such examination without he has been engaged in the business of horseshoeing exclusively for four years, or has served an apprenticeship in such business for at least three years. It thus appears that a person who happens to be engaged exclusively in the business of horseshoeing, at the time of the passage of the act, may be given a license without examination, regardless of how incompetent he may be, while no person, how-

ever competent, can receive such a favor, if he does not happen to be engaged exclusively in the business of horseshoeing. That is, if he carries on any other branch of blacksmithing besides that of horseshoeing he is forever excluded from the occupation of a horseshoer. It is hardly necessary to add that such an act works a denial of the equal protection of the laws, which is an infraction of both the State and Federal constitution, and is in conflict with the provisions of the constitution which expressly state that it was ordained for our common welfare.

In the case of Harmon v. State, 66 O. S., 249, the court decided the constitutionality of the act requiring an examination of stationary engineers. That act permitted any stationary engineer who had been engaged three years continuously in such business prior to its passage, to receive a license without examination. The court thus comments upon that provision:

> "To escape an examination, and yet obtain a license under this section, the applicant must have been a steam engineer in the State of Ohio for three years next prior to the passage of the act, or hold a license under an ordinance of a municipality in this state. This section confers the privilege of obtaining a license without examination on all engineers who were continuously employed as such for three years next prior to the passage of the act no matter how incompetent they may have become by reason of age, habits or other causes. And no matter how competent an engineer may be by reason of long service, if he has not been employed continuously for three years before the passage of the act, if he is short a month or more in the three years, he is denied the privilege of obtaining a license without examination. This three year provision is clearly arbitrary and without reason. It is arbitrarily forming a favored class and is in conflict with section two of the Bill of Rights which guarantees equal protection and benefit; and it is also in conflict with the purpose for which the constitution was established, which was to promote our common welfare. This section of the act is to promote the welfare of a particular three year class, instead of the common welfare of all. The section is, therefore, unconstitutional."

There is another infirmity or two in this act, but owing to lack of time I cannot elaborate upon them.

Yours very truly,

J. M. SHEETS,
Attorney General.

PERSONAL EXPENSES OF COUNTY COMMISSIONERS NOT AUTHORIZED TO BE PAID OUT OF COUNTY TREASURY.

COLUMBUS, OHIO, October 9th, 1902.

Edward Gaudern, Prosecuting Attorney, Bryan, Ohio.

MY DEAR SIR:—Yours of October 8th, at hand and contents noted. You inquire whether, in my opinion, under the provisions of Section 897-5, (95,O. L. 501), the commissioners are entitled to receive out of the county treasury, their personal expenses, such as railroad fare, hotel bills, etc., while engaged in the performance of their official duties.

I have already had occasion in a number of instances, to examine into this question, and have arrived at the conclusion that such expenses cannot be paid out of the county treasury. In the case of Richardson v. The State, 19 C. C. 191, it was held that under the provisions of Section 897, R. S., such expenses could not be paid out of

the county treasury. This case was taken to the Supreme Court and affirmed by the Supreme Court, and will be published in 66, O. S. The language construed in Section 897, R. S., which the court held not to authorize the payment of the personal expenses of the commissioners out of the county treasury, is exactly the same as the language used in Section 897-5.

It is a rule of universal construction, that where the courts have construed the language of a statute, to mean a particular thing, and the Legislature has afterward used the same language in a subsequent enactment, that the courts will conclusively presume that the Legislature intended that the same construction should be given the same language in the subsequent enactment. The only change Section 897-5 makes in the original act, is to limit the *official expenses of the* commissioners to be paid out of the county treasury to $200.00 in any one year.

If the Legislature intended to allow the personal expenses of the commissioners to be paid out of the county treasury, it should have so enacted, and not have used the same language which had theretofore been construed by the court to prohibit the allowance of such expenses. You are fully aware, of course, that the individual opinion of any Legislator as to what the intent of the Legislature was with reference to a particular act, has no bearing upon the meaning of the act.

I have arrived at this conclusion reluctantly, for personally I believe county commissioners are not paid the salary they should receive.

Very truly yours,
J. M. SHEETS,
Attorney General.

A BUSINESS PROHIBITED BY LAW CAN BE TAXED

COLUMBUS, OHIO, October 13th, 1902.

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

DEAR SIR:—The following questions are submitted to this office for opinion in your letter of October 11th..

First: Section 4364-2 makes it unlawful for any person to sell or give away in any house of ill-fame, any spirituous, malt, vinous or other intoxicating liquor or liquors.

Question: Does the violation of the above law prevent the enforcement of the provisions of the Dow Law, supplemented by the provisions of the Cain Law, (Vol. 95, page 463)?

Second: The Beal Law, (Vol. 95, page 87) authorizes local option under certain conditions.

Question: Can the provisions of the Cain Law, (Vol. 95, page 463), be enforced in localities where local option prevails under said Beal Law?

The same general question underlies both the questions above propounded, viz., can a tax be imposed upon a business which is prohibited by law.

Both the Winn Law, (Section 4364-1 et seq.R. S.) and the Beal Law, (95 O. L. 87), make it unlawful to sell intoxicating liquors under certain circumstances and conditions, while the Dow Law, supplemented by the Cain Law, seeks to impose a tax "upon the business of trafficking in intoxicating liquors," without exception or limitation. So that, as above stated, the sole question to be determined is whether, where the business of trafficking in intoxicating liquors is carried on in violation of law, is such business subject to the Dow Tax?

Your request for an immediate answer will preclude me from entering upon an extended discussion of this question. I must content myself with a statement in the briefest possible form of the reasons which lead me to the conclusion that such bus-

iness although carried on in violation of law, is subject to the tax provisions of the Dow Law.

First: There is no element of protection to the traffic in intoxicating liquors in the Dow Law. The purpose of the tax imposed by that law is not to give legal sanction to the business, or to afford it the protection of the law. If this was its purpose or effect, it would be a license, and would be unconstitutional and void. The purpose of the law is to provide against the evils resulting from the traffic. Surely the evils are not lessened by the fact that the business is carried on in violation of law. Such business, therefore, falls fairly within the purpose of the Dow Law.

Second: Both the Winn Law and the township local option law were in force at the time of the passage of the Dow Law, but no exception is contained in said law relieving such business from the payment of the tax. The tax being imposed upon the traffic in intoxicating liquors generally, and no exception being made in favor of such persons as carry on the business in violation of either the Winn Law or the Beal Law, such persons fall within the letter as well as the spirit of the Dow Law.

Third: A person engaged in the business of trafficking in intoxicating liquors in violation of law, could not plead that fact in defense of an action against him for the Dow Tax. To permit him to do so, would be to permit him to take advantage of his own wrong.

Fourth: A very hasty examination of the authorities has enabled me to find the following cases bearing on the question:

In the case of Markle v. Newton, Treasurer, 64, O. S., 493, this question was involved although not directly presented to the Supreme Court. In this case the Plaintiff had been carrying on business of trafficking in intoxicating liquors for several years in a local option township. The auditor of Medina County in the year 1899, entered upon the duplicate, the taxes not only for the year '99, but for several preceding years. The plaintiff brought suit to restrain the collection of the taxes, on the ground that the auditor was without authority to enter a tax upon such business for any year preceding the current year. While, as above stated, the question whether a tax could be charged at all in a local option township where the business was carried on in violation of law, was not squarely presented to the Supreme Court, yet that question was necessarily involved in the decision of the case. The court held that the taxes were lawfully charged.

In the case of Conwell et al. vs. Sears, Treasurer, 65, O. S., 49, the syllabus reads as follows:

> "The assessment upon the traffic in intoxicating liquors required by Section 4364-9 of the Revised Statutes, is legally and properly made upon that traffic though it be carried on in violation of a municipal ordinance."

Where the business is carried on in violation of a municipal ordinance, it is as much a violation of law as if it were carried on in violation of a statute. The municipal ordinance was enacted by virtue of a statute conferring such power upon a municipal corporation, so that in the case above cited, we have the decision of the Supreme Court of the State that such traffic may be taxed, although carried on in violation of law.

The question is still more squarely made in the case of Stevenson v. Hunter, in the Court of Common Pleas of Lucas County, decided by Pugsley, Judge, reported in Second Nisi Prius Reports, page 300. The second paragraph of the syllabus is as follows:

> "An assessment can be lawfully made under the Dow Law upon the business of trafficking in intoxicating liquors in a township which has voted against the sale of intoxicating liquors under the township local option act of March 3, 1888."

The opinion is very elaborate in this case, and cites among other cases, the case

of Youngblood vs. Sexton, 32, Mich. 406, and the License Tax Case, 5 Wall. 462. The following is from the opinion of Judge Pugsley:

> "The Dow Law subjects every person carrying on the business of trafficking in intoxicating liquors to a special tax. The local option law prohibits the carrying on of the business in a township which has voted against it. There is no inconsistency between these two laws. If, notwithstanding the prohibition, the business is carried on, it would be an anomaly to hold that a violation of the law relieves from the payment of the tax. The result would be, that those who are lawfully engaged in carrying on the business, must pay the tax, while those who carry on the business in violation of law, are exempt. This would be putting a premium on disobedience of the law. It is no answer to this to say that the person who violates the law by carrying on a prohibited business may be punished by a fine and imprisonment. The tax is imposed, not to punish him, nor on the other hand in consideration of any protection due to the business. The business is not protected, but his property and the fruits of his business are protected, and in consideration of this, and the general benefits of government, he should pay the tax the same as all law abiding citizens."

You are advised therefore, that it is the opinion of this office that persons who carry on the traffic in intoxicating liquors in any house of ill-fame, or who carry on such business in any munipical corporation which has voted to prohibit the sale of intoxicating liquors, are liable to the payment of the Dow Tax, and that the provisions of the Cain Law apply to any and all such business.

Very truly,
J. E. TODD,
Assistant Attorney General.

AUTHORITY OF COUNTY COMMISSIONERS TO SETTLE WITH A RAILWAY COMPANY ABOUT TO BRING CONDEMNATION PROCEEDING FOR RIGHT OF WAY THROUGH INFIRMARY FARM.

COLUMBUS, OHIO, Oct. 15th, 1902.

F. W. Woods, Medina, Ohio.

MY DEAR SIR:—Yours of October 11th, duly received.

Your inquiry requires an answer to the question whether, where a railway company is about to proceed to condemn a right of way across the infirmary farm belonging to the county, the commissioners are authorized to agree with the railway company as to the amount of compensation to be paid the county without condemnation proceedings being instituted and carried to a termination?

Following the principle laid down in Railway Company vs. Railway Company, 50 O. S. 603, Railway Company vs. Belle Center, 48 O. S. 273, and Railway Company vs. Dayton, 23 O. S. 510, I am of the opinion that the railway company can successfully maintain an action to condemn a right of way across the infirmary farm belonging to your county. Section 845, R. S., empowers county commissioners to sue and be sued, to prosecute and defend actions, both at law and in equity. Power to sue and be sued carries with it power to settle the subject in controversy.

Throop on Public Officers, Section 544.

Hence I am clearly of the opinion that your question should be answered in the affirmative.

Very truly,
J. M. SHEETS,
Attorney General.

PENALTY CANNOT BE CHARGED AND COLLECTED WHERE TAXES ON LAND FORFEITED TO THE STATE ARE COMPUTED AND READJUSTED ACCORDING TO THE PROVISIONS OF SECTION 2907a.

COLUMBUS, OHIO, October 15th, 1902.

Hon. P. H. Kaiser, County Solicitor, Cleveland, Ohio.

DEAR SIR:—I am in receipt of your communication in which you request an opinion from me as to whether penalty can be charged and collected, where taxes on lands forfeited to the State are computed and readjusted according to the provisions of Section 2907a, Revised Statutes, (94, O. L., 116).

This section provides that where lands were forfeited to the State for more than two years prior to any decennial appraisement, that the county auditor is required, on application of the owner, to readjust and compute the taxes due on the land on the basis of the "new decennial appraisement," for each year the tax was not paid, "and upon the payment of the taxes so readjusted," the auditor is required to issue a remitter for the difference. It will thus be observed that it is the taxes that are to be paid, adjusted upon the basis of the new appraisement, not taxes and penalty. It will also be observed that upon the payment of these taxes, the auditor must issue a remitter for the difference.

From these provisions it is clear to me that no penalties are to be charged or collected.

This remitter of course, can apply only to *taxes*—not assessments, such as street, sidewalk, sewer, etc.

Very truly,
J. M. SHEETS,
Attorney General.

AS TO THE DUTIES OF INSPECTOR OF WORKSHOPS AND FACTORIES UNDER THE ACT OF APRIL 17th, 1896.

COLUMBUS, OHIO, October 15th, 1902.

Hon. J. H. Morgan, Chief Inspector of Workshops and Factories, Columbus, Ohio.

DEAR SIR:—Under communication of this date, you inquire what are the duties of your department under the Act of April 17th, 1896, 92 O. L., 186, as amended April 21st, 1898, 93 O. L., 155, entitled "An Act to create a better sanitary condition in workshops and factories where dust creating machinery is used." This Act is found in Bates' Revised Statutes of Ohio, beginning with Section 4364-86. A brief analysis of the six sections of the Act will probably best exhibit the duties of your department.

Section 1, provides, "That all persons, companies or corporations operating any factory or workship, where emery wheels or emery belts of any description are used, * * * * * * shall provide the same with blowers, or similar apparatus, which shall be placed, * * * * * in such manner as to protect the person or persons using the same from the particles of dust produced and caused thereby, and to carry away the dust arising from or thrown off by such wheels or belts while in operation, * * * * * * * * * * * * * * * * * * * ."

Sections 2,3, and 4 prescribe with great particularity, how such blowers or apparatus shall be constructed and operated.

Section 5, relates to the duties of the Inspector, and reads as follows:

> "It shall be the duty of the chief inspector of workshops and factories to cause his district inspectors to inspect such workshops and factories in this state having and using such machinery as is

described in this Act, as often as he may deem advisable, and the district inspector shall have entry to such workshops and factories at all times when directed to make such inspection, and shall report to the chief inspector such violation as he may find, and the chief inspector shall notify the person or persons, company or corporation operating such workshop or factory to comply with the provisions of this Act within thirty days after date of issuing order, which notification shall be in writing and may be served by the district inspector or mailed to the last known address of such person, persons, company or corporation, which service shall be deemed sufficient notice for the purpose of this Act.''

Section 6 imposes a penalty of fine, or imprisonment, or fine and imprisonment upon the person having charge of or the management of such factories as fail to comply with the provisions of this act, or any orders made by the chief inspector within thirty days after the same have been issued.

This act is complete in itself and the duties of the department with respect thereto must be gathered entirely from the act.

In the analysis above given, it is seen that the only duty imposed upon your department is that contained in Section 5 above quoted. This duty is merely to make inspection and to issue orders or notices to such persons as may be found violating the act, to comply with its provisions within thirty days after the issuing of the order. There is no provision any where in the act requiring the inspector to institute any criminal proceedings against persons found violating the law, or persons who refuse or fail to comply with the orders of the department. While such persons are guilty of a misdemeanor, and, upon conviction, may be punished therefor, yet the duty of instituting criminal proceedings in such cases is a public duty, resting upon each individual of the public at large, just as in other criminal matters. To illustrate, in case of such misdemeanors as Sabbath desecration, gambling, violation of the game laws, etc., it is not the duty of any particular person to institute prosecution against the persons so violating, but it is a public duty and any one having knowledge of the facts, has a right and upon him rests the duty of instituting proceedings for the punishment of the offense. So, in the case under consideration, the duty of the department is fully performed when the inspection has been made and the order issued to comply with the provisions of the law. A failure to so comply constitutes an offense in which the public at large is intersted, and which any person, having knowledge of the facts, is at liberty to prosecute.

In order that I may not be misunderstood, permit me to say that there are some acts relating to inspection of public buildings, workships and factories, which impose a particular duty upon the department, to see that such acts are properly enforced. Other acts impose this duty upon the prosecuting attorney of the county, or upon the mayor or chief of police of the cities, but as above intimated, the act under consideration stands alone and the duties of the department, with respect to the requirements of the act, must be ascertained from an examination of the act itself.

It might be well to add that the department being without a fund to be used for the purpose of prosecuting violations of this act, and being without any legal counsel for that purpose, it would be impossible for the department to institute prosecutions for violations of this law.

Yours very truly,

J. E. TODD,
Assistant Attorney General.

AS TO WHETHER BOARD OF PHARMACY HAS POWER TO RE-REGISTER PHARMACISTS AFTER EXPIRATION OF PREVIOUS CERTIFICATE.

COLUMBUS, OHIO, October 16th, 1902.

Wm. R. Ogier, Sec. State Board of Pharmacy, Columbus, Ohio.

MY DEAR SIR:—With reference to the question as to whether your Board has power to reregister a registered pharmacist, who has failed for more than 60 days, after the expiration of his previous certificate of registration, to make application therefor as required by Section 4407 R. S., I beg to state that in my opinion this is a matter which is within the discretion of the Board. In other words, the time named in the statute is not a mandatory provision, but is directory merely. In Black on the Interpretation of laws, the author says:

> "Where there is no substantial reason why the thing to be done might not as well be done after the time prescribed as before, no presumption that by allowing it to be so done, it may work an injury or wrong, nothing in the act itself, or in other acts relating to the same subject—matter, indicating that the Legislature did not intend that it should rather be done after the time prescribed than not to be done at all, there the Courts assume that the intent was, that if not done within the time prescribed, it might be done afterwards."

The following examples may be cited as carrying out the principle thus announced. The statute requiring a public officer to take an official oath within 15 days after his appointment is directory as to time and if he qualifies any time before he enters upon the discharge of his duties is sufficient. Also the statute fixing the time within which a public officer must file his bond is directory, and he may file the bond after the time. Also the statute requiring grand jurors to be summoned "at least five days before the first day of the Court," is directory. They may be summoned later; also, the statute requiring a judge to give his decision in before the next term succeeding that in which the case was submitted, is directory. He may give the decision later.

I have given but a few of the examples which might be given of cases in which courts have held the time within which acts were to be performed was directory. These will be sufficient to illustrate the principle announced.

I do not mean to have it understood that you are compelled in any instance to register a person although he may have failed for more than 60 days after the expiration of his certificate, yet I mean to say, that you are to use your good judgment in each case and determine what is just and right under the circumstances.

Yours very truly,

J. M. SHEETS,
Attorney General.

PERSONS MAINTAINING A BOAT UPON THE WATERS NAMED IN THE ACT OF APRIL 28, 1902, (95, O. L., 277), FOR PLEASURE ONLY, ARE REQUIRED TO PAY THE LICENSE FEE PROVIDED IN SAID ACT.

COLUMBUS, OHIO, October 16th, 1902.

The Honorable Board of Public Works, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for an opinion upon the question as to whether, under the provisions of the act of April 28, 1902, (95 O. L. 277), persons using their own boats on the reservoirs referred to in that act, not for profit

but for their own comfort and pleasure only, are required to pay the license fee provided for in Section 7 of the act.

This section provides that an annual license fee shall be charged and collected on all boats and water craft "maintained and operated" on these reservoirs. If keeping and using a boat on these waters for pleasure and recreation only, and where no income is derived therefrom, is "maintaining and operating" a boat within the meaning of the act in question, then the owner must pay a license, otherwise not.

When first reading this act I was inclined to the view that operating a boat for pleasure and not for profit, was not "maintaining and operating" a boat, but that it was only those who kept boats upon these waters for hire, who came within the provisions of the act requiring a license fee to be paid. After considering the act more carefully, and after reflecting upon the purpose of its enactment, I have changed my view, and am of the opinion that all persons who operate a boat upon these waters, whether with a view to pleasure or profit, should pay a license fee. Nobody ought to raise such a question. Everybord who enjoys the privileges of these waters, ought to be willing to pay the pittance required for the privilege. He who maintains a boat upon these waters for pleasure, is saving the expense of hiring one, and he is as much interested in preserving and beautifying these artificial bodies of water as the man who keeps boats for hire. I can see no reason in principle for exempting those who maintain boats for pleasure, and requiring the payment of a license fee from those only who maintain boats for hire.

This much is certain however, if the license fee is not charged, it cannot be collected, and it seems to me that the Board of Public Works should enforce the provisions of the act against all who maintain boats upon these waters, whether for pleasure or for profit. and if the Board is wrong, those who feel aggrieved have a remedy in court. If however, the Board should exempt those who operate boats for pleasure only, and should be wrong in that view of the law, the public has no remedy.

Very truly,

J. M. SHEETS,

Attorney General.

PERSONS ENGAGED IN COMPOUNDING AND RECTIFYING INTOXICATING LIQUORS ARE REQUIRED TO PAY THE DOW TAX.

COLUMBUS, OHIO, Oct. 22, 1902.

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

DEAR SIR:—I beg leave to acknowledge the receipt of yours of Oct. 17th, seeking an opinion from me as to whether persons engaged in rectifying and compounding intoxicating liquors, and selling the same to the trade, may be classed as manufacturers within the meaning of the provisions of Section 4364-16, R. S., and consequently exempt from the payment of the Dow Tax required to be paid by dealers in intoxicating liquors.

Section 4364-16, R. S., provides:

> "The phrase 'trafficking in intoxicating liquors', as used in this act, means the buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes, but such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof at the manufactory, by the manufacturer of the same in quantities of one gallon or more at any one time."

It will thus be seen that no dealer is exempt from the payment of the tax except those engaged in the manufacture of intoxicating liquors from the *raw material.*

"Raw material" means just what it says; i. e. the grain used in the manufacture of whisky, the fruit used in the manufacture of brandy or wine, barley, rice, hops, etc., used in the manufacture of beer. An intoxicating liquor is not "raw material," it matters not to what extent it may be compounded with other intoxicating liquors. A person engaged in rectifying and compounding intoxicating liquors, is not engaged in manufacturing intoxicating liquors from the "raw material." The liquors had already been manufactured from the "raw material". They were intoxicating before he purchased them, hence he could not be engaged in the manufacture of intoxicating liquors. He is engaged in *compounding and rectifying* intoxicating liquors, not manufacturing. Hence it is clear that any person engaged in compounding and rectifying intoxicating liquors for sale to the trade, is required to pay the Dow Tax.

Very truly,

J. M. SHEETS,
Attorney General.

FEES OF JURORS SITTING IN THE PROBATE COURT IN CASES FOR THE APPROPRIATION OF PRIVATE PROPERTY, MUST BE PAID OUT OF THE COUNTY TREASURY.

COLUMBUS, OHIO, Oct. 27th, 1902.

Hon. Morris E. Aungst, Canton, Ohio.

MY DEAR SIR:—I am in receipt of your communication of recent date in which you seek an opinion from this office as to whether the fees of jurors who sit in cases pending in the probate court for the appropriation of private property, should be paid out of the county treasury, or be taxed as costs in the case, to be paid by the losing party.

While this is a question that does not come directly within my province to answer, yet as I am somewhat familiar with the question, I will grant you the courtesy of an answer.

Section 6451, R. S., provides in substance, that jurors, witnesses and sheriffs, serving in cases pending in the probate court for the appropriation of private property, shall have the same fees as are provided by law for like services in the court of common pleas, and that

> "the whole costs so taxed shall be adjudged against the corporation."

There is no express requirement in this section that the fees of jurors shall be considered as "costs", and taxed as a part of the bill of costs. If however, there were no other provisions of statute bearing upon the subject of the fees of jurors, it might be fair to presume that the Legislature intended to cast the burden of the jurors' fees upon the corporation instituting the proceedings. There are however, a number of statutory provisions bearing upon this subject, and as they are *in pari materia,* they should be construed together in order to arrive at the Legislative intent.

Section 5182 of the code of civil procedure provides:

> "Each grand and petit juror drawn from the jury box pursuant to law, and each juror selected by the court, pursuant to Section five thousand one hundred and seventy-three of this chapter, and each talesman shall be allowed two dollars per day, for each day he serves, and if not a talesman, five cents per mile from his place of residence to the county seat, and such compensation shall be certified by the clerk of the court, and paid by the county treasurer on the warrant of the county auditor."

Section 6411, R. S., provides, that

> "The provisions of law governing civil proceedings in the court of common pleas, shall, so far as applicable, govern proceedings in the probate court, when there is no provision on the subject in this title."

It follows then, that unless there is some provision to the contrary, the provisions of Section 5182, R. S., apply, and jurors sitting in the probate court in cases for the appropriation of private property, must be paid out of the county treasury. I have been unable to find any provision to the contrary.

I might end this opinion here, for it seems to me that the provisions of statute above quoted, make it clear that the fees of jurors in appropriation cases, should be paid out of the county treasury, but there are a few suggestions that might be added.

It has been the policy of the law to provide for the payment of both witnesses and jurors at the time the services are rendered. A witness may demand his fees in a civil case, and if not paid, he need not attend; in a criminal case they are paid out of the county treasury. In cases before a justice of the peace, the jury must be paid before the verdict is rendered. And it would hardly seem that the Legislature would make careful provision for the protection of jurors in the payment of their fees in every case except in that of the appropriation of private property, and leave them in that instance to wait for their fees until the costs shall be paid by the losing party. Not only that, but the fees of jurors have not generally been looked upon as costs, to be taxed in the case, any more than has the salary of the judge who sits in the trial of the case.

For these additional reasons, I am confirmed in my views above expressed.

Very truly,

J. M. SHEETS,
Attorney General.

COMPENSATION OF DEPUTY STATE SUPERVISORS OF ELECTION.

COLUMBUS, OHIO, Nov. 12th, 1902.

Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—I have the honor to acknowledge the receipt of your communication of recent date, in which you request an opinion from me as to what compensation the deputy state supervisors of election and the clerks of these boards are entitled to receive since the passage of the act of October 22nd, 1902.

This act provides:

> "Section 1. Each deputy state supervisor of elections and the clerks of boards of deputy state supervisors of elections shall receive for his services the sum of two ($2.00) dollars, for each election precinct in their respective counties for each election held in their said counties the returns of which are, or may be required by law to be made to the board of deputy state supervisors of elections, provided that the compensation paid each of said officers shall in no case be less than $100.00 per annum, which shall be paid out of the general revenue fund of the county treasury upon vouchers of such boards made and certified by the chief deputy and the clerk thereof." * * * * * * *
>
> "Section 2. This act shall take effect and be in force from and after its passage; and all acts and parts of acts in conflict or inconsistent with the provisions of this act are hereby repealed, provided, however, that nothing in this act shall be so construed as to repeal, or operate, to repeal by implication, the act of April 29, 1902." * * * * * * * *

The act excepted from the repealing clause, applies only to Hamilton County. Hence, need not be considered in this opinion.

It appears from this act that all laws previously enacted, providing compensation for the deputy state supervisors of election and the clerks of the respective boards, are repealed, and this act alone provides the basis upon which compensation must be allowed.

Prior to the above enactment, deputy state supervisors were allowed $2.00 per day, but not to exceed, however, thirty days in any one year, and five cents per mile for the number of miles traveled "in going to and returning from the county seat." This provision for compensation of course is superceded by the act of October 22nd, and the question is, how their compensation shall now be measured.

It is $2.00 for each election precinct in their respective counties for each election held therein, "*the returns of which are or may be required by law to be made to the deputy state supervisors of election*"; the minimum compensation however, not to be less than $100.00 per annum. So then it appears that the compensation is determined by each election held within the county where the returns are "required by law to be made to the board of deputy state supervisors of election."

The returns of the annual November election must of course be made to the deputy state supervisors of election; also in case of a special election of a member of the General Assembly or a member of Congress. But the returns of the annual April township and municipal elections, and of the election of members of boards of education and justices of the peace, are not made to the deputy state supervisors of election. (See Election Laws, p. 80; Revised Statutes, Sec. 2966-8.)

Therefore, in passing on the compensation due the deputy state supervisors and clerks of these boards, the question to be determined is, whether the returns of the particular election under consideration are required by law to be made to them.

I have not carefully scrutinized the statutes with a view to determine the returns of what elections must be made to the deputy state supervisors. That question is easily ascertained by reference to the statutes.

Another question submitted is, whether the deputy state supervisors of election and the clerks of the respective boards, are entitled to be paid their personal expenses, such as hotel bills, car fare, etc., necessarily incurrd while attending the meetings of the board. Clearly they are not. The act of October 22nd, makes no provision for the payment of such expenses, nor did the law as it existed prior thereto make any provision for such payment. The provisions of Section 2966-4, R. S., (Election Laws, p. 77), authorizing the payment of "all proper necessary expenses in the performance of the duties of the deputy supervisors," to be paid out of the county treasury, did not include the personal expenses of the deputy supervisors, such as hotel bills, transportation, etc., incurred while attending the meetings of the board.

The provision for the payment of "all proper necessary expenses" was evidently meant to cover the expenses incurred in furnishing booths, guard-rails, ballot boxes, etc., and also incidental expenses incurred in procuring stationery and other supplies necessary for the use of the board of deputy supervisors, for there is no other provision for the payment of such expenses. While the payment of the expenses incurred in procuring and distributing ballots, blanks, instructions to voters, etc., is specially provided for.

Had it been the intention of the Legislature to provide for the payment of the personal and living expenses of the members of the board, it would have been very easy to make that intention plain. It has been the uniform holding of the courts that no compensation by way of per diem, expenses or mileage can be allowed to a public officer except by express provision of statute.

In Clark vs. Commissioners, 58, O. S., 107, Judge Burket says:

> "It is well settled that a public officer is not entitled to receive pay for services out of the public treasury, unless there is some

statute authorizing the same. Services performed for the public, where no provision is made by statute for payment, are regarded as a gratuity, or as being compensated by the fees, privileges and emoluments accruing to such officer in the matters pertaining to his office. Jones vs. Commissioners, 57 Ohio St., 189."

Section 897, R. S., provides that each county commissioner, "when necessarily engaged in attending to the business of the county pertaining to his office under the direction of the board, and when necessary to travel on official business out of his county, shall be allowed in addition to his compensation and mileage as herein before provided, any other reasonable and necessary expenses actually paid in the discharge of his official duty."

The Supreme Court, in construing this provision, held that

"The expenses which are authorized to be paid a county commissioner, by the last clause of Section 897, of the Revised Statutes, include only his official expenses 'actually paid in the discharge of some official duty', as distinguished from those incurred for his personal comforts and necessities. He has no vaild claim against the county, or its funds, beyond the per diem compensation and mileage allowed, for any of his personal expenses."

Richardson v. The State; 66, O. S., 108.

The principle announced in this case is decisive of the question under consideration, and in my opinion, needs no further comment.

Are the deputy state supervisors entitled to mileage? In my opinion they are.

The law as it stood before the act of October 22nd, provided that deputy state supervisors should receive both compensation and mileage. The act of October 22nd, fixes their compensation, but is silent as to whether they shall receive any mileage. Hence, in my opinion the law providing for the payment of mileage has not been repealed. Mileage in contemplation of law is not compensation for services rendered, but signifies "a compensation allowed to officers for their trouble and expense in traveling on public business."

2nd Bouvier's L. D., 179.
169 Me., 431.

If the act of October 22nd, were construed as taking away the right to receive mileage, it would result in great injustice to any deputy state supervisor who lived any considerable distance from the county seat. He would be compelled to pay out a large part, if not all of his annual salary in transportation charges, while the members living at the county seat would be subject to no expense at all.

The further question is presented as to how the compensation of deputy state supervisors and clerks shall be measured for the year beginning August 1, 1902, and ending August 1, 1903, August 1, being the day on which the official term begins.

As to all services rendered prior to October 22nd, they should be paid for according to the provisions of the law as it then stood. From October 22nd, 1902, to August 1. 1903, the compensation to be paid these officers, should be such proportion of their annual compensation as the time served from October 22nd, to August 1st; is to the entire year; i.e., in this instance it would be about three-fourths of the annual salary.

These officers are required to serve a whole year for the compensation provided, and when the service is less than a year, it follows, as a matter of course, the compensation must be in proportion to the services rendered. For were it not so, a deputy state supervisor might serve for six months, and then resign, and in the meantime have drawn the salary for the entire year. His successor then, would have to serve the remainder of the year without compensation.

Hence it is clear to my mind that the rule above suggested is the proper one to apply in measuring the compensation due these officers for the time mentioned.

Very truly,

J. M. SHEETS,
Attorney General.

AS TO WHETHER FINES ASSESSED FOR INFRACTION OF THE BEAL LAW SHALL BE PAID INTO THE MUNICIPAL TREASURY OR THE COUNTY TREASURY.

COLUMBUS, OHIO, November 13th, 1902.

Hunter S. Armstrong, St. Clairsville, Ohio.

DEAR SIR:—In receipt of yours of November 12th, in which you ask me for an opinion as to whether a fine assessed by the Court of Common Pleas for an infraction of the provisions of the Beal Law should be paid into the treasury of the municipality where the violation of the law occurred, or paid into the county treasury.

While the act in question is a little ambigious upon the subject, it occurs to me that it was the legislative purpose to require all such fines to be paid into the treasury of the municipality where the violation of the law occurred.

It is true that Section 4364-20g, which provides that fines collected under the provisions of the Beal Law "shall be paid into the treasury of the municipal corporation wherein the said fine was imposed or bond forfeited," yet, I think a liberal construction of this provision would require that the fine be paid into the treasury of the municipality where the offense was committed regardless of where the case was tried. There is no provision in this act for the payment of fines in the county treasury under any circumstances.

Section 1788 R. S. gives the police judges of the different municipalities, jurisdiction in misdemeanors co-extensive with the county. And this provision was in force at the time the Beal Law was passed. Hence the police judges of a municipality might try a person charged with the offense of an infraction of the Beal Law although committed in another municipality in the same county. If Section 4364-20g were narrowly and literally construed it might result in the municipality in which the case was tried getting the benefit of the fine, notwthstanding that the offense might have been committed in some other municipality of the county.

I do not think the Legislature intended any such result should follow from this provision. Municipalities putting the Beal Law into operation are deprived of taxes that would otherwise be obtained from the Dow Law Assessment. And it would seem, where persons are guilty of an infraction of the Beal Law, the municipality in which the offense was committed should have the benefit of the fines collected for such infraction.

Very truly yours,

J. M. SHEETS,
Attorney General.

FOREIGN INSURANCE COMPANIES DOING MORE THAN ONE KIND OF BUSINESS, MAY BE ADMITTED INTO THE STATE OF OHIO TO DO THE BUSINESS PROVIDED FOR BY THE LAWS UNDER WHICH THEY ARE ADMITTED.

COLUMBUS, OHIO, November 13th, 1902.

Hon. A. I. Vorys, Superintendent of Insurance, Columbus, Ohio.

DEAR SIR:—I have the honor to acknowledge the receipt of your letter of recent date, in which you request an opinion from this office as to whether The Ridgely Pro-

tective Association, a foreign corporation whose charter authorizes it to do a health, accident and life insurance business on the assessment plan, can lawfully be licensed to do the business of health and accident insurance in the State of Ohio.

It appears that this company was licensed by your predecessor to engage in health and accident insurance in Ohio, but you, being of the opinion that no insurance company whose charter authorizes it to engage in the business of health, accident and life insurance combined, was eligible to admission into the state, hence, refused to relicense this company. This refusal, it seems, was based upon the construction placed by you upon the provisions of Section 3630e of the Revised Statutes, this being the only section which this class of companies claimed to authorize their admission into the state. It provides for the admission into the state, of corporations organized under the laws of another state, to

> "transact business of life or accident, or life and accident insurance upon the assessment plan,"

but does not provide for the admission of companies, organized to transact health, accident and life insurance combined.

After this refusal on your part to relicense this company, the 75th, General Assembly further supplemented Section 3630 of the Revised Statutes, by adding a new Section (3630j), which provides in substance, that a corporation organized under the laws of another state or country

> "and doing the business of insuring against accidental, personal injury and loss of life, * * * * and against expense and loss of time occasioned by injury or sickness,"

may be admitted into the State of Ohio to transact the business of health and accident insurance, upon certain conditions named in this section. It is claimed by The Ridgely Protective Association, that under the provisions of Section 3630j, R. S., it is entitled to be admitted into the State of Ohio to transact the business of health and accident insurance.

Does this company come within the provisions of the section just quoted? What requirements must this company meet in order to comply with the provisions of this section?

First: It must be a foreign corporation.

Second: It must be "doing the business" of health and accident insurance.

This company comes within both of these requirements.

Are any other requirements needed except those with which it is able and ready to comply? It seems to me not. True, it is authorized by its charter to do the business of health, accident and life insurance, but it is not seeking admission to the State of Ohio except for the purpose of doing the business of health and accident insurance.

The question has arisen, whether any company which is authorized by its charter to do any business except that of health and accident insurance, can be admitted to the State of Ohio under the provisions of Section 3630j, R. S.

It seems to me that before we are authorized in rejecting this company's application for admission to the state, Section 3630j must be construed as though it provided that corporations organized under the laws of another state, and doing the business of health and accident insurance, *exclusively*, ect., might be admitted into the state—a construction, which I do not think would be upheld by the courts.

The doctrine of interstate comity, permits corporations to engage in business in states other than those of their creation, unless prohibited by the laws of the states to which they migrate. This principle was first announced in the early case of Bank of Augusta v. Earle, 13 Peters, 519, and has become thoroughly intrenched in American jurisprudence. Hence, the question becomes, not so much whether a foreign corpor-

ation is permitted to enter Ohio to engage in a lawful business, but whether it is excluded by the laws of the state from entering its borders.

There are many foreign corporations, whose charters permit them to engage in many different kinds of business, but cannot, under the laws of Ohio, engage in all the different classes of business authorized by their charter. Yet these same companies have been admitted into the state, and are constantly being admitted into the state to engage in such business as the laws of the state authorize. In oher words, such companies do not exercise within the borders of Ohio, all the powers they possess, but are permitted to exercise such powers as domestic corporations might exercise, engaged in a similar class of business. They are not excluded because their charters give them more powers than they are authorized to exercise in Ohio. For these reasons, it seems to me that you are authorized to license this company.

It has been suggested that if this company is admitted to do the business of health and accident insurance, it may later ask to be admitted to do the business of life insurance. Should it make such application, it should be refused on the ground of having already been admitted to do the business of health and accident insurance, and could not, under the law, be admitted to combine the three classes of insurance.

Very truly,

J. M. SHEETS,
Attorney General.

AS TO THE ADMISSION OF THE GREAT CAMP OF THE KNIGHTS OF THE MODERN MACCABEES INTO THE STATE OF OHIO.

COLUMBUS, OHIO, November 13th, 1902.

Hon. A. I. Vorys, Superintendent of Insurance, Columbus, Ohio.

DEAR SIR:—I beg to communicate to you my conclusions upon the questions submitted with reference to whether you, as Superintendent of Insurance, have a right to refuse to license a foreign fraternal beneficiary association to do business in Ohio on the ground that its name is so similar to that of another already admitted to the state, that the similarity of names would lead to confusion and thus deceive the public, also whether the name of the Great Camp of the Knights of the Modern Maccabees is so similar to the name of The Supreme Tent of the Knights of the Maccabees, of the World, that the two names would likely be confounded and the public be deceived thereby.

It appears that The Supreme Tent of the Knights of the Maccabees of the World has been doing business in this state for many years and has a large and flourishing membership; that it had a subordinate camp in Ohio which is called "The Great Camp for Ohio of the Maccabees of the World"; and also that The Great Camp of the Knights of the Modern Maccabees, a later organization, has adopted the same emblem, the same lodge system, and the same ritual as the older order; and that the later organization now seeks admission to the State of Ohio under the provisions of the Act of April 27th, 1896, providing for organization of domestic fraternal beneficiary associations, and also for the admission into the state of foreign associations of the same character.

The first inquiry for consideration is, "have you a right to refuse the application of the Great Camp of the Knights of the Modern Maccabees into the state, if in your opinion its name is so nearly identical with that of the Supreme Tent of the Knights of the Maccabees of the World, as to create confusion and thus deceive the public?

The act of April 27th, 1896, above referred to, provides both for the admission into the state of foreign fraternal beneficiary associations and also for the organ-

ization of domestic fraternal beneficial associations. Section 1 of this act, among other things provided that "Such associations shall be governed by this act." This provision, of course, includes both domestic and foreign associations. Section 7 of the act applies especially to the manner of the organization of domestic associations, and among other things, requires that "The proposed corporate name of the association shall not too closely resemble the name of any similar organization."

In order to comprehend fully the legislative intent in enacting this provision, it becomes necessary to examine other similar provisions of the statutes upon the subject of the organization of corporations. The chapter of the laws of Ohio authorizing the creation of corporations, provides that,

> "The Secretary of State shall not in any case file or record any articles of incorporation in which the name of the corporation is the same as one already adopted or appropriated by an existing corporation of this state or so similar to the name of such existing corporation as to be likely to mislead the public." R. S. Sec. 3238., also, "No corporation shall change its name to any one already appropriated, nor to any one likely to mislead the public." R. S. Section 3238a.

It is thus seen that the legislative policy of the State is against the appropriation by one corporation of a name so similar to that of another as would be likely to mislead the public. Hence it is evident that the purpose of enacting the provisions above quoted, with reference to similarity of names to be adopted by beneficial associations, was to save confusion and to protect the public from deception.

It is argued, however, that the provisions of Section 7 of the Act of April 27th, 1896, applies to domestic corporations only. And that they have no application whatever to foreign corporations. But, as already suggested, Section 1 of this act provides that such associations (meaning both foreign and domestic) "shall be governed by this act." Hence I am of the opinion that Section 7 so far as it applies must govern the admission of foreign corporations into the state.

Suppose we accede to the claim that Section 7 applies to domestic corporations only. The Superintendent, in that event, must admit a foreign association into the state regardless of the fact that its name my be identical with that of another association already doing business in the state, whether the older association be a domestic or foreign corporation.

It is conceded that a domestic company can not appropriate the name already appropriated by any other company either domestic or foreign, provided the foreign association has already been admitted into the state. Section 7 clearly prohibits such an appropriation of names. If the same limitation is not imposed upon foreign corporations then the foreign corporation may organize and adopt the name of a domestic company which may have worked up a large and flourishing business, and a reputation for doing business on a safe and sound basis, then be admitted into the state, take advantage of the reputation of the domestic corporation, and practice its deceptions upon the public. Again, Section 7, among other things, requires an association, before it is authorized to engage in business in Ohio, to furnish proof satisfactory to the Superintendent of Insurance,

> "that at least one hundred subscribers for certificates of membership have been secured in said association, and that there has been deposited to the credit of said association for the payment of death and other claims, and which amount can not be used for expenses, the sum of $5,000.00, which sum, if advanced by the trustees, officers or directors, may be repaid to them from time to time from the proceeds of an expense fund to be created for this purpose."

This is a salutory provision and a very necessary one in order to prevent the policy holders from gross imposition. This deposit is an earnest of good faith—a pledge that the association will perform faithfully and honestly its obligation to its members. If, however, this section does not apply to foreign associations, the Superintendent of Insurance must admit them without this deposit and even though there may not be a penny in the treasury to pay losses. No pledge of good faith can be required; they may practice their impositions upon the public, while the State must stand by and helplessly look on. I do not think the Legislature intended to enact a law that would protect the people against the imposition of domestic associations and at the same time open the doors wide to all manner of frauds that might be practiced by foreign associations of similar character. For these reasons, it is my opinion that the provisions of Section 7 apply and the question of similarity of names between a foreign association seeking admission into the State to do a fraternal beneficiary insurance business and another association already authorized to do business in the State, whether domestic or foreign, is a proper subject for your consideration.

The second question propounded is, as to whether the similarity between the names of the Great Camp of the Knights of the Modern Maccabees and the Supreme Tent of the Knights of the Maccabees of the World, is so close that you would be justified in rejecting the application of the former for admission into the State, in my opinion, should be answered in the affirmative.

That the people generally know absolutely no difference between these two organizations is entirely clear. They are so similar that any person, not a member, would mistake one for the other almost invariably. In my opinion the question whether the name of the later order is so similar to that of the older one that a Court of equity would interfere to protect the former association in the name adopted by it, is of little or no importance in this case. The laws of Ohio make it your duty to protect the public from any imposition, that is likely to result from a similarity of names. And that is the question for you to consider.

The question has been argued to me by counsel claiming that the contract or policy written by the Great Camp of the Knights of the Modern Maccabees does not come within the requirements of the law with reference to beneficial fraternal insurance, but as that question is not submitted by you, I will give it no consideration.

Yours very truly,

J. M. SHEETS,
Attorney General.

WHOLESALE DRUGGISTS ARE REQUIRED TO PAY THE DOW TAX.

COLUMBUS, OHIO, November 13th, 1902.

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

DEAR SIR:—Your letter of this date received, containing the inquiry—"whether or not wholesale druggists, who at the same time are wholesale liquor dealers, selling said liquor only to retail druggists who sell only upon prescription, issued in good faith by a reputable physician, in active practice, etc., as defined in Section 4364-15 R. S., can be legally exempted from payment of the Dow Tax."

In answer thereto I would say, the mere fact that one is a wholesale druggist, and at the same time a wholesale liquor dealer, cannot exempt him from the operation of the Dow Law, and from the payment of the Dow Tax therein required, even though he should only sell intoxicating liquors to retail druggists. Such sale is plainly contemplated by said act to include such persons within its operation. Any other con-

struction given the same would but change wholesale liquor dealers into wholesale druggists to escape its operation.

Very truly,
J. M. SHEETS,
Attorney General.

LEGALITY OF PROCEEDINGS UNDER SECTION 3067, REVISED STATUTES.

COLUMBUS, OHIO, November 13th, 1902.

Colonel Henry M. Taylor, Ass't. Adjutant-General, Columbus, Ohio.

DEAR SIR:—The communication of Alexander Robertson, Captain of Company A., Seventh Infantry, Ohio National Guard, bearing date, October 29, 1902, together with enclosure referred by you to this office by endorsement under date of November 7th, 1902, in regard to certain proceedings under Section 3067 of the Revised Statutes of Ohio, has been received and considered.

Henry C. Shirer, a private of Company A., Seventh Regiment, Ohio National Guard, for non-attendance at drill was arrested by the chief of police of Zanesville, Ohio. Such arrest was made upon the supposed authority conferred on such officer by Section 3067, Revised Statutes of this State, pursuant to a written authority or warrant delivered to him by Captain Robertson of said Company A., which warrant, notice or authority is enclosed in the letter referred to this department.

Upon application to the probate court of Muskingum County, by writ of habeas corpus, Shirer was discharged from custody upon the ground that the warrant upon which the arrest was made was insufficient. An inspection of the authority or warrant given by Captain Robertson to the chief of police, does not disclose the nature of the violation charged, nor in fact, that any offense within the section has been committed at all. Such warrant or authority therefore, could, under no circumstances, be set up as a prevailing practical defense against the proceeding in habeas corpus, or be any protection to the officer making the arrest.

Grave doubts may exist whether these provisions of Section 3067 are applicable to the National Guard when not in active service, in as much as the ultimate judgment to be rendered in the matter may extend only to a fine, or a dishonorable discharge from the Guard. So that, without at this time intimating that the law may not be enforced in a proper manner and in a proper case, I would suggest that in the future, in cases similar to this, (when the Guard is not in active service), that some definite charge or complaint should be made upon which to predicate the issuing of the authority or warrant referred to in the statute. And that the warrant or authority itself should describe with reasonable certainty, the violation complained of, so that in case of inquiry upon habeas corpus, the officer who has the custody of the prisoner may exhibit to the court a warrant or authority, which shall inform both the prisoner and the court of the nature of the charge made.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

POWERS OF COUNCILS OF ADMINISTRATION OF OHIO NATIONAL GUARD.

COLUMBUS, OHIO, Nov. 14th, 1902.

To the Adjutant-General of Ohio, Columbus, Ohio.

SIR:—The communication addressed to you by William E. Bundy, Colonel of the First Infantry Regiment, Ohio National Guard of Dayton, date November 12, 1902,

together with schedule of fines, etc., adopted by the council of administration of the First Infantry Regiment, has been referred to this department.

I have to say that the powers of such councils of administration, in so far as determining the amounts that shall be collected as dues and as fines, are contained in subdivision No. 7 of Section 540 of the Regulations for the Ohio National Guard. Such subdivison is in the following words:

> "7. To determine the amounts that shall be collected as dues and as fines for absence without proper excuse from drill, parade, encampments or other duty."

It will be observed that there appears no authority by which the councils of administration may determine that punishment by imprisonment may be inflicted in the alternative, or be superadded to a fine. Section 3067, Revised Statutes of Ohio, provides that dues and fines inflicted may be deducted from any pay due the delinquent. Section 3068, Revised Statutes, provides how fines shall otherwise be collected, and in neither section is imprisonment made a part of the penalty.

In addition to what has been said, it appears that the authority conferred upon councils of administration to determine the amounts of fines to be collected, is confined to cases of absence without proper excuse from drill, parade, encampments or other duty. Section 535 of the Regulations of the Ohio National Guard, provides generally that the councils of administration have authority to conduct the civil affairs of their Command, but such general clause does not extend the limitations prescribed in subdivision 7, upon the subject-matter of fines.

I therefore conclude that in so far as the council of administration is concerned in determining amounts to be collected as fines, it must confine itself to fixing the amounts, and is not authorized to provide imprisonment, either as an alternative or conjunctive punishment.

I herewith return papers submitted.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AS TO WHETHER THE COLE LAW CAN OPERATE TO REQUIRE COMPANIES COMING UNDER ITS PROVISIONS, TO PAY EXCISE TAX ON GROSS RECEIPTS FOR THE YEAR BEGINNING MAY 1st, 1901 OR ONLY AFTER THE PASSAGE OF THE ACT, APRIL 15, 1901.

COLUMBUS, OHIO, November 18th, 1902.

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

DEAR SIR:—I am in receipt of yours of recent date, in which you seek an opinion from me as to whether the Act passed April 15th, 1902, known as the Cole Law, requiring certain classes of corporations to pay into the State treasury in the month of November each year an annual excise tax equal to 1 per cent. of their gross receipts for the year previous, ending on the 31st day of May, can operate to require such companies to pay the 1 per cent. excise tax on their gross receipts for the year beginning May 1st, 1901, and ending May 1st, 1902, or whether the tax for the year 1902 is limited to the 1 per cent of their gross receipts earned from and after the 15th of April, 1902, date of the passage of the Act, to the 1st day of May.

In order to determine these questions the nature of the tax levied and collected, must be inquired into. It is not a tax levied and collected on the preceding year's gross receipts, as such, for if it were it would be a property tax and not being uniform with other property tax would be unconstitutional. The gross receipts of the preceding year, is merely the yard stick by which the taxes are measured, as the

capital stock of certain other classes of corporations, is the yard stick by which the excise tax required to be paid by such companies, is measured. The tax required to be paid under the Cole Bill is an excise charged, and collected for the privilege of *continuing* to exercise the franchise of a corporation not for the *previous* exercise of the franchise. Should any company on or before the 1st day of May have decided to surrender its corporate franchise, it might have done so. In that event no excise tax would be due from it. But, not having done so it is required to pay the excise tax named in the Cole Bill, which is measured by the gross receipts of the preceding year.

In the case of Southern Gum Company against Laylin, decided by the Supreme Court of Ohio just previous to its summer adjournment, it was sought to recover back the excise tax paid by that Company of 1-10 of 1 per cent. based on its capital stock, on the ground that the Act under the provisions of which it was paid, was unconstitutional, and that it was retroactive in effect. The Court held that the Act was constitutional, that the tax could not be recovered back, and that it was taxing the privilege of continuing the exercise of its franchise as a corporation. The principle involved and decided in that case, in my opinion, is decisive of the questions under consideration. Hence it is my opinion that you should charge and collect an excise tax from the corporations named in the Cole Bill, a sum equal to 1 per cent of the gross receipts of these companies, for the year beginning May 1st, 1901, and ending May 1st, 1902.

Yours very truly,
J. M. SHEETS,
Attorney General.

THE BUSINESS OF A SAVINGS AND LOAN ASSOCIATION AND A SAFE DEPOSIT AND TRUST COMPANY MAY BE CONDUCTED BY A SINGLE CORPORATION.

COLUMBUS, OHIO, Nov, 19th, 1902.

Hon. Lewis C. Laylin, Secretary of State, Columbus, Ohio.

DEAR SIR:—Your inquiry of October 23rd, 1902, whether, under existing laws a savings and loan association and a safe deposit and trust company may be incorporated under one charter, either by original articles of incorporation, or by amendment, is before me.

On February 18, 1901, this office, in an opinion found upon pages 49 to 53 of the Report of the Attorney General for 1901, concluded, for reasons therein fully stated, that a comparison of the statutes, Sections 3797 to 3821, inclusive, relating to savings and loan associations, with Sections 3821a to 3821g, inclusive, relating to safe deposit and trust companies, disclose that the functions of the respective class of companies were so dissimilar, that in the absence of a provision of statute allowing one corporation to transact both kinds of business referred to, it should be taken to be the intent of the Legislature, that a single corporation may not be chartered to exercise the functions and powers, both of a savings and loan association, and of a safe deposit and trust company.

From time to time, since this office passed upon the question submitted, the Legislature, has sought to specifically confer upon savings and loan associations, power to engage in the business of a safe deposit and trust company, but such enactments, being in such form as to contravene the Constitution of the State, served no purpose, other than to indicate that in the minds of the Legislature, the two classes of business are not irrelative.

On May 10th, 1902, (95 O. L., p. 531), the Legislature of this state passed an act

entitled "An act to authorize the consolidation of savings and loan associations with safe deposit and trust companies in certain cases." Section 1 of said act authorizes the consolidation of such companies under the conditions therein named. Section 2 provides that the proceedings in consolidation shall be the same as those provided in Section 3381 of the Revised Statutes, relating to the consolidation of railroad companies. Section 3 of said act provides that when such agreement of consolidation is made and perfected, and the same or a copy thereof is filed with the Secretary of State, the several companies, parties thereto, shall be held and taken to be one company, possessing all the rights, privileges, powers and franchises of said several companies, but subject to all and singular, the provisions of law relating to the different branches of the business of such new company, the same as though conducted by separate companies.

By this act the Legislature responsibly declared that the kinds of business referred to might properly and legally be transacted by a single incorporated company, and in the act provides for the consolidation of any two of the respective existing companies into one. Conceding the vaildity of this act, one of the following conclusions must logically and legally follow: either first, that the only mode by which a company may be authoritatively formed to do both kinds of business is by consolidation, thus contemplating the pre-existence of two companies, a savings and loan association and a safe deposit and trust company, ready and willing to consolidate, or second, that it is the Legislative intent that a single corporation may transact both kinds of business, and the act in question is merely to provide a means by which existing companies of the respective kinds may consolidate into one corporation, and that the policy of this state is to treat the classes of business referred to as similar and relative.

If it is admitted that one corporation may do these two kinds of business at all, it would seem to follow irresistibly that the purposes of a savings and loan association and a safe deposit and trust company, may lawfully be provided for in original articles, because what may be done indirectly, naturally, may be done directly. And if such incorporation may be made by original articles, then under Section 3238a, R. S., a savings and loan association may so amend its articles as to include the purpose of doing a safe deposit and trust company, and in all cases, a company so incorporated, shall be held and taken to possess all the rights, privileges, powers and franchises of a savings and loan association, and a safe deposit and trust company, and subject to all and singular, the provisions of law relating to the different branches of the business, the same as though conducted by a separate company.

Very respectfully,
GEORGE H. JONES,
Assistant Attorney General.

AS TO WHO MAY BE EXCUSED FROM DENTAL EXAMINATIONS.

COLUMBUS, OHIO, November 21st, 1902.

Dr. H. C. Brown, Columbus, Ohio.

DEAR SIR:—I am in receipt of your inquiry, seeking an opinion from me as to whether the Board of Dental Examiners may excuse from examination a person who has been actively engaged in the practice of dentistry, from and after January 1st, 1893, although such person may not have been a "Proprietor" of a dental office during the time named.

The Act of April 29th, 1902, providing for the examination of persons desiring to practice the profession of dentistry, provides that the Board of Dental Examiners shall excuse from examination "any person or all persons who are or have been, the

proprietor or proprietors of a dental office, or place of performing dental work in this State, continuously since January 1st, 1893.''.

The provisions of the Act, in exempting certain persons from examination can be upheld only under the theory that persons exempted by reason of long experience have became proficient in their profession, hence do not need the test of an examination. A person actively engaged in the practice of dentistry from and after January 1st, 1893, would certainly be as fully competent to practice the profession as though he were the ''proprietor'' of a dental office for the same period, and should come under the same rule of exemption.

Very truly yours,
J. M. SHEETS,
Attorney General.

IN REGARD TO PREPARATION AND ALLOWANCE OF BILLS OF EXCEPTION IN CASES DECIDED SINCE OCT. 22.

COLUMBUS, OHIO, December 2, 1902.

Robert Thompson, Prosecuting Att'y., Carrollton, Ohio.

DEAR SIR:—I am in receipt of your letter of November 26th, in which you call my attention to the apparent inconsistency in the law relating to the preparation and allowance of bills of exception, as passed by the Legislature at its extraordinary session, and in which you ask my opinion as to the proper method to be followed in order to procure a bill of exceptions in cases decided by the trial courts since this act was passed.

Section 1 of this act amends Sections 5301 and 5302 R. S. Section 2, repeals the original Sections 5301 and 5302, and provides that ''This act shall be held to apply, after January 1, 1903, to all pending actions.'' Section 3, provides, ''This act shall take effect and be in force, from and after its passage''.

It is evident that the Legislature was laboring under the erroneous impression that the preparation and allowance of bills of exception relate to the remedy, and that under the provisions of Section 79, R. S., an amendment of the statutes relating to this subject would have no application to pending actions, unless expressly so stated in the act, hence undertook to make the act apply to cases pending after January 1, 1903.

It has been firmly established, however, by repeated decisions of the Supreme Court, that the preparation, settlement and allowance of a bill of exception, in no manner relates to the remedy; and that the bill of exception must be prepared, settled and allowed according to the provisions of the law in force at the time of the rendition of the judgment by the trial court. Young v. Shallenberger, 53, O. S., 291; Baker v. City of Lancaster, 53, O. S., 671; Kreamer v. Martin, 53, O. S., 672; Griffeth v. Murphy, 54, O. S., 613, and Sheetz v. Shuberty, 54, O. S., 632.

Hence it clearly follows that the amendment of the statute relating to the preparation and allowance of bills of exception, applies to all cases pending at the time it goes into operation, which, by the provisions of Section 3 of the act, was on the date of its passage, towit, October 22nd.

The act in question should be construed as though the provision ''this act shall be held to apply, after January 1, 1903, to all pending cases'' were entirely eliminated. For this provision merely declares what was the law already. It does not seek to postpone the operation of the act until January 1st. In order to work such a result, it should have read, ''This act shall not apply to pending cases until after January 1, 1903.''

It is therefore my opinion that you would be safe in following the law as it now

stands, in the preparation, settlement and allowance of bills of exception in any cases decided since the 22nd day of October.

It would seem to me, however, that professional courtesy on the part of opposite counsel should permit you to comply both with the law as it existed prior to the amendment referred to, and also with the law as amended. A journal entry showing the allowance of a bill of exceptions would do no harm, even though it be unnecessary.

Very truly yours,

J. M. SHEETS,
Attorney General.

THE TREASURER AND AUDITOR ARE ENTITLED TO THE FIVE PER CENT. PROVIDED, ON COLLECTING DELINQUENT PERSONAL TAXES.

COLUMBUS, OHIO, Dec. 9th, 1902.

Hunter S. Armstrong, Pros. Att'y., St. Clairsville, Ohio.

MY DEAR SIR:—Yours of Dec. 8th, at hand.

You inquire whether, in my opinion, under the provisions of Section 1069, R. S., as amended in 95th, Ohio Laws, page 574, the county auditor is entitled to fees on personal taxes collected on the delinquent personal duplicate, provided for in Section 2855, R. S.; also, whether the county treasurer is entitled to five per cent. for collecting taxes on the delinquent personal duplicate.

In answer to your first inquiry, I beg leave to state that in my opinion the auditor is entitled to five per cent. on such collections. The "grand duplicate" of the county, as I understand the meaning of that term, refers to the entire duplicate of all the taxable property of the county. That would include delinquent taxes as well as those that were not delinquent. I can see no reason for a distinction between taxes on the delinquent duplicate, and taxes on the regular duplicate. They are all part and parcel of the "grand duplicate" of the county.

As to the second inquiry, I am also of the opinion that the treasurer is entitled to the five per cent. By the provisions of Section 2855, R. S., the auditor must make a delinquent duplicate of personal taxes immediately after the August settlement, and add ten per cent. penalty thereto, and deliver the same to the county treasurer, who is required to collect the same by any means authorized by law, and for his services he is entitled to five per cent. Hence I am of the opinion, whether these taxes are voluntarily paid, or whether he proceeds by distress, action, rule of court, or special effort in any other direction, he is equally entitled to five per cent.

I am aware of the decision of the Court in the case of Hunter v. Borch, 51, O. S., 320. The provision there is somewhat different from the provisions of Section 2856, R. S. Under the provisions of Section 1094, R. S., the treasurer is required to proceed to collect "by distress or otherwise", the taxes due, together with five per cent. penalty, "which penalty shall be for the use of the treasurer as compensation for such collection." "By distress or otherwise", means by distress or some other active method pointed out by law, calculated to enforce payment. It means mone than standing behind the counter and receiving the money. For that the treasurer is given a regular per cent. Hence the decision of the court in that case, that where the treasurer merely stood behind the counter and took the taxes upon delinquent property after the 20th, of December, he was not entitled to the five per cent. penalty.

In the case of delinquent personal taxes, it is somewhat different. Here an extra duplicate is made up of the delinquent personal taxes, on which ten per cent. penalty is added. This duplicate is placed in the hands of the treasurer, who is required at a time other than the usual time for receiving taxes, to proceed "by any of the means provided by law", to collect the taxes, and for this collection he is entitled to five

per cent. "One of the means provided by law" is standing behind the counter and receiving the taxes due on this delinquent duplicate.

Very truly,
J. M. SHEETS,
Attorney General.

COMPENSATION OF A CORONER MUST BE COMPUTED AND ALLOWED BY THE COUNTY COMMISSIONERS.

COLUMBUS, OHIO, Dec. 8th, 1902.

U. S. Martin, Prosecuting Attorney, Dayton, Ohio.

DEAR SIR:—I am in receipt of your communication in which you seek an opinion from me as to whether the fees due a county coroner are "claims against the county", which must be allowed by the county commissioners before the auditor is authorized to issue his warrant on the county treasurer for the amount due; also, whether, under the head of "necessary writings", for which the coroner is entitled to receive ten cents per one hundred words, he has a right to include such as subpoenas, description of body, inventory of property found on body, notice to relatives, results of post-mortem examination, etc., etc.

I beg to state in answer to the first inquiry, that I am clearly of the opinion that such claims must be allowed by the commissioners before they can be paid. Section 894, R. S., provides:

> "No claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal."

The amount of fees due a coroner is not fixed by "some other person or tribunal", nor is the amount of compensation due a coroner fixed by law. The *rate* of compensation due is fixed by law, but not the *amount*. The *amount* due depends upon the number of bodies viewed, the distance traveled and the number of words written. When these facts are brought to the knowledge of the commissioners, they are then able to compute the *amount* due the coroner.

I can hardly conceive a case that comes more clearly within the provisions of Section 894 requiring the claim to be allowed by the commissioners, than that of the amount of compensation due the coroner. Indeed, an occasion might arise where the commissioners must pass upon the question as to whether there is any right to an allowance. The coroner is not entitled to hold an inquest over every dead body. It is only where bodies have been found dead under a suspicion that they may have died by violence. It would hardly be claimed that the coroner could hold an inquest over the dead body of a person whose death resulted from an ordinary case of typhoid fever. Hence, the commissioners must pass not only upon the amount of compensation due, but whether there is a right to any compensation, before a warrant can be issued for the amount claimed.

In answer to the second inquiry, I am equally clear that the coroner is entitled to charge and receive ten cents per one hundred words for all such writings as are named in the inquiry—indeed, for all writings reasonably necessary in order to perform fully and completely all the duties enjoined upon him by law. Section 1239, R. S., provides that he shall receive ten cents per one hundred words "for drawing all necessary writings and return thereof." This statute means just what it says. Just what writings would be reasonably necessary in order to perform fully and completely

his duties, could not always be forseen by the Legislature, hence the general provision above quoted.

Very truly,
J. M. SHEETS,
Attorney General.

HAS THE BOARD OF TRUSTEES OF THE OHIO HOSPITAL FOR EPILEPTICS THE POWER TO APPOINT AN ADVISORY BOARD AND PAY THEIR EXPENSES, ETC.

COLUMBUS, OHIO, December 9th, 1902.

Dr. H. P. Olemacher, Gallipolis, Ohio.

DEAR SIR:—I am in receipt of your communication from the Trustees of the Ohio Hospital for Epileptics, in which inquiry is made as to whether, in my opinion, the Board of Trustees can lawfully appoint an advisory medical board of from 8 to 10 physicians, located throughout the different parts of the State, whose duty shall consist in consulting and advising with the medical staff at the institution, either by correspondence or by personal visits at the institution; also whether the Board of Trustees would be authorized to pay the personal expenses of this advisory board out of either the salary or expense fund of the institution.

Section 751-2, R. S., authorizes the Trustees of the Ohio Hospital for Epileptics to "Provide such administrative force and medical skill, as in their opinion, the best interests of the institution may require, and shall conduct the hospital in accordance with the laws in force relating to other institutions of the State, so far as the same may be applicable."

The "medical skill" authorized to be employed must, of course, be similar to that employed in other benevolent institutions of the State and this hospital must be conducted "in accordance with the laws in force regulating other benevolent institutions."

In determining what "medical skill" may be employed, we are materially aided by an examination of the various provisions of the statute providing compensation for the different officers and employes of the several benevolent institutions of the State.

Reference to these statutes will disclose provisions for salaries of physicians and assistant physicians—indeed for almost every employe from superintendents to seamstresses, but no salary for a member of an "advisory medical board". If an advisory board of physicians can be appointed and their expenses provided for, it follows, that a salary may also be provided for the members of this board. If an advisory medical board may be created and 8 or 10 physicians appointed to that board, there is no reason why the board can not be increased to 18 or 20, or any other number, that the trustees may conclude advisable. If the Board of Trustees of the Ohio Hospital for Epileptics may have an advisory board of physicians so may every other benevolent institution of the State and the trustees may increase these boards to any number they see fit, and, as already suggested, if they are authorized to pay the personal expenses of these advisory boards, they are equally authorized to provide a salary for members of this board.

It can thus be seen what might follow from holding that such power lay within the breast of the trustees.

I do not intend, in the least, to reflect upon the integrity of the present board of Trustees for I think I can fully appreciate the integrity of these gentlemen and their great desire for the success of the institution whose affairs they are called upon to manage. It is not a question as to what might be desirable but it is a question as to power.

While the present board, no doubt, would exercise great care and not abuse such

powre, if it were found to exist, but the present members cannot remain as trustees forever. The personnel of the board must change sooner or later. The successors might not be actuated by the same laudable motives, and the institution might soon be loaded down with a corps of employes whose expenses and compensation, if allowed, would absorb its resources.

What is said of the hospital for epileptics would apply with equal force, to every other benevolent institution of the State. This consideration makes it clear to me, that it was never the purpose of the Legislature to grant such unrestricted powers to the trustees of any institution.

If your board of trustees is clearly of the opinion that an advisory medical board is needed, it would be better to present the matter to the next Legislature for action, than to give a doubtful construction of the statute in favor of existing authority.

Very truly yours,

J. M. SHEETS,
Attorney General.

AS TO WHETHER A BOAT OWNED AND REGISTERED IN PENN. AND CHARTERED BY OHIO FISHERMEN, IS LIABLE FOR TONNAGE TAX.

COLUMBUS, OHIO, December 11th, 1902.

State Fish & Game Commission, Columbus, Ohio.

GENTLEMEN:—Answering your question of the 10th inst., as to whether "a boat owned and registered from Pennsylvania port, but chartered or leased by Ohio fishermen, is liable for tonnage tax as provided in Section 6968-6, R. S", I would say that by an examination of that section and the preceding sections, it is apparent that the restrictions contained in the above section operates upon "persons, firms, or corporations" and not upon vessels of one character or another employed or owned by them in their business of fishing. The section provides that for each boat registered under the laws of the United States, used for the purposes defined in that section, there must be paid the sum of $10.00 for each net ton capacity of each boat, and for those not so registered, the sum of $15.00.

So that from the consideration of these sections, it is apparent, that the mere fact that the boat may be owned or registered from a Pennsylvania port, does not exempt it in any way from the operation of that statute, if used for the purposes therein mentioned.

Very truly yours,

J. M. SHEETS,
Attorney General.

PENALTY FOR VIOLATING A LOCAL OPTION ORDINANCE.

COLUMBUS, OHIO, December 17th, 1902

F. W. Woods, Prosecuting Attorney, Medina, Ohio.

DEAR SIR:—Yours of December 16th at hand and contents noted. The law as it stood before the enactment of the Beal Law, prescribed no penalty for any person violating a local option ordinance. That penalty was always prescribed by the ordinance itself. Before a person can be guilty of an infraction of the Beal Law there must have been a local option election and it must have been carried on in the manner prescribed in the Beal Law. Hence it is clear that a person can not be guilty of

an infraction of the Beal Law because he is guilty of an infraction of an ordinance providing for prohibition of the sale of intoxicating liquors, enacted under the provisions of the law as it existed prior to the passage of the Beal Law.

Very truly yours,

J. M. SHEETS,
Attorney General.

AUTHORITY OF COUNTY COMMISSIONERS TO COMPEL THE OPENING OF A COUNTY ROAD.

COLUMBUS, OHIO, December 17th, 1902

W. E. Weygand, Prosecuting Attorney, Wooster, Ohio.

DEAR SIR:—Yours of December 11th came duly to hand, and owing to press of other business, I could not give it immediate attention, and indeed, I answer you now without having given the matter as extended an examination as I should like to give it. But other things are crowding upon me so that I must dispose of it.

If the county road, of which you speak, in your letter, was established under the provisions of Chapter 2, Title 7 of the Revised Statutes, I am unable to find any express authority by which the commissioners can compel the road in the municipality spoken of to be opened. The law was quite imperfect upon that subject up until the year 1892, at which time the Legislature provided (89 O. L. 126) that such roads should be opened by the commissioners by contract. This remained the law until April 14th, 1896, at which time Section 4650 R S. was amended so as to take out that provision and leave it as it now reads. The trustees are ordered to open the road but the law gives no machinery by which it can be opened. There is no road supervisor who has any jurisdiction within the limits of the municipality. As the road was located by the county commissioners the municipality is under no obligations to open it; Section 2747 having no application to this particular case.

A municipality, as you are aware, is under no obligations to take the responsibility of maintaining a street unless properly dedicated, or unless it voluntarily takes upon itself the obligation.

If the particular road in question had been established under the provisions of Chapter 6 or 7, Title 7, R. S., then the commissioners, of course, would have the power in the manner pointed out in these chapters, to open the road. I understand, however, from your letter, that this is not the case.

The question has arisen in my mind, whether the commissioners having the power to establish a road, would not have the inherent power to open it and pay the expense out of the road fund of the county. I am inclined to think they would, but have not been able in the limited time I have had to examine these questions to satisfy myself on the subject.

Very truly yours,

J. M. SHEETS,
Attorney General.

REBATE TO PERSONS DEALING IN INTOXICATING LIQUORS.

COLUMBUS, OHIO, December 22, 1902.

John W. Zuber, Prosecuting Att'y., Paulding, Ohio.

DEAR SIR:—Yours of December 19th came duly to hand. The question presented by your letter is whether, where a person dealing in intoxicating liquors, after he has made a second payment, under Section 4364-11, and desires to discontinue the bus-

iness, in giving him a rebate, the County Treasurer must consider the whole payment of $350, and return to him the unearned tax or must he keep out at least $50 of the last payment.

It is my opinion, that he must return to him such proportion of the tax as has not been earned. That is, the tax to be returned is to the whole tax as the remainder of the year in which he is not engaged in the business is to the whole year. The whole $350 becomes an obligation at the beginning of the tax year and becomes a lien upon the premises in which the business is carried on, at that time. The division of the payment into two installments, is for the convenience of the person engaged in the business. Section 4364-11 provides that when a person ceases to engage in the business before the end of the year, the County Auditor shall issue to such person a refunding order "for the proportionate amount of said assessment except that it shall be in no case less than $50". That is, if the person has engaged in the business for a time so near the end of the year that the prorata proportion to be refunded would be less than $50.00 he should have no refunding order whatever. It does not mean that the Treasurer shall, in no case, retain less than $50.00.

Very truly yours,
J. M. SHEETS,
Attorney General.

VALIDITY OF CLAIMS OF COUNTY AUDITORS.

COLUMBUS, OHIO, Dec. 26th, 1902.

C. B. Nichols, Prosecuting Attorney, Batavia, Ohio.

DEAR SIR:—Your letter of December 15th, and also of Dec. 23rd, came duly to hand. Owing, however, to unusual press of other matters, I could not give your first letter the prompt consideration I should like to have given it.

I will try to state an answer to your inquiries in their order.

First: Are claims of the county auditor, made out in the following form, to-wit:

"1901—April	23	Advance on salary and fees.....	$2,000 00
" July	2	Services member 'Board of Equalization'...	88 73
" "	4	Swearing assessors and appraising railroads.	83 20
" "	16	Extra work	576 00
" Aug.	13	Advance on salary and fees.....	1,200 00
" Oct.	15	Services as auditor balance due for year ending October 15th, 1901.....	1,259 44
" "	"	Extra services required by 'Dec. Ap.'.....	784 00
" "	"	Furnishing State Board of Equalization with transcript of number of acres, etc.....	48 00
Total		.....	$6,039 37,"

a compliance with the provisions of Section 1077, R. S., which requires that

> "All claims for services of the county auditors, which are payable from the county treasury, shall be made out in detail according to the rates named in the foregoing section, and shall be presented to the county commissioners who after being satisfied the labor has been performed, shall allow said bill or claim, and cause the same to be spread upon the minutes of their board."

It seems to me that it is quite clear that this question must be answered in the negative. A "detailed account" in ordinary business transactions is well understood by everybody, and it is the same kind of a detailed account that is required to be made out by auditors when they present their claims for alllowance and payment. An account "made out in detail", means that the items of services rendered shall be

set forth. Not only that, but the rate of compensation must also be set forth. The reason for these requirements are clear to all. The commissioners are required to scrutinize these items, and examine for themselves, to determine whether all the services claimed for have been rendered, and also whether they have been previously paid for. This they cannot do unless the statute is complied with.

It has frequently happened in this state, that county officers have presented duplicate claims for the same services, which have been allowed and paid. The remedy for this evil is this requirement of the statute, that all accounts shall be made out in detail, both as to amount of services rendered and as to rate of payment therefor.

Take the first item of the account; "1901— April 23— Advance on salary and fees,.....$2,000.00." How many months and for what months is this claim for salary presented, allowed and paid? What portion of the Two Thousand Dollars allowed is salary, and what portion fees? What particular services were rendered, and what rate was charged for the fees claimed to be due? The account is silent on all these matters.

The criticisms which apply to the first item, apply to all other items, hence they need not be further considered.

Second: Where a county auditor performs work that should have been performed by his precedecessor and for which the predecessor had received pay, but without informing the county commissioners that the work had not been done, and without being requested by the commissioners to perform the work, can the commissioners allow and pay him therefor?

This question, in my opinion, should also be answered in the negative. It is a well recognized principle of law, that where one person performs services for another without his knowledge or request, the services so performed are deemed to be gratuituous, and he can recover no compensation therefor. This principle of law is elementary, and needs no citation of authorities. Had the county auditor desired to be paid for these services, he should have either arranged with his predecessor for such payment, or have contracted with the county commissioners for the completion of the work. (Whether the county auditor is entitled to pay from his predecessor is a question not before me, hence do not consider it.)

I wish to digress, however, enough to say, that it is clearly the duty of the county commissioners to see that an outgoing auditor has performed all the services required of him, before he is allowed and paid his salary. If, however, he has been allowed and paid in full under the mistaken belief that he has performed all the services that is due from him, and the county is afterward compelled to expend money for the completion of the work he should have performed, an action would lie to recover the amount.

Third: Was it proper to allow and pay the county auditor $784.00 as "extra services required by decennial appraisement", he having entered upon the discharge of his duties on the third Monday of October, 1900, and without the board of county commissioners allowing anything for extra clerk hire on account of the decennial apprpaisement?

Section 1076, R. S., provides that the county commissioners may make an additional allowance to the auditors of their respective counties, for clerk hire, not exceeding twenty-five per cent. of their annual allowance, in the years when the real property of the county is required by law to be appraised. This allowance is not made as a matter of course. It is only where additional clerk hire is needed, and the auditor is put to an additional expense because of this fact, that the commissioners are authorized to make the allowance for additional clerk hire. The county auditor is required under the law, to put in all his time in the service of the county, and if he can, without extra clerk hire, perform the duties required of him in the years of the decennial appraisement, he cannot be allowed any extra compensation. If extra clerks are needed, to the extent that they are needed, the county commissioners may provide

for their payment, providing the amount does not exceed twenty-five per cent. of the annual allowance of the county auditor. But in the first place, the clerks must be needed; and in the second place, the allowance to the auditor cannot exceed the cost of their employment.

It seems, however, from your statement, that the allowance of $784.00 was not for clerk hire, but for extra services to the county auditor himself, which, in my opinion, was clearly illegal. But even if it had been for clerk hire, an itemized statement of the clerks hired, and amount paid each, would be required to be presented for allowance. For, as stated in your letter, the purpose of the statute is "to reimburse the auditor for any extra money paid out for clerk hire on account of the decennial appraisement."

Fourth: Is the county auditor entitled to receive pay out of the county treasury for swearing assessors under the provisions of Section 2757, R. S., for furnishing the state board of equalization an abstract of the real property of his county under the provisions of Section 2817, R. S.? for making out the delinquent personal tax list as required by Section 2855, R. S., also for making list of names of tax-payers and the amount of road tax with which each stands charged, and for transmitting the same to the township clerks of the respective townships of his county, as required by Section 4738, R. S.

It is entirely clear that he is not. It has been frequently and uniformly held by the Supreme Court of Ohio, that in order

> "To warrant the payment of fees or compensation to an officer, out of the county treasury, it must appear that such payment is authorized by statute."
>
> See Clark v. Commissioners, 58 O. S., 107, and cases cited.

There is no provision of statute authorizing payment to the county auditor for these services, hence these services must be performed in return for the salary he receives. For, as is stated in Jones v. Commissioners, 57, O. S., 189, "for all services by a county auditor for which no specific provision is made for payment, he is deemed to be compensated by the salary attached to the office."

There is a liberal annual salary attached to the office of a county auditor, and he is supposed to earn this salary. In order to earn it, he must perform without extra compensation, all duties devolved upon him, for which no specific provision is made by statute for payment."

There is still another reason why he is not entitled to be paid extra for furnishing an abstract of the real estate of his county under the provisions of Section 2817, R. S. This is one of the extra duties he is required to perform during the decennial appraisement year, and Section 1076, R. S., already referred to, provides that such services shall be compensated by an allowance for extra clerk hire.

Fifth: Does the term, "omitted property", as is used in Section 1071, R. S., include the property of railways, banks, express, telephone and telegraph companies, where the returns have been voluntarily made, but for any reason have not been placed by the auditor on the tax duplicate until after the first of October?

It would hardly seem that the auditor could be serious in making such a claim. In such cases the returns are all made within the time prescribed by law, hence, it could not be omitted property. There can be no omitted property where the returns have been promptly made. "Omitted property" means only such, as the owner in his effort to evade taxation, omits to return, and which the auditor by his industry and zeal, under the provisions of Section 2781 and 2782, R. S., places on the tax duplicate. It does not include any additions made under the provisions of Section 1039, R. S.

The companies referred to in your letter, have nothing to do whatever with appraising their property. They make their returns, and public officers are then called upon to appraise the property of these companies. In the case of railroads and

banks, the county auditors are the appraisers, and the state board of equalization sits to equalize the values. In the case of express, telephone and telegraph companies, the state board of appraisers and assessors appraise the property. If, for any reason the board of equalization, or the board of appraisers and assessors should be unable to get through with their work by first of October, and the county auditors would then be entitled to four per cent. on the taxes collected on these properties, the fees of the county auditors would run into hundreds of thousands of dollars. Take steam railroads alone, their appraised value in the year 1902 amounted to about one hundred and twenty million dollars. If the tax rate the state over would average two and one-half per cent., and the county auditors were entitled to receive four per cent. upon the tax thus collected because the board of equalization did not get through by the first of October, on railroads alone, their fees would amount to one hundred and twenty thousand dollars. The absurdity of the position taken by the aduitor, is thus made apparent.

Very truly,
J. M. SHEETS,
Attorney General.

UNDER SECTION 7262 MAY THE COURT REQUIRE RECOGNIZANCE WITH SURETIES, OF WITNESSES FOR THE STATE IN CRIMINAL CASES.

COLUMBUS, OHIO, December 29th, 1902.

F. W. Woods, Prosecuting Att'y. Medina, Ohio.

DEAR SIR:—Yours of December 26th duly received and contents noted. You inquire whether in my opinion, under Section 7262, R. S., where a criminal case is continued, the Court may require witnesses for the State to enter into a recognizance, with sureties, for their appearance at the next term of court. Owing to press of other matters, I have not been able to give this question the consideration that I would like to, but it occurs to me that a "recognizance" means more than a personal recognizance. The term recognizance covers both personal recognizance and rocognizance with sureties. Hence I am quite sure that the law intended to leave it to the discretion of the Judge to determine wether the recognizance should be personal or with sureties.

Section 7151, R. S., permits magistrates before whom a preliminary hearing is had, to require a witness to enter into a recognizance with sureties. Surely if the magistrate should be permitted to require security for the appearance of witnesses, the Court before whom the accused is finally tried, should have the same power.

If the Court should not require the witness to give more than personal recognizance, and in many instances it would be equal to no recognizance whatever, and he could be spirited away, justice would thus become a mockery.

If, however, the Court should require the witnesses to give recognizance with sureties and the witness feels aggrieved, on the ground that the Court has exceeded its authority, the witnesses have a remedy by habeas corpus.

Very truly yours,
J. M. SHEETS,
Attorney General.