1457.

STREETS AND HIGHWAYS—RIGHT OF PRESCRIPTION MAY BE ACQUIRED OVER TOWNSHIP LANDS LYING WITHIN VILLAGE—APPROPRIATION BY CONDEMNATION—MAY ESTABLISH PARKWAYS AND DRIVES—ASSESSMENT UNDER SECTION 3852-1, GENERAL CODE.

*SYLLABUS:*

1. *Lands owned and held by a township in its proprietary capacity as a quasi public corporation within the limits of a village in such township, may be established as a public highway and village street by prescriptive use as a public highway where the nature, extent and length of time of such use would have the effect of establishing such lands as a public highway or street as against an individual owner.*

2. *Such lands so owned and held by the township may be appropriated by the village for street purposes by condemnation proceedings in the manner provided by law.*

3. *Even though public park grounds within a municipal corporation are so held as to forbid their use for streets as such without appropriation proceedings for said purpose, the municipality may establish parkways or drives in and upon such grounds, and assess a part of the cost of improving the same in the manner provided by Section 3852-1, General Code.*

COLUMBUS, OHIO, December 28, 1927.

HON. OSCAR A. HUNSICKER, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your communication requesting my opinion with respect to certain questions therein stated. Your communication is as follows:

> "In the year 1805 certain premises were deeded to 'the inhabitants of township number four in the tenth Range of the Connecticut Western Reserve, lately so called in a corporate capacity' ------ 'to be forever held by them in common as a part of the Public Square whereon to erect any kind of public buildings to be unenclosed and by no means to be transferred or alienated.' These premises are described as being 'a certain piece of land situated in the Town of Hudson and lying in the form of the letter L, partly round the center of said number four in the tenth Range containing seven and one-half acres.'
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> Along the east side of the said premises and situated entirely thereon lies a street which has been used as such by the inhabitants of Hudson Village for many years. This street is in the village of Hudson, Ohio, and is commonly known as 'East Main Street.' The inhabitants of the village of Hudson, Ohio, and also of the Township of Hudson, desire to improve said East Main Street by grading, draining, paving, constructing sewers, sidewalks, etc., as expressed by resolutions of the Township Trustees and ordinances of the village council. Both units of government, however, believe that the improvement, or at least one-half thereof, should be assessed against the adjoining property as in the case of other village streets.
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> The following questions arise in connection therewith upon which we desire your opinion:
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> 1. Can the Council in the village of Hudson, Ohio, condemn that land now called East Main Street which is part of the property hereinabove described, and appropriate the same for street purposes under the control of the Council, thus removing the control from the Township Trustees to the village council?

2. Is there any way by which the Township Trustees can retain control and ownership of said street and yet have at least one-half the cost of said improvements, less the cost of intersections, assessed against the abutting property, there being residences along one side of the street?

3. Would it be possible for the Township Trustees were they so disposed to transfer the ownership and control of said East Main Street to the village council without condemnation proceedings?"

The facts stated in connection with the questions submitted by you are entirely too meager to permit of a categorical answer with respect to any of them, and the most that I can do is to make some observations which may be of material assistance in arriving at a solution of these questions on such pertinent facts as you may be able to ascertain.

In the first place, I will assume that Husdon civil township is one and the same as surveyed township number four mentioned in your communication. In this view, certain statutory provisions relating to the power of civil townships to take title to real estate for township purposes may be noted. In this connection Section 3244, General Code, so far as pertinent to the question at hand reads.

"Each civil township lawfully laid off and dedicated, is declared to be, and is hereby constituted, a body politic and corporate, for the purpose of enjoying and exercising the rights and privileges conferred upon it by law. It shall be capable of suing and being sued, pleading and being impleaded, and of receiving and holding real estate by devise or deed, or personal property for the benefit of the township for any useful purpose. The trustees of the township shall hold such property in trust for the township and for the purpose specified in the devise, bequest, or deed of gift."

Section 3281, General Code, provides in part as follows:

"The trustees may receive on behalf of the township, any donation by bequest, devise, or deed of gift, or otherwise, of any property, real or personal, for any township use."

The statutory provisions above noted were enacted long after the date of the deed referred to in your communication. However, as to this I apprehend that the statutory provisions above noted with respect to the power of civil townships to accept title for township purposes or for the benefit of the public are in a large measure but declaratory of an inherent power in this regard already possessed by them as quasi public corporations.

In the case of *Board of Education* vs. *Ladd*, 26 O. S. 210, the court in its opinion says that civil townships have always existed in the state for the purposes of local administration; and they are recognized as political organizations in the Constitution of 1802 by the provisions therein made for the election of the officers of such townships. In any event I shall at this late date assume that the township here in question had full power and authority to accept the deed referred to in your communication for the purposes and with the effect thereby intended.

With this assumption I apprehend that the solution of the questions submitted by you depends in some measure on whether the township took fee simple title to the lands described in said deed in its proprietary capacity as a quasi public corporation for the uses and purposes therein mentioned, or whether, on the other hand, the purpose and effect of said deed was merely that the said lands were to be held as park and public grounds for the benefit of the general public. The distinction here had in mind is stated in the opinion of the court in the case of *First German Reformed Church* vs. *Summit County*, 3 O. C. C. (N. S.) 303, 310, 311, as follows;

"The distinction between dedication to the public use and that of grants to individuals, of either estates or easements, differ somewhat in their character, and they differ both in the manner of and evidence of its accomplishment, and in the character of the interest bestowed on the public, as well as in the character of the rights which individuals are privileged to enjoy therein. And it differs also from a grant of lands to the public, as an individual in the organized form of a municipal corporation or board of county commissioners for the individual use of such corporation. These corporations are authorized to hold lands as individuals hold for the purposes for which they need them in their corporate capacity, and they convey lands thus held for their corporate purposes in the same manner as individuals. The rights embraced in a dedication of land to public use differ from either of the foregoing. In that case the public, as an organized body, has no right to appropriate it, or any part of it, to its individual use; for it has no right, as a corporate body, of property therein. Its rights are passive and not active, and whatever right there is in the property by way of the easement is really vested in the public, and the officers representing the public organization manage it and control it merely as trustees for the public, for whose use it is dedicated."

I will not presume to state all of the tests that may be material in order to determine whether the township here in question took fee simple title to the land described in this deed in its proprietary capacity, or otherwise. Obviously, this would depend upon the granting and habendum clauses of the deed and all other provisions therein indicating the intent of the grantor with respect to this question. The question might likewise depend to some extent upon whether there was any consideration for said deed of conveyance, and upon any other competent facts indicating the intention of the parties.

In this connection I note that it is contemplated in said deed that the township may "erect any kind of public buildings" on said land. This to my mind is some evidence of an intention to grant said land to the township in its proprietary capacity, although this is not at all conclusive. If in pursuance to this authority the township had erected a township house or other building used by it in its proprietary capacity, this would be more or less cogent evidence of the intention of the township to accept said deed in its proprietary capacity, and not otherwise.

If, on the facts which you have at hand or which may be ascertained, it is determined that the township holds this land in its proprietary capacity as a quasi corporation, the fact that a part of the land described in this deed has been used as a street is especially significant. It may well be that the use of the east side of said premises for the purposes of a street or highway has been for such length of time and has been carried on in such manner as to give this portion of the premises the status of a public highway by prescription. If the use of this portion of the highway, both as to time and manner of use, is such as would establish the tract of land so used as a public highway as against an individual owner, such use would likewise establish a prescriptive use of this part of the premises against the township, if it be determined that it is the owner of the same.

The right to hold land by prescriptive use is predicated upon the operation of the statute of limitations, and the trustees of a township are not exempt from the operation of a statute of limitations in the prosecution of an action by them to recover possession of lands. (Oxford Township vs. Columbia, 38 O. S. 87.)

If this part of the premises in question which has been used by the public as a street, and which in your communication you call "East Main Street," has by prescriptive use the status of a public highway, and if said premises and the assessable private lots and lands abutting on and contiguous to said thoroughfare are all within

the corporate limits of the village of Hudson, it may be safely said that in such situation the board of township trustees of Hudson Township would have nothing to do with the improvement of the street or with the assessment of any part of the cost and expense thereof.

Where a public highway by annexation of territory, or otherwise, is included within a municipal corporation, it becomes a public highway or street of the municipality and as such is subject to the provisions of Section 439 of the Municipal Code of 1869, 66 O. L. 222, which now as Section 3714, General Code, reads as follows:

> "Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance."

In support of the proposition above stated the following cases are noted:

> City of Steubenville vs. King, 23 O. S. 610, 611;
> Railroad Co. vs. Commissioners, 35 O. S. 1, 9;
> Railroad Co. vs. Defiance, 52 O. S. 262, 299.

In this connection I know of no statutory authority authorizing a board of township trustees to cooperate with village authorities in the improvement of a village street, other than in the case where a road is established as a part of the line or boundary between the township and the municipal corporation. (Sec. 7177 G. C.)

If it should be determined on the facts at hand or ascertained that Hudson Township does hold the premises in question in a proprietary and corporate capacity, but that the use of what is called "East Main Street" has not as to time or manner of use been such as to establish said portion of the premises as a public highway, the only practicable thing for the village to do is to condemn the land desired for street purposes. This for the reason that although by the provisions of Section 3281, General Code, the trustees of the township are authorized to sell real property of the township which is not needed for township purposes, such sale can only be at public auction in the manner provided in said section.

If, on the other hand, the premises described in this deed, including the tract thereof which has been used for street purposes, have never been held by the township in its proprietary and corporate capacity, but said premises are merely park grounds held for the benefit of the public generally, other questions are involved and in their solution it will be necessary for us to inquire whether the control and supervision of said premises are now in said township or in the village of Hudson. This is a matter which the legislature may regulate and provide for in its discretion. (Gleason vs. Cleveland, 49 O. S., 431, 436.)

As will be noted, Section 3714, General Code, above quoted, provides that the council shall have the care, supervision and control of the public grounds within the corporation. Section 4356, General Code, applicable to villages, so far as pertinent provides:

> "The council shall provide by resolution or ordinance for the care, supervision, and management of all public parks, * * * owned, maintained or established by the village. * * *"

However, in this connection I note the provisions of Section 3427-1, General Code, which read as follows:

"That the trustees of any township, having within its limits a public park, public square or grounds devoted to public uses for park purposes, and which are not under the control of park commissioners, are authorized and empowered to control, care for, grade and improve any such public park, public square or public grounds; to plant or place therein and care for trees, shrubbery and plants, and to maintain lawns in good condition; to construct and maintain fountains; to lay out, construct, reconstruct, repair and maintain in good condition suitable drive-ways and walks, constructing the same of such materials as are deemed most suitable, and to provide and maintain suitable and sufficient lights in any such public park, public square or public grounds; to construct, reconstruct, repair and maintain therein all necessary sewers, drains and ditches; and to protect and preserve to public uses for park purposes all of said property and improvements, and, to that end, to adopt by-laws, rules and regulations for the government and control of any such public park, public square or public grounds and the drive-ways and walks therein, and to protect them and the trees, shrubbery, plants and improvements from misuse, injury or destruction, and to provide for the due enforcement of such rules and regulations by fines and penalties, but such by-laws, rules and regulations shall not conflict with the constitution or laws of the State of Ohio."

Giving effect to the rule of statutory construction that all statutes pertaining to this subject must be given their proper and appropriate force and application, I know of no way in which this can be done in the present instance other than by holding that the provisions of Section 3427-1 have application only to township parks that are outside of the corporate limits of villages located in such township.

Viewing the premises in question merely as park grounds held for the benefit of the public generally, the question of the right of that same public to establish any part of said premises as a public highway by prescriptive use is one of some difficulty

In 29 Corpus Juris, at page 387, it is said:

"The public may acquire a prescriptive right to a highway over any land which is subject to the right of the state to lay out a highway over it, as, for instance, lands once covered by a highway, or turnpike, since discontinued, or lands held in common, or in trust, provided in all cases that the user is otherwise sufficient to establish a highway by prescription."

In the authority above cited it is further said:

"A highway may be established by prescription over public lands, whether state, county, or municipal."

However, it is difficult to see how the use by the public of the lands as a park upon which the public has a right to pass and repass can possess that adverse nature which is necessary to give effect to rights by way of prescription. This point is noted by the Supreme Court of Massachusetts in the case of *McKay* vs. *Reading*, 184 Mass. 140, where the court held that the repeated use of a strip of an open common for driving or walking was the exercise of a right in common, and did not make the part of the park so used a public highway by prescription.

In the case of *Emerson* vs. *Wiley*, 7 Pick. 68, the court in its opinion said:

"The passing over a training field or open common, is no uncommon usage, and however long it may continue, it will not convert a field or common into a public highway."

The court in the case of *McKay* vs. *Reading*, supra, cites in support of its decision the case of *Langley* vs. *Gallipolis*, 2 O. S. 108. In this case the court sustained the right of the authorities of the village of Gallipolis to enclose a public square in said village for the purposes of improvement and ornament, notwithstanding that it appeared that for over fifty years this public square had been used as an open public common, and had also to some extent been used as a public highway for the passage of carts, drays and teams. The court in its opinion on this point says:

> "The fact that this ground was left open, and used as an unenclosed public common for many years, was not inconsistent with the terms of the dedication and could not lay the foundation for any presumption against the right of the village to use the ground in any other manner deemed more advantageous or preferable within the terms of the dedication. No exclusive, continued and uninterrupted adverse possession by any individual in any portion of this public common, by which any private right was acquired, could be set up. Neither can any presumption arise in favor of a dedication to the mere purposes of a public highway from the fact of its being unenclosed for many years, and to some extent passed over by the traveling public, as any unenclosed public common would always be liable to be used. Streets or public highways are admitted to exist on each side of, or around, this public ground. When unenclosed, therefore, the public square would, of course, be more or less passed over by people traveling the streets. But the public authorities of the village, as the mere trustees of the public property, would not be competent, in derogation of the terms of the dedication, to convert this public common into a highway or street; and much less can any such presumption of such dedication arise from any such use as that here claimed to have existed."

There are authorities, however, which do recognize the proposition that there may be such adverse use of park property held in common for the benefit of the public which, if continued for the required length of time, may have the effect of establishing park grounds so used as public highways or streets. Thus, in the case of *Veale* vs. *Boston*, 135 Mass. 187, it appeared that the city of Boston put a fence around Boston Common, and in doing so threw into Park Street in said city what had been up to that time a part of the common. The city then constructed over a part of this strip that part of Park Street which was thereafter used for travel by horses and carriages, and constructed a sidewalk over the balance of such strip. It was held that twenty years' use of this strip as part of Park Street, under the circumstances, made it a part of the public way.

A like decision on similar facts is found in the case of *Green County* vs. *Huff*, 91 Ind. 333.

However, with respect to the premises here in question I am inclined to the view that if on the facts that you have at hand or which may be ascertained these premises have the status of public park grounds held in trust by the village authorities for the benefit of the general public, and if no use of that part of said premises known as "East Main Street" has been made other than the mere passage of persons and vehicles for purposes of convenience, such use in itself would not have the effect of establishing the strip of ground so used as a public highway or street.

The next question, viewing the premises in question as park grounds, is whether or not the village authorities may by appropriate affirmative action on their part establish that portion of the premises known as "East Main Street" as a public highway or street.

In the case of *Langley* vs. *Gallipolis*, supra, the court in its opinion quoted from the case of *Commonwealth* vs. *Alburger*, 1 Whart. 469, as follows.

"When property is dedicated or transferred to public use, the use is indefinite, and may vary according to the circumstances. The public not being themselves able to manage or attend to it, the care and employment of it must devolve upon some local authority or body corporate as its guardian, who are in the first instance to determine what use of it, from time to time, is best calculated for the public interest, subject, as charitable uses are, to the control of the laws and the courts, in case of any abuse or misapplication of the trust. The corporation has not the right to these squares so as to be able to sell them, or employ them in a way variant from the object for which they were designed."

In the case of *State, ex rel.* vs. *S. M. & N. R. R. Co.*, 111 O. S. 512, 522, the court in its opinion said:

"There is no room for disagreement upon the proposition that where property is dedicated to a public purpose generally it can not be diverted therefrom and used for other public purposes, and further that where it has been dedicated for a public purpose therein specified, it can not be used for purposes inconsistent therewith, nor can there be longer any doubt upon the further proposition that while neither the legislature nor the municipality may authorize the use of property for a purpose other than such as contemplated by the dedication unless in the exercise of the power of eminent domain, yet the legislature, or a municipality acting under legislative authority, can apply the dedicated property to all public and beneficial purposes consistent with the terms and purposes of the dedication and regulate the public user."

The court in support of this proposition cites the following authorities and decisions:

18 Corpus Juris, 117;
Langley vs. Town of Gallipolis, 2 O. S. 108;
LeClercq vs. Town of Gallipolis, 7 Ohio, pt. 1, 218;
Board of Education of Van Wert vs. Inhabitants of Said Town, 18 O. S. 221;
Malone vs. City of Toledo, 28 O. S. 643;
L. & N. R. R. Co. vs. City of Cincinnati, 76 O. S. 481.

With respect to the question of the right of municipal authorities to lay out a public hghway or street upon park lands, the general rule seems to be that a public highway as a part of the street system of the municipality can not be established on park grounds.

Riverside vs. MacLain, 210 Ill. 308;
Board of Education vs. Detroit, 38 Mich. 505;
Price vs. Thompson, 48 Mo. 361;
State, etc. vs. Orange, 59 N. J. L. 331.

Touching this point, the court in the case of *Langley* vs. *Gallipolis*, supra, further said:

"Such a place, thus dedicated to the public, may be improved and ornamented for pleasure grounds and amusements for recreation and health; or it may be used for the public buildings, and place for the transaction of the public business of the people of the village or city, or it may be used for purposes both of pleasure and business. Any such appropriation may be

made under the direction and control of the municipal authorities; but the place must, for the purposes of the dedication, remain free and common to the use of all the public. And an appropriation to the purposes of a mere public highway, or to the private and individual use and purposes of any lot owner or particular class of lot owners in the village or city, of ground dedicated as that in question, would be inconsistent with the objects of the dedication, and a plain diversion from its appropriate and legitimate uses."

I note, however, that in the case of *Mathers* vs. *City of Cincinnati*, 7 O. D. Rep. 496, decided in 1878 by the District Court of Hamilton County, said court in sustaining the right of the City of Cincinnati to grant a right of way to a street railroad company through Eden Park in said city, in its opinion on this point said:

"It is claimed that the provision of the ordinance reserving the rent for the use of a portion of a public park is contrary to law, and also that the city had no right to make a grant of use of a public park for street railroad purposes. The city having the right to lay off roads and avenues for other purposes through a public park, has equally the right to lay off a road for the accommodation of the public in this method through a park. The city might establish first an avenue along the line of this route, and then permit the railroad company to use it. Without that circuity of action the city may at once grant the right to occupy or pass through the park."

It does not appear in the report of this case whether the land in Eden Park was purchased and laid out and established by the City of Cincinnati for park purposes, or whether it obtained the same by dedication for such purposes; and this might be a very material consideration in a question of this kind.

In any event, in view of the principles of law recognized and applied in the case of *Langley* vs. *Gallipolis* and other decisions above cited, I am not prepared to hold that if the premises here in question have the status merely of public park grounds the authorities of the village of Hudson have the power, without condemnation proceedings, to establish any part of these premises as a street and as a part of the municipal street system.

The authorities which deny the right of a municipal corporation to establish upon public grounds dedicated to park purposes a public highway as a part of the street system of such municipality, do not have the effect of denying to the municipal corporation the right to establish and maintain public walks and driveways in and upon such park grounds when the same will better serve the use and enjoyment of such park grounds by the public.

But as observed by the court in its opinion in the case of *Nichols* vs. *Cleveland*, 104 O. S. 19, 35:

"The driveways in the public park are not public streets or highways, with all accruing rights to abutting owners, but are subject at all times to alterations and improvements as circumstances may require."

So in this case, if it would better serve the use of the premises in question for park purposes, the village authorities might lay out, establish and maintain a driveway along that part of the premises known as "East Main Street," or upon such other part of said premises as might best serve the public. The cost and expense of establishing such park driveway may, of course, be wholly paid for by the village or, if so desired, a portion of such cost and expense not exceeding fifty per cent thereof may be specially assessed in the manner provided by Sections 3852-1, et seq., General Code.

For the purposes of this opinion I deem it necessary to set out only said Section 3852-1, which reads as follows:

> "Each municipal corporation shall have special power to levy and collect special assessments for the following improvements, to be exercised in the manner provided by law. Any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part not to exceed fifty per cent of the entire cost of and expense connected with the constructing or improving of any boulevard, parkway or park entrance by any of the following methods:
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> 1. By a percentage of the tax value of the property assessed.
> 2. In proportion to the benefits which may result from the improvement.
> 3. By the foot front of the property bounding and abutting on the improvement."

The above discussion touching the contemplated use of a part of the premises in question described in the deed to the township for purposes possibly different from those therein intended, suggests a brief consideration of what rights, if any, of third persons may be affected by such contemplated user. If it be determined that the premises in question are held in fee simple title by Hudson Township in its proprietary and quasi corporate capacity, I do not believe that the establishment and use of that part of the premises known as "East Main Street" for street purposes would be such action as would give the owners of property fronting and abutting on said park or any taxpayer or other member of the public a right to complain. This for the reason that in such case such persons would have no legal right to be affected.

> First German Reformed Church vs. Commissioners of Summit County, 3 O. C. C. (N. S.) 303, 312, 313;
> Smith vs. Heuston et al., 6 Ohio, 101.

If, on the other hand, the premises in question are but park grounds dedicated and held for park purposes, it would seem that the owners of property fronting and abutting on said park would have a right to complain of a diversion of said premises from the intended use (LeClercq vs. Town of Gallipolis, 7 Ohio, Pt. I, 218); unless perhaps it could be said that the knowledge of such persons of the long continued use of that part of the premises known as "East Main Street" and their relation thereto would have the effect of estopping them from the assertion of rights that they might otherwise have.

With respect to persons who may now claim under the original grantor of said premises, it may be asserted that if the deed whereby the premises in question were conveyed to the township was on a consideration of any kind and contained no provision for a reverter, no diversion of the use of said premises would cause said premises or any part thereof to revert; unless said premises were granted by way of conditional limitation to the particular use contemplated in the execution and delivery of the deed.

> Williams vs. First Presbyterian Society, 1 O. S. 478;
> Village of Ashland vs. Greiner, 58 O. S. 67;
> Watterson vs. Ury, 5 O. C. C. 347;
> May vs. Board of Education, 12 Ohio App. 456.

I may add that if it is determined that the premises described in the deed have the status of park grounds under supervision of the village for the benefit of the public, it is not conceived how the legal rights of any individual would be affected by the establishment in and upon said premises of a parkway or drive, as distinguished from a village street as such.

In conclusion I venture to give expression to a thought that has been in mind during the whole of the above discussion, and that is that the use of the part of the premises in question which you designate as "East Main Street" has been, perhaps, something more than a mere passing or repassing thereon by members of the public as a matter of convenience, and has been so effectually adverse in nature and extent, and has been so long continued as to establish such strip of land as a public highway and street, even though it be determined that the purpose and effect of the deed was to establish said premises as public park grounds. In such case the village authorities in the improvement of such street, and in the assessment of the cost and expense thereof, will have to take into account Section 3837, General Code, which provides for the payment by the corporation of a part of the cost and expense of an improvement where the same passes by or through a park or other public ground.

Respectfully,
EDWARD C. TURNER,
*Attorney General.*

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1458.

ELECTIONS—CANDIDATE FOR MAYOR—MAY HAVE NAME APPEAR AS PARTY NOMINEE AND ALSO AS INDEPENDENT CANDIDATE FOR SAME OFFICE.

*SYLLABUS:*

*Under the provisions of Section 4995, General Code, the name of a candidate may appear as a party nominee for mayor, and also as an independent candidate for the same office, nominated by petition, when each such act is done at the time and in the manner provided for original nominations.*

COLUMBUS, OHIO, December 28, 1927.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication requesting my opinion as follows:

> "We are enclosing herewith letters from the Board of Deputy State Supervisors of Elections for Columbiana County, Ohio, and request your opinion as to whether a candidate for Mayor nominated at the primary may also file by nominating petition and thereby have his name placed both upon the ticket of his party and upon an Independent ticket as a candidate for the same office."

Section 4995, General Code, is as follows:

> "When no nominations were made originally for a particular office, it shall be unlawful for any committee appointed for the purpose of filling vacancies to name a candidate of another political party for such office or to so name a candidate nominated by petition. When the nomination of a candidate of one party is endorsed by another, it shall be done at the time and in the manner provided for original nominations."