850.

GENERAL ASSEMBLY—MEMBER MAY BE APPOINTED SPECIAL INSTITUTIONAL EXAMINER—AUTOMATICALLY VACATES SEAT IN GENERAL ASSEMBLY IF APPOINTMENT IS ACCEPTED—MUST RETURN ADVANCE SALARY.

SYLLABUS:

1. *Under the holding of the authorities that an employment is not an "office", a member of the present General Assembly may be appointed as Special Institutional Examiner in the office of the Auditor of State, providing said member upon, or prior to, the acceptance of the appointment resigns as member of the General Assembly. In case such an appointment be made and the member of the General Assembly does not resign, such officer's seat in the General Assembly shall be vacant.*

2. *While a member of the Eighty-seventh General Assembly may be appointed Special Institutional Examiner, yet if such a member accepts such employment, thus vacating his seat in the General Assembly, it will be the duty of such member to return to the state his salary of one thousand dollars paid to him for his services as such member for the year* 1928.

COLUMBUS, OHIO, August 10, 1927.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

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

> "The Eighty-seventh General Assembly made appropriation of $300 per month for the ensuing biennium of 18 months for 'Special Institutional Examiner', which apparently is authorized by Sections 271, 272 and 273 of the General Code.
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> The appropriation was made upon the initiative of the Finance Committee and was the result of their investigation of the condition of the dairy herds at the different State institutions and arrived at through their inspection tours during the last session.
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> * * * * * * * * * * *
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> I have no one in view for the position, but two men—members of the present General Assembly—are recommended to me and I believe are well qualified to fill the duties of the position and are more or less applicants for the appointment.
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> Question: In view of the Constitutional provision and also of Sec. 15 of the General Code, could either of said members be legally appointed, provided they resign from their present positions in the General Assembly?"

You state that the Eighty-seventh General Assembly made an appropriation for your use for a Special Institutional Examiner, and an examination of the Appropriation Act (House Bill No. 502). page 15, discloses that an appropriation was made for the six months' period ending December 31, 1927, and for the succeeding year as follows: "Auditor of State—Personal service—A 1. Salaries— * * * Special Institutional Examiner * * * $1,800.00—$3,600.00." This appropriation obviously provides funds with which to pay an examiner of the character prescribed,

in case you see fit to appoint such an examiner. No additional provisions were made in the appropriation act as to this position, or as to the powers and duties incident thereto.

Sections 271, 272 and 273 respectively provide as follows:

"Sec. 271. Not less than six times each year the financial transactions of each public institution of the state, including the monthly financial statements required by law to be filed by the officers thereof with the auditor of state, shall be thoroughly and critically inspected and examined. Such further inspection and examination shall be made as is deemed necessary by the governor and auditor of state."

"Sec. 272. Such inspections and examinations shall be made without giving any previous knowledge or notice of an intended inspection or examination to a person, official or board connected with an institution, whose books are to be so inspected or examined."

"Sec. 273 The auditor of state shall appoint a competent person who shall employ all his time in making such inspections and examinations and who shall report the result thereof to the auditor of state."

Since the appropriation was made for such a position for the first time by the Eighty-seventh General Assembly, the question is whether or not a member of such General Assembly is legally eligible to accept such position if appointed, or whether such an appointment is prohibited by the Constitution or law.

In your letter you refer to Section 15 of the General Code, which provides as follows:

"No member of either house of the general assembly except in compliance with the provisions of this act shall:

1—Be appointed as trustee or manager of a benevolent, educational, penal or reformatory institution of the state, supported in whole or in part by funds from the state treasury;

2—Serve on any committee or commission authorized or created by the general assembly, which provides other compensation than actual and necessary expenses;

3—Accept any appointment, employment or office from any committee or commission authorized or created by the general assembly, or from any executive, or administrative branch or department of the state, which provides other compensation than actual and necessary expenses.

Any such appointee, officer or employee who accepts a certificate of election to either house shall forthwith resign as such appointee, officer or employee and in case he fails or refuses to do so, his seat in the general assembly shall be deemed vacant. Any member of the assembly who accepts any such appointment, office or employment, shall forthwith resign from the general assembly and in case he fails or refuses to do so, his seat in the general assembly shall be deemed vacant. But the provisions of this section shall not apply to school teachers, township officers, justices of the peace, notaries public or officers of the militia."

It is manifest that Section 15, supra, does not prohibit such an appointment. It does prohibit a member of the General Assembly from accepting an appointment

to such a position as the one to which you refer, except in compliance with the terms of the section, which provides that if a member accepts such appointment he shall at once resign as member of the General Assembly, or, upon failure so to do, his seat will be declared vacant.

The only section of the Constitution of Ohio necessary to be considered in connection with your question is Section 19, Article II, which reads as follows:

> "No senator or representative shall, during the term for which he shall have been elected, or for one year thereafter, be appointed to any civil office under this state which shall be created or the emolument of which shall have been increased during the term for which he shall have been elected."

In view of the limitation by the authorities generally of the meaning of "office" so as to exclude mere employments, it seems clear that the constitutional provision would not prevent either of the men referred to in your letter from accepting the position under consideration. In other words, while "employments" may come within the spirit, they do not come within the letter of the Constitutional provision, according to the holdings by the courts and text book writers.

The word "civil" as used in this section, seems to be used to limit the application of the section to civil officers as distinguished from military or naval officers.

Section 24, page 10 of Mechem's Public Offices and Officers, citing Rawle Const., 213, and Story Const., 790 reads as follows:

> "Any officer who holds his appointment under the government, whether his duties are executive or judicial, in the highest or the lowest departments of the government, with the exception of officers of the army and navy, is a civil officer."

The same authority in Section 1, page 1, defines "office" as follows:

> "A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.* *"

And in Section 2, page 3, the author says:

> "A public office differs in material particulars from a public employment, for, as was said by Chief Justice Marshall, 'although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to perform a service without becoming an officer.'
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> 'We apprehend that the term "office",' said the judges of the Supreme Court of Maine, 'implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office; and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments and sometimes to another; still it is a legal power which may be rightfully exercised, and in its effect it will bind the rights of others, and be subject to revision and correc-

tion only according to the standing laws of the state. An employment merely has none of these distinguishing features. * * *

'The officer is distinguished from the employee,' says Judge Cooley, 'in the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and usually, though not necessarily, in the tenure of his position. In particular cases, other distinctions will appear which are not general'."

In the following sections (Sections 3 to 12, inclusive) Mechem discusses the various tests usually employed in determining what is an "office," but it is unnecessary here to quote from these sections for the reason that the courts of Ohio, including the Supreme Court have repeatedly prescribed the criteria to be employed in determining this question.

In a very able opinion in the case of *State ex rel.* vs. *Vance,* 18 O. N. P. (N. S.) 198, affirmed by the Court of Appeals "on the opinion of the lower court," after extensively reviewing a number of Supreme Court cases, including *State ex rel.* vs. *Brennan,* 49 O. S. 438, *State ex rel.* vs. *Jennings,* 57 O. S. 424, and *State ex rel.* vs. *Halliday,* 61 O. S. 192, Judge Newby said:

"Upon a study of the various definitions of a public officer and the discussion of the question by the courts and the examples cited by them, we find the infallible test to be this: Is the incumbent of the position under inquiry, in an independent capacity, clothed with some part of the sovereignty of the state, to be exercised in the interest of the people? That is, are his duties prescribed by law without any direction or control over them by the appointing power, and to be exercised in a governmental function in the interest of the public as contradistinguished from those created by contract and subject to control and direction by an employer."

He then applied this test, and after pointing out that the powers and duties of a county superintendent of schools spring from the law alone, the county superintendent being absolutely and entirely independent of the board of education and free from its direction and control, and that he is invested with a part of the sovereignty of the state exercising public functions in the interest of the people, concluded that the position of county superintendent "possesses all the indicia necessary to make the position a public office and the incumbent of the position a public officer."

In the case of *State ex rel.* v. *Commissioners,* 95 O. S. 157, it was held by the Supreme Court of Ohio that a clerk of the board of county commissioners was not a county officer, the second syllabus reading as follows:

"An appointee, though his duties are specifically fixed by law, if such duties do not require the exercise of political or governmental functions as a part of the sovereignty of the state, but simply involve the exercise of clerical acts in recording the transactions of officers who are invested with such functions, is not such a public or county officer as contemplated by the State Constitution."

In the opinion, concurred in by the other members of the court, Judge Jones said:

"The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him. But it has been held by this court that while an oath, bond and compensation are usually elements in determining whether a position is a public office they are not always necessary. In the present case some of the *indicia* are lacking. The appointee is not required to give a bond or to take an oath, and neither by statute nor by the resolution of appointment was there a fixed tenure of employment. Crawford was employed for an indefinite period at a monthly salary of $125 per month. His position, therefore, was subject to the pleasure of the commissioners. The chief and most decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.

* * * It is no longer an open question in this state that 'to constitute a public office, * * * it is essential that certain independent public duties, *a part of the sovereignty of the state,* should be appointed to it by law.' *State ex rel. Attorney General* vs. *Jennings et al.,* 57 Ohio St., 415; *State ex rel. Armstrong* vs. *Halliday, Auditor,* 61 Ohio St., 171; *Palmer* vs. *Ziegler,* 76 Ohio St., 210, and *State ex rel.* vs. *Brennan,* 49 Ohio St., 33.

In all of these cases it is manifest that the functional powers imposed must be those which constitute a part of the sovereignty of the state. But as stated by Spear, C. J., in *The State, ex rel. Hogan, Attorney Gen., etc.,* vs. *Hunt,* 84 Ohio St., at page 149, without a satisfactory definition of what is the 'sovereignty of the country' the term 'office' is not adequately defined. If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state.

The duties cast upon Crawford, however, are not of that character."

Your attention is also directed to the case of *The Board of Education* vs. *Featherstone,* 110 O. S. 669, which affirmed the judgment of the Court of Appeals "for the reason that the election of the defendant in error by the board of education * * * as clerk of the board, did not confer upon him any function of sovereignty or constitute him an officer within the prohibition of Section 20, Article II of the Constitution of Ohio."

In the case of *Theobald* vs. *State ex rel.,* 10 O. C. C. (N. S.) 175, it was held:

"An 'officer' in the sense in which the word is used in the Constitution of Ohio is an individual who takes the oath of office and becomes responsible to the public for all his official acts and those of his subordinates."

This case was affirmed by the Supreme Court without report in 78 O. S. 476.

Section 19 of the present Constitution was formerly Section 20 of the Constitution of 1802. In so far as the phrase "civil office" is concerned, no change was made by the Constitutional Convention of 1851.

The debates in the Constitutional Convention of 1850-51 throw considerable light on the question here under discussion. On page 151, Volume 2, Debates Ohio Convention, appears the following:

"The question then being on the adoption of the twenty-eighth amendment, to-wit:

Sec. 19, In the fifth line strike out all after the word 'elected.'

MR. REEMELIN said that he was well aware that the Legislature would not have much power after the Convention had finished its labors; still, he could easily imagine, that there were offices which they could create. The people complained bitterly of legislators appointing themselves to lucrative situations, as had occurred in the penitentiary, lunatic asylum, and other public departments."

On page 562 the following minutes of the proceedings are set forth:

"MR. GREEN of Ross, said there would probably be less necessity for retaining such a provision hereafter, than there had been heretofore. If the section was to be retained, he would like to see a provision incorporated into it, which would determine what an office should be, in the meaning of the Constitution. *He referred to a difficulty growing out of this question, wherein a gentleman who was a member of the Senate of Ohio, had considerable to do with fixing the compensation of public printer, and was afterwards himself elected to that office. Subsequently, when a proposition was made to repeal the law authorizing the election of public printer, a question was raised, whether the State Printer was an officer. He was elected by the General Assembly, commissioned by the Governor, and his compensation was fixed by law; yet we were told, and successfully too, that he was not an officer.*

He hoped the motion of the gentleman from Preble would prevail; and then, if something definite upon this subject cannot be inserted in lieu of the words proposed to be stricken out, he would be in favor of striking out the whole section.

MR. REEMELIN supposed it was no more than proper, to state that the object of this section was to preserve the purity of the General Assembly. He thought, if gentlemen would examine the whole subject, they would see that the section might be safely retained. By the sixteenth section it was provided, that the General Assembly might fix the term and the compensation of all officers not otherwise fixed in the constitution; and in the seventeenth section, it was provided that no senator or representative, during his term, and one year subsequent to the expiration thereof, should be elected or appointed to any civil office in the State, which might have been created, or the emoluments of which might have been increased during his term aforesaid. And he gave instances of the temptations to corruption in this way in connection with the office of canal commissioner, etc.

MR. MASON said it appeared to him that a complete remedy for the evil suggested by the gentleman from Hamilton, (Mr. Reemelin) would be found at last with the people. For if a Senator or a Representative were actuated from bad motives in creating an office, or in fixing the emoluments

of an office, he would have to submit his claims to the tribunal of public opinion, and if he had been guilty of wrong, it would be fully pointed out, and he would have but little chance of succeeding.

MR. REEMELIN desired principally to guard against corruption in the case of officers who were appointed. So far as elective officers were concerned, he cared but very little about this. But he desired the General Assembly to be kept clear of all those inducements to corruption, which had heretofore existed." (Italics the writer's.)

It is quite apparent that no sovereign power of the state has been vested by the General Assembly or the Constitution in the position for which the appropriation was made, the duties which said appointee will be required to perform not being of such a nature as to make him a civil officer within the terms of the section of the Constitution above quoted.

I am therefore of the opinion that a member of the present General Assembly may be appointed by you as Special Institutional Examiner, providing said member upon, or prior to, the acceptance of the appointment resigns as member of the General Assembly. In case such an appointment be made, and the member of the General Assembly does not resign, such officer's seat in the General Assembly shall be vacant.

There is another feature in connection with your question upon which I feel I should advise you. I am informed that each of the members referred to in your communication has not only received his salary of one thousand dollars for the year 1927, but his salary of one thousand dollars for the year 1928 as well.

Section 50 of the General Code provides as follows:

"Every member of the general assembly shall receive as compensation a salary of one thousand dollars a year during his term of office. Such salary for such term shall be paid in the following manner: Two hundred dollars in monthly installments during the first session of such term and the balance of such salary for such term at the end of such session.

Each member shall receive the legal rate of railroad transportation each way for mileage once a week during the session from and to his place of residence, by the most direct route of public travel to and from the seat of government, to be paid at the end of each regular or special session. If a member is absent without leave, or is not excused on his return, there shall be deducted from his compensation the sum of ten dollars for each day's absence."

This section has heretofore been construed by this department in an opinion rendered under date of February 10, 1914, reported in Annual Report, Attorney General, 1914, at page 172. In this opinion, my predecessor in office, Hon. Timothy S. Hogan held as follows:

"If a state senator has drawn his salary for the current year, and the session has been concluded, and he resigns from the senate and is appointed to another state position, he may retain the salary that he has drawn as senator and receive his salary from the time of his induction into his new office, this office being that of lieutenant governor."

In the opinion the then Attorney General used this language:

"Under Section 50, General Code, as above copied, Senator Greenlund was entitled to draw, and as I understand your letter, did draw his full salary for the year 1913, at the close of the late session of the legislature. His doing so was perfectly legal, and in compliance with the law, and entirely dissimilar to a case presented some time ago when it was claimed that a like salary was drawn at a time when a resignation was intended, and where it was not expected on the part of the recipient of the salary that he would hold himself in readiness for the balance of the year to perform the duties of the office, if any should be presented.

* * * * * * * *

I have been convinced that there is necessity for legislation with respect to the salaries of members of the General Assembly. I have been more than doubtful of the constitutionality of the present act in that respect. The present statute was passed over the veto of Governor Harmon on May 31, 1911. Without having before me what Governor Harmon said, my personal recollection is that one of his reasons for vetoing the statute was that he believed it unconstitutional. The great objection to the present statute is that it seeks to pay the members for the second year of their term at the end of the session held in the first year.

I have in mind an instance wherein one member of the General Assembly received his salary at the end of the session held in the first year for the whole second year and then resigned. Under a demand from this department the member was required to return the second year's salary. But I am unable to see any well-founded objection to a member of the General Assembly receiving his salary for one year at the end of the session held in that year, as he really renders all the service to be rendered.

I would not care to suggest the invalidity of the statute beyond the fact that certainly a member should not draw the second year's salary in the first year, and at least not before the end of the second year session. The salaries are fixed at the amounts they now are doubtless upon the theory of compensation for services rendered in each year for the session held in each year —the regular session as regularly held, and the extraordinary session when one is so held."

At the time of the rendering of this opinion, Section 50, supra, passed May 18, 1911 (102 v. 274) read as follows:

"Each member of the General Assembly shall receive as compensation a salary of one thousand dollars a year, which shall be paid in monthly installments of not exceeding two hundred dollars during the year, but in any year in which a session of the General Assembly is held the balance of the salary for such year shall be paid at the end of the session. Each member shall receive two cents per mile each way for mileage once a week during the session from and to his place of residence, by the most direct route of public travel to and from the seat of government, to be paid at the end of each regular or special session. If a member is absent without leave, or is not excused on his return, there shall be deducted from his compensation the sum of ten dollars for each day's absence."

The section was amended to read as it now reads on April 15, 1919 (108 v. Pt. 1, 262.)

In so far as the question here involved is concerned, the important change in the statute as amended is that the section now permits "the balance of such salary for

such term" to be paid at the end of the first session, while by the terms of the section before amendment authority was only granted to pay the balance of a salary *for such year* at the end of the session.

It will be observed that by the express terms of Section 50, supra, the member is to receive as compensation a salary of one thousand dollars a year *during his term of office.* Certainly it cannot be contended that such salary could be paid after the term of office had been terminated, whether such term be terminated by the expiration thereof, by death, by resignation or otherwise.

In the instant case if either of the two members of the General Assembly referred to in your letter should be appointed as Special Institutional Examiner and should accept such appointment, it would be his duty immediately to resign, and if he failed to resign, his seat in the General Assembly would be deemed vacant. The second thousand dollars paid to each of these members on or about the first of July of this year is for his services as a member of the General Assembly for the year 1928. That is to say the member is paid in advance for whatever services he may be called upon to perform during the second year of his term. His services in the capacity of representative until the end of his term belong to the state. Should such a member for any reason see fit to resign from his office of member of the General Assembly and not serve in that capacity in the year 1928, it is manifest that he would have no right whatsoever, either legally or morally, to retain compensation for services which he did not intend to render, or as in the instant case, for services which he had legally incapacitated himself to render.

I am not unfamiliar with the case of the *State of Ohio on Relation of C. C. Crabbe, Attorney General, Relator* vs. *Wilbur E. Baker, Director of Finance of the State of Ohio, Respondent,* No. 94278, in the Common Pleas Court of Franklin County, Ohio, in which a writ of mandamus was issued ordering the Director of Finance to approve and certify for payment to H. H. Griswold his compensation for services rendered as special counsel in the Attorney General's Department. The facts were that Mr. Griswold, Speaker of the House of Representatives, in the Eighty-fifth General Assembly, after the adjournment of the legislature, accepted an appointment as special counsel in the office of the Attorney General. The Director of Finance had refused to approve and certify for payment the amount due as compensation for the services of Mr Griswold as special counsel for the reason that he had already drawn a full year's salary as a member of the General Assembly, the Director contending that it was the duty of Mr. Griswold to refund to the state treasury the portion of his salary covering the period after his resignation, namely, June 1st to December 31st, 1923. Upon hearing a peremptory writ was allowed. No opinion was filed in the case and all that it can be said that the case decides is that Mr. Griswold was entitled to his pay for his services as special counsel. It in no wise passed upon the right of Mr. Griswold to retain the salary which he had received as a member of the General Assembly. Indeed, no finding for such sum had been made by the properly constituted authority and no demand was ever made upon Mr. Griswold to return such salary. The case is plainly distinguishable for these reasons and for the further reason that the question of salary for the second year was not involved and in no wise affects the question under consideration.

Therefore, for the reasons above stated, it is my opinion that if a member of the Eighty-seventh General Assembly be appointed Special Institutional Examiner and such a member accepts such employment, thus vacating his seat in the General Assembly, it will be the duty of such member to return to the state his salary of one thousand dollars paid to him for his services as such member for the year 1928.

Respectfully,
EDWARD C. TURNER,
Attorney General.